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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. LAW APPLICABLE TO CONTRACTS CONCLUDED BY THE UNITED NATIONS WITH PRIVATE PARTIES—PROCEDURES FOR SETTLING DISPUTES ARISING OUT OF SUCH CONTRACTS—RELEVANT RULES AND PRACTICES

Reply to a questionnaire from the Institut de droit international

APPLICABLE LAW

I. *Do the Constitution, the internal rules of your organization, or international conventions (headquarters agreements, etc.) provide any indication as to the law applicable to contracts concluded with private parties?*

The legal capacity of the United Nations to contract is derived from Article 104 of the Charter[1] and granted express recognition in section 1 (*a*) of the Convention on the Privileges and Immunities of the United Nations (hereinafter referred to as the "General Convention").[2] This capacity has been fully acknowledged in practice. Recognition of United Nations capacity in this sphere has been given both by State organs on which the Organization has needed to rely in connexion with the performance of its contracts and by official bodies, private firms and individuals with whom the United Nations has wished to enter into contractual relations. The United Nations has exercised its contractual capacity both through officials of the Secretariat acting on behalf of the Secretary-General, in his capacity as chief administrative officer of the Organization, and through subsidiary bodies established for particular purposes by one of the principal organs. Subsidiary organs, such as UNICEF and UNRWA, which have been entrusted by the General Assembly with a wide range of direct functions, have regularly entered into commercial contracts in their own names.[3]

In addition, legal capacity to contract has been given express recognition in the statutes and regulations of United Nations organs, e.g. in the Regulations of the

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[1] Article 104 of the Charter states:

"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

[2] United Nations, *Treaty Series*, vol. 1, p. 15. Article I, Section 1 (*a*) of the General Convention states in relevant part:

"The United Nations shall possess juridical personality. It shall have the capacity: "(*a*) to contract; . . .".

[3] *Yearbook of the International Law Commission*, 1967, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 207.

[4] Document ST/SGB/UNEF/1, paragraph 27. Paragraph 27 of those Regulations provided that:

"The Commander shall enter into contracts and make commitments for the purpose of carrying out his functions under these Regulations".

United Nations Emergency Force (UNEF),[4] in the agreement with Thailand concerning the headquarters of the Economic Commission for Asia and the Far East (ECAFE),[5] and in the Regulations for the United Nations Force in Cyprus.[6]

So far as is known, no State has placed any express limitation upon its recognition of the contractual capacity of the United Nations. The Organization may therefore use its contractual powers, subject to the limitations imposed by its own structure and the authority given by resolutions adopted by its organs, for the same purposes as any other legal entity recognized by particular municipal systems.[7]

Neither the United Nations Charter, the Convention on the Privileges and Immunities of the United Nations nor any of the regulations granting legal capacity to contract to subsidiary organs of the Organization have specified the law applicable to contracts concluded with private parties.

Regarding the application of article III, section 7 (*b*) of the Headquarters Agreement between the United Nations and the United States (the "Headquarters Agreement"),[8] we wish to make the following observations.

Article III, section 7 (*b*) of the Headquarters Agreement provides:

> "Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district."

Whether such a provision applies to contracts concluded in the Headquarters district must be interpreted in conjunction with both the Charter of the United Nations and the Convention on Privileges and Immunities of the United Nations.

This principle of interpretation may be drawn from the Headquarters Agreement itself. In section 26[9] thereof, it is stated that the provisions of that Agreement and those of the General Convention are to be treated as complementary. Section 27[10] of the Agreement further states that the provisions of that Agreement are to be construed so as to enable the United Nations to discharge its responsibilities and fulfill its purposes.

The Organization executes a great number of its contracts at Headquarters. However, substantial numbers of contracts are also executed either by the United Nations itself or through its subsidiary organs under a variety of conditions and in numerous countries. If the Headquarters Agreement were interpreted to apply the federal, state and local law of the United States to contracts signed at Headquarters, there would arise a dichotomy of practice in the interpretation of the law to be applied to such contracts. Contracts signed at Headquarters would be governed by

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[5] United Nations, *Treaty Series*, vol. 260, p. 35, article II, section 2.

[6] Document ST/SGB/UNFICYP/1, article IV, section 22. Reproduced in the *Juridical Yearbook*, 1964, p. 181. The Regulations came into force on 10 May 1964.

[7] *Yearbook of the International Law Commission*, 1967, vol. II, p. 208.

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

[9] "*Section 26*

"The provisions of this agreement shall be complementary to the provisions of the General Convention. In so far as any provision of this agreement and any provisions of the General Convention relate to the same subject matter, the two provisions shall, wherever possible, be treated as complementary so that both provisions shall be applicable and neither shall narrow the effect of the other; but in any case of absolute conflict the provisions of this agreement shall prevail."

[10] "*Section 27*

"This agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently, to discharge its responsibilities and fulfill its purposes."

United States law, whereas contracts signed elsewhere (including all other places in the United States) would be governed by general principles of law or by the law specified in the contract.[11] This could result in confusion and in difficulties not consonant with the proper and efficient performance of the functions of the Organization. The position of the Organization has been that the place of the signing of a contract can at most be considered only as one of many factors in a determination of the law of the contract. For this reason, it has never recognized article III, section 7 (*b*) of the Headquarters Agreement as imposing local law upon contracts concluded at Headquarters.

Consistent with this interpretation, the Organization relies on general principles of law in the interpretation of contracts concluded by it with private parties. Neither he United States nor any other State has placed any express limitation upon this interpretation of the relevant law to be applied in the construction of contracts entered into by the United Nations.

The application of general principles of law to contracts entered into by the United Nations may be seen, paraphrasing Judge Jessup, as an invocation of conflict rules and principles themselves.[12] It may be presumed that the forum called upon to adjudicate a dispute arising out of a contract between the United Nations and a private party would be guided by these principles. In such a case, the selection of the relevant law governing the contract, as suggested by Professor Cavers, "would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case".[13]

II. (a) *What are the purposes of the principal contracts which your organization concluded with private parties? Could you classify the different types of contracts involved?*

The United Nations has entered into a variety of contracts of a private law character. At the Headquarters of the United Nations, these include, for example, contracts for maintenance, for purchase of office equipment, for the leasing of premises, for printing, etc.[14] These contracts further include contracts between private parties and the United Nations for materials, supplies, equipment, studies, etc., when the United Nations acts as the executing agency for contracts with private parties under agreements concluded with governments by other United Nations agencies, e.g. United Nations Development Programme. In addition, the United Nations contracts with private parties, both individuals and institutional or corporate entities, for work on a short term basis supplemental to its work at Headquarters, e.g. research, editing, translation. It also concludes contracts with private individuals for their services as consultants or experts. These contracts are, then, classifiable as contracts for materials and equipment and contracts for services.

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[11] The Organization does not consider it to be inconsistent with these principles for it to rely upon the law imposed by the contract itself. In a limited number of cases a contract may specify a particular law of applicability. In such cases, the contract may be construed consistently with such a provision. Clauses of the latter description have now almost ceased to be used. See *Yearbook of the International Law Commission*, 1967, vol. II, p. 208. More often the contract is silent on the law of applicability. In such cases general principles of law are invoked.

[12] Jessup, *Transnational Law*, New Haven, 1956, p. 94. Note also that Jessup refers to the *Serbian Loans* case before the Permanent Court of International Justice, referring to which he states: "It (the Court) noted that some rules of private international law are to be found in treaties and are thus transformed into 'true international law'."

[13] *Ibid.*, p. 99.

[14] *Repertory of Practice of United Nations Organs*, Vol. V, Articles 92-111 of the Charter, p. 332.

Of course, the Organization concludes a large number of contracts for services of staff members.[15] However, such contracts are considered by it to be governed by the internal administrative law of the Organization as established by the Staff Regulations,[16] Staff Rules[17] and Administrative Instructions[18] of the United Nations.

II. (b) *Do the contracts concluded between your organization and private parties generally (or occasionally, in which case on what occasions?) specify the law or legal system which governs them?*

Generally speaking, the United Nations contracts (both those of a commercial nature and employment contracts) have not specified the law considered to be applicable to such agreements.[19] In the case of employment contracts, the contract itself has formed part of a growing system of international administrative law, independent of given systems of municipal law. The references to municipal law contained in employment contracts have, therefore, been specific rather than general (e.g., social security laws). Very occasionally they have been introduced for the purposes of providing a convenient yardstick for measuring compensation or separation benefits.[20] As indicated above, clauses of the latter description have now almost ceased to be used. In any case, at no time did they amount to a choice of an actual system of municipal law to govern the entire terms of an employment contract. An internal appellate system has been established to consider disputes of a serious nature regarding employment contracts of staff members. The United Nations Administrative Tribunal has referred both to the internal administrative law of the Organization and to the general principles of law in interpreting employment contracts. It has largely avoided references to municipal systems.

In the case of commercial contracts, express reference has rarely been made to a given system of municipal law. The standard practice is for the contract to contain no choice of law clause as such; provision is made, however, for the settlement of disputes by means of arbitration when agreement cannot be reached by direct negotiations.[21] For example, in the case of contracts concluded with parties resident in the United States, reference may be made to arbitration according to the procedures

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[15] The Organization is empowered to contract for the services of staff members, through the Secretary-General, by Article 101, paragraph 1 of the Charter, which states:

"The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.".

[16] The General Assembly established the Staff Regulations of the United Nations according to Article 101 of the Charter by resolution 590 (VI) of 2 February 1952. They have thereafter been amended from time to time by that body.

[17] Document ST/SGB/Staff/Rules/1/Rev.4, 1977.

[18] Administrative instructions are internal Secretariat documents that contain or deal with Staff Regulations and Staff Rules, interpretations of those Regulations and Rules, the Secretary-General's policy for implementation of those Regulations and Rules, instructions and procedures and statements of established policy. They are the principal means by which the Secretary-General communicates with the staff on matters of financial, administrative and personnel policies. The authority for the issuance of administrative instructions is contained in Document ST/SGB/100 dated 14 April 1954. See document ST/AI/226.

[19] *Yearbook of the International Law Commission*, 1967, vol. II, p. 208.

[20] For references to cases involving employment contracts which contained clauses of this nature, see *Hilpern* v. *UNRWA* and *Radicopoulos* v. *UNRWA, Judgements of the United Nations Administrative Tribunal, No. 1-70* (AT/DC/1-70—United Nations publication, Sales No. 58.X.1), Nos. 57, 63, 65 and 70.

[21] Although informal negotiations between the parties are preferred before the contractual provision on arbitration is invoked, no specific provision is made for such process in contracts concluded by the Organization at Headquarters. However, under the governing procedures for contracts concluded by the Geneva Office of the United Nations provision is made for such negotiations through the prior use of a designated expert. Article 25 of the *Cahier des clauses et conditions générales applicables aux marchés de fournitures* (Document MUN/251/68-GE.68-6632) provides:

established by the American Arbitration Association, by the Inter-American Arbitration Association in respect of contracts with Latin American suppliers, or by the International Chamber of Commerce in many of the remaining cases. No further reference is made in the contract to the legal system to be applied.[22]

In an opinion of the General Legal Division of the Office of Legal Affairs of the United Nations, drafted in reply to an inquiry of the Legal Office of the Food and Agriculture Organization of the United Nations, the question of specifying a legal system in the United Nations contracts was addressed. That opinion, dated 10 December 1962, stated:

> "You have deliberately omitted from your proposed standard form any provision making the law of a particular State applicable to the particular contract, and have expressly provided instead in your Article 17 that the rights and obligations of the parties would be governed by the agreement and by generally recognized principles of law, to the exclusion of any given municipal law. The idea behind your practice is not to volunteer to make the laws of any particular State applicable to our contract. However, our feelings on this point are reflected in the contract by means of a complete absence of any provision on this matter rather than an express provision such as you have included in your own contract.
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> "We have felt that it would be preferable as a matter of normal practice to deal with the question only if and when it actually arises, and in the light of the circumstances of the case, rather than in advance by means of a provision in the contract on this point. However, some of our contracts have included a provision making a particular law applicable because of the importance of such a provision to the other party. When the proposal is to make New York law applicable, our familiarity with that law makes it relatively easy for us to accept such a proposal. We try to avoid laws with which we are unfamiliar, but have on occasion had to accept. In such cases, the law is usually that of the country of residence of the other party or in which he has a place of business, and I cannot recall any instance in which the laws of a third state (that is, other than the country of residence of the other party or New York State) has been made the applicable law."

The view expressed in that opinion reflects what has continued to be the approach of the United Nations with regard to specifying any governing law or legal system.

II. (c) *If the contracts concluded between your organization and private parties*

"EXPERT OPINIONS

"1. If any dispute arises as to the interpretation of execution of the contract, the parties shall arrange to obtain an expert opinion prior to the institution of any judicial proceedings. The more expeditious of the two parties shall notify the other party in writing of the subject of the dispute and shall propose the name of an expert. The other party shall, within 10 days, signify whether or not it agrees to the appointment of that expert and, if it does not so agree, shall make a counterproposal, to which a reply shall be given within 10 days after notification thereof. This exchange of correspondence shall be by registered letter with acknowledgement of receipt.

"2. If the two parties fail to agree, the expert shall be appointed, at the request of the more expeditious party, by the President of the International Chamber of Commerce.

"3. The expert shall have full powers to require the submission to him of any documents, of whatever kind, and to seek such explanations from the parties as he deems necessary in order to determine the nature and cause of the dispute. His function shall be to draw up and communicate to the parties, within one month after the date of his appointment, a report analyzing the origin and nature of the dispute which has arisen and to propose a settlement.

"4. The costs of the expert opinion shall be apportioned equally between the two parties."

[22] *Yearbook of the International Law Commission*, 1967, vol. II, p. 209.

generally specify the law or legal system which govern them, do they refer to international legal rules (international law, the internal law of the organization or general principles of law) or to a national legal system (which one?)? In the latter case, is the law considered "frozen" as of a particular date or is there no limitation of this sort? Is there reference in the contract to the national law on a subsidiary basis? Is there reference to a combination of the national law and general principles of law? Or does the applicable law vary according to the contract? In the last alternative, do you make the distinction on the basis of the importance of the contract, its subject-matter, the fact that it is concluded and carried out in one country or in several, the public or private status of the other party to the contract, etc.? What are the effects of such distinctions? Please provide examples of the clauses used.

The contracts in question do not specifically refer to any international legal rules. However, it has been the practice of the United Nations to interpret the contracts concluded by it on the basis of general principles of law, including international law, and upon the standards and practice established by its internal law, including its Financial Regulations,[23] principles of delegation of authority under the Charter and the internal rules and procedures promulgated thereunder.

The law considered to apply would be for matters of substance all applicable laws to which it may refer which were in force at the time of the conclusion of the contract.[24] For matters of adjective or procedural law which might arise in connexion with the resolution of a dispute, the applicable law would be that law in effect at the time of the resolution of the dispute.

No reference is generally made to municipal law either as a primary or subsidiary basis.

No reference is made to the application of any combination of municipal law and general principles of law. However, from a practical point of view special attention is given in the making of contracts that such contracts be in general conformity with the law of the place where the contract is made and is to be executed and the national law of the private parties with which the contract is concluded. Similar considerations of a general character may be given to municipal laws in the resolution of disputes which may therefrom arise. However, in no case does the United Nations consider the law of any national system to be binding upon it either in the execution of contracts or in dispute settlements arising therefrom.

As a result, while no reference will be made to applicable law in its contracts, the United Nations may give special attention to laws of national jurisdictions and

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[23] ST/SGB/Financial Regulations, 2 July 1975.

[24] Attention must be called, however, to the special circumstances governing an employment contract of a staff member of the United Nations. In addition to the letter of appointment, which forms the primary basis for the contractual relationship, the Staff Rules and Regulations may also form part of the basis of the contract. In that regard, the Administrative Tribunal of the United Nations, in particular in its judgement No. 19 (*Kaplan* v. *Secretary-General of the United Nations*), has distinguished between the contractual and statutory elements in the relation between staff members and the Organization:

"All matters being contractual which affect the personal status of each staff member—e.g. nature of his contract, salary, grade;

"All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning—e.g., general rules that have no personal reference.

"While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members" (*Judgements of the United Nations Administrative Tribunal Nos. 1-70* (AT/DC/1-70—United Nations publication, Sales No. 58.X.1) p. 74). See also judgement No. 202 (*Queguiner* v. *The Secretary-General of the Inter-Governmental Maritime Consultative Organization*) (AT/DEC/202).

may on occasion consult with local authorities as to the current status of municipal laws as a matter of comity.

II. (d) *What is the most recent trend in the contractual practice of your organization?*

The most recent trend in United Nations contractual practice is to avoid wherever possible reference to any specific law of application, especially any system of national law, and to consider the governing law of the contract to be found in general principles of law, including international law, as well as in the terms of the contract itself.

III. *Is there any case-law or established practice concerning the law applicable to contracts concluded by your organization? If so, please give examples and the transcripts of the main decisions taken in this respect*

The established practice concerning the law applicable to contracts is, as stated otherwise herein, to reject any specific reference to municipal laws and to rely on general principles of law in the interpretation of contracts with private parties.

Section 1 (*c*) of the General Convention refers expressly to the capacity of the United Nations "to institute legal proceedings". This capacity has been widely recognized by judicial and other State authorities.[25] The United Nations practice in respect of the receipt of private law claims, specifically claims in contract, and steps taken to mitigate or avoid such claims is not extensive.

One example of judicial action may be cited with reference to dispute resolution of contracts to which the United Nations was a party.

In *Balfour, Guthrie & Co. Ltd., et al.* v. *United States et al.*[26] the United Nations brought an action arising out of the loss of and damage to a cargo of milk which had been shipped on behalf of UNICEF on a United States vessel: the United Nations action was joined with that of six other shippers. The Court, having regard to the terms of Article 104 of the Charter which, as a treaty ratified by the United States, formed part of the law of the United States, stated that "No implemental legislation would appear to be necessary to endow the United Nations with legal capacity in the United States". It noted further: "The President, however, has removed any possible doubt by designating the United Nations as one of the organizations entitled to enjoy the privileges conferred by the International Organizations Immunities Act", under Section 2 (*a*) of that Act. These privileges included "to the extent consistent with the instrument creating them" the capacity "to institute legal proceedings."

In addition, a number of arbitrations have been conducted in which the United Nations was a party. In *Starways Limited* v. *United Nations*,[27] the United Nations had contracted with Sabena airlines for the charter of several DC-4 aircraft to be stationed in the Democratic Republic of the Congo, in connexion with the United Nations mission in the Congo. One such aircraft belonged to and was operated by Starways Limited, a subcontractor of Sabena. The aircraft was destroyed by fire on 17 September 1961, having been attacked by rebel forces hostile to the United Nations mission. A claim was brought and submitted to arbitration. The arbitration agreement stipulated that the question of contractual liability was excluded from the terms of reference.

However, of special interest is the fact that the applicable law was stipulated to be that of the (former) Belgian Congo. The Arbitration Agreement stipulated:

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[25] *Yearbook of International Law Commission*, 1967, vol. II, p. 216.

[26] 90F.Supp. 831 (N.D., Cal., S.D., 5 May 1950).

[27] Arbitrator's decision rendered 24 September 1969, under the rules of the American Arbitration Association, Howard H. Bachrach, sole arbitrator. For a summary of the case, see *Juridical Yearbook*, 1969, p. 233.

"Except for the conduct of the case and the procedure indicated in this agreement, the law applied by the Arbitrator shall be the codes and legislation of the Belgian Congo which remained in force in the Democratic Republic of the Congo pursuant to Article 2 of the Loi Fondamentale of 19 May 1960."

It should, however, be pointed out that the applicable law here was established by agreement between the parties. It was neither stipulated by the contract nor automatically applied as a matter of conflict of law principles.

IV. *Is the establishment of contracts (for supplies, etc.) preceded by calls for tenders on a competitive basis? What rules govern such procedures?*

The Office of General Services of the United Nations is responsible for procuring equipment, supplies and services in accordance with the prescribed Financial Regulations and Rules (Regulation 10.5 and Rules 110.16 through 110.24) of the United Nations. Financial Regulation 10.5 provides that normally tenders for such equipment, supplies and other requirements are to be invited by advertisement. Contracts may only be entered into by duly authorized officers of the Organization. That authority normally rests with the Assistant Secretary-General, Office of General Services, or that officer's authorized delegate.[28] A Committee on Contracts has been established to render advice to the Assistant Secretary-General, Office of General Services, in matters involving, but not limited to, single requisitions of $US 10,000 or more; contracts involving income to the Organization of $US 5,000 or more, and proposals for modifications and renewals of contracts.[29]

Normally, contracts are let after competitive bidding. Tenders are invited by advertising through publication or distribution of formal invitations to bid. However, in cases where the nature of the work involved precludes invitation of tenders and where proposals are called, a comparative analysis of such proposals is kept on record.[30] Contracts may be awarded without advertising or formal invitations to bid when the contract involves a commitment of less than $US 2,500 in the case of United Nations Headquarters, the United Nations Office at Geneva and UNIDO, Vienna and $US 1,000 in the case of regional economic commissions, provided that the award is made in conformity with designated specifications.[31] Other exceptions involve cases where prices are fixed by national legislation;[32] standardization of supplies or equipment has received prior approval of the Committee on Contracts; the subject of the contract is considered to be a matter of special priority or urgency for the Organization;[33] or the Assistant Secretary-General, Office of General Services, determines that competitive bidding would not give satisfactory results.[34] All bids are publicly opened at the time and place specified in the invitation to bid.[35] Contracts are awarded to the lowest acceptable bidder. However, when the interests of the Organization so require, all bids may be rejected.[36] Written contracts or purchase orders are required to be made for every purchase beyond specified amounts. Those amounts vary, according to the agency of the United Nations executing the contract.[37]

V. *Do you find it useful to draw up as detailed contracts as possible, for instance by establishing standard models, in order to avoid disputes?*

Contracts are generally on a fixed price basis with firm specifications describing

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[28] Financial Rule 110.16(*b*).
[29] Financial Rule 110.17(*a*).
[30] Financial Rule 110.18.
[31] Financial Rule 110.19.
[32] Financial Rule 110.19(*b*).
[33] Financial Rule 110.19(*c*)-(*g*).
[34] Financial Rule 110.19(*h*).
[35] Financial Rule 110.20.
[36] Financial Rule 110.21.
[37] Financial Rule 110.22.

the work to be done. The performance of the contractor is controlled, where applicable, by progress reports and results. The policy of the Organization is to avoid "open-ended" contracts with regard to time and costs. On the other hand, certain types of work call for payment on a time/rate basis. Time/rate contracts are appropriate when the work to be executed is of a measurable quality. For example, when a contract stipulates a certain amount of drilling work, payments may be based on a fixed rate per foot or per type of operation.

Contracts are amended only when there exists legitimate and agreed reasons for so doing, i.e. an extension of work to be executed, a change in the scope of the work or a change in emphasis resulting in a change in, or extension of time or personnel. All amendments involving financial modifications must be submitted to the Committee on Contracts. This body endorses the general terms of the amendment and ensures that they are consistent with those set out in the original contract.

The final text of a contract may be subject to review and approval by the Office of Legal Affairs, the Office of the Controller and the substantive division. This is not always the case, and is generally not true of routinely recurring contracts. Contracts are generally signed by the Chief, Purchase and Transportation Service, on behalf of the United Nations. Copies of the contract are then forwarded to the contracting body. The contractor retains its copy(ies) and returns the others to the Organization.

The degree to which a detailed contract proves to be useful varies under a number of conditions, including its nature and the purposes underlying the contract. Contracts may take a variety or forms including: purchase orders, letters of agreement and formal contracts. The "boiler plate" or the standardized "general conditions" clauses of the contract are, in principle, uniformly applied to contracts entered into by the United Nations with private parties. However, the Geneva Office of the United Nations has developed its own set of "general conditions" in contract making. In the case of contracts of a less important nature or those in which certain provisions of the "general conditions" would be inapplicable such conditions may be partially deleted or included in abbreviated form.

In March 1975, there was held a meeting of the Agency Contract Specialists Group of the Working Group on Administration and Finance Matters (WGAFM) of the United Nations and its specialized agencies. That meeting was held in pursuance of a decision taken by WGAFM at its fifteenth session in the course of which it considered a draft standard contract form prepared by the United Nations for use of all the specialized agencies.[38] At the meeting of the Group the United Nations participant stated that after studying the comments received from the specialized agencies, it was obvious that with the exception of "General conditions" a single standard form for use by all the agencies was difficult to design in view of the different circumstances. The United Nations representative, therefore, proposed that rather than a rigid standard form contract, a model contract outline would be more suitable as a tool for standardization of contracts within the United Nations system. A contracting officer might then use the elements of the model outline as might be appropriate to the special requirements of the contract.[39] The components of the proposed model included: (*a*) a model contract cover page and (*b*) a model schedule of contractual provisions. The production of such standard models for United Nations system contracting is an example of the current trend within the system to establish universally applied norms. This effort toward creating standard approaches to contract making has been conducted within the United Nations for some time, where guidelines have

[38] Document DP/WGAFM/R.15.
[39] Document DP/WGAFM/WP.3/R.1, paragraph 3.

been issued in an effort to maintain uniform approaches to contracts whenever possible.[40]

VI. *Would you consider that the elaboration of international substantive rules and uniform laws in the field of contract (for instance by means of international conventions) and the widest possible use of the result in international commercial relations could play a useful role in the emergence of an international legal system applicable to the contracts here under consideration?*

Yes, this Organization would consider that such elaboration and use could play a useful role in the question under consideration.

PROCEDURES FOR SETTLING DISPUTES

VII. *Do the Constitution, the internal rules of your organization or international conventions (headquarters agreements, etc.) make any provision as to procedures for settlement of, and the body competent to deal with, disputes arising from contracts concluded between your organization and private parties?*

Section 29 of the General Convention states that

"The United Nations shall make provision for appropriate modes of settlement of:

"(*a*) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;"

In order to provide a suitable means of settlement of any disputes of a private law character, the United Nations has regularly made provision in its contracts for recourse to arbitration.[41]

VIII. *Do the contracts in question generally (or occasionally, in which case on what occasions?) contain a provision designating the body to which any disputes arising under such contracts are to be referred?*

The contracts in question generally contain provisions designating arbitration as the manner in which any disputes are to be resolved.

In addition, special attention has been given to the preferred place of arbitration and its designation in such contracts. In 1964 the Office of Legal Affairs of the United Nations advised the Office of General Services of the United Nations regarding a proposal that the United Nations standard bid form and United Nations contracts should specify that the place of arbitration would be New York. An extract from that opinion is reproduced below:

"There would naturally be practical advantages from our point of view should arbitrations be held in New York. On the other hand, there is the consideration that a requirement to this effect might dissuade parties either not resident or not represented in New York from bidding for United Nations contracts, and such a possibility should be avoided. To provide therefore in the standard bid form that arbitration should be in New York would not seem to us to be entirely advisable.

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[40] There are currently two manuals published under the auspices of the Office of General Services, United Nations, and designated to supply guidelines in contract making procedures, namely the *Manual of Procedures for Purchase and Standards Section* (New York, 1971) and the *Manual of Procedures for Contracts Section* (New York, 1971). The latter manual is designated to supply models for contracts entered into by the United Nations as an executing agency of the UNDP.

[41] *Yearbook of the International Law Commission*, 1967, vol. II, p. 296.

"On the other hand, when it is apparent at the time of contracting that a strong conflict of interest would exist between the United Nations and the contracting party in respect to the place of arbitration, it would be advisable to include agreement on the place of arbitration in the disputes clause. In such cases, should the United Nations consider it advisable that arbitration in the particular case should be in New York, it would be advisable to try to reach agreement on the inclusion of the words 'Any arbitration hereunder shall take place in New York unless otherwise agreed by the parties' in the arbitration clause of the contract."[42]

IX. *If the contracts in question do contain a provision on dispute settlement machinery, to what type of body is such competence ascribed: international or national arbitration bodies, an international administrative tribunal or a national court? Please provide examples of such provisions*

Competence for the resolution of disputes that may arise out of such contracts is ascribed to arbitration bodies. There have been various clauses on arbitration used by the United Nations in contracting. These provisions designate the structuring of the arbitration either under the rules of the American Arbitration Association or the International Chamber of Commerce, or they may designate the structuring of an *ad hoc* panel with final recourse, in case of dispute, to the President of the United Nations Administrative Tribunal. Three examples of these clauses are set out below.

(*a*) "Any controversy or claim arising out of or in connexion with the interpretation or enforcement of this Agreement or any breach thereof shall be settled by arbitration in New York City in accordance with the then obtaining rules of the American Arbitration Association. The parties hereto agree to be bound by any arbitration award rendered as a result of such arbitration as the final adjudication of any such controversy or claim."

(*b*) "Any dispute arising out of the interpretation or application of the terms of this contract shall, unless it is settled by direct negotiations, be referred to arbitration in accordance with the rules then obtaining of the International Chamber of Commerce. The United Nations and the Contractor agree to be bound by any arbitration award rendered in accordance with this section as the final adjudication of any such dispute."

(*c*) "Any dispute arising out of or in connexion with this contract shall, if attempts at settlement by negotiation have failed, be submitted to arbitration in New York by a single arbitrator agreed to by both parties. Should the parties be unable to agree on a single arbitrator within thirty days of the request for arbitration, then each party shall proceed to appoint one arbitrator and the two arbitrators thus appointed shall agree on a third. Failing such agreement, either party may request the appointment of a third arbitrator by the President of the United Nations Administrative Tribunal. The arbitrator shall rule on the costs which may be divided between the parties. The decision rendered in the arbitration shall constitute the final adjudication of the dispute."

The choice as to which of the three arbitration provisions is selected in any given case is based to some degree on the particular exigencies of each contract, on the convenience of the parties and their familiarity with the referred to rules and procedures, and upon the prospective costs which might be involved in the cases of invocation of this dispute settlement procedure.

[42] *Yearbook of the International Law Commission, 1967*, vol. II, p. 209.

X. *Have the bodies in question had to meet frequently? Has their activity given rise to difficulties?*

The United Nations has only had recourse to arbitral proceedings in a limited number of cases. The arbitral awards which have been given have been very largely based on the particular facts relating to the contract concerned and have not raised points of general legal interest regarding the status, privileges and immunities of the Organization.[43] Very few cases regarding commercial contracts to which the United Nations was a party have come before municipal courts; in instances in which the United Nations was the plaintiff the most frequent issue was the capacity of the Organization to institute proceedings. In one case it was held that a United Nations subsidiary organ bringing an action arising out of a contract was obliged to comply with venue requirements.[44]

Such difficulties as have arisen regarding the contractual capacity of the Organization have usually followed a dispute over the execution of a particular contract. On several occasions, it has been alleged by the other party that the United Nations lacked juridical personality and thus could not enforce its contractual rights before a local court. These arguments, in which the legal personality of the Organization was denied as part of a denial of its capacity to institute legal proceedings, do not appear to have been raised in any commercial dispute in which the United Nations took action as a plaintiff, although they have been presented in correspondence.[45] In *United Nations* v. *B.*[46] and *UNRRA* v. *Daan*,[47] however, arguments denying the legal personality of the two organizations were presented by former staff members when action was brought to recover sums paid to them in error under their contracts of employment; these arguments were rejected by the courts. It may also be noted that in a dispute which arose in 1952 with a private firm with whom the United Nations had entered into a commercial contract, the firm sought to halt arbitration proceedings by means of a court order on the grounds that the Organization's immunity from suit and execution rendered its contracts unenforceable. In correspondence, the Office of Legal Affairs denied this argument relying on precedents with respect to State immunities and the firm's acceptance of an arbitral procedure for the settlement of disputes. The request of a motion to stay arbitration was subsequently dropped by the firm concerned.[48]

In 1958, following a dispute as to the execution of a commercial contract, UNRWA sought to enter into arbitration with the other party. The other party having declined to appoint an arbitrator in accordance with the terms of the contract, UNRWA requested the President of the Court of Arbitration of the International Chamber of Commerce to appoint one. The latter appointed Professor Henri Battifol of the Faculty of Law of the University of Paris. The section of Professor Battifol's award dealing with the question of the competence of the arbitrator included the following passage which is of general interest regarding the capacity of an international organization, or of its subsidiary organs, to enter into contracts and to secure their enforcement:

> ... "Whereas UNWRA, an organ of the United Nations, derives from the treaties under which it was constituted, especially the Convention on the Privileges

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[43] See, however, the award given by Professor Batiffol, cited, *infra*.

[44] *UNKRA* v. *Glass Production Methods, Inc. et al.*, 143 F. Supp. 248 (S.D.N.Y., 1956).

[45] *Yearbook of the International Law Commission, 1967*, vol. II, p. 207.

[46] Tribunal Civil of Brussels, 27 March 1952.

[47] Cantonal Court, Amersfoort (The Netherlands), 16 June 1948; District Court of Utrecht, 23 February 1949; Supreme Court, 19 May 1950.

[48] *Ibid.*, foot-note 39.

and Immunities of the United Nations of 13 February 1946, juridical personality and the capacity to contract; and whereas the stipulation of an arbitration clause, implied by such capacity, thus derives its legal basis from an instrument of public international law and is valid under that law without any need in that respect for reference to a national law, as would be the case for a contract between private parties, who to this day are subject to the authority of a State and hence to a national legal system, whether by reason of their nationality or domicile, the location of their property or their place of business or employment;

"Whereas, although certain legal systems do allow the signatory of an arbitration clause to petition an ordinary court of justice to supervise the arbitration proceedings or even, if the court deems it appropriate, to act as a substitute for the arbitrator, such substitution presupposes that the action is brought under a national system which has made provision for that possibility and regulated its consequences; and whereas, inasmuch as the present case does not involve an action brought under a national legal system but is governed by public international law, which has not made provision for such a possibility and does not, moreover, possess any organization of its own capable of regulating the consequences, the stipulated arbitration clause must be read according to its terms, which preclude recourse to the ordinary courts in case of disputes to which it refers, that being the only solution compatible with the immunity from jurisdiction of international agencies;

"Whereas the refusal of the respondent company to co-operate in the appointment of the arbitrator and in drawing up a settlement cannot bar the implementation of the arbitration clause; whereas, although national legal systems make varying assessments of the respective roles of damages and of performance in kind in the event of non-performance of a contract attributable to the debtor, all such systems recognize, in varying degrees, the right to require performance in kind wherever possible; and whereas, inasmuch as international law, on which the present arbitration clause is based, makes no provision on this subject, it is necessary to adhere to the general principle of the binding effect of contracts and to consider whether implementation of the arbitration clause in accordance with the terms thereof is possible despite the refusal of the respondent to co-operate;

"Whereas appointment of the arbitrator despite respondent's failure to act is possible, at least where the contract, as in the present case, provided for recourse to a third party for the purpose of such appointment in case of disagreement between the parties; whereas no distinction is to be made between disagreement concerning the person to be appointed and disagreement concerning the desirability of an appointment; and whereas the wording of article 12 ("should the parties not agree within 30 days as to the choice of the arbitrator, the appointment will be made by the President of the Court of Arbitration of the International Chamber of Commerce") covers both eventualities, in accordance with the genuine will of the parties, which was to submit to arbitration any dispute arising from the contract;

"Whereas the refusal of the respondent to co-operate in drawing up a settlement can be made good by the submission to arbitration of the draft settlement proposed to the respondent, whereupon the arbitrator will decide whether the proposed wording adequately and correctly sets out the subject of the dispute, having regard to the documents produced and particularly the correspondence between the parties; and whereas such replacement of the contract by a judgement, which is admissible, *inter alia*, in case of refusal to fulfil a promise of sale, is purely and simply the performance, upon a ruling by the judge, of the original contract, such ruling standing, in these circumstances, in lieu of a settlement;

"Whereas in the present case the complainant requested the President of the Court of Arbitration of the International Chamber of Commerce, in accordance with article 12 of the general conditions annexed to the contract, to appoint the arbitrator; whereas that request was acted upon; whereas, the complainant having submitted to the appointed arbitrator the draft settlement proposed by the complainant to the respondent, the arbitrator found, in the light of the documents produced, that the said draft adequately and correctly set out the subject of the dispute; and whereas the arbitrator was therefore validly seized of the dispute and is competent to take cognizance of it."[49]

The arbitrator found in favour of UNRWA as regards the merits of the dispute.

XI. *Is the attribution of jurisdiction to be considered as implying a choice as to the applicable law? Or is the question left to the appreciation of the bodies in question? Are there any decisions by these bodies on the subject?*

The attribution of jurisdiction for dispute settlement or contract claims to properly constituted arbitral bodies has not been considered as implying a choice as to the applicable law. The determination of the applicable law of the contract is left to the arbitrators. The number of disputes presented to arbitration for settlement is not great and few formal written opinions have been rendered. Reference may, however, be made to the opinion of Professor Battifol, above, and to the following cases: *Balakhany (Chad) Limited* v. *Food and Agriculture Organization of the United Nations;*[50] *Aerovias Panama, S.A.* v. *United Nations;*[51] *Lamarche* v. *Organisation des Nations Unies au Congo.*[52]

XII. (a) *In case of an action by a private party against your organization on the basis of a contract, do you generally rely on such immunity from jurisdiction as the organization may enjoy or do you agree to waive such immunity?*

The United Nations normally does not waive its immunity except in cases of third party liability covered by insurance. Rather than waive immunity, it submits to arbitration. However, as to its immunity, it may be noted that as stated in Section 2 of the General Convention:

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

Similar provisions are contained in the majority of other international agreements relating to the privileges and immunities of the United Nations.[53] Article I, section 1 of the Agreement with Switzerland expresses the privilege as one derived from international law:

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[49] *Ibid.*, p. 208.

[50] Award of the arbitration dated 29 June 1972. Barend van Marwijk Kooz, Arbitrator, cited in the *Juridical Yearbook* 1972, p. 206-207.

[51] Award of the arbitration dated 14 January 1965, under the rules of the American Arbitration Association.

[52] Award of the arbitration dated 6 August 1965, under the rules of the International Chamber of Commerce.

[53] For the regional economic commissions see section 7 of the ECLA Agreement (United Nations, *Treaty Series*, vol. 314, p. 49) and section 6 of the ECAFE Agreement (*ibid.*, vol. 260, p. 35). In the case of the ECA Agreement (*ibid.*, vol. 317, p. 101), no immunity from legal process is provided for the Commission itself, *expressis verbis*, though the Headquarters of the Commission are declared inviolable (section 2) its officials are granted immunity in respect of official acts (section 11(*a*)), and the Executive Secretary himself and his immediate assistants are granted diplomatic privileges and immunities (section 13); the Agreement and the General Convention are to be treated as complementary, however, in so far as their provisions relate to the same subject matter (section 17).

"The Swiss Federal Council recognizes the international personality and legal capacity of the United Nations. Consequently according to the rules of international law, the Organization cannot be sued before the Swiss Courts without its express consent."[54]

Immunity from legal process is not one of the privileges granted to the Organization under the Headquarters Agreement with the United States. Until the United States became a party to the General Convention,[55] the Organization's immunity from suit in that country had been based on national enactments.[56] Title I, section 2 (*b*) of the International Organizations Immunities Act provides:

"International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."[57]

One judicial decision may be noted relating to the immunity of the United Nations. In *Curran* v. *City of New York et al.*,[58] the plaintiff brought an action against the City of New York, the Secretary-General and others, to set aside grants of land and easements by the City to the United Nations for its headquarters site, exemption of the site from taxation and the allocation of funds by the City for the improvement of nearby streets. The Secretary-General moved to dismiss the action against him on grounds of his immunity from suit and legal process. The United States Attorney for the Eastern District of New York informed the Court that the State Department recognized and certified the immunity of the United Nations and of the Secretary-General. The City of New York sought to dismiss the complaint on the ground that it failed to state a sufficient cause of action. The Court held that the complaint should be dismissed and stated:

"The Department of State, the Political branch of our Government, having without any reservation or qualification whatsoever, recognized and certified the immunity of the United Nations, and the defendant Lie to judicial process, there is no longer any question for independent determination by this Court."

On a number of occasions, most notably in the case of actions involving United Nations immunities brought before United States courts, the United Nations has entered an *amicus curiae* brief. The majority of these cases, however, were in the early years of the Organization's history. The established practice at the present time is to assert the immunity from suit of the United Nations in a written communication

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[54] United Nations Legislative Series, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations* (ST/LEG/SER.B/10), p. 197.

[55] The United States acceded to the Convention on 29 April 1970.

[56] Even prior to the accession of the United States to the General Convention, the United Nations took the position that its immunity from suit forms part of general international law, and thus part of the law of the United States, even in the absence of any legislation and, moreover, that the Organization's immunity from suit is derived from Articles 105 and 104 of the Charter, a treaty to which the United States is a party and which similarly forms part of the law of the land. United States courts have preferred to rely on national legislation, however, in upholding the Organization's immunity. See *Yearbook of the International Law Commission*, 1967, vol. II, p. 223, foot-note 49.

[57] United Nations Legislative Series, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations* (ST/LEG/SER.B/10), p. 129.

[58] Supreme Court (Special Term) of Queens' County, 29 December 1947; 77 N.Y.S. 2d 266. The United Nations was not a defendant as such. It may be assumed, however, that the Secretary-General was named in his representative capacity.

to the Ministry of Foreign Affairs of the State concerned. When time permits this communication is sent through the Permanent Representative of the State concerned at United Nations Headquarters. In the written communication the Ministry of Foreign Affairs is requested to take the necessary steps to inform the appropriate office of government (usually the Ministry of Justice or the Attorney-General's Office) to appear or otherwise move the court to dismiss the suit on the grounds of the Organization's immunity. When a summons or notification of appearance has been received, this is returned to the Ministry of Foreign Affairs. In cases brought by former staff members, the United Nations has usually referred in its note to the Ministry of Foreign Affairs to the fact that an alternative means of recourse exists for the staff member in the internal appellate machinery maintained by the Organization for its staff.[59]

In some instances local courts have taken decisions denying the immunity of the Organization or of its subsidiary organs despite the non-waiver of immunity.[60]

The case of *Bergaveche* v. *United Nations Information Centre*[61] concerned an employee of the United Nations Information Centre in Buenos Aires. In 1954, when his fixed-term contract was not renewed, he brought an action before the local Labour Court for termination indemnities. The United Nations Information Centre did not submit to the jurisdiction and requested the Ministry of Foreign Relations to notify the Court of its immunity from suit. The Court dismissed the action on the grounds that under the terms of Article 105 of the Charter and of the General Convention it lacked jurisdiction.

In response to a fresh submission by Mr. Bergaveche, another Labour Court gave a decision on 7 February 1956, in which it assumed jurisdiction by virtue of the fact that Argentina was not a party to the General Convention. Argentina acceded to the Convention on 31 August 1956 and in April 1957 the *Ministerio Público* advised the Labour Court that the action should be dismissed since the United Nations and its agencies enjoyed immunity from suit under the Convention and the Convention had become law in Argentina. The Court therefore dismissed the action on 23 April 1957. On appeal it was argued that, since the employment of Mr. Bergaveche had ended in 1954, the Statute adopted in 1956 could not be applied retroactively to his case, or, if retroactivity was intended, this could not affect rights under labour legislation already acquired. In its decision of 19 March 1958, the Court held that the appellant's argument did not succeed since the statute concerned was a procedural one which was immediately applicable in the case of both pending and future proceedings.

In an internal memorandum prepared by the Office of Legal Affairs in 1948 it was stated with reference to Section 2 of the General Convention that, since the words "except in so far as in any particular case it shall have waived its immunity" must refer to the immediately preceding words ("shall enjoy immunity from every form of legal process"),

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[59] *Yearbook of the International Law Commission, 1967*, vol. II, p. 224.

[60] A number of these cases, mostly given by courts of first instance, involved UNRWA. For a summary see Annual Report of the Secretary-General, *Official Records of the General Assembly, Ninth Session, Supplement No. 1* (A/2663), pp. 106 and 107, and *Repertory of Practice of United Nations Organs*, Suppl. No. 2, vol. III, pp. 518 and 519. Further information is contained in the Annual Reports of the Director of UNRWA, *Official Records of the General Assembly, Ninth Session, Supplement No. 17* (A/2717), Annex G, para. 11 (i); *ibid., Tenth Session, Supplement No. 15* (A/2978), Annex G, para. 19; *ibid., Eleventh Session, Supplement No. 14* (A/3212), Annex G, para. 19; *ibid., Thirteenth Session, Supplement No. 14* (A/3931), Annex II, para. 26.

[61] *Camara Nacional de Apelaciones del Trabajo de la Capital Federal*, 19 March 1958.

"it would appear that by this Article permission is given to the United Nations to waive its immunity only in so far as legal process in any particular case is concerned, and such waiver cannot extend to any measure of execution."

This conclusion was said to be in accordance with a number of municipal decisions, notably those given by English and United States courts, in respect of the waiver of State immunities. The memorandum then continued:

"According to the reports of the Preparatory Commission of the United Nations, Article 2 of the General Convention was based on similar articles in the constitutions of international organizations. Some of their constitutional instruments, such as that of UNRRA, provide that the member government accord to the administration the facilities, privileges, exemptions and immunities which they accord to each other including immunity from suit and legal process except with the consent of or so far as is provided for in any contract entered into by or on behalf of the Administration.

"A similar provision is contained in Article IX, Section 3 of the Articles of the International Monetary Fund, providing for waiver of immunity for the purposes of any proceedings or by the terms of any contract thereby differentiating between the two forms of waiver. Apparently, it was not the intention of the Preparatory Commission or the General Assembly to extend waiver this far in so far as the United Nations was concerned, or such a provision would have been included. rather than just the words 'legal process'. In fact the words used in the original draft of this section were: 'The Organization, its property and its assets wherever located and by whomsoever held shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract'.

"This wording was changed by the Legal Committee of the Preparatory Commission to read in the more restrictive fashion that it now stands. It must be concluded, therefore, that it was not the intention of the Preparatory Commission, or of the General Assembly, to extend the right of waiver to waiver in future by the terms of a contract.

"Since permission is given by the General Convention to the United Nations to waive its immunity in any particular case in so far as legal process is concerned, it is to be supposed that the authority to carry out such a waiver is placed with the Secretary-General, since the Secretary-General is responsible for the administration of the United Nations. It would not be possible to expect the Secretary-General to ask further authority from the General Assembly in each instance that legal process is to be served upon the United Nations; also the fact that the General Assembly found it necessary to write in a limitation upon the extent of any waiver, in so far as execution is concerned, would indicate that the General Assembly intended to transfer this authority to the Secretary-General, since if it were itself the waiving authority, there would be no necessity for making a limitation for its own right of waiver. This argument might be countered by stating that it is specifically provided in the General Convention that the Secretary-General may waive immunity in so far as officials and experts of the United Nations are concerned (Section 20, 23, 29). However, such a provision would be necessary in this instance since otherwise it might be supposed that the official or expert was entitled to waive his own immunity. In the case of the United Nations, the Secretary-General is 'the chief administrative officer of the Organization' and therefore such a clarification concerning the ability

probably did not appear to be necessary to the Preparatory Commission or the General Assembly."[62]

In practice, the Secretary-General has determined in all cases whether or not the immunity of the Organization should be waived.

XII. (b) *Does your attitude regarding waiver of immunity depend on the jurisdiction seized of the case and the law which would be applied by it?*

The only situation in which the Organization might normally waive its immunity would be one involving third party liability insurance.

One example of this situation would be a contract of insurance for motor vehicles. By resolution 23 (I), paragraph E of the General Assembly, the Secretary-General was instructed to insure that the drivers of the United Nations and all members of the staff who own or drive motor cars shall be properly insured against third party risk. In a 1949 memorandum of the Office of Legal Affairs it was stated:

> "As it is really not feasible to take out insurance without permitting the insurance carrier the right to defend any suits which might be brought against the United Nations, the Secretary-General clearly has the power to waive immunity of the United Nations for the purpose of permitting such suits to be brought."[63]

XII. (c) *What is your position when the contract at issue does not provide for procedures for the settlement of disputes?*

There are very few cases in which provision is not made for arbitration. If the other party prefers, the United Nations does not insert the arbitration clause but includes a provision that no waiver of immunity is intended. Current practice requires that all contracts provide for arbitration to be specified as the method of dispute settlement. However, were the situation to arise, the United Nations would not generally waive its immunity from jurisdiction but would seek resolution of the dispute through a forum other than national courts, most usually arbitration.

GENERAL QUESTION

XIII. *Do you consider present practice satisfactory? In what way do you think it should be directed or developed?*

In general, the present practice is deemed to be satisfactory.[64]

26 February 1976

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2. PROTECTION OF THE UNITED NATIONS EMBLEM AGAINST UNAUTHORIZED USE UNDER GENERAL ASSEMBLY RESOLUTION 92 (I) AND THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

Letter to a private individual

Our attention has been drawn to a notice in a numismatic periodical advertising your manufacture and sale of a medal bearing a replica of the United Nations emblem.

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[62] *Yearbook of the International Law Commission*, 1967, vol. II, p. 225.

[63] *Ibid.*, p. 226.

[64] The above reply was communicated to the Rapporteur of the Institut de droit international on the question of contracts concluded by international organizations with private parties, for the purposes of the preparation of his report to the Fourth Committee of the Institut. On 6 September 1977, the Institut de droit international adopted a resolution on the question, which is reproduced in its report on its Oslo session (1977).

Please be advised that there are restrictions on the use of the United Nations name and emblem. These restrictions were established by the General Assembly of the United Nations in 1946 and are set out in its resolution 92 (I) of 7 December 1946. The resolution, whose purpose is to protect the United Nations name and emblem against unauthorized use, in particular for commercial purposes, requires that the United Nations name, or emblem, may not be used without prior authorization from the Secretary-General of the United Nations. The resolution also provides that Member States of the United Nations take such legislative or administrative measures as may be necessary to prevent the use of the United Nations name, or emblem, without authorization from the Secretary-General.

The United Nations emblem is also protected under article 6 *ter*, para. 1 (*b*) of the Paris Convention for the Protection of Industrial Property, to which your country is a party.

The reproduction of the United Nations emblem on the medal produced by your company is unauthorized and should be discontinued.

I would appreciate your notifying us promptly and within a period of two weeks, in order to obviate further action on our part, (*a*) that measures have been taken by you to cease this unauthorized use, and, in particular, (*b*) that you will withdraw all medals from sale or other distribution.

It is necessary that stamps and medals bearing the United Nations name or emblem be restricted to those issued under official United Nations auspices. We have licensed a specific firm for the production of United Nations commemorative medals, and no further licensing arrangement is envisaged now.

12 March 1976

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3. CONTRACTUAL OBLIGATION OF THE UNITED NATIONS TO REIMBURSE A MEMBER STATE ON ACCOUNT OF THE DESTRUCTION OF A PLANE SUPPLIED BY THAT STATE TO UNMOGIP—SUCH AN OBLIGATION MUST BE MET IRRESPECTIVE OF WHETHER IT IS COVERED BY SPECIFIC APPROPRIATIONS AND INDEPENDENTLY OF THE ABILITY OF THE ORGANIZATION TO COLLECT DAMAGES FROM A THIRD PARTY RESPONSIBLE FOR THE DESTRUCTION

Memorandum to the Chief, Political, Legal and Common Services Section, Budget Division

1. In reply to your memorandum of 22 March 1976, we hold the view that clear legal obligations of the United Nations should be paid, regardless of whether there is an appropriating resolution or whether the Organization has a claim against a third party for the sum in question, on which it has not yet been able to collect.

2. In regard to the case of the aircraft which you mention, the agreement between the United Nations and [name of a Member State] for the provision of the plane to UNMOGIP was unquestionably not *ultra vires*, and there is no other ground to doubt its validity. It was entirely equitable to provide for reimbursement to the Member State concerned in the event of the destruction of the plane. There is no term, either express or implied, in the agreement to the effect that reimbursement should be dependent on the ability of the United Nations to collect damages from a third party responsible for the destruction. It remains only for the United Nations to fulfil the terms agreed upon.

3. Since the beginning of the Organization the General Assembly has recognized that valid legal obligations may arise which are not covered by specific appropriations, and in order to meet such obligations it has provided a Working Capital Fund and a series of resolutions on unforeseen and extraordinary expenses, the latest of which is resolution 3540 (XXX) of 17 December 1975. That resolution authorizes the Secretary-General, in some cases with the prior concurrence of the Advisory Committee on Administrative and Budgetary Questions, and subject to the Financial Regulations and to a special provision on large commitments relating to the maintenance of peace and security, "to enter into commitments to meet unforeseen and extraordinary expenses in the biennium 1976-1977". General Assembly resolution 3541 (XXX) of 17 December 1975, the latest resolution on the Working Capital Fund, provides that:

> "5. The Secretary-General is authorized to advance from the Working Capital Fund:
>
> "...
>
> "(*b*) Such sums as may be necessary to finance commitments which may be duly authorized under the provisions of the resolutions adopted by the General Assembly, in particular resolution 3540 (XXX) of 17 December 1975 relating to unforeseen and extraordinary expenses; the Secretary-General shall make provision in the budget estimates for reimbursing the Working Capital Fund;".

These resolutions apply to the obligation to the Member State concerned just as they apply to obligations in respect of injuries or death incurred in the service of the United Nations, obligations under judgements of the Administrative Tribunal or awards of arbitral tribunals called upon to interpret United Nations contracts, and other legal obligations to pay "unforeseen and extraordinary expenses".

4. The obligation of the United Nations to comply with its agreement is not conditioned upon its ability to collect on its claims against third parties, unless the agreements so specify. As a matter of law, the claim of the Organization over against the destroyer of the property is, so far as the said Member State is concerned, *res inter alios acta*. As a practical matter, the United Nations would seriously impair its reputation and credit if it made the speed of its performance of its obligations dependent on that of its most reluctant debtors.

24 March 1976

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4. UNITED NATIONS MEETINGS HELD AWAY FROM AN ESTABLISHED HEADQUARTERS—PRACTICES OF CONCLUDING *ad hoc* AGREEMENTS WITH HOST STATES REGARDING THE ARRANGEMENTS FOR SUCH MEETINGS—DIFFICULTIES ENCOUNTERED WITH RESPECT TO THE INCLUSION IN SUCH AGREEMENTS OF A STANDARD LIABILITY CLAUSE

Letter to an official of the Ministry for Foreign Affairs of a Member State

The United Nations Secretariat for many years has followed the practice of concluding a formal agreement with any host Government where a United Nations meeting is to be held away from an established headquarters. Such agreements set out the specific contributions to be made by the Secretariat and the host Government, respectively, and they contain clauses on financial arrangements, security and protection, liability for claims and privileges and immunities. In negotiating these agree-

ments the Secretariat has sought not only to satisfy the legal and practical requirements of the Secretariat, but also to develop standard formulations which would ensure that all host Governments would incur essentially the same obligations towards the United Nations and that the various categories of participants would enjoy approximately the same status in all host countries.

Unfortunately, there have been instances where agreement could not be reached between the Government hosting a United Nations meeting or seminar and the United Nations Secretariat because the representatives of the Government objected to the inclusion in the agreement of clauses which the Secretariat considered to be indispensable standard provisions.

The general question of the formulation of and grounds for the standard liability clause was the subject of an exchange of views held in mid December 1975 between your office and the Office of Legal Affairs of the United Nations. We explained that this standard liability clause was usually included in all agreements between the United Nations and Governments hosting meetings or conferences away from an established headquarters of the Organization. The underlying principle was that the host Government, and not the United Nations, should bear such risks as may be involved in the provision of premises or transportation, and in the employment of local personnel. Authority for this view is found in operative paragraph 10 of General Assembly resolution 2609 (XXIV) where it was decided that "United Nations bodies may hold sessions away from an established headquarters when a Government issuing an invitation for a session to be held within its territory has agreed to defray, after consultation with the Secretary-General as to their nature and possible extent, the actual additional costs directly or indirectly involved."

Your office explained that your Government because of legislative restrictions was unable to assume liability for the acts of others, and that the Government therefore opposed the inclusion of the standard liability clause. The Government, however, was in principle willing to undertake a financial obligation commensurate with the direct costs to the United Nations of contracting insurance coverage for the categories of risks referred to in the standard liability clause.

As we believe the main purpose of a standard liability clause to be financial, we would be agreeable in principle to the suggestion that the risks in question be covered by insurance, for which the premiums should be charged to the account of the host Government. Your office was informed of this view and informal agreement was reached that the next step should be to establish a formulation which could be mutually acceptable, *ad referendum*, for future agreements.

Accordingly, I wish to suggest a formulation for your consideration in the hope that it will be approved by you *ad referendum* for future agreements:

> "1. Included among the additional costs to be borne by the Government under General Assembly resolution 2609 (XXIV), paragraph 10, are the costs to the United Nations incurred by the satisfaction or settlement of any action, claim, or other demand against the United Nations arising out of:
>
> "(*a*) injury to person or damage to or loss of property (whether United Nations property or otherwise) in the premises, including damage to the premises, referred to in Article . . .
>
> "(*b*) injury to person, or damage to or loss of property caused by, or incurred in using the transportation referred to in Article . . .
>
> "(*c*) the employment of the locally recruited personnel referred to in Article . . .

"2. If the United Nations Secretariat contracts insurance coverage against the risks referred to in the preceding section, the insurance premium shall be charged to the host Government."

The cross references in the formulation would refer to other articles of the agreement in question, which would specify, respectively, the premises, transportation and personnel to be provided or made available by the host Government pursuant to the agreement.

20 January 1976

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5. PROCEDURE FOLLOWED IN CERTAIN INSTANCES WHERE ADDITIONS TO THE LIST OF SPONSORS OF DRAFT RESOLUTIONS WERE OBJECTED TO BY THE ORIGINAL SPONSORS—QUESTION WHETHER THIS PROCEDURE SHOULD BE FOLLOWED WITH RESPECT TO STATES WHOSE CO-SPONSORSHIP IS ACCEPTABLE TO THE ORIGINAL SPONSORS

Memorandum to the Secretary of the Second Committee of the General Assembly

1. This is in reply to your memorandum in which you requested our views on whether the procedure should continue to be followed whereby the names of Member States whose co-sponsorship of a draft resolution had been objected to by one or more of the original sponsors are listed in the report of the committee concerned on the item in question as having expressed the wish of their delegations to become co-sponsors of the draft resolution.

2. This procedure was adopted as a compromise solution by the Sixth Committee in a very complex situation and should not in our view be considered as a legal precedent. We do not believe that it should in any way be encouraged because of the questions that arise as to the precise status of the Member States concerned. However, we do not see any alternative to the Secretariat's implementing the decision of a Main Committee, which after all is the master of its own proceedings, if such Committee decides to follow the example of the Sixth Committee at the twenty-ninth session concerning Member States whose co-sponsorship had been objected to.[65] There appears to be agreement among the members of the Second Committee that this procedure should be followed in the Committee's report concerning UNITAR and, therefore, the Rapporteur should reflect this when preparing the Committee's report on that item.[66]

3. As to whether this "intermediate status" whereby States are listed as having expressed the wish to become, but not listed as being, co-sponsors should also be applied to States whose co-sponsorship is fully acceptable to the original sponsors of a draft resolution, it is our view that if the original sponsors inform the Secretariat of their acceptance of the States concerned as co-sponsors, or if the Secretariat is satisfied that the States concerned are acceptable to the original sponsors, then, such States should be listed as being co-sponsors and not merely as States having expressed their wish to become co-sponsors.

29 November 1976

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[65] See *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 86, document A/9890, para. 7.

[66] *Ibid., Thirty-first Session, Annexes*, agenda item 58, document A/31/361, para. 5.

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6. ORDER OF PRIORITY OF PROPOSALS UNDER THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY—MEANING OF THE PHRASE "IN THE ORDER IN WHICH THEY ARE SUBMITTED" IN RULES 91 AND 131—DUTIES OF THE SECRETARIAT IN THIS CONNEXION

Memorandum to the Deputy Executive Assistant to the Secretary-General

1. Under rules 91 and 131 of the rules of procedure of the General Assembly, proposals relating to the same question are to be voted on "in the order in which they are submitted". It is now clearly established that the order referred to is the order of submission of a draft to the Secretariat, not the date of circulation of the document or of its formal introduction in the organ concerned.

2. It is the duty of the Secretariat to note the time of receipt of a proposal, to allocate a number accordingly, and to send the document immediately for translation and reproduction, particularly in view of the provision in rules 78 and 120 of the rules of procedure that "no proposal shall be discussed or put to the vote at any meeting... unless copies of it have been circulated to all delegations not later than the day preceding the meeting". In order to prevent any misunderstanding, should the Secretariat receive a proposal and be requested to hold it until some later date, the responsible official should explain that he cannot consider the proposal as being officially submitted and, therefore, he cannot assign a number until he is requested by the sponsor or sponsors to proceed with its submission for reproduction.

19 November 1976

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7. ORDER OF VOTING OF PROPOSALS BEFORE A MAIN COMMITTEE OF THE GENERAL ASSEMBLY—UNDER THE RULES OF PROCEDURE OF THE ASSEMBLY, PROPOSALS WHETHER SUBMITTED BY MEMBER STATES OR BY MAIN OR SUBSIDIARY BODIES ARE VOTED ON IN THE ORDER OF SUBMISSION UNLESS THE COMMITTEE DECIDES OTHERWISE

Memorandum to the Secretary of the Fifth Committee of the General Assembly

1. Rule 131 of the rules of procedure of the General Assembly states:

> "If two or more proposals relate to the same question, the committee shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted. The committee may, after each vote on a proposal, decide whether to vote on the next proposal".

2. Accordingly, whenever a Main Committee of the Assembly has had before it two or more proposals relating to the same question, such Committee has invariably followed the established practice of voting on the proposals in the order of their submission. This practice has been followed in the Fifth and other Main Committees not only in the case of proposals submitted by Member States but also when one of the proposals before it had been submitted in the form of a draft resolution embodied in the report of a main or a subsidiary organ, including expert bodies such as the Committee on Contributions and the Advisory Committee on Administrative and Budgetary Questions. This course of action is also dictated by logic, there being no utility in establishing subsidiary organs or expert bodies to prepare recommendations if those recommendations were to rank only after the proposals of States.

3. The Committee on Contributions is an expert body established under rule 158 of the General Assembly's rules of procedure specifically for the purpose of advising the Assembly on the apportionment, under Article 17, paragraph 2, of the

Charter, of the expenses of the Organization among Members and also on the assessments to be fixed for new Members, on appeals by Members for a change of assessments and on the action to be taken with regard to the application of Article 19 of the Charter (see rule 160 of the rules of procedure of the General Assembly).

4. Acting under the provisions of rule 160 of the rules of procedure of the General Assembly, the Committee on Contributions for a number of years adopted the practice of embodying its recommendations regarding the scale of assessments in the form of a draft resolution in its reports to the Fifth Committee at various sessions. The Fifth Committee has acted on these draft resolutions, treating them as the basic proposals before it. In this respect, the normal rule is complied with, the proposal of the Committee on Contributions regarding the scale of assessments being the first in point of time to be submitted to the Fifth Committee, as part of the report of the Committee on Contributions. This conclusion is amply confirmed in practice.

5. At the twenty-third session of the General Assembly, the Fifth Committee had before it in connexion with the agenda item entitled "Scale of assessments for the apportionment of the expenses of the United Nations":

(*a*) The report of the Committee on Contributions (A/7210 and Add.1 and 2 and Add.2/Corr.1) and a note by the Secretariat (A/C.5/L.949) subsequently revised (A/C.5/L.949/Rev.1), embodying the recommendations of the Committee in the form of a draft resolution;

(*b*) A draft resolution (A/C.5/L.955 and Add.1) sponsored by Argentina and others; and

(*c*) An amendment (A/C.5/L.953) to the draft resolution contained in document A/C.5/L.949/Rev.1.[67]

The Fifth Committee, at its 1263rd meeting, adopted the amendment to the draft resolution embodied in the note by the Secretariat and then voted on the draft resolution (A/C.5/L.949/Rev.1). The draft resolution, as amended, was adopted. Subsequently, at its 1266th meeting, the Committee adopted draft resolution A/C.5/L.955 and Add.1.[68] Thus the voting followed the order of submission of the two proposals before the Committee.

6. At the twenty-seventh session of the General Assembly, the Fifth Committee had before it in connexion with the same item

(*a*) The report of the Committee on Contributions (A/8711 and Corr.1 and Add.1) containing the draft resolution which the Committee was recommending to the Assembly for adoption;

(*b*) A draft resolution (A/C.5/L.1091/Rev.1) submitted by the United States of America;

(*c*) A draft resolution (A/C.5/L.1092) sponsored by Argentina and others;

(*d*) An amendment (A/C.5/L.1095) to the draft resolution contained in document A/C.5/L.1092;

(*e*) A draft resolution (A/C.5/L.1093), sponsored by Afghanistan and others; and

(*f*) An amendment (A/C.5/L.1097 to the draft resolution contained in document A/C.5/L.1093.[69]

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[67] *Ibid., Twenty-third Session, Annexes,* agenda item 77.
[68] *Ibid.,* document A/7451, paras. 18 and 19.
[69] *Ibid., Twenty-seventh Session, Annexes,* agenda item 77.

At its 1540th meeting the Fifth Committee voted first on the draft resolution recommended by the Committee on Contributions and then voted on the other draft resolutions before it in the order in which they had been submitted.[70]

7. At the eighteenth session of the General Assembly, however, the Fifth Committee had before it:

(*a*) The report of the Committee on Contributions embodying the recommendations of the Committee in the form of a draft resolution (A/5510); and

(*b*) A draft resolution (A/C.5/L.806) submitted by the United Arab Republic and Yugoslavia.[71]

The Fifth Committee acted on the latter draft resolution and adopted it unanimously.[72] In this case, the difference between the draft resolution recommended by the Committee on Contributions in its report and that recommended by the United Arab Republic and Yugoslavia was mainly in form and not in substance. The Fifth Committee did not act on the draft resolution recommended by the Committee on Contributions. There was clearly a consensus reached by the members of the Fifth Committee not to follow the normal practice of voting on proposals in their order of submission. Thus, in this case, the proposals were not voted on in the order of submission because the Committee, in accordance with the provisions of rule 131, decided otherwise.

8. It appears from the above that the established practice is for the Fifth Committee to vote on proposals whether they have been submitted by States or by experts bodies in the order in which they have been submitted, unless the Committee decides otherwise. In the present case, it is clear that the draft resolution embodied in the report of the Committee on Contributions (A/31/11, para. 59) was submitted before the other proposals before the Fifth Committee and, consequently, in accordance with the normal practice, should be voted on first.[73]

24 November 1976

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8. Provisions and practice relating to the grant of observer status to intergovernmental organizations by the General Assembly, the Economic and Social Council, the United Nations Conference on Trade and Development and the Commission on Transnational Corporations

Letter to the Legal Adviser, International Bauxite Association

1. Thank you for your letter of 1 December 1975 and its enclosures.

2. With respect to the question raised in your letter, the first step is for your organization to submit in writing the application for observer status. A summary of the provisions and practice relating to the grant of observer status to intergovernmental organizations by the organs referred to in your letter is given below for your consideration.

A. *The General Assembly*

3. The General Assembly has by resolution granted observer status on a regular basis to six intergovernmental organizations, namely, the Organization of American

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[70] *Ibid.*, document A/8952, para. 24.

[71] *Ibid.*, *Eighteenth Session, Annexes*, agenda item 62.

[72] *Ibid.*, document A/5659, para. 10.

[73] At the 41st meeting of the thirty-second session held on 3 December 1976, the Fifth Committee decided that the draft resolutions submitted by Member States should be given priority over that presented by the Committee on Contributions (A/C.5/SR.41, para. 7).

States, the League of Arab States, the Organization of African Unity, the European Economic Community, the Council for Mutual Economic Assistance and the Islamic Conference. It has been the practice that at the Assembly sessions observer organizations make statements only in the Main Committees on matters which are within the scope of the activities of the organizations concerned. In Addition to the six regional intergovernmental organizations mentioned above, the Main Committees and other subsidiary organs of the General Assembly have on occasion invited intergovernmental organizations at their request to make statements at meetings on matters with which the organizations are concerned.

4. So far permanent or regular observer status has been granted by the General Assembly only to regional intergovernmental organizations which have wide responsibilities in many fields. It should be noted that the rules of the General Assembly, unlike those of the Economic and Social Council (see paragraph 5 below) do not contain any provision on the participation of intergovernmental organizations in its meetings and observer status is accorded only by adoption of resolutions in individual cases.

B. *The Economic and Social Council*

5. Rule 79 of the rules of procedure of the Economic and Social Council (adopted by the Council in resolution 1949 (LVIII) of 7 May 1975) provides as follows:

> "Representatives of intergovernmental organizations accorded permanent observer status by the General Assembly and of other intergovernmental organizations designated on an *ad hoc* or a continuing basis by the Council on the recommendation of the Bureau, may participate, without the right to vote, in the deliberations of the Council on questions within the scope of the activities of the organizations."

Intergovernmental organizations, in addition to those accorded permanent observer status by the General Assembly, which participate in the work of the Council on a continuing or *ad hoc* basis are given in the Council's decision 109 (LIX) of 23 July 1975.

6. Generally speaking, organizations concerned with a specific activity in the economic or social field are normally granted observer status by the Economic and Social Council rather than by the General Assembly.

7. Insofar as subsidiary organs of the Economic and Social Council are concerned, the regional economic commissions have been authorized by the Countil to invite representatives of intergovernmental organizations to participate in consultative capacity in the consideration of any matter of particular concern to those organizations following the practice of the Economic and Social Council. On the basis of this authorization those commissions have invited certain intergovernmental organizations to attend their meetings. The existing rules of procedure of the regional commissions, however, do not contain any provision on the participation of intergovernmental organizations. In its resolution 1949 (LVIII), mentioned in paragraph 5 above, the Economic and Social Council drew the attention of the regional economic commissions "to the rules of procedure annexed to [that] resolution, which they may wish to take into account in connexion with their own rules of procedure." The terms of reference of the functional commissions do not include provisions concerning intergovernmental organizations, nor do their rules of procedure provide for participation of such organizations in their meetings. The Council, however, has provided that certain intergovernmental organizations should be represented as observers at sessions of specific functional commissions. In a decision adopted by the

Council at its 1769th meeting on 20 May 1971 under the title "Relations with non-United Nations intergovernmental organizations in the economic and social field", the functional commissions were asked to continue to invite to their meetings intergovernmental organizations in fields of direct concern to them and keep the Council informed thereof. It was further stated in the decision that those organizations would be entitled to participate, without the right to vote, in debates on questions of concern to them. In its resolution 1949 (LVIII) the Council decided to consider at its sixtieth session [April-May 1976] the question of the review of the rules of procedure of its functional commissions.[74] [For subsidiary organs of the Council other than the regional economic commissions and functional commissions, see also paragraph 10 below.]

C. *The United Nations Conference on Trade and Development (UNCTAD)*

8. The United Nations Conference on Trade and Development was established by the General Assembly in its resolution 1995 (XIX) of 30 September 1964 as an organ of the General Assembly. Paragraph 18 of that resolution provides specifically that the Trade and Development Board (which is a permanent organ of the Conference) shall, as required, make arrangements to obtain reports from and establish links with intergovernmental bodies whose activities are relevant to its functions.

9. Rule 80 of the rules of procedure of the Conference and rule 78 of the rules of procedure of the Board provide in identical terms as follows:

> "1. Representatives of specialized agencies, the International Atomic Energy Agency and the inter-governmental bodies referred to in paragraphs 18 and 19 of General Assembly resolution 1995 (XIX) which are designated for this purpose by the Conference or the Board, may participate, without the right to vote, in the deliberations of the Conference [Board], its main committees and other sessional bodies upon the invitation of the President or Chairman, as the case may be, on questions within the scope of their activities.
>
> "2. Written statements of specialized agencies, the International Atomic Energy Agency and inter-governmental bodies referred to in paragraph 1 above, related to items on the agenda of the Conference [Board], shall be circulated by the secretariat to members of the Conference [Board]."

In accordance with these rules it is for the Conference or the Board to designate the intergovernmental organizations to participate in its meetings as observers.

D. *The Commission on Transnational Corporations*

10. The Commission on Transnational Corporations was established by the Economic and Social Council in its resolution 1913 (LVII) of 5 December 1974

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[74] At its sixtieth session, the Council, by its resolution 153 (LX), decided to review at its organizational session for 1977, the rules of procedure of its functional commissions so that they might conform to its revised rules of procedure [see Council resolution 1949 (LVIII)] and to that end to request the Secretariat to prepare a draft revised text of the rules of procedure of the commissions. At its organization session for 1977, the Council had before it the draft referred to above (E/5899); it decided to review the rules of procedure of its functional commissions at its sixty-second session. At that session (2053rd meeting on 26 April 1977), the Council adopted without a vote the revised rules of procedure of its functional commissions proposed by the Secretariat, as orally revised at the meeting. The final text of the revised rules of procedure of the functional commissions (E/5975) (issued later as a United Nations publication, Sales No. E.77.I.10) provides as follows in its rule 74:

> "Representatives of intergovernmental organizations accorded permanent observer status by the General Assembly and of other intergovernmental organizations designated on a continuing basis by the Council or invited by the commission, may participate, without the right to vote, in the deliberations of the Commission on questions within the scope of the activities of the organization."

as a subsidiary organ of the Council. Although the term "Commission" is used in its title, it has been considered as a standing committee rather than a functional commission of the Council. The terms of reference of the Commission do not include any provision on intergovernmental organizations, nor is there any provision for separate rules of procedure for the Commission. Consequently, rule 27, paragraph 1, of the rules of procedure of the Council applies to the Commission. That paragraph reads as follows:

> "The rules of procedure contained in chapters VI and VIII to XII shall apply to the proceedings of the committees and sessional bodies of the Council and their subsidiary bodies, unless provided otherwise."

Since rule 79 quoted in paragraph 5 above belongs to Chapter XII of the rules of procedure of the Council, an intergovernmental organization granted observer status under that rule may participate in the meetings of the Commission on Transnational Corporations.

* * *

11. The foregoing summary shows the relationship between the General Assembly and the Economic and Social Council, the relationship between the two principal organs and its subsidiary organs, as well as the terms of reference of a subsidiary organ in the matter of the granting of observer status. I hope that this information will assist you in your consideration of requesting observer status for your organization. Please do not hesitate to let me know if I can be of any further assistance in this matter.

20 January 1976

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9. HABITAT: UNITED NATIONS CONFERENCE ON HUMAN SETTLEMENTS—REQUEST CONTAINED IN THE CONVENING RESOLUTION THAT THE SECRETARY-GENERAL INVITE ALL STATES TO PARTICIPATE IN THE CONFERENCE—PRACTICE OF THE SECRETARY-GENERAL IN IMPLEMENTING AN "ALL STATES" CLAUSE

Memorandum to the Secretary-General, Habitat: United Nations Conference on Human Settlements

. . .

2. The General Assembly, in operative paragraph 1(*a*) of resolution 3438 (XXX), adopted on 9 December 1975, requested the Secretary-General to invite "All States to participate in Habitat: United Nations Conference on Human Settlements;". We note that in the first revised version of the draft resolution submitted to the Second Committee (A/C.2/L.1436/Rev.1) this subparagraph was accompanied by a foot-note reading as follows:

> "It is the understanding of the General Assembly that, in discharging his functions under this paragraph, the Secretary-General will follow the practice of the General Assembly in implementing the 'all States' clause and that in all cases where it is advisable he will request the opinion of the General Assembly before taking appropriate decisions.".[75]

In the second revision of this draft resolution which was approved and submitted by the Second Committee to the General Assembly for adoption, the said foot-note was

[75] See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 59, document A/10412, para. 16.

deleted. The deletion was mentioned in the report of the Second Committee as follows:

> "At the 1707th meeting, the representative of Canada, on behalf of the sponsors, introduced a further revision (A/C.2/L.1436/Rev.2) of the revised draft resolution. The revision incorporated the removal of foot-note 3 from operative paragraph 1, subparagraph (*a*)."[76]

Although we have searched all relevant records, we are unable to ascertain the implications, if any, of the removal of this foot-note.

3. It is clear, however, that in so far as the Secretary-General is concerned, whenever an "all States" formula or clause is included by a competent organ of the United Nations, with or without the said foot-note, in a resolution convening a conference or in a treaty, the Secretary-General has always pointed out that it is not within his competence to determine whether an entity is or is not a State within the meaning of the provision and that he would in all cases, where it is advisable, seek the guidance of the General Assembly before taking appropriate decisions to implement the provision.[77]

4. In accordance with the practice of the General Assembly, the Secretary-General has, when requested by the General Assembly to invite "all States", issued invitations to the following categories of States: (*a*) States Members of the United Nations; (*b*) States members of any of the specialized agencies or of the International Atomic Energy Agency; (*c*) Parties to the Statute of the International Court of Justice, and (*d*) any other States specifically invited as such by the General Assembly in any resolution. On several recent occasions the Secretary-General has been specifically instructed by the organ convening the Conference concerned, through a foot-note similar to that quoted in paragraph 2 above or through a recorded understanding, to follow this practice of the General Assembly in implementing the "all States" provision.[78] In the present case the removal of such a foot-note could not be considered as conferring on the Secretary-General a competence which he does not possess. In the absence of clear instructions from the General Assembly, the Secretary-General would have no choice but to invite only those belonging to the four categories enumerated above.

17 February 1976

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[76] *Ibid.*, para. 17.

[77] See for example the statement made by the Secretary-General at the 1258th plenary meeting of the General Assembly (*Official Records of the General Assembly, Eighteenth Session, Plenary Meetings*, vol. II, 1258th meeting, paras. 99-101) and the statements made by the Legal Counsel at the 918th meeting of the Sixth Committee (*Ibid., Twenty-first Session*, Sixth Committee, 918th meetings, paras. 27-28, reproduced in the *Juridical Yearbook*, 1966, p. 240) and at the 1431st meeting of the Sixth Committee (*Ibid., Twenty-eighth Session*, Sixth Committee, 1411th meeting, paras. 58-59).

[78] See for example Economic and Social Council resolution 1840 (LVI) of 15 May 1974, entitled "Preparations for the World Food Conference"; General Assembly resolution 3166 (XXVIII) of 14 December 1973 entitled "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents" and the related understanding adopted by the General Assembly at its 2202nd plenary meeting; General Assembly resolution 3276 (XXIX) of 10 December 1974 entitled "Conference on International Women's Year" and the related understanding (*Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 12, document A/9829/Add.1, para. 16); and General Assembly resolution 3247 (XXIX) of 29 November 1974 entitled "Participation in the United Nations Conference on the Representation of States in their Relations with International Organizations" and the related understanding (*Ibid.*, agenda item 88, document A/9836/Rev.1, para. 6).

10. HEARING OF PETITIONERS BY THE FOURTH COMMITTEE OF THE GENERAL ASSEMBLY—AN ORGANIZATION WHICH IS GRANTED A HEARING MAY, UNDER NORMAL PRACTICE AND SUBJECT TO A CONTRARY DECISION OF THE COMMITTEE, MAKE ONLY ONE PRINCIPAL STATEMENT TO BE DELIVERED BY ONE SINGLE INDIVIDUAL

Memorandum to the Secretary of the Fourth Committee

1. You have asked for my opinion on a question which has arisen regarding the number of representatives of the *Union nationale pour l'indépendance* (UNI) of French Somaliland who may be heard in the Fourth Committee.

2. By a telegram of 20 October 1976 (A/C.4/31/8/Add.2), the Secretary-General of UNI informed the Chairman of the Fourth Committee that "delegation four persons from UNI will arrive New York to participate in debate on French Territory of Afars and Issas."

3. If I understand the position correctly, a practice has grown up in the Fourth Committee, under which the Committee has agreed to hear either an individual petitioner—appearing personally and without particular affifiation to an organization—or an organization which designates a representative. Thus, for example, at the twelfth session of the General Assembly, at the 702nd meeting of the Fourth Committee, the Chairman, in response to a question said that:

> "... requests for hearings had to be submitted by persons in their own name or on behalf of an organization. In the former case, the hearing, if granted, was personal and the petitioner himself appeared before the Committee... If the request was on behalf of an organization, the hearing was granted to the organization. Occasionally the organization, in its request for a hearing, mentioned the name of its representative, but more often it designated him only when its request had been granted. In such cases, as soon as the Secretary-General was informed of the name of the representative he informed the Committee in an addendum to the request. It was presumed that in the absence of express objection the Committee agreed to hear the representative thus designated. Needless to say, if a member of the Committee had any objection to the representative of the petitioning organization he could raise the question in the Committee and it would then be for the Committee to decide whether or not it would hear the representative."[79]

4. Clearly, therefore, where the Committee agrees to hear an individual, that person must appear. Where, as presumably would be the present case, an organization is granted a hearing, the organization may designate its representative subject to Committee approval if any question is raised. However, while the organization has the initial right to name its representative, possibly from a delegation numbering more than one person, it would not accord with normal practice for that organization to make more than one main statement and, consequently, for more than one person from a particular organization to make such a statement. The same principle, incidentally, applies with respect to Member States on each item, where the principal statement is made by only one representative.

5. As it is usual for a decision to hear an organization to be limited to one principal statement, a departure from this practice would require an express decision by the Fourth Committee. Such a departure would presumably only be authorized in exceptional circumstances, as it would seem clearly undesirable to have resort to a multiplicity of statements from different persons, which statements could be repetitious or even conflicting.

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[79] *Official Records of the General Assembly, Twelfth Session*, Fourth Committee, Summary Records, 702nd meeting, para. 53.

6. It is to be concluded, therefore, that while the UNI may designate its representative from among the members of its delegation, the hearing of a principal statement from more than one representative would not accord either with normal practice or with the principles usually applied and would consequently require a special decision of the Committee.

8 November 1976

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11. Application of regulation 4.3 of the Financial Regulations to the United Nations Emergency Force (UNEF(II)) and to the United Nations Disengagement Observer Force (UNDOF)

Legal opinion prepared at the request of the Assistant Secretary-General, Controller, Office of Financial Services

1. The question has arisen of how regulation 4.3 of the Financial Regulations is to be applied to the operations of the United Nations Emergency Force (UNEF(II)) established in 1973 and to the United Nations Disengagement Observer Force (UNDOF) established in 1974. This regulation reads as follows:

> "Appropriations shall remain available for twelve months following the end of the financial period to which they relate to the extent that they are required to discarge obligations in respect of goods supplied and services rendered in the financial period and to liquidate any other outstanding legal obligation of the financial period. The balance of the appropriations shall be surrendered."

A. *Applicability of regulation 4.3*

2. Regulation 1.1 provides that:

> "These regulations shall govern the financial administration of the United Nations, including the International Court of Justice."

Although a special account, in terms of regulation 6.6, has been established to receive contributions to and to meet the expenses of UNEF(II) and UNDOF, regulation 6.7 provides that: "Unless otherwise provided by the General Assembly, such . . . accounts shall be administered in accordance with the present Regulations". As the General Assembly has not otherwise provided in respect of the financing of the Forces, regulation 4.3 would appear fully applicable to them, subject to the modification discussed in section B below.

B. *The financial period*

3. Regulation 4.3 refers to a "financial period", which is defined by regulation 2.1 as follows:

> "The financial period shall consist of two consecutive calendar years, the first of which shall be an even year."

Until the twenty-eighth session of the General Assembly the regulation referred to the "financial year", but it was amended at that time,[80] on the proposal of the Secretary-General (A/C.5/1539). That proposal, which affected several regulations,

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[80] See, in *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 30* (A/9030), p. 134, the decision taken by the Assembly at its 2206th plenary meeting on 18 December 1973 on the recommendation of the Fifth Committee in para. 90 (*f*) of Part II of its report (*Ibid., Annexes,* agenda item 79, document A/9450/Add.1).

was, as the Advisory Committee for Administrative and Budgetary Questions pointed out, "restricted to those [changes] that are required by or flow from programme budgeting on a biennial basis".[81]

4. Because of the special appropriation and authorizations made for UNEF (II) and UNDOF by the General Assembly at each of its sessions since the twenty-eighth—to correspond to the specific lengths of the mandates assigned to these Forces by the Security Council—the financial period of these two Forces is not coincident with that relating to the other parts of the regular budget. Accordingly, the Secretary-General informed the General Assembly at its thirtieth session that a "special financial year [from 25 October to 24 October] is, accordingly, being adopted" both for the purpose of presenting the financial information about the Forces and for accounting statement purposes (A/10350, para. 12). This special period is also reflected in the Financial Report and Accounts.[82]

5. It can therefore be concluded that for the purpose of regulation 4.3 the "financial period" for the special account is the period from 25 October of a given year to 24 October of the following one.[83]

C. *Development and analysis of regulation 4.3*

6. As formulated at present, regulation 4.3 appears to refer to two different types of obligations: those obligations arising from the receipt of goods and services during the financial period in question, and other types of obligations required to be liquidated. This section will deal with the distinction between these two concepts and the interpretation of the latter.

7. Except for the amendment referred to in paragraph 3 above, regulation 4.3 achieved its present form in General Assembly resolution 456 (V) of 16 November 1950. Previously the corresponding regulation 13, and the regulation immediately following it, which had both been adopted by General Assembly resolution 163 (II) of 20 November 1947, had read as follows:

> "*Regulation 13:* Appropriations shall remain available to the extent that they are required to meet the outstanding obligations as at 31 December represented by goods supplied and services rendered up to and including that date.
>
> "*Regulation 14:* The balance of appropriations shall be surrendered in accordance with the provisions of regulation 17. Outstanding obligations not represented by goods supplied or services rendered up to and including 31 December shall be a charge to the appropriations of the succeeding year.".

8. In 1950 the Secretary-General proposed that regulation 13 be replaced by the following text:

> "4.3: Appropriations shall remain available for twelve months following the end of the financial year to which they relate to the extent that they are required to meet the outstanding legal obligations as at 31 December of that year. The balance of the appropriations will be surrendered.".

In explaining why he was proposing a departure from a provision strictly limited to "goods supplied and services rendered" within a fiscal year, the Secretary-General stated:

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[81] *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 8A* (A/9008/Add.1-34), p. 131, para. 2.

[82] See for example *ibid., Thirty-first Session, Supplement No. 7* (A/31/7), Vol. 1, Statement V and Schedules 15-18.

[83] An argument could perhaps be made that, since the General Assembly has not "otherwise provided", regulation 2.1 controls and the biennium should remain the "financial period" of the special account for purposes of the Financial Regulations. However, in the light of past practice it would now be difficult for the Secretary-General to take this position.

"The General Assembly will recall the recommendation of the Board of Auditors that a final cut-off date for availability of appropriations should be established. The 'legal obligations' referred to in [the proposed] regulation 4.3 will, however, need to be defined, and that definition may, in due course, result in the inclusion of some items in the accounts of a particular financial year which would not have been so included under the present United Nations provision whereby only those obligations for goods supplied or services rendered by the end of the financial year are valid for the retention of appropriations relating to that year. It has been suggested that the opinion of the Auditors might be sought on the definition of such obligations.".[84]

9. The Advisory Committee for Administrative and Budgetary Questions slightly redrafted the Secretary-General's proposed text into the form later actually adopted, but recommended as follows against the suggestion that the term "legal obligations" be defined:

"The Committee considers that, in so far as the United Nations is concerned, a definition of the term "legal obligations" is not necessary. Experience has shown that they fall into the following categories: services rendered and goods supplied up to 31 December; commitments to an unspecified amount arising out of General Assembly resolutions, for example, reimbursement of travel expenses of representatives to sessions of the General Assembly, and reimbursement of national income taxation levied upon staff members.".[85]

10. This brief account of the evolution of regulation 4.3, and in particular the comment of ACABQ, supports the plain reading of the text to the effect that the provision is intended to apply both to obligations in respect of goods actually supplied or services actually rendered in the financial period in question and also to the liquidation of other legal obligations, i.e. those that do not relate to such goods or services.

11. This interpretation is further supported by the advice rendered in a letter addressed on 2 April 1959 by the Chairman of ACABQ, in the name of the Committee, to the Director General of the International Atomic Energy Agency:

"5. The Advisory Committee recognized that financial regulation 5.03 [of the IAEA] raises some points of interpretation, which have also arisen in the United Nations and most of the Specialized Agencies, all of which have financial regulations comparable to regulation 5.03 of the Agency. It may be that the situation is somewhat more significant in the Agency which has to engage in the procurement of specialized equipment involving long delivery periods and in research contracts of extended duration.

"6. Nevertheless, it appears to the Advisory Committee that the practice and experience of the United Nations in regard to its financial regulation 4.3 (which is the same in substance as the Agency's financial regulation 5.03) offer a solution to the problem of the Agency.

"7. In the first place, therefore, it seems unnecessary to amend the text of regulation 5.03 and the problem could be met by determining an appropriate interpretation of the phrase 'any other outstanding legal obligation'. Such an interpretation would provide for the carry-forward, under certain conditions, of unliquidated obligations even though the goods or services covered by those obligations have not actually been delivered in the year in question.

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[84] *Official Records of the General Assembly, Fifth Session, Annexes*, agenda item 41, document A/1331, para. 7.

[85] *Ibid.*, document A/1412, comment on proposed text of regulation 4.3.

"8. Among the conditions in which such carry-over should be permitted and the criteria to be applied, the following, which take account of the practice in the United Nations, seem to be important:

"(i) The financial obligations of any year should as far as possible be a true measure of the level of the activities performed in that year; to that extent obligating in bulk and the consequent carry-forward of unliquidated obligations, in cases where the activity has not been performed in its entirety, should be followed only as an exceptional measure.

"(ii) The carry-forward of obligations should normally be limited to those in respect of 'non-recurring' expenditures—that is expenditures specifically authorized for stipulated items or projects and for which there is no similar provision in the appropriations for the next following year. Thus categories of expenditures in respect of which funds are provided year after year, such as furniture, library books and stationery, should normally be excluded from the application of this interpretation. Within this limitation, the Director-General should in the light of a thorough review of each obligation, exercise his discretion to decide whether any such obligation should be sustained in the accounts, even though the goods or services in question might not have been delivered before 31 December of the year.

"(iii) To the extent possible, long-term research contracts should be governed by progressive obligations and payments, corresponding to a breakdown of the total contract into reasonable component stages.

"(iv) A detailed report of all obligations that are to be carried forward under this interpretation should be submitted to the Board of Governors as well as to the External Auditors of the Agency, showing in the case of each obligation, the date on which it was recorded, the purpose and amount of the obligation and special reasons, if any, for its maintenance in the accounts. The External Auditors should be specifically invited to review these obligations and to include in their report any comments which they might have."

D. *Conclusion*

12. In the light of the foregoing analysis of the text and the history of regulation 4.3, one may draw the conclusions indicated in the following paragraphs.

13. The phrase "obligation in respect of goods supplied and services rendered in the financial period" relates to goods and services actually received during the period in question, on the basis of a contract or other arrangement or undertaking between the United Nations and the supplier, whether or not the exact amount of the obligation has been determined during the financial period.

14. The phrase "any other outstanding legal obligation of the financial period" relates, *inter alia,* to obligations not involving the supply of goods or services as, for example, those arising from decisions of the General Assembly, from a fault of the Organization or one of its agents for which indemnity must be paid, or as the result of other claims involving the responsibility of the Organization. It also relates to contractual obligations entered into during the financial period for the supply of goods or the rendering of services when such goods and services are not received during the period, this category obviously being subject to a test of reasonableness

in light of the necessity of maintaining without interruption the smooth operation of the two Forces. In this connexion, reference may be made to the guidelines indicated in the Advisory Committee's letter to the Director-General of the IAEA referred to in paragraph 11 above.

15. Thus, appropriations could be reasonably carried forward under regulation 4.3 in respect of:

(*a*) contractual obligations incurred in good faith for goods to be supplied and for services to be rendered during the financial period, even when such goods and services are for any reason not actually received before the end of the period, provided that delivery is still expected within a reasonable time; and

(*b*) contractual obligations incurred in good faith for goods to be supplied or services to be rendered subsequent to the financial period, if it was reasonably necessary to enter into such contracts in advance in order to ensure that the goods and services would be available when required.

On the other hand, appropriations for a given fiscal year could not reasonably be committed by legal obligations incurred in respect of goods and services only required in and to be budgeted for a subsequent financial period, if there is no reason why such contracts should be entered into in advance and resources of the United Nations be prematurely committed thereby.

14 October 1976

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12. Payment out of United Nations funds of travel expenses of representatives of Member States to the General Assembly—Conditions required for the travel of a representative member of a permanent mission to his capital city and return to be paid by the United Nations

Memorandum of the Assistant Secretary-General, Controller, Office of Financial Services

1. I regret the delay in this reply to your memorandum of 27 February, concerning a request from a Permanent Mission to the United Nations for the payment by the United Nations of travel expenses for a member of the Mission who wishes to visit his country for consultations with his Government.

2. Paragraph 1 of the Annex to General Assembly resolution 1798 (XVII) of 11 December 1962, concerning the system of travel and subsistence allowances to members of organs and subsidiary organs of the United Nations, permits the Secretary-General to include, within the maximum number of payments allowed for representatives or alternates to the General Assembly:

> "... the travel to his capital city and return, for purposes of consultation or report, of a member of a permanent mission in New York who is designated as a representative or alternate representative to a session of the General Assembly, provided such travel is certified by the permanent representative to be in connexion with the work of the particular session *and provided it takes place either during or within three months before or after such a session.*" [italics added.]

3. From your memorandum of 27 February, and from the request of the Permanent Mission, dated 13 February, it appears that the member of the Permanent

Mission on behalf of whom travel expenses are being requested meets all the qualifications for payment of such expenses in the passage just quoted, except the proviso that travel must take place during or within three months of the Assembly session. The Permanent Mission has adduced a number of reasons why other responsibilities have prevented the person concerned from travelling within the prescribed time-limits. Unfortunately, no matter how justified these reasons, the language of General Assembly resolution 1798 (XVII) is absolute as regards the time-limits and no authority is given to the Secretary-General to grant exceptions where he believes such exceptions to be warranted. I must therefore confirm our previous opinion that the Secretary-General may not meet the travel expenses concerned under General Assembly resolution 1798 (XVII). If the Secretary-General considers that he should have greater latitude in these matters, particularly where small States are concerned, he may wish to raise the issue with the General Assembly at its next session but, pending Assembly action, the existing provisions continue to prevail.

4. You have asked whether, in the circumstances, an *ex gratia* payment could be made, as you consider that the purpose underlying resolution 1798 (XVII) was to facilitate the effective participation of all Member States in the work of the General Assembly. In this respect, financial regulation 10.3 provides as follows:

> "The Secretary-General may make such *ex gratia* payments as he deems to be necessary in the interests of the Organization, provided that a statement of such payments shall be submitted to the General Assembly with the annual accounts.".

Financial rule 110.13 reads:

> "(*a*) *Ex gratia* payments may be made in cases where, although in the opinion of the Office of Legal Affairs there is no legal liability on the United Nations, the moral obligation is such as to make payment desirable in the interest of the Organization.
>
> "(*b*) The prior approval of the Secretary-General is required for *ex gratia* payments when:
>
> "(i) The amount exceeds $2,500; or
>
> "(ii) The proposal for payment originates with the Controller; or
>
> "(iii) The recipient is a staff member of the United Nations receiving a salary of more than $8,000 (net) per annum.
>
> "(c) In other cases, *ex gratia* payments may be made after approval by the Controller, except that approval by the Director of Personnel also shall be required if the recipient is a staff member of the United Nations."

5. Under paragraph (*a*) of financial rule 110.13, the role of the Office of Legal Affairs in regard to *ex gratia* payments is confined to an expression of opinion that there is no legal liability on the United Nations. Consequently, it is not for this Office to determine the existence or extent of any moral obligation involved. On the first of these points, it is clear from the preceding paragraphs of this memorandum that we are of the opinion that the Organization has no legal liability in the circumstances here concerned. On the second point, while expressing no view on the nature or extent of the moral obligation involved, we have no doubt that you will wish to consider the ramifications of granting an *ex gratia* payment in circumstances which in all probability may apply to a very large number of the smaller Missions to the United Nations. To establish a precedent which would make it impossible to deny many similar requests could give rise to a situation where the General Assembly might consider that the Secretariat is circumventing the express provisions

of resolution 1798 (XVII). Such a situation would be avoided if no exception is made in the circumstances under consideration and if the matter is referred to the Assembly at its next session, suggesting wider latitude for the Secretary-General and possibly retroactive effect for less stringent provisions to accommodate the present request by way of reimbursement.

12 April 1976

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13. EVENTUALITY OF THE GENERAL ASSEMBLY FAILING TO ADOPT FOR LACK OF THE REQUIRED TWO-THIRDS MAJORITY A SCALE OF ASSESSMENTS FOR A GIVEN FINANCIAL PERIOD—RESPONSIBILITY OF THE GENERAL ASSEMBLY REGARDING (1) THE EXPENSES OF THE UNITED NATIONS UNDER THE REGULAR BUDGET AND (2) THE PROVISION OF FUNDS BY APPORTIONMENT OR OTHERWISE—PROCEDURES FOR APPORTIONMENT OF EXPENSES

Memorandum to the Assistant Secretary-General, Controller, Office of Financial Services

Introduction

1. I have received your memorandum of 29 October 1976 concerning the question of the situation which might arise if in the General Assembly a two-thirds majority is not obtained to adopt either a resolution embodying the new scale of assessments recommended by the Committee on Contributions for the years 1977-1979,[86] or a resolution continuing the existing 1974-1976 scale for another two years. You have asked whether, in this eventuality, there would be any legal basis for assessing Member States for the 1977 expenses of the Organization under the regular budget and for the 1976-1977 expenses of UNEF/UNDOF.

2. Briefly speaking, there would appear to be no legal basis under the Charter for *requiring** Member States to contribute to the 1977 expenses of the Organization, in the total absence of any indication from the Assembly on how those Member States are to be assessed. However, it is my opinion, given the various alternatives which exist, that the situation to which you allude can be avoided or at least its consequences mitigated.

3. In order to explain my opinion further it is necessary to examine briefly the responsibilities of the General Assembly regarding: the expenses of the United Nations (I), the provision of funds by appointment or otherwise (II), and the procedures for apportionment (III), all in connexion with the regular budget of the Organization. As far as UNEF/UNDOF expenses are concerned, the same general considerations would *mutatis mutandis* apply. These expenses are not, therefore, the subject of any separate detailed consideration at this stage.

4. In the light of the considerations just indicated, we offer certain suggestions as to the procedures which may be followed in the present case (IV).

I. *Responsibilities of the General Assembly regarding the expenses of the United Nations*

5. The budgetary powers and responsibilities of the General Assembly are spelled out in Article 17 of the Charter, the relevant provisions of which, in the present context, provide that:

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[86] *Ibid., Thirty-first Session, Supplement No. 11* (A/31/11).

* In contradistinction to a request for voluntary contributions.

"1. The General Assembly shall consider and approve the budget of the Organization.

"2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."

6. Article 17 has twice been the subject of detailed examination, in various of its aspects, by the International Court of Justice in its advisory opinions regarding *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954*, p. 47) and *Certain expenses of the United Nations* (*Article 17, paragraph 2 of the Charter*) (*I.C.J. Reports 1962*, p. 151). While recognizing the wide powers conferred by Article 17 of the Charter on the General Assembly,* the Court has affirmed in both of its opinions that the Assembly's authority is not absolute. In the *United Nations Administrative Tribunal Case* (at p. 59), the Court said that:

> "the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it, for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements".

7. These remarks were cited with approval in the *Certain expenses Case* (at p. 169), in which the Court added (at p. 169), that:

> "Similarly, obligations of the Organization may be incurred by the Secretary-General, acting on the authority of the Security Council or of the General Assembly, and the General Assembly 'has no alternative but to honour these engagements' ".

In this connexion, the Court referred (at pp. 168-169) to Regulation 4.1 of the Financial Regulations and Rules of the United Nations which provides that:

> "The appropriations voted by the General Assembly shall constitute an authorization to the Secretary-General to incur obligations and make payments for the purposes for which the appropriations were voted and up to the amounts so voted."

8. It is thus abundantly clear that the General Assembly is under a legal obligation to provide the funds necessary to meet the expenditures for which it has voted appropriations. Within the present context, the General Assembly has, by its resolution 3539 (XXX) of 17 December 1975 (*Programme budget for the biennium 1976-1977*), voted appropriations for the biennium 1976-1977, and the Assembly is thus obliged to find the funds necessary to cover the outstanding appropriations for 1977.

II. *Responsibilities of the General Assembly regarding the provision of funds by apportionment or otherwise*

9. After laying down the obligation of the Assembly to meet its financial commitments, the Court, in the *Certain expenses Case* (at pp. 169-170) declared that:

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* In the *Certain expenses Case*, for instance, the Court remarked (at p. 162) that:

"The general purposes of Article 17 are the vesting of control over the finances of the Organization and the levying of apportioned amounts of the expenses of the Organization in order to enable it to carry out the functions of the Organization as a whole acting through its principal organs and such subsidiary organs as may be established under the authority of Article 22 or Article 29.

"Article 17 is the only article in the Charter which refers to budgetary authority or to the power to apportion expenses, or otherwise to raise revenue . . .".

"The obligation is one thing: the way in which the obligation is met—that is from what source the funds are secured—is another. The General Assembly may follow any one of several alternatives: it may apportion the cost of the item according to some special scale of assessment: it may utilize funds which are voluntarily contributed to the Organization, or it may find some other method or combination of methods for providing the necessary funds. In this context, it is of no legal significance whether, as a matter of book-keeping or accounting, the General Assembly chooses to have the item in question included under one of the standard established sections of the 'regular' budget or whether it is separately listed in some special account or fund. The significant fact is that the item is an expense of the Organization and under Article 17, paragraph 2, the General Assembly therefore has authority to apportion it."

10. Various sources may thus be used for finding the necessary funds but, where the regular budget is concerned, its magnitude requires that the bulk of those funds are found by the Assembly's apportionment of expenses between Member States. In line with the general principles stated above, the Assembly is legally required to apportion expenses when funds to cover those expenses are not available from other sources such as income producing activities, or voluntary contributions.

III. *Procedures for apportionment of expenses*

11. Apart from the proviso in Article 18, paragraph 2, of the Charter that a two-thirds majority is required in the General Assembly for the adoption of decisions on "important questions", including budgetary questions, the Charter does not contain any provisions on the procedures to be followed by the Assembly in apportioning expenses among Member States. The applicability of Article 18, paragraph 2, to the present situation is considered in more detail in paragraphs 15, 16 and 19 below. Beyond this, the procedures for apportionment of expenses can be determined at its discretion by the General Assembly. In the exercise of this discretion, the Assembly has adopted rule 160 of its rules of procedure which provides that:

"The Committee on Contributions shall advise the General Assembly concerning the apportionment, under Article 17, paragraph 2, of the Charter, of the expenses of the Organization among Members, broadly according to capacity to pay. The scale of assessments, when once fixed by the General Assembly, shall not be subject to a general revision for at least three years unless it is clear that there have been substantive changes in relative capacity to pay. The Committee shall also advise the General Assembly on the assessments to be fixed for new Members, on appeals by Members for a change of assessments and on the action to be taken with regard to the application of Article 19 of the Charter."

In addition, from time to time the General Assembly has, in the form of resolutions, laid down guiding principles to be followed by the Committee on Contributions in arriving at its recommendations. As with most of its rules of procedure, the Assembly can, by specific decision, amend or vary the terms of rule 160 or its application in specific cases. Likewise it may alter the guiding principles relating to the apportionment of expenses.

(a) *Role of the Committee on Contributions and the practice of the Assembly*

12. It is clear from the terms of rule 160, as it now stands, that the role of the Committee on Contributions is advisory. While the Assembly would clearly wish to give the greatest weight to the advice of an expert committee of this nature, it is not bound by that advice. It can thus accept, amend or reject the Committee's recommendations, whether they relate to the actual scale of assessments or the dura-

tion of the application of a particular scale. Thus, for instance, at its eleventh session, the Assembly, having before it a revised scale of assessments recommended by the Committee on Contributions for years 1956, 1957 and 1958,[87] decided to adopt that scale for only 1956 and 1957.[88]

13. The practice of the General Assembly establishes that the normal procedure for assessing expenses is for the Assembly to adopt the recommendations of the Committee on Contributions regarding scales of assessment for succeeding three-year periods by overwhelming majorities. However, at the nineteenth session of the General Assembly in 1964-1965, a situation arose where it was not possible for the Assembly to act, at that session, on the recommendations of the Committee on Contributions on a scale of assessments for 1965, 1966 and 1967. It will be recalled that, at that session, voting on matters of substance was precluded by the question of the applicability of Article 19 of the Charter to the expenses of UNEF and ONUC and decisions were taken by a procedure of no objection. Under this procedure, rather than taking a decision on apportionment, the Assembly, by its resolution 2004 (XIX) of 18 February 1965, requested:

> "... Member States to make advance payments towards the expenses of the Organization in amounts not less than 80 per cent of their assessed contributions for the financial year 1964, pending decisions by the General Assembly on the level of appropriations and the scale of assessments for 1965, and subject to such retroactive adjustments as may then be called for."

Subsequently, at its twentieth session, by its resolution 2118 (XX) of 21 December 1965, the Assembly adopted a scale of assessments for the years 1965, 1966 and 1967. Thus, throughout the bulk of 1965, the Organization met its financial obligations on the basis of cash advances, made voluntarily by Member States, subsequently converted into binding assessments under Article 17 of the Charter through action of the General Assembly at its twentieth session.

14. Practice thus discloses that, while adoption of scales of assessment recommended by the Committee on Contributions for immediately succeeding years constitutes the normal procedure, amendments to the Committee's recommendations have been adopted and even alternatives procedures followed.

(b) *Article 18, paragraph 2, of the Charter*

15. As pointed out in paragraph 11 above, decisions of the General Assembly on budgetary questions require a two-third majority under Article 18, paragraph 2, of the Charter. Principle and practice would indicate that adoption of a scale of assessments, or of principles and directives relating thereto, are budgetary questions. This issue arose at the 2108th plenary meeting of the General Assembly, on 13 December 1972, and was the subject of an opinion by the Legal Counsel.[89] The specific points in question related to directives to the Committee on Contributions on the principles to be applied in drawing up a new scale of assessments (in particular, the percentage ceiling for the largest contributor). The Legal Counsel was of the view that the adoption of the budget and the apportionment of expenses must be characterized as budgetary questions, and he concluded that the same characterization should apply to directives to the Committee on Contributions on the formulation of a new scale. The Legal Counsel's opinion was the basis for a ruling by the President of the Assembly at the 2108th plenary meeting, that the draft resolutions then before the

[87] *Ibid., Eleventh Session, Supplement No. 10* (A/3121 and Add.1).
[88] General Assembly resolution 1087 (XI).
[89] Reproduced in the *Juridical Yearbook*, 1972, p. 160.

Assembly required a two-thirds majority. This ruling was not challenged, and all the resolutions obtained the requisite two-thirds majority.

16. It is thus to be concluded that adoption of a new scale of assessment for the apportionment of expenses for the years 1977, 1978 and 1979 would require a two-thirds majority in the General Assembly. Likewise, adoption of a resolution to continue for another two years the existing scale beyond the end of 1976 (the limit specified in General Assembly resolution 3062 (XXVIII) of 9 November 1973) would also require a two-thirds majority.

IV. *Suggestions regarding the present situation*

17. The possibility that a two-thirds majority might not be obtained for adoption of either of the two alternative courses of action set out in the previous paragraph, has led to the present request for an opinion. These, however, would not appear to be the only available alternatives, taking into account the principles and practice indicated earlier in this memorandum.

18. The first course of action relates to the adoption, *in toto,* of the recommendations of the Committee on Contributions. However, as pointed out above, the recommendations do not have to be adopted as they stand. They can be amended by the Assembly, both as to the level of assessments and as to the length of duration of the scale. While adjustments in the scale itself may be complicated and time-consuming, the application of the scale for perhaps only one or two years is simple to effect, requiring only a simple majority in the Fifth Committee, under rule 125 of the rules of procedure, the requirements of a two-thirds majority for amendments and proposals on budgetary questions being confined to the plenary. Such application could also be stated to be without prejudice to decisions of the Assembly at its next or a later session on the basis of a further review of the scale of assessments by the Committee on Contributions in the light of any new criteria the Assembly might wish to adopt. In other words, many variations might be explored to find an acceptable solution, within the broad framework of the recommendations of the Committee on Contributions.

19. If negotiation along the lines just indicated were to prove fruitless, and the question then arose of continuing the existing scale of assessments until a solution could be found, it should be noted that such a continuation might prove possible by a procedure other than the adoption of an express resolution to this effect. Should a draft resolution containing a new scale of assessments fail to be adopted by the requisite majority, the President of the General Assembly could draw attention to the legal obligation of the Assembly, as outlined above, to provide funds to cover the appropriations it has voted. He could state that, in view of such an obligation, he would presume that it was the intention of the Assembly that the existing scale of assessments should be continued until the Assembly has adopted a new scale. If the President's ruling were the subject of an appeal, he could put the appeal to a vote and, under rule 71 of the rules of procedure, his ruling would stand, "unless overruled by a majority of the members present and voting." The need to obtain a two-thirds majority would thus be avoided. Whether such a course of action were feasible would, of course, depend upon the attitude of the President which, in turn, might be affected if a resolution extending the existing scale for two years had already been defeated (although, technically, a ruling by the President to continue the scale until a new one is adopted would differ from a proposal to continue it for a fixed period of time).

20. Should the procedure of the presidential ruling either prove not acceptable, or should his ruling be overruled, it is still open for the Assembly, as a last resort,

to follow the precedent of the nineteenth session, and to request cash advances from Member States at a stated percentage of the 1976 assessments, pending definitive arrangements by the Assembly at its next session. Such a request, either in the form of a resolution or of a statement by the President, would be the minimum the Assembly could do to meet its legal obligation to defray the expenses of the Organization under the appropriations voted in connexion with the regular budget for the biennium 1976-1977.[90]

3 November 1976

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14. QUESTION WHETHER THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION IS A SUBSIDIARY ORGAN OF THE GENERAL ASSEMBLY—ORGANS ESTABLISHED UNDER A TREATY—THE TREATY PROVISIONS CONCERNING THE FUNCTIONING OF SUCH ORGANS CANNOT BE OVERRIDDEN BY GENERAL ASSEMBLY RESOLUTIONS

Memorandum to the Officer-in-charge, Department of Conference Services

1. I have received your memorandum of 16 August 1976 on the above subject.

2. The answer to your first question is that the Committee on the Elimination of Racial Discrimination is not a subsidiary organ of the General Assembly. As is explained in a legal opinion of 15 September 1969 (published in the United Nations *Juridical Yearbook, 1969,* p. 297), it falls into a special category of "treaty organs of the United Nations", which are organs whose establishment is provided for in a treaty, for the purpose of carrying out its provisions, but are so closely linked with the United Nations that they are considered organs of the Organization. The Committee in question was established in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly in resolution 2106 (XX) of 21 December 1965. It makes no difference that the treaty in this case was itself adopted as a decision of the General Assembly; the Assembly did not directly create the Committee, as it does in establishing subsidiary organs, but the Committee came into being only when a sufficient number of States had bound themselves by the Convention to bring it into force in accordance with its terms.

3. The answer to your second question is that the provisions of General Assembly resolutions regarding the holding of meetings do not override the provisions of the Convention on the Elimination of All Forms of Racial Discrimination on the meetings of the Committee in question. "Treaty organs" must function in accordance with the provisions of the treaties which create them and give them tasks to perform. As they are organs of the United Nations, they are subject to the general budgetary and administrative authority of the Assembly in all matters which do not impede or prevent them from carrying out the provisions of the treaties; but General Assembly resolutions cannot amend treaties, and until the treaties are formally amended by one of the recognized procedures, resolutions which conflict with them have no legal effect in respect of the treaty organs concerned. Thus, for example, when the suggestion

[90] By its resolution 31/95 B of 14 December 1976, the General Assembly adopted for the financial year 1977 the scale of assessments recommended by the Committee on Contributions and resolved that as an exception to rule 160 of the rules of procedure of the General Assembly, that scale of assessments should be reviewed by the Committee on Contributions in 1977 and a report submitted to the Assembly for its consideration at its thirty-second session.

was put before the General Assembly a few years ago that a treaty organ—the International Narcotics Control Board—should hold one session a year instead of two, it was recognized that the suggestion could not be entertained since the Single Convention on Narcotic Drugs, 1961, which created the Board, provided for two sessions a year.[91]

17 August 1976

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15. QUESTION WHETHER THE SUPPLY BY A NON-GOVERNMENTAL ORGANIZATION OF EQUIPMENT IN CONNEXION WITH A NUTRITION AND HEALTH EDUCATION ACTIVITY IN SOUTHERN RHODESIA WOULD CONTRAVENE SECURITY COUNCIL RESOLUTION 253 (1968)—INTERPRETATION OF SECURITY COUNCIL RESOLUTIONS CONCERNING SOUTHERN RHODESIA

Memorandum to the Non-Governmental Organizations Section, Department of Economic and Social Affairs

1. I refer to your memorandum forwarding an enquiry from a non-governmental organization concerning the interpretation of Security Council resolutions relating to Southern Rhodesia. In particular, we understand that a branch of that organization had proposed to provide a vehicle to Southern Rhodesia in connexion with a nutrition and health education activity, and had been advised that this might contravene Security Council resolution 253 (1968).

2. As is well known, the Security Council has adopted 17 resolutions concerning Southern Rhodesia since the unilateral declaration of independence, in addition to the more numerous resolutions on this subject adopted by the General Assembly during the same period.

3. In particular, acting under Chapter VII of the Charter, the Security Council has, in general, prescribed comprehensive sanctions against the illegal régime in Southern Rhodesia, requiring, *inter alia*, that States should not recognize the illegal régime,[92] or any act performed by its officials or institutions,[93] and should sever all diplomatic, consular, trade, military and other relations with the illegal régime,[94] and interrupt any existing means of transportation to and from Southern Rhodesia.[95]

4. In examining whether or not a particular action would be in breach of Security Council resolutions concerning Southern Rhodesia it would be relevant, *inter alia*, to determine whether the action contemplated would violate any of the foregoing provisions, or would constitute assistance[96] or encouragement[97] to the illegal régime, either directly or indirectly, or involve recognizing[98] the latter, or involve any economic relation,[99] or other relation[100] with the illegal régime, or would constitute a remittance

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[91] See article 11, paragraph 2 of the Single Convention on Narcotic Drugs, 1961 (United Nations, *Treaty Series*, vol. 520, p. 151.

[92] Security Council resolutions 216 (1965), para. 2, 217 (1965), para. 6, 277 (1970), para. 2, 288 (1970), para. 5, and 328 (1973), para. 7.

[93] Security Council resolution 277 (1970), para. 3.

[94] *Ibid.*, para. 9 (*a*).

[95] *Ibid.*, para. 9 (*b*).

[96] Security Council resolutions 217 (1965), para. 8, 232 (1966), para. 5 and 277 (1970), para. 2.

[97] Security Council resolution 217 (1965), para. 8.

[98] Security Council resolutions 216 (1965), para. 2, 217 (1965), para. 6, 277 (1970), para. 2, 288 (1970), para. 5, and 328 (1973), para. 7.

[99] Security Council resolutions 217 (1965), para. 8, 221 (1966), first preambular paragraph, 232 (1966), first preambular paragraph, and 277 (1970), paras. 6 and 9 (*a*).

[100] Security Council resolutions 277 (1970), paras. 6 and 9 (*a*), and 318 (1972), para. 5.

of funds to a person or body in Southern Rhodesia.[101] If the proposed action would involve any of these things, then this would contravene one or more of the provisions contained in the pertinent resolutions of the Security Council.

5. Needless to say, the answers to these questions might depend to some extent on the meaning and scope of such words as "assistance", or "economic relation" etc., concerning which there could possibly arise some differences of opinion between Member States. For our part, however, we would consider that all concerned should refrain from acts which, under the least restrictive of possible interpretations, might be said to fall within these prohibitions, thus avoiding any diminution of the intended effect of the resolutions in question.

6. It may be relevant to add that the Security Council has also requested "all Governments to take stringent measures to enforce and ensure full compliance by all individuals and organizations under their jurisdiction with the sanctions policy against Southern Rhodesia . . ."[102] and has called upon States "to enact and enforce immediately legislation providing for the imposition of severe penalties on persons . . . that evade or commit breach of sanctions by . . .", *inter alia,* importing goods from or exporting goods to Southern Rhodesia, providing any facilities for transport of goods to and from Southern Rhodesia, or conducting or facilitating any transaction . . . that may enable Southern Rhodesia to obtain from or send to any country any goods or services.[103]

7. The Security Council has also forbidden the insurance of air flights and marine consignments to and from Southern Rhodesia,[104] and of any commodities or products exported from or destined for Southern Rhodesia, or belonging to any commercial industrial or public utility undertaking in that country.[105]

8. It remains to mention that two of the prohibitions stipulated by the Security Council in its resolution 253 (1968) of 29 May 1968 were made subject to certain limited exceptions, which, in the case of commodities or products, referred, *inter alia,* to "supplies intended strictly for medical purposes, educational equipment and material for use in schools and other educational institutions",[106] and, in the case of payments and remittances, referred to "payments exclusively for pensions or for strictly medical humanitarian or educational purposes, or for the provision of news material and in special humanitarian circumstances, foodstuffs".[107]

9. There is, however, no fixed definition of the terms "medical, humanitarian or educational purposes", "schools and other educational institutions" or "special humanitarian circumstances", as used by the Security Council in 1968, which would enable us to characterize automatically a particular type of supply or payment (such as for nutrition or health education purposes, aid to children, aid to refugees etc.) as, *ipso facto,* coming within the intended exception.

10. It may further be noted that, in the absence of some extraordinary emergency or natural disaster, a very wide range of activities are essentially of a social or humanitarian character, and of obvious benefit to the individuals whom they are intended to help, and yet the foreign support of such activities in Southern Rhodesia would involve, even if as a by-product, the importation into Southern Rhodesia of

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[101] Security Council resolution 253 (1968), para. 4.
[102] Security Council resolutions 328 (1973), para. 7; see also Security Council resolution 277 (1970), para. 8.
[103] Security Council resolution 333 (1973), para. 4.
[104] *Ibid.*, paras. 6 and 7.
[105] Security Council resolution 388 (1976), para. 1.
[106] Security Council resolution 253 (1968), para. 3 (*d*).
[107] *Ibid.*, para. 4.

goods and services in breach of Security Council resolutions, adopted both before and after 1968, and which could be of material assistance to the illegal régime, as well as involving, at least some form of recognition of that régime. It may be added that resolutions of the Security Council and of the General Assembly concerning Southern Rhodesia have tended to become increasingly restrictive and comprehensive from year to year in regard to sanctions against Southern Rhodesia.

11. Moreover, it would not seem possible for equipment, such as a vehicle, or nutrition or health education operations, to be provided in Southern Rhodesia without some recognition of the illegal régime, at least to the extent of enabling material and personnel to enter and leave the country, as well as permitting Southern Rhodesia to obtain goods and services from foreign sources, and presumably also involving, *inter alia,* at least some remittance of funds to a person or body in Southern Rhodesia, all of these acts constituting direct breaches of the sanctions prescribed, unless specifically permitted by the 1968 exceptions referred to in paragraph 8 above.

12. From the limited information at our disposal, therefore, it would appear that the action proposed, however highly motivated, would involve at least some breach of the restrictions contained in the relevant Security Council resolutions concerning Southern Rhodesia.

2 November 1976

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16. QUESTION WHETHER COMPLIANCE BY A MEMBER STATE WITH SANCTIONS AGAINST RHODESIA COULD BE TREATED AS A CONTRIBUTION TO A "PEACE-KEEPING" OPERATION, THE COST THEREOF BEING LEVIED AGAINST ALL MEMBER STATES IN THE FORM OF COMPULSORY BUDGETARY ASSESSMENTS

Memorandum to the Under-Secretary-General, Co-ordinator, United Nations Assistance to Cape Verde, Indo-China and Zambia

1. I am replying to your memorandum of 31 May, on the above subject, in which you refer to remarks by a Minister for Foreign Affairs about the possibility of his country's compliance with sanctions against Rhodesia being treated as a contribution to a "peace-keeping operation", the cost thereof being levied against all Member States in the form of compulsory budgetary assessments.

2. We would share the views quoted in paragraph 2 of your memorandum, where a distinction is drawn between compliance with sanctions voted by the Security Council and peace-keeping operations. Furthermore, the financing of peace-keeping operations is not necessarily undertaken on the basis of compulsory assessments under Article 17, paragraph 2, of the Charter, but may be based on voluntary contributions. UNFICYP for example is financed on a voluntary basis. On the other hand, UNEF I, ONUC, UNEF II, and UNDOF were or are financed on the basis of compulsory assessments, the legality of such a procedure being upheld in respect of UNEF I and ONUC by the International Court of Justice in its advisory opinion of 20 July 1962 on *Certain Expenses of the United Nations.*[108]

3. While the Security Council and the General Assembly have not in the past considered that special expenses arising out of compliance with sanctions should be the subject of compulsory financial assessments against all Member States, a decision to such an effect is theoretically possible. Chapter VII of the Charter, under which

[108] *I.C.J. Reports, 1962,* p. 151.

the Security Council voted the Rhodesian sanctions, foresees special agreements with Member States (Article 43) and consultations with the Security Council in cases of special economic problems (Article 50) in giving effect to decisions of the Security Council under Chapter VII. Compulsory assesments, as explained below, could be envisioned in connexion with procedures under either Article 43 or Article 50.

4. Article 43 of the Charter and related provisions, regarding special agreements, have never been implemented. These provisions appear designed, furthermore, to cover primarily the case of armed action rather than economic sanctions. Nevertheless, Article 43 is widely drawn, and refers not only to armed forces, but also to "the nature of the facilities and assistance to be provided". It is conceivable that the Security Council, on the basis of a formal request by a Member State, could interpret the wording just quoted to cover "assistance" to the United Nations in implementing decisions on sanctions and the Council could conclude a special agreement on this subject with the State concerned.

In the advisory opinion of the Court, referred to above, the Court noted that: "If, during negotiations under the terms of Article 43, a Member State would be entitled (as it would be) to agree, that some part of the expenses should be borne by the Organization, then such expense would form part of the expenses of the Organization and would fall to be apportioned by the General Assembly under Article 17".[109]

5. While the course of action just envisaged is legally possible, it is highly unlikely in practice, as no agreements have ever been concluded under Article 43; as the Security Council would be reluctant to set such a precedent (which might be invoked to cover all trading losses of Member States arising out of compliance with Council resolutions imposing sanctions under Chapter VII of the Charter), and as it would probably be very difficult to find a two-thirds majority in the General Assembly (Article 18 of the Charter) to impose and apportion a compulsory financial assessment of the nature here concerned.

6. The article of the Charter which most closely fits the circumstances in which the Member State concerned finds itself is Article 50. This article reads:

> "If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems."

In its advisory opinion in the *Certain Expenses* case, the Court observed, in connexion with Article 50, that: "Presumably in such a case the Security Council might determine that the overburdened State was entitled to some financial assistance; such financial assistance, if afforded by the Organization, as it might be, would clearly constitute part of the 'expenses of the Organization' ".[110] In line with this opinion such "expenses of the Organization" could be the subject of compulsory assessments of Member States under Article 17, paragraph 2, of the Charter.

7. While it is clearly open to the Member State concerned to request the Security Council for relief under Article 50 of the Charter, including financial assistance, it is again doubtful whether the Council would adopt a decision clearly equating such assistance with "expenses of the Organization" which are subject to compulsory assessment, because of the precedent it would create, quite apart from the financial implications involved. In this connexion, it is to be noted that the Council is well

[109] *Ibid.*, p. 166.
[110] *Ibid.*, p. 167.

aware already of the special problems posed for certain countries in giving effect to the resolution on Rhodesia; the Council has for example called for assistance on a voluntary basis to Zambia (e.g. resolutions 253 (1968) of 29 May 1968, and 277 (1970) of 18 March 1970). Likewise, recently, when the Council took cognizance within the framework of Articles 49 and 50 of the Charter, of the special economic problems confronting Mozambique, the Council's call for assistance to that State (resolution 386 (1976) of 17 March 1976), in giving effect to the sanctions on Rhodesia, was again of a voluntary nature and any language which might foresee a system of compulsory assessments as a source of financial assistance was carefully avoided.

8. It is, therefore, to be concluded that: (i) it would be legally possible for the Organization to render financial assistance to a Member State, in the circumstances here concerned, on the basis of compulsory assessments against all Member States, but (ii) from a practical point of view it is very doubtful whether the Security Council and the General Assembly would be prepared to take such decisions because of the precedent that would be created and the expenditures involved.

Nevertheless, if the Member State concerned were to feel, on the basis of informal conversations with interested Member States, that a practical possibility of a favourable decision existed, it could set the process in motion by means of a formal communication to the Security Council requesting assistance under Article 50 of the Charter.

15 June 1976

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17. TREATY PROVISIONS GOVERNING RADIO COMMUNICATIONS OF PROJECT PERSONNEL OF THE UNITED NATIONS DEVELOPMENT PROGRAMME IN THE TERRITORY OF A MEMBER STATE HOSTING A REGIONAL COMMISSION—SCOPE OF THE RELEVANT PROVISIONS OF THE HEADQUARTERS AGREEMENT OF THE REGIONAL COMMISSION CONCERNED

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

1. I refer to your memorandum by which you transmitted a copy of a letter from the Executive Secretary of ECA requesting the advice of the Office of Legal Affairs on the possibility of linking the radio transmitting and receiving sets operated by UNDP project personnel to the radio station installed at the Headquarters of ECA.

2. We have analyzed the question in the light of the Agreement regarding the Headquarters of ECA,[111] signed on 18 June 1958, and also on the basis of the International Telecommunication Convention dated 25 October 1973, to which the host country of ECA is a party.

3. The authority of the United Nations to establish and operate radio stations flows from the International Telecommunication Convention and from the Agreement between the United Nations and the International Telecommunication Union.[112] Under Article XVI of the latter Agreement, the International Telecommunication Union "recognizes that it is important that the United Nations shall benefit by the

[111] United Nations, *Treaty Series*, vol. 317, p. 101.
[112] *Ibid.*, vol. 30, p. 316.

same rights as the members of the Union for operating telecommunication services." This right is otherwise reserved by the International Telecommunication Convention for States Member of the Union. The International Telecommunication Convention itself provides as follows (Chapter IV, Article 39):

> "1. The relationship between the United Nations and the International Telecommunication Union is defined in the Agreement concluded between these two organizations, the text of which appears in Annex 3 to this Convention.
>
> "2. In accordance with the provisions of Article XVI of the above-mentioned Agreement, the telecommunication operating services of the United Nations shall be entitled to the rights and bound by the obligations of this Convention and of the Administrative Regulations annexed thereto. Accordingly, they shall be entitled to attend all conferences of the Union, including meetings of the International Consultative Committees, in a consultative capacity."

4. In operating radio stations, the United Nations therefore is bound by the provisions of the International Telecommunication Convention regarding *inter alia* the prohibition against harmful interference and the allocation of wavelength frequencies by the International Frequency Registration Board. As far as the ECA is concerned, the above-mentioned Headquarters Agreement for ECA regulates the issue in its Article III, Section 7 (*a*). This provision of the Headquarters Agreement requires prior agreement between the ECA and the Telcommunication Board of the host country on the frequencies to be used by the ECA station before the frequencies may be communicated by the ECA to the International Frequency Registration Board. While this provision may not fully reflect the rights of the United Nations under the International Telecommunication Convention and the Agreement between the United Nations and the International Telecommunication Union, it appears that this constraint on the United Nations in respect of its communication of frequencies to the International Frequency Registration Board applies only to the ECA and need not automatically apply to other United Nations activities in the country concerned.

5. It has not been possible to ascertain that the question of the operation by the United Nations of its own radio communications within the host country of ECA has been covered in any other formal agreement between the United Nations and the Government concerned, and it therefor may be assumd that th use of radio transmitting and receiving sets by UNDP project personnel in the country presently is not covered by any bilateral agreement between the United Nations and the government concerned. Such assumption is compatible with the information set out in the Executive Secretary's letter from which it appears that although the radios are part of the project equipment and therefore UNDP property until such time as they are formally transferred to the Government, they are, on the other hand, registered, operated and licensed under local regulations and license fees are paid for them. In this respect it may be observed that the voluntary compliance by the United Nations with the domestic regulations of a country in which activities are carried out cannot be taken to abrogate the United Nations rights under the International Telecommunication Convention but is merely an expression of co-operation to serve practical needs. However, should restrictions imposed under local laws and regulations result in obstacles or curtailments that are unacceptable to the United Nations from an operational view point—and here considerations of safety may be pertinent—it is clear that the United Nations is entitled to insist on its rights as a Telecommunications Administration under the International Telecommunication Convention as a prerequisite to the carrying out of United Nations activities in the country concerned.

6. For the reasons set out above, it therefore appears that the question of the United Nations radio communications within the host country of ECA, including radio communications between UNDP project personnel in the field and the radio station of ECA's Headquarters, may have to be taken up with the appropriate authorities of the Government with a view to obtaining a solution that adequately meets the operational requirements of the United Nations. In this connexion, the legal position of the United Nations would be that the ECA Headquarters Agreement is confined in scope to activities of the ECA, and that the subject of radio communications for other United Nations activities in the country concerned is not regulated bilaterally, but that the United Nations is recognized by the International Telecommunication Union as a Telecommunication Administration with the same rights as States Members of the International Telecommunication Union, and that such rights in principle also may be exercised in the country in question.

22 December 1976

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18. STANDARDS OF CONDUCT TO BE OBSERVED BY STAFF MEMBERS OF THE UNITED NATIONS OUTSIDE PROFESSIONAL ACTIVITIES—STAFF MEMBERS BELOW THE LEVEL OF ASSISTANT SECRETARIES GENERAL ENJOY IMMUNITY FROM LEGAL PROCESS ONLY IN RESPECT OF ACTS PERFORMED BY THEM IN THEIR OFFICIAL CAPACITY

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

I have read the letter complaining about disruptive behaviour of four staff members of the United Nations on the occasion of a meeting at a University.

As you have noted, staff members are, under staff regulation 1.4, obliged at all times to conduct themselves in a manner befitting their status as international civil servants and to avoid any action and any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. Violation of this obligation could, depending on the seriousness of the matter to the United Nations and the particular circumstances, justify disciplinary action under Chapter X of the Staff Regulations and Rules quite apart from whether any local criminal proceedings are involved. The Administrative Tribunal has specifically acknowledged that "misconduct punishable under staff regulation 10 could be either misconduct committed in the exercise of a staff member's professional duties or acts committed outside his professional activities but prohibited by provisions creating general obligations for staff members".[113] There have been cases where behaviour outside of official duties and after working hours have been referred to the Joint Disciplinary Committee for advice.

Of course any complaint received by the United Nations in respect of behaviour outside official activities should be communicated to the staff member with a request for his side of the story. Thereafter it is a matter for the Secretary-General's discretion whether or not to pursue the matter by further investigation or action.

As for the immunity question, United Nations officials (other than Assistant Secretaries General and above who have "diplomatic" status) do not have immunity from legal process except as respects their official acts. The staff members concerned here, therefore, enjoy no immunity from suit or criminal process in respect of their

[113] See for example *Judgements of the United Nations Administrative Tribunal*, Numbers 1 to 70, Judgement No. 30, p. 133.

non-United Nations activities. Even if they did, it would be for the Secretary-General and not the staff members themselves to determine whether the immunity should be asserted or waived (staff regulation 1.8). No plea of immunity based on United Nations employment could properly be made by a staff member without the knowledge of the Secretary-General. If the staff member did so he would be in violation of staff regulation 1.8.

So far as I know there has been no detailed discussion of the standards of conduct for international civil servants since the ICSAB 1954 "Report on Standards of Conduct in the International Civil Service"[114] which does deal with special requirements relating to outside activities, political activities and private life of staff members. I do believe however that it would still be reasonable so to interpret staff regulations 1.4 and 1.7 and staff rule 101.8 as to preclude an international civil servant from repeatedly and publicly taking in his personal capacity strongly partisan positions on political issues. I also believe that, under staff rule 101.8, a staff member should be guided by any instruction given under authority of the Secretary-General with respect to future conduct in this regard.

18 August 1976

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19. REGISTRATION OF TREATIES AND INTERNATIONAL AGREEMENTS UNDER ARTICLE 102 OF THE CHARTER—ANY ACTION (INCLUDING TERMINATION OR DENUNCIATION) EFFECTING A CHANGE IN A REGISTERED TREATY OR INTERNATIONAL AGREEMENT MUST ALSO BE REGISTERED—PRACTICE OF THE SECRETARIAT AS TO REGISTRABILITY ISSUES

Letter to a private individual

Your letter of 18 June 1976 was referred to me for reply. In response to your inquiry concerning the practice of the Secretariat with regard to denunciations of treaties, I should like to provide you with the following information.

1. Under article 2 of the Regulations to give effect to Article 102 of the Charter,[115] any subsequent action which effects a change in a treaty or international agreement registered with the Secretariat must also be registered. This includes any certified statements regarding terminations and denunciations.

2. While the Secretary-General has no competence to decide the legality of an action taken by a party, it will notify a party of any appearances of inconsistency with the terms of the agreement and ask for clarification of the party's position. I would like in this respect to refer you to an extract of the preface to the monthly *Statement of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat* which sets forth the position of the Secretariat:

> "In some cases, the Secretariat may find it necessary to consult with the registering party concerning the question of registrability. However, since the terms 'treaty' and 'international agreement' have not been defined either in the Charter or in the Regulations, the Secretariat, under the Charter and the Regulations, follows the principle that it acts in accordance with the position of the Member States submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement

[114] Document COORD/Civil Service/5.
[115] Adopted on 14 December 1946 by General Assembly resolution 97 (I).

within the meaning of Article 102. Registration of an instrument submitted by a Member State, therefore, does not imply a judgement by the Secretariat on the nature of the instrument, the status of a party, or any similar question. It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status which it would not otherwise have."

3. The practice of the Secretariat is to register all actions and objections to such actions, leaving the question of the status of the agreement to the parties themselves.

. . .

5. In response to your request for specific instances where these issues have been raised, I would refer you to an article published by Daniel Bardonnet in the *Annuaire français de droit international,* 1972, entitled "La dénonciation par le Gouvernement sénégalais de la Convention sur la mer territoriale et la zone contiguë et de la Convention sur la pêche et la conservation des ressources biologiques de la haute mer, en date du 29 avril 1958 à Genève".

29 June 1976

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20. Practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding (1) reservations and objections to reservations relating to treaties not containing provisions in that respect (2) correction of errors in the original of a treaty

AIDE MEMOIRE

I. *Reservations and objections to reservations relating to treaties not containing provisions in that respect*

1. In the present state of international practice, the fact that a multilateral treaty does not contain any provisions relating to reservations cannot justify the conclusion that States wishing to become parties to the treaty may not formulate reservations. However, so far as the signatory and contracting States are concerned, whether or not the treaty is in force, the question that presents itself is the acceptance or rejection of the reservation or, in other words, the participation in the treaty of a State which makes it commitment conditional upon application of the treaty in ways not provided for in the treaty itself.

The alternatives are either a rigid system (the written consent of all parties to the treaty will be required before the deposit of an instrument accompanied by a reservation is accepted), or a flexible system (the reservation will be presumed to have been accepted in the absence of any objection, the parties remaining free to draw from the reservation whatever legal consequences are right and proper in their treaty relation with the reserving State). In the first case, participation in the multilateral treaty will doubtless be more restricted, but this will be offset by respect for the "integrity of the treaty"; in the second case, wider participation in the treaty will perhaps carry with it what may be called a "bilateralization" of international relations.

2. Originally, the Secretary-General applied a rigid system inherited from the practice followed by the Secretary-General of the League of Nations. Subsequently,

in 1952, he received instructions from the General Assembly to follow a flexible system[116] (in 1959, those instructions were extended to all conventions in respect of which the Secretary-General acts as depositary[117]) until such time as he might be given further instructions. Although the Vienna Convention on the Law of Treaties of 23 May 1969[118] is not yet in force,[119] and although it cannot in any event be invoked against the Secretary-General in the absence of further instructions from the General Assembly, its provisions with regard to reservations may be seen as a compromise between a flexible system and a rigid one, or as a variation on the practice currently followed by the Secretary-General.

A. *Definition of the term "reservation"*

3. According to article 2, paragraph 1 (*d*), of the Vienna Convention, " 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". It will be noted that this definition covers modifications by excess or by default; in other words, it covers both statements designed to extend, for the State making the reservation, the scope of certain of its treaty obligations and those purporting to exclude or restrict the application of certain provisions of the treaty.

B. *Procedure to be followed in case of doubt as to the scope of a statement*

4. The Secretary-General, as depositary of multilateral treaties, sometimes encounters problems of definition with regard to reservations. Is the statement a statement of intention or of general policy? Is it a statement of interpretation? Or is it a statement of reservation in the proper sense?

In case of doubt, it behoves the depositary to ask the State which formulated the statement whether its effect is to modify the application of the treaty in its relations with the other contracting States. The depositary will communicate the reply to the States concerned by circular letter.

C. *Treatment of reservations and objections*

5. In the exercise of his depositary functions with regard to reservations and objections to multilateral treaties not containing any provision on that point,[120] the Secretary-General follows a practice based on the rules of customary international law and the instructions given to him on the subject by the General Assembly in 1952 and 1959.

On this point, the Vienna Convention codified some of these customary rules, and also established *de lege ferenda* certain presumptions which constitute, in the matter of reservations or objections, what is commonly referred to as the "Vienna system".

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[116] See General Assembly resolution 598 (VI) of 12 January 1952.

[117] See General Assembly resolution 1452 B (XIV) of 7 December 1959.

[118] *Official Records of the United Nations Conference on the Law of Treaties*, Documents of the Conference (A/CONF.39/11/Add.2; United Nations publication, Sales No. E.70.V.5), p. 287.

[119] The Convention will enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession. As at 11 October 1977, 31 instruments of ratification or accession had been deposited.

[120] Treaties concluded under the auspices of the United Nations before 1950 contain no provisions concerning reservations (with the exception of the 1949 Revised General Act for the Pacific Settlement of International Disputes).

6. Whether or not the treaty is in force, a signatory or contracting State to which the depositary communicates the text of a reservation has the following options:

To accept the reservation;

To object to the reservation, while indicating that its objection is not intended to preclude the entry into force of the treaty as between the objecting and reserving States;

To object to the reservation, specifying that the objection has the effect of precluding the entry into force of the treaty as between the two States;

To object to the reservation, declaring it incompatible with the purpose and object of the treaty.

(a) *Rules of customary law*

7. A reservation must be formulated in writing (article 23, paragraph 1, of the Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (article 7 of the Convention). This rule also applies to objections.[121]

Either a reservation or an objection may be withdrawn at any time (article 22 of the Convention).

A reservation may be made only at the time of signature or of deposit of the instrument of ratification, acceptance, approval or accession (article 19 of the Convention). If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn (article 23, paragraph 2, of the Convention).

(b) *Instructions by the General Assembly*

8. Having noted the advisory opinion of the International Court of Justice of 28 May 1951 regarding reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[122] and the report of the International Law Commission on the question of reservations to multilateral conventions,[123] the General Assembly, in its resolution 598 (VI), gave the Secretary-General, as depositary of multilateral treaties, the following instructions:

To accept the deposit of documents containing reservations or objections;

To refrain from passing upon the legal effect of such documents; and

To communicate the text of such reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

These instructions related only to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and to conventions concluded after the date of adoption of resolution 598 (VI), but by its resolution 1452 B (XIV) the General Assembly extended them to *all* conventions concluded under

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[121] On this point, the Secretary-General's practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations.

[122] *I.C.J. Reports 1951*, p. 15.

[123] *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), p. 2.

the auspices of the United Nations which did not contain provisions relating to reservations.[124]

(c) *The Vienna Convention system*

9. While the Vienna Convention makes the States parties, and only the States parties, competent to pass upon the legal effect of reservations and objections, it does specify, or rather limit, that competence by virtue of the following two presumptions:

A reservation is considered accepted if no objection is raised within a period of 12 months (article 20, paragraph 5, of the Convention), the time-limit for objections by States therefore being one year after receipt of notification of a reservation;

An objection does not preclude the entry into force of the treaty as between the objecting and reserving State, unless a contrary intention is definitely expressed (article 20, paragraph 4 (*b*), of the Convention).

D. *The legal effects of reservations and objections*

10. The legal effects of reservations and objections to reservations will be considered below from the standpoint of (*a*) the initial entry into force of the treaty and (*b*) the treaty relations between the parties to the treaty.

(a) *Reservations, objections and initial entry into force of the treaty*

11. The principle is that reservations do not preclude the deposit of an instrument. So far as the Secretary-General is concerned, this is a rule deriving from the very terms of the General Assembly's instructions. The Vienna Convention does not deal directly with this question, but its provisions do not contradict the principle.

Consequently, if the final clauses of the treaty in question stipulate that the treaty shall enter into force after the deposit of a certain number of instruments of ratification, approval, acceptance or accession, the depositary will, subject to what is said in the next paragraph, include in the number of instruments required for entry into force all those which have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections.

12. An objection may nevertheless have the legal effect of precluding the deposit of an instrument containing a reservation which is completely invalid,[125] and hence of precluding entry into force, but it is not for the Secretary-General to pass upon the matter. His practice is as follows: once the number of instruments required for the initial entry into force of the treaty have been received, if some of those instruments are accompanied by reservations which have met with objections or if it was the deposit of an instrument accompanied by a reservation that brought the number received up to the number required for initial entry into force, he announces the entry into force of the treaty unless one or more of the contracting parties should "object", within 90 days, to the inclusion of the instruments in question in the number required for the initial entry into force of the treaty. However, the contracting parties remain free at any time to raise objections as regards their reciprocal treaty relations.[126]

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[124] Multilateral treaties concluded under the auspices of the League of Nations for which the Secretary-General of the United Nations assumes depositary functions pertaining to a secretariat continue to be subject to the system concerning reservations which was in force at the time when the treaty was concluded; see *Juridical Yearbook*, 1971, p. 224.

[125] For example, where one or more contracting parties object to the instrument on the ground that the reservation is incompatible with the object or purpose of the treaty.

[126] See *Juridical Yearbook*, 1975, p. 205.

13. This procedure of consulting States with a view to obtaining their tacit consent to an action of the depositary should not be confused with the procedure of tacit acceptance of reservations in the absence of objections within 12 months, as provided for in article 20, paragraph 5, of the Vienna Convention. What is involved in the latter case is a time-limit granted to States either to accept or to reject the reservation as regards the application of the treaty in their treaty relations, whereas the consultation procedure referred to above is used in this case by the Secretary-General to ascertain whether the Contracting Parties are not opposed to the inclusion of the instrument containing a reservation that had met with objection in the number of instruments required for the initial entry into force of the treaty.

(b) *Treaty relations among the parties*

14. Both reservations and objections to reservations are apt to produce certain legal effects with regard to the application of the treaty as between the reserving State and the other contracting parties, whether or not they have formulated objections to the reservation.

As the depositary, the Secretary-General is not competent under the terms of the General Assembly's instructions to pass upon the legal effect of reservations and objections. He must restrict himself to communicating to the States concerned the documents containing the reservation or objection, without seeking to clarify whether the reservation or objection has the effect of preventing the treaty from having effect as between the reserving State and the other contracting parties or simply of precluding the application in their treaty relations of the provisions of the treaty to which the reservation relates. It follows that the Secretary-General will not be in a position to determine whether the treaty has entered into force for the reserving State, since one cannot exclude the theoretical possibility that all the contracting parties without exception might subsequently, at some time and moment without any time limit, object to the entry into force of the treaty in their relations with the reserving State. The instrument accompanied by a reservation would in that case be accepted for deposit, but would be temporarily devoid of all legal effect.

15. Consequently, in the event of a reservation, the practice of the Secretary-General until 1976 was not to indicate any date of entry into force either in the circular letter announcing the deposit of an instrument accompanied by a reservation or in the various documents relating to registration (the Register, the Monthly List and the *Treaty Series*). As from 1976 the practice was changed so that where ratifications, accessions and the like are accompanied by reservations not provided for in the treaty in question, the date of entry into force is indicated as follows:

> "With effect from [date], subject to the legal consequences which each party may see fit to attach to the above-mentioned reservations concerning the application of the treaty."

16. In this connexion, the Vienna Convention spells out two points. Firstly, it sets a time-limit for objections to reservations since under the terms of article 20, paragraph 5, any reservation to which no objection is raised within 12 months will be considered to have been accepted. Secondly, article 21 of the Convention makes it clear that if the reservation is accepted, or if the State objecting to it does not specify that the purpose of its objection is to preclude the entry into force of the treaty in its reciprocal relations with the reserving State,[127] the treaty will have

[127] In most cases of reservations to multilateral treaties, the only difference there can be between a State which accepted the reservation and a State which objected to it without specifying its reasons will arise in case of dispute. A judicial or arbitration body dealing with a dispute relating to those provisions of the treaty which are the subject of the reservation must, if the reservation was accepted, apply the treaty as modified by the reservation; otherwise, it will first have to pass upon the legal effects of the objection.

effect as between the two States in question, save only as regards the provisions to which the reservation relates.

II. *Correction of errors in the original of a multilateral treaty*

A. *Identification of errors*

...

2. Corrections to the original text of a treaty may be necessary because of a physical error in typing or printing, spelling, punctuation, numbering, and so on, because of lack of conformity of the original of the treaty to the official records of the diplomatic conference which adopted the treaty, or because of a lack of concordance between the authentic texts constituting the original of the treaty.

3. It is the responsibility of the depositary, who has custody of the original of the treaty, to initiate the correction procedure *proprio motu* or at the request of one or more of the States which participated in the elaboration and adoption of the treaty. First of all, each error must be thoroughly scrutinized by the depositary —in this case by the Secretariat—in order to determine whether it falls in one of the categories mentioned above and does not have the effect of modifying the meaning or substance of the text of the treaty. In case of doubt—that is to say, if in the depositary's opinion the modification proposed does not seem wholly justified or is open to dispute—it will be the depositary's obligation to persuade the State which proposed the correction, through consultations, to withdraw its proposal or, in the last resort, to refer the matter to the contracting paries and the signatory States.

B. *Communication of proposed corrections to States*

4. A list of the proposed corrections will be drawn up and communicated to the States concerned.

5. Until 1964, the Secretary-General's practice was apparently not entirely consistent, the list of States which were to receive notification of proposed corrections being drawn up on an *ad hoc* basis, depending, for instance, whether the treaty was open for signature or was in force, whether the number of signatory States was large or small, whether certified copies had been circulated among States and whether there were any contracting parties. The usual practice was apparently to communicate proposed corrections to all States which had signed or might sign the treaty—this method was followed, for example, in the case of the 1954 Convention relating to the Status of Stateless Persons and the 1956 Customs Convention on the Temporary Importation of Commercial Road Vehicles—but there were some cases where proposed corrections were more widely circulated, such as the proposed corrections to the Chinese text of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which were communicated to all States whether or not Members of the United Nations, or the proposed corrections to the 1948 Havana Charter establishing an International Trade Organization, which were communicated to all the States that had adopted the text of the Convention.

6. Since 1964, the consistent practice of the Secretary-General has been to communicate proposed corrections not only to signatory States but to all the States that participated in the elaboration of the treaty in question, which in practice means all States represented at the Conference that adopted the treaty, and all signatory States and contracting parties. This practice was sanctioned by articles 26 and 27 of the International Law Commission's draft on the law of treaties, as adopted in 1962 at its fourteenth session; draft article 27 provided that "the depositary shall bring the error to the attention of all the States which participated in the adoption

of the text and to the attention of any other States which may subsequently have signed or accepted the treaty . . .".[128]

This procedure was followed in the case of the 1964 Agreement establishing the African Development Bank, the 1958 Agreement on the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicle Equipment and Parts, the 1962 Convention on the International Transport of Perishable Foodstuffs, the 1956 Convention on the Recovery Abroad of Maintenance, the 1961 Single Convention on Narcotic Drugs, the 1968 and 1973 International Sugar Agreements and, more recently, in the case of the 1971 Convention on Psychotropic Substances, the 1972 Customs Convention on Containers, 1974 Convention on the Limitation Period in the International Sale of Goods and the 1975 International Tin Agreement.

It will be noted, however, that article 79, paragraph 2, of the Vienna Convention provides for the communication of proposed corrections only *to the signatory States and to the contracting States.*

C. *Procedure relating to the acceptance of proposed corrections and to any objections*

7. When studying the question of the acceptance of proposed corrections and of any objections to corrections, the International Law Commission noted, in its report to the General Assembly on the work of its eighteenth session,[129] that, placing the matter on the plane of a right rather than simply of diplomacy, only contracting States should be considered as having an actual legal right to a voice in any decision regarding a correction.

However, the practice of the Secretary-General, which in fact is the practice codified by the Vienna Convention, is also to accept objections from signatory States. This practice is based on the fact that a State which, by its signature, has bound itself to "refrain from acts which would defeat the object and purpose of a treaty" pending the entry into force of the treaty must be allowed to express an opinion on proposed corrections to a text that is in the process of being incorporated into its domestic law. However, there have been cases, such as that of the 1974 Customs Convention on Containers, where objections were communicated to the Secretary-General by States which were neither signatories nor contracting parties. Such objections, although not considered valid, were communicated to all interested States for information.

D. *Time-limit for objections*

8. Objections must be notified to the depositary within a certain period; article 79, paragraph 2, of the Vienna Convention provides that the depositary "shall specify an appropriate time-limit within which objection to the proposed correction may be raised".

9. In accordance with international practice, the Secretary-General normally sets a time-limit of 90 days from the date shown on the notification. It should be noted, however, that in establishing the time-limit for objections to proposed corrections, account will be taken of factual circumstances such as the nature and the number of proposed corrections, and whether or not the treaty is in force. The example may be cited of the corrections to the original of the 1962 Coffee Agreement. Because the errors were obviously typographical, and because a time-limit of 90 days would have exceeded the period during which the treaty was open for signature, the Secretary-General set a 30-day time-limit for objections.

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[128] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209), p. 27.

[129] *Ibid., Twenty-first Session, Supplement No. 9* (A/6309/Rev.1), p. 100.

During the period specified by the Secretary-General, any interested State will be entitled to raise an objection, either because it does not consider the proposed correction justified or because it considers the correction procedure itself inappropriate. For instance, a State may well consider the period allowed for stating its position to be inadequate, or may on the other hand find it too long for pressing domestic constitutional reasons. Again, it may consider that a procedure for consultation by tacit consent is not appropriate in the case of a correction which might affect the substance of the treaty and would therefore constitute a kind of indirect amendment.

E. *Legal effects of objections*

10. Is an objection by one State sufficient to block a proposed correction? On this point, there is no practice of the Secretary-General to report. Objections notified to the Secretary-General have usually been withdrawn after consultation between the Secretariat and the objecting State. This was so, for example, in the case of the 1956 Convention on the Recovery Abroad of Maintenance and the 1962 Coffee Agreement.

11. On this point, article 79, paragraph 2 (*b*), of the Vienna Convention provides that the depositary shall communicate the objection to the signatory States and to the contracting States, but this does not resolve the problem of the legal effects of an objection. The gap left by the Vienna Convention already existed in the International Law Commission's draft articles on the law of treaties (article 25), a fact which did not escape the notice of some members of the Commission.[130] In order to prevent the exercise of a kind of veto by the party raising the objection, would it not be desirable to provide that the dispute should be settled by the same majority as had been required for the adoption of the treaty? The matter was finally dropped on the ground that it was wiser not to confine States within a rigid system, but to let them settle any difficulties among themselves. In practice, the Secretary-General, acting as depositary or, in other words, as the representative of all the parties to the treaty, will surely propose to the parties whatever procedure seems to him to be appropriate for settling the matter.

1 July 1976

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21. PARTICIPATION OF INTERNATIONAL ORGANIZATIONS IN VARIOUS MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL

Letter to the Director-General, United Nations Educational, Scientific and Cultural Organization

I have the honour, on instructions from the Secretary-General, to acknowledge receipt of your letter of 30 June 1976 concerning the draft Protocol to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950.[131]

In reply to your request, I wish to inform you that the Secretary-General is prepared to act as depositary for the Protocol. It is noted that participation in this Protocol will be open only to States parties to the 1950 Agreement, which it supplements and which is itself deposited with the Secretary-General of the United Nations.

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[130] See *Yearbook of the International Law Commission, 1962*, vol. I, 662nd meeting, p. 218.

[131] United Nations, *Treaty Series*, vol. 131, p. 25.

On the question of the participation of the European Economic Community in this Protocol, to which you draw my attention, please find annexed hereto the text of the provisions adopted in this respect in various other agreements deposited with the Secretary-General.

14 July 1976

ANNEX

Participation of international organizations in multilateral treaties deposited with the Secretary-General

1. It should first of all be noted that article 90 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, done at Vienna on 14 March 1975,[132] provides as follows:

> "After the entry into force[133] of the present Convention, the competent organ of an international organization of a universal character may adopt a decision to implement the relevant provisions of the Convention. The Organization shall communicate the decision to the host State and to the depositary of the Convention."

2. Secondly, it is pointed out that a number of recent commodity agreements deposited with the Secretary-General provide for the participation of international organizations. One example is the International Tin Agreement, 1975, article 54 of which reads as follows:

> "(*a*) Any reference to a Government in articles 47, 48, 49, 50, 51 and 52 shall be construed as including a reference to an intergovernmental organization having responsibilities in respect of the negotiation, conclusion and application of international agreements, in particular commodity agreements.
>
> "(*b*) Such an organization shall not itself hold any votes, but in the case of votes on matters within its competence, it shall be entitled to cast the votes of its members States and shall cast them collectively. In such cases, the member States of the organization in question shall not be entitled to exercise their individual voting rights."

Mention may also be made of the International Cocoa Agreement, 1975, article 4 of which provides as follows:

> "1. Any reference in this Agreement to a 'Government' shall be construed as including a reference to any intergovernmental organization having responsibilities in respect of the negotiation, conclusion and application of international agreements, in particular commodity agreements. Accordingly, any reference in this Agreement to signature or to deposit of instruments of ratification, acceptance or approval or to notification of provisional application or to accession by a Government shall, in the case of such intergovernmental organizations, be construed as including a reference to signature, or to deposit of instruments of ratification, acceptance or approval, or to notification of provisional application, or to accession, by such intergovernmental organizations.
>
> "2. Such intergovernmental organizations shall not themselves have any votes, but in the case of a vote on matters within their competence, they shall be entitled to cast the votes of their member States and shall cast them collec-

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[132] Reproduced in the *Juridical Yearbook*, 1975, p. 870.

[133] The Convention is not yet in force. As of 17 October 1977, it had been ratified by nine States.

tively. In such cases, the member States of such intergovernmental organizations shall not be entitled to exercise their individual voting rights.

"3. The provisions of paragraph 1 of Article 15 shall not apply to such intergovernmental organizations; but they may participate in the discussions of the Executive Committee on matters within their competence. In the case of a vote on matters within their competence, the votes that their member States are entitled to cast in the Executive Committee shall be cast collectively by any one of those member States."

As for the International Coffee Agreement, 1976, provision is specifically made in article 4, paragraph (3), for the participation of the European Economic Community, in the following terms:

"Any reference in this Agreement to a Government shall be construed as including a reference to the European Economic Community, or any intergovernmental organization having comparable responsibilities in respect of the negotiation, conclusion and application of international agreements, in particular commodity agreements."

3. Lastly, mention may be made of article 24 of the Convention for the Protection of the Mediterranean Sea against Pollution of 16 February 1976 (deposited with the Spanish Government), which provides that the Convention and protocols

"... shall also be open until the same date for signature by the European Economic Community and by any similar regional economic grouping ...".

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22. EFFECT OF GENERAL DECLARATIONS MADE BY NEW STATES ON ACCESSION TO INDEPENDENCE IN RESPECT OF SUCCESSION TO MULTILATERAL TREATIES RENDERED APPLICABLE TO THEIR TERRITORIES BEFORE INDEPENDENCE

Memorandum to the Deputy Regional Representative, Regional Office of the United Nations High Commissioner for Refugees at United Nations Headquarters

1. This is in reference to a memorandum of 4 August 1976 on the above subject.

2. The author of the memorandum refers to a letter dated 12 March 1968, addressed to the Secretary-General by the Prime Minister and Minister of External Affairs of a Member State containing a general statement on the subject of succession by the State in question to treaty rights and obligations.[134] He notes that, notwith-

[134] This statement reads in part as follows:

"I have the honour to inform you that the Government of [name of the country concerned], conscious of the desirability of maintaining existing legal relationships, and conscious of its obligation under international law to honour its treaty commitments, acknowledges that many treaty rights and obligations of the Government of [name of the State which was responsible for the international relations of the country concerned] in respect of [name of the country concerned] were succeeded by [the latter] upon independence by virtue of customary international law.

"Since, however, it is likely that by virtue of customary international law certain treaties may have lapsed at the date of independence, it seems essential that each treaty should be subjected to legal examination. It is proposed after this examination has been completed, to indicate which, if any, of the treaties which may have lapsed by customary international law the Government wish to treat as having lapsed.

"It is desired that it be presumed that each treaty has been legally succeeded to by [name of the country concerned] and that action be based upon this presumption until a decision is reached that it should be regarded as having lapsed. Should the Govern-

standing the said declaration, the State concerned deposited on 12 September 1970 with the Government of the Netherlands, which is the depositary of the Agreement of 23 November 1957 on refugee seamen, a specific notification of succession to the said Agreement (the said notification was subsequently registered by the Government of the Netherlands with the Secretariat, on 17 September 1970, in accordance with Article 102 of the Charter and the relevant General Assembly Regulations). He inquires whether the State concerned "has registered in New York"—by which we understand: deposited with the Secretary-General—any other declaration concerning succession to treaties.

3. It will be recalled that all actions effected in respect of multilateral treaties deposited with the Secretary-General, together with the corrsponding declarations, reservations, etc., can be found in the Secretariat document entitled *Multilateral Treaties in respect of which the Secretary-General performs depositary functions —List of Signatures, Ratifications, Accessions, etc., as at 31 December 1975* (ST/LEG/SER.D/9).

4. As will be seen from that publication, a few notifications of succession were effected by the State concerned after 12 September 1970.

5. The practice of that State, as reflected in the document referred to above, may indeed prove useful in approaching their Government concerning participation in the 1951 Convention[135] and the 1967 Protocol relating to the Status of Refugees.[136] However, two observations are called for in this respect:

(i) General declarations of intent such as the communication of 12 March 1968 (see paragraph 2 above) are mostly of a provisional nature and solely establish a presumption of succession on the part of the State concerned. Such a presumption may be reversed at any stage, in regard to any given treaty, by a specific declaration. Because of this, it is the practice of the Secretary-General, as depositary of international agreements, to consider the would-be successor State as a party to an agreement only after a notification of succession specifically mentioning the agreement succeeded to has been deposited with him. Such an explicit notification of succession is deemed necessary even when a "devolution agreement" has been concluded between the territory, before accession to independence, and the State formerly responsible for its international relations.

(ii) Failing succession, the normal means of participation explicitly provided for by the 1951 Convention and the 1967 Protocol (namely, accession) is still available to the State concerned.

1 September 1976

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23. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION—LEGAL EFFECTS OF STATEMENTS OF INTERPRETATION AND OTHER DECLARATIONS MADE AT THE TIME OF RATIFICATION OR ACCESSION—A DECISION BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

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ment be of the opinion that they have legally succeded to a treaty but subsequently wish to terminate its operation, they will in due course give notice of termination in the terms thereof."

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

[136] *Ibid.*, vol. 606, p. 267.

THAT A RESERVATION ALREADY ACCEPTED IS INCOMPATIBLE WITH THE OBJECT AND PURPOSE OF THE CONVENTION WOULD HAVE NO LEGAL EFFECT

Memorandum to the Director of the Division of Human Rights[137]

1. I refer to your telegram of 31 March 1976 concerning a number of questions raised by a member of the Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination.[138]

A. *What are the legal effects of mere declarations and statements of interpretation made at the time of ratification or accession as far as the status of the Convention and its application are concerned, and to what extent should the Committee take such a declaration into account when considering the reports submitted by the State concerned?*

2. A basic principle in this regard (see our memorandum of 23 July 1975 to the Deputy Director of the Division of Human Rights[139]) is that any declaration made by a State purporting to exclude or modify the legal effect of certain provisions of a treaty in their application to that State constitutes a reservation and that, to take effect in such circumstances, any reservation must have been accepted in accordance with the procedure prescribed in article 20 of the Convention.

3. A mere statement or a declaration of interpretation which has not been subjected to the procedure prescribed in article 20 does not constitute a reservation and therefore cannot, in any event, have the effect of modifying the legal status of the Convention.

4. It is true that statements of interpretation are a very special case. The States which have made them consider that their purpose is not in any way to modify the legal effect of the Convention, but simply to make more explicit the meaning of a particular provision, and it is on this understanding that the declarations in question have been received by the Secretary-General, in his capacity as depositary, and communicated by him to the other States concerned.

5. When a declaration of this kind has been made, the Committee should take account of it in considering the reports submitted by a State, in that even if legal interpretations other than the one given in the declaration were possible, the internal decisions taken by the declaring State in applying the Convention would have to be judged in the light of its interpretation.

6. A problem might arise if the Committee took the view that the statement was not really of an interpretative character but was in fact a reservation likely to modify the legal effect of the Convention.

In such a case, it would be for the Committee, if necessary and in accordance with article 9, paragraph 2, of the Convention, to draw attention to the point in the report it addresses annually to the General Assembly through the Secretary-General, and to make any suggestions which it might consider appropriate.

7. It should be borne in mind that, apart from the procedure of reporting to the General Assembly laid down in article 9 of the Convention, States parties, acting individually, are entitled to draw the attention of the Committee to the fact that

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[137] This memorandum was used as the basis for a statement by the Director of the Division of Human Rights at the 286th meeting of the Committee (CERD/C/SR.286), the text of which was subsequently circulated in slightly modified form as "Note by the Secretary-General" (CERD/C/R.93).

[138] United Nations, *Treaty Series*, vol. 660, p. 195.

[139] Reproduced in part in the *Juridical Yearbook*, 1975, p. 206.

another State is not giving effect to the provisions of the Convention. At the conclusion of conciliation proceedings held before the Committee, and if no agreement is reached, a report might then be submitted through the Committee to all the States parties (see articles 11-13 of the Convention).

B. *What is the legal effect of a unanimous decision by the Committee that a reservation is incompatible with the object and purpose of the Convention, when that reservation has already been accepted? What would be the effect of such a decision by the Committee in the light of article 20, paragraph 2, of the Convention?*

8. The Committee is not a representative organ of the States parties (which alone have general competence with regard to the implementation of the Convention). When a reservation has been accepted at the conclusion of the procedure expressly provided for by the Convention (article 20), a decision—even a unanimous decision—by the Committee that such a reservation is unacceptable could not have any legal effect.

C. *Is a party to the Convention which did not make reservations at the time of ratification or accession entitled to make any later?*

9. The answer is in the negative. In accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a reservation may be formulated only at the time of signature, ratification or accession. A reservation made at the time of signature has to be confirmed at the time of ratification, otherwise it is considered as not having been maintained.

5 April 1976

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24. INTERNATIONAL COCOA AGREEMENT 1975—POSITION OF COUNTRIES WHICH EXPRESS AN INTENTION TO APPLY THE AGREEMENT ON A *de facto* BASIS PENDING FORMAL NOTIFICATION OF PROVISIONAL APPLICATION—QUESTION OF THE PARTICIPATION OF SUCH COUNTRIES, IN THE INTERIM PERIOD, IN THE INTERNATIONAL COCOA COUNCIL—QUESTION WHETHER A NOTIFICATION OF "INTENTION TO APPLY THE AGREEMENT PROVISIONALLY" CAN BE LEGALLY CONSIDERED TO BE EQUIVALENT TO A NOTIFICATION OF PROVISIONAL APPLICATION

Letter to the Executive Director, International Cocoa Organization

By your letter of 25 August 1976 you sought our advice as to what would be the position of countries which, having requested an extension of the time-limit for the deposit of instruments of ratification of the International Cocoa Agreement, 1975, beyond 30 September 1976, may not be able, at that date, to notify the Secretary-General of their intention to apply the Agreement provisionally in accordance with the provisions of its article 68. You mention that one of the Governments concerned has informed you that it would endeavour to apply the provisions of the Agreement on a *de facto* basis, within the existing internal legislation, pending formal notification of provisional application.

As for your first question, the Government in question is a party to the International Cocoa Agreement, 1972, and hence will be entitled to full participation in any meeting of the old Council which may be held under article 74, paragraph 6 of that Agreement for such purposes as settlement of accounts and disposal of assets. Until the said Government either ratifies the new Agreement or makes a notification

to the Secretary-General of provisional application of it, however, the mere extension of the time-limit for deposit of its ratification will not *ipso facto* give it any status with regard to participation in the new Council operating under the 1975 Agreement. You will know better than I whether the rules and practices of your Organization would permit the Council to grant observer status.

Your second question is whether the Government concerned, which will endeavour to apply the provisions of the new Agreement on a *de facto* basis within existing legislation, could declare to the Council its intention to apply the Agreement provisionally, so that the Council could notify the Secretary-General. We think that under article 68 of the 1975 Agreement, any notification concerning provisional application which is to have legal effect would have to be made directly by the Government concerned to the Secretary-General; but if there is any possibility of doubt as to whether such a notification is in conformity with the terms of article 68, the Secretary-General would attach great importance to the views of the Council, which has competence under the Agreement in regard to disputes and complaints, and he would normally be guided by those views. Therefore, while the notification should be made to the Secretary-General, consideration by the Council would be highly important in such circumstances.

The question arises whether a notification of "intention to apply the Agreement provisionally", as described in your letter, can be legally considered by the Council to be equivalent to a notification that a signatory "will apply the Agreement provisionally", as required by article 68. Any notification would of course have to mention either the date of entry into force of the Agreement or some later date as the beginning of "provisional application". We are not fully informed about what "provisional application" and "provisional entry into force" mean in the actual practice of commodity organizations, and you may wish to inquire about the matter among the other such organizations in London. We know at least of some cases where "provisional application" has fallen short of strict compliance with the full terms of an agreement, and where an undertaking in that regard, though expressly stating that certain provisions could not be complied with, has been counted towards provisional entry into force. For example, the International Coffee Agreement, 1962,[140] provided for notifications by signatories of an undertaking to seek ratification or acceptance, with the understanding that notifying Governments would "provisionally apply the Agreement" (article 64, paragraph 2). The largest importer (the United States) declared in its notification that until its Congress had enacted implementing legislation, it could not require certificates of origin for imports, nor could it prohibit or limit imports from non-members. Nevertheless, that notification was counted towards provisional entry into force of the Agreement. You may possibly find, in the practice of other organizations, that it is understood that "provisional application" means only that pending ratification States will do their best, within their existing legislation, to apply the agreement. We imagine that, among the members of commodity organizations, there is likely to be a good deal of sympathy with the legal problems that arise from delays in parliamentary action. At any rate, we are unaware (though our information is not complete) that any complaint has ever been made, or that any dispute has arisen, in a commodity organization because of incomplete application of an agreement by a State which has made a notification of provisional application but has not ratified.

If it is admitted in practice that "provisional application" pending ratification need not mean full and rigorous application if the existing national legislation does

[140] United Nations, *Treaty Series*, vol. 469, p. 169.

not allow it, there would seem to be no reason why the Government you refer to (and other States in a similar position) would not be able to make a notification "that it will apply this Agreement provisionally . . . when it enters into force", in accordance with the terms of article 68; and if that is done, there would be no occasion to submit anything to the Council. If, however, such a State feels compelled to depart from the terms of article 68 (or synonyms thereof) and to use some more ambiguous expression in its notifications, the Secretary-General would be grateful for the guidance of the Council.

10 September 1976

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25. PROVISION OF THE HEADQUARTERS AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA BARRING SERVICE OF PROCESS WITHIN THE HEADQUARTERS DISTRICT EXCEPT WITH THE CONSENT OF THE SECRETARY-GENERAL —IMMUNITY OF THE UNITED NATIONS FROM MEASURES OF EXECUTION—PRACTICE OF THE ORGANIZATION WITH REGARD TO JUDGEMENT DEBTS OF STAFF MEMBERS— UNAVAILABILITY OF STAFF MEMBERS' PENSION FUND ENTITLEMENTS TO SATISFY JUDGEMENT DEBTS

Letter to the attorney of a private individual

I refer to the Order issued on 15 December 1976 which the wife of a United Nations former staff member sought to leave in the Office of the Secretary of the United Nations Joint Staff Pension Fund. She was advised then that under the Headquarters Agreement between the United States and the United Nations,[141] no service of process may be effected on anyone within the Headquarters District unless the Secretary-General so authorizes in any particular case.

The status of the Headquarters District is not the principal impediment to the withholding of the pension entitlement of the staff member concerned. Under the Convention on the Privileges and Immunities of the United Nations, to which the United States is a party, the Secretary-General may waive the Organization's immunity from suit but not its immunity from measures of execution.

Staff members are not immune from suit in their private capacity, and it is the United Nations policy to seek to prevent the Organization's immunity from execution from prejudicing the rights of creditors of staff members where the staff member's private affairs are involved. Although United Nations salary is not subject to garnishment, the Staff Regulations and Rules permit deduction from salaries and allowances, in the Secretary-General's discretion, for debts to third parties. Consequently, it is the practice at the time of separation to make deductions for judgement debts from final pay due from the United Nations to a staff member. Staff members are as a matter of proper conduct required themselves to meet their judicially established private legal obligations while they are in service.

The staff member concerned, however, is no longer in United Nations employ and no monies were due and owing from the United Nations to him at the time of the above mentioned Order. As a retired staff member, he does have pension entitlements payable by the United Nations Joint Staff Pension Fund.

Monies of the United Nations Joint Staff Pension Fund are entirely separate from United Nations assets. The Pension Fund is governed by its own Regulations

[141] United Nations, *Treaty Series*, vol. 11, p. 12.

different from the United Nations Staff Regulations. The United Nations is only one of several participating member Organizations; and the Chief Administrative Officer of the Pension Fund is not the Secretary-General of the United Nations but the Secretary of the Fund itself. Under the Regulations applicable to the Pension Fund, the Secretary of the Fund does not have the discretion which the Secretary-General enjoys under the Staff Regulations and Rules, to deduct or to withhold entitlements for private creditors of the pensioner and such deductions are not even permissible for debts owed to the United Nations itself.

The United Nations Administrative Tribunal is the only judicial body which has jurisdiction in matters relating to the Pension Fund Regulations and may order payment by the Fund to a claimant. Persons claiming under the Pension Regulations may invoke the Tribunal's jurisdiction, but the wife of a former participant, himself still living, would probably not have standing to invoke the Tribunal's jurisdiction. On the other hand, the staff member concerned could claim against the Pension Fund for failure to make timely payments of his pension entitlements in accordance with his payment instructions; and this failure on the Fund's part would not be justifiable under the Regulations by reference to the pensioner's obligation to his wife or other creditor.

Since the United Nations Joint Staff Pension Fund may not, consistently with the Regulations which are binding on it and which may be invoked by its participant properly withhold any entitlements from the staff member concerned, the Secretary of the Fund is in no position to act in accordance with the Order even voluntarily.

21 December 1976

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26. PRIVILEGES AND IMMUNITIES OF A PERSON DESIGNATED BY A MEMBER STATE AS A "MEMBER OF ITS PERMANENT MISSION TO THE UNITED NATIONS WITH AMBASSADORIAL RANK"—AUTOMATIC ENTITLEMENT TO DIPLOMATIC PRIVILEGES AND IMMUNITIES OF PERSONS REFERRED TO IN SECTION 15, PARAGRAPHS 1 AND 2 OF THE HEADQUARTERS AGREEMENT OF THE UNITED NATIONS—THE REFERENCE IN SECTION 15, PARAGRAPH 2 OF THE AGREEMENT TO PERSONS "AGREED UPON BETWEEN THE SECRETARY-GENERAL" AND THE HOST STATE REFERS TO CLASSES OF PERSONS AND NOT TO INDIVIDUALS—ENTITLEMENT OF REPRESENTATIVES OF MEMBER STATES TO DIPLOMATIC PRIVILEGES AND IMMUNITIES UNDER SECTION 11 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—INTERPRETATION OF THE PHRASE IN THAT SECTION "WHILE EXERCISING THEIR FUNCTIONS AND DURING THEIR JOURNEY TO AND FROM THE PLACE OF MEETING"—STATUS OF THE PERMANENT OBSERVER TO THE UNITED NATIONS OF AN INTERGOVERNMENTAL ORGANIZATION GRANTED OBSERVER STATUS BY THE GENERAL ASSEMBLY

Letter to the attorney of a member of a permanent mission to the United Nations

I

I am most grateful for your thoughfulness in transmitting to me copies of the briefs which have been field in a case involving a member of a permanent mission to the United Nations.

This case which, in the light of some of the arguments so far advanced, bears upon the interpretation of cardinal provisions of the Charter of the United Nations (Article 105), of the Headquarters Agreement between the United Nations and the host country and of the Convention on the Privileges and Immunities of the United

Nations, is naturally of the greatest concern to the Secretary-General of the United Nations, who has an obvious responsibility in seeking to ensure that the rights of Member States are equally protected and that the functioning of the Organization is not impeded.

Particularly in view of the contentions put forward by the Plaintiff in his latest Response, the issues are such that—should they be the subject of determinations in a national Court which are deemed by the Secretary-General to be prejudicial to the consistent interpretation by the United Nations of the treaty provisions concerned—consideration will have to be given to recourse to arbitration under Section 21 of the Headquarters Agreement or to a request for an advisory opinion of the International Court of Justice under Section 30 of the Convention on the Privileges and Immunities of the United Nations.

II

...

III

The surrounding facts and the various points arising in this case have been exhaustively examined in the briefs already filed with the Court, and thus it is not necessary to repeat them in detail at this stage. The points raised in this letter are intended to be illustrative and not exhaustive, and the fact that a particular issue referred to by the Plaintiff is not alluded to, should not be taken as indicative of any position by the United Nations on the Plaintiff's contentions regarding that issue. I would like to record that, generally speaking, the position and practice of the United Nations regarding the privileges and immunities of representatives of Members and of observers of intergovernmental organizations and regarding the inviolability of the archives and papers of such persons, is in accord with the arguments advanced in the memorandum of 20 July 1976 which you filed with the Court on behalf of the Defendants.

IV

It is the considered opinion of the Secretary-General that Ambassador X [name of the person involved in the case] enjoys, and at all times pertinent to the present case—that is, from the commencement of the proceedings before the Court up to the present time—has enjoyed the privileges and immunities of a diplomatic envoy. This opinion derives from the relevant provisions of international law, binding upon the host State, and as found more particularly in the Charter of the United Nations, the Headquarters Agreement, and the Convention on the Privileges and Immunities of the United Nations. As a diplomatic envoy, Ambassador X is immune from the jurisdiction of the Courts of the host State, and the present action against him should therefore be dismissed.

A

The Secretary-General considers Ambassador X to enjoy diplomatic privileges and immunities under Section 15 (1) of the Headquarters Agreement "as a resident representative with the rank of ambassador or minister plenipotentiary", such enjoyment being automatically conferred under Section 15 (1) by Ambassador X's designation by a Member State as a member of its Permanent Mission to the United Nations with ambassadorial rank. This designation was duly notified to the Permanent Representative of the host State by the Secretary-General in writing on 29 January 1976. It is to be noted that, in Ambasador X's capacity as Permanent Observer of

an intergovernmental organization granted observer status by the General Assembly, such designation and notification fully meets the conditions mentioned in the 1955 Exchange of Notes between the Permanent Observer of the intergovernmental organization in question and the Ministry for Foreign Affairs of the host State.

B

The Secretary-General's notification of 29 January 1976 to the Permanent Representative of the host State, regarding Ambassador X, was in the standard form used by the United Nations Protocol Office in all cases where privileges and immunities are requested for members of permanent missions, from the rank of principal permanent representative down through all other ranks comprising the diplomatic staff of the missions.* It is not indicated on the form whether Section 15 (1) or Section 15 (2) of the Headquarters Agreement is pertinent in a particular case. In either event, in accordance with diplomatic usage and the courtesies of international correspondence, the form is couched in the language of a request.

The Secretary-General considers that the request made in respect of Ambassador X comes under Section 15 (1) by virtue of his ambassadorial rank. In this respect, the Secretary-General is of the view that the term "resident representative", as used in Section 15 (1)—i.e. in lower case—is a generic term, referring to members of the mission "with the rank of ambassador or minister plenipotentiary", and not a specific title of the person concerned.

The specific titles of members of permanent missions vary and are not established under the Headquarters Agreement or the Convention on the Privileges and Immunities of the United Nations. Furthermore, such titles do not necessarily have any bearing, under the internal rules of the Organization, on the representative character of the person concerned. Thus, for example, any member of a mission, regardless of his official title, may be designated by his Government or by the Permanent Representative to represent his State in a particular United Nations organ, with full rights, including the right to vote. This applies equally, from the Organization's point of view, where Ambassador X is concerned.

C

Entitled as he is, in the Secretary-General's view, to diplomatic privileges and immunities under Section 15 (1) of the Headquarters Agreement, no question can arise of the consent of the host State being required to Ambassador X's enjoyment of such privileges and immunities. Such enjoyment is automatic. Even if, for the sake of argument, Ambassador X's case were considered to come under Section 15 (2) of the Headquarters Agreement, the Secretary-General is of the view that the host State is not required to give its consent in each individual case before privileges and immunities attach to the individual concerned. The reference to persons "agreed upon" in Section 15 (2) is, generally speaking, to classes of persons, not to individuals. Practice since the conclusion of the Headquarters Agreement establishes that the necessary agreement of the parties, including the host State, was settled in principle by the original establishment of the diplomatic list (as distinguished from the clerical and administrative list) on which would be carried the names of all members of mission diplomatic staffs who by reason of that status would be entitled to the privileges and immunities guaranteed by Section 15.

Moreover, the fact that this agreement was one only as to categories of mission staff and not as to individuals was clearly demonstrated at the time of the adoption

* The form refers to a request from the "Permanent Representative". If the request comes directly from a Government or from the Mission "Permanent Representative" is deleted, and the appropriate substitution made.

of the Headquarters Agreement. In resolution 169 (II), which authorized the Secretary-General to bring that Agreement into force in the manner provided by its terms, the General Assembly by Part B decided to recommend to the Secretary-General and to the appropriate authorities of the host State to use Section 16 of the Convention on the Privileges and Immunities of the United Nations as a guide in considering "*what classes* of persons on the staff of delegations might be included in the lists to be drawn up by agreement between the Secretary-General, the Government of the [host State] and the Government of the Member State concerned" (italics supplied). In this context it is material that Section 16 of the Convention defines as representatives of Members "*all* delegates, deputy delegates, advisers, technical experts and secretaries of delegations" (italics supplied). No objection was made by the representatives of the host State in the General Assembly to this interpretation.

Any other conclusion would be against reason. The Government of the host State has always acknowledged that the staff of permanent missions are appointed by the Member Governments and accredited not to the host State but to the United Nations. Consequently, it cannot assert, in each individual case of a member of the staff of a permanent mission, a right akin to that of *agrément* in bilateral diplomatic relations.

D

The Secretary-General would not contest that cases may arise where the host State might question the correctness of the designation or the genuineness of the service of a given individual on a mission, but he can see no grounds for a question in the instant case where the procedures followed comply fully with the provisions of the Headquarters Agreement and the 1955 Exchange of Notes. It has not been alleged at any point that Ambassador X has acted or was intended to act outside the scope of his duties as Special Adviser to the Permanent Mission of which he has been designated as a member, or as Permanent Observer of an intergovernmental organization granted observer status by the General Assembly. In the latter capacity, information activities regarding the role and position of the organization concerned in the United Nations, or of the response of that organization to United Nations decisions, is not precluded by law or by practice. Thus, it should be common ground that no basis for question exists under the Headquarters Agreement and the 1955 Exchange of Notes regarding Ambassador X's entitlement to and enjoyment of diplomatic privileges and immunities.

V

There remains the additional ground for Ambassador X's privileges and immunities arising from the Convention on the Privileges and Immunities of the United Nations. Section 11 of that Convention specifies the more important immunities attaching to "the representatives of Members", including "immunity from legal process of every kind", and, in subsection (*g*) thereof, explicitly extends to representatives, in addition, "such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy" except for certain exemptions from customs and excise duties and sales taxes. In other words, taken as a whole, Section 11 of the Convention in fact confers, except for the exemptions just mentioned, diplomatic privileges and immunities on the representatives of Members. The definition of "representatives" in Section 16, already referred to in the present letter, covers Ambassador X as a Special Adviser to the Permanent Mission of which he has been designated as a member.

The privileges and immunities referred to in Section 11 are enjoyed by representatives "while exercising their functions and during their journey to and from the

place of meeting". The Response of the Plaintiff appears to argue for a very narrow interpretation of the words "while exercising their functions". In the view of the Secretary-General, to interpret those words so as to limit them to times when the person concerned is actually doing something as part of his functions as a representative, for example, speaking in a United Nations meeting, leads to absurd and meaningless results making such an interpretation wholly untenable. The only reasonable interpretation is the "broad" one, namely to regard the words concerned as describing the whole period during which the person involved discharges his responsibilities. In this respect, reference may be made to an opinion of the United Nations Legal Counsel in 1961, which reads, in part, as follows:

> "...I have no hesitation in believing that it was the 'broad' interpretation that was intended by the authors of the Convention. This must follow from the fact that the expression 'while exercising their functions' is contained in the opening paragraph and qualifies each and all of the privileges and immunities provided in the subparagraphs, (*a*) through (*g*), that follow.
>
> "A glance at those subparagraphs will clearly show that the privileges and immunities provided by any of them would become meaningless if it is applicable only when the representative is 'actually doing something as a part of his functions' (e.g., is present in the room or building where the meeting... is being held). Such an interpretation would lead to the absurd conclusion that a representative, immediately after having performed an official function, or after having left the meeting room may, under paragraph (*a*) for example, be arrested, or detained, or have his personal baggage seized. By the same narrow interpretation, he may, the moment he left the meeting room, have his papers confiscated, or his right to use codes suspended, or his courier seized, or be conscripted into national service, etc. Should such a narrow interpretation prevail, the basic purpose of the Convention, which is to assure the representatives the independent exercise of their functions, would clearly be totally defeated.
>
> "The broader interpretation is also borne out by the fact that the phrase 'while exercising their functions' is immediately accompanied and complemented by the phrase 'and during their journey to and from the place of meeting'. In other words, 'while exercising' means during the entire period of presence in the State (not city) for reasons of the conference in question. This is logical because the journey' necessarily is that to and from the State, not the Conference hall. Only this interpretation avoids absurdity and only this is consistent with the immediately following reference in subsection (*a*) to 'personal baggage'. Therefore, in accordance with the general principle that a treaty must be interpreted to effectuate its purpose and not to lead to absurdity, it seems to me, without reference to other criteria of interpretation, that only the 'broad interpretation' should have been intended by the phrase in question." [*Yearbook of the International Law Commission, 1967*, Vol. II, p. 176, para. 87].

VI

In the light of the foregoing, it is the opinion of the Secretary-General that, under the rules of international law as expressed in the applicable international agreements, more particularly the Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations taken jointly or separately, Ambassador X enjoys the privileges and immunities of a diplomatic envoy in the host State, including immunity from legal process.

VII

The privileges and immunities of representatives of Members, as spelt out in Section 11 (*b*) of the Convention on the Privileges and Immunities of the United Nations, include "inviolability for all papers and documents". This inviolability is further specified in article 30, paragraph 2, of the Vienna Convention on Diplomatic Relations, of 18 April 1961,[142] which sets forth the rules of international law pertaining to diplomatic relations, and which is consequently authoritative in interpreting the relevant provisions of the Headquarters Agreement relating to the privileges and immunities of diplomatic envoys.

The Secretary-General considers that any records certified by Ambassador X to pertain to his official functions as a member of the Permanent Mission of which he has been designated as a member are inviolable and not subject to compulsory disclosure. Records enjoying inviolability, in the Secretary-General's view, may also encompass minutes of meetings and any memoranda, correspondence or instructions relating to the interests of these Member States either individually, or as a Group. There is no reason why an immunity which pertains to each Mission individually should not apply collectively to a group of such Missions when archives and papers pertinent to their activities as Member States are held in common.

VIII

The position of regional organizations or arrangements, such as the intergovernmental organization of which Ambassador X was designated as Permanent Observer, is expressly recognized in the Charter of the United Nations, Chapter VIII, Articles 52, 53 and 54, being devoted to this subject. Such organizations or arrangements are recognized, for instance, as a means through which the United Nations Security Council can encourage the pacific settlement of local disputes. Furthermore, the intergovernmental organization in question is represented as an observer at sessions of the General Assembly and the Economic and Social Council, pursuant to resolutions of these organs. It is also invited to many United Nations Conferences as an observer.

In view of the foregoing, it is natural that this intergovernmental organization should set up machinery, in the form of a Permanent Observer's Office, to maintain continuous liaison with the United Nations. The Permanent Observer, as an invitee to meetings of certain United Nations organs, enjoys in this capacity, in the Secretary-General's view, functional immunities necessary for the performance of his functions. While these immunities are not spelt out in detail in the Headquarters Agreement, or the Convention on the Privileges and Immunities of the United Nations, they flow by necessary intendment from Article 105 of the Charter. It can be argued with considerable cogency that such functional immunities, to have any real substance, should include inviolability for official papers and documents relating to an observer's relations with the United Nations. However, there would appear to be no necessity to expand upon this position in this letter, as the Secretary-General is firmly of the opinion that Ambassador X enjoys the full scope of the privileges and immunities of a diplomatic envoy. The United Nations trusts that this opinion will be upheld by the Court, if it finds it necessary, in the final outcome, to render a decision on this point.

26 August 1976

[142] *Ibid.*, vol. 500, p. 95.

27. QUESTION WHETHER MINIMUM WAGE LEGISLATION ENACTED IN A COUNTRY SHOULD BE DEEMED TO APPLY IN THE CASE OF FOREIGN DOMESTICS FORMING PART OF THE HOUSEHOLD OF DIPLOMATIC AGENTS OR INTERNATIONAL ORGANIZATION PERSONNEL WHILE STATIONED IN THE COUNTRY CONCERNED—RATIONALE UNDERLYING LEGISLATION ALLOWING ENTRY OF FOREIGN DOMESTICS OF DIPLOMATIC AGENTS AND INTERNATIONAL ORGANIZATION PERSONNEL IN THE COUNTRY WHERE THOSE OFFICIALS ARE STATIONED—REVIEW OF EXISTING PRACTICES

Letter to the Permanent Representative of a Member State

I wish to take this opportunity to bring to your attention a matter which is of very considerable concern to the United Nations, and, indeed, to the wider field of all intergovernmental organizations in your country, as well as to the etnire diplomatic and consular corps stationed therein. The matter relates to the question of whether or not local minimum wage legislation should be deemed to apply in the case of foreign domestics who form part of the households of diplomatic agents or international organization personnel while stationed in the country.

I am asking for your assistance in obtaining from the State Department confirmation of what we understand to have been a general assumption to date, namely that minimum wage legislation was not deemed to apply in the circumstances here concerned. The United Nations would also hope to be able to explore with the State Department at some convenient time suitable guidelines for the future regulation of this matter.

* * *

An element of considerable urgency exists in obtaining the Ministry's confirmation on the first of the foregoing points, as it may be most pertinent in the defence of a class action presently pending before the Courts of your country.

The defendants in the case are officials of the United Nations, together with their spouses, neither officials being citizens of the host State. They have had in their employ, as domestic servants, certain non-immigrant aliens, plaintiffs in the present action, who entered the country under the facilities provided by Federal legislation for the admission of the domestic staff of representatives to or of officers of intergovernmental organizations such as the United Nations.

The pertinent legislation, currently the Immigration and Nationality Act 1952 and the regulations made pursuant thereto, permits the entry of foreign domestics, and their temporary sojourn in the country as non-immigrant aliens, solely for the purpose of their employment with the representative or officer concerned. If such employment ceases, the domestic is to be repatriated. The legislation contains no provisions bearing upon the wages to be paid to these domestic employees.

* * *

The view that minimum wage legislation in a host State is not applicable in the circumstances here concerned is fully consistent—while the contrary position is not—with the whole rationale underlying legislation permitting the entry of domestic employees of diplomatic or international organization personnel to the country in which the employers are stationed in the performance of their duties. In permitting the entry of the domestics concerned, your country, for instance, has recognized that this is a necessary facility to accommodate the needs of a United Nations community which embraces an enormous diversity of culture, languages, customs, dietary habits and social organization. Persons within that community who require domestic help, for example in caring for children and preparing them for return to

their home countries, are obviously best served by nationals of their own country familiar with the national language and habits. The law thus allows such domestics to enter free of the restrictions normally imposed on aliens, this entry being for the sole purpose of employment with qualified employers, namely diplomatic or international organization personnel. These domestic cannot become part of the general labour force in the host State, their repatriation as already pointed out being required when their employment with a qualified employer ceases, and thus considerations of public policy which might be applicable to the general labour force do not necessarily apply.

* * *

Given the widely differing wage rates, both for employers and employees, in different countries of the world, it would in fact be in large measure frustrating the purpose of the entry procedures concerned to insist on the application of local minimum wage legislation to the domestics in question, particularly in a highly developed country such as your own country. It would be beyond the means, certainly of most of the personnel of international organizations, to pay the travel expenses of their domestics and then to be required to comply fully with local minimum wage standards. Anomalies would be created where domestics, brought into this country for brief and limited periods, might be entitled to hourly wages out of all proportion to what they could ever receive on their return home, a return which is mandated by the conditions of their entry visa. Further anomalies would arise in this country depending on the place of residence of the employer, given the absence of minimum wage legislation in some States, and the diversity of minimum wage scales in other States.

* * *

The rationale being the same for permitting the entry of the domestics of diplomatic personnel as it is for officers of intergovernmental organizations—indeed the basic enabling legislation makes no distinction in this respect—it follows that, if minimum wage legislation is taken to apply, it does so to all foreign domestics employed by the diplomatic, consular and alien international organization personnel in your country. It is neither logical nor fair to seek to apply such legislation in respect of domestics in the employ of international officials having only functional immunities—in fact, a small percentage of all the domestics involved—while not applying it in respect of the household staffs of diplomatic personnel. Leaving aside the question whether a functional immunity does or does not apply in respect of certain aspects of suits, such as the one which gives rise to this letter, it does not accord with accepted international law to determine the applicability in principle of local law by reference to whether or not a particular person enjoys complete or only partial immunity from the jurisdiction of local courts. The application of local law is a matter quite separate from the question of immunity from jurisdiction, and the issue of immunity should not serve to create a false distinction in this sphere.

* * *

We are not aware of the existence of any rule or practice in public international law pursuant to which diplomatic or consular agents—or persons in a similar position in the employ of intergovernmental organizations—are required to comply, in the matter of the wages of their alien domestics, with the provisions of the minimum wage laws of the country in which they are stationed. We have been unable to find any case law or diplomatic correspondence which supports such a view. No regulations of foreign services instructing diplomatic officers to apply such local legislation when abroad have been brought to our attention.

We have never been informed by our Officers here or in other countries, or by missions or delegations to the various United Nations offices throughout the world, that host States have sought to insist, either by notice of the applicability thereof or by judicial or other procedings, that local minimum wage laws apply to the foreign domestics of the representatives or staff members concerned. On the contrary, diplomatic and other practice seems to indicate that, as a matter of comity, local minimum wage legislation has not been applied to foreign domestics in the employ of embassies or their personnel, or of officials of intergovernmental organizations.

* * *

With considerations of the foregoing nature in mind, the Secretariat of the United Nations, and its members, have acted on the assumption that minimum wage legislation was not *stricto sensu* applicable to foreign domestic employees who entered this country under what is now known as a G-5 visa.[143] This assumption has never been challenged in any way by the State Department, which has in fact been aware of the existing situation and which, while it has notified the Secretariat of the applicability of social security and tax legislation to the domestic concerned, has never informed us of the existence, much less the applicability, of Federal or State minimum wage legislation. Indeed, the history of the contracts and relations between the Secretariat and the Federal authorities on the question of G-5 visas bears out the conclusion that it was a common opinion that minimum wage legislation was not applicable. To illustrate this further, it is useful at this point to look at that history in more detail.

As indicated earlier in this letter, provision for the G-5 visa is made in Federal legislation, on the analogy of the A-3 visa for servants of diplomatic and consular personnel accredited to your Government,[144] and no reference to domestic employees is made in the Headquarters Agreement between the United Nations and your country or in the Convention on the Privileges and Immunities of the United Nations, to which your country is a party. There being no reference to domestic employees in the pertinent international agreements, it was initially left to staff members to make direct application to the immigration autharities for the issue of such visas, without any United Nations involvement. However, in order to assist the host State in the issuance of G-4* and G-5 visas, the Secretariat established a Visa Committee in 1947, as an informal body of an advisory character, and that Committee has functioned since that time. While the Committee performs a service for staff members in the handling of applications for G-5 visas, it was established and has continued to function primarily as a facility for assisting the host State in ascertaining the *bona fide* character of applications, in the granting of visas in accordance with uniform criteria arrived at in consultation with the host State, and in seeking necessary assurances from those concerned that the terms and conditions for the granting of a visa, particularly in respect of matters such as repatriation, will be observed.

While it has been assumed that minimum wage legislation did not apply, this does not mean that the United Nations has not throughout been aware of the need to secure just and fair conditions for G-5 visa holders, both in the interests of the persons concerned and of the public image of the Organization. The Visa Committee

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[143] The G-5 visa is issued to attendants and servants of (1) the diplomatic staff of permanent mission, (2) United Nations officials having diplomatic status and (3) other foreign United Nations officials.

[144] The A-3 visa is issued to attendants and servants of the diplomatic corps in the capital of the country concerned and the consular corps throughout the country.

* The question of G-4 visas does not arise in the present connexion, the remarks contained herein are therefore confined to procedures for G-5 visas.

has, therefore, in considering applications for G-5 visas, required that the potential recipients of such visas be informed in advance of locally prevailing wage scales and conditions of work, so that the prospective employee could arrive at an informed decision on whether or not to accept the arrangements proposed by the staff member concerned. No fixed criteria for wages have been insisted upon by the Committee —this being left to the staff member and the prospective employee concerned— although staff members applying to the Committee have been told informally by the Secretary of the Committee that wages over and above a certain minimum, which has been raised from time to time, should be paid if a favourable outcome of the Committee's consideration of the application were to be expected.

The Visa Committee's assumptions in the above respects clearly seem to have enjoyed the full concurrence and support of the competent authorities of your country. Thus, for example, a meeting on visa matters was held at your Mission on 16 September 1968, in which representatives of the Mission and of the Secretariat participated. The minutes of that meeting in our possession disclose that the representatives of your country, speaking of G-5 visa holders, said that:

> "(*a*) All household employees not paid by government funds are subject to Social Security coverage and taxes must be paid.
>
> "(*b*) *Wages*—The... Government does not wish to be in the position of telling the United Nations staff what to pay their servants, but wages should be reasonable and servants on G-5 visas must be informed regarding prevailing rates for household help."

These remarks were made at a time when the Department of Labor of your country seems to have had under consideration a directive requiring the prospective employer of a foreign domestic to sign a contract for the "prevailing wage". Furthermore, the State Department has never given the slightest indication whatsoever, from 1968 up to the present, that it has departed in any way from the above position in the matter of wages. This is despite the extension, in the intervening years, of State and Federal minimum wage legislation to domestic employees. It is also despite the fact that, in certain countries, according to the information available to the United Nations Travel Unit, the Consular officials of your country refuse to grant a G-5 visa to a potential domestic of a United Nations official until they have been supplied with a copy of the contract between the employer and the employee which specifies the wages to be paid. Finally, it is despite the fact that, when a renewal form is filed each year by a G-5 visa holder with the Immigration and Naturalization Service, that form contains a specific box which is completed by each applicant containing information on "Income per week". It follows that the authorities of your country have considered the remuneration of G-5 domestics and have had ample information regarding the practice in this respect. This practice, including all cases where minimum wage standards may not have been met, has not been questioned by the competent consular or immigration and naturalization service personnel. In the face of such a situation, failure to notify the United Nations of any possible change in position regarding the application of minimum wage legislation would be a lapse which could have very serious consequences for the United Nations.

We have been led to believe that the host State has much appreciated the assistance of the Visa Committee in the matter of G-5 visas, and that it would be an occasion for regret on its part if the Secretariat finds it necessary to abolish the Committee and to return to the earlier procedures whereby staff members would be required to address their requests for G-5 visas directly to the immigration authorities, without the intervention in any respect of the Organization. Such a course of action may, however, be inevitable if the present matter is not quickly resolved. In

the prevailing uncertainty, the Secretariat cannot assume any responsibility in advising staff members on the terms and conditions of service of G-5 visa holders lest that advice, in turn, could be held to be misleading and thus possibly giving rise to the argument, cognizable in the United Nations Administrative Tribunal, that the Organization is liable for any damage which the employer or employee might have suffered as a consequence.

* * *

An intergovernmental organization such as the United Nations is entitled to expect that the relevant authorities of the host country will always inform the Organization of the enactment of new or the extension of old legislation to matters, such as the present one, which are of immediate and direct concern to the Organization. The Secretariat of the United Nations cannot, nor, indeed, would it be compatible with its functions for it to scrutinize all Federal and State laws and to determine their applicability or otherwise to the Organization. Where the authorized channel of communication, namely the State Department, has taken a position on a matter, as it has in the present case, the Secretariat is bound to assume that the position remains in effect until notified to the contrary.

In the above circumstances, the Secretariat is entitled to rely on and, indeed, we are sure it can expect, the active assistance of the State Department in resolving before the Courts an issue of the present nature. Most helpful, in this respect, would be the confirmation sought at the outset of this letter that the State Department shares the assumption, at least for the past, that minimum wage legislation was never intended to apply in the case of G-5 visa holders who have entered and remain in this country under a special legislative provision made in the interests of the foreign relations of the host State. Early receipt of this confirmation, for possible transmission to the Courts should the proceedings in the present case continue, will then permit us to exchange views and to enter into consultations on the question of the regulation of this matter in the future.

17 November 1976

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28. IMMUNITY FROM SUIT AND LEGAL PROCESS OF STAFF MEMBERS OF THE UNITED NATIONS IN RESPECT OF ACTS PERFORMED BY THEM IN THEIR OFFICIAL CAPACITY —SUCH IMMUNITY IS NOT A BAR TO THE APPEARANCE OF A STAFF MEMBER AS A WITNESS IN JUDICIAL PROCEEDINGS—IT MAY BE WAIVED BY THE SECRETARY-GENERAL IF, IN HIS OPINION, IT WOULD IMPEDE THE COURSE OF JUSTICE AND CAN BE WAIVED WITHOUT PREJUDICE TO THE INTERESTS OF THE UNITED NATIONS

Letter to a judge, Criminal Court of the City of New York

I wish to refer to a case against a private individual in which a Security Officer of the United Nations Secretariat is the complainant. A hearing in this case was held before you in the Criminal Court of the City of New York on 12 December 1975.

I am directed by the Secretary-General of the United Nations to respond to the request of the Court for a statement of the Secretariat's opinion on the extent of the immunity from jurisdiction which is possessed by the complainant during the hearing of the case.

The said complainant is an official of the United Nations in the sense of Section 17 of the Convention on the Privileges and Immunities of the United Nations

and therefore enjoys the privileges and immunities specified in Section 18 of the Convention. Of particular relevance is Section 18 (*a*) which states that officials of the United Nations shall

> "(*a*) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity."

The Convention on the Privileges and Immunities of the United Nations was acceded to by the United States of America on 29 April 1970.

Already in 1945, however, the United States Congress had enacted the *International Organizations Immunities Act,* Title 22 U.S.C.A. §§ 288-288f; Public Law 291, 79th Congress. Section 288 d (*b*) provides immunity from jurisdiction to United Nations officials to a similar extent as does the above quoted Section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations; Section 288 d (*b*) reads:

> "(*b*) Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned."

It is therefore clear that being an officer and employee of the United Nations Secretariat, the complainant enjoys immunity from suit and legal process regarding all acts performed by him in his official capacity as an officer in the Security Service of the Secretariat.

It is understood by the Secretariat that the District Attorney intends to call the complainant as a witness in order to substantiate the charges against the defendant.

In the opinion of the Secretariat any immunity possessed by the complainant is not a bar to his appearance as a witness. The Secretariat is agreeable to co-operate with the local law enforcement authorities in this matter and has directed the staff member concerned to appear voluntarily, as and when requested by the Court, and to testify as to his personal knowledge of facts and circumstances relevant to the complaint and the charge. In so doing, the Secretariat understands that the staff member will be subject to the rules and procedures of the Court, including cross-examination by the defense, with regard to all issues concerning the truthfulness of the testimony.

In response to the express request of the Court for the Secretariat's opinion on whether the said staff member—were he to appear as a witness—would be immune from contempt of court citations, perjury charges or "cross-complaints", I wish to call attention to the conditions under which the Secretary-General is authorized, indeed obliged, to waive the immunity of an official. In this respect Section 20 of the Convention on the Privileges and Immunities of the United Nations states, *inter alia*:

> "... The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations..."

It appears, however, that the above-quoted provision does not contain authority for the Secretary-General to waive immunity on purely hypothetical grounds, or even prior to his full knowledge of the legal and actual facts at issue, since he must

determine the reasons why "the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations".

In previous cases immunities granted to diplomatic personnel or officials of international organizations have not been a bar to such persons testifying voluntarily as witnesses. As a recent example from practice I refer to a case which was heard in New York City Criminal Court, Part III, and in which United Nations officials from the Secretariat's Security Service testified as witnesses against defendants on 15 September 1970.

8 January 1976

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29. DECISION RENDERED BY A CRIMINAL COURT OF THE UNITED STATES IN A CASE INVOLVING A UNITED NATIONS STAFF MEMBER APPEARING AS COMPLAINANT ON BEHALF OF THE ORGANIZATION—IT IS EXCLUSIVELY FOR THE SECRETARY-GENERAL AND NOT FOR THE JUDICIAL AUTHORITIES OF A HOST STATE TO DETERMINE WHETHER, IN ANY GIVEN INSTANCE, A STAFF MEMBER HAS PERFORMED AN OFFICIAL ACT OR HAS ACTED IN EXCESS OF AUTHORITY AND WHETHER IMMUNITY SHOULD BE WAIVED—PROCEDURES AVAILABLE FOR THE SETTLEMENT OF DISPUTES WHICH MIGHT ARISE FROM DETERMINATIONS OF THE SECRETARY-GENERAL IN THOSE RESPECTS

Letter to the Permanent Representative of a Member State

I have the honour to refer to a decision rendered in the Criminal Court of the City of New York, on 19 January 1976 in the case of the *People of the State of New York* v. *Mark S. Weiner* (published 20 January 1976 under New York County, Criminal Court, Trial Term, Part 17).[145] In this case a United Nations Security Officer is appearing on behalf of the United Nations as complainant, in a matter relating to his official duties, and the Judge's decision contains a number of remarks which bear upon the privileges and immunities of the United Nations, and which give rise to the most serious concern on the part of the Organization. This concern compels me to bring the matter to your attention, and to place on record the position of the Secretary-General on the major legal issues involved.

Facts of the case

Before turning to the legal issues, it is necessary to give a brief account of the facts surrounding the case.

On Friday, 14 November 1975, at approximately 0300 a.m., the defendant in the case in question sprayed red paint on the wall dividing the circular driveway to the Secretariat building at the entrance to the Headquarters Division at 43rd Street. He was immediately detained by United Nations Security Officers, who also called in police officers from the 17th precinct of New York City Police Department. The defendant was then arrested, charged with criminal mischief (a class A misdemeanor under Section 145.00 of New York Penal Law) and he was taken to the 17th precinct station in the custody of the N.Y.C.P.D. Officers.

As already indicated, one of the United Nations Security Officers who detained the defendant is the chief witness and complainant on behalf of the Secretariat. The Security Officer therefore was directed by his supervisors to appear voluntarily, as

[145] 378 N.Y.S. 2d 966. For a summary of the decision, see p. 249 of this *Yearbook*.

and when requested by the Court, and to testify as to his personal knowledge of facts and circumstances relevant to the complaint and the charge.

There have been four hearings in the case, all of which were held before the same Judge. Responding to pleadings by Counsel for the defendant, the Court, at the hearing held on 25 November 1975, requested the Secretariat to submit a legal memorandum on the question of the Court's jurisdiction over acts against United Nations property situated within the Headquarters District. On 9 December, I, as United Nations Legal Counsel, wrote to the Judge stating the Secretariat's view on the jurisdictional issue and,[146] at the hearing held on 12 December 1975, the Judge indicated that he did not intend to sustain the objections made against the Court's jurisdiction.

At the hearing held on 12 December, Counsel for the defendant raised objections to the admission of the testimony by the United Nations Security Officer, who was present, on the grounds of the Security Officer's immunity from jurisdiction for official acts. As a result of this objection, the Court requested the Secretariat to submit a further legal memorandum on the extent of the immunity from jurisdiction possessed by the Security Officer in connexion with his appearance as a witness for the prosecution in the criminal proceeding against the defendant. The Judge ruled that for the Court to proceed with the case, the Secretariat should state in a memorandum its view on whether the Security Officer had acted in his official capacity and whether he—were he to appear as a witness—would be immune from contempt of court citations, perjury charges or "cross complaints".

Pursuant to this request, on 8 January 1976, the Officer-in-charge of the Office of Legal Affairs wrote to the Judge stating the Secretariat's position on the extent of the immunity from jurisdiction enjoyed by United Nations officials appearing voluntarily as witnesses in criminal proceedings.[147]

In his written ruling on 19 January 1976, referred to at the outset of this letter, the Judge denied the motion by the defense to dismiss for lack of jurisdiction and ordered a hearing held on 9 February 1976.

At the hearing on 9 February, the District Attorney proposed adjournment of the case in contemplation of dismissal. However, this was refused by the defendant and his attorney, both of whom insisted on a full hearing. The Judge fixed such a hearing for 27 February 1976, at 9:30 a.m.

Legal position of the Secretariat

The Secretariat has no comments on the actual decision of the Judge to deny the motion to dismiss for lack of jurisdiction in his ruling of 19 January. Its concern, however, is raised by some of the reasoning advanced on the matter of the Security Officer's privileges and immunities. In effect, it would seem, the Judge was arguing that it was in the last instance for him, and not for the Secretary-General, to determine whether the Security Officer was acting in an official capacity and, furthermore, whether the Guard had exceeded his authority through the use of excessive force, such excess, in the Judge's view, rendering inapplicable the Guard's immunity for official acts. While the Judge's remarks are in the nature of *obiter dicta,* their circulation in published form, without the Secretariat's contrary views being on record, could have a most serious effect upon the position of United Nations officials in countries throughout the world.

First and foremost, in the view of the United Nations Secretariat, it is exclusively for the Secretary-General to determine the extent of the authority, duties and functions

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[146] See *Juridical Yearbook*, 1975, p. 157.

[147] The letter in question is reproduced on p. 234 of this *Yearbook.*

of United Nations officials. These matters cannot be determined by, or be subject to scrutiny in national courts. It is clear that if such courts could over-rule the Secretary-General's determination that an act was "official", a mass of conflicting decisions would be inevitable, given the many countries in which the Organization operates. In many cases it would be tantamount to a total denial of immunity.

Likewise, the Secretariat cannot accept that what is otherwise an "official act" can be determined by a local court to have ceased to have been such an act because of alleged excess of authority. This again, would be tantamount to a total denial of immunity. It may be noted, in addition to what is said in the paragraphs that follow, that the Secretariat has its own disciplinary procedures in cases where an official has acted in excess of his authority, and also the power to waive the immunity particularly where the course of justice would otherwise be impeded. The Secretariat realizes that cases of conflict may arise as to whether an act was "official" or whether an official had overstepped his authority, but the Convention on the Privileges and Immunities of the United Nations expressly provides procedures for waiver of immunity, or for the settlement of disputes by the International Court of Justice. These are the appropriate procedures for settlement, not the over-ruling of the Secretary-General's determinations by national courts.

In the present case, the Secretary-General at no point waived the immunity of the Security Officer concerned, under Section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations[148] and also Section 288 d (*b*) of the United States International Organizations Immunities Act.* The authority granted in Section 20 of the Convention to waive the immunity of any official is enjoyed exclusively by the Secretary-General, and waiver cannot be effected instead by the Court. That this is a reasonable understanding of the Convention is borne out not only by the specification in Section 20 of the conditions under which the Secretary-General may waive, but also by the provisions in Article VII for the settlement of disputes regarding all differences arising out of the interpretation or application of the Convention. As already mentioned, the Convention foresees that disputes are not to be settled by the courts of a Member State party to the Convention, but that differences between the United Nations on the one hand and a Member on the other hand are to be decided by an advisory opinion of the International Court of Justice. The fact that such a procedure is available conclusively demonstrates the weakness of the assumption by the Judge that national courts may determine the extent of immunity from jurisdiction enjoyed by a United Nations official acting in his official capacity as directed by the Secretary-General.

I trust that the foregoing will serve to explain the very real concern which the Secretariat feels over the reasoning of the Judge, and its need to place its absolute reservations to that reasoning on record. The Secretariat cannot accept an approach which would submit the official acts of its officials to the scrutiny of national courts throughout the world. To do so, as already pointed out, would be tantamount to

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

* The opinion of the Judge is inaccurate and misleading in not referring to these sources of the immunity, which were made plain in the Secretariat's letter to him of 8 January 1976. The Judge instead refers in his opinion to Articles 104 and 105 of the Charter and the Headquarters Agreement of 1947. The Charter articles are only in the most general terms, which are subsequently spelt out in specific detail in the Convention on Privileges and Immunities, and the Headquarters Agreement does not deal with the privileges and immunities of United Nations officials. The Judge is further in error when he cites the decision in *United States ex. rel. Casanova* v. *Fitzpatrick* as a precedent, as this case related to a member of a permanent mission, and turned on the interpretation of Section 15 of the Headquarters Agreement, not upon the Convention on the Privileges and Immunities of the United Nations which is here involved.

stripping officials of their immunity. The Organization is frequently operating in areas of tension and conflict, in which immunity for official acts is essential if United Nations officials are to function at all.

Finally, I trust you will agree it is crucial that testimony by United Nations Security Officers may be admitted and accepted as competent by criminal courts in cases that involve the safety of United Nations personnel or property. The absolute need for such testimony, both by officials and by members of permanent missions in relation to complaints made by such missions, has been constantly stressed by United States representatives in the Committee on Relations with the Host Country. The Secretariat, however, would be most reluctant to instruct its officials to testify if it is accepted that the particular Court before which they are to appear may strip them of the proper immunities accorded to them by international and national law.

I very much hope that, in the light of the above, we may arrive at a mutual understanding on the procedures and issues to be taken into account when United Nations officials are called upon to testify as witnesses in courts in the United States.

11 February 1976

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30. Determination for United Nations purposes of the marital status of a staff member

Letter to the Director of Administration, Office of the United Nations High Commissioner for Refugees

I refer to your letter of 8 December concerning the marital status of a staff member.

A review of the case as it appears from the files of the Office of Legal Affairs and from the papers which we have received from the Geneva Personnel Office indicate the following:

—The staff member concerned, a national of Uruguay, married a national of the United Kingdom, in New York State in 1953; the marriage was registered with the Uruguayan Consulate in New York.

—He obtained a divorce, which became final on 7 January 1969, in the State of Tlaxcala in Mexico where neither he nor his wife resided. He appeared through his attorney and accepted the jurisdiction of the court; his wife did not participate at all in the proceedings.

—On 18 January 1969 a marriage certificate was issued by the Registrar of the Court in Tlaxcala declaring the marriage of the staff member and a national of the United Kingdom, by a proxy ceremony where both parties appeared through representatives.

—In June 1969 the first wife wrote to the United Nations Personnel Office in New York stating her position that her marital status remained unchanged and referring to her status for such United Nations purposes as visa, medical insurance, pension entitlements, etc.

—In October 1969 the staff member requested the Geneva Personnel Office to change his marital status for United Nations purposes to reflect his divorce and remarriage as evidenced by the translations from the Tlaxcala documents of divorce and marriage which he provided.

—In April 1970 he was advised by the Geneva Office of Personnel, after consultation with the Office of Legal Affairs, that a change in his marital status for United Nations administrative purposes would not in the circumstances of his case be made without some indication from him that this would be consistent with his marital status as recognized in Uruguay.

It is the usual policy of the United Nations to intervene as little as possible in the private affairs of staff members. On the other hand the marital status of a staff member and the identity of a staff member's spouse do affect legal rights and obligations under the Staff and Pension Regulations and Rules as between the United Nations and the staff member and as between the United Nations and the spouse. The occasion therefore sometimes arises for an administrative determination by the United Nations of a staff member's marital status involving the complexities of private international law.

The United Nations administration was at the outset of this case placed on notice of a very substantial question as to the validity of the second marriage by the divorce and remarriage documents which the staff member originally presented as well as by the first wife's letter; and the United Nations could not therefore simply acknowledge the second wife as the staff member's wife for United Nations purposes without examination of the legal issues.

Such examination entailed reference to his personal legal status under the laws of his home country, Uruguay, where the generally recognized principle that a marriage is valid if valid where performed is subject to the equally general exception that the law of the "matrimonial domicile" governs the dissolution of a prior marriage. In my view, which is of course based on the documented material at hand, there is a strong legal basis for continuing to recognize the first wife as the legal wife. So far as we have been able to determine, the second marriage would not be valid and the first marriage would be still in effect in Uruguay as well as in Argentina (where the staff member lived with his first wife prior to the divorce), the United Kingdom (the country of nationality of the two women concerned), New York (the place of the first marriage) and indeed in most jurisdictions other than Mexico. I cannot therefore justify from the legal viewpoint an administrative decision changing the staff member's marital status for the purposes of United Nations Staff and Pension Regulations and Rules.

The staff member concerned may find advantages in having the matter settled, not only now but for the future, by a determination of the United Nations Administrative Tribunal. He might accordingly consider taking an appeal under Chapter 11 of the Staff Regulations and Rules from the decision denying his request regarding his marital status. In his request for reconsideration he might wish to submit documents or information (such as opinions on the case based on Uruguayan law) which might provide a legal basis for a different administrative decision. If the final decision is nonetheless maintained, then I think it entirely likely that the Secretary-General would be agreeable to an application being submitted directly to the Tribunal under Article 7 (1) of its Statute without Joint Appeals Board proceedings.

28 January 1976

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

1. INTERNATIONAL LABOUR ORGANISATION

The following memoranda, dealing with the interpretation of International Labour Conventions, were drawn up by the International Labour Office at the request of Governments:

(*a*) Memorandum on the Employment Injury Benefits Convention, 1964 (No. 121), drawn up at the request of the Government of Norway, 26 July 1976. Document GB.203/19/3; 203rd Session of the Governing Body, May-June 1977.

(*b*) Memorandum on the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), drawn up at the request of the Government of Sweden, 27 July 1976. Document GB.203/19/3; 203rd Session of the Governing Body, May-June 1977.

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2. UNIVERSAL POSTAL UNION

1. QUESTION WHETHER ARTICLES WHICH ARE PROHIBITED UNDER ARTICLE 33 OF THE UNIVERSAL POSTAL CONVENTION MAY BE DELIVERED

An Administration inquired whether a postal item containing opium, morphine, cocaine or other narcotics might be delivered to the addressee. The International Bureau replied as follows:

Article 33, paragraph 3, of the Convention establishes a general principle whereby prohibited articles which have been wrongly accepted are dealt with in accordance with the legislation of the country of the Administration establishing their presence. Under paragraph 4 of the same article, this general principle is subject to restrictions in certain cases, such as those specified in paragraph 2 (*b*) (items containing opium, morphine, cocaine and other narcotics), which may in no circumstances be delivered to the addressee or returned to origin. In other words, even if internal legislation permits the delivery of prohibited articles to the addressee in some cases, such delivery may in no circumstances be effected if the items in question contain opium, morphine, cocaine or other narcotics. However, the latter prohibition relates only to the delivery of postal items in the usual sense and in accordance with postal practice. It does not therefore preclude "delivery" for any other purpose in accordance with national legislation.

2. QUESTION CONCERNING PERMISSIBLE ANNOTATIONS ON PRINTED PAPERS UNDER ARTICLE 126, PARAGRAPH 1, OF THE DETAILED REGULATIONS FOR IMPLEMENTING THE UNIVERSAL POSTAL CONVENTION

An Administration inquired whether it was permissible under article 126, paragraph 1, of the Detailed Regulations for implementing the Convention:

(*a*) To add, after printing, the name or the name and address of the addressee in the salutation or in the printed text;

(*b*) To insert these particulars in more than one place;

(*c*) To show more than one serial number on printed papers.

The international Bureau replied as follows:

It should first of all be noted, in this connexion, that article 126 gives an exhaustive list of the exceptions to the general principles governing the definition of printed papers. Its terms must therefore be strictly complied with. As regards the question raised in subparagraph (*a*), a sender could at one time have claimed that the wording of the relevant provisions of the Convention and of the Detailed Regulations permitted him to send through the international postal service, at the printed paper rate, a printed text to which he had added the name, or the name and address, of the addressee either in the salutation or in the text itself. However, this possibility no longer exists. In accordance with article 126, paragraph 3, of the Detailed Regulations for implementing the Lausanne Convention, the additions referred to in paragraphs 1 and 2 of the article, including the name and address of the addressee, should not be of such a nature as to constitute a conventional language or, in other words, of such a nature as to impart to the printed paper the character of current personal correspondence. Clearly, the addition to a printed text of the name or the name and address of the addressee, whether in the salutation or in the text itself, imparts to the text the character of current personal correspondence. It follows that such additions may only be made outside the printed text and the printed salutation.

In view of this conclusion, the question whether the name and address of the addressee may be inserted in more than one place (the question raised in subparagraph (*b*)) is probably irrelevant. However, the answer would seem to be that, in compliance with the spirit of the Regulations, these particulars should appear only once.

With regard to the question raised in subparagraph (*c*), the text of article 126, paragraph 1 (*c*), specifies that it is permissible to show "the" serial or registration number. In other words, only one serial or registration number is admissible.
