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THE UNITED STATES AND THE UNITED NATIONS SECRETARIAT: A PRELIMINARY APPRAISAL*

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I. INTRODUCTION

International organization is the fragile child of conflict and adjustment between pressing inter-state needs and persisting ideas of sovereignty with their exciting influence on nationalist feeling. Indeed, nationalism — and "culturism" — today continue as vital, irrepressible and often explosive social forces at the very moment when states are learning with increasing facility to manage their many common international concerns within ever-widening and authoritative institutions.[1] For almost everywhere in contemporary inter-state relations the operations of international organizations and their staffs have become a familiar experience.[2] From the long-accepted

*This paper is restricted to a study of the principal matters presently in dispute between the United States and the Secretary-General of the United Nations. It will provide an introduction to the larger question of the role and independence of the international secretariat that is to be examined by the writer in a later study.

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[1]LEVI, WORLD ORGANIZATION (1951) 23-27. POTTER, AN INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATION (1948, 5th ed.) 20-21. For a summary of the activities of the great variety of public international organizations in operation today see, for example, (1952) Vol. VI International Organization (World Peace Foundation). The documentation of the United Nations and its various organs alone is both impressive and oppressive. For a comprehensive list of public and private international organizations, committees, etc., see the 1952 Index, Vol. VI, International Organization, prepared by Lis V. Thomsen.

[2]Hammell and Others, *Sovereignty and International Cooperation,* in REPORT OF FORTY-FIFTH CONFERENCE, INTERNATIONAL LAW ASSOCIATION, *Lucerne* 1952, pages 19-42.

specialized functions of the Universal Postal Union and its predecessors through the often too-dramatized activities of the United Nations in New York and in the field, the line of supra-national civil service duties now reaches perhaps its most authoritative present expression in the European Coal and Steel Community. For out of ECSC come orders directly to the coal and steel producers of its sovereign members, from a "legislature" with jurisdiction to set prices and quotas, from an "executive" competent to supervise the operation of the program and having direct access to the national courts of member-states to compel local obedience on behalf of the Community.[3]

But it is one thing to create an international organization to serve the common purposes of military allies or kindred political societies. It is quite another to erect a system of universal institutions, with state security and human welfare their principal objectives, to erect such institutions in an age of great political tension and with a membership embracing almost all the potential antagonists. Indeed, it is a saddening irony that the United Nations should find itself attempting to do tasks today under conditions that even the boldest political idealist in 1945 might never have had the temerity to demand of it. For the United Nations as an institution, its members and its staff, now face the difficult duty of developing some kind of new balance between maintaining their symbolic, legal and administrative independence while yielding gently to the pressures of the "cold war" — at least in so far as those pressures may require some concessions to the severe security-consciousness of United States public opinion and government policy. Yet, the dispute between the United States and the United Nations over personnel matters is but a symptom of the larger malaise affecting most political and institutional arrangements embracing the East and the West in our day. Viewed on another plane, however, the success or failure that will mark the resolution of this problem may affect the administrative atmosphere of the United Nations as an independent international organization, perhaps for the duration of its location in the United States.

II. The Historical Development of the International Secretariat

It is less than one hundred years since the first evidence emerges of modern states joining in extra-national inter-state projects that would require personnel and authority to some extent independent of the geographic and political sovereignty of the member states.[4] Perhaps one of the earliest

[3]Green, *Legal Aspects of the Schuman Plan* (1952) 5 Current Legal Problems 274. See also, for example, the address of the Hon. L. B. Pearson, Secretary of State for External Affairs on May 3, 1953 describing recent decision of the NATO Council affecting the military budgets of member states. (Dept. of External Affairs, Statements and Speeches No. 53/20).

[4]There is a rich literature on the development of diplomatic immunities as well as on the parallel problem of the status and immunities of International Organizations and their

expressions of this process was to be found in the management of the Danube and Rhine rivers.[5] But here the employees of the river Commissions were nominated by their governments and their immunity from the local jurisdiction of the riparian state was severely limited. Indeed, that modest "immunity" was founded juridically on the concept of "neutrality", the only concept that seemed relevant and possible at the time since it was directed largely to maintaining the neutrality of Commission personnel should war break out among the signatories to the treaties establishing the Commissions.[6]

Of course there long had existed the practice and doctrine of immunities and privileges for diplomatic officials and in a much more limited degree for consular agents. But except for very special cases, and not going much beyond the later part of the 18th Century, these immunities and privileges were rarely in favor of nationals of the grantor state and thus had no effect upon the

staffs. See for example Kunz, *Privileges and Immunities of International Organizations* (1947) 41 A.J.I.L., 828, Note 13, and citations there; Yuen-Li Liang, *The Legal Status of the United Nations in the United States* (1948-49) Int. Law Quart. 577; Clive Parry, *International Government and Diplomatic Privilege* (1947) Mod. Law Rev. 97; C. W. Jenks, *The Legal Personality of International Organizations* (1945) 22 B.Y.I.L., 267, Footnote 1; H. M. Wood, *Legal Relations Between Individuals and A World Organization of States* (1944), 30 Transactions of the Grotius Society 141; L. Preuss, *The International Organization Immunities Act* (1945) 40 A.J.I.L. 332; L. Preuss, *Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest* (1931) 25 A.J.I.L., 694; L. SECRETON, LES IMMUNITÉS DIPLOMATIQUES DES REPRÉSENTANTS DES ETATS MEMBRES ET DES AGENTS DE LA SOCIÉTÉ DES NATIONS (1928); *J.* Secreton, *The Independence Granted to Agents of the International Community in Their Relations with National Public Authorities* (1935) 16 B.Y.I.L. 56; Sir Cecil Hearst, *Diplomatic Immunities — Modern Developments* (1929) B.Y.I.L. 1; E. Schwelbe, *The Diplomatic Privileges* (Extension Act 1944), (1945) 8 Mod. Law Rev. 50; RANSHOFAN-WERTHEIMER, THE INTERNATIONAL SECRETARIAT (1945); HILL, THE IMMUNITIES AND PRIVILEDGES OF INTERNATIONAL OFFICIALS (1947); CORBETT, POST-WAR WORLDS (1942); THE INTERNATIONAL SECRETARIAT OF THE FUTURE (1944), (Royal Institute of International Affairs); W. R. Crocker, Some Notes on the United Nations Secretariat (1950) IV, *International Organization* 598; THE UNITED NATIONS SECRETARIAT (United Nations Studies No. 4 [1951] Carnegie Endowment for International Peace); CROSSWELL, THE PROTECTION OF INTERNATIONAL PERSONNEL ABROAD (1952).

[5]CHAMBERLAIN, THE REGIME OF INTERNATIONAL RIVERS: DANUBE AND RHINE (1923) 47 et seq.; HIGGINS & COLOMBOS, THE INTERNATIONAL LAW OF THE SEA (2nd ed. 1951), 159; For an interesting historical survey see the Judgment of the P.C.I.J. in *Jurisdiction of the European Commission of the Danube* (1927) P.C.I.J. Ser. B., No. 14.

[6]Article XXI of the Public Act of November 1st, 1865 (55 British State Papers 93) reads as follows: "The works and establishments of all kinds created by the European Commission of the Danube . . . particularly the navigation cash office at Soulina . . . shall enjoy the neutrality stipulated by Article XI of the said Treaty, and shall be in case of war equally respected by all the belligerents.

The benefit of this neutrality shall be extended . . . to the general inspection of navigation, to the administration of the Port of Soulina, to the staff of the navigation cash office . . . and lastly to the technical staff charged with the superintendence of the works" (cited in Chamberlain, supra Note 5, 307).

jurisdiction of the sovereign over his own citizens.[7] In theory and practice, therefore, immunities attaching to persons as against the state of their own nationality were little in evidence in the 19th Century whether in the area of multi-national organization, bi-lateral Commissions and Tribunals and *a fortiori* in the traditional category of diplomatic personnel.

Modern international organization, of which the Postal Union is one of the earliest and best known examples, stems from the burgeoning commercial and political intercourse that marked the nineteenth Century with its vast increase in population, travel and trade.[8] The need for agencies to service such inter-state public functions as postal services and quasi-public needs such as moving transport across state frontiers, led to the proliferation of public and private international unions in the last quarter of the Century. But in all of these the information and consultative side was emphasised while "legislative" and "executive" authority remained limited and in most cases was not even contemplated. In a sense, however, the emergence of these permanent bureaus represented one branch of the barely perceptible organization of the modern international world into a kind of primitive constitutional framework where the growing variety of conferences represented the legislature, the rise of arbitration the judiciary, and international unions and their bureaus, the executive. However, this analogy has a more structural than substantive significance.

With the establishment of the League of Nations, the I.L.O. and the Permanent Court of International Justice after World War I, the scale of permanent international organization reached a new level of magnitude. It was necessary to give effective legal status to the League and its servants for their manifold international activities, and in particular for the relations of staff with their own states when as international officials they were carrying out the functions of the organization in such states. What evolved in the relations of the League to Switzerland applied more or less similarly to the I.L.O. and at the same time there was a parallel development in the relations of the Permanent Court of International Justice to the Netherlands.[9]

Two main conceptions seem to have dominated these relationships. There was, first, the belief that traditional diplomatic privileges and immunities should attach to the highest officers of the organization with the less senior officials afforded more limited privileges — immunity for official acts and various tax exemptions — while Swiss nationals had even more restricted immunities from local jurisdiction, confined to official acts, freedom from

[7]ADAIR, THE EXTERRITORIALITY OF AMBASSADORS IN THE SIXTEENTH AND SEVENTEENTH CENTURIES (1929) 1-14. SATOW, A GUIDE TO DIPLOMATIC PRACTICE Vol. I (1922, 2nd ed.) 251-283.

[8]EAGLETON, INTERNATIONAL GOVERNMENT (1948) 157-187, particularly 168-169 and citations in note 17.

[9]HILL, *op. cit.* note 4, at 3-13.

cantonal and municipal direct taxes on their League salaries, and military training deferment. Second, the League itself soon achieved status as a kind of quasi-international person having that quantum of juridicial personality necessary for its activities, e.g., inviolability, the ownership of all forms of property and capacity to deal freely with member governments.[10] The most advanced statement of the privileges and immunities of international organizations and their staffs in the inter-war years is to be found in the arrangements entered into between the Government of Canada and the I.L.O. for its temporary wartime location in Montreal.[11] Here the immunities favouring Canadian nationals in matters of taxation, military service, freedom from local jurisdiction for official acts, etc., were no different than those afforded to non-nationals while the higher category of diplomatic immunities was not provided for. These arrangements suggest considerable progress beyond the agreements that governed the relations between the League and Switzerland and mark the clear beginnings of the "functional" immunity concept for all staff members.

The League — I.L.O. experience was highly suggestive and some of the major personnel lessons, of this first attempt at a universal security system, were the following:[12]

1. There was a natural reluctance on the parts of a state playing host to an international organization to extend to its own nationals "diplomatic" or even specifically restricted privileges and immunities from local jurisdiction. This reluctance at first extended even to the position of Dutch judges and higher officials of the Permanent Court in their relations with the Netherlands.
2. The symbolic role of the head of the Secretariat, and his principal deputies or aides, rendered it desirable, certainly as a matter of protocol and perhaps too as a matter of administrative efficiency, to afford such personnel diplomatic status *vis-à-vis* the host state.
3. There was need for greater specificity in stating the precise immunities and privileges to which other members of the Secretariat might be entitled *vis-à-vis* the host state and member states in matters of their subjection to any member state jurisdiction.
4. The status of the Organization itself, as a legal person, needed a more secure definition than had been provided for in the Covenant

[10]For the development and details of these provisions see The Modus Vivendi of 1921 and The Modus Vivendi of 1926, with the Swiss Federal Council, cited in HILL *op. cit.* at 121 and 138.

[11]P.C. 6283, Aug. 14. 1941.

[12]For a detailed examination of the practical results of immunities and privileges in the League and the I.L.O., see RANSHOFEN-WERTHEIMER *op. cit.* 265-273; also HILL *op. cit.* 96-100.

and various agreements; while the day-to-day legal relations to the host state of the Organization, its Headquarters and its property would best be served by detailed articulation in a bilateral convention.

5. The principal objective in defining the status of the Organization, in providing "diplomatic" privileges for its senior personnel, as well as other grades of immunities for the remainder of the staff, was to give the Organization the means to function in a truly international manner — in short to make it independent of control by the host state or by any member state save for such control collectively contemplated by the membership itself or necessary for the protection of the reasonable administrative and police interests of the host state.
6. Finally throughout the whole period there was little or no abuse of these exemptions from local jurisdiction by Swiss nationals or non-nationals.

III. The United Nations System

These experiences were borne in mind both by the draftsmen in San Francisco in 1945 and later by the Preparatory Commission. The articles in the Charter, the Report of the Preparatory Commission[13] and the later implementing international engagements went a good way toward clarifying what had been general and uncertain in the League — I.L.O. regime. An examination of Article 7, and Articles 97, 100, 101, 104, 105 of the Charter reveals how positive were the views of the signatories that the Secretary General and his staff were to be independent of any "instructions" from member governments, that the Secretariat was to be an organ of the U.N. and that the U.N. was to have all the necessary legal capacity for the "fullfilments of its purposes" and was for these purposes to enjoy "privileges and immunities in the territory of each of its members"; similarily, delegates of its members and officials of the organization also were to enjoy privileges and immunities necessary for the "independent exercise of their functions."[13a]

In order however to have the largest measure of detailed agreement among member-states as to the meaning of these general provisions, the General

[13]Report of the Preparatory Commission of the United Nations (1946) (U.N. doc. PC/20) Chap. VII, App. A, particularily, paras. 3 and 7; see also Chap. VIII, The Secretariat.

[13a]Art. 7 (1) There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

Art. 97 The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Assembly in 1946 adopted the Convention on Privileges and Immunities,[14] reflecting the best thinking arising out of the League experience as well as the presently anticipated needs for the even more varied operations of the United Nations. The central features of the Convention — only 38 states so far have ratified it, not including the United States — are the creation of juridical status for the Organization, of diplomatic status only for the Secretary-General and his Assistant Secretaries-General, while the remainder of the staff were limited to specific functional immunities from local jurisdiction.[15] These are confined to such matters as immunities for all official acts, exemption from taxation, exemption from national service obligations and immigration restrictions, foreign exchange benefits, repatriation facilities and

Art. 100 (1) In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

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

Art. 101 (1) The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

(2) Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

(3) The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

Art. 104 The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

Art. 105 (1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

(2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

(3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

[14]U.N. Treaty Ser. 15; see also HANDBOOK ON THE LEGAL STATUS, PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, U.N. doc. ST/LEG/2.

[15]Articles I, V.

customs privileges for household effects upon taking up residence in a member country. Parallel provisions are provided for experts hired *ad hoc* to go abroad on missions for the U.N.[16], while a U.N. *"Laissez-Passer"* was established to facilitate official travel on behalf of the Organization.[17]

What is significant about the Convention is that it makes no distinction between nationals and non-nationals in their relations with member states of their own nationality, and that it emphasizes limited functional immunities rather than any generalized diplomatic privileges save for the Secretary-General and the Assistant Secretaries-General. Moreover, all of these privileges and immunities may be waived by the Secretary-General for any official or by the Security Council for the Secretary-General himself;[18] indeed the Convention is perfectly clear that the rules were designed to assist the Organization rather than to provide private exceptions to proper local jurisdiction.[19]

In addition to the Convention, agreements have been signed by the United Nations and most of the Specialized Agencies with their respective host states governing the status of headquarters sites and their operation in relation to the host state, its national and local governments. The U.N.-U.S. Headquarters Agreement of 1947[20] provides for the "inviolability" of the property and the archives of the United Nations subject to waiver by the Secretary-General permitting access by municipal officials whenever in his opinion it is necessary. Freedom of access to all those travelling officially to the United Nations from Governments or accredited organizations is also agreed to.[21] In other respects generally local law and police rules apply, for the intention of these headquarter agreements has been to " . . . express mainly the rules of customary international law applicable to the premises of diplomatic missions."[22] In short what was doubtful with respect to the status of the League — requiring doctrinal development and *ad hoc* agreements as the Leagne's position and needs were crystallized — now has been rooted firmly in the Convention and in these bilateral agreements with host states as well as made broadly applicable to the U.N. membership as a whole through the general and positive language of Articles 104 and 105 of the Charter.

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[16]Article VI.

[17]Article VII.

[18]Article V, Sec. 20.

[19]Article I, Sec. 20; Article VI Sec. 23.

[20]11-12 U.N. Treaty Series 11; also GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS (2nd ed. 1949) 640. Cf. also Headquarters Agreement, Canada and the International Civil Aviation Organization, 1951, Can. Treaty Series, No. 7.

[21]Secs. 11, 13.

[22]Brandon, *The Legal Status of the Premises of the United Nations* (1951) 28 B.Y.I.L., 90 ffl 113.

With its very limited experience in playing host to an international organization the United States may be said to have been quite reasonable in its agreement on the Headquarters' site — although its alleged "reservation" providing that security reasons should permit the barring of entry to the U.S. and to the Headquarters, indicated the inhibitions in the U.S. national view. On the other hand, the U.S. has not ratified the Convention on Privileges and Immunities and the administration of this aspect of its relations with international organizations and their staffs has depended on the International Organizations Immunities Act of 1945.[23] Here the U.S. had denied any special status to its own nationals and applied the conception of *persona-non-grata* to international staff while paradoxically the Act at the same time rejects the relevance of "diplomatic" privileges and immunities to international organizations and their personnel. The net effect of the refusal of the United States to accede to the Convention has been to discriminate against its own nationals in theory although in matters of taxation and military service reasonable working arrangements seem to have been reached to prevent discriminatory injustice against American nationals. Nevertheless, the climate of American opinion from the beginning of the presence of the U.N. in the United States has been decidedly cool toward the growth of any large group of persons having a special status and, particularly, to refuse such status to American nationals. And it is this climate together with the additional tensions of the "cold war" and the special character of Federal party politics and governmental machinary that has led in a large measure to the present dispute over personnel between the United Nations and the United States.

IV. Specific Problems Arising out of U.S. Views and Policies

While some latent resistance in United States opinion to the special — if by no means dramatically different — legal position required for international personnel could have been forseen once the United Nations located in New York, these problems of relative political novelty for the U.S. likely would have been resolved over the years without too much difficulty. No one could have anticipated, however, the extent to which after 1946[24] the deterioration of the relations between the Soviet Union and the West would have affected the development of the Secretariat. The Canadian espionage investigations of 1945-46 were the curtain-raiser to a series of North American experiences that found U.S. public opinion not unexpectedly sensitive to direct subversion and espionage as well as to the more elusive machinations of the Communist Party in the U.S. and its many "front" and allied organizations.[25]

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[23] 59 Stats. U.S. 669.

[24] Cohen, *Espionage and Immunity — Some Recent Problems and Developments.* (1948) 25 B.Y.I.L. 404.

[25] For the most recent summary of these alleged activities within the U.S. Government service see Unanimous Report of Internal Security Sub-Committee of Senate

Meanwhile a very rapid U.N. recruitment program in New York — almost three thousand employees within two years — was made necessary by the exigencies of organization.[26] On the soundest of grounds the United States from 1946 to 1948 exercised little or no direct influence on Secretariat personnel policies except of course, for the early employment from among U.S. nominees of one or two of the most senior officials of the Organization.[27] In general, the United States was prepared to follow the principle that seemed to have been accepted in San Francisco and by the Preparatory Commission that the Secretary-General — except in the matter of the Assistant Secretaries General — was to be given the widest latitude in recruiting staff of competence and integrity,[28] subject only to the general direction of the Charter that "reasonable geographic distribution" be sought wherever possible. The combined effect therefore, of the Charter, the Headquarters Agreement, the International Organization Immunities Act and this early American policy of non-interference, was to assist substantially — despite the limitations of the Act — in creating the requisite conditions for establishing an independent Secretariat in New York and abroad, internationally-minded and "loyal" to the Secretary-General.

In addition, the United States had to accustom itself to those provisions of the Headquarters Agreement which afforded to persons traveling to the United Nations on official business due access to the Headquarters and, therefore, admission to the United States. This covered not only U.N. officers and diplomatic personnel but also representatives of Accredited Non-governmental Organizations visiting the U.N. on behalf of their principals as well as all other persons officially invited by the United Nations. Finally, the international operations of the U.N. and the *Laissez-Passer* provisions of the Convention contemplated reasonably simple travel arrangements for U.N. officials, strictly, it seems, without requiring passports from the state of their own nationality. But since the U.S. was not a party to the Convention passports were applied for by American nationals who were officials of the U.N., and, until the sharp change in the political situation, few difficulties were encountered in obtaining them in the first three or four years of U.N. operations in the United States.

JUDICIARY COMMITTEE Aug. 24, 1953, republished in U.S. News and World Report, Aug. 28, 1953, 16 et. seq.

[26]REPORT OF THE SECRETARY GENERAL OF PERSONNEL POLICY, (Hereinafter called REPORT) U.N. doc. A/2364, Para. 30.

[27]SCHWEBEL, THE SECRETARY-GENERAL OF THE UNITED NATIONS (1952) 58.

[28]Secretary-General's Note to Correspondents No. 582, 2 Jan. 1953, p. 2 — "At that time in response to enquiries by the Secretary-General, the Secretary of State (Mr. James F. Byrnes) said that the United States Government did not wish to recommend United States citizens for employment or give official support or clearance to applicants and staff members."

When, however, the political temperature in the U.S. began to reflect the seriousness of international tensions and was aggravated particularly by the ascerbities of party politics in this period, the interest of the U.S. in municipally located subversion and espionage was feverishly heightened. By 1948-49 the State Department already was informing the Secretary-General in a very limited and not too satisfactory form[29] that certain persons on the staff of the United Nations were past, present or potential subversives and thus were a possible threat to the security interests of the U.S.. By late 1952, accusations by various agencies of the U.S. Government, particularly Grand Juries and Senate Investigating Committees, had led to a number of specific problems for the Secretary-General. These may be listed as follows:

1. Certain American nationals among U.N. personnel were being charged by these agencies with past, present or potential "subversive" and/or "espionage" activities.
2. A number of United States nationals employed by the Secretariat had refused to testify before a Federal Grand Jury and/or a U.S. Senate Investigating Committee on the grounds that their answers might tend to incriminate them. They claimed the privilege of the Fifth Amendment of the United States Constitution which provides for protection against self-incrimination.[29a]
3. The State Department in a number of cases already had refused to give passports to American nationals in the Secretariat suspected of subversive activities and these nationals, therefore, had been unable to travel on the business of the U.N. — the U.S. not having acceded to the Convention with its *"Laissez-Passer"* provisions.
4. The U.S. Government had forecast its refusal to permit entrance into the United States of those non-nationals representing Non-Governmental Organizations, and travelling to the U.N. on official business, whose admission would present a threat to United States security.
5. There was some suggestion that non-nationals of the Secretariat suspected of subversive activities might be subpoened before U.S. investigating agencies and also that such personnel, should they leave the country on U.N. business, might not be granted re-admission to the U.S. to resume their U.N. employment.
6. There was the possibility of Congressional legislation to render it a criminal offence for any U.S. national to take employment with an international agency unless prior clearance had been obtained from the U.S. Government.

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[29]See Note 582 supra, page 2; REPORT para. 46.

[29a] Art. V. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . "; *cf.* Canada Evidence Act, R.S.C. 1927, Cap. 59, Sec. 5.

There is no need to emphasize here the concern felt in 1952 in the United States and in the Secretariat about these allegations and procedures and the awareness of many members of the U.N. that these events were tending to threaten the morale, the independence and the good name of the Secretariat. A point had been reached in the relations of the United States to U.N. personnel policies that required a most careful examination of the legal, political and administrative issues in order to reconcile those Charter principles and Staff Regulations founding the Secretariat's independence and responsibility with the claims of the U.S. to take all measures necessary for the protection of its security.

V. The Jurists' Opinion and U.N. Policy

Faced with this growing challenge to his independent judgment as the chief personnel officer of the U.N., the Secretary-General appointed three lawyers, — from the United States, the United Kingdom and Belgium — to serve as a Commission of Jurists and to advise him on the more immediately controversial questions particularly those relating to the management of allegedly supervise personnel.

The Commissioners' Opinion[30] of November 1952 is now one of the more celebrated documents of U.N. legal history whatever may be its intrinsic merits as legal analysis. It gave rise at once to much controversy and also to some fears that if all of its recommendations were followed they might limit considerably the independence of the Secretariat not only in its relations with the U.S. but *vis-à-vis* other member-states as well. Nevertheless the Opinion influenced substantially the Secretary-General's Report to the General Assembly on Personnel Policy submitted in March, 1953.[31]

There is no need now to examine the language of the Opinion in full detail, but some extensive references are necessary to its specific findings, to the quality of its reasoning and research, to the influence it has excercised on subsequent Secretariat policy, General Assembly opinion, and United States views, and finally to its effect on the position of those U.S. nationals later dismissed by the Secretary-General, — including the method of their dismissal and the decisions of the Administrative Tribunal in reviewing those dismissals.

Five questions were put to the Commission:

> *First:* Whether it was compatible with Secretariat employment for a staff member to refuse to answer questions put to him by an investigatory organ of his government. While this question was phrased generally, and appeared to affect all member-states, it clearly seemed designed to deal with those U.S. nationals seeking the benefits of the Fifth Amend-

[30]Opinion of Commission of Jurists (hereinafter called Jurists' Opinion) U.N. doc. A/INF/51.

[31]Supra note 26.

ment in their appearances before a Grand Jury or U.S. Senate Committee. The Commission answered firmly in the negative.

Second: What should the Secretary-General do about a refusal by the U.S. Government to issue a passport to a staff member for official travel. The Commission's answer was not too clear but seemed to suggest that such a refusal should be treated as an allegation of past, present or potential subversive activities and that the Secretary-General should be put upon his inquiry as to the fitness of the employee to remain an international civil servant.

Third: What action should the Secretary-General take when an official source of the U.S. Government informs the Secretary-General that a staff member of U.S. citizenship is "disloyal" to the U.S. The Commission advised that the Secretary-General should make the fullest inquiry but he must have *reasonable grounds* for believing the allegations before the employee can be discharged. This standard was also to apply, it seems, to the passport cases.

Fourth: Should the Secretary-General make available the archives of the Organization to U.S. investigating agencies or authorize staff members to reply to questions requiring confidential information about their official arts. To this the Commission gave a clear negative.[31a]

Fifth: Does the Secretary-General have authority to dismiss holders of permanent appointments on evidence of "subversive" activities against their country or a refusal to deny such activities. The Commission replied that the Secretary-General has authority to dismiss under the present Staff Rules and Regulations.[32]

Apart from these specific replies, the Jurists attempted also to provide more generalized guides to a personnel policy. It is not unfair to say, however, that it is very difficult to know what parts of the Opinion are merely *obiter dicta,* and what are recommendations clearly intended to be taken as principles of a judgement — in short, as *ratio decidendi.* Thus, the following additional

[31a]*U.S.* v. *Keeney* (U.S. District Court, District of Columbia, 17 March 1953) reported and discussed in (1953) 2 Int. Law and Comp. Law Quart. 482-83; Here the court held that information relating to a U.S. national's application to the U.N. for employment, that includes references and recommendations before such employee is actually hired, such information is not "official" U.N. information and therefore is not immune to disclosure to a United States Senate Committee; and, that in any case, U.S. public law 291 of the 79th Congress, Sec. 288e, requires any persons entitled to such partial immunity for their official acts etc. to be notified to and accepted by the Secretary of State and that this was not done in the present case. The Court does not appear, however, to have discussed how far under the United States Constitution such a treaty as the Headquarters Agreement over-rides a Congressional enactment.

[32]This answer required a consideration of the STAFF RULES AND REGULATIONS, U.N. doc. ST/AFS/SGB/94 (1952), hereinafter referred to as STAFF RULES.

propositions are to be found in the Opinion, if not directly, at least in the linking of various statements into some kind of cohesive pattern of decision:

1. There can be no conflict of "loyalty" between the allegiance owed by a national to his own state and the responsibility of a staff employee for his duties as an officer of the U.N. (Opinion, 17). Obviously the Commission must have intended the words "loyalty" and "conflict" in some special sense. There are bound to be many occasions when staff members conceivably might be making decisions or recommendations that "conflict" with the immediate political or economic policies of the states of their nationality. The Technical Assistance program, the field operations of truce teams and similar examples are highly suggestive of situations where there may be a United Nations interest quite distinct and at variance from a given national interest.
2. Any conviction of a staff member for disloyal activities by the courts of his own country or the courts of the country where he has residence, should bar such person from U.N. employment. (Opinion, 22). Here the Commission faced the difficulty of using the term "disloyal" to apply to the activities of non-nationals *vis-à-vis* the state of their residence and in a subsequent *Corrigendum* substituted "subversive" for "disloyal", declaring however, that the meaning was more or less the same. Here are the beginnings of a confusion to be seen in many passages in the Opinion, not only the semantic difficulty with terms such as "disloyal" and "subversive", but a basic ambiguity as to the intention of the Commission. For it is never made absolutely clear in these general propositions whether the Commission wished to deal only with the specific U.S. situation or instead with allegations of "disloyalty" or "subversion" from any member-state.
3. Allegations to the Secretary-General from *any source* that an applicant or an employee is engaged or "is likely to be engaged" in subversive activity in the host country should put the Secretary-General on enquiry at once and if he has "reasonable grounds" for believing the charges, the applicant or staff member should be denied employment or discharged (Opinion, 28-29). This is a significant recommendation comprising both useful elements and less desirable ones. There can be little doubt that this duty of the Secretary-General to concern himself with allegation from *any source* may require investigations based on mischievous gossip. However, the onus of proof remains with the Secretary-General since he must be satisfied by *reasonable grounds.* This same standard is to apply where allegations are made by the organ of any member-state or where there has been an admission before a U.S. proceeding that a national or non-national, in the past has been a member of a "subversive" organization. (Opinion, 29-31).

The Opinion is markedly deficient in providing definitions for "subversive" or in giving some guidance with respect to facts suggesting that a person is "likely to be engaged" in subversive activities. Without such guidance these are dangerously flexible phrases and a strong self-disciplining procedure in the assessment of evidence would be needed to execute these rules with justice. Indeed, these propositions raise what could become one of the most difficult of all questions in the relations of the United States to the U.N. namely, whose standard will determine the quantum of evidence as to subversiveness that may be sufficient to justify a decision against the employability of an accused.

4. Present active membership in the Communist Party of the U.S. is incompatible with continued U.N. employment — although past membership will be a matter for the discretion of, and require further inquiries by, the Secretary-General. (Opinion, 31-32). Considering the climate of U.S. opinion and the decisions of the U.S. Supreme Court upholding the Smith Act,[33] — which virtually outlaws Communist activity if not the Party itself, — this proposition would seem to be one that the Secretary-General must accept. But it is not easy to apply it to non-Americans who may be members of a Communist Party in other non-Communist states, e.g. France and India. Would this rule permit the transference of an employee to a country where Communist party membership may not be objectionable, e.g. Guatemala? In any case whatever the theoretical variations, it would be very indiscreet today for the Secretary-General to retain in employment at home or abroad a member of the U.S. Communist party who is a U.S. national.

5. The Opinion did not believe that the appellate procedures provided by the Joint Appeals Board and the Administrative Tribunal[34] — for

[33]For a summary discussion of the Supreme Court of the United States decision on the Smith case see REPORT, Annex VI, paras. 4-6.

[34]Staff organization as well as diciplinary and appellate procedures are extensively provided for, and developed, in the U.N. Secretariat. See STAFF RULES, supra note 32, particularily the following:

Reg. 1.4: "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status."

Reg. 8.1 and Rule 108.1; provides for the establishment of a Staff Council (presumably elected by the Staff Association) to insure "Continuous Contact between the Staff and The Secretary-General."

Reg. 8.2 and Rule 108.2: provide for a Joint Advisory Committee composed of Staff

the review of staff diciplinary or contractual questions — were proper for these "subversive" dismissals and appeals. It recommended instead the creation of an Advisory Panel from senior Secretariat personnel, with an outside independent chairman, to consider allegations from the U.S. Government charging subversion or espionage. (Opinion, 32-34). The Jurists were moved by a practical concern for the reluctance of governments to have security information travel the ordinary appellate route in staff appeals. It may be suggested, however, that the Jurists were insufficiently aware of the prestige of the Administrative Tribunal or the strict rules which govern the powers of the Secretary-General with respect to dismissals.[35] Indeed, the recent decisions of the Administrative Tribunal ordering compensation to be paid to seven dismissed U.S. nationals, and reinstatement in the case of four others, is a reminder of how clearly within the framework of the Staff Rules and Regulations must the Secretary-General act particularily in the case of employees holding permanent contracts.[36] It would be surprising to find the General Assembly yielding to the recently declared intentions of the U.S. so to amend the Statute of the Tribunal as to prevent appell-

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Council and Secretary-General nominees, to advise the Secretary-General on personnel and staff welfare policies.

Reg. 10.1, 10.2 and Rule 110.1: provide for the powers of the Secretary-General to summarily dismiss for "serious misconduct" and for the creation of a Joint Disciplinary Committee representing the Staff and the Secretary-General to advise him on disciplinary cases, at his request.

Reg. 11.1 and Rule 111.1 provide for appellate machinery within the Secretariat to deal with administrative decisions concerning terms of appointment and disciplinary action. A Joint Appeal Board comprising Secretary-General and Staff nominees hears appeals in these matters.

Reg. 11.2. The U.N. Administrative Tribunal can hear appeals from Staff members alleging non-observance of terms of appointment, including all pertinent regulations and rules.

See also ADMINISTRATIVE TRIBUNAL STATUTE AND RULES [U.N. doc. A/CN. 5/2 General Assembly, Resolution 351 (IV) November 24, 1949]. Article 3 gives it jurisdiction over all employment contract disputes, including the interpretation of relevant Rules and Regulations; but under Article 7 applications are to be heard only after submission to the Joint Appeals Board and disposal of the case by it — except in those cases where the Secretary-General and the applicant agree to go directly to the Tribunal or where the Secretary-General has not acted on a favourable decision, or where the decision is unfavourable but the applieation is not regarded as frivolous.

[35]Rule 9.1, provides other grounds for termination of permanent appointments (abolition of post, unsatisfactory services, health) of fixed term appointments, (abolition of post, expiration of term, health, unsatisfactory services) and for the termination of all other staff members (but presumably not including permanent appointments) where such action "is in the interest of the United Nations."

[36]See Judgments of the Administrative Tribunal, U.N. docs. AT/DEC/18 to AT/DEC/38 — cases No. 26-46 inclusive; for example, case No. 37 (Joel Gordon) where the Administrative Tribunal, as in other similar cases, denied the right of the Secretary-

ate review and the award of compensation in these "subversive" cases.[37] However proper the abolition of such loyalty review appeals may have been with respect to the administration of the U.S. federal civil service, it is not likely to commend itself as a policy to the General Assembly. Indeed, board of review procedures in loyalty proceedings in the U.S. operated from 1947 to 1953 when they were replaced recently with Department review and authority to dismiss.[38]

One last word about the Opinion as a whole. It is not unfair to suggest that the Opinion reflects the great haste with which it was drafted — something under three weeks — and the seeming unfamiliarty of the members of the Commission with general international law as well as with the specific problems of an international secretariat. While the Opinion may have been designed for non-technical readers, it is almost too deliberately devoid of scholarship, and its confusion of specific and general findings, its uncertainty in use of key terminology such as "loyalty" and "subversion" and its ambivalence in not being quite certain whether all of its generalizations were to apply to the U.S. only or to all member and host countries, must be regarded as serious weaknesses in a document that was designed to give confidence and guidance at a crucial moment in the life of the Secretariat.

For the Secretary-General, however, the opinion became an influential source in determining his immediate personnel policies and for reporting upon them to the Seventh Session of the General Assembly. In his Report the Secretary-General emphasized his own authority and the fundamental need for

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General, under the terms of Reg. 10.2 of the STAFF RULES, to discharge those holding permanent contracts because they claimed the privilege of the Fifth Amendment. The Tribunal said (pages 8-9 of AT/DC/29):

"9. In the present case, the Applicant invoked the privilege provided in the constitution of his country. This step did not give rise to legal procedures against the Applicant. This provision of the constitution may be properly invoked in various situations which, because of the complexity of the case law, cannot be summarized in a simple formula.

The legal situation arising from recourse to the Fifth Amendment was so obscure to the Secretary-General himself that he considered it desirable to seek clarification from a Commission of Jurists. These cases were later discussd by the General Assembly who reached no decision. Subsequently these conclusions were partially set aside by the Secretary-General himself.

The nature of serious misconduct appeared so disputable to the Secretary-General that he granted termination indemnities which are expressly forbidden by the Staff Regulations (Annex III) in cases of summary dismissal.

Whatever view may be held as to the conduct of the Applicant, that conduct could not be described as serious misconduct which alone under article 10.2 of the Staff Regulations and of the pertinent Rules justifies the Secretary-General in dismissing a staff member summarily without the safeguard afforded by the disciplinary procedure.

10. In these circumstances, the decision to terminate the Applicant's employment since it cannot be based upon the provisions of the Staff Regulations and Rules must be declared illegal."

[37]New York Times, 27 Sept. 1953 (A. M. Rosenthal) Section 1. Page 1, 37; also Section 4, pages 1-2.

[38]New York Times, 28 April 1953, pages 1, 20.

an independent international secretariat and, indeed, reminded the members how squarely his conception was founded on the Charter itself as well as on the Staff Rules adopted by the Assembly. Moreover, he described the various attempts to obtain detailed information from the U.S. about allegedly subversive personnel and how difficult it was until recently to receive anything but superficial reports from the State Department. The Secretary-General was prepared to accept the Jurists' Opinion at least with respect to dismissing all employees who were convicted of espionage or subversion or who claimed the privilege of the Fifth Amendment. He was willing to suspend permanent employees who claimed the privilege but giving them an opportunity later to testify or face dismissal.[39] As to the mere allegations, the Secretary-General was adamant that he would need to have reasonable grounds to justify dismissal and such grounds would have to amount *to a preponderance of evidence:* in short, the onus would remain here with the Secretary-General.[40] Moreover, in view of the recommendations of the Jurists, and the nature of the confidential information to be studied, an Advisory Panel had been established, with recommending functions only, to examine the evidence submitted by the U.S. and make suggestions to the Secretary-General.[41] Finally, the Secretary-General declared that the U.S. had not yet acceeded to the Convention on Privileges and Immunities and that the International Organizations Immunities Act did not afford diplomatic status for the Secretary-General and the Assistant Secretaries-General, nor provision for U.S. nationals in matters of taxation, national service and other benefits; while at the same time he urged that member states ought not to employ their control over passports to limit the employability of their nationals or the movement of Secretariat officials.[42]

The Report was a kind of half-way house between certain of the severe views of the Jurists — particularly the dismissal of employees holding permanent contracts in the Fifth Amendment cases — and those whose stand would deny any effect upon Secretariat policy to U.S. municipal legal procedures. But the Report left unclear the definition and standards the Secretary-General would apply in determining the meaning of "subversive" or "likely to be subversive;" the method for resolving disputes between the U.S. and the Secretary-General as to the adequacy or significance of information gurnished by the U.S.; the future of the Administrative Tribunal and the Secretary-General's policy toward the Tribunal in the treatment of subversive cases; and finally, the relevance of these experiences with the U.S. to possible parrallel problems aris-

[39]This authority has now been denied to him by the Administrative Tribunal as not coming within the powers conferred by the STAFF RULES. See Case No. 37, supra Note 36.

[40]REPORT, paras. 97-98.

[41]REPORT, paras. 104-105.

[42]REPORT, paras. 110-115.

ing with other member and host states. And since the Secretary-General at this writing has not reported to the Eighth Session of the General Assembly with respect to personnel problems, as required by Resolution 708 (VII), his recent experiences with the U.S. Government, the additional question of N.G.O. representatives and the views of the new Secretary-General on personnel policy in gneral and the subversive question in particular, all remain to be disclosed.

Meanwhile, early in 1953 the U.S. Government took measures to police more directly American employees and applicants for employment with international organizations by embracing them generally within the framework of the federal loyalty procedure program. The "loyalty" clearances established in President Truman's Executive Order of January 9th, 1953,[43] sought therefore to meet the Secretary-General's demands for more adequate information about alleged subversives or spies among U.S. nationals in the Secretariat or seeking employment. This Order was subsequently amended in some of its most important provisions when on 27 April, 1953,[44] federal employee loyalty procedures were wholly revised. Later, on 27 May 1953, an International Organizations Employees Loyalty Board was established, by Executive Order, within the Civil Service Commission to deal with U.S. nationals employed or being considered for employment on the internationally recruited staff of the United Nations for a period exceeding ninety days.[45] All such personnel were to be covered by a "full field investigation" conducted by the Federal Bureau of Investigation. In determining the loyalty status of the person concerned, the Board was to be guided by the following standards: " . . . whether or not on all the evidence there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."[46] Finally, the Secretary-General was to receive information from the Secretary of State" . . . in as much detail as the Board determines that security consideration permit . . . "[46a]

While the Secretary-General has not yet reported on the operations of his own Advisory Panel, on the other procedures as outlined or on the quality of the evidence now being received from the U.S. Government, a number of assumption perhaps can be made in anticipation of his statement. It is clear that there is a deep cleavage between the security risk standard in both Executive Orders and the "preponderance of evidence" standard, in favour of employee, in the Secretary-General's Report. It would be surprising if some clash of opinion both with respect to the quantum and value of evidence does not arise, polarized by these conflicting yardsticks. It will also be surprising if the Advisory Panel does not have some difficulty in attempting to

[43]Executive Order No. 10422.

[44]Executive Order No. 10450.

[45]These Provisions are set out in a "Release by the Press Secretary to the President", June 2, 1953.

[46]This standard is the same as that set out in Executive Order No. 10422.

[46a]*Supra* note 45, clause 5 as amended.

perform fair and confidential review services for the Secretary-General without at the same time developing reasonably formal hearing procedures for accused personnel. Moreover, since the Secretary-General is not bound to take the Panel's advice, conflicts between the developing standards of the Panel and the Secretary-General are not impossible — if the Panel takes its duties seriously and develops some inevitable formality in its inquiries. Then too, there are the recent decisions of the Administrative Tribunal denying the Secretary-General the right under the Staff Regulations and Rules to dismiss personnel holding permanent contracts and declaring that they do not commit a breach of the Regulations, by taking advantage of the Fifth Amendment of the U.S. Constitution. Not only do these decisions limit the freedom of the Secretary-General to discharge without compensation in such cases, but they have already provided a new source of acrimonious public debate in the U.S. Mr. Henry Cabot Lodge, the Permanent Delegate of the U. S., has warned that he will seek General Assembly reversal of such judgments, possible amendments to Staff Regulations and certainly U.S. membership on the Administrative Tribunal when the next vacancies occur.[47] The juridical basis for expecting the General Assembly to consider itself authorized to reverse the Tribunal's judgments would seem to be considerably in doubt for generalized legal reasons indeed not unlike the principles underlying the "ex post facto" and "Bill of Attainder" clauses of the U.S. Constitution.[48]

Finally, the Secretary-General's policy had already led in 1952 to permission for the Federal Bureau of Investigation to make its enquiries on the Headquarter's premises and to send questionnaires to all U.S. nationals on the international staff of the Secretariat, whether located in the U.S. or abroad. This procedure was defended by Mr. Lie, the first Secretary-General, in his major statement to the Assembly on personnel policies last March.[49] The principal reason advanced was that both the interviews and the fingerprinting at Headquarters were not *per se* a violation of the Headquarters' Agreement; indeed, they were a generally convenient arrangement to expedite clearances by the F.B.I. of scores of American nationals who felt that the sooner they were "cleared" the better. There is some evidence however, that the Swiss Government has not been as favourably disposed to such administrative simplicity and has disliked permitting the circulation of the questionnaire

[47]*Supra* note 37; also N.Y. Times Oct. 2, 1953, page 6.

[48]U.S. Const. Art. I, Sec. 9; also the STAFF RULES REG. 12.1 provide: "These regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members."

[49]See Statement by Mr. Trygve Lie on Personnel Policy, before the General Assembly on 10 March 1953, Press Release S/G 281, 16-7; (1953) XIV United Nations Bulletin, No. 6. (March 15, 1953).

in Geneva, while UNESCO apparently refused to circulate the questionnaire in its Paris Headquarters among U.S. nationals on the staff.[50]

As this is being written the General Assembly is sitting in its Eighth Session in New York. On its agenda will be found the pending report on personnel policies of the new Secretary-General. It expects also to hear the comments on this report of the Advisory Committee on Administrative and Budgetary Questions. Doubtless serious discussion will take place in the Fifth Committee as well as in the Plenary sessions. For the General Assembly probably has not forgotten how deeply disturbed many delegations appeared to be in the Plenary debates on Mr. Lie's report to the Seventh Session. Every delegation statement recognized the conflicting claims of Secretariat independence on the one hand and host country security on the other. Perhaps one of the strongest criticism of Mr. Lie's policies were made by the French Delegation.[51] It emphasized the absence of truly secret information in the Secretariat and that much of the alarm was "being rung for a ghost." Indeed, it is worth summarizing the main points in the French analysis because it also supports, in part, the U.S. view on prior clearances of nationals who are employees of an international organization:

1. Every member state, not only host countries, has the right to decide under what conditions it authorizes its nationals to become members of the U.N. staff. But such provisions cannot directly limit the Secretary-General's freedom to employ. (The statement did not attempt to reconcile the administrative and legal impasse resulting from this position.)
2. Every member state is entitled to expect that the Secretary-General will not retain in service a staff member found to be engaged in some subversive activity against that state's security.

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[50]See (1953) VII International Organization, 422-423, for a summary of the UNESCO proceedings.

[51]See PROVISIONAL VERBATIM RECORD OF THE FOUR HUNDRED AND EIGHTIETH MEETING, 30 March 1953, U.N. doc. A/PV 418, pages 28-52. The Plenary discussions contain very important statements on delegation views. Mr. Lodge for the U.S. supported the SECRETARY-GENERAL'S REPORT and the JURIST'S OPINION, particularly with respect to membership in the Communist Party, the Fifth Amendment cases and where the employee's record suggest potential ("likely to engage") subversive activity; See U.N. doc. A/PV 416, page 13. See also the support given by Mr. Leslie Munro of the New Zealand Delegation for the Jurist's view that any "subversive" activity against a host state is "serious misconduct" and warrants dismissal under Regs. 1.4, and 10.2 of the STAFF RULES: See U.N. doc. A/PV. 416, 19-20. The Canadian statement by Mr. Paul Martin was a very careful formulation confined largely to emphasizing the need for Secretariat independence, declaring Canada's satisfaction with the integrity and industry of the staff generally and to indicating certain reservations about the Jurist's approach to the Fifth Amendment cases: See U.N. A/PV. 418, 23-38.

3. Every host country is entitled to inform the Secretary-General that it considers it undesirable that international functions should be assigned on its own territory to a particular national. In principle, the Secretary-General should comply with the State's wishes but it is for the Secretary-General, bearing in mind these wishes, to make the decision whether to keep that staff member or to employ him in another country. (Presumably a French Communist would be unacceptable for employment in France but possibly acceptable if employed elsewhere and not otherwise a security threat to France.)
4. A particular host country's legislation and jurisprudence do not enjoy any privileged position in relation to the legislation and jurisprudence of other states so far as the Organization is concerned. The Secretary-General is bound only by the principles of the Charter and the French Delegation expresses strict reservations about the meaning drawn by the Secretary-General from the use made by certain American staff members of the protection given them by the Fifth Amendment. (This is the "equality of states" argument employed to prevent the supremacy of any one municipal legal order in the operations of the Organization.)
5. The International status of the organization must have the respect of all member states including host states. This precludes a host state from asking the Secretary-General to cooperate in the execution of that country's laws and internal regulations so far as international civil servants are concerned.
6. Temporary contracts should be replaced by permanent ones and rarely given thereafter; security for staff should be reinforced and the authority of Administrative Tribunal supported by the Secretary-General, inspired by the spirit of its jurisprudence.

Not all delegations concurred in these French views, but they state the strongest case against some of the interim administrative concessions made by Mr. Lie and they refer also to related questions of general personnel administration. For there can be no doubt that some of the problems of the Secretariat arose out of the fact that only a limited time was available to the Secretary-General in the years 1946-47 when he sought to recruit many senior and middle-rank civil servants perhaps without an opportunity to examine adequately their personal and technical records.[52]

The net effect of the Plenary debate at the Seventh Session was to pass the Resolution 708 (VII) — inviting the Secretary-General to report to the Eights Session, — and also to leave behind the deep collective concern of all delegations for the importance of the issue as it would influence the

[52]REPORT, paras. 30-34.

future efficiency and morale of the Secretariat as well as the attitudes of the U.S. Government and public opinion toward the Secretariat and perhaps to the U.N. system as a whole.

VI. Conclusions

It is an unhappy commentary on the tensions of these years that the United Nations should have any energies dissipated by such issues as the personnel dispute at a time when it needs all of its resources to fulfill the high tasks assigned to it. Moreover it has been argued that the dispute over personnel might never have arisen had it not been for the political accident or necessity that located the United Nations in the United States; and that similar issues have not appeared to bedevil the relations of other international agencies in their respective host states, e.g. UNESCO in France, W.H.O. in Switzerland and F.A.O. in Italy. Ironically too, it is in France and Italy that the two largest Communist parties in the Western world are to be found and yet the feeling of vulnerability to international personnel in these two states does not seem to have matched the intensity of United States' sensibilities.

On the other hand, there is in this debate a very real international organization problem. It would be absurd to be indifferent to the depth of American concern with respect to the suspicions among the great powers today. Equally it would be absurd to ignore the domestic political significance in the U.S. of a growing awareness since 1947 that international expansionist Communism, sired and incited by the Soviet Union, has employed American nationals as well as its own emmissaries to serve its interests and to undermine in every possible way the stability of U.S. institutions. Of course, this awareness has been accentuated by the often bitter differences between the two great political parties and by the appearance in American federal politics of one or two very influential public men who have concentrated particularly on the problem of domestic pro-Soviet activity. Yet it is public knowledge today that communists and the Communist Party in the United States now seem to have been decimated in membership and broken in influence by the revulsion of U.S. public opinion and the effectiveness of Federal enforcement agencies. It very well may be, therefore, that a moment is approaching in the formation of U.S. opinion that will permit a more balanced, objective approach to the nature of an international secretariat and its needs. If this is true it may then be possible for the U.S. and other members of the United Nations to approach the complex questions raised by allegations of subversion and espionage in a spirit of constructive detachment.

Of course, this is not a problem which has meaning for the U.S. alone. The principles arising out of this dispute must be considered in the light of their relevance to the position of all host and member states. Manifestly there are certain minor burdens which every host state ought to be prepared

to accept and among these irritations are not only the presence of personnel engaged on multi-national tasks that may be at variance with the international policies of a host state, but also the more striking fact that among these international personnel may be host state nationals who are no less good citizens of the host state because they are loyal servants of the international organization. It may ease the difficulties of popular U.S. acceptance of this thesis if the practical fact is emphasized that the U.N. Secretariat in New York — and this is equally true of the World Bank and the Fund in Washington — are concerned with matters where security information plays a negligible role. Direct espionage or subversion is therefore no more or less likely to take place because of employment in the U.N. Secretariat. There is very little to hide in the relatively open files of a glass house; while a determinedly "subversive" civil servant can have no more influence on policy than astutely observant delegations or secretariat seniors permit him to have — namely little or none at all. And all of these possibilities are no less true of U.S. citizens or public servants in relation to their own government.

It is, of course, not impossible that American nationals and others in the Secretariat conceivably might have convictions about their international problems at variance with the relevant policies of the states of their nationality. But this is the price that must be paid for having any international organization whatever that is engaged in a positive program embracing both security and welfare. This is not a question of divided loyalties so much as it is of the emphasis to be placed on the interests to be served. The orientation of the international civil servant's mind is principally, but by no means exclusively, to the multi-national world rather than to his own state. As an American student put it in a penetrating study of the Secretariat:[53]

> Only a truly international staff can fully serve the fundamental purpose of the Secretariat: to provide a center of cohesion and continuity, a hard core, to the international system by assisting the Secretary-General in the performance of his great responsibilities. A secretariat staffed by persons whose primary and permanent loyalties lie elsewhere is, both by definition and by all our experience with international work, incompetent to fulfill in more than perfunctory measure the complex assignments of the international executive. The tasks of the Secretariat may, in fact, be too difficult for a staff of unquestionable international character; they would clearly he beyond the capacities of a staff divided and inhibited in its loyalties.

It patently is true that there can be no room in an international civil service for deliberate subversion or espionage, but that is a problem of personal integrity and is far removed from the question of a U.S. or Canadian national giving loyal and efficient service to an international organization. Wilfred

[53] *Supra* note 1, THE UNITED NATIONS SECRETARIAT, at p. 56.

Jenks dealt feelingly and candidly a dozen years ago with the true character of the international viewpoint:[54]

> The first of these special qualifications is a distinctively international outlook . . . A lack of attachment to any one country does not constitute an international outlook. A superior indifference to the emotions and prejudices of those whose world is bounded by the frontiers of a single state does not constitute an international outlook. A blurred indistinctness of attitude towards all questions, proceeding from a freedom of prejudice born of lack of vitality, does not constitute an international outlook. The international outlook required of the international civil servant is an awareness made instinctive by habit of the needs, emotions, and prejudices of the peoples of differently-circumstanced countries, as they are felt and expressed by the peoples concerned, accompanied by a capacity for weighing these frequently imponderable elements in a judicial manner before reaching any decision to which they are relevant.

It may be suggested, moreover, — as Mr. Dean Acheson himself has done — that recent U.S. preoccupation with "subversive" United Nations personnel would seem to have been very much out of proportion to the actual dangers to U.S. security from staff members. And that preoccupation has tended to close off an awareness of the desirable admixture of qualities and interests, all founded on personal integrity, that can have a man remain a decent and loyal citizen, while performing as a conscientious and effective international civil servant.

The legal problems too, though difficult are really not particularily formidable. There should be no tampering with that language of the Charter which gives status to the Organization and independence to the Secretariat — with freedom to the Secretary-General to fashion employment policies subject to the Staff Rules and Regulations, General Assembly principles, and the Administrative Tribunal judgements. The Convention on Privileges and Immunities solved many of the foreseeable problems of the relations with host and member states. What was not foreseen were these novel difficulties raised by the impact of international Communist behaviour on the security thinking and police needs of many Western states, especially the U.S.

There are two possible approaches to the legal aspects of the question. There is, on the one hand, an insistence on the strict independence of the Secretary-General to employ and to discharge within the Regulations as he sees fit. This view is buttressed by the practical assumption that the Secretary-General's own good sense, aided by adequate information from member states, can be trusted to evaluate unfit personnel and that his announced use of the Advisory Panel should provide effective safeguards against "subversive" or "spying" activities. On the other hand member states may claim that personnel seeking employment with the U.N., or

[54]W. C. Jenks, *Some Problems of an International Civil Service* (1943) III Public Administration Rev. 93 at 95.

already employed, be required to have the approval of the states of their nationality; while host-states conceivably may go further and insist that all employees resident in the host state, including non-nationals, be subjected to some measure of local government clearance. It is interesting to observe that despite the French Delegation's generally critical statement it did agree that member states could determine the conditions under which their nationals were to be employed by the U.N. — but that at the same time municipal rules could not control the staff decisions of the Secretary-General.

Yet this proposal of member state approval, or host-state clearance of non-nationals — *a fortiori* the latter — is open to some objection. It means that the independence of the Secretary-General is directly inpinged on, in a form not contemplated by the Charter, by the municipal rules of member states. Certainly the draftsmen could not have intended that the Secretary-General should be subject to the municipal decrees of individual states discriminating against selected classes of persons with respect to their eligibility for international employment.

In this light the proposed McCarran Act,[55] the recommendations of the Jurists with respect to the use of the Fifth Amendment, the possible diplomatic, if not public, insistence by the U.S. that the Secretary-General be guided by the findings of its municipal agencies with respect to the political "risk" quality of American Secretariat employees, all are procedures that inpinge on the freedom of the Secretary-General. It is difficult to know just how far any of these procedures are vitally necessary to American security. It is easy to see however, that they may directly affect the ability of the Secretary-General to employ those U.S. nationals who *in his opinion* may be worth employing. Indeed, at this very moment of writing the recruiting of U.S. experts under the U.N. Technical Assistance program has been severely interrupted by the ability of the Secretary-General to obtain U.S. clearances rapidly or in some cases not at all.[56] Some compromise here would seem to be desirable. Indeed, it may be hoped that the proposed McCarran Act will give way before such compromise and in the result permanent arrangements between the U.S. and the Secretary-General on the furnishing *and evaluation* of information will be established. The real difficulty, however, is that the standard of employability in the President's Executive Order is one

[55]Bill S.3 of the 83rd Congress, 1st Session, passed by the Senate in June 8, 1953, and referred to The House of Representatives on June 9, 1953, making it an offence to obtain employment from or retain employment with the U.N. without security clearances from the Attorney General, all subject to a fine of $10,000 and/or up to five years imprisonment. See also SENATE REPORT No. 223, MAY 4, 1953, TO ACCOMPANY BILL S.3 FROM THE COMMITTEE ON JUDICIARY, stating that only by congressional legislation can U.S. nationals effectively be prevented from taking employment with the U.N. without a security clearance from the U.S. Government.

[56]N.Y. Times, Sept. 30, 1953, page 2.

which places the onus on the candidate or employee to prove he is not a security risk while the Secretary-General's Report, supported by the Jurists, places the onus on the Secretary-General, who is to be satisfied by the *"preponderance of evidence."* It will be surprising if a number of problems soon do not arise out of this conflict of standards and if, to solve them, there will not need to be established something amounting to a Standing Mixed Panel comprising the Secretary-General and the United States with a "neutral" chairman, and with the Panel's decisions becoming binding by custom if not by law.

A number of other legal and administrative problems are almost equally contentious. There is the effect of any U.S.-U.N. arrangements on the position to be taken by other member states with respect to the employability of their nationals and in some cases non-nationals. There is the control of passports by member states thus interfering with the free movement of Secretariat staff on official business. And there is the U.S. interpretation of the Headquarters Agreement that has led to the refusal of entry into the U.S. of Non-Governmental Organization representatives traveling to the U.N. on official business.

With respect to the position of other member states it is clear that if the Secretary-General accepts the U.S. position on the Fifth Amendment cases other member states may demand similar treatment for those of its nationals who have refused to testify before their national investigation agencies. How acceptable this would be to many U.N. members, particularily where this procedure may be asserted by states notorious for the arbitrary behaviour of their state organs, is a nice question. It is not difficult to predict that such procedures could become subject to considerable abuse and might deprive the Secretary-General not only of independence of judgment in many cases but, in the end, of valuable personnel. In short, the effects of having local law and process become a standard for employability of given nationals by the U.N. would be to transpose into Secretariat employment policy municipal standards greatly varying in their quality of substantive fairness and procedural decency.

Similarly, while all member government allegations about subversion and espionage must be taken very seriously by the Secretary-General, there scarcely can be one rule for the U.S. and another for other member-states. Perhaps here, too, the development of specific procedures — negotiation always, arbitration when necessary — to resolve disputes between member-states and the Secretary-General may be necessary. Conceivably these could lead to the slow evolution of a standard common to the U.S. and other member states, a standard that balances the problem of state security and dignity and some limited control over nationals with the needs of a truly independent international secretariat and Secretary-General.

The passport question too, presents more annoyance than difficulty. In most cases, there is no problem in U.N. personnel moving about on the business of the Organization. But the United States is not a party to the Convention on Privileges and Immunities and U.S. passport laws do permit a refusal to issue a passport where the "security" qualities of the national have been adversely determined by the State Department.[57] Some sensible arrangements need to be developed here. Who shall have the final word in a dispute between the Secretary-General and the U.S. may not be easy always to resolve, but perhaps here also the recommendations of the proposed Standing Mixed Panel may become accepted as a matter of tradition by the U.S. although, of course, there would be no legal means to compel a passport to be issued.

Finally, the views asserted by the U.S. as to its right under the Headquarters Agreement, to refuse entry to N.G.O. representatives, need to be fully studied. The Secretary-General already has refused to accept these U.S. "reservations".[58] Indeed, the Legal Department of the Secretariat has expressed the opinion[58a] that no reservation, — covering the refusal to permit the immigration entry of N.G.O. personnel for security reasons, — in fact was made at the time of ratification and Senate consent and, that in any case, the Joint Resolution of the 80th Congress did not deal specifically with the cases provided for in Sections 11 and 13 of the Agreement governing travel to Headquarters, visas and the non-applicability of United States immigration laws. Negotiations on these questions are presently continuing between the Secretary-General and the U.S. and doubtless some agreement will result — although here again the low sensitivity threshold of U.S. opinion as well as the new administrative procedures required by the McCarran Immigration Act,[59] are likely to render the process an uneasy one .

At bottom the personnel problem is a reflection of tension, distrust and the largely unanticipated results of embracing both "East" and "West", the super-powers and their supporters, within a common forum and a common security *cum* welfare institution. More immediately it is the result of the very special character of United States' opinion and recent public experience there with "subversive" activities in and out of government service. There is now however a very substantial body of discussion and analysis, as well as several months of Secretariat experience in dealing with the U.S., to permit the Secretary-General and the General Assembly to arrive at some statement

[57]See JURIST'S OPINION 48-49 for a summary of the U.S. State Department Regulations governing the issuance of passports.

[58]See PROGRESS REPORT BY SECRETARY-GENERAL TO ECOSOC on negotiations with the U.S. concerning the interpretation of the Headquarters Agreement, Press Release PM/2558, 27 July 1953; also Press Release ECOSOC/1189, S/G 322, 31 July, 1953.

[58a]U.N. doc E/2397, April 10, 1953.

[59]The Immigration and Nationality Act (1952), 66 Stats. U.S. 163.

of general principles about staff behaviour and member-state obligations that should be acceptable to all member and host states, and particularly to the U.S. It would be helpful at this juncture if the U.S. would accede to the Convention on Privileges and Immunities and were to take a fresh look at its obligations under the Headquarters Agreement. But even if this cannot be done, because of the taut sense of responsibility in security matters which American leadership may feel today, there is nothing to prevent the General Assembly from formulating — with the advice of a Commission selected to study the issues — a statement of principles and procedures that will secure the best interests of both the Organization and all member and host-states in these subversive allegation matters. It probably would be impractical to attempt to amend the Convention or the Headquarters Agreement at this time even if it were found desirable to do so, and a General Assembly Resolution on Principles and Methods to deal with allegedly subversive staff should do just as well. Such a statement should reflect the need to reassert the independence of the Secretary-General in his employment practices and should formulate particularitv the extent to which certain limited "clearance" requirements by member states may or may not be consistent with such independance; the desireability of some clarifying details as to proper and improper "political" activity by international civil servants; the need to establish procedures for settling disputes between the U.S. and the Secretary-General on the evaluation of information; some conclusions as to the meaning of the Fifth Amendment cases, and the relevance of any resulting employment standards and procedures *vis-à-vis* U.S. nationals, to all other host and member states; the desireability of some clearer definition of the legal status of the *"Laissez-Passer"* and some limitations on the control of passports by states to affect the movements of U.N. personnel; a clearer formulation of the rights of accredited N.G.O. representatives to visit the U.N. officially with the least hindrance by the host state, — except on "proven" security grounds or where such visitors are not *bona fide* on the business of their organizations. And finally, these procedures should seek to retain the Administrative Tribunal — now commanding the substantial respect of most member-states and U.N. employees — as the proper appellate body to review the dismissal of holders of permanent contracts. Perhaps the Tribunal should have special in camera procedures for these security cases as well as some principles — including a fixed maximum — to guide the amount of indemnities awarded, if any, for those discharged on "subversive" or like grounds.[60]

[60]For a statement of the views of international civil servants with respect to the policies followed by the Secretary General of the United Nations in dismissing or suspending personnel on Fifth Amendment or other "subversive" grounds, see the legal opinion of Prof. Henri Rolland, published by the Federation of International Civil Servants Associations, N.Y. Times, October 24, 1953.

Such a code of principles and procedures, passed by two-thirds of the General Assembly, might go far toward clarifying what is now too ambiguous and thus to removing what may become a chronic irritant in the relations of the U.N. and the U.S. These principles would serve also to help prevent the spread of the personnel dispute to other member states and could become a model for the parallel relations of the Specialized Agencies and other international organizations.

It would be melodramatic to pretend that the future of the U.N. hangs by the wise management of the personnel issue. There are deeper ills to treat and greater battles for the U.N. to win. Indeed, Percy Corbett long ago doubted whether any immunities whatever are necessary for international civil servants;[61] but this is a counsel of indifference. Widely dispersed "diplomatic" privileges, no, but for the rest: function, history and ritual are against him. Modern international organization is a growing political organism ever in need of finding new adjustments between the desire of many states to strive together for peace and welfare and the deep resistances in their policy and law to the emergence of supra-national authorities. The United Nations is the most "comprehensive" of all such organizations and frequently it has met the fate of too much being expected from it in an 'out of joint' time. But if anything lasting is to come from the U.N. there will need to be, among many other elements, the sustained support of member-states for it as an institution, with a life, an identity, a developing "independence" of its own, but an independence that must be fitted always, in a creative constitutional sense, into the hard mould of ideas about national sovereignty.

It would be unrealistic, however, to ignore these authentic Secretariat needs, raising as they do problems of law, administrative technique and morale, or to ignore the symbolic significance of a well-defined, independent Secretariat position for the United Nations system as a whole. It will require, therefore, political insight and skill, much patience and a considerable feel for the evolving constitutional law and administration of international organizations, to dispose of these matters so that the United Nations, its members and its staff, may freely and efficiently go about their immensely varied and urgent business.

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[61] CORBETT, POST-WAR WORLDS (1942) 173.