CONFIDENTIAL

To: Assistant Director-General 19 December 1952

From: Legal Office

Report of the Commission of Jurists to the Secretary-General of the United Nations

You have requested us to examine certain questions raised by you concerning the Opinion of the Commission of Jurists dated 29 November 1952 and the position of staff members of this Organization thereunder. These questions are:

(a) To what extent must the World Health Organization take account of the Opinion of the Commission of Jurists in relation with its staff policies?

(b) What should be the attitude of the Director-General at the present time, should an authority external to the Organization approach him with allegations regarding the loyalties of the staff members of the Organization?

(c) May a State Member of the Organization require that staff members who are nationals of that State receive the approval of the Government before appointment?

We therefore submit the following reply, taking each question in the order in which it appears above:

I.

Report of the Commission of Jurists

1. We note that in the preliminary to its report, the Commission states that its findings are intended to apply not only in the relations between the United Nations and the United States of America, but also in the relations between the United Nations and other States in whose territories staff of the United Nations may be located.

The report states (on page 5), as follows: "While this relationship is particularly conspicuous in the country in which the Headquarters of the United Nations is situated, it is not wholly confined to that country (the United States of America). Similar questions may arise in greater or lesser degree in other countries in which staff of the United Nations may be located, either temporarily or permanently. In approaching, therefore, the relationship between the United Nations and the United States of America, we have been careful not to overlook the consequences in other countries of any opinions we may form."

Given that, insofar as the United Nations is concerned, the report of the Commission is intended to cover "host countries" other than the United States of America, to what extent may the views expressed therein have a bearing on the staff policies of the World Health Organization? The autonomy of the Director-General in appointing the staff is limited only, in the relations between the World Health Organization and the United Nations, by the agreement concluded between the two organizations on 10 July 1948 (Handbook of Basic Documents, page 91). We therefore cite the relevant provisions of this Agreement:

"Article III - Personnel Arrangements

1. The United Nations and the World Health Organization recognize that the eventual development of a single unified international civil service is desirable from the standpoint of effective administrative co-ordination, and with this end in view agree to develop as far as practicable common personnel standards, methods and arrangements designed to avoid serious discrepancies in terms and conditions of employment, to avoid competition in recruitment of personnel and to facilitate interchange of personnel in order to obtain the maximum benefit from their services.

2. The United Nations and the World Health Organization agree to co-operate to the fullest extent possible in achieving these ends, and in particular they agree to:

(a) Consult together concerning the establishment of an international civil service commission to advise on the means by which common standards of recruitment in the secretariats of the United Nations and of the specialized agencies may be ensured;

(b) Consult together concerning other matters relating to the employment of their officers and staff, including conditions of service, duration of appointments, classification, salary scales and allowances, retirement and pension rights, and staff regulations and rules, with a view to securing as much uniformity in these matters as shall be found practicable;

(c) Co-operate in the interchange of personnel, when desirable, on a temporary or permanent basis, making due provision for the retention of seniority and pension rights;

(d) Co-operate in the establishment and operation of suitable machinery for the settlement of disputes arising in connexion with the employment of personnel and related matters."

It will be noted that there is nothing in these provisions whereby the World Health Organization expressly undertakes to apply UN practices, nor does the Agreement empower the United Nations so to insist. The text provides that the parties shall "develop as far as practicable"; "co-operate to the fullest extent possible"; "consult together"; "co-operate". We are for this reason of the opinion that whatever decisions and measures may be taken by the Secretary-General acting upon the report, the Director-General is in no way obliged himself to act upon it. On the other hand, the Director-General would

be acting within the limits of his powers in taking cognizance of the report, in view of the position of the World Health Organization as a Specialized Agency; but any action taken upon it would, of necessity, have to conform with the Constitution, the Staff regulations, and the Directives of the Health Assembly and the Executive Board.

2. We may therefore, enquire, at this stage, to what extent the findings of the Commission are applicable or admissible insofar as this Organization is concerned. For purposes of convenience, it is proposed to deal with this problem under the following headings:

(a) As between the Organization, its staff, and the "Host Countries" where its Headquarters and Regional and other offices are situated.

(b) As between the Organization, its staff, and other Countries, not being "Host Countries".

It is proposed to deal under separate headings with the following:

(c) Privileges and Immunities.

(d) The extent to which the Director-General should take account of national laws and customs in determining his staff policies.

* * * * *

(a) The relations between the Organization, its staff, and the "Host Countries".

The instruments which determine these relations are as follows:

(i) Switzerland. The Agreement (and arrangement for its execution), concluded between the Organization and the Swiss Federal Council on 17 July 1948.

(ii) United States (Washington). Public Law 291 - 79th Congress, Chapter 652, 1st Session, enacted by the Senate and the House of Representatives.

(iii) France (Brazzaville). Agreement between the Organization and the Government of France, signed on 23 July 1952.[1]

(iv) Egypt (Alexandria). Agreement between the Organization and the Government of Egypt, signed on 24 May 1951.

(v) India (New Delhi). Agreement concluded between the Organization and the Government of India on 21 June 1949.

(vi) Philippines (Manila). Agreement concluded between the Organization and the Government of the Philippines on 21 May 1952.

(vii) Denmark (Copenhagen).[2] Convention on the Privileges and Immunities of the Specialized Agencies, approved by the World Health Assembly on 17 July 1948.

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[1] Not yet approved by the World Health Assembly.

[2]

All these legal instruments provide that the Organization shall facilitate the administration of Justice in the Host Country and that the immunities granted to individual members of the staff are not for their personal benefit. In addition, those mentioned under subparagraphs (i) and (iii) to (vi) contain a general security clause. Public Law 291 provides that the Secretary of State may require an employee of an international organization in the United States, to depart therefrom, should he determine that the presence of such a person in the country is undesirable.

Now the Commission is of the opinion that where any person, irrespective of his or her nationality, is convicted of a crime by the Courts of the "Host Country", and the crime involves " an ingredient of disloyalty" to the State, the conviction should be regarded as an absolute bar to the employment or continuation of employment of that person in the State in question. It goes on to suggest that such a person might, in certain cases, be transferred to the staff working in another country (Report, page 22).

Although these premises are, in our opinion, somewhat loosely worded, we think that it must be a matter of general agreement that in the type of case envisaged, e.g. an act in the "Host Country" which imperils the national security of that country, the International Agency concerned would be justified in terminating the employment of the person involved. Such an act would constitute a fundamental breach of the oath of office and the Director-General would be entitled to summarily dismiss the staff member under Staff Regulation 10.1 for serious misconduct. We cannot however agree with the Rport where it suggests that the case might be dealt with by the transfer of the person concerned to an office in another country. If a staff member has been found guilty of serious misconduct, justifying dismissal, we cannot oursevles conceive of any circumstances in which a transfer would be justified, particularly as such would hold where a staff member was dismissed for serious misconduct not involving any political activity, e.g. fraud.

We now turn to the other head dealt with by the Commission, namely persons who are or who have been engaged in espionage or other subversive activities in the host country or who are or who have been members of a political party or other organization declared to be a subversive organization.

It is at this point that the Commission draws a distinction between acts which are criminal under the laws of the "Host Country" and those which are not criminal per se. In our opinion this distinction is invidious and extremely misleading. In thecase of the first head, namely conviction for a crime involving an element of disloyalty, it is not so much the fact that a crime has been committed which is important as the fact that the conviction is prima facie evidence that the person convicted was actively taking part in activities in the country amounting to a breach of his oath of office and of the Staff Regulations. This latter should be the only grounds under which a person should be dismissed. In this connexion you have asked us for our views upon the commentary in the "Times" newspaper leader of 2 December 1952. This leader states: ".....But the report gets into deep water when it goes further afield and attempts to lay down for him (the Secretary-General) rules for the political screening of non-Americans whom the Secretariat may employ. He should exclude.....any persons whom he has reasonable grounds for believing to be engaged in any activities regarded as disloyal by the Host Country". The leader then goes on

to say that it can only assume that this means the exclusion of any Communist from employment at United Nations Headquarters.

If this assumption is correct, it would seem that the report is based more on ep ediency than on logic. As we have stated above, it is not the "criminality" "subversiveness" or "disloyalty" under the national law which justifies dismissal but the failure of the person so charged to have fulfilled his or her obligations under the Staff Regulations.

We would recall here the terms of Staff Regulation 1.5:

> "Staff members shall conduct themselves at all times in a manner compatible with their status as international civil servants. 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 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."

This rule emphasizes that mere membership of a political group is permitted. To find grounds for dismissal on this fact alone, it would be necessary to prove without any shadow of doubt that the requirements placed upon membership of that group were such that the individual members were obliged to conduct activities not compatible with their status as international civil servants. As such a decision would affect a class and not individuals, we would further more submit that the decision could not be taken by the Executive Head of the international organization concerned, and would have to be referred to the organ responsible for the approval of the Staff Regulations.

(b) Relations between the Organization, its staff and countries other than the "Host Countries".

The Commission has not dealt expressly with this point, and while certain statements in its report touch upon it, they appear to have the "Host State" and not other States in mind. We shall therefore deal with this in replying to the second of your questions.

(c) Privileges and Immunities.

This question is dealt with in Parts V and VII of the Report. Unfortunately we do not have to hand the separate document referred to in the Report and which contains a study of the question. As the two references quoted deal with the immunities of the staff and the inviolability of the archives, we will discuss them in that order.

(i) Immunities of the staff.

The Commissiom states that in its opinion "there is no immunity or privilege enjoyed by any member of the United Nations staff behind which he could shelter if brought to account on any charge of his taking part in subversive activities against the United States of America".

In the United States this is undoubtedly correct in the sense that there is no immunity from the jurisdiction. Under Public Law 291, no member of staff, including the Secretary-General, may enjoy diplomatic immunity.[1] The only immunity enjoyed is in the following terms:

> "..... officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions..."

Since the activities to which the report relates could in no way be considered as being exercised in an official capacity, the United States are clearly free to prosecute staff members for criminal offenses or to call them as witnesses. In Switzerland, however, and to a lesser extent in the other "Host Countries" in which WHO has offices, the position is not the same. To take Switzerland, all officials enjoying the full immunity conferred by the Agreement with the Federal Council are immune from the jurisdiction, whether the act complained of was or was not accomplished in the exercise of the official functions of the employee. This immunity extends to all officials at Headquarters down to and including those in category P.2. Staff members below this grade are in the same position as in the United States.

In the countries where the Regional Offices are situated, as a general rule the Director-General, the Deputy Director-General, the Assistant Directors-General and other officials of a Director's status enjoy full diplomatic immunity.[2] Other staff members enjoy immunity only as regards their official functions.

Where such full immunity from the jurisdiction exists, the staff member cannot be called to appear before a tribunal or any other similar body, whether as defendant or witness, unless the Director-General decides that the immunity shall be waived. In this respect, therefore, the position of the World Health Organization, insofar as its offices outside the United States are concerned, differs considerably from that existing in the United States. We would also emphasize that the object of the immunities, is not, as suggested by the Commission, to shelter staff members against breaches of the law committed by them. It is to protect the independence of the organization and to permit the staff to exercise their functions freely and without interference. Any other interpretation can only serve to render the immunities impotent and to discredit the international organizations they protect.

(d) The extent to which the Director-General should take account of national laws and customs in determining his staff problems.

We have elected to deal with this separately in view of the findings of the Commission on the Constitutional privilege against self-incrimination.

As we have stated above, an international organization faced with the commission of a crime under national law by one of its employees, should not take a decision as to dismissal on the basis of the national law, but on its own "internal law", namely the staff regulations. Therefore the commission of the "crime" serves as evidence to the organization in making its decision, and no more than that.

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[1] Section 8(c)

[2] In the Tuberculosis Research Office in Copenhagen this benefit is conferred only on the Director-General, or an official acting on his behalf during his absence from duty.

Where a staff member is convened as a witness before some national authority and refuses to answer a question which might tend to incriminate him, he is exercising a right under that law. The extent to which the Organization should take account of this is a matter purely for its own appreciation. For this reason, we submit that the Commission is on dangerous ground when it seeks to justify its contention that an individual invoking the privilege should be dismissed by arguing in the following terms:

> "Indeed in the United States much legislation has been passed restricting federal, state or municipal employment in the case of persons connected with organizations declared subversive and machinery established to ascertain whether such connexion exists. We refer (inter alia) to...." (Here are quoted certain US rules and precedents.)
>
> "There can be no doubt that in the United States of America it is not contrary to the Constitution for legislative or other consequences affecting employment to follow from the exercise by an employee of some constitutional right or privilege.
>
> "It appears to us, therefore, that in cases where this privilege is invoked in the United States, the Secretary-General must take notice of the fact and be prepared to take the appropriate action."

We would respectfully submit that to hold thus is to assimilate the United Nations to an institution of the United States Government, and that United States laws regarding employment are equally valid within the Secretariat. The proper argument in our view is whether, within the general principles laid down by the staff regulations, the refusal to answer an incriminating question is sufficient evidence to show a breach of a staff members obligations. As to such a thesis, we make the most express reservations, since dismissal without further corroboration would amount to a finding of guilt without proof in law and without any possibility of the person involved defending himself.

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II.

<u>Complaints alleging disloyalty made by a State, not being a "Host State", to the Director-General.</u>

The recommendations of the Commission, as we have pointed out in paragraph 2(b) of Part I above, appear to be limited to the relations between the Organization its staff and the "host state". It would in fact be difficult to apply them directly in the case of other States, as the majority of their arguments are based upon the thesis that all staff members resident in the Host State owe some degree of allegiance to that State and that the operation of thennational laws of that State should largely determine the attitude of the Secretary-General. Once a person has left a country, it has to a great extent lost any jurisdiction over him, particularly when it is recalled that as a general rule, extradition will not be ordered for political offenses.

We would prefer to consider this once more purely on the basis of the obligations of the staff member under the Staff Regulations and his oath of office. If certain activities in the "Host Country" are considered as constituting serious misconduct and consequent dismissal, then in our view the same should hold whereever the activities have taken place. To this extent the separation in this memorandum of the relations between the Organization and the "Host Country" on

the one hand, and other countries on the other, is somewhat artificial; it has been done in order to deal appropriately with the report of the Commission. To us, a mere allegation of disloyalty, either before or during employment, could not suffice to justify termination, as otherwise staff members whose countries had undergone a change of regime and who held political views considered as seditious in those countries would have to be dismissed. The Commission itself states that provided such persons observe the laws of the "Host Country", their presence in the Secretariat presents no problems to the Secretary-General.

We would therefore submit that should this question arise, the Director-General should be guided by the same principles as we have put forward above in paragraph (a), namely that dismissal would be justified in the following circumstances, namely, where it was shown to the Director-General that the person concerned had, during the course of his employment, indulged in activities amounting to a breach of the oath of office and of the obligations imposed by the Staff Regulations.

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III

Approval by States of candidates for employment

You have asked us to indicate any previous discussion of this subject in the organs of the World Health Organization. We therefore submit the following information:

(1) The Interim Commission.

At the first session of the Interim Commission the Budget Committee recommended[1] that the Committee on Administration and Finance should approve the appointment to the staff of individuals whose salary was at the rate of $5000 per annum or higher. This was taken up again at the second session[2], where the proposal was attacked on the ground that it restricted the freedom of the Executive Secretary in appointing a staff which in his opinion was the best qualified. Nevertheless, the proposal was maintained, with slight amendments.[3]

(2) The World Health Assembly.

During the discussion of the Staff Regulations in the Committee on Administration and Finance of the First World Health Assembly,[4] a proposal was made by which staff members would be approved by their respective governments upon recruitment. This was followed by a discussion during which it appears that the proposal received no support. It was therefore withdrawn.

It may be noted that the Commission has restated the position of the Secretary-General in this respect. The report points out (on pages 18 and 19):

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1 Official Records No. 3, page 31, Annex 5
2 " " No. 4, page 43
3 " " " page 44
4 " " No.13, pages 182 and 183

"In our opinion, it would be contrary to the spirit, and indeed the letter, of these two articles if the Secretary-General were to abrogate his responsibility in the selection or retention of staff by submitting to the dictation or pressure of any individual Member State or any outside body. To do so would also be to act in contravention of Article 101(3) which provides that:

> 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.

"We regard the considerations enumerated above as being of paramount importance and we would state our conclusions upon this aspect of the matter in the following terms:

1. The independence of the Secretary-General and his sole responsibility to the General Assembly of the United Nations for the selection and retention of staff should be recognized by all Member Nations and if necessary asserted, should it ever be challenged...."

As the staff of the World Health Organization are recruited and employed under Staff Regulations similar in broad lines and principles to those of the United Nations, we are of the opinion that no State Member can in any way insist that candidates for employment of the nationality of that State be subject to screening or approval before appointment.

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IV

Conclusions

The conclusions that we draw from this study are therefore as follows:

1. A staff member can only be dismissed in a case involving a complaint by a Member State regarding his loyalty if it can be shown by the evidence that there has been a breach of the oath of office or the terms of the Staff Regulations.

2. Simple membership of a political party cannot in itself justify dismissal unless it can be shown that the requirements placed upon the members of that party are such as to give rise to a breach of the oath of office or the terms of the Staff Regulations; the decision as to principle being the responsibility of the Health Assembly after examining the evidence. Thereafter decisions as to individuals would remain the responsibility of the Director-General.

3. Conviction for a crime in the "host country" involving an element of disloyalty is sufficient evidence in itself to show a breach of the oath of office or the Staff Regulations.

4. The Director-General is the sole arbiter in this respect, and his decision must be based upon the general rules and principles set forth in the conditions of employment of the staff. He has to take account of national laws only insofar as they furnish evidence; such laws cannot per se determine the conditions of employment of his staff.

5. Where an official enjoys total immunity from the jurisdiction, he cannot be called as a defendant or witness before any tribunal or authority external to the organization unless the immunity is waived. The decision to waive the immunity rests solely with the Director-General.

6. Responsibility for the selection and appointment of staff is that of the Director-General alone. While it would be most desirable that persons with a known unsatisfactory record should not be recruited as international officials, Member States, or any other authorities external to the Organization, have no authority to require approval of persons appointed to the staff. Such states or authorities may only bring to the knowledge of the Director-General factual elements which he might take into consideration in making his final decision.

7. Generally speaking, the World Health Organization should refrain from applying the measures proposed in the Report, if such should be suggested, without further advice. The Report has already received a fair degree of criticism and we are not satisfied that the members of the Commission appreciated sufficiently the status of the United Nations nor the distinction which must be drawn between national laws and the internal rules of the international organization.

It is therefore proposed that should the Director-General find himself forced to an issue , he should forthwith notify his intention of taking the matter before the ExecutiveBoard and the Health Assembly in order that an advisory opinion be requested of the International Court of Justice, in accordance with Article 76 of the Constitution and Article X of the Agreement with the United Nations.

The International Court of Justice, with its wide geographical distribution and high competence of its Judges, commands the authority necessary to give an opinion on a problem of the importance of that facing this Organization.