

**Laos 1959-1961 -  
correspondence, official  
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*HS L 179:85*



Dag Hammarskjöld's samt.

Laos - 1959

9 Sept

Text of Memorandum send to the members  
of the Sub-committee and Representatives  
of USA, U.K., France and U.S.S.R.

9 September 1959

1. From the point of view of the Secretary-General, a decision of the Security Council is not open to question, as regards its legality. He must accept the decision as it is taken by a main organ, on its responsibility.
2. However, the Secretary-General is in a sense the guardian of the Charter and in a position to guide and supervise executive United Nations activities. He must, for that reason, form a view on the legal situation with regard to various decisions in the implementation of which he may be involved.
3. A decision by the Security Council to establish a sub-committee under Article 29 is clearly procedural and as such not subject to the veto. However, a committee is not a sub-committee under Article 29 simply by being said to be so, or simply because of the choice of a certain terminology in the determination of its mandate. Thus, in the recent Security Council proceedings, the question whether the proposed sub-committee, as being under Article 29, was of a procedural nature or not should not have been put to the vote, the relevant question being whether the committee rightly belonged under Article 29.
4. The question whether a committee belongs under Article 29 or not, is, as already stated, not resolved either by a reference to the article or by the use of a certain terminology. The relevant factors are two:
  - a) what are the concrete tasks of the committee, and
  - b) how are those tasks fitted into the proceedings of the Security Council.
5. In order to clarify the previous paragraph ad a), three cases should be distinguished. If the written mandate clearly refers to a purely procedural task (a "function" in the sense of Article 29), no problem arises as the committee is clearly within the terms of Article 29. If the committee, according to the terms of reference, would have clearly substantive tasks ("functions" under chapter 6 or 7), obviously no reference to Article 29 can change the fact that the decision to set up the committee is of a substantive nature. If, finally, the text, as in this case, is ambiguous, the situation is the following. The committee will, as the decision is taken under Article 29, have to regard that as a basic fact in the interpretation of the mandate, that is to say that the committee must interpret the words in the mandate which could point in the direction of chapter 6 or 7 as under no circumstances doing so in view of the fact that the decision has been regarded as procedural. Were the committee not to observe that limitation, it would act ultra vires. Actions of the committee which would turn it into a substantive body do not change the

legality of the decision of the Security Council, but lay the committee open to serious charges. To the extent that there is identity between the membership of the committee and the membership of the Security Council sponsoring the resolution there also necessarily arises a question about the basic decision; was it in the intention of the sponsors of the resolution to use the ambiguity of the terms of reference for actions exceeding the framework of Article 29, as the committee has later done?

6. Regarding paragraph 5 ad b) above, it is in the present case of great relevance that the decision was taken before any substantive item was inscribed on the agenda and, in fact, in preparation of the consideration whether such an item should be inscribed. In my view, it is obvious that a committee, in this way established before the inscription of a substantive item, can only be procedural. The last paragraph of the San Francisco Declaration could, in my view, not apply as there is no ambiguity in the situation. It is to be regretted that this basis was not used for the defense of the draft. If that had been done, ambiguity regarding the extension of the veto rights could have been avoided, while the ultimate result would have been the same, with uncontradictable legality also regarding the proceedings. However, I do not regard the controversial elements in the proceedings as putting in doubt the legality of the committee, provided this is established and works in accordance with the principles set out above. It is obvious that a decision based on the thesis explained in this paragraph instead of those used would not have either broadened or reduced the possible functions of the committee as now established.

To Botswana (and Cote)  
U.S.A (Darco)  
Dixon  
Deraid  
Nitelie  
(Read by Dabryun)

9 September 1959

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