

uary 1988 and at the United Nations Headquarters in New York from 17 January 1988 to 15 September 1988.

18. The Conference also adopted the following resolutions which are appended to this Final Act:

1. Resolution on the Montreal Protocol.
2. Resolution on the exchange of technical information.
3. Resolution on the reporting of data.
4. Tribute to the Government of Canada.

IN WITNESS WHEREOF the representatives have signed this Final Act. DONE at Montreal, this sixteenth day of September one thousand nine hundred and eighty seven in one original in the Arabic, Chinese, English, French, Russian and Spanish languages, each language version being equally authentic. The original text will be deposited with the Secretary-General of the United Nations.

**American Bar Association
Standing Committee on World Order
Under Law
Section of International Law and Practice
and
Section of Individual Rights and
Responsibilities
Report to the House of Delegates*
II. U.N. Payment**

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association urges the executive and legislative branches of the United States Government to take cooperative action so that payment will be made without delay to the United Nations, including its specialized agencies, of all amounts assessed to the United States.

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REPORT

The United Nations currently faces a financial crisis. U.N. Secretary General Javier Perez de Cuellar has warned that the U.N. will soon be unable to pay its employees and could be driven to bankruptcy.¹

The major cause of the crisis is the failure by the United States Government to pay its U.N. assessments in full. The U.S. currently owes the U.N. \$147 million in pre-1987 arrearages, \$106 million in 1987 regular assessments, and \$67 million in assessments for U.N. peacekeeping forces.² In addition to this \$320 million total the U.S. currently owes over \$45 million in arrearages on assessments by U.N. specialized agencies (W.H.O., F.A.O., I.L.O., etc.).

The United States Congress has required cutbacks of three kinds in U.S. payments to the U.N.

The Kassebaum-Solomon amendment³ required a reduction of U.S. payments on U.N. assessments from 25 to 20 percent unless the U.N. and its specialized agencies adopted weighted voting on budgetary matters. This cutback took effect with the U.S. fiscal year 1987 budget which covered U.N. contributions for calendar 1986. On a total U.S. assessment of \$210 million for calendar 1986 for the regular U.N. budget, Kassebaum cutbacks amounted to \$42 million. Including reductions on assessments by specialized agencies, Kassebaum cuts cost the U.N. system over \$80 million in fiscal 1987.

The Gramm-Rudman-Hollings Act (Balanced Budget and Emergency Deficit Control Act of 1985)⁴ requires cuts in all "unprotected" budget items, including U.N. appropriations. Gramm-Rudman-Hollings gives no protection to appropriations legally required under international treaties, including the U.N. Charter. Threatened cuts under Gramm-Rudman-Hollings contributed to reductions in appropriations for the U.N. in fiscal 1987, although no automatic cuts actually occurred.

Specific cuts aimed at particular U.N. programs include:

- Tax equalization withholding on U.S. contributions to salaries of U.S. nationals who work for the U.N.: \$13.8 million in fiscal 1987;
- Withholding of the U.S. share of funds budgeted for the Palestine Liberation Organization and the South West Africa People's Organization:⁵ \$1 million in 1987;

1. Washington Post, Oct. 29, 1987, at A34.

2. U.N. Doc. ST/ADM/SER.B/288 updated by U.N. Dept. of Public Information, 21 January, 1988.

3. 22 U.S.C. § 287e note (West Supp. 1986) (Pub. L. No. 99-93, § 144, 99 Stat. 405, 424, approved Aug. 16, 1985).

4. Balanced Budget and Emergency Deficit Control Act of 1985 (Pub. L. No. 99-177, 99 Stat. 1037, approved Dec. 12, 1985, codified principally at 2 U.S.C. § 901).

5. 22 U.S.C. § 287e note (1983 Supp.) (Pub. L. No. 98-164, § 114, 97 Stat. 1017, 1020, approved Nov. 22, 1983).

- Withholding of the U.S. share of funds budgeted for the Second Decade to Combat Racism and Racial Discrimination, for implementation of General Assembly Resolution 3379 (XXX) (the "Zionism as racism" resolution), for construction of a conference center in Addis Ababa, and for the Preparatory Commission implementing the Law of the Sea Convention:⁶ approximately \$1 million in 1987.

In fiscal year 1987, the Administration's low request for payments to the U.N. was cut further in Congressional appropriations, so that in FY 1987, the U.N. received only \$100 million, less than half the U.S. assessment, an all time low. Specialized agencies also suffered deep cuts and deferred payments.

For U.S. fiscal year 1988, the President requested \$193 million for payment toward U.N. regular assessments of \$213 million. The Congress appropriated only \$144 million of that amount. U.S. assessments for U.N. specialized agencies payable in U.S. fiscal year 1988 total \$214 million. Congress appropriated only \$175 million to meet those obligations. For 1988 U.N. peacekeeping assessments of \$54 million, Congress appropriated only \$29 million.⁷

The Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, modified the Kassebaum-Solomon Amendment, but attached new conditions that extend potential withholding to 60 percent of the U.S. assessment. The President must certify to Congress that consensus based decision making is being implemented by the General Assembly, that progress is being made toward reduction of the percentage of seconded employees of the U.N. Secretariat, and that a 15 percent reduction in the staff of the Secretariat is being implemented. Even with such a presidential report, the Congress may by joint resolution require withholding of 20 percent of the U.S. assessment.⁸

Title III of the Fiscal Year 1988 Appropriations Bill recommends that further conditions be attached to the actual disbursement of the appropriated funds: "The Department [of State] should objectively evaluate each international organization in terms of these criteria in determining the final payment of the limited FY 1988 resources for that organization [:]

(1) that organization's performance during FY 1987 in fulfilling the mission of its charter;

(2) that organization's concrete benefit to the United States, in terms of American jobs, exports, critical information, or valuable services to U.S. citizens or companies;

6. 22 U.S.C. § 287e note (West Supp. 1986) (Pub. L. No. 99-93, § 144, 99 Stat. 405, 424, approved Aug. 16, 1985).

7. 133 CONG. REC. H12531 (daily ed. Dec. 21, 1987).

8. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, § 702 (amending 22 U.S.C. 287e note) in HR Rep. 100-475, Dec. 14, 1987, at 59.

- (3) that organization's progress on its program of budget reform;
- (4) that organization's cash flow situation and financial management capability; and
- (5) the political factors involved in maintaining that organization's necessary funding."⁹

These provisions could potentially result in reductions of U.S. payments even more severe than those made in fiscal 1987, though their actual efforts remain to be seen. Even disbursement of the entire appropriation will fall far short of full payment of the U.S.'s assessed obligations.

Meanwhile U.S. arrearages mount and the U.N. is kept on the brink of financial collapse. U.N. specialized agencies also face serious deficits. The World Health Organization, for example, will have a shortfall of over \$30 million in 1987 and 1988 because of U.S. withholdings.¹⁰

Unless additional appropriations are made, U.S. arrearages in payments on the U.N. regular budget alone will grow to over \$318 million by the end of fiscal year 1988. Unless U.S. appropriations for fiscal 1989 are augmented beyond the small increase currently requested by the President, U.S. arrearages will surpass the amount of U.S. contributions due for the preceding two years. Under Article 19 of the U.N. Charter, the U.S. will then legally lose its vote in the General Assembly.¹¹ Such a development will surely call into question the U.S.'s leadership role in the United Nations.

The rationale for the Kassebaum amendment was that U.N. voting on budgetary matters was irresponsible because one nation-one vote resulted in control by a numerical majority of small nations that together contribute only one percent of the budget, over the objections of many of the large contributors.

Since passage of the Kassebaum amendment, the U.N. has adopted procedures on budgetary matters that require a consensus of all nations, effectively giving the U.S. a veto.¹² U.N. Ambassador Vernon Walters hailed this procedure as actually giving the U.S. more power than Sen. Kassebaum required. Five out of six U.N. specialized agencies subject

9. 133 CONG. REC. H12532 (daily ed. Dec. 21, 1987).

10. Information supplied by United Nations Association, 1010 Vermont Avenue, Washington, D.C., Jan. 22, 1988.

11. U.N. Charter, Art. 19:

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

12. General Assembly Resolution 41/213. Adopted 19 Dec., 1986.

to the Kassebaum amendment (I.L.O., W.H.O., U.N.I.D.O., I.C.A.O. and W.M.O.) have adopted consensus voting on budgetary matters. (The F.A.O. is still considering the procedure.) In the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, the Congress found that "the consensus based decision-making procedure established by General Assembly Resolution 41/213 is a significant step toward complying with the intent" of the Kassebaum amendment.¹³

Secretary of State Shultz called for restoration of U.S. contributions to their proper level to take account of these reforms.¹⁴ The rationale for the Kassebaum cutbacks is no longer valid.

Under international law, the Kassebaum, Gramm-Rudman-Hollings and other withholdings were never valid, since they are nullifications of U.S. obligations under Article 17 of the U.N. Charter: "1. The General Assembly shall consider and approve the budget of the Organization. 2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." The use of the word "shall," the *travaux préparatoires*, and prevailing state practice indicate that assessments adopted under Article 17 are binding.¹⁵

In the Certain Expenses advisory opinion,¹⁶ the International Court of Justice held that expenditures for a General Assembly peacekeeping operation did constitute expenses of the Organization within the meaning of Article 17. The U.S. Congress enacted a resolution expressing satisfaction with the decision, saying it provided "a sound basis for obtaining prompt payment of assessments . . . by making them obligations of all members of the United Nations."¹⁷

On March 17, 1987, U.S. Secretary of State Shultz testified before the House Foreign Affairs Committee's Subcommittee on International Operations that the U.S. is "obligated, *obligated*, to pay" its U.N. assessments. (His emphasis) "We're on the line at the U.N.," he said. "We said that if they change, we would live up to our obligations."¹⁸ The U.N. has changed its voting procedures on budgetary matters. The budget cuts under the Kassebaum amendment should be restored.

13. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, sec. 702. House of Representatives (Conference) Report 100-475, Dec. 14, 1987, at 59.

14. Shultz, Prepared testimony before the House Foreign Affairs Committee Subcommittee on International Organizations, 17 March, 1987 at 16.

15. R. Nelson, Current Developments: International Law and U.S. Withholding of Payments to International Organizations, 80 A.J.I.L. 973 at 978, Oct. 1986.

16. 1962 ICJ REP. 151 (Advisory Opinion of July 20).

17. 22 U.S.C. § 287k (1982) (Pub. L. No. 87-731, § 5, 76 Stat. 696, approved Oct. 2, 1962).

18. Note 14, *supra*.

The Gramm-Rudman-Hollings cutbacks and the withholdings for specific U.N. programs are also violations of the U.S. obligation to pay under Article 17 of the U.N. Charter. The U.N. Charter is a multilateral treaty to which the U.S. is a party. It is part of the supreme law of the United States under Article VI of the Constitution.

The Vienna Convention on the Law of Treaties states, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."¹⁹ Although the U.S. has not ratified the Vienna Convention, it is "recognized as the authoritative guide to current treaty law and practice."²⁰

A U.S. court has held that in U.S. law, later acts of Congress supersede earlier treaty obligations when the two conflict.²¹ The treaty obligations nevertheless remain, and violations of those obligations continue to be violations of international law. But violation of the United Nations Charter should stand in a different category than supersession of an ordinary treaty. The U.N. Charter is of constitutional importance to international law. "To an international instrument of this stature, the 'later in time' overruling canon should not apply. . . . The rules derived from the Charter prevail not only over earlier law but also over later statutes."²²

If the United States is to be ruled by law, unilateral nullification by national governments must become the lawlessness of the past. Arguments that the U.S. is only obligated to pay assessments it considers "reasonable" or "responsive to U.S. interests,"²³ are simply assertions that the U.S. may violate the U.N. Charter as it sees fit. The "Goldberg Corollary" that "if any member can insist on making an exception to the principle of collective financial responsibility with respect to certain activities of the organization, the United States reserves the same option to make exceptions if, in our view, strong and compelling reasons exist for doing so"²⁴ is another assertion of the right of unilateral nullification, and is contrary to international law.²⁵ Withholding under the *ultra vires* doctrine shares the same fatal fault.²⁶

19. Vienna Convention on the Law of Treaties, Art. 27, May 22, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF. 39/27 (1969).

20. Message from Department of State to U.S. Senate, S. EXEC, Doc. L, 92nd Cong., 1st Sess. 1 (1971).

21. *Diggs v. Shultz*, 470 F.2d 461, 465 (D.C. Cir. 1972).

22. Sohn, Remarks, 63 ASIL PROC. 180 (1969).

23. Keyes, testimony before the House Committee Affairs, Subcomms. on Human Rights and International Operations, Feb. 25, 1987 and Mar. 12, 1986 at 6.

24. U.N. Doc. A/5916/Add.1 (1965), reprinted in 53 DEP'T ST. BULL. 454-57 (1965).

25. See discussion of the Certain Expenses opinion, *supra*.

26. See Franck, Unnecessary UN-Bashing Should Stop, 80 AJIL 336 (1986).

Some have argued that U.S. withholding is simply reciprocity, justified by withholdings by 17 other nations, most members of the Soviet bloc. But violation of a multilateral treaty by one party (or seventeen) does not justify violation by others. The U.S. has since 1980 become by far the largest withholder. Even the Soviet Union has paid most U.N. regular assessments in full. Its withholdings have been for U.N. peacekeeping operations. Recently Secretary Gorbachev announced that the Soviet Union would pay its arrearages in installments extending over several years, including those for peacekeeping operations.²⁷ Should the U.S. continue to be the most flagrant budgetary scofflaw in the United Nations system?

We cannot afford not to pay. Relative to our national budget, the amount we owe to the United Nations is small. But for the future of the United Nations, the amount we have not paid looms very large indeed. We cannot afford to let the U.N. go bankrupt. As Secretary of State Shultz has stated:

Our membership and active participation in international organizations benefit us in many ways. They provide permanent forums in which we seek support for our policies, our interests and our values, as well as to pursue multilateral programs which advance those interests. They provide a means of settling disputes peacefully, furthering human rights and promoting cooperation in development assistance, agriculture, technology, health and transportation.²⁸

U.N. assessments for the U.N. regular budget and for peacekeeping expenses are legal obligations of the U.S. under international law. The U.N.'s specialized agencies are important forces for promotion of the rule of law and the well-being of mankind.

The U.S. was a leader in the drafting of the U.N. Charter. We freely accepted the legal obligation to pay our assessments when the Senate ratified the Charter and made it part of the supreme law of the U.S. It would be tragic if the U.S. continues to violate international law and abdicates its leadership and even its vote in the United Nations. The U.S. should pay all of its assessments, including its arrearages, in full.

The American Bar Association is committed under its Goal Eight to the advancement of the rule of law in the world. The A.B.A. should urge the U.S. Congress and the President to honor our legal obligations under the U.N. Charter. We, of all nations, should pay our assessments to the United Nations, for we are a nation committed to the rule of law. For all

27. Washington Post, Oct. 16, 1987, at A30.

28. Shultz, Prepared testimony before the House Foreign Affairs Committee Subcommittee on International Operations, 17 March, 1987 at 17.