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LETTER DATED 8 MARCH 1950 FROM THE SECRETARY-GENERAL TO THE PRESIDENT OF THE SECURITY COUNCIL TRANSMITTING A MEMORANDUM ON THE LEGAL ASPECTS OF THE PROBLEM OF REPRESENTATION IN THE UNITED NATIONS

8 March 1950

During the month of February 1950 I had a number of informal conversations with members of the Security Council in connexion with the question of representation of States in the United Nations. In view of the proposal made by the representative of India for certain changes in the rules of procedure of the Security Council on this subject, I requested the preparation of a confidential memorandum on the legal aspects of the problem for my information. Some of the representatives on the Security Council to whom I mentioned this memorandum asked to see it, and I therefore gave copies to those representatives who were at that time present in New York.

References to this memorandum have now appeared in the Press and I feel it appropriate that the full text now be made available to all members of the Council. I am therefore circulating copies of this letter and of the memorandum unofficially to all members and am also releasing the text of the memorandum to the Press.

(Signed) Trygve Lie
Secretary General

/LEGAL ASPECTS

February 1950

LEGAL ASPECTS OF PROBLEMS OF REPRESENTATION IN THE UNITED NATIONS

The primary difficulty in the current question of the representation of Member States in the United Nations is that this question of representation has been linked up with the question of recognition by Member Governments.

It will be shown here that this linkage is unfortunate from the practical standpoint, and wrong from the standpoint of legal theory.

From a practical standpoint, the present position is that representation depends entirely on a numerical count of the number of Members in a particular organ which recognize one government or the other. It is quite possible [for the majority of the Members in one organ to recognize one government, and] for the majority of Members in another organ to recognize the rival government. If the principle of individual recognition is adhered to, then the representatives of different governments could sit in different organs. Moreover in organs like the Security Council, of limited membership, the question of representation may be determined by the purely arbitrary fact of the particular governments which happen to have been elected to serve at a given time.

From the standpoint of legal theory, the linkage of representation in an international organization and recognition of a government is a confusion of two institutions which have superficial similarities but are essentially different.

The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. It is true that some legal writers have argued forcibly that when a new government, which comes into power through revolutionary means, enjoys, with a reasonable prospect of permanency, the habitual obedience of the bulk of the population, other States are under a legal duty to recognize it. However, while States may regard it as desirable to follow certain legal principles in according or withholding recognition, the practise of States shows that the act of recognition is still regarded as essentially a political decision, which each State decides in accordance with its own free appreciation of the situation.

A recent expression of this doctrine occurred during the consideration of the Palestine question in the Security Council, when the representative of Syria questioned the United States recognition of the Provisional Government of Israel. The representative of the United States (Mr. Austin) replied:

/"I should

"I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the de facto status of a State.

"Moreover, I would not admit here, by implication or by direct answer, that there exists a tribunal of justice or of any other kind, anywhere, that can pass judgment upon the legality or the validity of that act of my country.

"There were certain powers and certain rights of a sovereign State which were not yielded by any of the Members who signed the United Nations Charter and in particular this power to recognize the de facto authority of a provisional Government was not yielded. When it was exercised by my Government, it was done as a practical step, in recognition of realities: the existence of things, and the recognition of a change that had actually taken place. I am certain that no nation on earth has any right to question that, or to lay down a proposition that a certain length of time of the exercise of de facto authority must elapse before that authority can be recognized."1/

Various legal scholars have argued that this rule of individual recognition through the free choice of States should be replaced by collective recognition through an international organization such as the United Nations (e.g. Lauterpacht, Recognition in International law). If this were now the rule then the present impasse would not exist, since there would be no individual recognition of the new Chinese Government, but only action by the appropriate United Nations organ. The fact remains, however, that the States have refused to accept any such rule and the United Nations does not possess any authority to recognize either a new State or a new government of an existing State. To establish the rule of collective recognition by the United Nations would require either an amendment of the Charter or a treaty to which all Members would adhere.

On the other hand membership of a State in the United Nations and representation of a State in the organs is clearly determined by a collective act of the appropriate organs; in the case of membership, by vote of the General Assembly on recommendation of the Security Council, in the case of representation, by vote of each competent organ on the credentials of the purported representatives. Since, therefore, recognition of either State or government is an individual act, and either admission to membership or acceptance of representation in the Organization are collective acts, it would appear to be legally inadmissible to condition the latter acts by a requirement that they be preceded by individual recognition.

1/ See Official Records of the Security Council, Third Year, No. 68, page 16.

/This conclusion

This conclusion is clearly born out by the practise in the case of admission to membership in both the League of Nations and in the United Nations.

In the practise of the League of Nations, there were a number of cases in which Members of the League stated expressly that the admission of another State to membership did not mean that they recognized such new Member as a State (e.g. Great Britain in the case of Lithuania; Belgium and Switzerland in the case of the Soviet Union; Colombia in the case of Panama).2/

In the practise of the United Nations there are, of course, several instances of admission to membership of States which had not been recognized by all other Members, and other instances of States for whose admission votes were cast by Members which had not recognized the candidates as States. For example, Yemen and Burma were admitted by a unanimous vote of the General Assembly at a time when they had been recognized by only a minority of Members. A number of the Members who, in the Security Council, voted for the admission of Transjordan [Jordan] and Nepal, had not recognized these candidates as States. Indeed, the declarations made by the delegation of the Soviet Union and its neighbours that they would not vote for the admission of certain States (e.g. Ireland, Portugal and Transjordan [Jordan]), because they were not in diplomatic relations with these applicants, were vigourously disputed by most other Members, and led to the request for an advisory opinion of the International Court of Justice by the General Assembly.

The Court was requested to answer the question whether a Member, in its vote on the admission to membership of another State, was "juridically entitled to make its consent to the admission dependent on conditions not expressly provided" by paragraph 1 of Article 4 of the Charter. One of the conditions which had been stated by Members had been the lack of diplomatic relations with the applicant State. The Court answered the question in the negative. At its fourth session the General Assembly recommended that each Member act in accordance with the opinion of the Court.

2/ A number of writers such as Scelle, Fauchille, Anzillotti, Malbone Graham, contended that admission to the League constituted an implied recognition by all Members. In the words of Lauterpacht (Recognition in International Law, page 401): "Actual practise did not substantiate these postulated implications of admission."

/The practise

The practise as regards representation of Member States in the United Nations organs has, until the Chinese question arose, been uniformly to the effect that representation is distinctly separate from the issue of recognition of a government. It is a remarkable fact that, despite the fairly large number of revolutionary changes of government and the larger number of instances of breach of diplomatic relations among Members, there was not one single instance of a challenge of credentials of a representative in the many thousands of meetings which were held during four years. On the contrary, whenever the reports of credentials committees were voted on (as in the sessions of the General Assembly), they were always adopted unanimously and without reservation by any Members.

The Members have therefore made clear by an unbroken practise that

(1) a Member could properly vote to accept a representative of a government which it did not recognize, or with which it had no diplomatic relations, and

(2) that such a vote did not imply recognition or a readiness to assume diplomatic relations.

In two instances involving non-members, the question was explicitly raised - the cases of granting the Republic of Indonesia and Israel the right to participate in the deliberations of the Security Council. In both cases, objections were raised on the grounds that these entities were not States; in both cases the Security Council voted to permit representation after explicit statements were made by members of the Council that the vote did not imply recognition of the State or government concerned.3/

The practise which has been thus followed in the United Nations is not only legally correct but conforms to the basic character of the Organization. The United Nations is not an association limited to like-minded States and governments of similar ideological persuasion (as in the case in certain regional associations). As an Organization which aspires to universality, it must of necessity include States of varying and even conflicting ideologies.

The Chinese case is unique in the history of the United Nations, not because it involves a revolutionary change of government, but because it is the first in

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3/ See statements by Mr. Faris el-Khouri and Mr. T. F. Tsiang on Indonesia at the 181st meeting (Official Records of the Security Council, Second Year, No. 74); and by Sir Alexander Cadogan, Mr. Manuilsky, and Mr. Jessup on Israel at the 330th meeting (Official Records of the Security Council, Third Year, No. 93).

/which two

which two rival governments exist. It is quite possible that such a situation will occur again in the future and it is highly desirable to see what principle can be followed in choosing between the rivals. It has been demonstrated that the principle of numerical preponderance of recognition is inappropriate and legally incorrect. Is any other principle possible?

It is submitted that the proper principle can be derived by analogy from Article 4 of the Charter. This Article requires that an applicant for membership must be able and willing to carry out the obligations of membership. The obligations of membership can be carried out only by governments which in fact possess the power to do so. Where a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfilment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.

If so, it would seem to be appropriate for the United Nations organs, through their collective action, to accord it the right to represent the State in the Organization, even though individual Members of the Organization refuse, and may continue to refuse, to accord it recognition as the lawful government for reasons which are valid under their national policies.
