*Extract from:*

# UNITED NATIONS
# JURIDICAL YEARBOOK

## 1983

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

## Chapter VI

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

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

1. QUESTION WHETHER A TRANSNATIONAL CORPORATION IS LEGALLY OBLIGATED TO "COMPLY WITH" OR TO "OBSERVE" A UNITED NATIONS RESOLUTION—LEGAL CHARACTER OF UNITED NATIONS RESOLUTIONS

*Memorandum to the Executive Director of the Centre on Transnational Corporations*

1. I refer to your memorandum of 2 May 1983 on the code of conduct of transnational corporations in which you asked my view on the following formulation:

> "Transnational corporations should comply with United Nations Security Council decisions concerning their activities in [name of a Territory] and, where applicable, observe all other relevant United Nations resolutions."

2. The proposed formulation raises a complicated question of whether a transnational corporation is legally obligated to "comply with" or to "observe" a United Nations resolution. The determination of the legal effects of a particular United Nations resolution is a complex matter requiring in-depth study of the nature, intention and purpose of the resolution involved. Your present formulation is further complicated by the fact that it refers not only to Security Council resolutions but also to "all other relevant United Nations resolutions". As you know, not all United Nations resolutions have binding force and even where a resolution is binding the problem arises whether it can be directly binding on transnational corporations. A decision of the Security Council under Chapter VII, for example, is a binding act of an international character and creates an obligation on the States to which it is addressed. But even Security Council decisions of this nature are not self-executing in the sense that they can be directly enforced by the Security Council within the jurisdiction of States, nor automatically binding on transnational corporations before first becoming part of domestic law. Such decisions create a binding international legal obligation, but the manner in which this obligation is translated into domestic law varies according to the legal system which prevails in each particular jurisdiction.

3. While some national constitutions contain general references to international organizations, such provisions usually fall short of incorporating decisions of international organizations into domestic law in the same way as many constitutions do with regard to treaties and international customs. Generally speaking, therefore, some domestic action of an executive, legislative or administrative nature is required to translate United Nations decisions into binding and enforceable domestic law.

4. On several occasions General Assembly and/or Security Council resolutions have condemned certain actions of certain transnational corporations (e.g., General Assembly resolution 35/206 C of 16 December 1980, para. 5). But whenever transnational corporations are called upon to take or to refrain from taking certain actions, the General Assembly and the Security Council resolutions normally impose the obligation on the States or Governments concerned (e.g., Security Council resolution 418 (1977) of 4 November 1977). As a rule, United Nations resolutions do not address directly transnational corporations on such matters.

5. Several ways may be considered to deal with the problem you raise. You may wish to consider restricting the reference to *binding* resolutions, or replacing *inter alia* "comply with" and "observe"

by such words as "taking into account" or "should not act in such a way as to be inconsistent with the decision . . . " Even with these changes, the formulation is not completely satisfactory for obvious reasons. An alternative might be to transfer this paragraph, which is now under chapter III, dealing with actions of transnational corporations, to chapter IV or V, dealing with the treatment of transnational corporations and international corporations respectively. It would seem more appropriate to deal with this question in either of these two chapters, where the States or Governments may be called upon, for example, to require transnational corporations not to act in contravention of United Nations resolutions.

6 May 1983

---

2. LEGAL MEANING AND IMPLICATIONS OF THE WORDS "EXISTING INTERNATIONALLY RECOGNIZED" AND "EXISTING INTERNATIONAL" AS QUALIFICATIONS OF "BOUNDARIES" IN, RESPECTIVELY, THE 1981 DECLARATION ON THE INADMISSIBILITY OF INTERVENTION AND INTERFERENCE IN THE INTERNAL AFFAIRS OF STATES AND THE 1970 DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

*Memorandum to the Under-Secretary-General for Special Political Affairs*

1. I refer to your memorandum dated 5 May 1983, in which you requested our opinion on the legal meaning and implications of the words "existing internationally recognized" and "existing international" as qualifications of "boundaries" in, respectively, paragraph 2, II, (*a*) of the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (General Assembly resolution 36/103 of 9 December 1981) and the fourth paragraph of the section devoted to the principle of non-use of force in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970). You also asked us to consider the legal implications of referring in any particular text to the inviolability of "international boundaries" without further qualifications.

2. We should like to note first that the general prohibition of the threat or use of force is a well-established rule of international law as evidenced in such important legal documents as the Kellogg-Briand Pact of 1928,[1] the Rio de Janeiro Anti-War Treaty (Non-Aggression and Conciliation) of 1933[2] and the Helsinki Final Act of the Conference on Security and Co-operation in Europe (1975).[3] This customary rule is restated and reinforced in singular clarity in Article 2, paragraph 4, of the Charter of the United Nations:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

Under the Charter, the use of force is justified only in two situations: self-defence (Article 51) and actions authorized by the Security Council under Chapter VII of the Charter. Otherwise this prohibition is comprehensive and all-embracing. It prohibits use of force under all circumstances, including violation of frontiers by force. Furthermore, the obligation is to be observed under all circumstances, irrespective of and without prejudice to the substantive issues or merits of the case. It is also generally recognized that, as a corollary, all disputes, including territorial disputes, should be settled by peaceful means. It should be stressed that the threat or use of force is prohibited as a means of realizing claims and settling disputes. That prohibition does not itself relate to or prejudice the existence of claims and disputes. The fact that the threat or use of force in international relations is prohibited as a means of realizing claims and settling disputes with respect to international boundaries does not in any way imply that such claims and disputes themselves are not legitimate under international law. The essence is that territorial claims cannot be enforced and boundary disputes cannot be settled

by the use of force. It follows logically that the inadmissibility of the threat or use of force for settlement of boundary disputes or the enforcement of territorial claims does not prove anything regarding the recognition or non-recognition of the boundaries in question. The prohibition of the threat or use of force applies to all existing boundaries, generally recognized or not, which in fact separate one State from another. This has been accepted in international practice and supported by opinions expressed by well-known international jurists.[4] It suffices to refer to the Helsinki Final Act of 1975, which lists in its Declaration on Principles Guiding Relations between Participating States inviolability of frontiers (principle III) in connection with the non-use of force (principle II) but which contains also the notion of the "peaceful change" of territorial jurisdiction (principle I). The States participating in the Conference on Security and Co-operation in Europe found this acceptable in spite of the existence of a number of frontiers in Europe the origins, character or status of which continued, or continue, to be contested. In this connection we should also like to point to the importance which the Organization of African Unity and the African States attribute to the inviolability of the existing colonial boundaries quite irrespective of the recognition of the lawfulness of their origins.[5]

3. The legislative history of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex) confirms this view. As you know, the Declaration was the product of several years of careful work and detailed negotiations in the Special Committee appointed for preparing the Declaration. The General Assembly unanimously adopted the instrument and many States have since regarded it as an important political and legal document and a source of international law.

4. In the initial stage of formulating the 1970 Declaration on Friendly Relations, there was immediate agreement in the Special Committee on the unqualified nature of the principle of inviolability of international boundaries as a basic concept. Several States suggested that the concept be extended even further to cases where only "international lines of demarcation" existed. However, several other States resisted this proposal. During the discussions, it was stressed that the objective of the principle of non-use of force was to prohibit the violation of all boundaries, even those of a *de facto* character. It was also pointed out in this connection that what is the legal status of such boundaries and whether or not they are recognized as such by the parties concerned was considered as irrelevant to the application of that principle. Although various compromise formulations were subsequently put forward (including the phrase "internationally agreed lines of demarcation"), none proved to be generally acceptable. After several years of further negotiations, it was decided to leave the statement of the general principle of the inviolability of existing international boundaries untouched but to add a further paragraph stating that:

> "Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed a prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character."

5. As to the 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States,[6] the first draft text submitted to the First Committee in 1979 by the States members of the Movement of Non-Aligned Countries (A/34/827, para. 9) did not contain any reference to the inviolability of boundaries. Nor was it included in the 1980 negotiating text (A/C.1/35/WG/CRP.1). The reference to the inviolability of "internationally recognized boundaries" appeared only in the 1981 text submitted by the Chairman (Guyana) of the *ad hoc* working group (A/C.1/36/WG/CRP.1/Rev.1). The records do not contain an explanation or interpretative statement on this point. Venezuela in this connection criticized the text for its lack of reference to the existence of disputes on territorial matters still pending and not yet resolved (A/C.1/36/PV.51, p. 46). We can only stress the fact that nothing speaks in favour of any intention of the authors to exclude the not specifically recognized boundaries from the prohibition of the threat or use of force. All they did was to underline the applicability of the rule reflected in Article 2, paragraph 4, of the Charter of the United Nations to recognized boundaries. In this respect we would like to draw attention to the fact that the exemption of non-recognized boundaries from the prohibition of the threat or use of force would create a

dangerous hole in this rule, a hole which would be all the more dangerous by the absence of a clear definition of what constitutes recognition of a boundary in international law.

6. The common element between the two phrases is "existing . . . boundaries"; they differ in the adjectives: "international" (1970 Declaration on Friendly Relations) and "internationally recognized" (1981 Declaration on the Inadmissibility of Intervention). The term "existing international boundaries" refers to *de facto* boundaries between States or countries regardless of their status in law and irrespective of the position taken by the parties concerned thereon. While the term "existing internationally recognized boundaries" retains the word "existing" (i.e., the *de facto* character of the boundaries), it requires the additional element of recognition; it therefore limits the concept to those boundaries which are "internationally recognized". The scope of the latter phrase is consequently more restrictive than that of the former, since not all "international boundaries" are "internationally recognized".

7. The phrase "internationally recognized" is itself vague and ambiguous. It is far from clear, for example, whether the phrase means recognition by more than one State; furthermore, in a particular situation does it require recognition by the parties or one of the parties directly involved? A logical and pragmatic interpretation would be that the position of the parties directly involved is an essential element. It is also not entirely clear what constitutes recognition. A declaration by the parties directly concerned recognizing a boundary would be sufficient, but many other forms of recognition under international law may also be envisaged.

8. Since the phrase "internationally recognized" is inherently ambiguous when it is injected into the principle of inviolability of boundaries, a State may negate the application of the principle by simply arguing that it does not recognize the boundary in question. Consequently, the phrase "internationally recognized" resticts the scope of application of the principle of the inviolability of frontiers; it introduces an ambiguous element and can be used as an "escape" clause at any time.

9. In the light of the above analysis, we should like to stress the all-embracing nature of the non-use of force principle, and the importance of keeping it entirely distinct from the issue of the status of a particular boundary or the recognition thereof. They are separate issues and should be dealt with separately. Recognition of boundaries is a highly political and legally complex issue. Therefore the words "internationally recognized" are problematic and cause confusion. Expressions of this nature should be avoided if the value of the principle of inviolability of boundaries is to be preserved. The terms "existing international boundaries" as used in the 1970 Declaration on Friendly Relations or "existing frontiers" as used in the Helsinki Declaration serve the purpose of maintaining the concept of inviolability of the lines which separate one State from another, but without prejudging the substantive issues involved.

26 May 1983

---

3. AGENDA OF MEETINGS OF STATES PARTIES TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS—QUESTION WHETHER THE MEETINGS MAY CONSIDER ANY MATTER OTHER THAN THE ELECTION OF MEMBERS OF THE HUMAN RIGHTS COMMITTEE PURSUANT TO ARTICLE 30 (4) OF THE COVENANT AND, IF SO, WHAT QUESTION CAN BE CONSIDERED UNDER AN AGENDA ITEM ENTITLED "OTHER MATTERS"

*Memorandum to the Assistant Secretary-General, Centre for Human Rights*

1. This is to respond to your memorandum of 16 December on the agenda of meetings of States parties to the International Covenant on Civil and Political Rights.

2. The question whether the meetings of States parties to the International Covenant on Civil and Political Rights may consider any matter other than the election of members of the Human Rights Committee pursuant to article 30 (4) of the Covenant must be examined from both the substantive and the procedural points of view.

3. With respect to the former, it should first of all be said that, at least in principle, a meeting of representatives of sovereign States may consider any question that these representatives wish to take up. Naturally, they can restrict their freedom through rules of procedure, and this possibility is discussed below. In addition, there may be some other limitations consequent on international law in general or the Covenant in particular; for example, in the light of the review procedures established in part IV of the Covenant and in the Protocol thereto, it would seem improper if the States parties were to decide to establish a procedure for reviewing communications from individuals concerning alleged violations of a State not party to the Protocol. There would, however, be no point in attempting to establish, in the abstract, a list of subjects that could or could not be considered by the States parties.

4. From the point of view of procedure, the device of including an item entitled "other matters" or "other business" on an agenda does not make much sense, unless it is clear that these matters are meant to be no more than isolated statements by particular representatives not leading to any collective consideration or are issues requiring merely a procedural decision (e.g., scheduling the next meeting). If a substantive discussion or decision is envisaged, it is highly desirable that a specific item be placed on the agenda and that the proposal to do so be notified to the States parties in advance so that they might prepare to consider the item—or to object on a reasoned basis thereto.

5. In the light of these considerations, it is suggested that the rules of procedure of the meetings of States parties to the Covenant (CCPR/SP/2) be amended to include some provisions regarding the agendas of these meetings, which at this point are not regulated at all in the rules. For this purpose we would suggest that the standard agenda be set out in the rules themselves (as is done in rule 9 of the rules of procedure for United Nations Pledging Conferences (A/33/580) adopted by the General Assembly some years ago) and that other items be added only if adequate notice thereof has been given.

6. Incidentally, the meeting will probably, as a consequence of General Assembly resolution 38/115 of 16 December 1983, wish to amend its rule 16 to add Arabic as an official and perhaps also as a working language.

7. Finally, it might be desirable to add a rule concerning the convening of meetings by the Secretary-General, to expand slightly on articles 30 (4) and 34 (2) of the Covenant. Such a rule would primarily deal with dates and notice.

21 December 1983

---

4. ARTICLE 19 OF THE CHARTER OF THE UNITED NATIONS AND WORKING CAPITAL FUND ADVANCES—QUESTION OF HOW TO TAKE INTO ACCOUNT, FOR THE PURPOSE OF ESTABLISHING THE AMOUNT OF CONTRIBUTIONS DUE FROM A MEMBER STATE FOR THE PRECEDING TWO FULL YEARS, INCREASES OR DECREASES IN THE ADVANCES THAT IT MAY BE REQUIRED TO MAKE TO THE FUND

*Memorandum to the Senior Contributions Officer, Office of Financial Service*[5]

1. This is in response to your memorandum of 14 October on Article 19 of the Charter of the United Nations and Working Capital Fund advances. The question is how to take into account, for the purpose of establishing the "amount of contributions due from [a Member State] for the preceding two full years", increases or decreases in the advances that it may be required to make to the Working Capital Fund (WCF).

2. The first question is whether any account should be taken at all of amounts payable in respect of the Working Capital Fund, which in the Financial Regulations are consistently referred to as "advances" and thus differentiated from the "contributions" due in respect of the regular budget. While the WCF advances are thus not "contributions" within the meaning of the Financial Regulations and Rules, they should be treated as such for the purpose of Article 19 of the Charter, because both the advances and the contributions constitute compulsory payments assessed by the General Assembly pursuant to Article 17 of the Charter for the purpose of meeting the expenses of the

Organization. Furthermore, as financial regulation 5.6 requires that payments from Member States be credited first to advances due for the regular budget, "the amount of . . . arrears" necessarily is directly affected by the amount of any WCF advances that become due; consequently, it would be unfair *vis-à-vis* a State to have its arrears measured in part by the amount of the advances due, if such amounts would not also appear in the other side of the equation, i.e., as contributions due.

3. The second question is whether additional advances assessed in respect of WCF determined for a particular biennium should be fully taken into account as of the beginning of the biennium, or should be divided into halves (as are the contributions due for the regular budget for the biennium). In this connection it should be noted that when the General Assembly establishes a particular level for WCF for a given biennium, it intends that that level be maintained throughout the biennium and consequently the entire amount of any change in the advance due from each Member State for the biennium is billed at the beginning of that biennium. In the light of this practice, which means that the total amount of any new advance due for the biennium may be reflected in the arrears at the beginning of the next calendar year (as required by financial regulation 5.4), it follows that that total amount must also be added to the contributions due for the first year of the biennium.

4. There is thus no dispute that whenever additional WCF advances are due, either because of an increase in WCF for a particular biennium or because the rate of assessment for a particular Member State is increased from the previous rate, the total amount of such increase due in respect of such State is to be added to the contributions due for the year in respect of which such advance is billed in accordance with paragraphs 2 and 3 above.

5. It is, however, less clear whether account should similarly be taken of any reduction in WCF advances, whether owing to a reduction in the amount of WCF (an unlikely contingency) or to a reduction in the rate of assessment for a particular Member State. Various arguments can be made either for taking such decreases into account or for not doing so:

(*a*) For taking decreases into account:

(i) In principle, there should be no essential difference between the effect to be given to a billing for a payment due and a credit for a refund due, in particular since in every instance there will be, in respect of the total of both WCF advances and regular budget contributions, a net amount due from the Member State to the Organization, which amount is merely increased or decreased depending on the payments due to or the refunds due from WCF.

(ii) Symmetry considerations suggest a parallel treatment of payments due to or refunds due from the WCF. For example, if at the beginning of a biennium for which no change in the total amount of WCF is foreseen, the rate of assessment of a particular Member State were to be increased for the first year of the biennium and decreased by precisely the same amount for the second year (thus restoring the rate to its original level—a not unlikely sequence), then it would seem that the total amount of the contributions due for the biennium should not be affected at all by these two mutually cancelling transactions, in particular as the amount of any "arrears" for that period would not thereby be affected; but this result can only be accomplished if equal effect is given to both positive and negative changes in the WCF advances.

(*b*) Against taking decreases into account:

(i) It should be recognized that for the Member State concerned, while a reduction in its advances to WCF is of course a favourable development, if account is taken of such a change by diminishing the "contributions due" side of the equation, this would have the effect of making the application of the penalty under Article 19 of the Charter more likely (because it makes it more likely that the arrears will exceed the contributions due for two years).

(ii) A credit resulting from a reduction in the WCF advances required from a Member State does not differ in essence from other types of credits under financial regulation 5.2 (e.g., those resulting from the Tax Equalization Fund), and these credits are not taken into account for the purpose of establishing contributions due. In particular, even though a credit resulting from a reduction in WCF advances would normally be used to reduce the contributions

payable, a Member State can demand that a sum equivalent to such credit be paid to it immediately by the Organization before the State makes its own payment of assessed contributions to the latter.

Although from a strictly logical point of view it would seem that the arguments summarized in subparagraph (*a*) for taking reductions into account should prevail, it would appear that the countervailing arguments as set out in subparagraph (*b*) against doing so might actually be given greater weight. This is so in particular in respect of argument (*b*) (i), which rests on the well-established principle that treaty provisions (including those of the Charter) should, in case of doubt, be interpreted so as to be as little burdensome to the States parties as possible. Consequently, it is suggested that it would be preferable not to deduct, from contributions otherwise due within the meaning of Article 19 of the Charter, any credits resulting from a reduction in WCF advances.

26 October 1983

---

5. QUESTION WHETHER A STATE PARTICIPATING AS AN OBSERVER ON A COMMITTEE OF LIMITED MEMBERSHIP CAN BECOME A CO-SPONSOR OF A PROPOSAL BEFORE THE COMMITTEE

*Internal memorandum*

Advice has been requested on whether a State participating as an observer on a committee of limited membership can become a co-sponsor of a proposal before the committee. In the practice of the General Assembly, only the States that are members of a committee are entitled to co-sponsor proposals submitted to that committee. Since in the case under review the State concerned is not a member of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations but participates in its work as an observer, it cannot be officially regarded as a co-sponsor of a proposal before the Committee. There would, of course, be no objection to reflecting in the Committee's report the fact that the State in question was a sponsor of the proposal when it was originally submitted to the Committee in 1981 and continues to support the proposal.

16 February 1983

---

6. QUESTION WHETHER A SUBSIDIARY ORGAN CAN PROVIDE THAT ONE OF ITS OWN SUBSIDIARIES USE FEWER LANGUAGES THAN ITSELF

*Cable to the Chief of the Governing Council Secretariat, United Nations Environment Programme*

The Department of Conference Services is not aware of any case where a subsidiary organ has provided that one of its subsidiary bodies would use fewer languages than itself, though arrangements are frequently made whereby an organ or conference is actually serviced with fewer languages than its rules provide, if it is known or informally agreed that certain languages will not be used by any participant. The legal difficulty with limiting the number of languages used in sub-subsidiary organs lies in the existence of General Assembly directives on the matter; for example, the Assembly has provided in its resolution 35/219 A of 17 December 1980 that all its subsidiary organs are to include Arabic among their working languages; however, no such decision was apparently made in respect of the Russian or Chinese languages. If a choice of languages is desired that would contravene a General Assembly or Economic and Social Council decision, then the permission of the Assembly or the Council must be secured. This can be granted by an explicit resolution or decision, or implicitly through the approval of a financial implications statement anticipating the use of fewer languages than those normally authorized.

7 April 1983

---

7. QUESTION WHETHER MEMBERSHIP IN ANY SUBSIDIARY ORGAN ESTABLISHED BY THE GOVERNING COUNCIL OF THE UNITED NATIONS ENVIRONMENT PROGRAMME AND ENTRUSTED TO ACT ON ITS BEHALF MUST CONSIST EXCLUSIVELY OF STATES MEMBERS OF THE GOVERNING COUNCIL

*Cable to the Chief of the Governing Council Secretariat, United Nations Environment Programme*

We refer to your cable requesting advice on whether membership in any subsidiary organ established by the Governing Council and entrusted to act on its behalf must consist exclusively of States members of the Governing Council.

In our view there is no legal impediment to the Governing Council establishing a subsidiary organ with authority to act on its behalf in matters within the competence of the Governing Council and having in its membership some States that are not members of the Council provided that the States concerned are Members of the United Nations or alternatively States that are assessed contributions by the General Assembly on the basis of their participation in UNEP activities. In the absence of guidance from the General Assembly there would not appear to be a sufficient basis for the Governing Council to include as members of the proposed subsidiary organ States that meet neither of these criteria.

10 May 1983

---

8. RULE 38 OF THE RULES OF PROCEDURE OF THE GOVERNING COUNCIL OF THE UNITED NATIONS ENVIRONMENT PROGRAMME RELATING TO RIGHT OF REPLY—PRACTICE OF THE GENERAL ASSEMBLY AND THE ECONOMIC AND SOCIAL COUNCIL REGARDING THE EXERCISE OF THE RIGHT OF REPLY

*Cable to the Legal Liaison Officer to the United Nations Environment Programme*

Rule 38 of the rules of procedure of the Governing Council of UNEP concerning the right of reply is based on rule 73 of the rules of procedure of the General Assembly.[7] Although rule 73 is formulated in a way that gives the President discretion to grant the right of reply or not to do so, in practice the right of reply is routinely granted to any Member State that requests it. In the light of this practice, members of the Governing Council of UNEP should be considered as having an absolute right to exercise the right of reply. In contrast, observer States and other observers such as the PLO and SWAPO do not have an absolute right to reply but may be granted an opportunity to reply by the President. In practice such requests are traditionally granted and very rarely denied. If a statement in the exercise of the right of reply by one State gives rise to a request by another State for a statement in reply, this request is normally acceded to in the practice of the Assembly and the Economic and Social Council. In effect, rule 46 of the rules of procedure of the Economic and Social Council, which was adopted in its current form later than the corresponding rule in the rules of procedure of the General Assembly and of the Governing Council of UNEP, accurately reflects the established practice whereby the right of reply is regarded to be an absolute right of Member States which is not subject to the discretion of the presiding officer as regards States which are full members of the organ concerned. The said may of course limit the length and the number of interventions that may be made in the exercise of the right of reply at a given meeting and under the same agenda item.

16 May 1983

---

9. PARTICIPATION OF A MEMBER STATE AS AN OBSERVER IN A SESSION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW—IMPLICATIONS, AS REGARDS PARTICIPATION OF THE MEMBER STATE CONCERNED IN MEETINGS OF UNITED NATIONS ORGANS, OF ACTION TAKEN BY THE GENERAL ASSEMBLY WITH REGARD TO THAT STATE'S CREDENTIALS

*Memorandum to the Chief of the International Trade Law Branch*

This is in reply to your memorandum of 13 June 1983 in which you requested our advice on the participation of [name of a Member State] in the sixteenth session of UNCITRAL.

We should like first of all to comment briefly on the legal situation regarding the participation of the State in question in meetings of United Nations organs. Basically, the fact that the General Assembly has on various occasions rejected the credentials of the representatives of the State to sessions of the Assembly does not automatically have the effect of excluding the State concerned from future sessions of the Assembly or from meetings of other United Nations organs. Indeed, it participates in the work of the Security Council and in various UNCTAD conferences notwithstanding the decisions taken by the General Assembly regarding the credentials of its representatives to Assembly sessions. Accordingly, the State in question is invited to all United Nations conferences and meetings open to all Member States and is treated in the same way as other Member States in respect of meetings of organs of limited membership. Thus, in the case of organs of limited membership, if States that are not members are to be officially notified of the meeting of the organ concerned or to be invited to participate in an observer capacity, then a notification or invitation, as the case may be, should be sent to the State concerned. It is also relevant to note that the Secretary-General accepts credentials issued for a Permanent Representative of this State and deals with the person so concerned in that capacity.

It is noted that the State in question was in fact correctly invited to attend the sixteenth session of UNCITRAL at Vienna from 24 May to 3 June 1983. In the absence of a decision of the Commission to exclude the observer of the State concerned from its meetings, the Secretariat should treat its representative in exactly the same way as observers of other States that are not members of the Commission.

In view of the foregoing, the name of the observer should not be excluded by the Secretariat from the provisional list of participants for the sixteenth session of UNCITRAL in the absence of a decision of the Commission to exclude the State from its meetings.

. . .

23 June 1983

---

10. PROCEDURAL QUESTIONS RAISED IN CONNECTION WITH THE ADOPTION OF A REPORT OF THE SUB-COMMITTEE ON PETITIONS, INFORMATION AND ASSISTANCE OF THE SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES—QUESTION WHETHER ACTION MAY VALIDLY BE TAKEN ON AN AMENDMENT NOT CIRCULATED IN ONE OF THE WORKING LANGUAGES—QUESTION WHETHER A FINAL VOTE MUST BE TAKEN ON THE REPORT AS A WHOLE AFTER SEPARATE PARTS HAVE BEEN ADOPTED

*Memorandum to the Officer-in-Charge, Department of Political Affairs, Trusteeship and Decolonization*

This is in response to your memorandum of 31 August, requesting legal advice as to two procedural questions raised in connection with the adoption of the 226th Report of the Sub-Committee on Petitions, Information and Assistance of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

1. As the Special Committee and its Sub-Committees are subsidiary organs of the General Assembly, they are to apply the procedures relating to committees of the Assembly, as provided in rule 161 of its rules of procedure.

2. With regard to the objection raised by a delegation concerning the failure to circulate the text of an amendment in one of the working languages before a vote was taken thereon, the relevant rule, namely rule 120, requires that "as a general rule" no proposals shall be put to a vote until the day following their circulation—which is understood to mean circulation in all the working languages. Chairmen are authorized to permit the discussion and consideration of amendments even if they have not been circulated at all or have only been circulated the same day. The practice in implementing this rule has been that frequent use is made of the exceptional authorization to act on uncirculated or only recently circulated amendments, particularly towards the end of a session. In particular, the procedure followed by the Chairman of the Sub-Committee, to read out the amendment at dictation speed to enable the interpreters to translate it carefully and the representatives to copy it down in their respective languages, is often followed. Consequently the objection in question is not well taken.

3. Rule 129 provides that if a proposal (such as the draft report) is divided, and action is taken to adopt separate parts thereof, a final vote must be taken on the proposal as a whole (i.e., on the sum of all the parts adopted separately). This is so whether the division was a formal one under the first part of rule 129, or is merely done informally. It is also immaterial whether the separate parts were adopted by votes or by consensus. The body as a whole must be given an opportunity of acting on (i.e., adopting or rejecting) the sum of all the separate parts. Consequently the demand of the delegation concerned was justified, and a vote on the report as a whole should now be taken.

1 September 1983

---

11. QUESTION OF THE PUBLICATION OF AN EXPERT'S DISSENT TO THE REPORT OF A GROUP OF EXPERTS—EXISTENCE OF A WELL-ESTABLISHED CUSTOM IN THE UNITED NATIONS FOR REPORTS PREPARED BY ANY REPRESENTATIVE ORGAN OR BODY OF GOVERNMENTAL EXPERTS CLEARLY TO REFLECT DISSENTING OPINIONS

*Memorandum to the Assistant Secretary-General, Centre against* Apartheid

1. This is in response to your memorandum of 28 September on the publication of an expert's dissent to the report of the Group of Experts on the Supply of Oil and Oil Products to South Africa.

2. In general, it is for each body to formulate and adopt its own report and, while the instructions of the parent body (e.g., as to the inclusion of certain materials or the limitation on length of reports) must be complied with, there are no explicit legal principles as to what must or must not be included. In the present instance, paragraph 1 of General Assembly resolution 37/69 J of 9 December 1982, which established the Group of Experts, gives no guidance on the inclusion or non-inclusion of dissenting opinions in the Group's report.

3. It should, however, be recognized that, in the light of the principle of sovereign equality, it is a well-established custom in the United Nations for reports prepared by any representative organ or body of governmental experts to reflect clearly any dissents, generally in the words of the dissenter. It might therefore be concluded that the General Assembly and the Committee against *Apartheid* may have expected that any report of the Group of Experts would conform to that practice.

4. It is noted that paragraph 6 of the report clearly refers to the fact that the expert of [name of a Member State] dissented. It would seem that from a legal point of view any expectations as referred to in paragraph 3 above should be satisfied if the position of the expert concerned is reflected comprehensively and in terms acceptable to his delegation, either in an annex to the report or in a separate document to be given the same and simultaneous circulation in every forum in which the report of the Group of Experts is to be considered.

. . .

30 September 1983

---

## 12. Question whether a Member State not a member of the United Nations Council for Namibia may be granted observer status in the Council

*Memorandum to the Under-Secretary-General for Political Affairs, Trusteeship and Decolonization*

Reference is made to your memorandum of 18 October 1983 by which you requested legal advice in connection with the request by a Member State for observer status in the United Nations Council for Namibia.

The resolutions adopted by the General Assembly relating to the establishment and terms of reference of the United Nations Council for Namibia are silent on the question of participation by non-members in the Council's meetings except in respect of the South West Africa People's Organization, which plays a special role in the work of the Council and regularly participates in the Council in a consultative capacity.

In the absence of instructions by the General Assembly on the question of participation by observers other than SWAPO in the work of the Council, it is within the competence of the Council itself to decide whether or not to grant the request for observer status. It is relevant to add that it has become the normal practice in United Nations organs of limited membership for the body concerned to decide on whether to invite non-members to participate in an observer capacity where this is not precluded by decisions of the competent deliberative organ. It is our understanding on the basis of information provided to us by members of the secretariat of the Council for Namibia that one Member State in fact already participates in an observer capacity in plenary meetings of the Council. In these circumstances we can see no obstacle to the Member State in question being invited by the Council to participate in a similar capacity on the same basis in the work of the Council.

24 October 1983

---

## 13. Question whether Member States not members of the Credentials Committee may participate as observers in the Committee's work

*Letter to the Permanent Representative of a Member State to the United Nations*

As you requested, the Office of Legal Affairs has examined the question of the participation in the Credentials Committee, as observers, of Member States that are not members of the Committee. Our comments on the matter are as follows:

The rules of procedure of the General Assembly are silent on the question of participation of non-members in committees of the General Assembly that are of limited membership.

In the practice of the Credentials Committee, that question arose at the resumed thirty-fifth session of the General Assembly. On that occasion, the Credentials Committee was considering an objection that had been raised in the General Assembly concerning the credentials of the representatives of a Member State. When the Committee met on 2 March 1981 at the request of the General Assembly to consider the matter, a letter had been received by the Chairman of the Committee from the representative of the State concerned requesting that he be permitted to present his delegation's position on its credentials to the Chairman personally or to the Committee. The Chairman made a statement to the Committee in which he noted that it was not the practice of the Committee to allow Member States not members of the Committee to make statements and that therefore the request by the representative of the State in question could not be acted upon. The Credentials Committee accepted that ruling without objection. The position taken by the Credentials Committee on the request of the State concerned is reflected in the relevant report of the Credentials Committee[8] approved by the General Assembly.

It is relevant to mention that the action taken by the Chairman of the Credentials Committee in the case referred to in the third paragraph above was based on the practice of the Credentials

Committee and on the advice of the Office of Legal Affairs. In giving its advice the Office of Legal Affairs had emphasized the fact that the Credentials Committee was an expert body and that non-members had not previously been permitted to participate in the Committee's work.

From a legal standpoint, it is our view that the attitude adopted by the Credentials Committee at the resumed thirty-fifth session is the correct one and should be maintained. If non-members were to participate actively in the work of the Credentials Committee and other expert bodies, such participation could seriously affect the ability of such bodies to carry out their responsibilities expeditiously and effectively.

7 November 1983

---

14. MOTION TO TAKE NO ACTION ON A PROPOSAL BEFORE THE GENERAL ASSEMBLY—QUESTION OF WHETHER THE MOTION CAN PROPERLY BE MADE UNDER THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY

*Statement made by the Legal Counsel at the 34th plenary meeting of the General Assembly on 20 October 1983*

A legal opinion has been requested on the question of whether the motion proposed by the representative of a Member State is a motion that can properly be made under the rules of procedure of the General Assembly. The motion under consideration was proposed within the context of rule 74 of the rules of procedure. That rule provides for the adjournment of debate on the item under consideration without any limitations as to the reasons for which a motion may be presented under the rule.

A review of the practice of the General Assembly shows that the Assembly has on several occasions in the recent past acted on motions to take no action on a proposal before it on the basis of rule 74. Among the precedents which I have referred to, there are not only those which relate to the item as a whole, but also several which relate to a specific question or text under consideration and to adjournment *sine die*.

As representatives may recall, an identical motion within the context of rule 74 of the rules of procedure of the General Assembly was proposed in similar circumstances when the same agenda item was considered at the thirty-seventh session. On that occasion the Assembly acted on the motion and adopted it.

In these circumstances, it is my view that the motion before the Assembly is receivable from a legal standpoint.

---

15. QUESTIONS RELATED TO THE CLOSURE OF DEBATE AND CONDUCT DURING VOTING IN THE PLENARY MEETINGS OF THE GENERAL ASSEMBLY AND IN THE MAIN COMMITTEES—RULES 75 AND 88 OF THE RULES OF PROCEDURE OF THE GENERAL ASSEMBLY

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

1. During the current session of the General Assembly a number of questions have arisen, in the plenary and some of the Main Committees, in relation to the closure of debate and conduct during voting, which are principally regulated by rules 75 [117] and 88 [128] of the rules of procedure. The present memorandum discusses these two subjects and their interaction.

I. EFFECTS OF CLOSURE OF DEBATE

A. *Statements*

2. Closure of debate decided under rule 75 or 117 clearly prevents the making of any further substantive statements as to the "item under discussion" (see section I.C. below) in relation to which

the motion for closure was adopted. No exception may be made, even for representatives already on the list of speakers (but see paragraph 4 below).

3. However, closure of debate does not prevent the exercise of the right of reply (rule 73 [115]) or the explanation of votes (rule 88 [128]), whether before or after the vote (see section II.C below).

B. *Motions and proposals*

4. Unless specifically otherwise provided in the motion for closure, no new substantive proposals, including amendments or sub-amendments,* may be submitted after a motion for closure of debate has been adopted. However, a proposal already submitted under rule 78 [120] but not yet formally introduced or even circulated should normally be dealt with; there are even precedents for permitting the principal sponsor to make a statement introducing such a proposal (particularly if the sponsors of other proposals had an opportunity to introduce these before the debate was closed). In addition, the sponsors of a proposal already submitted should normally be permitted to submit a revised version even after closure of debate as long as the initial proposal has not been substantially changed.

5. Normal procedural motions or manoeuvres, such as the withdrawal of a proposal as well as its immediate reintroduction (rule 80 [122]), the division of a proposal (rule 89 [129]) or a motion that there be no vote on a proposal after another has been acted on (rule 91 [131]), are permitted even after closure of debate. The same should be held of a motion to adjourn the debate (for the purpose of putting aside one or more proposals—rule 74 [116]) or of one addressed to an issue of competence (rule 79 [121]). However, other types of proposals relating to procedures not specifically provided for in the rules of procedure (e.g., the referral of an item to a standing or *ad hoc* body) should be considered as substantive proposals (i.e., in accordance with paragraph 4 above).

C. *Item under discussion*

6. Rule 75 [117] refers to the closure of the debate on "the item under discussion". Such an "item" need not be an entire agenda item, but can be a sub-item, a particular proposal or set of proposals, or even an amendment to a proposal. For this reason it is important for the President to ascertain, as soon as a proposal for closure of debate is made, and in any event before asking the body to take a decision on it, what the scope of the proposal is. However, to the extent that this is not done, it should usually be assumed that the motion is intended to have the broadest effect it can sensibly be given, i.e., to close debate on as much of the agenda item as possible; certainly it should never be presumed, without explicit confirmation, that debate was meant to be closed merely on an amendment or on one of a series of related proposals.

D. *Closure achieved by other means*

7. Closure of debate achieved by a motion under rule 75 [117] does not differ substantially from that achieved by closure declared after the normal conclusion of debate or on the exhaustion of a closed list of speakers (rule 73 [115]); indeed, this is explicitly provided in the corresponding procedural rule of the Economic and Social Council (rule 45—E/5715/Rev.1). Nevertheless, the prohibition against the making of further statements and against introducing new substantive proposals (see paragraphs 2 and 4 above) are usually not enforced as strictly in the case of such informal closure.

## II. THE VOTING PROCESS

A. *Structure of rule 88 [128]*

8. It should be recognized that rule 88 [128] in effect consists of two separate rules:

(*a*) The first sentence protects the integrity of the voting exercise (see section II.B below);

(*b*) The remaining text deals with explanation of votes (section II.C). This differentiation is explicitly recognized in the rules of procedure of the Economic and Social Council, which deal with these two subjects respectively in rules 63 and 62.

*Hereinafter, "proposals" should be understood as referring also to amendments and sub-amendments.

B. *Conduct during voting*

9. The first question is how to define "during voting" for the purpose of determining the interval during which the strict rule against interruptions* must apply. Though occasionally there have been a few differing rulings, in the past years it has been clearly recognized and consistently held that the period protected by the first sentence of rule 88 [128] (i.e., the period of voting in the "narrow sense") is merely the interval between the time the presiding officer actually initiates the voting process by calling for the casting of votes or ballots on a particular question, and until the results of that particular vote are announced (cf. Economic and Social Council rule 63; the draft Standard Rules of Procedure for United Nations Conferences, A/38/298, annex, rule 56). This is the only period that requires the extraordinary protection provided by the first sentence of rule 88 [128], and in view of the severe restrictions in that sentence (e.g., the prohibition against normal points of order, or against routine procedural motions, such as to suspend a meeting) such protection should not, and in practice cannot, be extended to any period for which this is not absolutely necessary; for example, if a very long series of votes is to be taken, it may be necessary to do so in the course of more than one meeting, i.e., to interrupt for some hours or even some days (e.g., elections to principal organs).

10. In respect of a connected series of votes, it follows from the above that the first sentence of rule 88 [128] is not intended to cover the entire period during which several votes are taken, including the intervals between such votes (i.e., between two amendments to the same proposal or even between two ballots for the same post), which might be referred to as a period of voting in the "wider sense". On the other hand, it must be recalled that such a period of voting normally follows on an explicit or implicit closure of debate (see section I.D above) and is therefore subject to the restrictions consequent on such closure (sections I.A and B), and that often deadlines are set for the submission of substantive proposals which normally will have expired before the period of voting starts. Furthermore, the President often announces (and usually should announce), before or at the beginning of a period of voting, the procedure that he intends to follow during such period (e.g., to permit explanations before the vote on all proposals and amendments, then to call for votes successively on each proposal and the amendments thereto, and then to permit explanations after the vote), and to the extent such announcement is not objected to or is explicitly accepted, it becomes a decision governing that voting period, which can only be changed by an implicit or explicit reconsideration of that decision (subject to rule 81 [123]); even if no explicit régime is established for a period of voting, it may be assumed, on the basis of the usual practice, that a restrictive procedure is to be followed, i.e., that one vote will follow on another, uninterrupted by any substantive business and generally any explanations of vote, though permitting some procedural motions (e.g., suspension or adjournment of the meeting). Only in the somewhat exceptional situation that no such restrictions exist in respect of a particular voting period may room be made during intervals between votes for statements, substantive proposals and procedural motions, and especially (see section II.C below) explanations of vote (i.e., either those after the previous vote or those before the next one).

C. *Explanations of vote***

11. The second sentence of rule 88 [128] states that "the President may permit members to explain their votes". By tradition, the right to explain a vote has become practically absolute (as stated, e.g., in Economic and Social Council procedural rule 62), though the President retains discretion (subject to the authority of the Assembly—rule 36 [107]) as to whether to permit explanations both before and after or only before (which would be unusual) or only after the vote. Also, if a series of votes is to be taken he may, but need not, allow explanations between such votes (see paragraph 10 above). Furthermore, it should be understood that explanations of vote are not part of the debate and that, therefore, the prior closure of debate does not affect the power of the President

*The present memorandum does not deal with what types of points of order it is permissible to raise under the first sentence of rule 88 [128].

**The present memorandum contains no discussion of what constitutes an explanation of vote, or restrictions on such explanations or an application to decisions taken without a vote.

to permit explanations of vote either before or after the vote, since there is a distinction between the period of debate (cut off by rule 75 [117]) and the period of voting in the wider sense (governed in part by rule 88 [128]) and in part by *ad hoc* decisions made in respect of each such period (see end of paragraph 10).

10 November 1983

---

## 16. Status under the Charter of the United Nations of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees

*Opinion requested by the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*

The question has been raised of the status under the Charter of the United Nations of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees. The Group was established by the General Assembly in its resolution 36/148 of 16 December 1981. By paragraph 4 of that resolution the Assembly:

> "*Decides* to establish a group of governmental experts of seventeen members who shall be appointed by the Secretary-General, upon nomination by the Member States concerned after appropriate consultation with the regional groups and with due regard to equitable geographical distribution . . ."

Paragraph 10 of the same resolution calls on the Group to "submit a report to the Secretary-General . . . for deliberation by the General Assembly at its thirty-seventh session". By its resolution 37/121 of 16 December 1982, the General Assembly enlarged the Group and requested it to submit its report to the Secretary-General for deliberation by the General Assembly at its thirty-eighth session.

The Expert Group is therefore expressly established by the General Assembly and its report is to be submitted to the Assembly, although the establishing resolution provides for the Secretary-General to appoint the members of the Group and to act as the conduit for transmitting the Group's report to the Assembly.

The Charter of the United Nations provides, in its Article 7, for six named principal organs of the United Nations and for "such subsidiary organs as may be found necessary". Article 22 specifically provides that:

> "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."

The Expert Group, not being a named principal organ, must therefore be a subsidiary organ. As it is specifically established by the General Assembly, it is a subsidiary organ of the Assembly under Article 22 of the Charter.

This characterization of the Group as a subsidiary organ of the Assembly is not affected by the fact that the members of the Group are appointed by the Secretary-General and that the Group reports through the Secretary-General to the General Assembly. Nor does the characterization of the body as an "Expert Group" affect this conclusion. Members of subsidiary organs of the General Assembly have been appointed in a large variety of ways, other than directly by the Assembly, and subsidiary organs not infrequently report through other bodies to the Assembly. Titles used for such subsidiary organs of the Assembly have *inter alia* been Commissions, Committees, Boards, Councils, Meetings, Panels, Working Groups and Expert Groups. Examples of this great variety of appointing methods, reporting procedures and titles for subsidiary organs of the General Assembly can be found in document A/AC.202/1 of 28 March 1980, which contains a list of subsidiary organs established by the General Assembly for the purposes of an *Ad Hoc* Committee of the General Assembly on Subsidiary Organs. The present Group of Experts is among the subsidiary organs of the General Assembly the list of which is provided annually by the Secretariat to the Committee on Conferences.

As the Group of Experts is expressly established by the General Assembly itself in the authorizing resolution, no analogy can be drawn with those cases arising particularly in connection with disarmament matters where the General Assembly directly confers a particular task on the Secretary-General and proposes that he carry it out with the assistance of experts, one such example being resolution 34/89 of 11 December 1979, whereby the Assembly "*Requests* the Secretary-General, with the assistance of qualified experts, to prepare a study . . ."

Such groups are not organs of the Assembly but advisory mechanisms to the Secretary-General.

It is therefore to be concluded that the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees is a subsidiary organ of the General Assembly established under Article 22 of the Charter. This flows from the provisions of that Article and of paragraph 4 of resolution 36/148 setting up the Group. This conclusion is supported by numerous precedents.

14 April 1983

---

17. QUESTION WHETHER THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AND THE UNITED NATIONS INTERIM FORCE IN LEBANON COULD PLAY A ROLE AS REGARDS THE LEGAL AND PHYSICAL PROTECTION OF REFUGEES IN LEBANON, THE WEST BANK AND GAZA

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

1. I wish to refer to your memorandum of 4 April 1983 concerning a letter from the Chairman of the Joint Inspection Unit to the Secretary-General which raises the question of the "legal and physical protection" of refugees in Lebanon, the West Bank and Gaza and states that urgent attention should be given to measures which could be taken by the United Nations to assure more adequate protection. Although the Chairman of JIU does not define what he means by "legal and physical protection", his letter does refer to possible roles for UNHCR in providing legal protection for refugees in the area and for UNIFIL in providing physical security. These suggestions raise legal questions relating to the exercise of territorial authority and the terms of reference of United Nations organs.

2. The legal and physical protection of Palestinian refugees, in the broad sense in which that phrase appears to be used by the Chairman of JIU, is the primary responsibility of the territorial sovereign or, in the case of occupied territory, the Occupying Power. In the absence of a specific mandate from the international community and the consent of the sovereign or Occupying Power, an international organ cannot assume such responsibility since it would lack both legitimacy and the means of carrying out its responsibility. As currently constituted, neither UNHCR nor UNIFIL is mandated to provide legal and physical protection to Palestinian refugees.

3. The UNHCR statute and the Convention relating to the Status of Refugees of 28 July 1951[9] excluded Palestinian refugees as persons receiving protection or assistance from other organs or agencies of the United Nations (chapter II, 7 (*c*), of the statute and article 1, D, of the Convention). The function assumed by UNHCR under its statute is that of providing *international* protection by the means specified in chapter II, 8, of the statute. The personal legal status of refugees is governed by the law of the country of domicile or residence (article 12, 1, of the Convention).

4. The mandate conferred upon UNIFIL by the Security Council, although somewhat vaguely worded, it is true, nevertheless seems to be confined to confirming the withdrawal of the occupying forces, restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority (see Security Council resolution 425 of 19 March 1978). Any change in the mandate of UNIFIL, particularly one of the nature tentatively suggested in the letter in question, would require a decision of the Security Council and for its effective application the consent of the sovereign or Occupying Power.

5. The problem raised by the Chairman of JIU in his letter to the Secretary-General is indeed a major one but as follows from what we set forth above it does not seem solvable on the lines indicated in the letter.

20 April 1983

---

18. QUESTION WHETHER A REPRESENTATIVE OF A MEMBER STATE MEMBER OF THE SECURITY COUNCIL HOLDING THE OFFICE OF PRESIDENT OF THE SECURITY COUNCIL MAY ADDRESS A COMMUNICATION TO HIMSELF AS PRESIDENT OF THE COUNCIL

*Memorandum to the Director of the Security Council and Political Committees Division*

1. You have raised the question of whether there is any legal obstacle in the way of a representative of a Member State which is a member of the Security Council communicating a request to the President of the Security Council when the office of President of the Council is occupied by the same representative.

2. From a legal standpoint it is clear that two separate and distinct capacities are involved, namely, that of a representative of a member of the Security Council and that of the President of the Council. There is certainly no legal obstacle against one and the same person holding the two capacities simultaneously. However, action taken in one of the two capacities must be distinguished from action taken in the other capacity even though the person taking the different actions happens to be one and the same person. This is a situation that occurs frequently when one person has more than one official capacity.

3. If one and the same person can hold and act under the two capacities mentioned above, it follows that that person must be able to address communications to himself or herself in the other capacity. An exception might be expressly provided for in the relevant rules of procedure but that is not the case with regard to the Security Council.

3 May 1983

---

19. ACCREDITATION OF REPRESENTATIVES OF MEMBER STATES MEMBERS OF THE SECURITY COUNCIL—PRACTICE FOLLOWED IN APPLYING RULES 13 AND 15 OF THE PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL

*Memorandum to the Chief of Protocol*

In order to clarify certain points that have arisen in recent months with regard to the accreditation of representatives of Member States members of the Security Council, it appears desirable to reconfirm the procedures followed by the Department of Political and Security Council Affairs with the implicit approval of the Security Council in applying rules 13 and 15 of the provisional rules of procedure of the Security Council.

According to that practice, a Member State member of the Security Council is required to submit credentials issued by the Head of State or Government or by the Minister for Foreign Affairs which expressly state that the person named is that State's accredited representative on the Security Council. Pursuant to rule 15, a report is issued on provisional credentials when accreditation is received from the appropriate authority in telegraph form, and a report stating that credentials are in order is issued when a written communication is received. It is considered that this requirement for specific mention of their accreditation on the Security Council serves to distinguish representatives of Member States members of the Council, which in accordance with Article 24 of the Charter of the United Nations acts on behalf of the United Nations membership as a whole, from representatives of Member States

not members of the Council, for whom accreditation by their Governments to serve on all organs of the United Nations is regarded as adequate pursuant to rule 14 of the provisional rules of procedure, and for whom credentials reports under rule 15 are no longer submitted by the Secretary-General when they are invited to participate in the Council's discussions.

Accordingly, any delegation of a Member State member of the Council making inquiries as to the appropriate manner of complying with the Council's provisional rules of procedure in the matter of representation and credentials should be informed that in accordance with the established practice of the Security Council credentials which expressly indicate that the person named is the accredited representative of the Member State concerned on the Security Council are required.

26 July 1983

---

20. EXPORT LICENCES REQUIRED BY THE LAWS OF MEMBER STATES FOR CERTAIN PURCHASES MADE BY THE UNITED NATIONS—QUESTION OF HOW TO DEAL WITH EXPORT LICENSING REQUIREMENTS OF THE UNITED STATES OF AMERICA FOR HIGH-TECHNOLOGY ITEMS PURCHASED BY UNIDO FROM CONTRACTORS WHO ARE NEITHER NATIONALS OF, NOR LOCATED IN, THE UNITED STATES

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

1. I refer to your letter of 10 May 1983 concerning the question of export licences required by the laws of Member States for certain purchases made by the United Nations. In particular, you wish our comments on how to deal with export licensing requirements of the United States of America for high-technology items purchased by UNIDO from contractors who are neither nationals of, nor located in, the United States.

2. The issue was raised by you some time ago and we had replied on 23 March 1983 that the United Nations seeks to avoid the exceedingly difficult legal issues involved in establishing any general rule by dealing with such matters on a case-by-case basis. Your 10 May 1983 letter observed that such a practice is not feasible for UNIDO, apparently because it would require your Purchasing Section to analyse what they are purchasing, so it would be preferable to have a single rule to cover all situations, presumably to the effect that all contractors, wherever and whoever they may be, must respect the laws of the country of manufacture of the equipment. You also express concern that UNIDO staff might otherwise be subject to civil and criminal penalties on entering the United States.

3. Quite apart from the complex legal issues involved, UNIDO could, of course, as a matter of UNIDO policy and from a stated desire to respect the perceived wishes of contributing States, require, as a condition of contract, that vendors outside the territorial jurisdiction of the regulating country of manufacture none the less obtain export licences from that country. However, the implementation of such an across-the-board policy might well lead to complaints by the Governments of the States of the contractors since those contractors, although obeying all their countries' laws, may be prevented from exporting products from their countries because UNIDO insisted that contractors respect the laws of a third country (see, for example, an article in the 7 July issue of *Australia News* concerning draft legislation to prevent the extraterritorial effect of United States export licensing laws). Also, there is the possibility of excluding otherwise desirable suppliers. In other words, UNIDO must balance the convenience of its Procurement Section with the possible difficulties UNIDO, as an institution, may face in adopting a policy without analysing each case. Despite our reservations to a single all-embracing policy, we have, at your request, attempted to analyse the situation generally.

4. In the United States, the Export Administration Act requires United States contractors and their subsidiaries not located in the United States to obtain United States export licences in respect of specified high-technology equipment. United States entities are subject, *ratione personae*, to United States law. Furthermore, the Act undoubtedly applies territorially to all firms or persons doing business

in the United States. The United Nations, of course, requires that all such contractors obtain such licences since they are a pre-condition of legal export, and the United Nations prefers that the contractor rather than the United Nations obtain them.

5. In a few cases the United Nations has, by contract, required non-United States contractors not located in the United States, but selling United States equipment or components, to obtain United States export licences. The reason for this is pragmatic rather than legal. The United Nations wants to avoid difficulties which might hinder future projects requiring such high-technology items from the United States. We emphasize that this conclusion is a policy decision based solely on operational concerns, for in our view, given the international legal personality and the special status of the United Nations in international law, the United Nations does not have to apply to its contracts any particular laws of Member States or to apply the laws of particular Member States in preference to the laws of other Member States. The United Nations will, of course, respect the applicable laws of Member States and may therefore require, by contract, that those with whom it contracts respect applicable laws and regulations. Which laws would be deemed "the applicable laws" by a judicial or arbitral tribunal seized of a case is a complex question which would have to be determined on a case-by-case basis in accordance with the provisions of the contract or the proper law of the contract (if any) or, if the forum is a court of a State, thein in accordance with the principles of private international law of the forum.

6. We realize, of course, that some States, for political or economic reasons, give extraterritorial effect to certain categories of their laws, e.g., their public laws. Whether or not this extraterritorial effect will be enforced, or recognized, by forums of other States depends on the principles of the conflict of laws of each forum. Most courts in Europe may apply foreign public laws to legal relationships of private law between private parties or between private parties and public bodies acting *jure gestionis* or *jure negotii*, at least if the foreign public law is the proper law of the contract or even the law of the place of contracting or place of performance. To our knowledge, European courts are generally disinclined to consider the place of manufacture or even invention in and of itself to be a close enough contract to be applied, although it seems that contracts of this kind are taken into account in anti-trust litigation by courts in the United States and recognition of this approach exists in Europe, for example, in the Swiss draft law on private international law. It is, however, doubtful whether any forum would accept claims based on foreign public law by foreign States or public bodies as plaintiffs acting *jure imperii*. Specific national legislation may also affect the outcome in the courts of a particular forum.

7. The United States Administration might seek to apply the Export Administration Act to UNIDO contracts with non-United States contractors not in the United States, and such a contractor might wish to respect this United States law, e.g., if it has assets in the United States or if its officers visit the United States. However, if UNIDO signed such a contract without requiring a contractor to obtain a United States licence and if the United States attempted to pursue UNIDO officials authorizing such a contract, we would have no hesitation in invoking the Organization's immunities under Article 105 of the Charter and under the Convention on the Privileges and Immunities of the United Nations.

8. In summary, we reiterate our earlier views that there is no simple legal solution to this difficult problem, though as a matter of policy UNIDO could require all contractors to obtain export licences from the country of manufacture of high-technology equipment. This might, we think, lead to complaints difficult to rebut legally; and therefore any such UNIDO general policy or rule of thumb, while making *ad hoc* decisions by contract officers in each and every case unnecessary, should none the less be flexible so that the requirements may be waived when the interest of UNIDO so dictates (e.g., if the relationship of the whole transaction to the country of manufacture was minimal). In cases of purchases or contracts involving very substantial sums, the bid invitations or requests for proposal, as well as the contracts themselves, may well be subject to special *ad hoc* treatment in any event.

1 August 1983

## 21. World Meteorological Organization Convention and General Regulations—Questions relating to resolution 3 of the Eighth World Meteorological Organization Congress of "Suspension of members for failure to meet financial obligations"

*Letter to the Secretary-General of the World Meteorological Organization*

This is in response to your letter of 24 March requesting our advice on certain questions concerning the WMO Convention and the General Regulations in relation to resolution 3 of the Eighth WMO Congress entitled "Suspension of members for failure to meet financial obligations".

Before responding to the particular questions set out in your letter, it should first of all be noted that under the above-mentioned resolution, in spite of its title, member States in arrears of their contributions are not actually suspended from membership, nor are all their rights and privileges suspended (as would be permitted by article 31 of the Convention—cf. Article 5 of the Charter of the United Nations), but rather they are only deprived of their right to vote in constituent bodies (cf. Article 19 of the Charter) and to receive WMO publications free of charge. Thus their right to participate otherwise in the organization and its organs is not suspended.

1. *Whether the number of member States whose voting rights are suspended should be deducted from the number on which a quorum of the Congress is established under article 12 of the WMO Convention.* Since article 12 refers only to members and does not refer to their voting rights (unlike regulations 173 and 187—see paragraph 3 below), no reduction in the quorum requirements of the Congress would seem called for; by the same token, if a State whose voting rights have been suspended is present at a Congress, it is to be counted towards the quorum. And since under article 11 (*b*) decisions require a two-thirds majority of the votes cast for and against (and for elections a simple majority of votes cast) and abstentions are evidently not taken into account, there is in any event no assurance that decisions will be adopted only if a certain minimum number of votes are cast in their favour; the proposed interpretation of article 12 would thus not raise any difficulties in that regard.

2. *Should the majorities required for the adoption of amendments by article 28 (b) or (c) of the WMO Convention be reduced if the voting rights of some member States have been suspended?*

(*a*) Again, as in paragraph 1 above, it should be noted that the cited provisions relate to "members which are States" and not to members with voting rights (cf. paragraph 3 below). Since amendments if adopted and brought into force may affect all members, it seems appropriate to take a strict interpretation and not reduce the majority requirements specified in article 28. It is, however, recognized that if fewer and fewer members can vote it may become increasingly difficult to adopt amendments, and if the rights of more than a third are suspended, constitutional amendments can no longer be adopted; in this these provisions, which call for absolute majorities, differ from those discussed in paragraph 1 above in relation to article 11 (*b*). If this is considered a likely development, perhaps a timely amendment of article 28 might have to be considered; alternatively, if resolution 3 (Cg-VIII) were altered to suspend all the rights and privileges of the members affected, it might be easier to argue that these States should not be counted for the purpose of article 28 voting majorities.

(*b*) It should be noted that subparagraph (*a*) above refers solely to the necessary vote in the Congress and not to the subsequent acceptance of amendments by individual member States that is explicitly required by article 28 (*b*) and implicitly by article 28 (*c*). The right of members in arrears to accept (or not) an amendment was not suspended by resolution 3 (Cg-VIII) and, *a fortiori*, the required majorities and the consequences of acceptance or non-acceptance were not changed.

3. *Whether the number of member States whose voting rights are suspended should be deducted from the number on which the quorum of a Regional Association or a Technical Commission is established under regulation 173 or 187.* In this connection it must first of all be noted that the Regional Associations and the Technical Commissions are both constituent bodies (within the meaning of resolution 3 (Cg-VIII)) under article 4 (*a*) (3) and (4) of the WMO Convention. Since regulations 173 and 187 explicitly refer to a "majority of members with voting rights" it would seem that in the Associations and Commissions (unlike in the Congress—see paragraph 1 above) the quorum

requirements are reduced if any members have their voting rights suspended. This interpretation is based on the clear language of these regulations, even though it should be recognized that the reference to members with voting rights was almost certainly not intended to take into account the possibility that some members might have their voting rights suspended, but was meant to exclude basically non-voting participants such as the associate members referred to in regulation 179.

4. *Does the suspension of voting rights under resolution 3 (Cg-VIII) apply to both substantive and procedural issues?* In view of the broad wording of the resolution, voting in respect of all types of issues would seem to be covered. That, incidentally, is also the effect of a suspension of voting rights under Article 19 of the Charter of the United Nations.

Except as examined in paragraph 2 (*a*) above, no amendment of either the Covenant, the General Regulations or resolution 3 (Cg-VIII) would seem called for.

22 April 1983

---

## 22. Legal and constitutional consequences that would arise from a possible inability of the General Assembly to elect a member of the Economic and Social Council

*Opinion prepared at the request of the Under-Secretary-General for Political and General Assembly Affairs*

1. The question has been raised of the legal and constitutional consequences that would arise from a possible inability of the General Assembly to elect a member of the Economic and Social Council—which would result temporarily in a Council of only 53 members, rather than the 54 prescribed by paragraph 1 of Article 61 of the Charter.

2. It will be recalled that this situation is rather similar to one that faced the Organization at the end of the thirty-fourth session of the General Assembly, in December 1979 and January 1980, when the Assembly was unable to elect one non-permanent member of the Security Council until 7 January 1980. Our Office advised the General Assembly on this question at its 118th meeting, on 31 December 1979.[10] After reviewing the applicable provisions of the Charter and of the rules of procedure of the General Assembly (which are in all here relevant respects similar in respect of the Security Council and the Economic and Social Council) as well as various situations in which a vacancy could arise in the membership of the Security Council (which again correspond to situations that could arise in respect of the Economic and Social Council), we concluded that:

> "... [W]hile the failure of the General Assembly to elect a non-permanent member of the Security Council would be inconsistent with Article 23 of the Charter, such an act of omission could not produce legal consequences for the functioning of the Security Council, which is the organ primarily responsible for the maintenance of international peace and security. In such a situation, it would be the view of the Office of Legal Affairs that decisions of the Security Council taken in accordance with the relevant provisions of Article 27 of the Charter would constitute valid decisions. This is not to say, however, that the exceptional situation created by such a failure on the part of the General Assembly is either legally or constitutionally desirable. But in the interests of maintaining the authority of the Security Council and the balance of powers between the General Assembly and the Security Council, it is essential that the General Assembly should fulfil its obligations and responsibilities under the Charter."

3. That conclusion, and part of the reasoning that preceded it, referred to the special obligations of the Security Council for the maintenance of international peace and security. While the functions of the Economic and Social Council are of course different, it cannot be said, certainly not as a matter of law, that they are of lesser significance, and in any event both Councils are, by virtue of paragraph 1 of Article 7 of the Charter, "principal organs" of the Organization.

4. Consequently, the reasoning of the 1979 opinion in respect of the Security Council is equally applicable to a failure of the General Assembly to complete an election of members of the Economic and Social Council.

5. In this connection it should also be noted that immediately subsequent to the delivery of the above-mentioned opinion to the General Assembly on the last day of 1979, the following occurred:

(*a*) After the President of the General Assembly indicated that it could be concluded from the preceding debate that the Assembly had "an inescapable responsibility" to discharge its responsibility under the Charter, the session of the Assembly was briefly suspended, and resumed again a few days later, on 4 January 1980, and tried, unsuccessfully, to complete the Security Council election.

(*b*) On 5 and 6 January and on the morning of 7 January, the Security Council held five urgent meetings. No member of the Council challenged its composition, though some expressed regret at the situation (no votes were taken in the Council at any of those meetings—the 2185th to 2189th).

(*c*) On the morning of 7 January, at the 120th meeting of its thirty-fourth session, the General Assembly completed the election of the non-permanent members of the Security Council.

(*d*) On the afternoon of 7 January, the Security Council met again for the first time during 1980 with its full complement of members. (Later, at its 2190th meeting, it took its first vote of the year.)

6. From the above it may be concluded that, should the General Assembly not be able to complete the election of the members of the Economic and Social Council before the end of 1983:

(*a*) The Council would then be imperfectly constituted until the election is completed;

(*b*) However, any decisions taken by the Council while thus imperfectly constituted would still be valid decisions—though, in the first instance, this is a matter for the Council itself to consider;

(*c*) The General Assembly has an obligation to make every effort to complete the election of the Council as soon as possible so that the period during which it has to meet with imperfect composition is reduced to a minimum.

15 December 1983

---

23. DECISION OF THE ECONOMIC AND SOCIAL COUNCIL IN ITS RESOLUTION 1982/26 OF 4 MAY 1982 THAT THE COMMISSION ON THE STATUS OF WOMEN, WHEN ACTING AS PREPARATORY BODY FOR THE 1985 WORLD CONFERENCE TO REVIEW AND APPRAISE THE ACHIEVEMENTS OF THE UNITED NATIONS DECADE FOR WOMEN, SHOULD "OPERATE ON THE BASIS OF CONSENSUS"—PRACTICE FOLLOWED IN UNITED NATIONS ORGANS WITH SIMILAR TERMS OF REFERENCE

*Memorandum to the Acting Assistant Director, Office of Secretariat Services for Economic and Social Matters*

1. You have requested the Office of Legal Affairs to provide clarification with regard to the decision of the Economic and Social Council in its resolution 1982/26 of 4 May 1982 that the Commission on the Status of Women, when acting as preparatory body for the 1985 World Conference to Review and Appraise the Achievements of the United Nations Decade for Women, should "operate on the basis of consensus".

2. Although there is no definitive or authoritative interpretation of the words "on the basis of consensus", we would suggest, in the light of the practice followed in United Nations organs with similar terms of reference, that the Commission consider the following interpretation in implementing Council resolution 1982/26 and General Assembly resolution 37/60 of 3 December 1982. When acting as the preparatory body for the 1985 World Conference, the Commission may decide by vote all questions of a procedural nature; however, all decisions on substantive questions, i.e., those relating to any aspect of the Conference, should be taken on the basis of consensus. If the Commission adopts this approach, it would not be precluded from taking indicative votes on those proposals on which a consensus could not be achieved; the results of such votes could also be included in the preparatory body's report to the Economic and Social Council, with an indication that these proposals are not considered as adopted by the Commission.

28 January 1983

---

24. RESPONSIBILITY FOR COSTS OF A PROPOSED COMMITTEE AGAINST TORTURE—UNITED NATIONS PRACTICE WITH RESPECT TO SIMILAR ORGANS ESTABLISHED BY TREATIES

*Cable to the Assistant Secretary-General, Centre for Human Rights*

We refer to your telegram of 27 January 1983. As you know, the normal practice is for States parties to treaties to be responsible for the costs of any organs or conferences provided for by those treaties. However, particularly in the field of human rights instruments, different practice has emerged in the United Nations. Organs which may bear some resemblance to the proposed committee against torture, such as the Human Rights Committee (article 28, 1966 International Covenant on Civil and Political Rights[11]), the Committee on the Elimination of Discrimination against Women (article 17, Convention on the Elimination of All Forms of Discrimination Against Women[12]) and the Committee on the Elimination of Racial Discrimination (article 8, International Convention on the Elimination of All Forms of Racial Discrimination[13]) are provided by the Secretary-General of the United Nations with the necessary staff and facilities for the effective performance of their functions without any reimbursement by participating States. In some cases, committee members are to "receive emoluments from United Nations resources"; in other cases (e.g., CEDAW), the corresponding expenses are borne by the States parties. The expenses of the international control organs established under the 1961 Single Convention on Narcotic Drugs[14] are also to "be borne by the United Nations". We believe this practice was developed in order to encourage the widest possible participation by States in human rights and similar treaties.

2 February 1983

---

25. QUESTION OF THE PROVISION OF SUMMARY RECORDS FOR MEETINGS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

*Memorandum to the Chief of the Planning and Meetings Servicing Section, Department of Conference Services*

1. Reference is made to the memorandum dated 16 February 1983 concerning summary records for the meetings of the Committee on the Elimination of Discrimination against Women, addressed to you by the Centre for Social Development and Humanitarian Affairs.

2. As you know, the Committee on the Elimination of Discrimination against Women was established pursuant to paragraph 1 of article 17 of the Convention on the Elimination of All Forms of Discrimination against Women.[12] Since the Committee was established under a separate treaty instrument, and not by the General Assembly, it is not automatically subject to the decisions of the General Assembly relating to meeting records and documentation for subsidiary organs of the Assembly. Under paragraph 9 of article 17 of the Convention, the Secretary-General of the United Nations is required to provide the necessary staff and facilities for the effective performance of the functions of the Committee under the Convention. In connection with the adoption of its rules of procedure, the Committee has decided that it requires summary records in order to perform its functions effectively. From a legal standpoint, therefore, there is no obstacle to the Committee having summary records. However, since no specific budgetary appropriation was made for the provision of summary records to the Committee, its decision to have records can only be implemented on a provisional basis, if existing resources permit, pending a decision by the General Assembly at its next session.

3. It is our understanding that the Committee's report reflecting its decision that it should have summary records will be transmitted to the General Assembly at its thirty-eighth session through the Economic and Social Council at its first regular session in 1983. The Centre for Social Development and Humanitarian Affairs or the Department of Conference Services may wish to bring CEDAW's decision on summary records to the attention of the General Assembly at its thirty-eighth session when CEDAW's report is considered, with a statement of financial implications and a request for

guidance from the General Assembly on whether, in the light of the Assembly's decisions relating to meeting records for its subsidiary organs, the cost of providing summary records to CEDAW should be met from regular budget resources or be borne by the States parties to the Convention on the Elimination of All Forms of Discrimination against Women.

23 February 1983

---

26. PROPOSALS FOR THE ESTABLISHMENT BY THE GENERAL CONFERENCE OF THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION OF A STANDING INTERGOVERNMENTAL REGIONAL COMMITTEE WHICH WOULD INCLUDE AS FULL MEMBERS A NUMBER OF TERRITORIES THAT ARE NOT RESPONSIBLE FOR THE CONDUCT OF THEIR INTERNATIONAL RELATIONS—QUESTION OF WHETHER PRECEDENTS EXIST IN INTERGOVERNMENTAL ORGANS SET UP WITHIN THE UNITED NATIONS

*Letter to the Director of the Office of International Standards and Legal Affairs, United Nations Educational, Scientific and Cultural Organization*

I wish to refer to your letter of 12 April 1983 concerning proposals for the establishment by the General Conference of UNESCO of a standing intergovernmental regional committee, in which not only UNESCO member States in the region concerned would be full members but also a number of Territories or groups of Territories that are not responsible for the conduct of their international relations would have the same status.

You have requested information on any relevant precedents that might exist in intergovernmental organs, committees or bodies set up within the United Nations. There is no precedent in the practice of the United Nations for granting full membership in a United Nations body to Territories that are not responsible for the conduct of their external affairs. It should be noted, however, that such Territories or groups of Territories are eligible for associate membership in two of the regional commissions of the Economic and Social Council. Under their terms of reference, applications for associate membership in respect of Territories or groups of Territories within the geographical scope of the commission concerned must be submitted by the State Member of the United Nations that is responsible for the conduct of the external relations of those Territories.

On this basis, the following have the status of associate members of the Economic and Social Commission for Asia and the Pacific (ESCAP): Brunei, Cook Islands, Guam, Hong Kong, New Hebrides, Niue and the Trust Territory of the Pacific Islands; and the following have that status in the Economic Commission for Latin America: Anguilla, the Netherlands Antilles, St. Christopher-Nevis and Montserrat. (St. Christopher-Nevis is scheduled to accede to independence on 19 September 1983 and is expected to become a Member of the United Nations and a full member of ECLA shortly thereafter.)

It should be noted that associate members of the regional economic commissions referred to above are entitled to participate fully, but without the right to vote, in the work of the commissions.

Apart from the foregoing and although not really relevant to the information you have requested, it might be useful to mention that there are examples of entities, other than fully independent States, that have full membership, including the right to vote, in United Nations organs, conferences, programmes or bodies. These examples are *sui generis* in nature and are based on *ad hoc* decisions of the competent deliberative organ of the United Nations. The entities in question are: Namibia, represented by the United Nations Council for Namibia, which has full membership in UNCTAD and in various United Nations organs and conferences; and the Palestine Liberation Organization, which is a full member of the Economic Commission for Western Asia.

29 June 1983

---

## 27. Arrangements for participation of Non-governmental organizations in the work of the Economic and Social Council—Question of the circulation of written statements by non-governmental organizations in the Economic and Social Council and its subsidiary organs

*Opinion prepared at the request of the Chairman of the Commission on Transnational Corporations*

The rules of procedure of the Economic and Social Council which govern the work of the Council and its subsidiary bodies do not contain specific provisions concerning the submission of written statements by non-governmental organizations. However, elaborate arrangements for participation of non-governmental organizations in the work of the Economic and Social Council have been established by the Council pursuant to Article 71 of the Charter of the United Nations. These arrangements are set out in Council resolution 1296 (XLIV) of 23 May 1968. Under these arrangements a Committee on non-governmental organizations has been established to select and classify non-governmental organizations that are to be granted consultative status with the Economic and Social Council. The non-governmental organizations granted consultative status with the Economic and Social Council are entitled to attend meetings, to make statements orally and to have written statements circulated on matters within their competence and to propose items for inclusion in the agenda of the Council.

As far as the submission of written statements in Commissions and subsidiary bodies of the Economic and Social Council is concerned, paragraph 29 of Council resolution 1296 (XLIV) provides:

> "Written statements relevant to the work of the commissions or other subsidiary organs may be submitted by organizations in categories I and II on subjects for which these organizations have a special competence. Such statements shall be circulated by the Secretary-General to members of the commission or other subsidiary organs, except those statements which have become obsolete, for example those dealing with matters already disposed of and those which have already been circulated in some other form to members of the commission or other subsidiary organs."

Paragraph 30 of the same resolution goes on to specify the conditions that are to be observed regarding the submission and circulation of such written statements. Subparagraph (*d*) of the paragraph relates to written statements submitted by an organization in category I. It provides:

> "A written statement submitted by an organization in category I will be circulated in full if it does not exceed 2,000 words. Where a statement is in excess of 2,000 words, the organization shall submit a summary, which will be circulated, or shall supply sufficient copies of the full text in the working languages for distribution. A statement will also be circulated in full, however, upon the specific request of the commission or other subsidiary organs."

A similar provision with a 1,500-word limitation appears in subparagraph (*e*), which relates to organizations in category II.

Organizations on the roster do not have an absolute right to submit written statements and to have them circulated but may be invited to submit such statements by the Secretary-General in consultation with the chairman of the relevant commission or other subsidiary organ, or by the commission or subsidiary organ itself.

On the basis of the foregoing, it is clear that the International Chamber of Commerce (ICC), which has the status of a non-governmental organization in category I with consultative status with the Economic and Social Council, is entitled to submit written statements on matters relevant to the work of the Commission on Transnational Corporations and in which ICC has a special competence, and moreover it is entitled to have such written statements circulated to members of the Commission even if they are in excess of 2,000 words provided that it supplies sufficient copies of the text in the working languages to the Secretariat. The Commission is therefore not legally competent of preventing ICC from exercising these rights if the statement (1) is on a matter in which ICC has a special competence and (2) is relevant to the work of the Commission.

15 March 1983

28. MEMBERSHIP, ASSOCIATE MEMBERSHIP AND OBSERVER STATUS IN THE CARIBBEAN DEVELOPMENT AND CO-OPERATION COMMITTEE—QUESTION WHETHER CDCC HAS THE AUTHORITY TO DECIDE WHETHER AN ASSOCIATE MEMBER OF THE ECONOMIC COMMISSION FOR LATIN AMERICA SHOULD PARTICIPATE IN THE COMMITTEE'S DELIBERATIONS WITH THE SAME STATUS AS IT ENJOYS IN ECLA OR WHETHER SUCH STATUS AUTOMATICALLY APPLIES TO THE COMMITTEE

*Memorandum to the Director, ECLA Subregional Office for the Caribbean*

1. Reference is made to your memorandum of 28 February 1983, seeking guidance from the Office of Legal Affairs on membership, associate membership and observer status in the Caribbean Development and Co-operation Committee.

2. Specifically, you have requested legal advice on whether CDCC has the authority to decide whether a country or Territory that is an associate member of the Economic Commission for Latin America should participate in the deliberations of CDCC with the same status as it enjoys in ECLA or whether associate membership status in ECLA automatically entitles the country or Territory concerned to participate with the same status in the deliberations of CDCC.

3. We have reviewed the relevant legislative provisions relating to the establishment of CDCC and the terms of reference of ECLA and our comments on the question you have raised are set out below.

4. As far as full membership (i.e., including the right to vote) in the Committee is concerned, we have indicated in legal opinions given previously on this subject to the ECLA secretariat that such membership is limited to the countries members of the Commission specified in ECLA resolution 358 (XVI) including "the other Caribbean countries" that have since achieved or will in the future achieve independence. No provision is made in the ECLA resolution, or in the Constituent Declaration of CDCC, concerning the participation by non-sovereign entities as associate members or as observers. In these circumstances the Committee itself is competent to determine the status and modalities of participation in CDCC of such non-sovereign entities.

5. In our view, there is no basis either in ECLA resolution 358 (XVI) or in the Constituent Declaration and Functions and Rules of Procedure of CDCC or in the terms of reference of ECLA for a conclusion that associate membership in ECLA automatically entitles those concerned to the same status in CDCC, and therefore it is entirely appropriate and certainly within the competence of CDCC itself to decide whether or not to grant that status to the entities concerned. Of course, as a subsidiary body of ECLA, CDCC must take into account the practice and policy of ECLA in deciding on questions of participation of the nature here involved. All entities that participate in the work of ECLA are eligible to participate in the work of CDCC and there would be no legal obstacle to their being granted the same status in CDCC as they have in ECLA.

14 March 1983

---

29. RULE 46 OF THE RULES OF PROCEDURE OF THE ECONOMIC AND SOCIAL COUNCIL—QUESTION OF GRANTING OF THE RIGHT OF REPLY TO OBSERVERS

*Cable to the Secretary of the United Nations Commission on Human Settlements*

We refer to your telex of 26 April requesting clarification of the meaning of the term "member" in rule 46 of the rules of procedure of the Economic and Social Council.

(*a*) The word "member" in rule 46 of the rules of procedure of the Council refers to a State that is a member of the Economic and Social Council and not to a State that is a Member of the United Nations;

(*b*) It should be noted, however, that although rule 46 gives absolute right of reply only to Council members, it does not preclude the President from granting an opportunity to reply also to Observers. Traditionally this courtesy has been accorded by the Council to observer States and

less frequently and consistently also to certain other entities, such as the Palestine Liberation Organization, authorized to participate in Council proceedings;

(*c*) As Observers have no absolute right of reply, opportunities to reply can be more readily restricted for them than for members. Presiding officers may completely deny Observers an opportunity to reply, though their decision in this respect can be reversed by the body concerned under whose authority the presiding officer acts (pursuant to rules 30 (2) and 33 (1) in the case of the Commission on Human Settlements);

(*d*) It is of course desirable that decisions of presiding officers on these questions be consistent throughout a session (so that if one Observer is granted the opportunity to reply, others are given the same opportunity in similar circumstances) and as far as appropriate with the established practice mentioned in (*b*) above.

27 April 1983

---

30. PARTICIPATION OF NATIONAL LIBERATION MOVEMENTS IN SESSIONS OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES—RULE 70 OF THE RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL—PRACTICE OF THE ECONOMIC AND SOCIAL COUNCIL IN THE APPLICATION OF RULE 73 OF THE COUNCIL'S RULES OF PROCEDURE

*Memorandum to the Assistant Secretary-General, Centre for Human Rights*

Reference is made to your memorandum of 31 May 1983 requesting the views of the Office of Legal Affairs on the participation of national liberation movements in sessions of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

In the light of the provisions of rule 70 of the rules of procedure of the functional commissions of the Economic and Social Council, which, as you correctly conclude in your memorandum, are also applicable to subsidiary organs established by the Commission by virtue of rule 24, there is certainly no legal obstacle to the issuance of an invitation to national liberation movements for the forthcoming session of the Sub-Commission. It is relevant to note that rule 70 of the rules of procedure of the functional commissions is based on identical provisions contained in rule 73 of the Economic and Social Council's rules of procedure. A review of the practice of the Economic and Social Council in the application of that rule reveals that the Palestine Liberation Organization and the African national liberation movements recognized by the Organization of African Unity have participated regularly in the sessions and in the work of the Council. Participation by these organizations (i.e., the Palestine Liberation Organization and the African National Congress, the Pan Africanist Congress of Azania and the South West Africa People's Organization) in meetings of the functional commissions and their subsidiary organs would therefore be entirely consistent with the practice of the Economic and Social Council. We should like to mention in conclusion that in practice the Economic and Social Council secretariat does not issue formal invitations to the PLO and to the African national liberation movements for the Economic and Social Council sessions. In order to avoid introducing a new practice in the Commission on Human Rights and its subsidiary organs you might wish to consider issuing notifications rather than invitations to the PLO and to the African national liberation movements recognized by OAU. It would then be for the organizations themselves to determine whether or not their participation is warranted on any matter of particular concern to them, in which case they could request permission to intervene on the basis of rule 70 of the rules of procedure of the functional commissions. Name plates could be provided for the organizations notified of the meeting concerned which actually attend the meeting.

7 June 1983

---

## 31. Question whether the Fourth Committee has the competence to grant a hearing to a petitioner directly on the question of Puerto Rico

*Opinion prepared at the request of the Chairman of the Fourth Committee*

1. The advice of the Office of Legal Affairs has been requested on the question of whether a petitioner may make a statement concerning Puerto Rico during the Fourth Committee's consideration of agenda item 103, which is entitled "Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Namibia and in all other Territories under colonial domination and efforts to eliminate colonialism, *apartheid* and racial discrimination in southern Africa".

2. At the 24th meeting of the Fourth Committee, on 24 November 1978, a legal opinion was delivered in the Committee and accepted by it on the question whether the Committee had the competence to grant a hearing to a petitioner directly on the question of Puerto Rico. That opinion concluded as follows:

> "[I]t is the view of the Office of Legal Affairs that the question of Puerto Rico is not a question before the Fourth Committee since it is not on the list of Territories to which the Declaration applies and consequently not in any of the chapters of the report of the Special Committee dealing with specific Territories allocated to the Committee by the General Assembly. Since the General Assembly has reserved to itself the consideration of the question of the implementation of the Declaration as a whole, which in the view of the Office of Legal Affairs is the context in which the question of Puerto Rico has hitherto been considered, it would not be within the competence of the Fourth Committee to consider or grant the request contained in document A/C.4/33/14 without express authorization from the General Assembly."[15]

3. Since the foregoing opinion, no steps have been taken by the General Assembly to include Puerto Rico on the list of Territories to which the Declaration on the Granting of Independence to Colonial Countries and Peoples applies. Furthermore, at its thirty-seventh session the Assembly did not accede to a request to include in its agenda a separate item relating to Puerto Rico.

4. As there has been no change in the legal situation since the previous opinion was given, the question remains whether the legal situation is altered by the fact that the issue is arising under agenda item 103 rather than under those parts of the report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples which deal with specific Territories under agenda item 18. Agenda item 103 derives, like the question of the Territories to be included in the list, from a chapter in the report of the Special Committee. In our view, it would be open to the same objections to hear a petitioner speak in the Fourth Committee specifically on Puerto Rico under this chapter as it is to hear a petitioner speak on Puerto Rico under the specific list of Territories. Puerto Rico is in that part of the report of the Special Committee which is reserved for plenary in that it relates to the implementation of the Declaration as a whole. More colloquially speaking, it would be unprecedented and legally objectionable to permit through the back door in the Fourth Committee that which has not been allowed through the front door. There would of course be no legal obstacle to the Committee's hearing a petitioner from Puerto Rico on the item under consideration to speak both in general terms and in relation to Territories on the list, provided, however, that his appearance under this item does not serve merely as a cloak for a statement on Puerto Rico.

21 October 1983

## 32. Question whether United Nations Development Programme funds may be used for technical assistance to Territories under United States administration and the French Overseas Territories in the Pacific

*Memorandum to the Assistant Administrator and Regional Director, Regional Bureau for Asia and the Pacific, United Nations Development Programme*

1. Please refer to your memorandum of 18 October 1983 in which you request advice on whether UNDP funds may be used for technical assistance to Territories under United States administration and the French Overseas Territories in the Pacific.

2. On the basis of the information available to us, the situation would appear to be as follows:

(*a*) *Trust Territory under United States administration.* The Trust Territory of the Pacific Islands (TTPI), that is, the Commonwealth of the Northern Marianas Islands, the Republic of Palau, the Republic of the Marshall Islands, and the Federated States of Micronesia, are all eligible for UNDP assistance under the Basic Assistance Agreement concluded on 10 June 1974 between the United Nations (United Nations Development Programme) and the United States as the Administering Authority.[16]

On 24 March 1974 the Northern Marianas Islands signed a Covenant which established the Commonwealth of the Northern Marianas Islands in political union with the United States. Under the Covenant, the Northern Marianas Islands would be under United States sovereignty once the trusteeship is terminated. Thus, in the interim period, the Commonwealth of the Northern Marianas Islands, although still part of TTPI, is treated differently by the United States Administration, which as a matter of policy requested that UNDP assistance not be extended to the Territory because it receives direct development assistance from the United States and is treated like the other Territories under United States sovereignty such as Samoa, Guam, the Virgin Islands and Puerto Rico. As you are aware, the United States has not concluded any UNDP Basic Special Fund or Technical Assistance Agreement in respect of the Territories under United States sovereignty; thus no UNDP country Indicative Planning Figures (IPF) have been established in respect of them.

(*b*) *French Overseas Territories.* France signed the Special Fund Agreement on 17 March 1960 and a Technical Assistance Agreement on 31 May 1954 to cover technical assistance provided by UNDP to Non-Self-Governing or Trust Territories for whose international relations the French Government is responsible. There is, therefore, no impediment to UNDP technical assistance to French Overseas Territories. However, from the information available to us, the French Government has indicated that it has no intention to request for its Overseas Territories and departments individual country IPFs for the third cycle. Nevertheless, it does not wish to deny them the advantages of participating in UNDP activities within the framework of regional and subregional programmes which may be of interest to them.

(*c*) *Membership in the South Pacific Commission.* TTPI, Guam, Western Samoa, Nauru, Fiji and Papua New Guinea and the French Overseas Territories in the Pacific are participating members of the South Pacific Commission (SPC) established on 6 February 1974 by Agreement signed between the Governments of Australia, France, the Netherlands, New Zealand, the United Kingdom of Great Britain and Northern Ireland and the United States of America, to promote the economic and social welfare and advancement of the people of the 20 Pacific Island countries and Territories within its zone of action.

The policy of the United States and France has been and still seems to be that the Territories under their jurisdiction which are members of the South Pacific Commission should not be denied the advantages of participating in joint UNDP/SPC activities within the regional and subregional programmes to the extent that such denial might undermine their being full and equal members of the Commission.

(*d*) *Membership in ESCAP.* TTPI and Guam are associate members of ESCAP, and for as long as the United Nations Trusteeship Agreement has not been terminated the membership of the Northern Marianas Islands remains as a part of TTPI; the United States has expressed no intention to seek separate membership for that Territory as a result of its special status *vis-à-vis* the United States.

2 November 1983

33. ARRANGEMENTS TO BE MADE FOR THE PROVISION OF ASSISTANCE BY THE UNITED NATIONS CHILDREN'S FUND TO THE REPUBLIC OF THE MARSHALL ISLANDS, THE FEDERATED STATES OF MICRONESIA AND THE REPUBLIC OF PALAU WHICH FORM PART OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS—PROVISION OF THE TRUSTEESHIP AGREEMENT CONCERNING CO-OPERATIVE ARRANGEMENTS WITH "SPECIALIZED INTERNATIONAL BODIES"—ANALOGY WITH THE UNITED NATIONS DEVELOPMENT PROGRAMME BASIC AGREEMENT CONCLUDED WITH THE ADMINISTRATIVE AUTHORITY

*Memorandum to the Chief, Administrative Services Section, United Nations Children's Fund*

1. We refer to your letter of 31 March 1983 in which you request advice on the appropriate arrangements to be made for the provision of assistance by UNICEF to the Republic of the Marshall Islands, the Federated States of Micronesia and the Republic of Palau which form part of the Trust Territory of the Pacific Islands.

2. The Trusteeship Agreement between the United Nations and the United States, as the Administering Authority, accords the United States full powers of administration, legislation and jurisdiction over the Trust Territory (article 3 of the Agreement). The Administering Authority is also authorized to enter into co-operative arrangements with "specialized international bodies, public or private" and to engage in other forms of international co-operation (article 10 of the Agreement).

3. As you are certainly aware, UNDP's Basic Agreement with respect to the Trust Territory was concluded with the United States as Administering Authority, and it is UNDP policy to treat the Trust Territory as one Trust Territory, until such time as the Trusteeship Agreement comes to an end.

4. We would recommend that UNICEF follow a similar course. As there is no basic agreement between UNICEF and the United States with respect to the Trust Territory, negotiations for the conclusion of a basic agreement should be initiated with the United States as the Administering Authority.

18 May 1983

---

34. CIRCULAR NOTE SENT TO THE STATES PARTIES TO THE STATUTE OF THE INTERNATIONAL ATOMIC ENERGY AGENCY BY THE GOVERNMENT OF THE UNITED STATES IN ITS CAPACITY AS DEPOSITARY OF THE STATUTE CONCERNING THE INSTRUMENT OF ACCEPTANCE TENDERED BY THE UNITED NATIONS COUNCIL FOR NAMIBIA—QUESTION OF THE ACCESSION TO MULTILATERAL TREATIES BY NAMIBIA, AS REPRESENTED BY THE UNITED NATIONS COUNCIL FOR NAMIBIA

*Memorandum to the Secretary of the United Nations Council for Namibia*

1. I wish to refer to your memorandum of 6 January 1983 requesting a legal opinion regarding the circular note of the Government of the United States, in its capacity as depositary of the statute of IAEA,[17] requesting the comments of States parties to the statute concerning the instrument of acceptance tendered by the United Nations Council for Namibia.

2. The circular note makes it clear that the Government of the United States, as the depositary of the statute, does not find itself in a position to accept the instrument of acceptance received from the United Nations Council for Namibia because of the specific language of articles IV and XXI (*c*) of the statute, which limits acceptance to States. The General Conference of IAEA, however, has decided to admit Namibia, as represented by the United Nations Council for Namibia, to membership. Although the decision by the General Conference of IAEA does not, formally speaking, constitute a decision by the parties to the statute, all the parties are represented in the General Conference. These circumstances, therefore, indicate the existence of a probable difference between the depositary and the parties regarding the acceptance of the instrument tendered by the Council.

3. Accordingly, the procedure followed by the Government of the United States appears to be in accordance with international practice as codified in article 77 (2) of the Vienna Convention on the Law of Treaties,[18] which reads as follows:

> "2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of signatory States and the Contracting States or, where appropriate, of the competent organ of the international organization concerned."

4. The only difficulty that could perhaps be found in the procedure adopted by the depositary in this instance is a possible lack of precision regarding what is now expected from the parties, namely, a decision as to whether the instrument should be deposited; instead, the depositary notification simply calls for "any comments" that the parties may have and remains silent as to the further steps that may be contemplated.

5. While Namibia, as represented by the United Nations Council for Namibia, is not a State, it has been treated as such by the international community on two recent occasions in connection with accession to multilateral treaties deposited with the Secretary-General, namely, the 1966 Convention on the Elimination of All Forms of Racial Discrimation[13] and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid.*[19]

6. Accession by Namibia to these Conventions, both of which provide for accession by States only, was based on paragraph 7 of General Assembly resolution 36/121 C of 10 December 1981, which reads as follows:

> "7. *Requests* the United Nations Council for Namibia, in its capacity as the legal Administering Authority for Namibia, to accede to the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* and such other related conventions as may be appropriate;"

In this connection, it may be recalled that the Secretary-General, in performing his functions as a depositary, follows the practice of the General Assembly regarding which entities are qualified as States (see *Official Records of the General Assembly, Twenty-eighth Session, Plenary Meetings*, 2202nd meeting, 14 December 1973); because of the prior decision by the General Assembly, the accession of the United Nations Council for Namibia did not raise any difficulty of a depositary nature in these two cases.

7. Granted that the two instances mentioned above may be considered as exceptional owing to the relationship that exists between the Secretary-General and the General Assembly of the United Nations, it remains that, in the case of the Namibian acceptance of the IAEA statute, it is up to the parties to make a final determination as to whether the Namibia instrument should be accepted.

8. In these circumstances, it would be the opinion of this Office that the Council should send as soon as possible to the Government of the United States in its capacity as the depositary, with a request that it be circulated to all States concerned, a concise note (*a*) recalling the decision taken by the General Conference of IAEA with regard to the admission of Namibia to IAEA as well as the special status of Namibia, recognized by the international community (even, implicitly at least, by the Government of the United States in its second communication) and evidenced by Namibia's admission to various international organizations, and (*b*) expressing the wish that the other parties pronounce themselves in favour of the deposit of the instrument of acceptance.

9. The response will probably be such as to remove all difficulties of a legal nature that the depositary may find in accepting the instrument. Should, however, the results be deemed inconclusive, article XVII of the IAEA statute ("Settlement of disputes") could be implemented.

. . .

13 January 1983

35. DECISION 83/10 OF THE GOVERNING COUNCIL OF THE UNITED NATIONS DEVELOPMENT PROGRAMME CONCERNING MONIES THAT ARE PROVIDED FROM THE UNITED NATIONS FUND FOR NAMIBIA, WHICH IS ADMINISTERED BY THE UNITED NATIONS COUNCIL FOR NAMIBIA, TO A TRUST FUND ADMINISTERED BY UNDP—QUESTION WHETHER SUCH MONIES COULD BE CONSIDERED "GOVERNMENT CASH COUNTERPART CONTRIBUTIONS"

*Memorandum to the Director, Division of Finance, United Nations Development Programme*

1. This is in reply to the memorandum dated 22 July 1983 concerning decision 83/10 adopted on 24 June 1983 by the Governing Council of UNDP at its thirtieth session. The decision concerns monies that are provided from the United Nations Fund for Namibia, which is administered by the United Nations Council for Namibia, to a trust fund administered by UNDP.

2. You have requested our views on the question whether such monies could, from the legal point of view, be considered "government cash counterpart contributions".

3. We have set out the relevant considerations, as we see them, in the attachment to the present memorandum. We would, in the light of such considerations, conclude as follows on the question raised.

(*a*) As the United Nations Council for Namibia is the legal Administering Authority for Namibia and, thus, exercises functions of a governmental nature, it is legally possible to support the view that monies provided to UNDP under the authority of the United Nations Council for Namibia could for UNDP purposes be regarded as monies received from a governmental source.

(*b*) However, even if regarded as received from a governmental source, such monies would nevertheless not constitute a "government cash counterpart contribution" for the purpose of UNDP project financing.

The monies in question are received by UNDP into a trust fund administered under UNDP Financial Regulations and Rules and it is from the trust fund that the monies are provided by UNDP to executing agencies for project implementation.

The term "government cash counterpart contribution" is used in UNDP Financial Regulations and Rules in the context of project implementation for which the UNDP Financial Regulations and Rules require the following:

(*a*) a provision of funds by UNDP to an executing agency to cover project costs which UNDP has agreed to cover and which usually require convertible currency;

(*b*) the services of an executing agency;

(*c*) contributions, in cash or in kind, from the recipient Government for project costs of a local nature, such as locally available building materials, equipment, supplies, labour and professional services.

It is with respect to (*c*) above that the expression "government counterpart contribution" is used in the UNDP Financial Regulations and Rules. Where the government counterpart contribution is made in cash, it is referred to in the UNDP Financial Regulations and Rules as a "government cash counterpart contribution". As the monies in question in the present case are provided for project implementation under (*a*) above, they could not be viewed as a "government cash counterpart contribution".

9 September 1983

**ATTACHMENT**

*The United Nations Council for Namibia.* The United Nations Council for Namibia is a subsidiary organ of the General Assembly. It is distinguishable from other subsidiary organs, however, because by virtue of General Assembly resolutions 2145 (XXI) of 27 October 1966 and 2248 (S-V) of 19 May 1967 it functions in a dual capacity: as a policy-making organ of the General Assembly and as the legal administering authority of Namibia.

The General Assembly, in resolution 2145 (XXI):

"4. [*Decided*] that the Mandate . . . terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa [Namibia] comes under the direct responsibility of the United Nations;

"5. [*Resolved*] that in these circumstances the United Nations must discharge those responsibilities with respect to South West Africa [Namibia];

" . . . "

The General Assembly in resolution 2248 (S-V) established the United Nations Council for Namibia, and, *inter alia*, entrusted the Council with the following powers:

" . . .

"(*a*) To administer South West Africa [Namibia] until independence, within the maximum possible participation of the people of the Territory;

"(*b*) To promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage;

" . . . "

The General Assembly has thus in resolutions 2145 (XXI) and 2248 (S-V) placed the United Nations Council for Namibia substantially in the position of the Administering Authority of Namibia with full powers of legislation and administration until Namibia achieves independence.

*The United Nations Commissioner for Namibia.* The General Assembly, in resolution 2248 (S-V) of 19 May 1967, provided for the appointment of a United Nations Commissioner for Namibia to whom the United Nations Council for Namibia would entrust such executive and administrative tasks as it deemed necessary.

*The United Nations Fund for Namibia.* The United Nations Fund for Namibia was established by the General Assembly by its resolution 2679 (XXV) of 9 December 1970. The relevant provisions of the resolution read as follows:

"*The General Assembly*,

"*Recalling* its resolution 2145 (XXI) of 27 October 1966, by which the United Nations decided to terminate the Mandate for South West Africa and assume direct responsibility for the Territory until its independence,

"*Recalling further* its resolve to discharge that responsibility with respect to the Territory,

"*Bearing in mind* that that responsibility includes the solemn obligation to assist and prepare the people of the Territory for self-determination and independence,

"*Considering* that, in order to discharge its responsibilities under resolution 2145 (XXI), the United Nations should provide comprehensive assistance to the people of the Territory,

"*Having considered* the request made by the Security Council, in its resolution 283 (1970) of 29 July 1970, that a United Nations fund be established to provide assistance to Namibians who have suffered from persecution and to finance a comprehensive educational and training programme for Namibians, with particular regard to their future administrative responsibilities in the Territory,

"*Taking into account* the assistance provided to Namibians at present from United Nations agencies and funds, notably the United Nations High Commissioner for Refugees, the United Nations Educational and Training Programme for Southern Africa and the United Nations Trust Fund for South Africa,

"1. *Decides* that a comprehensive United Nations Fund for Namibia shall be established;

" . . . "

As required by the General Assembly, the United Nations Council for Namibia serves as "trustee" of and administers the United Nations Fund for Namibia.

The United Nations Fund for Namibia is composed of three separate accounts: (*a*) the general account for educational, social and relief activities; (*b*) the trust fund for the United Nations Institute for Namibia; and (*c*) the trust fund for the Nationhood Programme for Namibia. It is from separate account (*c*)* that the monies in question in the present case are provided to the trust fund administered by UNDP.

*Separate account (*c*) was established within the United Nations Fund for Namibia at the request of the General Assembly in 1978.

II

*The trust fund administered by UNDP.* The trust fund administered by UNDP, titled "UNDP Trust Fund for the Nationhood Programme for the Fund for Namibia", was established by the Secretary-General in 1979. At the same time, authority for administration of the trust fund was delegated to the Administrator of UNDP. The trust fund is administered under the UNDP Financial Regulations and Rules.

The trust fund receives its monies exclusively from the United Nations Fund for Namibia's separate account (*c*) above.

III

*Transfer of monies from the United Nations Fund for Namibia to the trust fund administered by UNDP.* The arrangements for the transfer of monies from the United Nations Fund for Namibia to the trust fund administered by UNDP are set out in the Guidelines of 30 March 1979 agreed to between the United Nations Commissioner for Namibia and UNDP Assistant Administrator and Regional Director for Africa.

As provided for in section 5 of the Guidelines, once a project document has been approved by the United Nations Council for Namibia, the Commissioner for Namibia, UNDP and the executing agency concerned, the monies specified in the project document as the contribution of the Fund for Namibia are transferred from the Fund for Namibia to the trust fund administered by UNDP.

The monies are, thereafter, allocated by UNDP to the executing agency for project implementation.

IV

*The term "government cash counterpart contribution".* The expression "government cash counterpart contribution" is used in the UNDP Financial Regulations and Rules in the context of project implementation.

For project implementation, the UNDP Financial Regulations and Rules require the following: (*a*) a provision of funds by UNDP to an executing agency to cover project costs which UNDP has agreed to cover and which usually require convertible currency; (*b*) the services of an executing agency; (*c*) contributions, in cash or in kind, from the recipient Government for project costs of a local nature, such as locally available building materials, equipment, supplies, labour and professional services.

It is with respect to (*c*) above that the expression "government counterpart contribution" is used in the UNDP Financial Regulations and Rules; and where the contribution is in cash, it is referred to as a "government cash counterpart contribution".

---

## 36. Procedure followed by the United Nations for receiving assessed contributions

*Memorandum to the Senior Contributions Officer, Office of Financial Services*

1. This is in response to your memorandum of today's date on the procedure for receiving assessed contributions.

2. The procedure so far followed by the United Nations, as described in your memorandum and in our conversation today, appears to be the correct and prudent one, i.e., to indicate in the acknowledgement of the payment to the State concerned precisely to which account(s) any given payment is being credited. This is done whether or not the paying State indicates the account(s) to which it wishes the payment to be credited and, if it does so, whether its indication coincides with those that the Secretary-General must abide by pursuant to United Nations financial regulation 5.6.

3. A specification of credits may not be essential in those instances in which the Secretariat's calculations coincide with those of the paying State, or even when that State has not specified any such calculation. When the Secretary-General is unable to accept the credits proposed by the paying State, however, it is highly desirable that he so indicate specifically in his acknowledgement of the payment. Should he fail to do so, then that State could argue, in spite of financial regulation 5.6, that its proposed payment scheme had tacitly been accepted. Though such an argument could be refuted by referring to the periodically published tabulations of payments received, which naturally reflect the Secretariat's calculations, and also on the basis that, whatever either the State or the

Secretary-General indicates in their correspondence, the provisions of the Financial Regulations must be observed, the Organization's position would be weaker than if it had clearly indicated in receiving a payment that it could not follow the State-proposed distribution scheme.

4. As a compromise, it might be agreed with a State that does not wish to receive an acknowledgement indicating a particular distribution of the payments received from it, that no such distribution will be shown if in its communication it does not specify any distribution that is contrary to the Financial Regulations, i.e., if it merely specifies "Payment to regular budget" or "Payment to UNIFIL".

24 January 1983

---

37. OBLIGATIONS OF THE UNITED NATIONS *VIS-À-VIS* ITS STAFF IN EVACUATION SITUATIONS—SPECIAL RESPONSIBILITY OF THE HOST GOVERNMENT *VIS-À-VIS* THE ORGANIZATION UNDER THE CHARTER OF THE UNITED NATIONS, THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND THE RELEVANT HOST-COUNTRY OR STANDARD BASIC AGREEMENT

*Memorandum to the Assistant Secretary-General for General Services*

I wish to refer herewith to your memorandum dated 24 November 1982 in which you requested our views on the obligations of the Organization *vis-à-vis* its staff in evacuation situations.

After careful research on the subject, we have reached the following conclusions.

The possible obligations of the Organization *vis-à-vis* its staff members and their families in situations of emergency can be divided into two categories:

(i) There is first the direct legal obligation of the Organization *vis-à-vis* its employees, their spouses and dependants which stems from their relationship as employer and employees and which is governed by their contract of employment and the internal law of the Organization. In emergency situations, the obligation of the Organization materializes in duties which arise from the contract of employment of the employees of the Organization. For evacuation purposes, the following situations may be envisaged:

1. All internationally recruited staff members and their families who are not nationals of the host country and for whom the Organization has a duty to repatriate under their contract of employment pursuant to rule 104.7 and annex IV of the Staff Rules and Regulations should be evacuated by the Organization;
2. Nationals (and their families) of the host country who have been recruited internationally are not eligible for evacuation by the Organization since according to their contract of employment and as nationals of the host country they do not qualify for repatriation;
3. Consultants and experts internationally recruited also have a right to be evacuated together with their wives and dependants subject to the conditions specified in their contract of employment as long as they qualify for repatriation purposes;
4. Locally recruited staff members who are nationals of the country of the duty station do not have a right to be evacuated by the Organization pursuant to their contract of employment with the United Nations as specified in staff rule 104.6 and appendix B of the United Nations Staff Regulations and Rules. They may, nevertheless, be guided and assisted by the Organization in emergency situations in accordance with paragraphs 20, 21 and 22 of the United Nations Security Handbook. Compensation and other rights are established in accordance with their contract of employment;
5. Locally recruited staff members who are not nationals of the host country do not have a right to be evacuated by the Organization since they do not have a right to be repatriated, and the same conclusions as specified for locally recruited nationals apply.

(ii) Apart from the legal obligations of the Organization which arise *vis-à-vis* its staff members under their contracts of employment, it may be possible to postulate some bases in international

law for a broader approach on the part of the United Nations towards its staff in specific emergency situations, taking into account the particular nature and circumstances of each situation. This broader approach can be seen as a counterpart to the Organization's own rights *vis-à-vis* the host Governments. As you know, the primary obligation for the security and protection of personnel, their families and property and of the Organization's property against disturbances in the host country rests with the host Government. This responsibility flows from every Government's normal and inherent function of maintaining order and protecting persons and property within its jurisdiction. In the case of the United Nations and its officials and property, however, the Government is considered to have a special responsibility under the Charter, the Convention on the Privileges and Immunities of the United Nations[20] and any relevant host-country or standard basic agreement. Where the Government will not or cannot discharge this special responsibility, the United Nations may at least have the moral obligation to seek to do so when, in its judgement, its personnel may be endangered because of employment with the Organization irrespective of any contractual rights involved. The extent to which the Organization can act will depend on the particular circumstances of the case and the resources available.

21 January 1983

---

38. AUTHORITY OF UNITED NATIONS SECURITY OFFICERS—COMMENTS ON PROPOSED GUIDELINES TO SECURITY SERVICE ON THE USE OF FORCE *VIS-À-VIS* STAFF MEMBERS AND VISITORS, USE OF FIREARMS AND NIGHTSTICKS AND THE RIGHT OF SECURITY OFFICERS TO MAKE ARRESTS AND TO CONDUCT RANDOM SEARCHES

*Memorandum to the Under-Secretary-General, Department of Administration and Management*

1. We refer to the memorandum of 18 October 1983 addressed to you and to the Staff Committee President by the staff representatives on the Joint Advisory Committee, containing proposals for amending the administrative instruction on the authority of United Nations security officers, on which our advice was requested by the Secretary of JAC.

2. In addition to a draft administrative instruction amending ST/AI/309 of 20 September 1983, the staff representatives suggest that clear guidelines should be issued by the Office of Legal Affairs in co-operation with the Office of General Services, on "the use of force *vis-à-vis* staff members and visitors, use of firearms and nightsticks and the right of security officers to make arrests and to conduct random searches".

3. Our comments on the issues raised by the staff representatives on JAC are as follows.

A. GUIDELINES TO SECURITY SERVICE; ARRESTS AND USE OF FORCE

4. The existing administrative instruction is worded in general terms and is essentially addressed to staff, outlining the necessity of staff to comply with directions given by the security officers in the performance of their duties as agents of the Secretary-General. The circular cautions that in case of non-compliance with directives given, the matter may be reported to higher authorities (para. 3) but reiterates the privilege of staff members to file complaints where a directive is "thought to be unfair or unjust" (para. 2).

5. The instruction does not outline the nature of the authority entrusted to the security officers or the manner in which such authority shall be carried out because both these matters are dealt with in some detail in the Security and Safety Service Manual and the Handbook for Personnel of the Security and Safety Service. In fact, this Office was involved in the preparation of both the Manual and the Handbook.

6. In general, security officers exercise their functions as agents of the Secretary-General "to preserve order and to protect persons and property within the Headquarters District (Area)" within the limits prescribed under applicable rules and regulations, including local law. Local law is relevant

because, under the Headquarters Agreement, federal, state and local law applies within the Headquarters Area (article 7) and it has not so far been deemed necessary to promulgate supplementary regulations in the area of criminal law and procedure, under article 8 of the Agreement.

7. With regard to arrests, the use of force and the use of firearms, the authority of the security officers is defined in the Handbook in the context of applicable local law. Thus, an arrest may only be made if the person to be arrested has in fact committed or is committing a felony. The use of physical force is discouraged unless the officer making the arrest encounters physical force, flight or other factors making the procedure impractical, or otherwise reasonably thinks it necessary to use force to defend the officer or someone else from seriously threatened physical injury. However, the security officers are enjoined to exercise their authority in direct proportion to the actual need and are warned that abuse of authority or use of excessive force may lead to disciplinary action under the Staff Regulations and Rules, and, in some cases, civil liability under local law (part IX of the Handbook).

8. We are of the opinion that the legal guidelines, as contained in both the Handbook and the Manual for the Security and Safety Service, afford adequate protection to all concerned, given the circumstances outlined above.

### B. DRAFT ADMINISTRATIVE INSTRUCTION; AMENDMENTS PROPOSED BY THE STAFF

9. The staff propose to amend the existing administrative instruction by adding provisions dealing with (*a*) interrogations, (*b*) the investigation of cases involving staff, (*c*) the conduct of inquiries arising from official allegation of misconduct (paras. 3-9) as well as (*d*) the conduct of searches and inspection of bags and vehicles (para. 10).

#### 1. *Interrogation*

10. Although we are not sure of the exact circumstances which prompted the proposed amendments, we should have thought that, given the fact that staff members retain the privilege to file complaints against any security officer exceeding or misusing his authority, if that were the case, individual cases could be dealt with on an *ad hoc* basis under the existing procedures, and action taken against the security officer concerned, as stated in the guidelines to the security service (sect. 9.05 of the Handbook).

11. On the other hand, we understand that some of the problems that have arisen relate to unwarranted interrogation of staff by security officers, a matter not expressly provided for in the instruction or the Handbook. Since the administrative instruction deals with staff obligation *vis-à-vis* the security officers, it may be appropriate to indicate in the instruction that the obligation to obey directives given by the security officers does not extend to submitting to interrogation unless so required by an official designated for that purpose by the Department of Administration and Management. However, we find the provisions proposed to be added to paragraph 3 of the administrative instruction rather difficult to accept, in so far as they appear to be based on the assumption that directions could be defied and action delayed, pending exhaustion of lengthy procedures involving evaluation of requests for investigation, before the actual questioning of suspects can even be commenced.

12. We would suggest, instead, that you consider amending the existing instruction as follows:

*Paragraph 1:* Amend the last sentence, which reads "The security officers, in turn, have been instructed always to observe courtesy in the discharge of their duties", to read as follows: "The security officers, in turn, have been instructed always to exercise their functions in conformity with established rules and regulations, including applicable local law, and to refrain from subjecting staff to interrogation or other coercive measures, without prior reference to the Chief of the Security Service, except in extraordinary circumstances requiring such immediate action because of peril to security or safety of others";

*Paragraph 3:* Add the following: "under the Staff Regulations and Rules, and applicable Personnel Directives", so that the paragraph would read: "Refusal to comply with directions issued by the security officers within their authority may be reported by the Chief, Security and Safety Service,

to the Office of Personnel through the Assistant Secretary-General, Office of General Services, for appropriate action, under the Staff Regulations and Rules, and applicable Personnel Directives."

2. *Investigations and inquiries into official allegations of misconduct*

13. The staff propose to include in the administrative instruction provisions intended to protect staff procedural rights, such as the right to counsel, where a decision to investigate has been taken; and in the case of an inquiry, the right to be informed of the allegations made or the intended charges, and the right to answer such charges with the assistance of counsel.

14. We do not think that the administrative instruction dealing with the authority of security officers would be the appropriate place to define staff procedural rights, for the simple reason that disciplinary cases do not arise solely from failure to comply with directives given by security officers. In our view, the whole question of staff procedural rights should be examined in the context of the Staff Regulations and Rules and applicable personnel directives on disciplinary measures.

15. We note in this respect that at Headquarters, Vienna and Geneva, chapter X of the Staff Rules provides that all disciplinary cases involving staff members shall be referred to a Joint Disciplinary Committee prior to imposition of disciplinary measures, and where no joint disciplinary committee has been established, personnel directive PD/1/76 applies.

16. The procedural safeguards incorporated in PD/1/76 have evolved over time through the jurisprudence and decisions of the Tribunal in disciplinary cases and the procedures outlined therein have recently been upheld by the United Nations Administrative Tribunal as affording staff adequate protection (Judgement No. 300).[21] In fact, observance of due process in course of proceedings leading to the imposition of disciplinary measures is a necessary pre-condition to the validity of such measures, and failure to do so automatically attracts the Tribunal's power of review (see, e.g., Judgements Nos. 130, 183, 210, 222 and 300).[22] Consequently, the Joint Disciplinary Committees observe the procedural safeguards in PD/1/76.

17. If the Joint Advisory Committee considers it appropriate to codify further the practice followed by the Joint Disciplinary Committee along the lines of PD/1/76, this can of course be done.

3. *Searches and inspections of bags and vehicles*

18. If it is found necessary to specify the conditions under which searches and inspections may be carried out, as proposed in paragraph 10 of the draft administrative instruction, we think that this should be done by amendment of the Security Handbook in which case the Security Service may have to be consulted to ensure that the proposed text does not in fact diminish the effectiveness of the Security Service in the performance of its duties.

19. We note, for example, that under the proposed text staff members are to be exempted from inspection when departing from the premises except when actually seen with United Nations property in their possession, but that such restriction would not apply upon entering the premises. We also note that it is proposed that inspection of vehicles should be done only on the basis of "a pre-arranged sampling". It is, we think, apparent that such limitations would not be consistent with the duties entrusted to the Service to safeguard United Nations property as well as that of the staff, visitors and delegates.

20. If, in fact, a suitable text is required, rule 2.08 of the Rules regarding security at the Vienna International Centre could be considered for inclusion in the Handbook if the Security Service finds it adequate. It reads: "Security officers are authorized to search persons [we could add, vehicles, handbags, briefcases or packages] and to seize personal property if they have reason to believe that any person is carrying an unauthorized weapon, explosives or other dangerous substances, narcotics or (suspected) stolen goods."[23]

C. GENERAL OBSERVATIONS

21. However desirable, it is often difficult to achieve an appropriate balance between the need to establish adequate security measures for the protection of persons and property in a given jurisdiction

and the desire to safeguard the procedural and substantive rights of the individuals likely to be affected by such measures. For that reason, most legal systems resort to such subjective formulations as "reasonable", "necessity" or "proportionality" (terms also used in the Handbook) when defining the extent of authority granted to security personnel and how it shall be exercised. In a place such as the Headquarters Area which enjoys a special status in municipal law, the problem is compounded by the presence of United Nations premises not only of staff and members of the public given access to the premises to attend or observe United Nations activities, but also of VIPs, diplomats and other State representatives for whom the United Nations assumes responsibility for their security. As a consequence, we think that any action that could lead security officers to relax their vigilance should be avoided wherever possible.

22. We would thus suggest that, rather than attempting to adopt exhaustive definitions of the authority of security officers, and corresponding rights of staff, a better course of action might be to review cases and problems on an *ad hoc* basis under existing guidelines. If, of course, some problems appear to arise from lack of rules or adequate guidelines, a case could be made for the issuance of new rules or guidelines. We would be glad, in such an event, to assist in reviewing these cases and determining the nature and extent to which additional rules and guidelines would serve a useful purpose.

13 December 1983

---

39. JURISDICTION OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL IN RESPECT OF PENSION MATTERS OF OFFICIALS WHO ARE NOT STAFF MEMBERS—ANALYSIS OF SUPPLEMENTARY ARTICLE B TO THE UNITED NATIONS JOINT STAFF PENSION FUND REGULATIONS ADOPTED BY GENERAL ASSEMBLY RESOLUTION 37/131 OF 17 DECEMBER 1982

*Memorandum to the Secretary of the United Nations Joint Staff Pension Board*

1. This is in response to your memorandum of 20 December on the jurisdiction of the United Nations Administrative Tribunal (UNAT) in respect of pension matters of officials who are not staff members.

2. New supplementary article B to the UNJSPF Regulations, adopted by paragraph I.3 of General Assembly resolution 37/131 of 17 December 1982 and quoted in your memorandum, extends the provisions of those Regulations to certain officials who are not staff members but who are covered by the Conventions on the Privileges and Immunities of the United Nations[20] and of the Specialized Agencies.[24] The relevant comment to annex XII of the United Nations Joint Staff Pension Board's report to the General Assembly, on the basis of which this new article was adopted, indicates that it is to apply to persons such as the members of JIU, the Chairman of ACABQ and the Chairman and Vice-Chairman and Vice-Chairman of ICSC (A.37/9, annex XII, supplementary article B, p. 71). By extending the Regulations as a whole to those officials, the Assembly presumably also meant to include article 48 thereof, which specifies the jurisdiction of UNAT in respect of UNJSPF cases. In effect, the new supplementary article assimilates those officials to staff members for the purposes of the Regulations. Since the ACABQ and ICSC officials are affiliated solely with the United Nations, which has by action of the General Assembly fulfilled the requirement of article 48 (*a*) (i) that the employing organization accept the jurisdiction of UNAT in UNJSPF cases, there should be no obstacle to permitting them to apply to the Tribunal; the same may be said of JIU members, whether on the basis that by chapter V of the Unit's statute they are generally assimilated to United Nations staff members or because they might be considered as employees of all the organizations participating in the Unit, each of which has separately taken the required action under article 48 (*a*) (i) in respect of their staffs.

3. While the above analysis suggests the reasoning UNAT would follow, it is naturally not binding on the Tribunal, which under article 48 (*b*) of the Regulations, as well as under article 2 (3) of its own statute, settles any dispute concerning its own competence. Unfortunately, there is

no way of testing the issue outside the context of an actual case brought by or on behalf of an official covered by the new Regulations, as the Tribunal does not give advisory opinions.

4. Although both article 48 (*b*) of the UNJSPF Regulations and article 2 (3) of the UNAT statute suggest that the Tribunal would only settle a question of competence if there were a dispute in relation to that competence, the Tribunal, like any court, could of course raise the issue *sua sponte* in an appropriate case, so as to make sure that its jurisdiction was not abused. However, given the jurisprudence of the Tribunal as to questions of its own competence, it is most unlikely to take a decision that would deprive a class of litigants of access to the Tribunal, particularly if there is no opposition thereto.

5. To ensure that no such opposition arises in the future, it might be useful if the Board were to confirm, by an official decision, the interpretation set out in paragraph 2 above. Such a decision would have the dual purpose of preventing a future representative of the Board in a UNAT proceeding from raising the issue of competence and would also constitute an authoritative interpretation of supplementary article B by the very body that formulated that text and proposed it to the General Assembly.

6. To make assurance triply sure, it would even be possible for the Secretary-General to exchange letters confirming the above interpretation with JIU, ACABQ and ICSC, as was done with the ICJ Registrar in respect of a somewhat similar issue raised in respect of the staff of the Court's Registry.[25] However, this would not seem to be necessary.

7. As the Secretary-General has been charged, by the General Assembly by its resolution 37/129 of 17 December 1982, to continue consultations and to report on the progressive harmonization and further development of the statutes, rules and practices of the Administrative Tribunal of the International Labour Organisation and the United Nations Administrative Tribunal, he will naturally take into account the question raised in your memorandum in possibly formulating any draft amendments of the UNAT statute or of article 48 of the UNJSPF Regulations that would definitively lay to rest any doubt as to this question.

. . .

31 January 1983

---

40. CONDITIONS UNDER WHICH MEETING FACILITIES MAY BE PROVIDED TO CLOSED MEETINGS OF NON-UNITED NATIONS ORGANIZATIONS AND ENTITIES WHICH ARE HELD AT UNITED NATIONS HEADQUARTERS

*Memorandum to the Under-Secretary-General for Conference Services and Special Assignments*

Reference is made to your memorandum of 17 October 1983 in which you requested an opinion from the Office of Legal Affairs on the provision of services to closed meetings of non-United Nations organizations and entities which are held at the United Nations.

Ideally, the responsibility of the United Nations in providing meeting facilities to non-United Nations organizations and entities should be limited to providing on an "as available basis" an appropriate meeting room with the required interpretation facilities. The organization of the seating arrangements and protocol for such meetings is not really a function of the United Nations Secretariat; it is a responsibility that the secretariat or officials of the organization, group or entity concerned are in a better position to fulfil. Nevertheless, it has been the practice of the United Nations Secretariat to be as accommodating as possible in this regard and in practice seating arrangements have regularly been taken care of, and name plates for participants provided, by the Meeting Services Section of the Department of Conference Services. In these circumstances drastic measures to change the current practice would be undesirable and unwarranted. At the same time, as you have rightly indicated in your memorandum, it is necessary to protect the United Nations Secretariat against possible criticism

by Member States for designations given to participants in non-United Nations meetings for which the Secretariat provides meeting services and facilities.

In our view, the solution outlined in your memorandum appears to be the correct one. Therefore it is advisable that in future, in so far as seating arrangements for non-United Nations meetings are concerned, the United Nations limit itself to providing name plates only for Members of the United Nations and for other participants invited to official meetings of United Nations organs and conferences. The organization, entity or group concerned could then if it so wishes itself provide name plates and designations for other participants as required.

25 October 1983

---

41. EXCLUSIVE COMPETENCE AND AUTHORITY OF THE SECRETARY-GENERAL TO APPOINT STAFF UNDER ARTICLE 101 OF THE CHARTER OF THE UNITED NATIONS

*Cable to the Regional Director of the United Nations Children's Fund*

With reference to your cable of 30 March 1983, we wish strongly to reaffirm the views of the Office of Legal Affairs concerning the exclusive competence and authority of the Secretary-General to appoint staff under Article 101 of the Charter of the United Nations. If a Government has objections to the employment of a staff member, they must be communicated to the United Nations in order that the Secretary-General may determine whether there exists an incompatibility with the Staff Regulations and Rules. The text of the substantive part of the note verbale to be sent to the Government concerned should read as follows:

"... has the honour to refer to the letter dated ... from ... to the Regional Director of UNICEF, regarding the employment by UNICEF of a locally recruited staff member who is not a national of the receiving State. The contents of this letter have been communicated to the United Nations Office of Legal Affairs, New York, which has advised us as follows.

"The exclusive competence and authority of the Secretary-General to appoint the staff of the United Nations derives from Article 101, paragraph 1, of the Charter of the United Nations to which [name of a member State] is a party. Article 101, paragraph 3, further provided that the paramount consideration in the employment of staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. The staff member who is the subject of the present note verbale was recruited on the basis of the procedures normally followed by the United Nations. Her selection was made from a group of applicants to an advertised post, having been judged best qualified.

"The position taken by the Government as set out in the letter referred to above is not acceptable to the United Nations since it would amount to the exercise of a veto by the Government in question on the exclusive competence and authority of the Secretary-General to appoint his staff under Article 101 of the Charter. If the Government entertains objection to the employment of a particular staff member, the Government is under duty to communicate the nature of the objections to the United Nations in order that the Secretary-General may determine whether there exists any incompatibility between the conduct of the staff member and the United Nations Staff Regulations and Rules. The Regional Director trusts that on further reviewing this matter the objections to the continued employment of the staff member will be withdrawn."

6 April 1983

---

42. UNITED NATIONS PERSONNEL PRACTICE REGARDING APPOINTMENT OF STAFF MEMBERS SECONDED FROM THEIR NATIONAL GOVERNMENTS—QUESTION OF THE TERMINATION OR RENEWAL OF FIXED-TERM APPOINTMENTS ON SECONDMENT

*Memorandum to the Secretary-General*

In reply to the question concerning termination of fixed-term appointment on secondment you put to me the other day, I would like to state the following:

Secondment to the United Nations has been defined only in connection with movement of staff between organizations in the United Nations common system. The Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff contains the following definition:

> "*Secondment* is a movement of a staff member from one organization to another for a fixed period during which he will normally be paid by and be subject to the staff regulations and rules of the receiving organization, but will retain his rights of employment in the releasing organization. The period of secondment may be extended for a further fixed period by agreement among all the parties concerned."

However, specific reference to secondment from government service is made in United Nations staff rule 104.12 (*b*), which provides as follows:

> "The fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, *including persons temporarily seconded by national Governments or institutions for service with the United Nations*. The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment." (Emphasis added.)

Under usual United Nations personnel practice, staff members appointed on secondment from their national Governments receive a United Nations letter of appointment containing a notation under the heading "Special Conditions": "On Secondment from the Government of _____ ." This letter of appointment is usually preceded by an exchange of letters between the United Nations and the Government in which the United Nations requests and the Government agrees to the secondment for a fixed period of time. Extensions of fixed-term appointments on secondments are preceded by a similar exchange.

The letter of appointment establishes the relationship between the United Nations and the staff member; and the exchange of letters constitute the agreement between the United Nations and the Government. The United Nations is not a party to the arrangements between the Government and the person seconded. Those arrangements may include the person's duty or only his right to return to government service and may be effective for a fixed or indefinite period of time and may or may not be co-extensive with the term of the United Nations appointment.

"Secondments" may be distinguished from another form of temporary release from government duties for service with the United Nations: There are cases in which national civil servants are temporarily released for service with the United Nations on the basis of a bilateral arrangement between the Government and the civil servant alone without any understanding between the Government and the United Nations. These temporary releases do not really constitute secondments as that word is used formally in the United Nations, in so far as the United Nations has no understanding at all with the Government concerned.

In any case of release by a Government for the purpose of United Nations service—whether or not the United Nations treats it as a formal "secondment"—the appointee will receive a letter stating that the United Nations appointment is "subject to the provisions of the Staff Regulations and Rules" and specifies that it "may be terminated prior to its expiration date in accordance with the relevant provisions of the Staff Regulations and Rules".

Whatever may be his rights and obligations *vis-à-vis* his Government, a United Nations appointee released from government service, therefore, is no different from any other fixed-term appointee during the period of his United Nations appointment under the United Nations Staff Regulations and Rules. Should his arrangement with his Government require him to leave United Nations service

prior to the expiry of his fixed-term appointment, then he may resign; but there would be no more legal basis for the United Nations to take any unilateral action in that regard than in respect of any other staff member. Should he be deemed to have violated, prior to the expiry of his United Nations contract, some obligation to his Government, the United Nations could take action only to the extent that his conduct justified disciplinary proceedings under chapter 10 of the Staff Regulations and Rules.

Upon the expiry of their fixed-term appointments, staff members—including those on secondment from their national Governments—are subject to the following provision which appears in all letters of appointment for a fixed term:

> "The Fixed-Term Appointment does not carry any expectancy of renewal or conversion to any other type of appointment in the Secretariat of the United Nations."

In deciding whether or not to renew a fixed-term appointment, the Secretary-General may exercise his discretion in the interest of the Organization without the strictures which apply during the time of the appointment in respect of termination.

23 March 1983

---

43. NATIONALITY STATUS OF TWO STAFF MEMBERS IN THE LIGHT OF A LETTER RECEIVED FROM A PERMANENT MISSION INDICATING THAT THE STAFF MEMBERS ARE NO LONGER CONSIDERED AS NATIONALS OF THE STATE CONCERNED

*Memorandum to the Officer-in-Charge, Office of Personnel Services*

1. I wish to refer to your memorandum of 28 February 1983 on the nationality status of two staff members. The letter dated 21 January 1983 addressed to the Office of Personnel Services by the Vice-Minister for Foreign Affairs and Permanent Representative of [name of a Member State] appears to raise two issues. First, it is alleged that the officials in question have conducted themselves in a manner which is incompatible with United Nations staff regulation 1.4 and the standards of conduct of the international civil service as set out in the report of the International Civil Service Advisory Board.[26] Secondly, the third paragraph of the letter formally states that the authorities of the State concerned no longer recognize the staff members concerned as being nationals of that State. The letter thus implicitly deprives the staff members of their nationality although it is unclear, on the basis of the letter alone, whether such deprivation has been carried out in accordance with the law and procedures in force in the State concerned.

2. While the two issues have been linked by the Permanent Representative, for the purposes of the United Nations they may be treated separately. Allegations concerning the conduct of officials should be examined and dealt with in accordance with the procedures set up for that purpose under article X of the Staff Regulations. If substantiated, such allegations may give rise to disciplinary measures or, in the case of serious misconduct, summary dismissal.

3. With regard to the question of nationality, the mere implicit assertion of deprivation of nationality by the Permanent Representative would not be sufficient to be taken note of by the United Nations. Deprivation of nationality is such a serious measure that it must be formally communicated to the United Nations. The United Nations cannot, generally speaking, question the sovereign legal acts of Member States in matters coming within their domestic jurisdiction, such as nationality, and a decision of the type under consideration, properly communicated, would have the effect of removing the staff members concerned from the quota of the State in question and they would then be considered stateless for United Nations purposes.

19 April 1983

---

44. ISSUANCE OF UNITED NATIONS IDENTITY CARDS TO DEPENDANTS OF MILITARY OBSERVERS—QUESTIONS OF WHO ARE ELIGIBLE DEPENDANTS, WHETHER SECONDARY DEPENDANTS MAY BE ISSUED UNITED NATIONS IDENTITY CARDS AND WHETHER A COMMON-LAW SPOUSE IS ENTITLED TO SUCH A CARD

*Memorandum to the Director, Office for Field Operational and External Support Activities*

1. I refer to a number of queries recently received on the above subject from UNTSO and UNMOGIP, relating to the question of dependants of military observers who may be eligible to obtain United Nations identity cards. The queries refer particularly to the following questions:

(*a*) Who are eligible dependants;

(*b*) Whether secondary dependants may be issued United Nations identity cards;

(*c*) Whether a common-law spouse is entitled to a United Nations identity card.

2. We would like first to stress that issuance of United Nations identity cards to dependants of military observers is a courtesy of the Organization, which does not normally undertake any responsibility for the presence of those dependants in the mission area. All costs for the travel of dependants of military observers to and from the mission area are paid either by the observer himself or by his Government. This is clearly set out in the manual issued for the guidance of military observers on appointment. Secondly, we would strongly recommend that the policy on this matter should be applied uniformly in all military observer missions and that such a policy, deriving from a courtesy, should be restrictively interpreted to prevent abuses and possible embarrassment to and liability of the Organization to the extent that United Nations identity cards entitle the bearer to cross military lines and travel in United Nations aircraft and vehicles.

3. With respect to question (*a*), we have already expressed our views in a memorandum to you dated 6 October 1982 to the effect that the issuance of identity cards to dependants of military observers should be subject to the same criteria as applied to the issuance of such cards to dependants of civilian international staff, namely, those developed under the Staff Rules. We would recommend that this position be firmly maintained.

4. With regard to the question under (*b*), in our opinion, secondary dependants should not be issued United Nations identity cards, and this is a policy which in effect has so far been implemented. The rationale behind this position is that United Nations identity cards are issued to dependants who would be eligible under United Nations Staff Rules and Regulations to travel to the duty station at United Nations expense. We would refer to rule 107.5 whereby eligible family members, for the purposes of official travel, shall be deemed to comprise a spouse and those children recognized as dependants. Secondary dependants are not included in the entitlement provided for in this provision. This criterion, together with the principle that issuance of United Nations identity cards should be restrictively interpreted, leads us to the conclusion that secondary dependants should not normally be eligible for United Nations identity cards unless an exception is made in special cases by the Office for Special Political Affairs.

5. With regard to the common-law spouse, we should point out that the United Nations is not empowered to recognize as a spouse anyone other than a party to a legally recognized marriage relationship. Valid common-law marriages are possible in only a few countries with the English legal system where it is still unnecessary to have a formal civil or religious ceremony in order to be recognized as legally married; moreover, no one who is already married can enter into a valid common-law marriage. To the extent that a common-law marriage is recognized as a valid marriage within the jurisdiction of the military observer's home country, there would in principle be no basis for denying such a marriage effect for the issuance of United Nations identity cards by assimilating such a spouse to a dependant. However, it is incumbent upon the military observer, or the person claiming as a spouse, to show that the marriage conforms to the requirements for a valid marriage in the home country of the military observer. For those purposes it is our view that the following should be produced:

A certificate from a senior legal or judicial officer of the home country of the military observer confirming that the marriage in question is recognized as a legally valid marriage in that country.

A determination as to the validity of a common-law marriage in these circumstances is solely for internal administrative purposes with a view to issuing a United Nations identity card to the spouse concerned.

4 May 1983

---

45. DETERMINATION FOR THE PURPOSE OF THE STAFF RULES OF THE NATIONALITY OF A STAFF MEMBER WITH DUAL ITALIAN/UNITED STATES NATIONALITY—IMPLICATIONS AS REGARDS THE TAX LIABILITY OF SUCH A DETERMINATION

*Memorandum to the Chief of the Administrative Section, Division of Personnel, United Nations Development Programme*

1. I refer to your memorandum of 19 April 1983 requesting our advice on whether a staff member with dual Italian/United States nationality could be determined to be of Italian nationality while retaining his United States nationality and on the implications which such a determination would have on his tax liability and on the reimbursement of the taxes by the Organization.

2. You have indicated in your memorandum that the person in question has been offered a fixed-term appointment with UNDP under the 200 Series of Staff Rules for a post in UNFPA as an Associate Programme Adviser in the Professional category in New York, that his P.11 indicates his nationality as Italian, that he has a valid Italian passport, that he travelled to New York on 16 January 1983 entering the United States on his United States passport and that he wishes to be recognized by UNDP as an Italian national. From his Personal History form it appears that he was born in New York on 26 August 1956, that his present nationality and his nationality at birth are indicated as Italian, that his permanent address is indicated as being in the United Kingdom, that his present address is indicated as being in the United States, that his mother tongue is Italian, that his secondary and university education was in Belgium and that his past work experience was in Belgium where he apparently worked for the European Economic Community with designation as an Italian national. In summary, it appears that the staff member was born in the United States as the child of an international civil servant who was an Italian national.

3. As you know, staff rule 204.5 provides as follows:

"*Nationality*

"(*a*) In the application of these rules, the United Nations shall not recognize more than one nationality for project personnel.

"(*b*) When project personnel have been legally accorded nationality status by more than one State, nationality for the purpose of these rules shall be the nationality of the State with which, in the opinion of the Secretary-General, the individual is most closely associated."

Determinations under rule 204.5 (*b*) require the exercise of the Secretary-General's discretion upon review of all the facts of each particular case. In determining the choice between nationalities the primary consideration is: with which of the two countries does the prospective staff member have the closest ties?

4. In the case in question it would not be an improper exercise of the Secretary-General's discretion under staff rule 204.5 to find that for the purposes of the Staff Rules the staff member is either (i) a national of Italy or (ii) a national of the United States. As indicated above in paragraph 2, the facts as presented to us are not conclusive and you may wish to seek further information from him relevant to making this determination. It appears that either factual determination is possible on the basis of the official status file and would be a proper exercise of discretion under staff rule 204.5.

5. With respect to your question concerning the staff member's tax liability and reimbursement thereof by UNDP in the event he is determined to be of Italian nationality, it is our opinion that the United States authorities would indeed consider him to be a United States citizen and thus the United States reservation to section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations concerning income taxes on the salary and emoluments of staff members would apply. Accordingly, UNDP would be liable for the reimbursement of the staff member's United States taxes in the same manner as for other UNDP staff members of UNFPA and this would have similar implications for the respective budgets. UNDP does not benefit from the Tax Equalization Fund for United Nations Secretariat staff financed out of the United Nations regular budget where the United States "assessment is not reduced by" amounts in respect of tax reimbursements paid by the Organization to United States staff members. In other words, if the staff member were to be considered as an Italian national for purposes of the Staff Rules, UNDP would, as is perfectly proper in such cases, bear the financial consequences of Italian nationality (e.g., home leave) as well as of United States nationality (e.g., tax reimbursement). Such financial consequences are the result of the factual determination to be made under rule 204.5 and ought not to be considered as the deciding factor.

24 May 1983

---

46. DECLARATIONS UNDER ARTICLE 14 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION—QUESTION WHETHER SUCH DECLARATIONS MAY INCLUDE RESTRICTIONS AS TO THE COMPETENCE OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

*Memorandum to the Assistant Secretary-General, Centre for Human Rights*

1. In your memorandum of 5 July 1983, you asked for our opinion on whether the declarations under article 14 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination[14] may be worded so as to limit the Committee's competence to certain select provisions of the Convention.

2. There are some very strong arguments against the admissibility of such a selective restriction of a declaration under article 14 of the 1966 Convention. Such restrictions are not provided for by the 1966 Convention. In general, treaty instruments dealing with the protection of human rights must be so interpreted as to promote their objective, in other words, in order to promote human rights. Moreover, the 1966 Convention is not the only instrument which admits declarations of this type. The International Covenant on Civil and Political Rights[11] provides for a very similar declaration in its article 41, and the Optional Protocol to the Covenant also provides for the consideration of individual communications. The 1950 European Convention on Human Rights provides for declarations on the question of individual remedies. However, none of these instruments recognizes selective restrictions regarding substantive provisions, and no practice has been established in this regard. Finally, such a selective declaration might imply that it was intended as a reservation, which, under article 20 of the Convention, may be made only at the time of ratification or accession.

3. Nevertheless, there are also some arguments which might justify a selective declaration:

(i) As you have noted, declarations made under this article are optional (in particular, they may be withdrawn at any time); it would therefore appear normal for the State concerned to be permitted to gradate the obligations which it assumes in the context of these declarations;

(ii) You cite the case of the declarations referred to in Article 36, paragraph 2, of the Statute of the International Court of Justice (recognition of the jurisdiction of the Court). The standard practice is that States may accompany these declarations with such restrictions as they see fit. This practice is particularly enlightening with regard to the 1966 Convention, for, unlike article 14 of the Convention, which is silent on the subject, Article 36 of the Statute specifically envisages certain conditions, from which it might have been concluded

that the stipulation of further restrictions was implicitly excluded; however, practice shows that this is not the case. As a result, the conclusion drawn in subparagraph (i) above is strengthened;

(iii) At any rate, there are already three cases of restrictive declarations under article 14 of the 1966 Convention.[27] The declarations of the three countries concerned were made with the reservation that the Committee must ensure that the matter under consideration was not being examined or had not been examined by another international body. While it may be argued that this restriction concerns procedure rather than substance, the fact remains that it is not provided for by the Convention;

(iv) Finally, it can be seen that the procedure under article 20 of the 1966 Convention concerning reservations would be difficult to apply to restrictions included in declarations under article 14 of this Convention. Indeed, reservations must be made no later than at the time of ratification or accession, while declarations under article 14 may be made long after ratification or accession. The application of article 20 to restrictions included in declarations under article 14 could have the effect of prohibiting any restriction, in declarations made after ratification or accession, which was certainly not the intended effect.

4. In conclusion, our opinion is that States which desire to include restrictions in their declarations under article 14 are not prevented from doing so by any well-defined rule of international law; however, these States run the risk of provoking objections which would be difficult to meet convincingly.

29 July 1983

---

47. LEGAL CAPACITY OF THE UNITED NATIONS TO ACQUIRE REAL AND PERSONAL PROPERTY, INCLUDING TO RECEIVE BEQUESTS—ARTICLE I, SECTION 1, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—FORM OF WORDS TO BE USED IN A WILL TO ENSURE THAT A VALID RECEIPT WILL BE OBTAINED IN RESPECT OF A GIFT TO THE UNITED NATIONS

*Letter to a solicitor*

We are writing in response to your letter of 29 June asking advice on the form of words to be used in a will to ensure that a valid receipt will be obtained in respect of the gift of Guyanan property held by a person who is both resident and domiciled in the United Kingdom.

According to article I, section 1, of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, the United Nations possesses juridical personality and is recognized in Member States as legally capable of acquiring real and personal property including receiving bequests and has in fact received many.

We infer that the testatrix's intention is that the gift will be in real property to be received and held by trustees for the benefit of the United Nations until sale when the proceeds will be paid to the United Nations. Inasmuch as Guyana and the United Kingdom are both parties to the Convention on the Privileges and Immunities of the United Nations, there would be no problem with respect to the acceptance of the property itself by the United Nations or of monies by the United Nations. Officials of the United Nations would be able to issue receipts and thus discharge the executor or trustee.

We would mention, however, that under its Financial Regulations and procedures, the United Nations could not itself undertake fiduciary responsibility as a trustee under private law and, therefore, the United Nations should not be named as a trustee in a will.

Any gift to the United Nations would preferably be made with an indication of the testatrix's wishes as to its use. Such intention should be expressed in precatory language. This is desirable in order to avoid the result, most probably inconsistent with her intentions, that the monies would

simply be received as miscellaneous income (i.e., applied to redeem total assessment of Member States without adding to the total sum available for United Nations purposes).

Under the United Nations Financial Regulations and Rules, money given for a purpose consistent with United Nations policy can be accepted, segregated and used for the purpose for which it was given. Thus, monies given for very generally expressed purposes such as "furtherance of peace" would be used to add to the money available for such programmes or activities as the Secretary-General considered would best serve the intended purpose. Similarly, a bequest "for humanitarian purposes" or for "assistance to refugees" or for "international assistance to children" would be directed to related United Nations programmes or activities. Unduly specific language—unless in precatory terms—might prevent acceptance.

30 August 1983

---

48. QUESTION WHETHER THE WORLD DISARMAMENT CAMPAIGN FUND CAN BE MADE BENEFICIARY OF THE ESTATE BY WILL OF A CITIZEN OF THE UNITED STATES—BEQUESTS MADE FOR A SPECIFIED PURPOSE MAY BE ACCEPTED BY THE UNITED NATIONS IF THE SECRETARY-GENERAL AGREES THAT THE PURPOSE IS CONSISTENT WITH THE POLICIES AND ACTIVITIES OF THE ORGANIZATION

*Memorandum to the Under-Secretary-General for Disarmament Affairs*

1. This is to reply to your memorandum of 17 February 1983 in which you requested our advice as to whether the World Disarmament Campaign Fund can be made beneficiary of the estate by will of a citizen of the United States.

2. The testator should not designate the World Disarmament Fund beneficiary of her estate because the World Disarmament Campaign Fund is not a legal entity which enjoys juridical personality and has not been accorded capacity to accept bequests. However, according to section I of the Convention on the Privileges and Immunities of the United Nations, the United Nations possesses juridical personality and the United Nations is recognized in Member States as legally capable of receiving bequests. In this respect, many bequests have been accepted by the Secretary-General of the United Nations.

3. In particular, the United Nations, and the Secretary-General on its behalf, can legally accept gifts and bequests of citizens of the United States because the legal capacity of the United Nations to such effect is legally inferred from Article 104 of the Charter of the United Nations, specifically provided for by the Convention on the Privileges and Immunities of the United Nations to which the United States is a party and recognized for the purpose of the domestic law of the United States by Executive Order No. 9698 and by section 2 of the International Organizations Immunities Act.[28]

4. The testator has expressed her wish that her bequest be applied for a specific purpose, i.e., she states in her letter of 1 February 1983 that "I am particularly interested in the World Disarmament Campaign". Under the Convention on the Privileges and Immunities of the United Nations and financial regulation 7.2, bequests made for a specified purpose may be accepted if the Secretary-General agrees that the purpose is consistent with the policies and activities of the Organization and no direct or indirect financial obligation or liability for the United Nations would result. In our view, a bequest made for the purpose of promoting public support for disarmament clearly satisfies the requirement of consistency with the policies of the United Nations since it is in accordance with Article 11 of the Charter. Furthermore, the General Assembly has devoted two special sessions to disarmament and, on 7 June 1982, launched a World Disarmament Campaign under the auspices of the United Nations. Thus once the bequest is accepted by the Secretary-General he will place it in the World Disarmament Campaign Fund, or later, if such specific use is no longer possible, the Secretary-General will apply the bequest to the use which he considers would most comport with the wishes expressed by the testator, consistent with the policies and activities of the Organization.

5. Therefore, in the circumstances we recommend that the testator designate the Secretary-General of the United Nations as beneficiary of her estate in her will and that she also indicate there, in precatory language, the use for which she wishes that her bequest be applied, as follows:

"To the Secretary-General of the United Nations to be used for the purpose of the World Disarmament Campaign or similar purpose . . . "

22 March 1983

---

49. PROPOSED CO-OPERATION WITH A PUBLISHING FIRM FOR THE PREPARATION OF A *UNITED NATIONS ATLAS OF THE WORLD*—QUESTION OF THE USE OF THE UNITED NATIONS NAME AND EMBLEM—UNITED NATIONS REQUIREMENTS REGARDING BOUNDARY DELIMITATIONS

*Memorandum to the Under-Secretary-General, Department of Public Information*

1. In your memorandum of 6 June 1983 you requested our consent to a proposal, made by the Department of Public Information, to co-operate with a publishing firm for the preparation of a *United Nations Atlas of the World.* As we understand it from your memorandum and from the proposal submitted to the Publications Board, the *United Nations Atlas of the World* will not be a United Nations external publication. The participation by the United Nations in the project will be to provide guidance and furnish relevant material and statistical data to the publisher, and the United Nations will receive royalties from the sale of the book.

2. As you know, the use of the United Nations name and emblem is regulated by General Assembly resolution 92 (I) of 7 December 1946, in which the Assembly recommended that:

"Members of the United Nations should take such legislative or other appropriate measures as are necessary to prevent the use, without authorization by the Secretary-General of the United Nations, and in particular for commercial purposes by means of trade marks or commercial labels, of the emblem, the official seal and the name of the United Nations, and of abbreviations of that name through the use of its initial letters".

Although in a letter of 14 July 1947 written to all Member States calling their attention to General Assembly resolution 92 (I) it was stated that it was "highly undesirable for the United Nations to be connected in any way with private commercial enterprise", it is clear from United Nations practice that the use of the United Nations name in connection with revenue-producing enterprises is not precluded so long as a legitimate United Nations purpose is being served.

3. We note your view that publication of the atlas would result in the creation of a popular channel for the dissemination of United Nations information and that the Department of Public Information has in the past encouraged the external publication of materials of interest to the United Nations with private publishing companies. We also note that care will be taken that all maps and nomenclature will conform to United Nations policy requirements. In this regard, we think it advisable to point out to the publisher that we see difficulties in the production of a four-colour atlas since use of colours highlights boundary delimitations which would make some maps difficult to approve, e.g., maps including Kashmir. In fact, we wonder whether there would be a market for maps which met all United Nations requirements. Nevertheless, we would see no objection to the use of the United Nations name in connection with this atlas as long as the publisher understands that the United Nations would require, by contract, that all maps comply with its requirements.

4. Notwithstanding the above, we would wish to emphasize that the publisher should be advised that the United Nations emblem may not be used on this publication. As you know, the use of the United Nations emblem on documents and publications is regulated by administrative instruction ST/AI/189/Add.21 of 15 January 1979, which provides in paragraph 11 that the emblem should only be used on official documents and publications of United Nations bodies.

. . .

13 July 1983

---

## 50. USE OF THE UNITED NATIONS NAME AND EMBLEM BY THE UNIVERSITY FOR PEACE—GENERAL ASSEMBLY RESOLUTION 92 (I) OF 7 DECEMBER 1946

*Memorandum to the Assistant Secretary-General, Office of Secretariat Services for Economic and Social Matters*

1. We refer to your request for advice dated 13 September 1983 on whether the University for Peace may use the United Nations emblem. As we understand it, in a letter dated 19 August 1983, the President of the Council of the University requested the Secretary-General's permission for the use of the United Nations emblem by the University for Peace.

2. The use of the United Nations name and emblem is regulated by resolution 92 (I), adopted by the General Assembly of the United Nations on 7 December 1946 . . .

3. It has been United Nations practice to refrain from authorizing the use of the United Nations name and emblem in a manner implying that a non-United Nations entity is part of the United Nations or incorrectly suggesting an endorsement by the United Nations or United Nations participation in sales proceeds. The practice with respect to the emblem is more restricted than for the words "United Nations", because the emblem more strongly suggests an official connection to the United Nations. None the less, the use of the emblem in close conjunction with such words as "We believe", or "Our hope for mankind", "Our hope for the future", or "Our hope for peace" has been specially authorized in order to permit non-United Nations entities to demonstrate support for the United Nations.

4. We have reviewed the letter of the President of the Council of the University and agree that the University for Peace could appropriately be authorized so to use the United Nations emblem. Although it is an autonomous institution legally separate from the United Nations, the University was created by an international agreement which was specifically approved in General Assembly resolution 35/55 of 5 December 1980; and the Secretary-General of the United Nations, the Director-General of UNESCO, the Director of the United Nations University and the Executive Director of UNITAR appoint members of the University's Governing Body. It is therefore closely linked with the United Nations and the United Nations system.

5. Accordingly, we would authorize the University for Peace to use the United Nations emblem provided that the letters "U.N." are placed above the United Nations emblem and the words "OUR HOPE FOR PEACE" are placed below the United Nations emblem. In addition, the University for Peace's own distinctive symbol must be used in conjunction with the "U.N.—OUR HOPE FOR PEACE" emblem, in order to emphasize that the University for Peace and the United Nations are two separate and independent legal entities. (For example, if used in the letterhead, the University's symbol must be printed on the left side and the "U.N.—OUR HOPE FOR PEACE" emblem must be printed on the right side, or vice versa.) Permission to use the United Nations name and emblem in this manner would in our view be appropriate under the circumstances.

17 October 1983

---

## 51. USE OF THE UNITED NATIONS FLAG—UNITED NATIONS FLAG CODE AND REGULATIONS IMPLEMENTING THE CODE—UNITED NATIONS SPONSORSHIP OF EVENTS ORGANIZED BY GROUPS OR INDIVIDUALS NOT OFFICIALLY CONNECTED WITH THE ORGANIZATION

*Memorandum to an Officer, Executive Office of the Secretary-General*

This is in response to your request for legal advice on the use of the United Nations flag and United Nations sponsorship of events organized by groups or individuals not officially connected with the Organization.

As far as the use of the United Nations flag is concerned, the General Assembly, by resolution 167 (II) of 20 October 1947, authorized the Secretary-General to adopt a flag code having in mind

the desirability of regulated use of the United Nations flag and the protection of its dignity. Under this authority the Secretary-General issued a Flag Code on 19 December 1947 and amended it on 11 November 1952. The Secretary-General has issued Regulations implementing the United Nations Flag Code the latest of which are those which became effective on 1 January 1967. The Code and the Regulations provide that the flag may be displayed "by Governments, organizations and individuals to demonstrate support for the United Nations and to further its principles and purposes".

As to the use of the flag by individuals, the practice shows that the provisions of the Flag Code and of the Regulations have been interpreted very liberally and it is only in clearly inappropriate cases that requests have been turned down (e.g., where the flag is to be used in place of a maritime flag on an ocean-going vessel) since we have always regarded the flying of the United Nations flag as a sign of support for the Organization. In these circumstances there is no obstacle to the use of the United Nations flag in the two cases under consideration . . .

The second question on which our advice has been requested concerns United Nations sponsorship of events organized by groups or individuals not officially connected with the United Nations. In this regard it should be noted that the Secretariat is not in a position to permit United Nations sponsorship of activities not officially related to the Organization, this being a matter within the competence of the appropriate intergovernmental body responsible for the particular area of activity concerned. In the case of the International Games for the Disabled, the request for United Nations support or sponsorship could perhaps be addressed to the Office of the Assistant Secretary-General for Social Development and Humanitarian Affairs for whatever action might be deemed appropriate.

21 July 1983

---

## 52. IMPLEMENTATION OF THE IMMUNITY OF THE UNITED NATIONS FROM LEGAL PROCESS—PROCEDURES FOLLOWED BY THE UNITED NATIONS WHEN CONFRONTED WITH AN ATTEMPT TO SERVE PROCESS—POLICY OF THE ORGANIZATION AS REGARDS DEMANDS FOR INFORMATION ABOUT STAFF MEMBERS

*Paper prepared for the Meeting of United Nations System Legal Advisers, New York, 14-16 September 1983*

### I. BASIS OF THE IMMUNITY OF THE UNITED NATIONS FROM LEGAL PROCESS

1. Section 2 of the Convention on the Privileges and Immunities of the United Nations provides for the immunity from every form of legal process of the United Nations, its property and assets, except in so far as in any particular case the immunity has been waived. Similar provisions are contained in all the other international agreements relating to the privileges and immunities of the United Nations.

2. The expression "every form of legal process" has been broadly interpreted to include every form of process before national authorities, whether judicial, administrative or executive and irrespective of whether the Organization itself is named as a defendant or is asked to provide information or to perform some ancillary role.

### II. PROCEDURES FOLLOWED BY THE UNITED NATIONS WHEN CONFRONTED WITH AN ATTEMPT TO SERVE PROCESS

#### A. *Actions involving United Nations immunities*

3. In the first years of the Organization's history the United Nations entered *amicus curiae* briefs in cases which challenged United Nations immunities. The practice at the present time is to assert immunity from suit of the Organization in a written communication to the Ministry of Foreign Affairs of the State concerned, accompanied by the summons or other judicial notification. The Ministry is requested to take the necessary steps to inform the appropriate authority (Ministry of

Justice, Attorney General's Office) to appear or otherwise to move the court to dismiss the suit on the ground of the Organization's immunities. When the plaintiff is a staff member or a former staff member, the Organization will usually inform the Ministry of the internal recourse procedures available under the Organization's Staff Regulations and Rules.

B. *Actions involving garnishment or attachment of salaries of staff members*

4. In the execution of a judgement against a staff member for a debt owed by the staff member, attempts are sometimes made to require the Organization to pay a part of the salary of the staff member to the creditor. The policy of the Organization is that such a proceeding, which is sometimes referred to as garnishment or attachment of salary, is null and void as far as the Organization is concerned. Service of a garnishment or attachment order upon the Organization is a form of legal process from which the Organization is immune by virtue of section 2 of the Convention on the Privileges and Immunities of the United Nations. In addition, the proceedings would be tantamount to a seizure of assets of the Organization from which the United Nations is exempt under section 3 of the Convention; this is so because any salary to be seized, before it is actually paid to the staff member, forms part of the assets of the Organization.

5. However, since the Organization's immunities afford no justification for a staff member's failure to meet his or her legal obligations, the United Nations lives up to its obligations under the Convention by taking measures to prevent immunity from legal process from defeating creditors' rights. The Organization, therefore, returns garnishment orders to the creditor or to the court office with an explanation of the Organization's immunity and its policy concerning private legal obligations of staff members. The staff member is requested, usually by the Office of Personnel Services, to settle the matter in such a way, either by payment or by further court action, as to avoid embarrassment to the United Nations. Should the staff member disclaim the debt or intend to appeal the judgement, he or she is required, as a matter of proper conduct, to take whatever legal steps are necessary to delay any direct actions *vis-à-vis* his or her salary. The Organization tries to avoid involvement in the question of the validity of court judgements concerning staff in their unofficial capacity. It is against established policy to authorize deductions from regular salary checks for debts to judgement creditors; however, deductions from final salary or other terminal payments due to a staff member upon separation may be made in favour of judgement creditors upon satisfactory evidence being presented.

III. POLICY OF THE ORGANIZATION AS REGARDS DEMANDS FOR INFORMATION ABOUT STAFF MEMBERS

6. It is not the policy of the Organization to respond to demands for personal information concerning staff members. However, the Organization will confirm that a staff member is employed by it and, to the extent that the information requested is in the public domain, the party requesting the information may be referred to a particular source, such as the Staff Regulations and Rules. In some instances the information requested is formally made available to the staff member and the requesting party is notified thereof so that it can make appropriate demands therefor from that person.

---

53. POTENTIAL CIVIL AND CRIMINAL LIABILITY OF MEMBERS OF THE SECURITY AND SAFETY SERVICE—APPLICABILITY OF FEDERAL, STATE AND LOCAL LAW WITHIN THE HEADQUARTERS DISTRICT—IMMUNITY OF UNITED NATIONS OFFICIALS FROM LEGAL PROCESS IN RESPECT OF ACTS PERFORMED BY THEM IN THEIR OFFICIAL CAPACITY

*Memorandum to the Assistant Secretary-General for General Services*

1. I wish to refer to your memorandum of 18 January 1983 on the potential civil and criminal liability of members of the Security and Safety Service. As your memorandum of the same date to the concerned staff members states, their request for advice on the applicability of the Penal Law

and the Code of Criminal Procedure of New York State and their relation to the Headquarters Agreement is redundant since the subject-matter was most carefully reviewed in 1976 at the time when the Handbook for Personnel of the Security and Safety Service was revised. For the benefit of the staff concerned, however, the following further clarifications may be useful.

2. As a general rule, federal, state and local law applies within the Headquarters District. The Handbook reflects this general rule by incorporating the appropriate standards and norms of local law. The exception which is provided for in section 8 of the Headquarters Agreement, the power to make regulations operative within the Headquarters District, has been utilized sparingly. Only three such regulations have been adopted: regulation No. 1 which deals with the United Nations Social Security System; regulation No. 2 which relates to qualifications for professional or other special occupational services with the United Nations; and regulation No. 3 which concerns the operation of services within the Headquarters District.

3. Of more relevance to the potential civil and criminal liability of the members of the Security and Safety Service is the question of immunity from legal process. Under section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations, to which the United States is a party, officials of the United Nations shall be immune from legal process "in respect of words spoken or written and all acts performed by them in their official capacity". The United Nations has consistently maintained that it is exclusively within the competence of the Secretary-General to determine when an act is carried out in an official capacity and that this is not a matter which is subject to review by the local authorities (see, for example, the letter dated 11 February 1976 from the Legal Counsel addressed to the Permanent Representative of the United States of America to the United Nations, commenting on a decision rendered in the Criminal Court of the City of New York in the case of *People of the State of New York* v. *Mark S. Weiner*[29]). The potential civil or criminal liability of members of the Security and Safety Service for acts carried out in the performance of their duties is no different from that of any other staff member falling within the purview of section 18 (*a*) of the Convention, that is to say that staff are *prima facie* immune from legal process in respect of such acts, such immunity, however, being subject to a waiver by the Secretary-General in any case where the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations (section 20 of the Convention). It should be noted that under section 29 (*b*) of the Convention the United Nations shall make provisions for appropriate modes of settlement of disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

5 April 1983

---

54. ESTABLISHMENT IN A MEMBER STATE OF A PARALLEL EXCHANGE RATE PROVIDING FOR A MORE FAVOURABLE RATE OF EXCHANGE FOR THE UNITED STATES DOLLAR THAN THE OFFICIAL RATE—QUESTION WHETHER THE ORGANIZATIONS OF THE UNITED NATIONS SYSTEM ARE ENTITLED TO THE BENEFITS OF THE BEST PREVAILING RATE OF EXCHANGE

*Memorandum to the Deputy Administrator, United Nations Development Programme*

1. On 10 January 1983 the Government of [name of a Member State] established a parallel exchange rate which provided for a more favourable rate of exchange for the United States dollar than the official rate. The question has been raised whether the organizations of the United Nations system are entitled to the benefits of the best prevailing rate of exchange which is legally obtainable or whether they must be restricted to the official rate of exchange.

2. The general principle which derives from the law and practice of international immunities is that international organizations are entitled to the benefits of the most favourable legal rate of exchange. This principle, which ensures that any benefit arising from the existence of differential rates accrues to the organizations concerned in the interests of the most efficient use of international

funds, has been expressly incorporated in recent agreements such as the UNDP Standard Basic Assistance Agreement.

3. This principle applies to all organizations of the United Nations system notwithstanding the fact that earlier agreements such as the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies, which were adopted by the General Assembly in 1946 and 1947 respectively, contain no express provision of any kind with regard to exchange rates. At the time when these Conventions were adopted, differential exchange rates were considered to be inconsistent with the obligations of States members of the International Monetary Fund and, therefore, it was not considered necessary to make any provision for the most favourable legal rate of exchange. The persistence of the practice of differential exchange rates, however, has led the organizations to include such a provision in more recent agreements, and the UNDP Standard Basic Assistance Agreement is to be considered as codifying the more recent law of international immunities in this regard.

4. It is the view of this Office, therefore, that the organizations of the United Nations system in the State in question are entitled to the benefits of the most favourable legal rate of exchange, a conclusion which is the only one that would be consistent with the legal arrangements in force and the financial policies laid down by the legislative organs of the organizations concerned.

29 June 1983

---

55. QUESTION OF THE USE OF EXEMPT SALARIES AND EMOLUMENTS OF INTERNATIONAL OFFICIALS TO ESTABLISH THE TAX RATE PAYABLE ON TAXABLE INCOME

*Memorandum to the Executive Officer of the Executive Office, Department of Public Information*

1. I wish to refer to your memorandum of 15 March 1983 requesting the advice of the Office of Legal Affairs as to whether the ministerial decision of 6 February 1963 of a Member State to suspend temporarily the application of an article of the national tax code applies to United Nations as well as UNESCO personnel.

2. The article in question provided that the tax rate payable by international organization officials of the nationality of the Member State concerned on taxable income be calculated on the basis of gross income, including the remuneration received from international organizations.

3. The United Nations and the agencies in the common system have consistently taken the position[30] that the use of exempt salaries and emoluments of international officials to establish the tax rate payable on taxable income is contrary to the provisions of sections 18 (*b*) and 19 (*b*) of the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies, respectively, which provide that such salaries and emoluments shall be exempt from taxation. The ministerial decision of 6 February 1963 which is referred to in paragraph 5 of the UNESCO circular tacitly recognizes the argument advanced by the international organizations at least in so far as their headquarters or other privileges and immunities agreements contain provisions on exemption from taxation. While the decision itself was made applicable to organizations having their headquarters in the State concerned, there is no doubt whatsoever that the decision applies *mutatis mutandis* to the United Nations since the State in question is a party to the Convention on the Privileges and Immunities of the United Nations.

4. On the basis of the foregoing, staff members of the United Nations whose duty station is in the State concerned should continue the practice of not declaring their United Nations salaries and emoluments and should continue to affix the appropriate extract from the *Official Gazette*.

15 April 1983

---

56. PRIVILEGES AND IMMUNITIES OF EXPERTS ON MISSION FOR THE UNITED NATIONS—QUESTION OF THE NATIONAL INCOME TAXATION OF HONORARIUMS PAYABLE TO THE MEMBERS OF THE HUMAN RIGHTS COMMITTEE

*Memorandum to the Controller*

1. This is to respond to your memorandum of 17 August on taxation of honorariums payable to members of the Human Rights Committee.

2. The status of the members of the Human Rights Committee (HRC), established by article 28 of the International Covenant on Civil and Political Rights (which constitutes an annex to General Assembly resolution 2200 (XXI) of 16 December 1966), is substantially the same as that of members of the Committee on the Elimination of Racial Discrimination to which our opinion of 15 September 1969 relates.[31]

3. Accordingly, the members of HRC should be treated as "experts on mission" for the United Nations, within the meaning of article VI of the Convention on the Privileges and Immunities of the United Nations and of the corresponding provisions relating to experts in certain headquarters and conference agreements. Though it might be argued that exemption from national income taxation of the official emoluments of such experts is "necessary for the independent exercise of their functions" (cf. section 22, *chapeau*), they are not explicitly granted such immunity by the Convention. Consequently:

(*a*) Even though the General Assembly formulated the Convention, it cannot now unilaterally interpret that instrument, and thus any appeal it might issue for States not to tax the emoluments of certain experts on mission would merely constitute a non-binding recommendation;

(*b*) In principle, the General Assembly could allow the Secretary-General, under section 17, to specify that certain experts on mission (e.g., members of CERD, HRC and CEDAW) are "officials" to whom article V of the Convention applies (and thus are tax-exempt under section 18 (*b*)). However, though the introductory words of section 22 suggest that some experts may be officials within the scope of article V, such a decision would depart from the pattern so far set by the Assembly in only classifying as article V officials full-time employees of the Organization—i.e., members of the Secretariat, JIU inspectors and the full-time officers of ACABQ and ICSC; the classification of part-time experts as "officials" would raise a number of difficulties, including the method of applying the other exemptions and immunities specified in section 18.

4. Since article 35 of the Covenant provides that "the members of the Committee shall . . . receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide", it would seem that the General Assembly could (aside from issuing an appeal as mentioned in paragraph 3 (*a*) above) decide that if any national income taxes are imposed on the net emoluments it specifies under the Covenant, such taxes will be reimbursed to the HRC members concerned, from United Nations resources. Furthermore, it could decide, in exercise of its power under Article 17 (2) of the Charter of the United Nations, that in so far as such taxes are imposed by a United Nations Member State, such tax reimbursements will be charged to its share of the Tax Equalization Fund provided for in financial regulation 5.2 (*e*) and financial rules 105.2-5.

22 August 1983

---

57. DECREE ISSUED IN A MEMBER STATE PROVIDING FOR A FOREIGN FISCAL CERTIFICATE—INCLUSION OF CITIZENS OF THAT STATE ON UNITED NATIONS OFFICIAL TRAVEL STATUS IN THE CATEGORY OF PERSONS REQUIRED TO ACQUIRE AND PAY FOR SUCH A CERTIFICATE—EXEMPTION OF THE UNITED NATIONS FROM ALL DIRECT TAXES UNDER THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

*Memorandum to the Chief, Office of the Administrator, United Nations Development Programme*

1. This is a reply to your memorandum of 10 May 1983 concerning a decree issued in a Member State which provides for a foreign fiscal certificate and includes citizens of that Member State on

United Nations official travel status in the category of persons required to acquire and pay for such a certificate.

2. Article 105, paragraph 1, of the Charter of the United Nations states that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes. This general principle of the Charter was subsequently expanded in the 1946 Convention on the Privileges and Immunities of the United Nations which provides in particular, in its section 7 (*a*), that the United Nations shall be exempt from all direct taxes.

3. Under article 2 (*a*) of the decree in question, citizens of the State concerned are required to acquire and pay for a foreign fiscal certificate irrespective of whether they are travelling on United Nations business. Such travel tax, in our view, is a direct tax on the United Nations from which the Organization, as was indicated above, is exempt in accordance with section 7 (*a*) of the Convention on the Privileges and Immunities of the United Nations to which the State concerned is a party. A tax of this kind places a direct burden on United Nations funds, and its collection with respect to official United Nations travel is therefore precluded by the Charter and the Convention on Privileges and Immunities of the Organization.

4. In the light of section 7 (*a*) of the above-mentioned Convention, any citizen of the State concerned, whenever travelling on official United Nations business, i.e., having his travel expenditures borne by the Organization, should be exempt from the application of the provisions of the decree requiring the acquisition of a foreign fiscal certificate.

23 May 1983

---

58. PROPOSED MODIFICATION TO THE LIABILITY CLAUSE IN THE HOST CONFERENCE AGREEMENT FOR THE SIXTH SESSION OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT—QUESTION OF POTENTIAL LIABILITY FOR DAMAGE CAUSED BY THE GROSS NEGLIGENCE OF UNITED NATIONS OFFICIALS

*Memorandum to the Director of the Budget, Office of Financial Services*

1. We wish to refer to your memorandum of 20 January 1983 regarding the proposed modification to the liability clause in the host conference agreement for the sixth session of the United Nations Conference on Trade and Development whereby the host Government would not be liable for property damage in the Sava Centre caused by the gross negligence of United Nations officials.

2. The Office of Legal Affairs notes that the Government has accepted, in all other respects, the standard liability clause and is of the view that the proposed modification merely states explicitly an implied condition of liability which the Organization has accepted on previous occasions. Insurance against the gross negligence of United Nations officials can hardly be considered to form part of the costs of holding a conference away from established headquarters, and to suggest to a host country that it should bear the cost of such liability insurance appears to this Office at least as not being in accordance with the letter or the spirit of General Assembly resolution 31/140 of 17 December 1976.

3. . . . To the extent that the gross negligence of United Nations officials may be considered a potential liability, which we doubt, it would be for the United Nations to bear the cost, either by obtaining a suitable policy or a rider to an existing policy, or by self-insurance.

25 January 1983

---

## 59. Legal arrangements that might be required should the General Assembly decide to establish a world-wide United Nations short-wave network, in particular for broadcasts emanating from the Headquarters of the United Nations and the seats of the regional economic commissions

*Memorandum to the Under-Secretary-General for Public Information*

1. We wish to refer to your memorandum of 23 December 1982 requesting information on possible legal arrangements that might be required should the General Assembly decide to establish a world-wide United Nations short-wave network, in particular for broadcasts emanating from the United States and the seats of the four regional economic commissions.

2. The existing legal framework for short-wave radio broadcasting by the United Nations is based on the legislative action of the General Assembly expressed in its resolution 13 (I) of 13 February 1946 and relevant headquarters agreements concluded between the United Nations and the United States and the four countries which are host to the regional economic commissions.

3. Resolution 13 (I) approved the recommendations of the Technical Advisory Committee on Information contained in its annex I which stated that:

> "10. The Department [of Public Information] should actively assist and encourage the use of radio broadcasting for the dissemination of information about the United Nations. To this end it should, in the first instance, work in close co-operation with radio broadcasting organizations of the Members. The United Nations should also have its own radio broadcasting station or stations with the necessary wavelengths, both for communication with Members and with branch offices, and for the origination of United Nations programmes. The station might also be used as a centre for national broadcasting systems which desire to co-operate in the international field. The scope of the radio broadcasting activities of the United Nations should be determined after consultation with national radio broadcasting organizations."

4. In implementation of this recommendation, section 4 (*a*) (1) of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 1947[32] provides that the United Nations may establish and operate in the Headquarters District its own short-wave sending and receiving radio broadcasting facilities which may be used on the same frequencies (within the tolerances prescribed for the broadcasting service by applicable United States regulations) for radio-telegraph, radio-teletype, radio-telephone, radio-telephoto and similar services. Section 4 (*b*) of the Agreement further provides that the United Nations shall make arrangements for the operation of these services with the International Telecommunication Union, the appropriate agencies of the Government of the United States and the appropriate agencies of other affected Governments with regard to all frequencies and similar matters. Finally, section 4 (*c*) provides for the establishment, to the extent necessary for efficient operation, of facilities outside the Headquarters District.

5. Provisions similar to section 4 of the United Nations Headquarters Agreement are to be found in section 14 (*b*), (*c*) and (*d*) of the ESCAP headquarters agreement.[33]

6. Article 5, 4 (*b*), of the ECWA headquarters agreement, which was signed at Baghdad on 13 June 1979,[34] provides that the United Nations may establish and operate at the headquarters of ECWA its own short-wave broadcasting facilities, subject to the necessary authorization from the General Assembly and *with the agreement of the Government as may be included in a supplementary agreement* (emphasis added).

7. The headquarters agreements of ECLA[35] and ECA[36] do not contain an express provision with regard to short-wave broadcasting. In the case of ECLA there is no provision of any kind for the operation of radio services; the ECA agreement contains a provision for the exchange of radio traffic with the United Nations radio network (section 7 (*a*)).

8. While it is the view of the Office of Legal Affairs that the headquarters agreements referred to in paragraphs 4 and 5 above appear to confer upon the United Nations the right to establish and operate short-wave radio broadcasting facilities in those headquarters, subject to the arrangements on frequencies and similar matters with ITU and the appropriate government agencies, the recom-

mendations of the Technical Advisory Committee on Information read together with the headquarters agreements could be interpreted to mean that, with regard to radio programmes emanating directly from a United Nations headquarters, both the right to broadcast and the scope of the broadcasting activity are subject to consultation with the national radio broadcasting organizations. As a practical matter, however, it is assumed that such broadcasts would be made on the basis of decisions taken by the General Assembly which would lay down the necessary and appropriate guidelines for consultation with national broadcasting organizations.

9. In conclusion, it is possible to summarize the legal arrangements that might be required as follows. Subject to the technical arrangements on frequencies and similar matters with ITU and the appropriate government agencies and the guidelines on consultation with the national radio broadcasting organizations, the United Nations has the right, at the present time, to establish and operate short-wave broadcasting at United Nations Headquarters, New York, and ESCAP headquarters, Bangkok. At ECWA headquarters, Baghdad, the establishment and operation of short-wave facilities, while provided for in principle, is subject to the authorization of the General Assembly and the agreement of the Government. At ECA headquarters, Addis Ababa, and ECLA headquarters, Santiago, it would be necessary as a preliminary matter to negotiate the necessary basic agreement with the host country concerned for the right to establish and operate short-wave radio facilities.

10 January 1983

---

## 60. Question of the application of section 205 of the United States Foreign Missions Act of 1982 to the permanent missions accredited to the United Nations

*Opinion prepared at the request of the Committee on Relations with the Host Country* [37]

1. The present document has been prepared in response to a request made by the Committee on Relations with the Host Country at its 95th meeting, on 28 March 1983. It was suggested at that meeting that it would be helpful for the Committee's work if a legal opinion were to be prepared by the Legal Counsel regarding the application of section 205 of the United States Foreign Missions Act of 1982 to the permanent missions accredited to the United Nations in New York.

2. The United States Foreign Missions Act was enacted on 24 August 1982 and became effective on 1 October 1982.

3. According to section 201 (*a*) of the Act, it is intended to regulate:

> "the operation in the United States of foreign missions and public international organizations and the official missions to such organizations, including the permissible scope of their activities and the location and size of their facilities".

4. Section 209 (*a*) of the Foreign Missions Act provides that the United States Secretary of State may make applicable any provision of the Act to an international organization to the same extent that it is applicable with respect to a foreign mission if the Secretary determines that such application is necessary to carry out the policy set forth in section 201 (*b*) and to further objectives set forth in section 204 (*b*).

5. The term "international organization" is defined by section 209 (*b*) of the Act as:

> "(1) a public international organization designated as such pursuant to the International Organizations Immunities Act (22 U.S.C. 288-288 f-2) or a public international organization created pursuant to a treaty or other international agreement as an instrument through or by which two or more foreign Governments engage in some aspect of their conduct of international affairs; and
>
> "(2) an official mission (other than a United States mission) to such a public international organization."

6. By a note verbale of 19 January 1983, the United States Mission to the United Nations informed all permanent missions and offices of permanent observers to the United Nations that, pursuant to the provisions of section 209 of the Act and a determination by the Secretary of State, the provisions of its section 205 are applicable to them.

7. Section 205 of the Act, now applied to the official missions to the United Nations, reads as follows:

"Section 205 (*a*) (1) The Secretary may require any foreign mission to notify the Director prior to any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission. If such a notification is required, the foreign mission (or other party acting on behalf of the foreign mission) may initiate or execute any contract, proceeding, application or other action required for the proposed action—

"(*A*) only after the expiration of the 60-day period beginning on the date of such notification (or after the expiration of such shorter period as the Secretary may specify in a given case); and

"(*B*) only if the mission is not notified by the Secretary within that period that the proposal has been disapproved; however, the Secretary may include in such a notification such terms and conditions as the Secretary may determine appropriate in order to remove the disapproval.

"(2) For purposes of this section, 'acquisition' includes any acquisition or alteration of, or addition to, any real property or any change in the purpose for which real property is used by a foreign mission.

"(*b*) The Secretary may require any foreign mission to divest itself of, or forgo the use of, any real property determined by the Secretary—

"(1) not to have been acquired in accordance with this section or

"(2) to exceed limitations placed on real property available to a United States mission in the sending State.

"(*c*) If a foreign mission has ceased conducting diplomatic, consular and other governmental activities in the United States and has not designated a protecting power or other agent approved by the Secretary to be responsible for the property of that foreign mission, the Secretary

"(1) until the designation of a protecting power or other agent approved by the Secretary, may protect and preserve any property of that foreign mission; and

"(2) may authorize the Director to dispose of such property at such time as the Secretary may determine after the expiration of the one-year period beginning on the date that the foreign mission ceased those activities, and may remit to the sending State the net proceeds from such disposition."

8. As indicated in the above-mentioned note verbale, all official missions to the United Nations are requested, from the date of the note, to notify the United States Mission to the United Nations prior to any acquisition, sale or other disposition, by or on behalf of the mission, of real property which is located in the United States, its territories or possessions. This includes, according to the note, but is not limited to, any purchase, lease, rental, alteration, addition or change in the purpose for which real property is used by a mission. It also includes any real property made available to a mission for its use with the exception for the time being of single-family residential property leased by or on behalf of the mission.

9. The note indicates that the notifications will be reviewed during the 60-day period and that, where possible, this period will be reduced.

### I. GENERAL INTERNATIONAL LAW ON PRIVILEGES AND IMMUNITIES

10. The Charter of the United Nations states, in its Article 105, that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the Members of the United Nations shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

11. Pursuant to Article 105, paragraph 3, of the Charter, the detailed application of this general principle was effected *inter alia* through the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946 (to which the United States is a party) and, in the particular case of the United States, through the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations signed on 26 June 1947.

12. For the purposes of the present study the Headquarters Agreement is of particular importance as it sets forth the privileges and immunities to which the resident representatives to the United Nations and their staffs are entitled. From the very beginning the United Nations took the position, in the light of Article 105 of the Charter, that those representatives should enjoy the same privileges and immunities as are accorded to diplomatic envoys accredited to the Government of the United States. The text of the draft agreement approved by the General Assembly on 13 February 1946 as a basis of discussions with the competent United States authorities reflected this position very clearly. Subsequently it was confirmed in article V, section 15, of the Headquarters Agreement which reads as follows:

> "(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,
>
> "(2) such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned,
>
> "(3) every person designated by a member of a specialized agency, as defined in Article 57, paragraph 2, of the Charter, as its principal resident representative, with the rank of ambassador or minister plenipotentiary, at the headquarters of such agency in the United States, and
>
> "(4) such other principal resident representatives of members of a specialized agency and such resident members of the staffs of representatives of a specialized agency as may be agreed upon between the principal executive officer of the specialized agency, the Government of the United States and the Government of the member concerned, shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it. In the case of members whose Governments are not recognized by the United States, such privileges and immunities need to be extended to such representatives, or persons on the staffs of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residences and offices, and in transit on official business to or from foreign countries."

13. It follows from article V, section 15, of the Headquarters Agreement that the relevant provisions of general international law on the question of privileges and immunities also apply to the resident representatives to the United Nations and their staffs. International law concerning this question is codified in the 1961 Vienna Convention on Diplomatic Relations. The concept of diplomatic privileges and immunities embodied in the Vienna Convention sets forth *inter alia* rights and duties of a receiving or host State. Among these duties is the obligation to provide every assistance to foreign diplomatic missions for the performance of their functions (articles 21 and 25 of the 1961 Vienna Convention).

14. As far as real estate matters are concerned, international law does not prevent a receiving or host State from adopting national legislation dealing with such property belonging to foreign diplomatic missions. However, it is self-evident that the legislation or, to be more precise, its application should not be contrary to the relevant responsibilities of a receiving or host State under international law.

## II. LEGAL IMPLICATIONS OF SECTION 205 OF THE UNITED STATES FOREIGN MISSIONS ACT

15. Inasmuch as the purpose of section 205 of the United States Foreign Missions Act seeks to regulate the future acquisition, sale or other disposition by or on behalf of the foreign missions' real estate property, that purpose seems to be consonant with the relevant provisions of international

law. However, certain elements in the section give rise to serious concerns from the point of view of existing international law.

### 1. *Sixty-day period*

16. Subparagraphs 1 A and 1 B of section 205 prescribe a 60-day period needed for the Department of State to review any mission's plans for the acquisition, lease or alteration of real property. It should be noted that, according to articles 21 and 25 of the 1961 Vienna Convention on Diplomatic Relations, "the receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way . . . and shall accord full facilities for the performance of the functions of the missions".

17. It is well known that the real estate market in New York City is extraordinarily tight, particularly in Manhattan, desirable properties remaining on the market for the briefest possible periods, and many Members of the United Nations find it increasingly difficult to secure suitable facilities for their missions on terms they can afford. Under the existing circumstances it has to be anticipated that the 60-day period would further aggravate the situation with respect to the acquisition of real estate property by missions, property owners being unwilling to hold the real estate in question for so long a period, and therefore insistence on so extensive a time-limit would not correspond to United States obligations under general international law not reflected in the 1961 Vienna Convention to facilitate such acquisitions and to accord full facilities for the performance by the missions of their functions. Even if the full 60-day period is possibly not insisted upon in practice, as the note of the United States Mission of 19 January 1983 indicates, the necessity of providing for a waiting period of up to 60 days would still lead to considerable additional complications in real estate transactions and therefore to the same conclusions under international law.

### 2. *Disposition of property*

18. Subparagraph (*c*) (2) of section 205 of the Act provides that the Secretary of State may authorize under certain conditions the disposition of property belonging to a foreign mission if such mission has ceased conducting diplomatic and other governmental activities in the United States. The conditions mentioned in subparagraph (*c*) (2) do not include the requirement of obtaining the consent of the Government whose mission ceased the activity for such disposition. Such consent is, however, required by international law. Article 45 of the 1961 Vienna Convention explicitly states that "if diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled, the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives".

### 3. *Issue of reciprocity*

19. Subparagraph (*b*) (2) of section 205 of the Act authorizes the Secretary of State to require any foreign mission to divest itself of, or to forgo the use of, any real property if he determines that it exceeds limitations placed on real property available to a United States mission in the sending State. The legal implication of the application of this provision to diplomatic missions accredited to the United Nations is that the Department of State will handle the situations envisaged by this subparagraph on the basis of reciprocity.

20. With respect to the application of section 205 (*a*) also the discretion of the Secretary of State is considerable and the reciprocity issue could emerge in this context as well. As a matter of fact, this issue underlies the whole Act, which gives rise to the possibility that missions could be treated differently on the basis of reciprocity. According to the above-mentioned section 209 (*a*) of the Act, determination by the Secretary of State to apply section 205 to the official missions accredited to the United Nations means that "such application is necessary to carry out the policy set forth in section 201 (*b*) and to further the objectives set forth in section 204 (*b*)".

21. Section 201 (*b*), from the chapter entitled "Declaration of Findings and Policy", is of a very broad nature. It states that

> "it is the policy of the United States to support the secure and efficient operation of the United States missions abroad, to facilitate the secure and efficient operation in the United States of foreign missions and public international organizations and the official missions to such organizations and to assist in obtaining appropriate benefits, privileges and immunities for those missions and organizations and to require their observance of corresponding obligations in accordance with international law."

22. The objectives of the Act as described in section 204 (*b*) are

"—to facilitate relations between the United States and a sending State,

"—to protect the interests of the United States,

"—to adjust for costs and procedures of obtaining benefits for missions of the United States abroad, or

"—to assist in resolving a dispute affecting United States interests and involving a foreign mission or sending State."

23. That both sections encompass the reciprocity concept follows clearly from section 201 (*c*) which equally belongs to the chapter entitled "Declaration of Findings and Policy" and which reads as follows:

> "(*c*) The treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary after due consideration of the benefits, privileges and immunities provided to missions of the United States in the country or territory represented by that foreign mission."

In the section-by-section analysis of the United States Senate Report No. 97-329 of 8 April 1982, *U.S. Code Congressional* and *Administrative News*,[38] it is said that:

> "Section 201 (*c*) mandates the consideration of benefits, privileges and immunities accorded to United States missions abroad in determining the assistance to be accorded to foreign missions in the United States in the specific application of the general policy enunciated in subsection (*b*). This element of reciprocity, while not necessarily determinative in all cases, is a key feature of the system envisioned by this title. The concept requires the Secretary of State to be cognizant of the treatment of United States missions and personnel in foreign countries and to take that treatment into account in determining how foreign missions are to be treated in the United States. In making such determinations the Secretary will also take into consideration national security concerns."

24. The 1961 Vienna Convention on Diplomatic Relations does not address itself specifically to the question of reciprocity. Since the present paper studies only a particular case concerning the granting of certain privileges and immunities to the missions accredited to the United Nations, the question of reciprocity in general international law is not dealt with. Therefore the question to be examined by this study is whether there is room for application of reciprocity *vis-à-vis* missions accredited to the United Nations.

25. The Charter objectives contained in Article 105 stipulate the obligation of all Members to recognize the legal capacity of the United Nations and to accord to the Organization, the representatives of its Members and its officials all privileges and immunities necessary for the accomplishment of its purposes. It follows from this that privileges and immunities granted to the Organization and the representatives of Member States have to be granted unconditionally and on an equal basis.

26. This is the underlying purpose of article V, section 15, of the Headquarters Agreement, which deals specifically with the privileges and immunities to be accorded to "resident representatives" to the United Nations and which, according to its article IX, section 27, "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 fulfil its purposes". The fact that by virtue of article V, section 15, the representatives of Member States to the United Nations and their staffs

shall be entitled "to the same privileges and immunities, subject to corresponding conditions and obligations, as it [i.e. the United States] accords to diplomatic envoys accredited to it" does not give room for unequal treatment on the basis of reciprocity. The legislative history of this article shows that the cited words were not inserted in order to introduce the reciprocity aspect but for the purpose of assuring the United States that the privileges and immunities granted to the representatives of Members would not be broader than those enjoyed by diplomatic envoys. In this connection the Legal Adviser of the United States Department of State, in a letter dated 29 April 1948, wrote the following:

> "It seems clear that the Charter of the United Nations does not permit the imposition of conditions of reciprocity on the granting of privileges and immunities under Article 105. Indeed the purpose of the Charter in respect of Article 105 is to provide for the granting unconditionally by Member States of certain privileges and immunities to the United Nations so that it may function effectively as a world organization untrammelled in its operation by national requirements of reciprocity or national measures of retaliation among States.
>
> "The background in the negotiation of section 15 of the Headquarters Agreement indicates that the phrase 'subject to corresponding conditions and obligations' was inserted by way of compromise to meet a desire on the part of the United States that persons covered by section 15 were not to receive privileges and immunities broader than those accorded to diplomatic envoys accredited to the President of the United States, and that, like diplomatic envoys, such persons might be found *personae non gratae* and made subject to recall. The negotiating background does not indicate that the quoted phrase was inserted for the purpose of permitting the United States to make the privileges and immunities provided for in section 15 dependent upon reciprocity. In the case of representatives of Members, and resident members of their staffs, the United States may be authorized under the Headquarters Agreement to bring about expulsion of personnel in cases where such action appears to be required. Except for this drastic weapon which the United States may under some circumstances use, the Headquarters Agreement does not provide for the cancelling of privileges and immunities." (Letter dated 29 April 1948 addressed to the Chairman of Subcommittee No. 6 of the Committee of Foreign Affairs, reprinted in *Structure of the United Nations and the Relations of the United States to the United Nations.* Hearings before the Committee on Foreign Affairs. House of Representatives, Eightieth Congress, second session, p. 50.)

27. The United Nations and its organs have pronounced themselves consistently in the same way, as is shown by the following citations.

(*a*) It is indicated in the *Yearbook of the International Law Commission* that:

> "it has been the understanding of the Secretariat that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States."[39]

(*b*) The Legal Counsel, speaking as a representative of the Secretary-General at a meeting of the Sixth Committee during the twenty-second session of the General Assembly, made the following statement with regard to privileges and immunities:

> "The Organization had a clear interest in assuring the privileges and immunities. It therefore seemed elementary that the rights of representatives should properly be protected by the Organization and not left entirely to bilateral actions of the States immediately involved. Therefore, the Secretary-General would continue to feel obligated to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise."[40]

(*c*) In a letter of 26 August 1976 on a matter related to privileges and immunities, the Legal Counsel stressed that:

> "The interpretation of cardinal provisions of the Charter of the United Nations (Article 105) . . . 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."

28. It might be noted that the conclusions reached above also find expression in commentaries on the Charter of the United Nations: Goodrich, Hambro and Simons advance the argument that "under the Charter, the General Convention and the Headquarters Agreement there is no basis for retaliatory or discriminatory treatment".[41] Leo Gross, in his article entitled "Immunities and privileges of delegations to the United Nations",[42] examines in a detailed survey the applicable international instruments and concludes that the Headquarters Agreement does not provide for reciprocity.

29. The Charter of the United Nations and the Headquarters Agreement therefore do not permit selective treatment of the representatives of Members to the United Nations on the basis of reciprocity. Permanent missions to the United Nations are accredited to the Organization and not to the United States. They all have equal rights and their treatment cannot depend on the treatment of the United States missions abroad. Section 210 of the Foreign Missions Act states the following:

> "Section 210. Nothing in this title shall be construed to limit the authority of the United States to carry out its international obligations, or to supersede or limit immunities otherwise available by law. No act or omission by any foreign mission, public international organization or official mission to such an organization in compliance with this title shall be deemed to be an implied waiver of any immunity otherwise provided for by law."

However, the United States note of 19 January 1983 does not mention section 210, either directly or indirectly, and it has to be noted that the reciprocity issue is referred to in subparagraph (*b*) (2) of section 205.

### III. CONCLUSION

30. In summing up, it should be reiterated that international law does not prohibit, as such, the extension and application of United States domestic legislation on real property to the permanent missions accredited to the United Nations. On the other hand, the imposition of an obligation on permanent missions in New York to submit to a waiting period of up to 60 days in real estate transactions and the application of subparagraph (*c*) (2) of section 205 without having regard to the consent of the Government concerned and recourse to the reciprocity concept underlying the Foreign Missions Act in the application of section 205 would be at variance with the obligations of the host country under international law. It is, however, the intention of the Legal Counsel to seek the assurances from the host country that it will apply section 205 to permanent missions in New York in a manner consistent with the said obligations.

26 May 1983

---

## 61. TAX EXEMPTIONS GRANTED IN NEW YORK TO OFFICERS OF A PERMANENT MISSION TO THE UNITED NATIONS—DISTINCTION BETWEEN MEMBERS OF A MISSION WITH DIPLOMATIC RANK AND MEMBERS OF THE ADMINISTRATIVE AND TECHNICAL STAFF

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

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of [name of a Member State] to the United Nations and has the honour to acknowledge the receipt of the note of 1 December 1982 concerning the exemptions granted in New York to diplomatic and non-diplomatic officers of the Mission of the State concerned to the United Nations.

The treatment for tax purposes of officers posted to New York differs according to whether they have diplomatic rank or are members of the administrative and technical staff. (It is assumed for present purposes that none of the officers are United States citizens or aliens in permanent resident status.)

While as a practical matter all members of the staff of a mission have the same type of visa (G), only those with diplomatic status enjoy full diplomatic immunity. Non-diplomatic officers under

United States law have a quasi-diplomatic status which, *inter alia*, relieves them from payment of United States social security and federal and state income tax on salaries and emoluments paid to them by their Government. However, they are liable for the payment of all other taxes. Officers with diplomatic status, on the other hand, have broader privileges and are exempt from most taxes which are more than service charges. Therefore, unlike non-diplomatic officers, diplomats are exempt from the tax on registration of motor vehicles in New York.

With regard to tax on life insurance, under New York law insurance companies are liable for a certain rate of tax on the volume of premiums paid to them. The insured would only be indirectly affected by the tax if and to the extent that such tax is passed on to him. Therefore, although in principle diplomats would be entitled to tax exemption, in practice a breakdown of the premium in order to establish the incidence, if any, of the tax is not made.

12 January 1983

---

62. STATUS OF THE OBSERVER MISSION OF THE SOUTH WEST AFRICA PEOPLE'S ORGANIZATION TO THE UNITED NATIONS—QUESTION WHETHER IT ENJOYS IMMUNITY FROM SUIT IN AN ACTION BROUGHT IN A COURT OF THE UNITED STATES

*Letter to an attorney*

I wish to refer to your letter of 12 September 1983 requesting a legal opinion on the status of the Observer Mission of the South West Africa People's Organization and enquiring, in particular, whether it enjoys immunity from suit in an action brought in a court of the United States.

The international legal status of the Observer Mission of SWAPO to the United Nations derives from General Assembly resolution 31/152 of 20 December 1976, "Observer status of the South West Africa People's Organization", in which the General Assembly invited SWAPO to participate in the sessions and work of the General Assembly in the capacity of observer and requested the Secretary-General to take the necessary steps for the implementation of the resolution and to accord all the facilities as may be required.

The Permanent Observer of SWAPO to the United Nations and other members of the Observer Mission benefit from a number of provisions of the Headquarters Agreement between the United Nations and the United States (Public Law 80-357, 4 August 1947), specifically with regard to transit to and from the Headquarters of the United Nations. In addition to the privileges and immunities under the Headquarters Agreement, it is the view of this Office that it necessarily follows from the obligations imposed by Article 105 of the Charter of the United Nations that the Permanent Observer of SWAPO enjoys immunity from legal process in respect of words spoken or written and all acts performed by him or members of the Mission in their official capacity before relevant United Nations organs. Consequently, in as much as the suit alleges that SWAPO and persons within the United Nations have conspired to violate the laws of the United States with regard to the use of certain funds, it would be the view of this Office that SWAPO enjoys immunity from suit. This limited form of immunity is sometimes referred to as functional immunity to distinguish it from the broader diplomatic immunity which is enjoyed by representatives of Member States.

. . .

21 September 1983

---

NOTES

[1] League of Nations, *Treaty Series*, vol. XCIV, p. 57.

[2] *Ibid.*, vol. CLXIII, p. 393.

[3] *International Legal Materials*, vol. 14, p. 1292.

[4] In general, see for example H. Kelsen, *The Law of the United Nations* (London, Stevens, 1950); I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 113 *et seq.*

[5] See, for example, OAU resolution 1964 AHG/Res. 17(1).

[6] The Declaration, initiated by the State members of the Movement of Non-Aligned Countries, was approved by the General Assembly by its resolution 36/103 of 9 December 1981, which was adopted in a recorded vote of 120 to 22, with 6 abstentions; the Group of Western European and Other States and Venezuela voted against the resolution.

[7] A/520/Rev.14 (United Nations publication, Sales No. E.82.I.9).

[8] A/35/484/Add.2, para. 4.

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

[10] Reproduced in *Juridical Yearbook, 1979*, p. 164.

[11] General Assembly resolution 2200 A (XXI); see also United Nations, *Treaty Series*, vol. 999, p. 171.

[12] General Assembly resolution 34/180.

[13] General Assembly resolution 2106 A (XX), annex; see also United Nations, *Treaty Series*, vol. 660, p. 195.

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

[15] Reproduced in *Juridical Yearbook, 1978*, p. 167.

[16] See *Juridical Yearbook, 1974*, p. 28.

[17] United Nations, *Treaty Series*, vol. 276, p. 3.

[18] *Ibid.*, vol. 1155, p. 331.

[19] General Assembly resolution 3068 (XXVIII), annex; see also United Nations, *Treaty Series*, vol. 1015, p. 243.

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

[21] For a summary of the judgement, see *Juridical Yearbook, 1982*, p. 143.

[22] For summaries of the judgements, see *Juridical Yearbook, 1969*, p. 187; *Juridical Yearbook, 1974*, p. 108; *Juridical Yearbook, 1976*, p. 131; *Juridical Yearbook, 1977*, p. 148; and *Juridical Yearbook, 1982*, p. 143, respectively.

[23] At a subsequent stage it was decided to include in administrative instruction ST/AI/309/Rev.1 of 17 February 1984, entitled "Authority of United Nations Security Officers", the following paragraph 2:

> "Security officers are authorized to search persons, vehicles, handbags, briefcases or packages and to seize property if they have reason to believe that any person is carrying an unauthorized weapon, explosives or other dangerous substances or narcotics, or is removing property from the premises without proper authorization. The removal of United Nations and/or personal property from the premises of the United Nations is governed by administrative instruction ST/AI/193/Rev.1 on material and package passes."

[24] United Nations, *Treaty Series*, vol. 33, p. 261.

[25] See JSPB/R.708(XXIX), para. 4.

[26] CCORD/CIVIL SERVICE/5, 1965 edition.

[27] ST/LEG/SER.E/1, p. 105: declarations by Iceland, Italy and Norway.

[28] Public Law, 291, 79th Congress; 59 Stat. 669.

[29] *Juridical Yearbook, 1976*, pp. 236-239.

[30] See *Juridical Yearbook, 1969*, p. 226.

[31] *Juridical Yearbook, 1969*, p. 207.

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

[33] *Ibid.*, vol. 260, p. 35.

[34] *Juridical Yearbook, 1979*, p. 10.

[35] United Nations, *Treaty Series*, vol. 314, p. 49.

[36] *Ibid.*, vol. 317, p. 101.

[37] Subsequently reproduced as A/AC.154/R.1.

[38] No. 8A, October 1982, 97th Congress, Public Law.

[39] *Yearbook of the International Law Commission, 1967*, vol. II (United Nations publication, Sales No. E.68.V.2), document A/CN.4/L.118, para. 96.

[40] *Repertory of United Nations Practice, Supplement No. 4* (United Nations publication, Sales No. E.82.V.7), Article 105 (2), para. 43.

[41] *Charter of the United Nations*, 3rd rev. ed. (New York and London, Columbia University Press, 1969), p. 623.

[42] *International Organization*, vol. XVI, 1962, pp. 504-506.