Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1985

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Chapter VI

SELECTED LEGAL OPINIONS OF THE SECRETARIATS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

A. Legal opinions of the Secretariat of the United Nations
(Issued or prepared by the Office of Legal Affairs)

1. PRACTICE OF THE GENERAL ASSEMBLY WITH REGARD TO THE EXAMINATION OF CREDENTIALS SUBMITTED BY MEMBER STATES

Letter to a scholar

In response to your request, we are transmitting herewith a note containing replies to the various questions listed in the questionnaire enclosed with your letter concerning the practice of the General Assembly of the United Nations with regard to the examination of credentials submitted by Member States. We trust that the information thus provided will be of assistance to you in connection with the preparation of your study on the practice of the General Assembly with regard to the examination of credentials.

12 February 1985

Replies to a questionnaire concerning the practice of the General Assembly with regard to the examination of credentials

1. Pursuant to rule 28 of the rules of procedure of the General Assembly and the practice established under that rule, the Credentials Committee is appointed at the opening of each session by the Assembly on the proposal of the temporary President, who is usually the outgoing President. The President submits a proposal concerning the nine States to be appointed to serve on the Credentials Committee after appropriate consultations with interested delegations. In recent years China, the Union of Soviet Socialist Republics and the United States of America have been, in accordance with a well-established practice, represented on the Credentials Committee at each session of the General Assembly. Apart from these three members, the remaining six members are normally selected as follows: two from the African Group, two from the Latin American Group, one from the Asian Group and one from the Group of Western European and Other States. Accordingly, the Credentials Committee appointed at the thirty-ninth session is composed as follows: Bhutan, China, Cuba, Equatorial Guinea, Italy, Ivory Coast, Paraguay, Union of Soviet Socialist Republics and United States of America.

2. Credentials received by the Secretariat are checked to ensure compliance with the requirements of rule 27 of the rules of procedure and duly registered and filed. When the Credentials Committee meets, the Secretary-General submits a memorandum to it on the status of credentials received for representatives of Member States authorized to represent their countries at the session then in progress.

3. The role of the Credentials Committee is to examine the credentials of representatives within the context of rule 27 of the rules of procedure on the basis of information provided to it by the Secretary-General and to report to the General Assembly on its findings and recommendations. The Credentials Committee reviews generally the status of credentials received in respect of the representatives of all States participating in the session on the basis of information submitted to the Committee by the Secretary-General and also examines any question concerning the credentials of representatives that may be specifically referred to it by the General Assembly.

4. It frequently happens that credentials for a delegation are submitted after the opening of a session of the General Assembly. In such cases the delegations concerned are not precluded from taking their seats in the Assembly hall. Under rule 29 of the rules of procedure, all representatives are entitled to sit provisionally, even if an objection has been made concerning their admission to the session in progress, until the Credentials Committee has examined the credentials in question and reported thereon to the Assembly and the Assembly has taken a final decision on the matter.

5. The Credentials Committee does not normally itself physically examine credentials submitted by States. It only does so exceptionally in individual cases if the need arises. All credentials received are however available for examination by any member of the Committee who may wish to do so.

6. The ruling of the President of the General Assembly in 1974 prevented the delegation of South Africa from participating in the twenty-ninth session of the General Assembly. South Africa has on a number of occasions attempted to participate in subsequent sessions but the Assembly has rejected the credentials submitted by the South African Government and as a consequence, on the basis of the precedent established at the twenty-ninth session, its delegation has not been permitted to participate in the work of the General Assembly. The position adopted by the General Assembly has not however affected the status of South Africa as a Member of the United Nations. It continues to be represented at Headquarters by a permanent representative whose credentials have been accepted by the Secretary-General and its representatives, who continue to enjoy the same privileges and immunities as representatives of other Member States, have been invited on several occasions to participate in the work of the Security Council.

7. At the twenty-eighth session of the General Assembly, the Assembly approved the credentials of the representatives of Portugal, "on the clear understanding that they represent Portugal as it exists within its frontiers in Europe and that they do not represent the Portuguese-dominated Territories of Angola and Mozambique, nor could they represent Guinea-Bissau, which is an independent State". The relevant report of the Credentials Committee[1] indicated the action taken by the General Assembly on that report. As a consequence of the General Assembly's action, the persons named in the credentials submitted by the Portuguese authorities were permitted to participate in the work of the Assembly at its twenty-eighth session as representatives of Portugal, excluding the Territories then under its domination in Africa.

8. Each principal organ has its own rules and procedures for reviewing credentials of representatives authorized to participate in its work. Consequently decisions of the General Assembly concerning credentials are not automatically binding on other principal organs. However, the decisions adopted by the General Assembly with regard to credentials of representatives of Member States to sessions of the General Assembly provide authoritative guidance to other United Nations organs and conferences and in practice the decisions adopted by these organs and conferences always conform to the attitude adopted by the General Assembly in dealing with questions concerning representation and credentials. In this connection, attention is drawn to the provisions of General Assembly resolution 396 (V) of 14 December 1950 entitled "Recognition by the United Nations of the representation of a Member State". That resolution, which has particular relevance in situations where more than one authority claims the right to represent a Member State in the United Nations, reads as follows:

"*The General Assembly*,

"*Considering* that difficulties may arise regarding the representation of a Member State in the United Nations and that there is a risk that conflicting decisions may be reached by its various organs,

"*Considering* that it is in the interest of the proper functioning of the Organization that there should be uniformity in the procedure applicable whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations,

"*Considering* that, in virtue of its composition, the General Assembly is the organ of the United Nations in which consideration can best be given to the views of all Member States in matters affecting the functioning of the Organization as a whole,

"1. *Recommends* that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case;

"2. *Recommends* that, when any such question arises, it should be considered by the General Assembly, or by the Interim Committee if the General Assembly is not in session;

"3. *Recommends* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies;

"4. *Declares* that the attitude adopted by the General Assembly or its Interim Committee concerning any such question shall not of itself affect the direct relations of individual Member States with the State concerned;

"5. *Requests* the Secretary-General to transmit the present resolution to the other organs of the United Nations and to the specialized agencies for such action as may be appropriate."

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2. DECISION TAKEN BY THE GENERAL ASSEMBLY AT ITS THIRTY-NINTH SESSION TO TREAT THE QUESTION OF APARTHEID AS AN IMPORTANT QUESTION WITHIN THE MEANING OF ARTICLE 18 OF THE CHARTER OF THE UNITED NATIONS—QUESTION OF THE MAJORITY REQUIRED FOR THE ADOPTION BY THE GENERAL ASSEMBLY OF DECISIONS IN THIS REGARD AT FUTURE SESSIONS OF THE ASSEMBLY

Memorandum to the President of the General Assembly

1. Reference is made to the letter, dated 31 October 1985, addressed to you by the Chairman of the Special Committee against Apartheid on the question of the majority required for the adoption of decisions under agenda item 35 concerning apartheid.

2. In his letter, the Chairman of the Special Committee against Apartheid indicated that the Special Committee was of the view that the decision adopted by the General Assembly at its thirty-ninth session to the effect that draft resolutions and proposals under the apartheid item was exceptional to the thirty-ninth session and would not be applicable to the fortieth session. Acting on behalf of the Special Committee and also in his capacity as Chairman of the African Group of States, he requested that you confirm the Special Committee's opinion. Our views on the matter are given in the paragraph below.

3. The General Assembly's decision at its thirty-ninth session to treat the question of apartheid as an important question within the meaning of Article 18 of the Charter of the United Nations and its consequential determination that resolutions and amendments on apartheid required a two-thirds majority for adoption were ad hoc decisions of the thirty-ninth session of the General Assembly which are not automatically applicable to the question of apartheid and resolutions on that question at future session of the General Assembly. While we have not had the opportunity, in the time available, to complete a comprehensive review of General Assembly practice, we have found instances where the Assembly has on previous occasions determined that the question of apartheid was an important question within the meaning of Article 18 of the Charter and rule 83 of the Assembly's rules of procedure. However, those decisions were also ad hoc decisions which had no automatic applicability beyond the sessions at which they were taken. We have also found one instance where an amendment to a draft resolution on the question of apartheid was declared by the President of the Assembly to have been adopted even though it obtained the support of less than a two-thirds majority of the representatives present and voting.

4. A determination by the General Assembly such as the one made at the thirty-ninth session in respect of the question of apartheid could only be held to be automatically applicable to future sessions if the General Assembly so decided in specific terms. Thus, in the case of the examination of reports

and petitions relating to Namibia, the General Assembly at its ninth session adopted special procedural rules which are reproduced in annex III to the General Assembly's rules of procedure. These special procedures were clearly intended by the Assembly to apply to future sessions. No such special procedure of a standing nature was adopted by the General Assembly in respect of the question of apartheid.

5. The foregoing leads to the conclusion that, at the fortieth session of the General Assembly, the simple majority is the one which basically applies to resolutions adopted under the item on apartheid and that a two-thirds majority would be required only if the General Assembly specifically so decided. While this conclusion would, in our view, be a sound and correct one from a procedural standpoint, we believe that in view of the history of the item at past sessions of the Assembly and taking into account in particular the fact that only last year the Assembly reaffirmed the important character of the apartheid item, it would be best if the issue of the majority required for the adoption of resolutions under the item were referred to the Assembly itself without a prior ruling by you. At the appropriate point in time the question could be put to the Assembly on your initiative or in the form of a response to a question raised from the floor by a representative. Attention could then be drawn to the precedent established at the thirty-ninth session and past practice and the Assembly could be asked to indicate whether it wished to apply rule 85 (i.e., adopt the resolutions under item 35 by a simple majority) or to follow the precedent established at the thirty-ninth session, in which case a two-thirds majority would be required pursuant to rule 83 of the rules of procedure for the adoption of resolutions under the item.

4 November 1985

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3. CONFERENCE CONVENED PURSUANT TO A DECISION OF THE GOVERNING COUNCIL OF THE UNITED NATIONS ENVIRONMENT PROGRAMME—QUESTION OF PARTICIPATION IN SUCH A CONFERENCE IN THE ABSENCE OF EXPRESS PROVISIONS ON THE MATTER IN THE CONVENING DECISION—PRACTICE FOLLOWED IN THIS RESPECT AS REGARDS CONFERENCES CONVENED BY THE GENERAL ASSEMBLY

Cable to the Legal Liaison Officer of the United Nations Environment Programme

We refer to your telegram concerning participation in a diplomatic conference for the finalization, adoption and signature of the global framework convention for the protection of the ozone layer, to meet at Vienna in March 1985 pursuant to decision 12/14 of 28 May 1984 of the Governing Council of the United Nations Environment Programme.

In the absence of express provisions regarding participation in the convening decision of the Governing Council, we suggest that the UNEP secretariat follow the practice established for similar conferences convened by UNEP and that if there is no clearly established practice, the formula applied by the General Assembly for major United Nations conferences convened under its auspices should be followed.

(*a*) We agree that all States should be invited, and all Members of the United Nations including South Africa fall within this category.

(*b*) Namibia, represented by the United Nations Council for Namibia, should be invited to participate in the conference in accordance with General Assembly resolution 37/233 C of 20 December 1982, paragraph 6, that is, as a full member.

(*c*) Invitations should be sent also to:

(1) Organizations that have received a standing invitation to participate in all conferences convened under the auspices of the General Assembly. These are the Palestine Liberation Organization (PLO), under General Assembly resolution 3237 (XXIX) of 22 November 1974, and the South West Africa People's Organization (SWAPO), under General Assembly resolution 31/152 of 20 December 1976;

(2) The African national liberation movements recognized by the Organization of African Unity (OAU). Apart from SWAPO which is covered under (*c*) (1), the liberation movements to be invited are the African National Congress and the Pan Africanist Congress of Azania.

(*d*) The Governing Council decision invites, *inter alia*, the intergovernmental organizations concerned to participate in the conference. Accordingly invitations should be sent to the specialized agencies and IAEA and to the intergovernmental organizations granted observer status by the General Assembly. These are: the Organization of American States, the League of Arab States, the Organization of African Unity, the European Economic Community, the Council for Mutual Economic Assistance, the Organization of the Islamic Conference, the Commonwealth Secretariat, the Agency for Cultural and Technical Cooperation, the Asian-African Legal Consultative Committee, the Latin American Economic System and the African, Caribbean and Pacific Group of States. There may be other intergovernmental organizations closely related to UNEP and its work that should be invited.

(*e*) Normally, in the case of major United Nations conferences in the economic and social spheres invitations are sent also to interested non-governmental organizations. In this regard the practice established at similar UNEP conferences and meetings should be followed.

10 January 1985

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4. QUESTION WHETHER THE COMMITTEE ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE CAN SEND MISSIONS TO GOVERNMENTS IN THE LIGHT OF GENERAL ASSEMBLY RESOLUTION 39/49 A AND THE COMMITTEE'S GENERAL MANDATE

Memorandum to the Chief of the Division for Palestinian Rights

1. Reference is made to your memorandum of 22 January 1985 requesting a legal opinion from the Office of Legal Affairs on the proposal concerning the sending of missions to Governments by the Committee on the Exercise of the Inalienable Rights of the Palestinian People.

2. We have reviewed the relevant provisions of General Assembly resolution 39/49 A of 11 December 1984 which, in paragraph 4, authorizes the Committee "to continue to exert all efforts to promote the implementation of its recommendations, to send delegations or representatives to international conferences where such representation would be considered by it to be appropriate, and to report thereon to the General Assembly at its fortieth session and thereafter". We note that similar provisions are contained in resolutions adopted at previous sessions.

3. Although the Committee has been expressly authorized to send delegations to international conferences when the Committee considers it appropriate, it has not similarly been authorized to send missions to national Governments. It could be argued that as only the sending of delegations to conferences is specifically authorized, the sending of delegations for other purposes is not permissible. However, in view of the general mandate given to it by the General Assembly "to exert all efforts to promote the implementation of its recommendations" and the wide variety of activities previously undertaken by the Committee in this regard with the acquiescence of the General Assembly, the Committee is not precluded from making a determination that sending missions to Governments is within its competence since it would be one way of promoting the objective in question.

4. It is necessary to add, however, that if the Committee makes such a determination it could be effectively implemented only to the extent that existing financial resources approved for Committee travel permit. If the sending of missions to Governments would give rise to expenses for the United Nations which cannot be met from existing resources made available by the General Assembly, then it would not be legally possible for such missions to be undertaken before funds are authorized for the purpose, after consideration is given to the matter by the Advisory Committee on Administrative and Budgetary Questions and by the Fifth Committee.

5. Finally, it should be noted that any action taken by the Committee under the provisions of

paragraph 4 of General Assembly resolution 39/49 A must be reported to the General Assembly, which will have an opportunity to take note of the action taken and, if it wishes, to provide guidance on action to be taken in the future.

23 January 1985

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5. QUESTION WHETHER THE PRESIDING OFFICER OF A CONFERENCE HELD UNDER THE AUSPICES OF THE UNITED NATIONS MAY CONDUCT PROCEEDINGS IN A LANGUAGE OTHER THAN ONE OF THE OFFICIAL LANGUAGES OF THE CONFERENCE

Memorandum to the Special Assistant to the Under-Secretary-General, Department of Administration and Management

1. You have mentioned to me that there is a possibility that the issue may arise whether the presiding officer may conduct proceedings in a language other than one of the official languages of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Under rule 46 of the provisional rules of procedure applicable to the United Nations Crime Congresses, which were approved by the Economic and Social Council, the official languages of the Congresses are Arabic, Chinese, English, French, Russian and Spanish.

2. Under rule 47, paragraph 2, of the same provisional rules, "Statements may be made in a language other than an official language of the Congress if the speaker provides for interpretation into one of the official languages . . ." This provision concerns individual interventions to be made by representatives during meetings but it does not provide a sufficient basis for meetings to be conducted by a presiding officer entirely or even partially in a language other than one of the official languages of the Congress. There is no instance in the practice of the United Nations which could serve as a precedent for a departure from established procedures in regard to the use of languages at United Nations meetings. In our view, although use of a language other than an official language is not expressly prohibited, it is essential that business be conducted in an official language of the Congress, bearing in mind that the rules of procedure and all the documentation for the Congress are only available in its official languages, and that any rulings relating to the conduct of business should properly be made only in one of the official languages of the Congress.

5 June 1985

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6. ADOPTION OF THE AGENDA OF THE COMMISSION ON HUMAN RIGHTS—QUESTION WHETHER, UNDER THE RULES OF PROCEDURE OF THE FUNCTIONAL COMMISSIONS OF THE ECONOMIC AND SOCIAL COUNCIL, A REPRESENTATIVE OF A STATE NOT A MEMBER OF THE COMMISSION MAY PROPOSE CHANGES TO THE COMMISSION'S AGENDA

Cable to the Assistant Secretary-General, Centre for Human Rights

This is my reply to your telegram concerning the agenda of a session of the Commission on Human Rights.

(*a*) Under the rules of procedure of the functional commissions of the Economic and Social Council, the provisional agenda must be communicated not less than six weeks before the opening of the session to all concerned as provided in rule 6, together with the related basic documents.

(*b*) Under rule 7, the Commission at the beginning of each session adopts its agenda on the basis of the provisional agenda referred to in rule 5. In our opinion this means that, before the agenda is adopted, only minor modifications and deletions may be proposed in respect of items already on the provisional agenda. A proposal for the inclusion of an additional item, whether by a member of the Commission or by a State that is not a member, would seek more than a minor modification and cannot therefore be entertained at that stage. Our opinion is based on a literal interpretation of the relevant

rules, on the fact that there is no provision for the inclusion of additional items except in accordance with rule 8 and also on the undesirability of the Commission suddenly being faced with new items which members are not in a position to consider properly in the absence of adequate preparation and documentation.

(*c*) Under rule 8, a member of the Commission and a State participating in the session under rule 69 of the rules of procedure may propose changes, including additional items of an "important and urgent character", once the agenda has been adopted. In the case of a State that is not a member of the Commission, pursuant to rule 69, paragraph 3, any proposal by such a State for the inclusion of an additional item or for any other change to the agenda under rule 8 would require a specific request of a member of the Commission before it is put to the vote.

17 January 1985

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7. ASSISTANCE TO BE PROVIDED BY THE SECRETARIAT OF THE UNITED NATIONS TO THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN UNDER ARTICLE 17, PARAGRAPH 9, OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, WHICH ESTABLISHED THE COMMITTEE

Cable to the Legal Liaison Officer, Office of the United Nations at Vienna

This is in reply to your telegram concerning the assistance to be provided by the Secretariat of the United Nations to the Committee on the Elimination of Discrimination against Women under article 17, paragraph 9, of the Convention on the Elimination of All Forms of Discrimination against Women of 1979,[2] which established the Committee. We agree that under article 17, paragraph 9, of the Convention the Secretary-General is required to provide conference servicing facilities and support staff to prepare for and to service sessions of the Committee. The Secretariat is thus responsible for processing and circulating documents required before, during and after sessions. However, all the substantive inputs into such documents must come from the Committee itself. In providing services to the United Nations related bodies established outside the framework of the Charter of the United Nations under separate treaty instruments, the Secretariat must be guided by decisions of the competent principal organs of the United Nations and the extent of its assistance to such bodies is determined by the staff and resources made available by the General Assembly for that purpose. Additional assistance such as the preparation of substantive reports for convention organs such as the Committee could not be provided by the Secretariat unless a competent deliberative organ authorized such assistance and the necessary staff and financial resources were made available. In the particular case under review we agree that, in accordance with the decision taken by the Economic and Social Council at its first regular session in 1984 regarding the Committee's report on its third session, the Secretariat is responsible for preparing a compendium of information based on national reports on achievements of, and obstacles experienced by, States parties, but the primary responsibility for the preparation of the Committee's report on those issues for the 1985 World Conference particularly its substantive elements, rests with the Committee.

18 January 1985

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8. PARTICIPATION OF NON-GOVERNMENTAL ORGANIZATIONS IN COMMODITY CONFERENCES—QUESTION WHETHER THE INTERNATIONAL NATURAL RUBBER COUNCIL'S RECOMMENDATION THAT THE INTERNATIONAL RUBBER RESEARCH AND DEVELOPMENT BOARD PARTICIPATE AS AN OBSERVER IN THE UNITED NATIONS NATURAL RUBBER CONFERENCE CAN BE ACTED ON BY THE CONFERENCE ITSELF IN THE ABSENCE OF GUIDANCE BY THE CONVENING AUTHORITY REGARDING PARTICIPATION OF NON-GOVERNMENTAL ORGANIZATIONS IN COMMODITY CONFERENCES—CURRENT PRACTICE WITH REGARD TO PARTICIPATION BY NON-GOVERNMENTAL ORGANIZATIONS IN UNITED NATIONS CONFERENCES

Cable to the Senior Legal Officer, United Nations Conference on Trade and Development

We refer to your cable concerning the participation of a non-governmental organization in the forthcoming United Nations Natural Rubber Conference. It is our opinion that the Conference could decide on the matter on the basis of the International Natural Rubber Council's recommendation that the International Rubber Research and Development Board participate as an observer in the United Nations Conference in the light of precedents established by the Olive Oil Conference 1978/79. However, since decisions regarding participation in commodity conferences are within the competence of UNCTAD we deem it advisable that the Trade and Development Board be informed even if only through its Bureau before the Conference convenes. Since the rendering of the legal opinion in 1972[3] referred to in your cable, participation by non-governmental organizations in United Nations conferences in general has changed considerably and now provision is routinely made for their participation by the convening authority. Whereas in 1972 there were restrictions on such participation which was only exceptionally provided for, the practice now is to broaden participation in United Nations conferences to include non-governmental organizations that meet the criteria established by the competent deliberative organ. We realize that such practice has not yet been formally extended to commodity conferences. It would be helpful if consultations could be held within UNCTAD on whether present practice regarding the participation of non-governmental organizations in other United Nations conferences should be extended to future commodity conferences.

5 March 1985

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9. QUESTION WHETHER THE COMMISSION ON HUMAN RIGHTS HAS COMPETENCE TO REQUEST THE SECRETARY-GENERAL TO CARRY OUT CERTAIN RESPONSIBILITIES—QUESTION WHETHER SUCH A REQUEST WOULD REQUIRE APPROVAL BY THE ECONOMIC AND SOCIAL COUNCIL

Memorandum to the Under-Secretary-General for Political and General Assembly Affairs

1. Reference is made to your memorandum of 15 March 1985 by which you have requested legal advice on whether the Commission on Human Rights has the competence to request the Secretary-General to perform the tasks set out in paragraph 4 of draft resolution E/CN.4/1985/L.73. You have at the same time drawn our attention to the fact that a resolution of a similar nature was considered and rejected by the Security Council.

2. In general, the question whether a matter comes within the competence of the Commission on Human Rights, which is a subsidiary organ of the Economic and Social Council, depends on the Commission's terms of reference. Where the terms of reference are not clear and a question arises as to the competence of a subsidiary organ to take action on a particular matter it would, in the first instance, be settled by that organ in accordance with its rules of procedure. Should the manner in which it is settled be questioned again in the parent organ it would then be for the parent organ to decide the issue, and its decision would be final.

3. Resolution 5 (I) of the Economic and Social Council, as subsequently amended by its resolution 9 (II), laid down the terms of reference of the Commission as follows:

"1. The Economic and Social Council . . . requiring *advice* and *assistance* to enable it to discharge [its] responsibility, establishes a Commission on Human Rights.

"2. The work of the Commission shall be directed towards submitting *proposals*, *recommendations* and *reports* to the Council regarding:

"(*a*) an international bill of rights;

"(*b*) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters;

"(*c*) the protection of minorities;

"(*d*) the prevention of discrimination on grounds of race, sex, language or religion;

"(*e*) *any other matter concerning human rights* not covered by (*a*), (*b*), (*c*) and (*d*).

"3. The Commission shall make *studies* and *recommendations* and *provide information* and *other services at the request of* the Economic and Social Council.

"4. The Commission may propose to the Council any changes in its terms of reference.

"5. The Commission may make *recommendations* to the Council concerning any sub-commission which it considers should be established." (emphasis added)

4. With regard to the competence of the Commission to deal with violations of human rights, Economic and Social Council resolution 1102 (XL) of 4 March 1966, which is the basis for the Commission's authority to deal with such violations, invited the Commission to consider the question of the violation of human rights in all countries and to submit to the Council at its forty-first session *recommendations* on measures to halt such violations. Resolution 2 (XXII) of the Commission, adopted on 25 March 1966 in response to Council resolution 1102 (XL), also envisaged the Commission's devising *recommendations* to the Council for measures to halt violations of human rights. Council resolution 1164 (XLI) of 5 August 1966 repeated the formula of the Commission devising *recommendations* for measures to put a stop to human rights violations. Stemming from Council resolutions 1102 (XL) and 1164 (XLI) (as well as from General Assembly resolution 2144 (XXI)), the Commission on Human Rights, in its resolution 9 (XXIII), interpreted its competence as including "the power to *recommend* and *adopt* general and specific measures to deal with violations of human rights . . ." Resolution 9 (XXIII) of the Commission was noted by the Council in the preamble to its resolution 1235 (XLII). It is significant that while earlier resolutions of the Council and the Commission referred to "recommendations by the Commission", resolution 9 (XXIII) of the Commission referred to "the power to *recommend* and *adopt* general and specific measures".

5. Thus the general thrust of the terms of reference is in the direction of the Council's having to approve the Commission's resolutions before they can be implemented. As regards the Commission's competence to deal with violations of human rights, the original conception was that the Commission should make "recommendations" to the Council. However, the Commission has interpreted its mandate as being not only to "recommend" but also to "adopt" measures to deal with violations. Each decision of the Commission should be assessed independently. As a general rule, if the decision involves financial implications, the prior approval of the Council should be awaited. The same applies if the establishment of any standing intersessional subsidiary bodies are involved. In practice, the Commission's decisions have only been implemented prior to approval by the Council in limited areas where the Commission is clearly acting within its competence and where such decisions were consistent with legislative mandates established previously by the Council. In the particular case under review, we believe that the Commission is not legally precluded from taking action on draft resolution E/CN.4/1985/L.73. The issue as we see it is not whether the Commission is competent to request the Secretary-General to carry out the responsibilities entrusted to him under paragraph 4 of the draft resolution, but rather whether the Council must approve the Commission's decision before the Secretary-General can take the action requested of him. The actions requested of the Secretary-General are not ones that are exclusively within the competence of the Commission on Human Rights, particularly since they involve reporting to a principal deliberative organ of the General Assembly. In these circumstances, we believe that if the draft resolution is adopted by the Commission it would have the status of a recommendation to the Council and that approval of the Council would be necessary before the Secretary-General could act as requested in paragraph 4 of the draft resolution. The fact that the Security Council has considered and rejected a draft resolution on the situation in Lebanon which is much broader in scope even though it contains some similar provisions, does not preclude the Commission from taking action on draft resolution E/CN.4/1985/L.73 and recommending it to the Council for its consideration.

22 March 1985

10. PROPOSED PUBLICATION BY AN OUTSIDE PUBLISHER OF A BOOK OF SPEECHES AND LECTURES DELIVERED BY A UNITED NATIONS OFFICIAL—STAFF RULES 101.6 (*e*) AND 112.7 AND PARAGRAPH 14 (*c*) OF ADMINISTRATIVE INSTRUCTION ST/AI/189/ADD.9/REV.1 AND PARAGRAPH 8 OF ADMINISTRATIVE INSTRUCTION ST/AI/190/REV.1—QUESTION OF THE SECRETARY-GENERAL'S CONTRIBUTION OF A FOREWORD TO THE BOOK

Memorandum to the Special Assistant to the Secretary-General

1. This refers to your note of 15 March 1985, requesting my views on the following questions raised in connection with the proposed publication by an outside publisher of a book of speeches and lectures delivered by a United Nations official over the last 10 years:

(*a*) To whom do the speeches of a United Nations official belong?

(*b*) Might the Secretary-General contribute a foreword to the proposed book?

2. With respect to question (*a*) above, a distinction must be made between lectures and speeches delivered by the person in question in the course of his official duties (for example as a contribution to a conference or seminar prepared by the United Nations or its specialized agencies) and those given in his private capacity outside the framework of the United Nations.

3. In the former case, the proprietary rights are automatically vested in the United Nations, pursuant to staff rule 112.7 and paragraph 14 (c) of administrative instruction ST/AI/189/Add.9/Rev.1.

Staff rule 112.7 provides that:

> "All rights, including title, copyright and patent rights, in any work performed by a staff member as part of his or her official duties shall be vested in the United Nations."

Paragraph 14 (*c*) of ST/AI/189/Add.9/Rev.1 provides that:

> "Articles or papers prepared by staff members for inclusion in a United Nations publication, *or as a contribution to a conference or seminar*, are covered by the terms of staff rule 112.7 . . ." (emphasis added)

4. On the other hand, the rights to lectures and speeches delivered by the person in question in his private capacity at non-United Nations conferences and seminars belong to him. He may therefore submit them for publication by an external publisher, provided he obtains prior approval of the Secretary-General, in compliance with staff rule 101.6 (*e*) (iv), which provides:

> "(*e*) Staff members shall not, except in the normal course of official duties or with the prior approval of the Secretary-General, perform any one of the following acts, if such act relates to the purpose, activities or interests of the United Nations:
>
> . . .
>
> (iv) submit articles, books, or other material for publication."

Paragraph 8 of administrative instruction ST/AI/190/Rev.1 provides:

> ". . . The approval of the Secretary-General required in staff rule 101.6 (*e*) for such publication will normally be accorded, if the article, book or other material includes, where and when appropriate, the following disclaimer:
>
> "The views expressed herein are those of the author(s) and do not necessarily reflect the views of the United Nations.' "

5. With respect to question (*b*) above regarding the Secretary-General's contribution of a foreword to the book, the decision depends primarily on policy rather than legal considerations. However, a research in our files shows that the following advice was previously given:

> "As the work of the United Nations covers so many fields, it is only natural and gratifying that staff members and former staff members are authors or compilers of a large number of publications. It is difficult, however, for the Secretary-General to provide forewords for all such publications, whatever their merits, and it has thus been long-established policy that the Secretary-General should decline requests for this purpose save in the most exceptional and compelling

circumstances such as where the Secretary-General may have himself initiated the preparation of the work or where the author is a very close personal associate."

2 May 1985

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11. PROPOSALS THAT THE GENERAL ASSEMBLY DECIDE THAT THE NEW INTEREST OR DISCOUNT RATE FOR PENSION COMMUTATION CALCULATIONS SET BY THE UNITED NATIONS JOINT STAFF PENSION BOARD IN 1984 TO BE APPLICABLE TO SERVICE AS FROM 1 JANUARY 1985 SHOULD INSTEAD BE APPLICABLE IN RESPECT OF ALL PERIODS OF SERVICE BY PARTICIPANTS AS OF SOME SPECIFIED FUTURE DATE—QUESTIONS OF COMPETENCE, ACQUIRED RIGHTS AND NON-RETROACTIVITY

Statement made by the Legal Counsel before a working group of the Fifth Committee on 11 December 1985

An opinion from the Office of Legal Affairs has been requested in respect of certain suggestions advanced during the debate on the report of the Pension Fund that the General Assembly decide that the interest or discount rate of 6.5 per cent set by the United Nations Joint Staff Pension Board for the calculation of lump sums payable by the Pension Fund in partial commutation of retirement, early retirement or deferred retirement benefits due under articles 28-30 of the Regulations of the Fund, which new rate the Board set in 1984 to be applicable to service as from 1 January 1985, should instead be applicable in respect of all periods of service by participants as of some specified future date, e.g., 1 April 1986. These suggestions raise both procedural and substantive questions, which will be examined in that order.

A. PROCEDURAL QUESTIONS: COMPETENCE

The only provisions of the Regulations relevant to the setting of the interest rate to be used in calculating the value of a commuted benefit are contained in article 11, paragraph *(c)* of which specifies the rates to "be used in all calculations required in connection with these Regulations", and in particular sets the rate of 3.25 per cent to be used from 1 April 1961 "until changed by the Board", i.e., by the United Nations Joint Staff Pension Board established by articles 4 and 5 of the Regulations; in addition, paragraph *(a)* authorizes the Board to adopt and revise mortality and other tables—presumably including those from which lump sum computations are derived.

The language of these provisions is clear. It is the Board that sets these interest rates and establishes these tables, rather than any other organ established by the Regulations, such as the Committee of Actuaries or the Investment Committee, or those organs mentioned therein, such as the Secretary-General or the General Assembly itself.

Even though the Pension Board was established by and may in a sense be considered to be a subsidiary organ of the General Assembly, if the Assembly wishes to assume itself any function that it has assigned to the Board by the Regulations, then it must amend the Regulations. The adoption of such an amendment would of course be subject to article 49 of the Regulations, paragraph *(a)* of which requires either a recommendation of or prior consultations with the Board. As far as we know, these conditions have not yet been fulfilled in respect of such an amendment, i.e., an amendment under which the General Assembly rather than the Board would set certain interest rates relevant to the Fund.

In this connection the question has also been raised whether the Assembly could not simply direct the Board to change the interest rate or to adopt certain tables. However, it should be noted that the Board is both a tripartite body (i.e., one representing the interests of the legislative organs of the member organizations, of their executive heads and of their participants) and an inter-organizational one (i.e., one on which each participating organization is represented). The Assembly itself has specified (in article 5 *(a)* (i)) that it itself should have two representatives on the 21-person Board. While the Assembly can presumably instruct these two representatives, it evidently cannot instruct the others or

the Board as a whole as to any discretionary decision that under the Regulations lies within the authority of the Board.

Past practice is also relevant and significant. Three changes of the interest rate for calculating lump sum commutations have taken place since article 11 (*c*) of the Pension Fund Regulations was adopted in its present form: from 3.25 per cent to 4 per cent as from 1 January 1979, to 4.5 per cent from 1 January 1983 and to 6.5 per cent from 1 January 1985. Each of those changes was made by the Board. The changes to 4 per cent and 4.5 per cent were not even referred to in the General Assembly resolutions relating to the annual reports of the Board in which these changes were reported (respectively resolutions 33/120 of 19 December 1978 and 37/131 of 17 December 1982). Although the Assembly did purport to approve the increase to 6.5 per cent, this was done in the context of a portion of its resolution relating to an entire package of proposals, all other parts of which required Assembly approval (paragraph I.1 (*g*) of resolution 39/246 of 18 December 1984); as that decision merely confirmed the action the Board had already taken, to which a specific reference was indeed made in the resolution, no consideration had to be or was given to the legal effect or need of that part of the Assembly's decision.

Finally, it should be noted that even though it is not suggested to change the interest rate of 6.5 per cent established by the Board itself in 1984, but merely to change the period or method of its application, such a decision would not thereby be exempt from the requirements of article 11 (*c*) of the Regulations, for evidently the period as to which a given interest rate is to be used—or the calculation in which it is to be used—is integrally related to the rate itself, and no separation of the two parts of such a decision is possible.

B. SUBSTANTIVE QUESTIONS: ACQUIRED RIGHTS AND NON-RETROACTIVITY

The suggested change, i.e., to apply the interest rate of 6.5 per cent to the entire period of service of present Pension Fund participants and not only to periods of service as from 1 January 1985 (a date subsequent to that on which that increased rate had originally been set), also raises serious substantive problems, namely, whether such a change would not deprive participants of an acquired right or violate the prohibition against the retroactive application of changes in employment conditions.

The reason for this concern is that by applying an increased rate not only in respect of a pension to be earned during future periods of service but also in respect of past periods, affected participants will suffer an immediate reduction, from the effective date of the new regime, in the lump sums to which they are entitled. Thus, should the new rule be applied as of 1 April 1986, a staff member retiring on 31 March 1986 would have his lump sum benefit calculated using a composite rate consisting of 3.25 per cent for the portion of his service that preceded 1979, 4 per cent for the portion during the period 1979 through 1982, 4.5 per cent for 1983 and 1984 and 6.5 per cent for 1985. If he or she retires a day later, the entire calculation would be based on a 6.5 per cent rate and therefore result in a considerably reduced lump sum. As the benefit in question would all be payable in respect of past service, it clearly comes squarely within the concept of an acquired right, which may not be diminished unilaterally. Whatever else that doctrine may mean or require, the diminution of a sum of money calculated entirely on the basis of service already accomplished, is prohibited.

Indeed, until recently, there appears to have been no doubt as to this point at all. In each of its reports to the General Assembly (A/33/9, para. 93; A/37/9, para. 36; A/39/9, para. 20) the Board indicated that it was principally in order to preserve acquired rights that it would apply the new rate only prospectively, i.e., in respect of service after the end of the year during which the decision was taken. In the first two instances the Advisory Committee on Administrative and Budgetary Questions specifically noted these references to acquired rights in its reports to the Assembly but did not dispute or otherwise comment thereon (A/33/375, para. 32; A/37/674, para. 10); only last year did it state that "it does not agree that acquired rights are necessarily involved in questions relating to the discount rate" (A/39/608, para. 10), a position that it reiterated this year (A/40/848, para. 7).

Taken literally, i.e., as applying merely to the discount rate by itself, one might concur from a legal point of view with these recently expressed doubts of the Advisory Committee on Administrative and Budgetary Questions. Certainly there is no acquired right to any particular interest or discount rate, or mortality table, or method of making calculations, or to the competence of the organ that is to

determine these rates and tables or to make these calculations. However, even granting that, as the Pension Fund Board noted, "the judgements of the administrative tribunals . . . did not provide a detailed and consistent definition of what constituted 'acquired rights'" (A/40/9, para. 67), as the *Mortished* case[4] indicates, the reduction of a sum of money payable in respect of past service has always been held to be violative of that principle.

Closely related to the issue of acquired rights, there is that of retroactivity, on which the United Nations Administrative Tribunal recently based its Judgement No. 360 in the *Taylor* case[5] against the Pension Fund. Although in certain situations the implications of that principle may not be free of doubt, it must be pointed out that the application of an increased discount rate to establish the lump sums due in respect of pensions earned on already completed periods of service does have elements of retroactivity that are not likely to be upheld by the Tribunal. The principle is that when a staff member is working he must know what all the elements of his remuneration for that period are; no later change in the rules, even of apparently only prospective application, is admissible if its effect is to diminish an amount payable in respect of any past period of service.

Attention has also been called to the fact that if the 6.5 per cent discount rate is to be used for all past periods of service, this would also be accompanied by the retroactive introduction for all such periods of new mortality tables which, by reflecting greater longevity, would be favourable to Pension Fund participants—i.e., they would tend to increase the size of lump sums taken in partial commutation of periodic pensions. However, we understand that this favourable effect would only partially offset the negative effect of the higher discount rate. In so far as this is true, i.e., that a combination of the higher discount rate and the new mortality tables would serve to reduce lump sums due in respect of periods of service already completed, that combination would still appear to threaten acquired rights and to offend the prohibition against retroactivity.

Finally, I understand that it has been suggested that since the lump sum is merely an optional alternative to a full periodic pension, there can be no legal objection to diminishing the lump sum as long as the periodic pension is not also reduced. This is not so. If a person has a right to choose among a number of alternatives, then to diminish even one of these clearly diminishes the value of the entire package. Thus, in the matter here under consideration, a retiring participant who needs a sum of money for a particular purpose, for example, to buy a house on retirement, would obviously be injured by any reduction of the lump sum entitlement, regardless of what happens to the periodic benefit.

In conclusion, I should like to summarize that the proposal to have the General Assembly apply an increased discount rate in respect of lump sum commutation calculations to all past periods of service raises difficult points of procedure as to the limits of the Assembly's authority to do that which it has delegated to a tripartite inter-agency organ, as well as of substance relating to the acquired rights of Pension Fund participants and to their right not to have any retroactive changes imposed upon them.

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12. APPLICATION TO DIPLOMATIC REPRESENTATIVES OF DOMESTIC LEGISLATION PROVIDING FOR PAYMENT OF A YEARLY *REDEVANCE* FOR THE USE OF HIGHWAYS—QUESTION WHETHER THE *REDEVANCE* IS TO BE CONSIDERED AS A CHARGE FOR SERVICES WITHIN THE MEANING OF ARTICLES 23 (1) AND 34 (*e*) OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS OF 1961 OR A TAX FROM WHICH DIPLOMATIC AGENTS SHOULD BE EXEMPTED IN ACCORDANCE WITH THE GENERAL CLAUSE OF ARTICLE 34 OF THE CONVENTION—QUESTION WHETHER THE OFFICIAL VEHICLES OF THE INTERNATIONAL ORGANIZATIONS IN THE HOST COUNTRY SHOULD BE EXEMPTED FROM THE *REDEVANCE* IN THE LIGHT OF THE HEADQUARTERS AGREEMENT

Memorandum to the Director-General, United Nations Office at Geneva

1. I wish to refer to your memorandum of 30 January 1985 addressed to the Secretary-General, regarding the application of domestic legislation providing for the payment of a *redevance* for the use of highways and transmitting a copy of a letter addressed to you by the President of the Diplomatic Committee, in which it is requested that information be obtained from the Office of the Secretary-

General in New York as to what steps could be taken to protect the diplomatic privileges and immunities of representatives in the host State under the provisions of article 34 of the Vienna Convention on Diplomatic Relations of 1961.[6]

2. It has been noted from the correspondence relating to this matter that the position taken by the domestic authorities is that the *redevance* is a toll and is consequently to be considered as a charge for services within the meaning of articles 23 (1) and 34 (*e*) of the Vienna Convention on Diplomatic Relations of 1961, while the Diplomatic Committee has concluded that it is a tax and that diplomatic agents should, therefore, be exempted from it in accordance with the general clause of article 34 of the Convention which reads: "A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, . . ." The central issue, therefore, is whether the *redevance* is in the nature of a charge for services rendered or a tax, and the legal context in which this question must be considered is the Vienna Convention, particularly article 34 thereof.

3. As you know, article 34 does not create an exemption from all types of dues and taxes. The range and types of dues and taxes in nearly all countries today are so numerous that it is difficult to state with precision a general rule on this subject. The solution provided for in the Vienna Convention is to state a general rule followed by a list of dues, taxes, charges and fees from which diplomatic agents will not be exempt. It is accepted in international law, and the Vienna Convention has codified the matter, that there should be no exemption from taxes which are in fact no more than charges for specific services rendered. Although the Vienna Convention contains no definition of the term "charges levied for specific services rendered", practice seems to confirm that this term encompasses local rates or taxes which relate to services rendered to property and to road and bridge tolls where the proceeds are used for the maintenance of the particular road or bridge (see, for example, *Satow's Guide to Diplomatic Practice*[7]).

4. It seems clear from the foregoing that if the system of collection of the *redevance* were different, that is to say if instead of an annual fee individual tolls were collected for use of the *autoroutes*, no doubt whatsoever would exist that the charge properly falls within the meaning of article 34 (*e*) of the Vienna Convention. It is not the view of this Office that the character of a particular tax can be determined by the manner of its collection but rather that it must be determined by its purpose and incidence.

5. The Diplomatic Committee has specifically raised two arguments which it believes counter the characterization of the *redevance* as a service charge. The first relates to proportionality and to the fact that the fee charged is the same whether the service (i.e., the *autoroute*) is used once or many times. It is true that the fee is a fixed sum, but it should be noted that the fee is not mandatory but is imposed only on the drivers of the vehicles who wish to use the roads specified in the legislation concerned. Secondly, you raise the question of the use of the fee and the need to demonstrate that the proceeds are in fact dedicated exclusively to the maintenance of the roads in question. While we do not believe that international law requires the country concerned to demonstrate that the proceeds are dedicated exclusively to the maintenance of the roads, there is no doubt that there must be some relation between the *redevance* and the maintenance of the roads if it is to be considered a service charge. In our view there is a relation between the *redevance* and the maintenance of the roads since the same Government which collects the *redevance* is also directly or indirectly taking care of the maintenance of roads.

6. For the foregoing reasons, the Office of Legal Affairs is of the opinion that the *redevance* is in the nature of a charge for services rendered within the meaning of article 34 (*e*) of the Vienna Convention.

7. There remains, finally, the question of the exemption accorded to the official vehicles of the international organizations having their seat in the State concerned, an exemption specified in article 2 (*e*) of the legislation. At first sight, this exemption would appear to be incompatible with the position that the *redevance* is a charge for services rendered since the Headquarters Agreement[8] provides in section 5 (*a*) that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services. Competent authorities provided a justification for this exemption as follows: ". . . the term 'taxes for services rendered' contained in the Headquarters Agreement has been interpreted in a restrictive manner by the United Nations and [the State concerned]."

8. In effect, the notion of "charges for public utility services" which is contained in section 5 (*a*) of the relevant Headquarters Agreement (and section 7 (*a*) of the Convention on the Privileges and Immunities of the United Nations[9]) is a more restrictive notion than that of article 34 (*e*) of the Vienna Convention and has consistently been interpreted in a restrictive manner by the United Nations. In the view of the United Nations, the exemption from direct taxes is absolute except for the charges for public utility services, which have been strictly defined as the charges for public utilities such as water, gas and electricity. We would refer you in this regard to the legal opinion issued by our Office on 27 February 1968[10] and the *Pratique suisse en matière de droit international public*, 1977.[11] The position taken by the authorities of the State concerned is, therefore, in our view consistent with the well-established practice under the Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations and is in accordance with the constant practice of the Organization in this regard.

9. In your memorandum you also request advice as to the attitude you should adopt towards the Diplomatic Committee. The Diplomatic Committee may be informed of the position taken by the United Nations in this matter. This position is not, of course, binding on the diplomatic community in the State concerned (except for the high officials of the Organization), although it may be persuasive. It may also be noted that the exemption in favour of the Organization's official vehicles is based on a particular interpretation of the Headquarters Agreement which is not applicable to diplomatic agents. It is clear, however, that to the extent that the Diplomatic Committee maintains its opinion on the character of the *redevance*, there would appear to be a difference as to the interpretation of articles 23 and 34 of the Vienna Convention between the State concerned and some, if not all, Member States. Since the said State is a party to the Optional Protocol concerning the Compulsory Settlement of Disputes, it would be possible for any other party to invoke the procedures foreseen in the Optional Protocol. While it would not seem necessary to invoke the jurisdiction of the International Court of Justice, some other form of settlement such as an arbitration by a single arbitrator could no doubt be agreed upon. The Secretary-General would, of course, be willing to lend his good offices to the parties in seeking to arrange such a settlement.

28 February 1985

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13. TRANSPORTATION OF NON-UNITED NATIONS PERSONNEL IN VEHICLES OR AIRCRAFT OF PEACE-KEEPING MISSIONS — QUESTIONS OF THE LIABILITY OF THE UNITED NATIONS IN CASE AUTHORIZED VISITORS ARE INJURED OR DIE WHILE BEING TRANSPORTED IN VEHICLES OR AIRCRAFT OF A UNITED NATIONS PEACE-KEEPING MISSION

Memorandum to the Senior Officer, Office of the Under-Secretaries-General for Special Political Affairs

1. The Office of Legal Affairs has re-examined the question of the liability of the United Nations for the transportation of non-United Nations personnel in vehicles or aircraft of the peace-keeping missions and, in particular, the question of whether a letter to the permanent representatives of contributing countries would be the most desirable and effective manner of dealing with this problem.

2. After further consideration, the Office of Legal Affairs has concluded that a letter from the Legal Counsel asking Governments to agree to a hold-harmless undertaking would not be effective. While such an undertaking could be effective as far as Governments are concerned, the same cannot be said of the release of third party claims by individuals.

3. The Office of Legal Affairs believes that a distinction must be drawn between passengers who are sponsored by troop-contributing countries and other passengers. In the case of the former, there is an implicit understanding between those Governments and the United Nations that the Governments concerned will hold the United Nations harmless against such claims. This implicit understanding could be made explicit by including in the "usual conditions" of approved visits an

understanding that the Government would hold harmless the United Nations in the event of the injury or death of the visitor or visitors in question. As far as other passengers are concerned, the practice which presently obtains in UNIFIL of requiring individual releases could be followed in respect of all peace-keeping missions.

22 March 1985

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14. STATUS AND LEGAL RIGHTS OF THE UNITED NATIONS UNDER THE INTERNATIONAL TELECOMMUNICATION CONVENTION AND THE UNIDO HEADQUARTERS AGREEMENT IN RELATION TO COMMUNICATION FACILITIES CONTROLLED BY UNIDO IN VIENNA

Memorandum to the Assistant Secretary-General for General Services

1. By your memorandum of 25 March 1985 you have asked whether there are any legally based reasons for the United Nations to maintain ownership and control of the United Nations communication facilities (now controlled by UNIDO in Vienna) after UNIDO becomes a specialized agency.

2. The legal status and rights of the United Nations in this matter derive principally from two instruments, namely the International Telecommunication Convention[12] and the UNIDO Headquarters Agreement.[13]

3. Under the International Telecommunication Convention and the United Nations/International Telecommunication Union Agreement, the United Nations is placed substantially in the same position as States members of the Telecommunication Union and has all the rights of a member Administration, including that of registering frequencies. Specialized agencies do not have that status and all those rights. This was made clear in several resolutions of the Plenipotentiary Conference of ITU (Nairobi, 1982), namely resolutions 39, 40 and 41. Resolution 40 is of particular significance in this connection as it confirms that, notwithstanding article IV, section 11, of the Convention on the Privileges and Immunities of the Specialized Agencies,[14] those agencies do not have the rights that Governments and the United Nations have under the International Telecommunication Convention.

4. Under section 4 (*a*) of the UNIDO Headquarters Agreement between the United Nations and Austria:

> "(*a*) The United Nations shall for official purposes have the authority to install and operate a radio sending and receiving station or stations to connect at appropriate points and exchange traffic with the United Nations radio network. The United Nations as a telecommunications administration will operate its telecommunications services in accordance with the International Telecommunication Convention and the Regulations annexed thereto. The frequencies used by these stations will be communicated by the United Nations to the Government and to the International Frequency Registration Board."

It should be noted that this provision refers specifically to the United Nations, even though almost all other provisions of the Agreement, including section 4 (*b*) (grant of appropriate radio facilities to UNIDO in conformity with technical arrangements to be made with ITU) and sections 13 and 14 (freedom of UNIDO communications from censorship; right of UNIDO to use codes and to broadcast in Austria) refer to UNIDO. It is thus clear that the Austrian Government also recognized the unique position of the United Nations in respect of telecommunications, and that however the existing Headquarters Agreement is transformed as a consequence of the separation out of UNIDO from the United Nations, the section 4 (*a*) rights are not ones that would be transferred to the new organization.

5. In view of the above, and also taking into account that the United Nations is the only worldwide organization in a position to operate a worldwide communication network, while organizations such as UNIDO could at best operate one terminal of such a system in a particular city, it appears entirely justified from a legal point of view for the United Nations to retain the existing communication facilities in Vienna and to establish any new ones, such as the proposed Alternate Voice and Data (AVD) circuit, under its ownership and control.

6. In this connection, it is important to note that paragraph 9 of the transitional arrangements

resolution[15] authorizes the Secretary-General to transfer to the new UNIDO "the assets of the United Nations used by the existing [UNIDO]". However, the report of the formal meeting on the conversion of UNIDO into a specialized agency (Vienna, 16-20 May 1983)[16] records the recognition of the participating States that changes in the existing working arrangements between the United Nations and UNIDO as a consequence of the transformation of the latter should only be made after UNIDO became a specialized agency. While the latter recommendation might inhibit changes at this time concerning any already existing facilities, the General Assembly's earlier decision indicates that to avoid differences at the time of separation any new communication facilities established by the United Nations in Vienna should from the beginning be operated under the aegis of the United Nations Office at Vienna rather than UNIDO.

7. In view of the above-mentioned legal considerations, it would appear appropriate and desirable to have the AVD circuit terminal located on UNOV the premises of the United Nations Office at Vienna and manned by the personnel of that Office.

15 April 1985

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15. UNITED NATIONS JURISDICTION IN THE SPACE LEASED BY THE ORGANIZATION—SUPPLEMENTAL AGREEMENTS TO THE HEADQUARTERS AGREEMENT—RESPONSIBILITY OF THE SECURITY AND SAFETY SERVICE WITH REFERENCE TO FIRE PREVENTION AND CONTROL ARRANGEMENTS IN SPACE LEASED BY THE UNITED NATIONS

Memorandum to the Chief of the Security and Safety Services

1. This responds to your memorandum of 15 February 1985, requesting our advice on the jurisdiction of the United Nations in general and the responsibility of the Security and Safety Service in particular with reference to the subject matter dealt with in Administrative Management Service report No. 6-82, pages 13 to 15, namely, fire prevention and control arrangements in leased space, specifically the DC I, DC II and Alcoa buildings and 304 East 45th Street.

A. IMMUNITY OF PREMISES

2. Any lands or buildings occupied by the United Nations outside the original headquarters district are to be included in that district by a supplemental agreement to the Headquarters Agreement[17] in accordance with section 1(*a*). 2 of that Agreement, which provides as follows:

> "(2) Any other lands or buildings which may from time to time be included therein by supplemental agreement with the appropriate American authorities".

3. To date, three supplemental agreements have been concluded. The DC I and Alcoa buildings are already covered by the Third Supplemental Agreement, concluded in 1980. On 5 November 1984, the Office of Legal Affairs submitted to the United States Mission a draft of a fourth supplemental agreement which includes, *inter alia*, leased space in the DC II building and at 304 East 45th Street. Once the fourth supplemental agreement is concluded, the DC II building and the offices at 304 East 45th Street will be inviolable in accordance with section 9 (*a*) of the Headquarters Agreement, which provides as follows:

> "(*a*) The headquarters district shall be inviolable. Federal, state, or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General. The service of legal process, including the seizure of private property, may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General."

4. However, even pending the conclusion of the fourth supplemental agreement, the leased space in the UNDC II building and at 304 East 45th Street is inviolable under section 3 of the Convention on the Privileges and Immunities of the United Nations,[18] which provides as follows:

> "The premises of the United Nations shall be inviolable . . ."

5. Section 7 (*b*) of the Headquarters Agreement provides:

"(*b*) Except as otherwise provided in this Agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district."

6. However, under section 8 of the Headquarters Agreement,

"The United Nations shall have the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district. Any dispute, between the United Nations and the United States, as to whether a regulation of the United Nations is authorized by this section or as to whether a federal, state or local law or regulation is inconsistent with any regulation of the United Nations authorized by this section, shall be promptly settled as provided in section 21. Pending such settlement, the regulation of the United Nations shall apply, and the federal, state or local law or regulation shall be inapplicable in the headquarters district to the extent that the United Nations claims it to be inconsistent with the regulation of the United Nations. This section shall not prevent the reasonable application of fire protection regulations of the appropriate American authorities."

B. LEGAL REGIME WITHIN UNITED NATIONS PREMISES

7. It should be noted, however, that such Headquarters regulations must be approved by the General Assembly in accordance with its resolution 481 (V) of 12 December 1950. None of the three regulations so far approved by the General Assembly are in any way relevant to fire prevention and control arrangements, and it would seem unlikely that any such regulation on this subject would be proposed by the Secretary-General or approved by the Assembly. In any event, the final sentence of section 8 of the Headquarters Agreement provides:

"This section shall not prevent the reasonable application of fire protection regulations of the appropriate American authorities."

8. With respect to the leased premises, whether or not included by supplemental agreement in the headquarters district, it should be noted that the landlords are subject to state and city regulations and ordinances and pass on their obligation to the United Nations as tenant. As a matter of contractual obligation towards the landlords, the United Nations has undertaken in its leases to comply with the fire regulations set by the City. Thus, a fire clause is included under article 6 of the leases covering the DC I, DC II and Alcoa buildings and 304 East 45th Street, under the heading "Requirements of Law, Fire, Insurance, Flood Loads".

C. OTHER REASONS FOR COMPLYING WITH LOCAL FIRE REGULATIONS

9. Section 17 (*a*) of the Headquarters Agreement provides:

"(*a*) The appropriate American authorities will exercise, *to the extent requested by the Secretary-General*, the powers which they possess to ensure that the headquarters district shall be supplied on equitable terms with the necessary public services, including electricity, water, gas, post, telephone, telegraph, transportation, drainage, collection of refuse, fire protection, snow removal, et cetera . . ." (emphasis added)

10. If the Organization is to benefit from the protection provided by section 17 (*a*), it is evidently necessary that, for practical reasons, the United Nations agrees to do so because this facilitates any action the local authorities would have to take in case of fire or other disaster. In any case, the United Nations has no choice in the matter unless and until a regulation is established under the Headquarters Agreement, as discussed in paragraph 5 above.

11. Even in the main complex, the United Nations agrees to follow City fire regulations because it acknowledges that those standards are objective and reasonable and meet the concerns of the Organization, namely, the maintenance of adequate security from fire and other hazards.

12. For the above-mentioned reasons, there should be coordination with the City of New York and direct negotiations with the City fire authorities to establish standards and procedures dealing with the prevention of fire as well as efficient means to be taken in case of a fire or other disaster in order to minimize the danger from or damage of fire. The negotiation and implementation of the coordination plan and the establishment of procedures are administrative tasks, but this Office would be prepared to assist as appropriate.

13. We suggest that, once an arrangement with the City fire authorities is completed and a coordination plan is finalized, the respective landlords should be informed of the arrangements and coordination plan. We could then seek letters of acknowledgement from them with respect to the arrangements for coordination rather than attempt to negotiate amendments to the leases currently in force, an attempt which might be resisted by the landlords.

28 May 1985

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16. ESTABLISHMENT IN A MEMBER STATE OF EXCHANGE PARALLEL MARKET RATES—UNDER THE STANDARD BASIC ASSISTANCE AGREEMENT BETWEEN THE UNITED NATIONS DEVELOPMENT PROGRAMME AND THE MEMBER STATE CONCERNED UNDP REMAINS ENTITLED TO THE MOST FAVOURABLE RATE OF EXCHANGE

Memorandum to the Chief of the Treasury Section, United Nations Development Programme

1. This is with reference to your memorandum of 2 December 1985 in which you request a legal opinion on the application of article X, paragraph 1 (e), of the Standard Basic Assistance Agreement (SBAA) concluded in 1981 between UNDP and a Member State.

2. The signature of the Agreement was accompanied by an exchange of letters recording the understandings of the Government and UNDP with regard to: (1) any new Standard Basic Assistance Agreement which UNDP might adopt for general use in the future, and (2) rights to intellectual property. Except for these understandings, the Member State concerned has accepted the Agreement without reservation or modification, in particular article X, paragraph 1 (*e*), which provides that the Government shall grant UNDP, its executing agencies, experts and other persons performing services on their behalf the rights and facilities of the most favourable legal rate of exchange.

3. An ordinance No. 181 concerning the exchange parallel market rates was promulgated a mere six weeks after the signing of the Agreement. Under article 1 of the ordinance, a parallel market for foreign currencies is officially created. Under this market, the purchase and sale of foreign currencies shall be in accordance with the rates of supply and demand. Article 4 provides that the parallel market rates shall be applied to all non-commercial operations, which would normally include activities of intergovernmental organizations; however, article 5 then excepts from article 4 the resources of international, regional and Arab organizations.

4. The ordinance clearly establishes a parallel market based on the market-determined rate of supply and demand as a legal rate of exchange. If this parallel rate is the most favourable rate of exchange, UNDP would in our view be entitled to that rate on the basis of article X, paragraph 1 (*e*), of the UNDP/SBAA notwithstanding the subsequent promulgation of the ordinance which in so far as it relates to UNDP is incompatible with the SBAA, which cannot be unilaterally modified by either party.

5. The Office of Legal Affairs, therefore, confirms that UNDP is entitled to receive the exchange parallel market rate if it is the most favourable rate of exchange, notwithstanding the apparent restrictions of article 5, paragraph B, of the ordinance.

17 December 1985

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17. DISPOSAL OF AN OFFICIAL VEHICLE OF A UNITED NATIONS INFORMATION CENTRE IN THE LIGHT OF CUSTOMS REGULATIONS ISSUED IN A HOST STATE—SECTION 7 (*b*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Memorandum to the Executive Officer, Department of Public Information

1. Your memorandum of 13 December 1985 on the disposal of an official vehicle of a United Nations Information Centre has been referred to this Office for advice.

2. We note that in this case the vehicle in question is an official vehicle of the Information Centre, that is to say it is the property of the United Nations. Section 7 (*b*) of the Convention on the Privileges and Immunities of the United Nations,[18] to which the host State is a party, clearly stipulates that property of the United Nations shall be exempt from customs duties on imports in respect of articles imported by the United Nations for its official use. Such articles will not be sold in the country into which they were imported except under conditions agreed with the Government of the country into which they were imported.

3. The Convention on the Privileges and Immunities of the United Nations does not lay down the conditions for resale but merely the general principle, namely, that the conditions shall be agreed with the Government. Under the 1963 Customs Regulations issued in the host State, no particular problem arose if the vehicle was resold after five years since no duties were payable. Under the 1983 Customs Regulations, however, the payment of some duties is necessary. In the view of this Office, the new Customs Regulations provide a basis for the implementation of section 7 (*b*) of the Convention on the Privileges and Immunities of the United Nations. It should be noted first of all that the 1983 Customs Regulations are not intended to derogate from the customs exemptions granted to international organizations. Secondly, the formula which is set out in them appears to be flexible enough to permit each transaction to be considered on its own merits.

4. In the light of the foregoing, the Centre should attempt to reach agreement with the Government on the conditions for resale taking into account the Convention on the Privileges and Immunities of the United Nations and the local law. In this sense the Centre should abide by the new customs regulations.

24 December 1985

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18. CONDITIONS UNDER WHICH OFFICIALS AND REPRESENTATIVES OF MEMBERS OF INTERNATIONAL ORGANIZATIONS ARE ADMITTED TO AND RESIDE IN THE UNITED STATES

Note to the Permanent Representative of a Member State to the United Nations

The Legal Counsel of the United Nations has the honour to refer to the Permanent Representative's note of 12 December 1984 addressed to the Secretary-General, requesting information with respect to the exemption from immigration laws of officials and representatives of members of international organizations in the United States.

The information which is provided below is based on the applicable law, whether an international instrument or domestic legislation giving effect to international obligations, and on the practice of the United Nations in interpreting such instruments in a universal manner.

Question (a)

[Is the exemption from immigration restrictions granted to officials and representatives of Members of the United Nations and the principal international organizations in the United States of America also granted, as a general rule, to other international organizations, whether headquartered there or not?]

Under section 7 of the United States International Organizations Immunities Act,[19] representatives to international organizations (defined in the Act as a public international organization in which the United States participates) and officers and employees of such organizations, as well as members

of the immediate families of the aforementioned persons, do enjoy exemption from immigration restrictions and alien registration. With regard to the United Nations, specific provision for such exemption is made in sections 11 (*d*) (Representatives of Members) and 18 (*d*) (Officials) of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946,[18] to which the United States is a party.

Question (b)

[Does the exemption from immigration restrictions mean that visas or entry permits, or both, are not required?]

Exemption from immigration restrictions does not mean that the designated beneficiaries are exempted from meeting normal travel and documentary requirements of the Government, including the issuance of visas or entry permits. However, Member States are not permitted to interpose their visa requirements in such a manner as to interfere with the privileges and immunities accorded to the exempted categories of persons. Section 13 (*a*) of the Headquarters Agreement[20] provides that where visas are required for representatives of Members or officials, experts, representatives of the media or non-governmental organizations and other persons invited to Headquarters on official business, they shall be granted without charge and as speedily as possible. In regard to United Nations officials, experts and other persons travelling on the business of the Organization, sections 25 and 26 of the Convention on the Privileges and Immunities of the United Nations also provide that applications for visas where required shall be dealt with as speedily as possible.

Question (c)

[If visas and entry permits are required, does the United States Government acknowledge *an obligation* to grant them to those who have been duly appointed or accredited as officials or representatives of members of international organizations to enable them to enter and remain in the country for the purpose of carrying out their official functions?]

The United States assumed certain obligations in this respect in sections 11 and 13 of the Headquarters Agreement.

Question (d)

[If visas are required, does the United States Government impose, or reserve the right to impose, conditions on the issue of the visas, e.g., officials or representatives of Members only to travel directly to the headquarters district or place of meeting and reside nearby, spouses not to work, etc.?]

As a general rule the United States has not imposed restrictions on movement or residence in connection with the issuance of visas. Officials of the Organization have never been subject to any such restrictions. In a small number of cases, the representatives of certain Member States have been restricted in their freedom of movement, usually on the basis of reciprocity, a restriction acquiesced in by the sending State. The United Nations does not, however, accept that the reciprocity principle applies. The right of spouses of representatives or officials to work is not dealt with in the applicable law but is largely a matter of policy and practice agreed upon between the United States and the Organization.

Question (e)

[Does the United States maintain that it has an overriding or residual *right to exclude* undesirable officials or representatives of Members on the grounds of national security, notwithstanding provisions in the relevant international instruments?]

In the rare instances where security concerns have been invoked, consultations between the Organization and the United States have usually resolved the issue. The Organization will not insist on the entry of persons with respect to whom substantial evidence of improper activities has been presented. The burden of proof in such matters lies with the host country.

Question (f)

[Does the Government reserve the right to deport alien officials and representatives of Members who abuse their privilege of residence by carrying out activities incompatible with their official status?]

Section 13 (*b*) of the Headquarters Agreement sets out the procedures to be followed in the event of an abuse of privilege.

Question (g)

[Does the United States Government recognize the United Nations laissez-passer as a valid travel document for use by officials not only for initial entry into its territory but also for transit and home leave?]

The United States recognizes the United Nations laissez-passer as a valid travel document in accordance with section 24 of the Convention on the Privileges and Immunities of the United Nations.

Finally, the Secretariat continues to maintain the views set out in the study of the status, privileges and immunities of the United Nations, specialized agencies and IAEA[21] and in the legal opinions quoted in your inquiry.[22]

30 January 1985

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19. PERSONAL INJURY CLAIM BROUGHT AGAINST THE GOVERNMENT OF A MEMBER STATE BEFORE UNITED STATES COURTS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

Letter to the Legal Officer of the Permanent Mission of a Member State to the United Nations

I wish to refer to your letter of 28 January 1985, following upon the meeting held in my office, requesting the comments or suggestions of the Office of the Legal Counsel with regard to a personal injury claim brought against your Government. Before addressing the specific points raised in your letter, we should point out that the Office of the Legal Counsel is in a position to provide legal advice to permanent missions on matters of a private law nature only to the extent that such advice concerns questions of principle involving points of international law or relations between the United Nations and the host country. For obvious reasons, this Office is not competent to provide legal advice on matters which fall under the domestic law and practice of individual Member States.

As we pointed out at our meeting, the legal basis of the claim in this case lies in the United States Foreign Sovereign Immunities Act of 1976.[23] That legislation was enacted by the United States Congress within the context of an evolving and restrictive interpretation of sovereign immunity by the international community at large, excluding, in a general way, commercial activities from the scope of sovereign immunity. As you know, the jurisdictional immunities of States and their property is a topic under active consideration by the International Law Commission and its Special Rapporteur. The essential purpose of the Foreign Sovereign Immunities Act is to submit immunity claims of foreign States to the judgement of United States courts in accordance with the principles set out in the Act. The claim in question is specifically brought pursuant to section 1605 (5) of the Act which provides, *inter alia*, that a foreign State shall not be immune from the jurisdiction of United States courts in any case in which money damages are sought for personal injury occurring in the United States and caused by the tortious act or omission of that State or any official or employee of that State.

Since the passage of the Foreign Sovereign Immunities Act in 1976, a fairly substantial jurisprudence has developed in the United States courts. Decisions arising under the Act are normally published in *International Legal Materials*, a publication of the American Society of International Law, which is readily available in the United Nations Libraries. Whether or not there are any precedents involving similar suits is a question that can only be answered after an extensive research of case-law, which this Office is not in a position to undertake. However, based on our general knowledge of the practice of the United States courts, it is our judgement that your Government would be well advised

to retain local counsel in this case with a view, if possible, to an eventual settlement out of court. Any other course of action would expose the Government to a judgement by default and possible execution by attachment of property or assets of the Government in the United States.

The questions which immediately come to mind in connection with the response to the complaint are whether or not the service of process meets the requirements of the Act, whether or not the Government can sustain a claim of immunity and, finally, whether the claim has any merit on the facts. These are questions which require familiarity with local law and practice and it is for this reason that we can confirm my oral advice to the effect that an experienced law firm be engaged by your Government.

5 February 1985

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20. TRAVEL REGULATIONS OF THE HOST STATE — INCOMPATIBILITY OF THOSE REGULATIONS WITH THE INTERNATIONAL OBLIGATIONS OF THE HOST STATE UNDER THE CHARTER OF THE UNITED NATIONS, THE HEADQUARTERS AGREEMENT AND THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS — LEGAL AND PRACTICAL CAPACITY OF THE ORGANIZATION TO IMPLEMENT THE REGULATIONS

Notes verbales to the Permanent Representative of a Member State to the United Nations[24]

I

The Secretary-General of the United Nations has the honour to refer to the note of 29 August 1985 concerning certain measures that the host State Government wishes to apply to travel undertaken by members of the Secretariat of the United Nations.

A

The Secretary-General has noted with concern the suggestion in the communication that certain members of the United Nations Secretariat have engaged in espionage or other clandestine activities. At no time during his term of office has the United States Administration brought to the attention of the Secretary-General any evidence or charges against any member of the Secretariat. In the absence of any specific evidence or charges, he cannot accept any blanket, unsubstantiated accusation against members of the staff of the United Nations. The Secretary-General wishes to emphasize that, in his capacity as chief administrative officer of the United Nations, he would fully investigate information brought to his attention and would proceed to take quick and effective action against any staff member shown to have engaged in any improper activities against the security of the Host State.

B

The Secretary-General is aware that the proposed restrictive measures, which are set out in the above-mentioned note, are based on recently adopted legislation, namely certain provisions of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987. While this legislation may contain certain directives addressed to organs of the United States Government, and the measures in question are evidently proposed in implementation of these directives, the Secretary-General is of the view that these measures are not compatible with the international obligations of the United States, *vis-à-vis* the Organization, under the latter's Charter, under the Headquarters Agreement and under the Convention on the Privileges and Immunities of the United Nations.

In particular:

(*a*) The proposed measures would seem to constitute discrimination among members of the Secretariat solely on the basis of their nationality, in violation of the principle that they are all international civil servants whose primary loyalty and responsibility are to the Organization. Any discrimination among them based on nationality runs counter to the essential character of the international civil service, as envisaged in the Charter of the United Nations. The unity of the international civil service

is absolutely essential if the Organization is to carry out its worldwide obligations with staff members whose individual nationalities might otherwise not be acceptable to the Governments with whom they have to deal or within whose jurisdiction they must operate. This principle of non-discrimination, indeed non-differentiation, is designed to protect both the Organization and its staff members, including American staff members serving in various countries.

(*b*) As applied to official travel, the proposed measures would improperly constrain the Secretary-General's choice of what staff members are to be assigned to carry out certain functions within the United States. The final provision of the note, whereby the United States Government reserves the right to review whether travel designated as official by the Secretary-General is "*bona fide* official travel of the United Nations", raises a particular problem with regard to the Secretary-General's independent exercise of his responsibilities under the Charter, free from national interference.

(*c*) As applied to private travel, in respect of which the proposed measures are even more restrictive, the question may be raised whether limiting staff members, who may spend years or even their entire working career assigned to Headquarters, to a distance of 25 miles from Columbus Circle, or just to the five boroughs of New York City, is, apart from being discriminatory, unduly onerous.

C

The note requests the Secretariat to ensure that the indicated measures are implemented. However, that would seem to be outside of both the legal and the practical capacity of the Organization. Furthermore, the Secretary-General does not see how he could instruct the Secretariat to implement measures that appear to him incompatible with the responsibilities entrusted to him by the Charter.

In view of the above, the Secretary-General would appreciate it if the United States Government could reconsider proceeding with the implementation of the proposed measures. In this connection he would like to note that the Secretary of State is given authority to waive implementation, *inter alia*, when foreign policy circumstances—which would certainly encompass relations between the United Nations and the United States—so require.

9 September 1985

II

The Secretary-General of the United Nations has the honour to refer to the note of 13 December 1985 concerning the regulation of travel of members of the Secretariat of the United Nations who are nationals of certain Member States.

In the view of the Secretary-General, these measures are similar to certain of those previously notified by the United States on 29 August 1985 in so far as they constitute a discrimination among members of the Secretariat solely on the basis of their nationality and improperly constrain the Secretary-General's functions as chief administrative officer of the Organization.

Consequently, the position taken by the Secretary-General in his note verbale of 9 September 1985 with regard to the notification of 29 August 1985, and which remains unchanged, applies also to the newly imposed travel regulations.*

14 December 1985

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* Since the position of the host State remained unchanged, the Secretary-General informed staff members in information circular ST/IC/86/4 of 14 January 1986 of his views on the matter and announced the undertaking of a practical measure related to official travel of United Nations staff members in the United States:

". . .

"2. In the course of the aforementioned discussion [with the host State], in so far as they related to official travel, the United Nations made it clear that such travel is the sole responsibility of the Organization, that arrangements for official travel must continue to be made by the United Nations in the usual way and that the Secretariat could not furnish data on such travel on a selective basis. The United States, while eventually accepting the United Nations insistence on these points, for its part insisted that it should be notified regarding official travel by staff members of the affected nationalities in the United States.

" 3. In the light of the situation thus created by the host country and in order to permit the normal functioning of the Organization within the United States and to obviate the effects of discrimination among staff members, the United Nations has undertaken, as a practical measure, to notify the host country of all official travel in the United States. In so doing, the United Nations has made it clear that it is acting on the basis of the specific obligations of both the host country and the United Nations for the protection of officials in the Organization both at Headquarters and while on official travel in the United States. In this connection reference is made, in particular, to General Assembly resolutions 39/83 of 13 December 1984 and 40/73 of 11 December 1985, in which the General Assembly has *inter alia* emphasized the duty of States to take all appropriate steps as required by international law to prevent any attacks on international and intergovernmental organizations and officials of such organizations. Reference is also made to the legislation of the host State, in particular to the Act for the Protection of Foreign Officials and Official Guests of the United States (Public Law 92-539 of 24 October 1972) and the Act for the Prevention and Punishment of Crimes against Internationally Protected Persons (Public Law 94-467 of 8 October 1976).

" . . ."

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21. Denial by a Member State of a request for the issuance of a visa to a staff member of South African nationality assigned to a United Nations Military Observer Group—Sections 17, 18, 24 and 25 of the Convention on the Privileges and Immunities of the United Nations

Note verbale to the Permanent Representative of a Member State to the United Nations

The Legal Counsel of the United Nations has the honour to refer to the case of a United Nations staff member assigned to the United Nations Military Observer Group in . . . as secretary to the Chief Military Observer.

The United Nations has requested the competent authorities to issue a visa to the staff member concerned. The United Nations Travel Unit was orally informed on 26 February 1985 by the Counsellor of the Permanent Mission that his authorities would not issue a visa in this case because of the nationality of the staff member in question (South Africa). The Travel Unit was informed that if the United Nations presented a visa application in respect of another staff member of a different nationality a visa would be granted.

The Legal Counsel of the United Nations wishes to draw the attention of the Permanent Representative to the fact that the person in question is an official of the United Nations within the meaning of section 17 of the Convention on the Privileges and Immunities of the United Nations,[25] to which (name of Member State) acceded, and that as such she is entitled to the privileges and immunities set out in section 18 of the Convention, including, in particular, immunity from immigration restrictions and alien registration. In addition, as a United Nations official, she is entitled to and is the holder of a United Nations laissez-passer, which shall be recognized and accepted as a valid travel document by the authorities of Member States pursuant to section 24 of the Convention.

Furthermore, section 25 of the Convention provides that applications for visas from the holders of United Nations laissez-passer shall be dealt with as speedily as possible and that such persons shall be granted facilities for speedy travel.

As the Permanent Representative will know, members of the Secretariat are international civil servants whose responsibilities are not national but exclusively international. In accordance with staff regulation 1.2, staff members are subject to the authority of the Secretary-General and to assignment by him to any office of the United Nations. In the discharge of his functions as the chief administrative officer of the Organization, the Secretary-General can make no distinction among staff members based on their nationality. Such discrimination would be contrary to the concept of the international civil service and would impede the effective functioning of the Organization.

It follows from what is stated above that by issuing a visa to the staff member in question the authorities of the State in question would not affect, change or alter in any way the State's position with respect to South Africa. Any misinterpretation in this respect could be countered by indicating

that she receives her visa exclusively because of her status as an international civil servant of the United Nations. Furthermore, the visa could be issued on the United Nations laissez-passer on which the nationality of the holder is not recorded.

13 March 1985

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22. QUESTION WHETHER A UNITED NATIONS OFFICIAL COULD LEGITIMATELY BE REQUIRED BY A MEMBER STATE TO POSSESS A TRANSIT VISA ISSUED ONLY UPON THE SUBMISSION OF A BIRTH OR BAPTISMAL CERTIFICATE—ARTICLE 105 OF THE CHARTER OF THE UNITED NATIONS

Memorandum to the Chief of the Legal Liaison Unit, United Nations Industrial Development Organization

Your cable of 5 February 1985 requested our views on a visa matter which we took some time to investigate, taking into account in particular the fact that the Member State concerned is not a party to the Convention on the Privileges and Immunities of the United Nations. Since we do not know whether we are dealing with an isolated case, we feel that at this juncture no immediate action is needed. However, any subsequent case should be taken up with the Government of the Member State concerned, and our response should be based on the following arguments:

Travel routes for United Nations officials are determined in accordance with the Staff Regulations and Rules and pertinent administrative instructions, whereby the normal route for all official travel shall be the most direct and economical route. The requirement that the official must possess a transit visa which is to be issued only upon the submission of a birth or baptismal certificate creates a specific obstacle to the travel as prescribed by the Organization. The right to freedom of movement of United Nations personnel travelling on official business from country to country has been based on the relevant provisions of the Charter of the United Nations, in particular Article 105, and on various sections of the Convention on the Privileges and Immunities of the United Nations. Although the Member State concerned has not acceded to the Convention, it has nevertheless assumed certain obligations under the Charter *vis-à-vis* the Organization. Among these is the undertaking to accord to officials such privileges and immunities as are necessary for the independent exercise of their functions. The position of the United Nations has always been to consider the mere requirement of a visa and the submission of pertinent information as unobjectionable as long as no more is involved than a formality. The action taken by the State concerned is more than just a formality and affects the Organization from the administrative point of view.

As regards the information to be submitted, the United Nations has always taken the stand that no question on religious affiliation should be asked in such documents as personal status forms. It has consistently maintained that such questions as religious affiliation are personal matters and are unrelated to the fulfilment of the purposes of the United Nations. By way of consequence, the Organization never instructs officials to comply with requests for information about religion.

15 March 1985

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23. STIPULATION IN A FINANCE LAW ENACTED BY A MEMBER STATE THAT ALL EMPLOYEES OF INTERNATIONAL ORGANIZATIONS OF THE NATIONALITY OF THAT STATE MUST PAY ONE TWELFTH OF THEIR ANNUAL SALARY AND 20 PER CENT OF THEIR INDEMNITIES AS A SPECIAL CONTRIBUTION IN 1985—QUESTION OF THE APPLICABILITY OF THE LAW TO UNITED NATIONS STAFF MEMBERS—SECTIONS 17 AND 18 (*b*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Note verbale to the Permanent Representative of a Member State to the United Nations

The Legal Counsel of the United Nations presents his compliments to the Permanent Representa-

tive of (name of Member State) to the United Nations and has the honour to refer to the 1985 Finance Law, articles 37 and 57 of which stipulate *inter alia* that all employees of international organizations who are of the nationality of the Member State must pay one twelfth of their annual salary and 20 per cent of their indemnities as a special contribution in 1985.

The Legal Counsel wishes to draw the attention of the Permanent Representative to the following: By decision of the General Assembly in resolution 76 (I) of 7 December 1946, all staff members of the United Nations, regardless of nationality, place of recruitment or rank, are officials within the meaning of section 17 of the Convention on the Privileges and Immunities of the United Nations and enjoy exemption from taxation on the salaries and emoluments paid to them by the United Nations pursuant to section 18 (*b*) of the Convention, to which the State concerned acceded on 27 April 1962. Consequently, in the view of the United Nations, the 1985 Finance Law is not applicable to United Nations staff members of the nationality of that State.

The Legal Counsel also wishes to take this opportunity to point out that article IX, paragraph 1, of the United Nations Development Programme Standard Basic Assistance Agreement, to which the State concerned is a party, also makes applicable to the United Nations and its organs, including UNDP and subsidiary organs of the United Nations acting as UNDP Executing Agencies, and to their officials, the provisions of the Convention.

The Legal Counsel would be grateful if the foregoing views of the United Nations could be brought to the attention of the appropriate authorities with a view to ensuring the non-application of the 1985 Finance Law to officials of the United Nations.

19 March 1985

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24. TRAFFIC ACCIDENT INVOLVING AN EMPLOYEE OF A COMPANY WHICH IS A SUBCONTRACTOR TO THE UNITED NATIONS DEVELOPMENT PROGRAMME—QUESTION WHETHER THE PERSON IN QUESTION COULD BE REGARDED AS HAVING BEEN ENGAGED IN OFFICIAL BUSINESS AT THE TIME OF THE ACCIDENT

Letter to the Permanent Representative of a Member State to the United Nations

I wish to refer to our meeting of 16 May 1985, at which we discussed an accident involving an employee of a company which is a subcontractor to UNDP/Office for Project Execution (OPE). You indicated that, while your authorities do not question the applicability of the UNDP/Standard Basic Assistance Agreement (SBAA) (and through the SBAA the Convention on the Privileges and Immunities of the United Nations) to this case, some questions have been raised as to whether the person in question could be regarded as having been engaged in official business at the time of the accident.

In response to your request for clarification on this point we are pleased to confirm the following: The United Nations (and UNDP) as a matter of law and practice take the view that any act which is performed by officials, experts, consultants or, in the case of UNDP, "persons performing services" for UNDP within the meaning of article IX of the UNDP/SBAA which is directly related to the mission or project, such as driving to and from a project site, would constitute prima facie an official act within the meaning of section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations. Travel to and from a project site necessarily forms part of the work of the persons engaged in the project. In the particular case of the person concerned, the fact that he was driving a project vehicle at the time of the accident would be an additional indication that prima facie he was performing an official act. Subsequent to our meeting, we requested information from UNDP regarding traffic accidents involving its official vehicles in Africa within the last few months and in which the Organization has followed the practice outlined above. Since December 1984 three accidents have occurred. In two of those cases the accidents occurred while the official concerned was driving to or from a project site, while in the third case the accident occurred while the official was driving from the UNDP office to the local airline office to arrange for home leave travel.

We also wish to take this opportunity to underline that, while the Secretary-General alone deter-

mines what may constitute an official act, the United Nations is under an obligation to cooperate with the appropriate authorities to facilitate the proper administration of justice and to prevent any abuse of privileges and immunities. You may, therefore, rest assured that before making a final determination under section 18 (*a*) of the Convention the Secretary-General always gives due consideration to all of the relevant circumstances. In the present case, if facts come to light which would indicate that it would be improper to invoke section 18 (*a*), the Secretary-General will refrain from doing so.

As we also informed you, the United Nations insures all of its vehicles and as a matter of policy seeks to settle all insurance claims either directly by the insurance company or, if necessary, by arbitration or judicial determination. It is not the policy of the United Nations to interpose its immunity to prevent the settlement of such claims.

22 May 1985

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25. TRADE CONTROL REGULATIONS ISSUED IN A HOST STATE—APPLICABILITY OF THE REGULATIONS TO THE SHIPMENT OF FURNITURE AND PERSONAL EFFECTS TO THE HOME COUNTRY BY MEMBERS OF A PERMANENT MISSION TO THE UNITED NATIONS—ARTICLE 31 OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Note verbale to the Permanent Representative of a Member State to the United Nations

The Legal Counsel of the United Nations presents his compliments to the Permanent Representative of (name of the host State) to the United Nations and has the honour to refer to the question of the shipment of the furniture and personal effects of members of the Permanent Mission of (name of a Member State) to the United Nations on their return to their home country. The United Nations has been advised that several members of the Permanent Mission have recently encountered difficulties in making the necessary arrangements for the shipment of their furniture and personal effects to the home country due to the trade control regulations issued in the host State.

The applicability of the regulations to the shipments of members of the Permanent Mission of (name of the Member State) to the United Nations is governed by the relevant rules of international law as well as by the language of the domestic regulations.

Under article 31 of the Vienna Convention on Diplomatic Relations of 1961,[26] a diplomatic agent enjoys immunity from the civil and administrative jurisdiction of the receiving State except in the case of (*a*) a real action, (*b*) an action relating to succession or (*c*) an action relating to any professional or commercial activity exercised by the diplomatic agent outside his official functions. The shipment of a diplomatic agent's furniture and personal effects clearly forms part of his official functions and would, therefore, be immune from the civil and administrative jurisdiction of the host State, including the regulations in question. Furthermore, the regulations themselves would seem to bear out that it was not the intention of the executive department, to which the President has delegated his authority in this respect, to prevent the shipment of furniture and personal effects by diplomatic and official personnel of the Member State in question employed by the diplomatic missions of that State or its missions to international organizations located in the host State. An appropriate section of the regulations, for example, expressly authorizes certain imports for diplomatic or official personnel, as follows:

> "All transactions ordinarily incident to the importation of any goods or services into the [name of the host State] from [name of Member State] are authorized if such imports are destined for official or personal use by personnel employed by diplomatic missions [of this State] or [its] missions to international organizations located in the host State, and such imports are not for resale."

Although no equivalent export provision appears in the regulations, the logical implication of the section in question is that the exportation of furniture and personal effects lawfully imported shall be permitted.

In the light of the foregoing, the Legal Counsel would be most grateful if the Permanent Representative of (name of the host State) to the United Nations could intervene with the appropriate author-

ities with a view to facilitating the shipment of furniture and personal effects of the members of the Permanent Mission of (name of the Member State) to the United Nations who are returning to their country.

15 July 1985

B. Legal opinions of the secretariats of intergovernmental organizations related to the United Nations

UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

CONSEQUENCES OF THE WITHDRAWAL OF A MEMBER STATE

Report by the Director-General[27]

Introduction

1. This document has been prepared in pursuance of 120 EX/Decision 3.1, section III, paragraph 4, in which the Executive Board, at its 120th session, requested the Director-General:

> "to study and report to the members of the Executive Board as soon as possible, and as far as possible, before the 121st session of the Board, on all the likely consequences of the withdrawal of a member State from UNESCO, in the light of precedents, if any, in UNESCO as well as other United Nations agencies, to enable the Executive Board to consider, take and suggest to the General Conference, the member States and their National Commissions, such steps as may be necessary to meet such consequences."

2. The following matters will be considered in turn in this document:

I. Constitutional provisions relating to withdrawal and precedents;
II. The withdrawal of a member State and the various organs of UNESCO;
III. Possible relations between the organization and States withdrawing;
IV. Impact of withdrawal on the activities of the organization;
V. Budgetary and financial consequences of withdrawal.

I. *Constitutional provisions relating to withdrawal and precedents*

A. CONSTITUTIONAL PROVISIONS

3. The Constitution of UNESCO did not originally contain any provision for the withdrawal of a member. The same was and still is the case with the Charter of the United Nations, to which the Constitution of UNESCO refers in assigning to the organization the objectives of international peace and of the common welfare of mankind which the Charter proclaims. Those who drafted the Charter of the United Nations took the view that it should not make express provision either to permit or to prohibit withdrawal from the Organization. They deemed that "the highest duty of the nations which will become members is to continue their cooperation within the Organization for the preservation of international peace and security. If, however, a member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other members, it is not the purpose of the Organization to compel that member to continue its cooperation in the organization".[28]

4. Similar considerations apparently prompted the decision by the Conference of Allied Ministers of Education, held in London in 1945 with a view to the establishment of UNESCO, not to include in the Constitution a provision concerning the withdrawal of members.

5. Following decisions to withdraw notified to UNESCO by Poland, Hungary and Czechoslovakia, the General Conference, meeting in July 1953 in extraordinary session, while "hoping that UNESCO will continue to adhere to the principle of universality of membership", requested the

Director-General and the Executive Board "to consider the matter of withdrawals from the organization and if appropriate, draft amendments to the Constitution to provide for such withdrawals".

6. In March 1954, the Executive Board, having before it the study prepared by the Director-General, noted that in accordance with the Constitution no draft amendment to the Constitution could be adopted by the General Conference unless the text had been communicated to member States at least six months in advance of the session.

7. The Board therefore requested the Director-General to prepare and circulate to member States within the regulation period alternative draft amendments on the subject, to enable the General Conference to adopt them if it saw fit.

8. In July 1954 the Board considered the draft amendments prepared by the Director-General in accordance with the directives he had been given. Learning that the United Nations was going to examine its Charter with a view to its possible revision, the Board recommended that the General Conference defer consideration of the matter to its ninth session (1956) in order to be able to take account of the attitude that might be adopted by the United Nations regarding withdrawal.

9. However, at the eighth session of the General Conference, held in Montevideo from 12 November to 10 December 1954, a number of delegations—Japan, South Africa, Belgium, the United Kingdom of Great Britain and Northern Ireland, India and the United States of America—opposed postponement of consideration of the matter.

10. The General Conference then decided, on the proposal of Australia, to amend the Constitution by adding a new paragraph 6 to article II, worded as follows:

"6. Any member State or associate member of the organization may withdraw from the organization by notice addressed to the Director-General. Such notice shall take effect on 31 December of the year following that during which the notice was given. No such withdrawal shall affect the financial obligations owed to the organization on the date the withdrawal takes effect. Notice of withdrawal by an associate member shall be given on its behalf by the member State or other authority having responsibility for its international relations."

11. This provision has not been modified since and thus remains in force today.

B. PRECEDENTS

(a) *Withdrawal of Poland, Hungary and Czechoslovakia (December 1952–January 1953)*

12. Even before the eighth session of the General Conference and the introduction into the Constitution of a clause providing for withdrawal, three States members of UNESCO—Poland, Hungary and Czechoslovakia—took the decision to withdraw from the organization.

13. On 5 December 1952, the Chargé d'affaires *ad interim* of Poland in France informed the Acting Director-General by letter of the decision to withdraw taken by his Government. In this letter, UNESCO was accused *inter alia* of having "begun to become a docile instrument of the cold war".

14. On 31 December 1952, the Minister for Foreign Affairs of Hungary, and on 29 January 1953, the Ambassador of Czechoslovakia, also informed the Acting Director-General of the decision taken by their respective Governments to withdraw from the organization for reasons similar to those given above.

15. The communication of the Polish Government was sent to the Director-General while the seventh session of the General Conference was being held (November-December 1952) and the Acting Director-General was thus able to submit it direct to the Conference.

16. After considering that communication, the General Conference adopted resolution 7 C/O.13, which reads as follows:

"*Communication from the Government of Poland*

"The General Conference,

Having taken note of the communication addressed to the Director-General by the Chargé d'affaires *ad interim* of the People's Republic of Poland in France, announcing, on the orders of his Government, Poland's decision to withdraw from the organization;

"1. Declares that the allegations contained in the aforesaid communication are completely unfounded; and

"Considering that the organization was set up to ensure the cooperation of all the nations of the world in the field of education, science and culture;

"Considering that the States members of UNESCO have, in consequence, recognized the universal character of the purposes and functions of the organization, which has always faithfully observed the principle of universality in all its activities;

"2. Invites the Government of the People's Republic of Poland to reconsider its decision, and to resume its full collaboration in the organization's activities.

"Twenty-fifth plenary meeting
11 December 1952."

17. The communications from the Governments of Hungary and Czechoslovakia were submitted by the Director-General to the Executive Board at its 33rd session, which took place from 8 to 18 April 1953.

18. The Board decided to include the question on the provisional agenda of the second extraordinary session of the General Conference, recommending "that it adopt regarding these communications a position similar to that already taken at the seventh session on the communication received from Poland (cf. 7 C/Resolutions, 0.13), refuting the allegations contained in the communications and inviting the Governments concerned to reconsider their decision;".

19. Resolutions 9.1 and 9.3 adopted by the General Conference at its second extraordinary session (July 1953) reflected in all respects the recommendations of the Executive Board.

20. Poland, Hungary and Czechoslovakia rejoined UNESCO in 1954.

(b) *Withdrawal of South Africa (1955)*

21. On 5 April 1955, the Ambassador of the Union of South Africa in Paris addressed a communication to the Director-General informing him of the decision of his Government to withdraw from the organization as of 31 December 1956. That decision, according to the South African authorities, was motivated by "the interference in South Africa's racial problems by means of UNESCO publications".

22. The communication was submitted by the Director-General to the Executive Board at its 42nd session (November 1955), and the Board adopted a decision in which it:

"*Declares* that, in the matter of race problems, as in all other spheres, the planning and conduct of UNESCO's activities, as decided on by the General Conference, have never violated article I, paragraph 3, of the Constitution, which prohibits the organization from intervening in matters which are essentially within the domestic jurisdiction of the member States;

"*Deeply regrets* the decision of the Government of the Union of South Africa;

"*Urgently appeals* to the Government of the Union of South Africa to reconsider its decision before it takes effect".

23. South Africa ceased to be a member of UNESCO on 31 December 1956 and has maintained no relations with the organization since that time.

(c) *Notice of withdrawal of Indonesia (1965)*

24. On 12 February 1965, the Minister for Foreign Affairs of Indonesia notified the Director-General of the decision of his Government to withdraw from the organization. A similar decision of withdrawal from the United Nations and the Food and Agriculture Organization of the United Nations (FAO) had also been taken by the Indonesian Government. The reason for these decisions was the founding of the State of Malaysia and its election to the United Nations Security Council.

25. On 30 July 1966, the Indonesian Government addressed a letter to the Director-General "superseding the notice of withdrawal of 12 February 1965 which [had] not yet taken effect".

(d) *Withdrawal of Portugal (1971)*

26. On 18 June 1971, the Minister for Foreign Affairs of Portugal notified the Director-General of the decision of his Government to withdraw from the organization.

27. The grounds for this decision were said to be that "in recent years . . . the organization has deviated from its statutory purposes and taken a number of political decisions [which] were not only outside its terms of reference but were juridically forbidden to it". This decision was connected with the resolutions adopted by the General Conference concerning the Portuguese colonies (Angola, Cape Verde, Guinea-Bissau, Mozambique, Sao Tome and Principe).

28. Portugal resumed its place in UNESCO on 11 September 1974.

29. These different States which withdrew from UNESCO or regarded themselves as no longer members of UNESCO did not maintain relations with the organization and were not represented in it in any way until they returned to the organization and fully resumed their activities as member States.

(e) *Withdrawal of the United States of America*

30. On 28 December 1983, Mr. Schultz, Secretary of State of the United States of America, addressed a letter to the Director-General in accordance with the provisions of article II, paragraph 6, of the Constitution, notifying him of the withdrawal of the United States of America from the organization. (The text of the letter was reproduced as an annex to document 119 EX/14.) The United States withdrawal took effect on 31 December 1984. In this connection, Mr. Schultz addressed a communication to the Director-General on 20 December 1984, which the latter received on 4 January 1985 and the text of which is reproduced in annex I to the present document.

C. CONSTITUTIONS OF THE OTHER SPECIALIZED AGENCIES

31. The Constitutions of the agencies listed below contain provisions concerning the withdrawal of member States:

International Labour Organisation (ILO);

Food and Agriculture Organization (FAO);

International Telecommunication Union (ITU);

Universal Postal Union (UPU);

International Civil Aviation Organization (ICAO);

World Meteorological Organization (WMO);

Work Bank;

International Monetary Fund (IMF).

32. On the other hand, there is no clause in the Constitution of the World Health Organization (WHO) which relates to the withdrawal of a member State. It should be noted, however, that the resolution of the Congress of the United States of America, quoted in the instrument of ratification which the United States deposited on becoming a member of the World Health Organization, contains a provision which expressly reserves its right to withdraw, one year after giving notice, in view of the absence of any withdrawal clause in the Constitution. Several States have given notice of their decision to withdraw from WHO, including the Union of Soviet Socialist Republics, the Ukrainian Soviet Socialist Republic, Bulgaria and Albania (1949-1950). They subsequently resumed their place within WHO.

33. The withdrawal of these member States was not considered as effective by the World Health Assembly, which repeatedly invited them to take part in the activities of the organization. In May 1956, therefore, to assist them to resume their participation, and given the absence of constitutional provisions or regulations concerning withdrawal and, consequently, the financial obligations of a State giving notice of withdrawal, the World Health Assembly took the following decisions:

"The Ninth World Health Assembly,

"Having studied the recommendations of the Executive Board in resolution EB17, R27,

"Desiring to find ways and means of enabling those members who have not been actively participating in the work of the organization rapidly to resume the exercise of their rights and to fulfil their obligations,

"Considering the provisions of the Constitution governing the financial obligations of members, together with the provisions of the Financial Regulations,

"Having considered the principles and policies which should apply to the settlement of the arrears of contributions of those members,

"Considering that, during the period in which those members were not actively participating in the work of the organization the members who were actively participating carried the financial burden of the organization, bore the cost of acquiring assets which now belong to the organization, and of providing to members not actively participating certain services of the organization,

"1. Decides that contributions must be paid in full for the years during which the members participated actively in the work of the organization (including the year during which the intention of the member concerned no longer to participate in the work of the organization was communicated to the organization;

"2. Decides that, for those years during which the members did not actively participate in the work of the organization, a token payment of 5 per cent of the amount assessed each year shall be required which shall, upon payment, be considered as discharging in full the financial obligations of those members for the years concerned;

"3. Decides that the payments required under paragraphs 1 and 2 above must be paid in United States dollars or Swiss francs; and may be paid in equal annual instalments over a period not exceeding ten years beginning with the year in which active participation is resumed if the members concerned wish to take advantage of this provision of the resolution; and that payment of those annual amounts shall be construed as preventing the application of the provisions of article 7 of the Constitution;

"4. Decides that in accordance with financial regulation 5.6, payments made by the members concerned shall be credited first to the Working Capital Fund; and, further,

"5. Decides that, notwithstanding the provisions of financial regulation 5.6, payments of contributions for the years beginning with that in which the members return to active participation shall be credited to the year concerned;

"6. Requests the Director-General, as the token payments established in paragraph 2 above are received, to so adjust the accounts of the organization as is appropriate under the terms of this resolution in respect of those years;

"7. Requests the Director-General to inform the members concerned of these decisions;

"8. Expresses the hope that this decision of the Health Assembly will facilitate the resumption by the members concerned of active participation in the work of the organization."

In May 1957, the tenth session of the World Health Assembly noted with satisfaction that Albania, Bulgaria, Poland, the Ukrainian SSR and the USSR had resumed full participation in the activities of the organization.

34. At the International Labour Organisation (ILO), the withdrawal of a member State does not take effect until two years after notification, which should be submitted to the Director-General, and provided that the member which withdraws has fulfilled all its financial obligations (article 1.5 of the Constitution). The United States of America, which withdrew from ILO on 6 November 1977, resumed its place on 18 February 1980.

35. At the Food and Agriculture Organization (FAO), the withdrawal of a member nation takes effect one year after the date of its communication to the Director-General. The member nation which withdraws must pay its contribution for the entire calendar year in which notice takes effect (article XIX). However, although its sessions are biennial, the General Conference of FAO adopts two separate draft programmes, each covering one year. The budget of the second year is purely provisional and has to be approved by the Council.

36. In the following organizations:

International Telecommunication Union (ITU);
International Civil Aviation Organization (ICAO);

Universal Postal Union (UPU);
World Meteorological Organization (WMO);
the withdrawal of a member State takes effect one year after notification is given.

37. The Constitutions of those four agencies make no explicit reference to the financial obligations of a member which withdraws.

38. The withdrawal of a member State from an international organization presents a wide variety of problems, involving among other things its obligations to the organization in question, e.g., its possible participation or that of its nationals in the work or activities of the organization and its possible representation within the organization. In fact, the withdrawal of a member State from an international organization radically alters the status which it had *vis-à-vis* that organization and has an undoubted effect on the budget of the organization.

39. These problems are examined below.

II. *The withdrawal of a member State and the various organs of UNESCO*

40. Article III of the Constitution states that UNESCO has three constitutional organs: the General Conference, the Executive Board and the secretariat.

THE GENERAL CONFERENCE

41. The General Conference consists of the representatives of the States members of the organization. A State whose withdrawal from the organization becomes effective *ipso facto* loses the right to be represented by a delegation at the sessions of the General Conference. Consequently, it is also unable to belong to the subsidiary bodies of the General Conference, i.e., the commissions (programme commissions, administrative commission) and committees (in particular the Legal Committee or the Headquarters Committee). It should be noted that at each of its ordinary sessions, the General Conference elects the member States which will sit on the Legal Committee or the Headquarters Committee until the end of the next ordinary session.

42. States which are not members of UNESCO may, however, be invited to send observers to the sessions of the General Conference, in accordance with rule 6 (4) of the Rules of Procedure of the General Conference which states that:

> "The Executive Board shall before each session of the General Conference decide upon the list of States not members of UNESCO which are to be invited to send observers to that session. This decision shall be taken by a two-thirds majority. The Director-General shall notify the States which appear on this list of the convening of the session and shall invite them to send observers."

THE EXECUTIVE BOARD

43. In accordance with article V.A.1 of the Constitution, "the Executive Board shall be elected by the General Conference from among the delegates appointed by the member States and shall consist of 51 members each of whom shall represent the Government of the State of which he is a national".

44. It is clear from the wording of the relevant provisions of the Constitution, as well as from their context, that only the representatives of the Governments of member States sit on the Executive Board as members.

45. The Constitution states in article V.A.3 that the members of the Executive Board shall serve from the close of the session of the General Conference which elected them until the close of the second ordinary session of the General Conference following that election. This is a standard clause which lays down a specific length of time for the term of office.

46. The withdrawal of a State represented on the Executive Board is not specifically mentioned in article V.A.4 of the Constitution as one of the instances where the term of office of a member of the Board ends before its normal conclusion. However, when a State withdraws from the organization, its representative automatically loses the essential qualification to be a member of the Board, namely to be the representative of a member State, since non-member States are not and cannot be represented on the Executive Board.

47. The Constitution states, *inter alia*, in Article VI that:

"1. The secretariat shall consist of a Director-General and such staff as may be required.

". . .

"4. The Director-General shall appoint the staff of the secretariat in accordance with Staff Regulations to be approved by the General Conference. Subject to the paramount consideration of securing the highest standards of integrity, efficiency and technical competence, appointment to the staff shall be on as wide a geographic basis as possible.

"5. The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive any instructions from any Government or from any authority external to the organization. They shall refrain from any action which might prejudice their positions as international officials. Each State member of the organization undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties."

48. Furthermore, the Staff Regulations and Staff Rules state in rule 104.2, entitled "Limitations on employment":

"(*a*) Except when another person equally well qualified cannot be recruited, an appointment shall not be granted to a candidate who is not a citizen of a member State."

No provision of the Constitution or of the Staff Regulations and Staff Rules makes reference to the case of staff members engaged as citizens of a member State who are still employed when the withdrawal of that member State becomes effective.

Nothing in the existing Rules and Regulations implies that the situation of these staff members and the rights arising out of their contracts of employment can be affected by the withdrawal of the member State of which they are citizens.

However, it is clear that the number of staff members who are citizens of a State which has ceased to be a member and the importance of the offices they hold cannot fail to have an effect on, and may even result in some disturbance in, the operation of the quota system established in implementation of the decisions of the General Conference.

Furthermore, it is clear that, in accordance with rule 104.2 (*a*) of the Staff Regulations and Staff Rules, new staff members who are citizens of a State whose withdrawal has become effective can be recruited only in quite exceptional circumstances.

The total number of staff of United States nationality is 143 (98 staff in the Professional category and above and 45 General Service staff). The distribution of the Professional staff according to grade is as follows:

1	ADG
2	D-2
8	D-1
25	P-5
28	P-4
21	P-3
13	P-1/P-2

Among the staff in the Professional category and above listed above, 81 are paid from the regular budget of the organization. They are therefore part of the quota allotted to the United States as a member State.

49. It should be pointed out that, when the International Labour Office was obliged to eliminate a number of posts and not to renew a number of contracts in order to cope with the budget difficulties resulting from the withdrawal of the United States of America during the period from 6 November

1977 to 18 February 1980, no special measures were taken in respect of United States staff members. They were treated in the same way as officials of other nationalities. However, the Deputy Director-General, a United States national, was invited by the Director-General to submit his resignation on the basis of a mutual agreement, bearing in mind the fact that his post was one of those whose elimination had been proposed by the Director-General and approved by the Governing Body, the latter acting with the delegated authority of the International Labour Conference.

50. A major problem arises in connection with the reimbursement of the tax levied on the salaries of United States staff members of UNESCO currently in service. Under the provisions of staff rule 103.18, the organization is required to reimburse to its staff members the amount of income tax levied on their salaries and emoluments by the States of which they are nationals. That provision is worded as follows:

> "(*a*) Income tax levied by the authorities of the country of which the staff member is a national on salaries and emoluments received by him from the organization shall, subject to the provisions of (*b*) below, be reimbursed by the organization;
>
> "(*b*) The amount of the reimbursement shall be the difference between the tax payable on the staff member's total income, including UNESCO earnings, and the tax which would be payable on his income excluding UNESCO earnings."

Such reimbursements are based on the principles which require that all officials of international organizations should receive equal remuneration in their respective pay categories, independent of the influences of tax legislation. In this regard it should be pointed out that UNESCO's Constitution incorporates, through its article XII, articles 104 and 105 of the Charter of the United Nations, the latter of which stipulates that officials of the Organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions.

51. Accordingly, article VI, section 19, of the Convention on the Privileges and Immunities of the Specialized Agencies provides for exemption from taxation in respect of the salaries and emoluments paid by the specialized agencies to their officials.

52. Not having ratified that Convention, the United States Government levies income tax on the salaries of its nationals who are officials of agencies of the United Nations system.

53. Nevertheless, by the terms of an agreement concluded by an exchange of letters in 1972, the United States Government undertook to pay to UNESCO the amount that the organization is required to pay to its staff members in accordance with the provisions of the staff rule governing the reimbursement of tax levied on salaries and emoluments.

54. That agreement was denounced on 14 October 1981 by the United States Government, which proposed that it be replaced by a new arrangement, one that would be less favourable inasmuch as it would result in changing the method of calculating the amount to be reimbursed by the United States, reducing that amount in relation to the amount which the organization is itself required, under its Staff Rules, to pay to the staff members concerned. Since 31 December 1982, no reimbursement has been made to UNESCO in this respect by the United States Government.

55. As the same problem has arisen in the other agencies of the United Nations, consultations have been held among the various organizations concerned, within the Administrative Committee on Coordination, and negotiations are currently under way between the United Nations Secretariat, acting on behalf of all the organizations of the United Nations system, and the competent authorities of the United States.

56. It should be noted that total reimbursements of income tax on salaries made by UNESCO to its United States staff members amounted in 1983 to $ US 166,738.48, of which $105,098.05 was paid as advances on income tax payable in 1983.

III. *Possible relations between the organization and States withdrawing*

57. Article VII of UNESCO's Constitution, relating to "National Cooperating Bodies", contains the following provisions:

"1. Each member State shall make such arrangements as suit its particular conditions for the purpose of associating its principal bodies interested in educational, scientific and cultural matters with the work of the organization, preferably by the formation of a National Commission broadly representative of the Government and such bodies.

"2. National Commissions or National Cooperating Bodies, where they exist, shall act in an advisory capacity to their respective delegations to the General Conference and to their Governments in matters relating to the organization and shall function as agencies of liaison in all matters of interest to it.

"3. The organization may, on the request of a member State, delegate, either temporarily or permanently, a member of its secretariat to serve on the National Commission of that State, in order to assist in the development of its work."

58. The existence and legal status of National Commissions are therefore governed by the domestic legislation of member States. Accordingly, the fate of the National Commission of a member State that withdraws from UNESCO depends on the domestic legislation by which it was set up.

PERMANENT DELEGATIONS

59. In accordance with a well-established practice, many member States have accredited permanent delegations to UNESCO. According to the terminology used in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character—which has not yet come into force—"permanent mission means a mission of permanent character, representing the State, sent by a State member of an international organization to the organization" (article 1, paragraph 1 (7)).

When a State loses its membership of UNESCO, its permanent delegation also loses its *raison d'être*. It ceases to be sent by a member State and, consequently, its functions as representing that State come to an end. As a result, the arrangements between the organization and the State concerned as regards its mission and in particular the facilities it enjoys (rental of premises, distribution of documents, etc.) no longer stand. By analogy with the practice in regard to diplomatic relations, a certain "winding-up period" could be granted to the State concerned to enable it to settle all the problems related to the closing of its mission.

POSSIBILITY, FOR A NON-MEMBER STATE, OF ESTABLISHING A PERMANENT OBSERVER MISSION AT UNESCO

60. Under the terms of article II of its Constitution, UNESCO has only member States or associate members. There is no constitutional provision for the accreditation to the organization of non-member States or of States which, having been members of the organization, have decided to withdraw.

61. Article 5.2 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character provides that non-member States of an international organization may, if the rules of the organization concerned so allow, establish permanent observer missions for the performance of certain functions in respect of that organization. It should be noted that under the Vienna Convention—which is quoted here for documentary purposes only; it is not yet in force, as there have not been a sufficient number of ratifications—the expression "rules of the organization means, in particular, the constituent instruments, relevant decisions and resolutions, and established practices of the organization" (art. 1, paras. 1-34).

62. As far as UNESCO is concerned, the issue of admitting permanent observers of a non-member State was considered by the Executive Board at its second session in 1947. In the report which he submitted to the Board on the subject, the Director-General referred to the possibility of extending certain facilities enjoyed by the representatives of member States to delegates who might be accredited to the organization by certain States which were not yet members. The report stated:

"Such extension may, in some cases, seem advisable from the diplomatic point of view, and may facilitate the progressive participation in UNESCO activities of States which, for one reason or another, have not been able yet to accept the Constitution. The fact that a State which has not yet

joined UNESCO appoints a delegate to the organization is a sign of interest. It would therefore be advisable to give such representatives and delegates the broadest possible facilities in the accomplishment of their mission."

63. However, it was not until 6 February 1951 that the Executive Board approved the principle of the possible admission to headquarters of permanent observers from non-member States (25 EX/SR.14).

64. On 27 July 1951, following the report of its External Relations Committee, the Executive Board authorized the Director-General to grant observers from non-member States the facilities indicated in document 26 EX/22. These facilities were as follows:

"(*a*) Observers are issued with a laissez-passer authorizing them to attend all public meetings of the various organs of UNESCO, subject to the proviso that observers may neither sit at the meeting table or make comments except at the express invitation of the competent authority, and in accordance with the regulations in force;

"(*b*) Observers receive all documents supplied to permanent delegations;

"(*c*) Observers have access to all the various working rooms, restaurants and bars arranged for the use of permanent delegations".

It should be noted that although it refers in general terms to non-member States, this decision, its context and, in particular, the report of the Director-General which it approves, indicate that it is concerned with States that have not yet accepted the Constitution. The case of States which are no longer members of the organization—having withdrawn of their own free will—does not seem to have been envisaged. The subsequent discussion refers to non-member States, making no distinction between those that may not yet have accepted the Constitution and those that have withdrawn from the organization.

65. The renting of offices to permanent delegations was the subject of special regulations adopted by the Executive Board at its fiftieth session. This text refers only to the permanent delegations of member States. Nevertheless, it should be noted that offices have been leased to the Holy See and to the Palestine Liberation Organization (PLO), as well as to intergovernmental organizations and to international non-governmental organizations.

66. With respect to the privileges and immunities which a permanent observer mission might enjoy, this issue would have to be settled mainly between the sending State and the host State. The Headquarters Agreement concluded between UNESCO and the French Government contains no special provision for observers from non-member States. That Agreement provides only that the French authorities shall not impede the transit to or from headquarters of any persons having official duties or invited there by the organization (Art. 9, para. 1).

67. With respect to the precedent of American withdrawal from the International Labour Organisation (ILO), it should be noted that the Government of the United States did not set up a permanent observer delegation to the organization from which it had withdrawn. Nevertheless, the United States has a permanent delegation to the United Nations Office at Geneva which provides liaison with all the agencies of the United Nations system having their headquarters in Geneva.

68. The ILO office in Washington continued to operate throughout the period of withdrawal of the United States from that organization. The United States sent unofficial delegations to sessions of the International Labour Conference held during the period of withdrawal. Those delegations had no specific status and are not mentioned in the Records of the Conference.

69. As regards the establishment of a "United States observer mission to UNESCO", the Director-General wishes to inform the Executive Board that on 11 January 1985 he received the communication reproduced in annex II. The reply to that communication is given in annex III.

IV. *Impact of withdrawal on the activities of the organization*

1. IMPACT ON THE ORGANIZATION'S ACTIVITIES IN THE UNITED STATES

70. A major international organization can conduct its activities in a country only if its legal status is recognized there and if it enjoys a certain number of immunities and privileges there. The

Constitution of UNESCO also stipulates in article XII that "the provisions of Articles 104 and 105 of the Charter of the United Nations Organization concerning the legal status of that Organization, its privileges and immunities, shall apply in the same way to this organization".

71. The Convention on the Privileges and Immunities of the Specialized Agencies defines their legal status in member States and grants them the status and the rights, privileges and immunities required for the performance of their functions in their territories.

72. The United States of America has not, however, acceded to that Convention, and it is by virtue of a federal act passed by the United States Congress in 1945 (The International Organizations Immunities Act) that UNESCO enjoys, in the United States, the status, immunities and privileges required for the performance of its functions on United States territory.

73. "The International Organizations Immunities Act" defines the international organizations to which its provisions apply as those "in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate executive order", which is nevertheless subject to revocation.

74. The International Organizations Immunities Act was made applicable to UNESCO by Executive Order No. 9863, 12 *Fed.Reg.* 3559 (1947).

75. UNESCO has established two liaison offices in the United States: one in New York, the other in Washington.

76. UNESCO's liaison office in New York is the central body for liaison with the United Nations. It ensures that UNESCO is represented at the United Nations General Assembly and on its committees and commissions, at the Economic and Social Council (ECOSOC) and in its subsidiary bodies, and at the Committee for Programme and Coordination (CPC). It also provides liaison between the various units of the United Nations Secretariat and the secretariat of UNESCO. It is located on the premises of the United Nations, and this allows UNESCO staff members, their families and experts designated by the organization to enjoy the right of access to Headquarters and transit, in accordance with the provisions of the Headquarters Agreement concluded on 14 December 1946 between the United Nations and the United States. However, although staff of the office in New York and members of their families are authorized, under that Agreement, to reside in the United States, the other immunities and privileges which they enjoy, including exemption from taxation on the salaries paid to them by UNESCO, are granted to them through the International Organizations Immunities Act.

77. The Washington office, set up in 1963 and closed two years later, was reopened in 1978.

78. It is responsible for liaison with the International Bank for Reconstruction and Development, the International Development Association, the International Monetary Fund and the Organization of American States. It also liaises with the authorities of the United States and, in particular, the United States National Commission for UNESCO. The status of the Washington office and the immunities and privileges enjoyed by its officials are governed by the International Organizations Immunities Act.

79. It should be recalled, however, that the essential role of the UNESCO office in New York is to provide liaison with the United Nations and that of the UNESCO office in Washington is to provide liaison with several international organizations that have their headquarters in that city. The functions of these offices therefore concern the United Nations and the organizations located in Washington as much as they do UNESCO itself. The United States continues to be a member of these various organizations and its withdrawal from UNESCO does not seem to have affected the operations of the other organizations involved, which should continue to enjoy appropriate facilities for their relations with UNESCO. Moreover, the United Nations maintains close and constant relations with many organizations to which the United States does not belong, in particular the European Economic Community and the Council for Mutual Economic Assistance, both of which have observer status at the General Assembly of the United Nations and enjoy, in that capacity, certain facilities, privileges and immunities in the United States.

80. UNESCO also has programme activities in the United States. During the 1984-1985 bien-

nium, these included, in particular, the holding of meetings and the sending of fellowship holders to institutions of higher education.

81. There is no question but that it would become very difficult for UNESCO to continue these activities on the territory of the United States if its legal status, immunities and privileges should cease to be recognized there.

82. The withdrawal of the United States from the organization should not automatically make the International Organizations Immunities Act inapplicable to UNESCO, as this would require formal revocation by the President of the United States of the 1947 Executive Order, mentioned earlier.

83. It should be noted that the United States continued to apply the Immunities Act to the International Labour Organisation after its withdrawal in 1977. A 1979 law amended the Immunities Act in order to confirm the application of the Executive Order, which had continued to govern the situation regarding the International Labour Organisation after the withdrawal of the United States.

2. CONSEQUENCES REGARDING MULTILATERAL CONVENTIONS AND AGREEMENTS ADOPTED UNDER THE AUSPICES OF UNESCO

84. With the exception of the Beirut and Florence Agreements, conventions adopted by the General Conference are submitted to the member States for ratification and are open to the accession of any non-member State that is invited to accede to them by the Executive Board or the General Conference, as the case may be. The status of member State of UNESCO is thus a necessary condition for ratification; but while that status is required at the time when consent to be bound by the treaty is expressed, and while it determines the ratification procedure, it is not a condition of being or remaining party to the treaty. Consequently, a State which, in its capacity as a member State, has ratified conventions adopted by the General Conference does not cease to be party to those conventions merely by the fact of its withdrawal from UNESCO.

85. The Beirut and Florence Agreements, as well as all conventions adopted by international conferences of States, are open not only to the States members of UNESCO but also to every State Member of the United Nations or one of its specialized agencies, or even to any State without qualification, as the case may be. Membership of UNESCO is thus not a condition for the expression of consent to be bound by these conventions. Nor is the status of member State required in order to be or to remain party to these conventions.Consequently, a State whose withdrawal from UNESCO has become effective does not cease to be party to these conventions or agreements merely by the fact of that withdrawal.

86. As regards bodies established by conventions and agreements to which a State that has withdrawn from UNESCO is party, there is nothing to prevent that State from becoming or remaining a member of such bodies for as long as it remains party to the convention concerned. The bodies in question are the World Heritage Committee established by the Convention for the Protection of the World Cultural and Natural Heritage and the Intergovernmental Copyright Committee established by the Universal Copyright Convention. Each of these conventions provides that its committee shall be composed of States parties to the convention. Membership of UNESCO is thus not required in these instances.

87. The Convention for the Protection of the World Cultural and Natural Heritage stipulates that the World Heritage Committee shall be established under the auspices of UNESCO. This, however, does not make the Committee a subsidiary body of UNESCO. It was established by the general assembly of only the States parties to the Convention, and the fact that the Convention had been adopted by the General Conference makes no difference.

88. It should be noted that invitations to the general assemblies of parties to the Convention for the Protection of the World Cultural and Natural Heritage are issued by the Director-General of UNESCO. The Intergovernmental Copyright Committee is convened on the initiative of its Chairman. Invitations to sessions of the Committee are sent out by the Director-General of UNESCO, the organization providing the secretariat of the Committee.

89. The United States of America is party to:

the Agreement for Facilitating the International Circulation of Auditory Materials of an

Educational, Scientific and Cultural Character, adopted by the General Conference at its third session, on 10 December 1948 (Beirut Agreement);

the Agreement on the Importation of Educational, Scientific and Cultural Materials, adopted by the General Conference at its fifth session, on 17 June 1950 (Florence Agreement);

the Universal Copyright Convention and Protocols 1, 2 and 3 annexed thereto, adopted on 6 September 1952 by an international conference of States convened by UNESCO;

the Convention concerning the Exchange of Official Publications and Government Documents between States, adopted by the General Conference at its tenth session, on 3 December 1958;

the Convention concerning the International Exchange of Publications, adopted by the General Conference at its tenth session, on 3 December 1958;

the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the General Conference at its sixteenth session, on 14 November 1970;

the Universal Copyright Convention as revised at Paris on 24 July 1971 and Protocols 1 and 2 annexed thereto, adopted on 24 July 1971 by an international conference of States convened by UNESCO;

the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, adopted on 29 October 1971 by an international conference of States convened by UNESCO;

the Convention for the Protection of the World Cultural and Natural Heritage, adopted by the General Conference at its seventeenth session, on 16 November 1972.

90. According to the general information contained in paragraphs 84 and 85 above, the United States has not ceased to be a party to these conventions or agreements by the mere fact of its withdrawal from UNESCO. As stated in paragraph 86 above, it can still become a member of the subsidiary bodies established under the conventions or agreements to which it is a party, or remain a member of such bodies.

91. Furthermore, the United States of America is a signatory to:

the Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted on 14 May 1954 by an international conference of States convened by UNESCO;

the Convention relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, adopted on 21 May 1974 by an international conference of States convened by UNESCO. It deposited the instrument of ratification of this Convention with the Secretary-General of the United Nations on 7 December 1984. Under the terms of the Convention, the latter will enter into force for the United States of America three months after the deposit of that instrument;

the Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region, adopted on 21 December 1979 by an international conference of States convened by UNESCO.

92. Among these conventions, a distinction should be drawn between:

(i) The Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region, which is open "for signature and ratification by the States of the Europe region which have been invited to take part in the diplomatic conference entrusted with the adoption of this Convention . . . ". On withdrawal from UNESCO, the United States will cease to belong to the "Europe region" as defined by UNESCO. It follows that the ratification procedure can no longer be open to it. On the other hand, it can accede to the Convention if so authorized by the ad hoc committee for which provision is made to that end under the Convention;

(ii) The Convention for the Protection of Cultural Property in the Event of Armed Con-

flict, which the United States has signed but not yet ratified, and which remains open for ratification by the United States since, in accordance with its provisions, it is submitted to the signatory States for ratification.

Consequences of the withdrawal of a member State on the financing of secretariat activities relating to the UNESCO conventions to which that State is a party

93. No UNESCO convention, whether adopted by the General Conference or by a conference convened by the General Conference, contains provisions concerning the financing by the States parties to the convention of the secretariat activities entailed thereby.

94. Only the Convention for the Protection of the World Cultural and Natural Heritage institutes a fund to which the States Parties to the Convention must contribute. The resources of the fund are not allocated under the Convention to coverage of the secretariat costs of the Convention, or to coverage of the costs of the secretariat of the World Heritage Committee entrusted to the Director-General. However, further to a decision of the World Heritage Committee, which is responsible for managing the fund, a substantial sum ($90,000 in 1985) drawn from the fund is earmarked for the remuneration of temporary staff.

95. While the UNESCO conventions contain no provisions making the States parties responsible for financing secretariat activities consequent upon the conventions, all these instruments entrust the organization with specific assignments which may be more or less onerous:

secretariat of an intergovernmental committee instituted under the Convention (Universal Copyright Convention, Convention for the Protection of the World Cultural and Natural Heritage, regional Conventions on the Recognition of Studies, Diplomas and Degrees in Higher Education, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations);

secretariat of a particular body (for example, the Protocol instituting a Conciliation and Good Offices Commission to be responsible for seeking the settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education); in addition, the Protocol (article 9) makes the organization responsible for the travel and per diem allowances of the members of the Commission;

convening of any revision conferences (Florence Agreement, Rome Convention, Madrid Convention for the Avoidance of Double Taxation of Copyright Royalties);

collection and circulation of reports by States on implementation of the convention, publication of information and studies on the subject (Beirut, Florence and Protocol, The Hague, Illicit Dealing in Cultural Property, World Heritage, Exchanges of Publications, Protection of Phonograms, Combating Discrimination in Education);

technical assistance for implementation of the convention (The Hague, Illicit Dealing in Cultural Property, Exchanges of Publications, Protection of Phonograms);

certificates (Beirut) and advice regarding the educational, scientific or cultural character of material (Beirut, Florence and Protocol);

offer of good offices for the settlement of disputes (Illicit Dealing in Cultural Property, The Hague);

preparation of official versions of the convention in different languages (Universal Copyright Convention, satellite conventions, Convention on the Double Taxation of Copyright Royalties).

96. In all these cases, the General Conference of UNESCO has accepted the duties assigned to it in the draft convention; and in the light of that acceptance the convention has been adopted. The question arises whether the organization can require a State which is not a member State but which is a party to a convention of this kind to contribute to the secretariat costs when such a contribution to the costs is not provided for in the convention itself. It should be noted in this connection that conventions adopted within the framework of UNESCO are usually open, with no financial conditions attached, to accession by States which are not members of the organization.

97. One recent fact, however, needs to be pointed out: the secretariat of the Convention on Wetlands of International Importance especially as Waterfowl Habitat, generally known as the Ram-

sar Convention, of which UNESCO is the depositary, is provided by a non-governmental organization: the International Union for Conservation of Nature and Natural Resources (IUCN), which was assigned and accepted this task on a provisional basis. However, this work seems to be placing a heavy financial burden on IUCN, which has limited resources. In fact, the Ramsar Convention contains no provision for the financing of its secretariat, and no State contributes to its operation. In so far as IUCN wishes to continue to provide the secretariat of the Convention, it has no choice but to call for voluntary contributions or to request that the Convention be revised. It is working on this problem.

98. In the absence of binding provisions, it would therefore appear that only voluntary contributions to the financing of the secretariat work entailed by UNESCO conventions may be expected from States which, while being parties to these conventions, are not, or are no longer, members of the organization. Equity nevertheless calls for a financial contribution from the above-mentioned States to cover such costs. In the absence of such a contribution, the total costs would be borne by the States members of UNESCO, while those States which had withdrawn from the organization would continue to enjoy, free of charge, all the advantages and services contingent upon those conventions.

Possible participation by a State which has withdrawn from the organization in the various categories of meetings convened by UNESCO

99. Subject to any specific provisions contained in the regulations or agreements relating to the meetings themselves, and subject to decisions of the competent organs of UNESCO concerning such meetings, participation in them is established by the "Regulations for the general classification of the various categories of meetings convened by UNESCO".

International conferences of States (category I)

100. With regard to international conferences of States or diplomatic conferences, article 11, paragraph 1, of the above-mentioned Regulations provides that "the General Conference, or the Executive Board, authorized by it, shall decide which States shall be invited". The Regulations do not qualify the States at this point. However, paragraph 2 of the same article states that "Member States and associate members of UNESCO not invited under paragraph 1 above may send observers to the conference". Member States and associate members thus have a right to be represented by an observer at all the international conferences of States members of UNESCO, even without special invitation. The Regulations make no reference to non-member States. It should, however, be pointed out that the Executive Board has invited the Holy See to send an observer to the various conferences of States concerning the recognition of studies, diplomas, and degrees in higher education. In one case, that of the Europe region, the Holy See was invited as a chief participant. Djibouti, a non-member State, was similarly invited as a chief participant to attend the International Conference of States with a view to adoption of the Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and Other Academic Qualifications in Higher Education in the African States.

Intergovernmental meetings other than international conferences of States (category II)

101. With regard to such meetings, article 21, paragraph 1, of the relevant Regulations provides that "subject to the existing regulations applicable, the Executive Board, on the Director-General's proposal, shall decide on the member States and associate members whose Governments are to be invited to the meeting". Paragraph 2 specifies that "Member States and associate members not invited under paragraph 1 above may send observers to the meeting". The status of member State or associate member is therefore required here, if the country concerned is to enjoy the right to participate *fully* in these meetings or if it is to send observers. However, by virtue of paragraph 3 of article 21 of the Regulations: "The Executive Board may designate non-member States, and territories for whose international relations, a member State is responsible, to be invited to send observers to the meeting."

Non-governmental conferences (category III)

102. Non-governmental conferences, in the sense of article IV.B.3 of the Constitution, are conferences attended either by international non-governmental organizations, or by intergovernmen-

tal organizations, or by both international non-governmental and intergovernmental organizations, and addressing their conclusions either to the participating organizations or to UNESCO (article 28 of the Regulations for the general classification of the various categories of meetings convened by UNESCO).

103. In accordance with article 31 of these Regulations, member States and associate members of UNESCO may send observers. However, there are no provisions in the Regulations concerning non-member States, whose participation appears to be excluded.

International congresses (category IV)

104. International congresses are meetings of specialists serving in an individual capacity. The results of their work are addressed to the Director-General who secures their distribution and utilization in the appropriate circles (article 38 of the above-mentioned Regulations). Participants in congresses are designated individually by the Director-General, who may, for that purpose, enter into consultations with the competent authorities in member States. Persons invited to participate in a congress must, as a general rule, be nationals of States members of UNESCO or of States Members of the United Nations, but the Director-General is authorized to extend invitations to congresses to nationals of States which are not members of UNESCO or of the United Nations. For the selection of these specialists, the Director-General consults international non-governmental organizations having consultative status with UNESCO. The specialists chosen by this means are invited through such organizations, and through the same channels make known their intention of participating in the congress.

Advisory committees (category V)

105. According to article 47 of the above-mentioned Regulations, "Advisory committees are standing committees governed by statutes approved by the Executive Board and are responsible for advising the organization on special questions within their competence or on the preparation or implementation of its programme in a particular sphere."

106. Members of these committees are specialists serving either in an individual capacity or as representatives of international non-governmental organizations. They are appointed in accordance with the provisions of the statutes of these committees. Member States and associate members of UNESCO may send observers (article 50). On the other hand, no mention is made in the Regulations of non-member States, whose participation appears to be excluded.

Expert committees (category VI)

107. According to articles 56 and 57 of the Regulations, expert committees are committees set up on an ad hoc basis to submit suggestions or advice to the organization on the preparation or implementation of its programme in a particular field. They are convened by the Director-General, and the participants, who serve in a private capacity, are appointed individually, either by the Director-General or by Governments at his invitation.

108. As a general rule, meetings of expert committees are private. The Director-General may, however, if he considers it desirable from the programme point of view, invite member States and international governmental or non-governmental organizations to follow their proceedings. The participation of non-member States appears to be excluded.

Seminars and training or refresher courses (category VII)

109. According to article 65 of the Regulations, the main purpose of these meetings is to enable participants to acquire a knowledge of some subject of interest to UNESCO or to give them the benefit of experience gained in this field.

110. Participants, who are selected individually by the Director-General, are, as a general rule, nationals of States members of UNESCO or of States which are Members of the United Nations or associate members of UNESCO. As a general rule, meetings in this category are private. The Director-General may, however, if he considers it desirable from the programme point of view, invite member States and international organizations to send observers to follow their proceedings. Non-member States are not mentioned in the Regulations, and their participation appears to be excluded.

Symposia (category VIII)

111. These meetings, whose purpose is to provide for an exchange of information within a

given specialty or on an interdisciplinary basis, do not usually lead to the adoption of conclusions or recommendations (article 74).

112. Participants in these meetings are designated in accordance with rules identical to those for meetings in categories V, VI and VII (cf. paras. 105-110 of this document).

113. There is no mention, in this section of the Regulations, of observers from non-member States, whose participation appears to be excluded.

Meetings convened jointly by UNESCO and an intergovernmental organization whose membership includes a non-member State of UNESCO

114. The Regulations for the general classification of the various categories of meetings convened by UNESCO remains applicable in this case. Since, however, these Regulations were drawn up for meetings convened by UNESCO alone, account is normally taken of the relevant rules applied in the other intergovernmental organization acting jointly with UNESCO.

115. Subject to the relevant General Conference resolutions and Executive Board decisions, the usual practice when a meeting is organized jointly by UNESCO and another intergovernmental organization is to invite the member States of both organizations jointly either as chief participants or, if appropriate, as observers according to the category of the meeting in question.

Place of meeting

116. With regard to countries where meetings can be held, the Regulations relating to meetings convened by UNESCO provide that, as far as categories I, II and III are concerned, the General Conference, the Executive Board, the Director-General or the body calling the conference, as the case may be, shall consider invitations received from member States. Consequently, it does not appear possible for a non-member State to host a meeting of categories I, II or III.

117. With regard to meetings in categories IV, V, VI, VII and VIII, the Regulations stipulate that the Director-General shall fix the date and place.

Intergovernmental councils and committees

118. The General Conference has instituted various intergovernmental councils and committees to guide and supervise the preparation and implementation of certain specific parts of the organization's programme. These bodies, whose meetings are assimilated to category II meetings, are as follows:

Council of the International Bureau of Education;

Intergovernmental Committee for Physical Education and Sport;

Intergovernmental Council of the International Hydrological Programme;

International Coordinating Council for the Programme on Man and the Biosphere;

Intergovernmental Council for the General Information Programme;

Executive Committee of the International Campaign for the Establishment of the Nubia Museum in Aswan and the National Museum for Egyptian Civilization in Cairo;

International Programme for the Development of Communication;

Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Cases of Illicit Appropriation.

119. These various committees are made up of member States elected or designated by the General Conference. Should a member State elected by the General Conference (or by one of its committees) decide to withdraw from the organization, it would cease to be a member of these committees as soon as its withdrawal took effect.

120. The case of the Intergovernmental Oceanographic Commission is different. Under article 4, paragraph 1, of the Commission's statutes, membership is open to any member State of any one of the organizations of the United Nations system. A member State that withdraws from UNESCO does not lose the right to remain a member of the Commission and to continue to participate in its activities. However, as mentioned earlier (paras. 93-98) in connection with activities relating to UNESCO's conventions, this question is solely one of equity. It is fundamental none the less.

Contractual arrangements (consultants, publications, studies, the purchase of equipment, fellowships)

(i) *Consultants*

121. Although they are not expressly mentioned in rule 104.2 of the Staff Regulations and Staff Rules (which concern staff members only), it is a corollary of the standard practice of the organization, and of item 2435 of the Manual in particular, that consultants are recruited from among nationals of member States. If the same principle is applied as for the recruitment of staff members, a national of a non-member State may be selected as a consultant only in quite exceptional circumstances, when it is impossible to find an equally well qualified person who is a national of a member State. At all events, the arrangements between the organization and the State which has withdrawn from it regarding consultations for the purpose of recruiting consultants become as a result null and void.

(ii) *Publications*

122. The printing of UNESCO publications normally takes place in various countries, taking into account the quality and cost of the work, terms of delivery and the transport costs involved. Unless the quality of the work so warrants it, contracts for printing or typesetting operations will not be entrusted to firms situated in non-member States of UNESCO.

(iii) *Study contracts and other contractual arrangements*

123. With regard to contracts for research, for writing articles or books, for public information or for organizing meetings and seminars, the choice of the contractor is made on the basis of technical competence, availability, cost considerations and other relevant factors. No existing rule requires that the individual, firm or institution concerned be located in a State member of UNESCO. At present, a large number of training courses and seminars are organized directly by UNESCO or by universities or institutions of higher learning under contract (e.g., postgraduate courses listed in paras. 10154 and 10360 of 22 C/5 Approved). Since the institutions concerned are selected for their technical competence in certain specialized fields of study, their willingness to conduct such courses and the facilities available, the fact that they are located in a member State which has withdrawn from UNESCO does not seem to affect such choice.

(iv) *Equipment and supplies*

124. The main considerations which are taken into account in the award of purchase contracts are the related cost of equipment, the specific requirements of the recipient member States, the after-sales service available locally and the delivery terms offered by the suppliers. The general rule is for contracts to be awarded to the lowest bidder, provided: (*a*) he can meet the exact specifications of the equipment needed by the member State concerned; (*b*) the equipment supplied is compatible with the existing equipment; and (*c*) servicing and maintenance are readily available on the spot. There are no particular provisions for purchases in a non-member State.

(v) *Fellowships and grants*

125. Whether UNESCO will place a fellow in an institution of higher education or research situated in a non-member State of UNESCO or not depends, on the one hand, on the quality or academic standard of the institution and, on the other, on the desire expressed by the recipient member State concerned. Cost factors as well as the facilities available for administering the fellowship naturally play a significant role in the choice of the institution. This applies to fellowships and grants awarded from regular programme as well as from extrabudgetary sources. However, it is reasonable to assume that the organization will have more difficulty in securing the various advantages or services referred to above in a State that ceases to be a member of UNESCO.

V. *Budgetary and financial consequences of withdrawal*

126. The questions to be considered here are, first, the payment of contributions to the regular budget on the basis of the assessments determined by the General Conference and, secondly, other financial matters.

PAYMENT OF CONTRIBUTIONS

127. The withdrawal of a Member State may take effect either at the end of a biennium or at the end of the first year of a biennium.

128. In the first case, the programme and budget voted by the General Conference before the withdrawal takes effect are not affected. Furthermore, the General Conference is informed, prior to the vote on the programme and budget for the following budgetary period, of the financial consequences of such withdrawal and can take the necessary measures to deal with them.

129. In the second case, it has become clear that the provisions of the Constitution (art. II, para. 6) can give rise to two interpretations. The Director-General accordingly set up a working group of four jurists, assisted as regards matters falling within their competence by the Comptroller and the Director of the Bureau of the Budget, to given an opinion on the matter.

130. The opinion submitted to the Director-General by the working group was as follows:

"In the light of the foregoing considerations, the working group concludes that, under the terms of article II, paragraph 6, of the Constitution, a State member of UNESCO whose withdrawal becomes effective on 31 December 1984 will be legally bound to discharge all financial obligations, and, in particular, to make its full financial contribution to the organization's regular budget for 1984-1985 as determined by the General Conference in resolution 16 and resolution 29.1 adopted at its twenty-second session."

131. The considerations that prompted the working group to express that opinion are set out below:

"3. The working group had before it two differing opinions from the legal service and examined in detail the respective arguments on which those opinions were based. In so far as the problem before it was linked to that of programme execution and the application of the Financial Regulations, it also took account of these aspects of the question in its opinion after hearing the explanations provided in that connection by the Comptroller and the representative of the Director of the Bureau of the Budget.

"4. All but one member of the working group rejected the view that a State whose withdrawal from the organization became effective at the end of the first year of the biennium would not be liable to pay the second half of its contribution. [This view, which was supported by one member of the working group, is set out below in paragraph 132.]

"5. It indeed appeared to the other members of the working group that that view disregarded the fundamental distinction which is made in law between the coming into being of an obligation and the actual existence of a debt on the one hand, and the date on which it has to be settled, on the other. The fact that the contribution to the biennial budget is divided into two equal instalments, payment of which is required on two different dates, does not affect the fact of the existence of the debt owed by the member State concerned to the organization. It is current practice for a debtor to have time in which to make payment. His debt exists but it does not become due for settlement until the date laid down by the relevant law, decision or contract.

"6. Article II, paragraph 6, of the Constitution, relating to the withdrawal of a Member State, provides that:

'Such notice shall take effect on 31 December of the year following that during which the notice was given. No such withdrawal shall affect the financial obligations owed to the organization on the date the withdrawal takes effect.'

"7. The working group therefore discussed the date on which member States' financial obligations as regards their contributions to the biennial budget come into being.

"8. The answer to this question is given in article IX, paragraph 2, of the Constitution, which says that 'the General Conference shall approve and give final effect to the budget and to the apportionment of financial responsibility among the States members of the Organization'. The English text of the Constitution makes it quite clear that the *final effect* of the decision taken by the General Conference in this respect applies to both the adoption of the budget and the apportionment of financial responsibility among the 161 member States.

"9. It is this decision of the General Conference that creates the financial obligation of member States in regard to their contributions. The budget is adopted for a two-year financial

period and the apportionment of member States' financial responsibility covers the same period of two years. Furthermore, the programme voted by the General Conference is not divided into two equal parts to be apportioned between two years, and its execution may involve less expenditure during the first year than during the second and vice versa.

"10. To allow exceptions to the rule of the unity of the programme and of the budget and admit any reduction in the financial obligations of a State that withdraws one year before the end of the financial period would be not only to abandon a claim that comes into being, legitimately and naturally, on the date of the *'final'* approval of the budget and the *'final'* apportionment of the scales of contribution, but also to call in question the budget and the scales of assessment as well as the programme approved by the General Conference. Here, practical arguments coincide with the logic of article II, paragraph 6, of the Constitution, which clearly states that no such withdrawal shall affect the financial obligations owed to the organization on the date the withdrawal takes effect.

"11. As a result of this article, and in accordance with 22 C/Resolutions 16 (the Appropriation Resolution for 1984-1985) and 29.1 (Scale of assessments), all the States that were members of the organization at the time of the twenty-second session of the General Conference and remained so during 1984, became debtors to the organization for their assessed share of the total budget adopted. The fact that this assessed share is divided into two in no way affects the legal existence of the debt they owe to the organization, but enables them to have a longer period for payment of the second half of their debt.

"12. This interpretation of article IX of the Constitution corresponds to the interpretation given by the International Court of Justice to Article 17 of the Charter of the United Nations, the wording of which is almost identical to the wording of the Constitution. In its opinion of 20 July 1962 on certain expenses of the United Nations, the Court declared:

> 'By Article 17, paragraph 1, the General Assembly is given the power not only to "consider" the budget of the Organization, but also to "approve" it. The decision to "approve" the budget has a close connection with paragraph 2 of Article 17, since thereunder *the Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specifically stated in Article 17, paragraph 2, of each Member to bear that part of the expenses which is apportioned to it by the General Assembly.*'

"13. It cannot be overemphasized that the arguments used to counter the view of the majority of the group and based on the fact that the two halves of the contributions are paid on different dates, are in opposition to the principle of the unity of the programme and of the budget permitting its execution. The organization's practice, in accordance with the financial regulations, of dividing contributions into two halves payable at the beginning of each of the two years of the biennium, is motivated by considerations of financial convenience since UNESCO has a Working Capital Fund and does not immediately need all the contributions, and since the contributions of States in most cases come from annual budgets. This practice in no way affects the unity of the biennial contribution nor the date on which member States' obligations come into being. Article 5, paragraph 3, of the Financial Regulations clearly underlines the difference existing between the total 'commitments in respect of contributions to the budget and advances to the Working Capital Fund' and the request to member States at the beginning of the financial period to 'remit one half of their contributions for the two-year financial period'.

"14. The working group also recalled that article II, paragraph 6, of the Constitution, which deals with withdrawal, was not adopted until 1954 at the eighth session of the General Conference, i.e., two years after the Conference had decided that the organization's programme, budget and financial period would henceforth cover a two-year period and had amended the Constitution and Financial Regulations accordingly.

"15. The debates of the Legal Committee in 1954 have been taken to back up an interpretation of article II, paragraph 6, of the Constitution as limiting the financial obligations of a State

whose withdrawal became effective on 31 December 1984 to half of its contribution for the 1984-1985 biennium. The working group, however, considers that these debates show that States which withdraw are required to pay the contributions due for the full financial period.

"16. Reference should be made to the events and records of the eighth session of the General Conference.

"17. On the instructions of the Executive Board, the Director-General submitted to the Genreal Conference a draft amendment to article II of the Constitution making it possible for any member to withdraw from the organization, provided that one year's notice was given, to run from the date on which that notice was communicated.

The text of the amendment was as follows:

> 'Any member State or associate member State of the United Nations Educational, Scientific and Cultural Organization may withdraw from the organization by notice addressed to the Director-General. Such notice shall take effect one year after the date of its receipt by the Director-General. No such withdrawal shall affect the financial obligations owed to the organization at the date of withdrawal.'

"18. When submitting this draft amendment, the Legal Adviser pointed out 'that it had given rise to three proposed amendments, submitted by the Belgian, United States and Australian delegations respectively. The third of those proposals had been withdrawn . . . The Belgian delegation's draft amendment[29] provided for the withdrawal of a member State on 31 December of the year following that during which notice was given. The United States delegation's amendment[30] stipulated that the financial obligations of the State should continue throughout the financial period in which its withdrawal took effect.' The Legal Adviser concluded that those two draft amendments were in keeping with the spirit of the draft amendment to the Constitution. *He added that, in conformity with the Financial Regulations and the Constitution, member States were required to pay the contributions due for the whole financial period, and he asked the Committee to examine the Belgian and United States drafts in turn.* (Records of the fifth meeting of the Legal Committee, 26 November 1954.)

"19. This latter statement, which the working group thought it relevant to stress, was not disputed. The Belgian amendment led to a modification in the wording of the draft submitted by the Director-General, such that the date on which notice took effect was deferred until 31 December of the year following the year in which the notice was given.

"20. With regard to the financial obligations of the State concerned, however, the amendment finally adopted corresponded perfectly in spirit with the draft for which the Legal Adviser had given the above-mentioned interpretation without being contradicted. The two statements by the Belgian and American delegates, at least in the form in which they were reported, were certainly somewhat ambiguous, and the withdrawal of the American amendment may be interpreted in various ways. It seems reasonable to suppose that the General Conference and no doubt the American delegation itself were of the view that the interpretation given by the Legal Adviser made any further clarification unnecessary. In any case, the withdrawal of the American amendment, and two isolated statements—which can in any case be interpreted in two different ways—cannot be used as grounds for saying that the budgetary obligations of the State whose withdrawal might take effect on 31 December 1984 would be confined to one half of its contribution for the 1984-1985 biennium."

132. As stated above (in paragraph 4 of the quotation contained in paragraph 131), one member of the working group expressed a dissenting view, which is reproduced below:

"In support of the thesis that the financial obligations of the United States of America for the 1984-1985 budget are confined to 1984, the following arguments may be put forward:

"A. While it is true that, in conformity with paragraph 6 of article II of the Constitution, the withdrawal of the United States of America—which may take effect on 31 December 1984—'shall not affect the financial obligations owed to the organization on the date the withdrawal takes effect', this is a *general* provision which must be applied to all categories of financial obligations, namely:

(i) *legal obligations*, the legal basis for which is:

either the Constitution (financial contribution to the budget provided for by article IX, para. 2);

or a normative instrument (such as the Convention for the Protection of the World Cultural and Natural Heritage);

(ii) *contractual obligations*, the legal basis for which is an agreement between UNESCO and the United States of America (such as the memorandum concerning the International Programme for the Development of Communication (IPDC), dated 30 September 1983);

(iii) *obligations contracted unilaterally*, the legal basis for which is a unilateral undertaking by the United States of America to provide a voluntary contribution (such as its commitments concerning Moenjodaro).

"The withdrawal of the United States of America will clearly not have identical effects on these various categories of financial obligations: for several of these obligations, the legal basis will not be affected by *discontinued membership of the United States of America*. This applies to all contractual obligations and all unilaterally contracted obligations, and to all legal obligations whose legal basis is not the Constitution. The United States of America will therefore have to continue to meet them *even after the date of withdrawal*.

"B. With regard to *financial contributions to the regular budget* of the organization, their legal basis is neither contractual nor unilateral, *but solely the Constitution*. Accordingly, the fact that a member State voted for or against the budget at the General Conference, or that it was absent, in no way alters its legal obligation to contribute financially to that budget, precisely because the legal basis for that obligation is not its participation in the vote on the resolution, but the Constitution itself.

"C. The Appropriation Resolution of the General Conference *therefore serves merely to give effect to the legal obligation imposed by the Constitution itself; the resolution does not give rise to the obligation*, which derives from the membership of UNESCO of the State concerned; the resolution is concerned merely with *distributing budgetary income* by apportioning 'financial responsibility among the States members of the Organization' as provided for in article IX, paragraph 2, of the Constitution.

"D. Since the legal basis of the obligation to contribute to the budget of the organization is the Constitution, it is also in the Constitution that the reason and *grounds for the legal obligation accepted by the United States of America* are to be sought. It is in fact in terms of its *membership of UNESCO* that the financial obligation requiring the United States of America to contribute to the budget is defined. This conclusion, which may be deduced both from the context and from the actual text of article II, paragraph 6, of the Constitution ('Membership'), is borne out by the provisions of article IX ('Budget'), paragraph 2 of which stipulates quite naturally that 'the General Conference shall approve and give final effect to the budget and to the apportionment of financial responsibility among the States *members* of the organization . . .' In other words, the very text of the Constitution implies that the extent of financial obligations concerning the regular budget of the organization *must be the consequence of membership, and not the consequence of the duration of the financial period of the organization*. It follows that if the grounds for the obligation cease to exist, the obligation itself cannot but lapse, unless the treaty has expressly provided for it to continue for a certain period of time — which is not the case with UNESCO. The very basis for the financial obligations binding on the United States of America in regard to its contribution to the budget thus necessarily confines such obligations to the period during which it remains a member, in other words until 31 December 1984.

"E. The preparatory work for paragraph 6 of article II of the Constitution, and more specifically the discussions of the Legal Committee at the eighth session of the General Conference (Montevideo, 1954), in any case leave little doubt as to the extent of the obligation binding on a withdrawing State. The statement made by the Legal Adviser to the Committee that is being quoted to justify the obligation for such a State to pay its full contribution cannot stand, because it was only the lead-in to a discussion in which it was very clearly contradicted by the statements of

the representatives of Belgium, the United Kingdom and the United States of America. The fact is that the Committee *did not adopt the United States draft amendment*, the effect of which would indeed have been to *dissociate* the date on which the financial obligations accepted by a State by virtue of its membership ceased to be effective—the point being that the United States amendment provided expressly that a withdrawing State should meet its financial obligations until the end of the financial period. *That amendment was withdrawn*. The preparatory work therefore confirms that it was the Committee's intention that the two dates should coincide, which means that a withdrawing State's financial participation in the budget is confined to the period during which it remains a member of the organization.

"F. It may moreover be asked what, in the last analysis, would be the practical consequences of the provision of the Constitution that clearly specifies the date on which the withdrawal takes effect, if that date were to have no effect on the amount of the contribution to the regular budget: a State would forfeit, by definition, all its *rights* as a member while nevertheless continuing to assume its *obligations* as a member in relation to the regular budget.

"G. It may be asked, finally, whether the application of the provisions of the financial regulations envisaging the possibility of supplementary estimates does not render 'manifestly . . . *unreasonable*' (according to the expression in the Vienna Convention on the Law of Treaties) the interpretation that would involve extending the financial obligations of the United States to include 1985, even though that country will no longer be a member of the organization, will no longer have a representative on the Executive Board and will obviously not be represented at the 1985 General Conference. Article 3.9 of the Financial Regulations provides for the possibility of supplementary estimates, with the provisional approval of the Executive Board, to a total of 7.5 per cent of the existing appropriation and subject to the final approval of the General Conference *at the end of the financial period* in question, particularly if the estimates exceed this percentage. If the financial obligations of the United States under the regular budget were also to encompass 1985, it would follow that the General Conference could, retroactively, and *in the total absence* of the State concerned, increase its financial obligations for 1985. This situation is the inevitable consequence of the rule of *budgetary unity*, which is recognized by the United Nations and UNESCO alike."

133. If one examines withdrawals from the organization in the past, one finds that all the States that have withdrawn from UNESCO, or which have considered themselves to have done so, have paid in full their assessed contribution for the financial period under way or ending on the date of their withdrawal.

134. On rejoining the organization, Poland, Hungary and Czechoslovakia had to pay their budgetary contribution for the period during which they had decided not to belong to UNESCO. By a decision of the General Conference, they were allowed to repay by instalments the amounts due by way of arrears of contributions. Repayment was made in full, although Poland and Czechoslovakia initially maintained that they had ceased to be members of the organization in 1953 and that they did not therefore intend to pay that part of their contributions for the period 1953-1954 which fell due in 1953. The Contributions Committee and the General Conference itself did not accept that point of view (cf. Resolutions 1954—Report of the Administrative Commission—Collection of Contributions).

135. With regard to South Africa, whose withdrawal became effective on 31 December 1956, all the contributions owing from that country were paid in full before the effective date of the withdrawal (rate of contribution for 1955-1956: 0.70 per cent; 1955: $66,440, and 1956: $73,560).

136. With regard to Portugal, whose withdrawal—notified on 18 June 1971—became effective on 31 December 1972, full payment of its contribution for the financial period 1971-1972 was made on 30 October 1974.

137. The withdrawal of the United States of America confronts the organization with a serious financial problem which has implications not only for the exeuction of the programme for 1984-1985 but also for future activities. The financial contribution of the United States of America amounts to $43,087,500 *for each of the years* of the budgetary period 1984-1985.

138. It is for the Executive Board to indicate the measures that should be taken to cope with the financial situation arising from the withdrawal of the United States of America.

139. With regard to the *budget for the period 1984-1985, the divergence of views and interpretations of the constitutional texts and regulations that may occur as to whether the United States is liable or not liable to pay the second instalment of its contribution*, as fixed by the General Conference before the notification of that State's withdrawal, by 22 C/Resolution 16 and 22 C/Resolution 29.1, *raises a problem of international law that the Executive Board has the power, under the Constitution, to have elucidated.*

140. The Executive Board will doubtless also wish to know what measures were taken by the International Labour Organisation (ILO) to deal with the budgetary problems resulting from the withdrawal of the United States of America.

141. To attenuate the financial consequences of that withdrawal, the Director-General of ILO took the step of appealing for voluntary contributions. A circular letter to that end was addressed to member States on 2 December 1977, i.e., less than a month after the date on which the United States left that organization.

142. The complete list of voluntary contributions received, amounting to a total of $6,475,038, is as follows:

Governments *(French alphabetical order)*	*$ US*
Germany, Federal Republic of	700,000
Saudi Arabia	208,889
Australia	125,623
Austria	54,833
Bahrain	29,469
Bangladesh	6,963
Belgium	193,993
Benin	5,000
Brazil	25,000
Burma	2,593
Cameroon	5,114
Canada	200,000
Cyprus	1,741
Denmark	100,000
Denmark (DANIDA)	100,000
Spain	80,000
Fiji	7,977
Finland	62,565
France	200,000
Ghana	18,939
Greece	33,945
Guyana	2,000
India	125,000
Indonesia	30,463
Iran (Islamic Republic of)	50,000
Iraq	1,000,000
Ireland	12,000
Japan	1,000,000
Jordan	8,704
Kenya	2,000
Kuwait	174,000
Libyan Arab Jamahiriya	200,000
Luxembourg	7,547
Madagascar	1,949

Governments (*French alphabetical order*)	*$ US*
Nigeria	67,285
Norway	374,777
New Zealand	20,000
Pakistan	5,230
Papua New Guinea	5,572
Netherlands	400,000
Philippines	21,759
Qatar	17,407
United Kingdom	248,230
Somalia	16,877
Sri Lanka	1,741
Sweden	109,000
Sweden (SIDA)	217,794
Switzerland	100,000
Suriname	1,710
Thailand	20,000
Trinidad and Tobago	11,400
Tunisia	10,000
Venezuela	49,949
TOTAL	6,475,038

(Document of the 212th session of ILO, February-March 1980: GB/212/PFA/1/24)

143. Switzerland also agreed to the postponement of payment of the annuities due for 1978-1979 in respect of the new ILO building. Payment of ILO's debt to the Fondation gouvernementale suisse was thus "rescheduled", so that the final date for paying off the loan was postponed by several years. This measure reduced the ILO budget for 1978-1979 by the sum of almost $5 million (the budget provision was $4,786,261).

144. To meet immediate financial commitments, the Director-General had recourse to various internal funds (including the Working Capital Fund). In addition, facilities were made available to ILO by a certain number of banks. In particular, the Union de Banques Suisses offered the organization credit facilities to the sum of $15 million.

145. These facilities permitted ILO to meet the additional costs of monetary fluctuations and inflation on the basis of the budget for 1978-1979, as adjusted as a consequence of the withdrawal of the United States of America (see below).

146. The money involved was repaid, in large measure, out of the American contribution when the United States rejoined ILO.

147. It should be mentioned, finally, that the staff of ILO itself voluntarily agreed to a salary reduction of approximately 2.2 per cent for a period of some six months. The money thereby saved was paid into a fund which made it possible to remunerate, on a temporary basis, staff members whose posts had been abolished and who could not yet be redeployed to new posts. These voluntary contributions were subsequently repaid to the staff members who had made them.

Measures to be taken to deal with the budgetary deficit resulting from the withdrawal of a member State

148. The financial consequences which would arise from the withdrawal of a member State could be dealt with in two different ways: either by finding additional resources to offset the possible financial losses, or by reducing all or part of the organization's expenditures.

149. If the solution of reducing all or part of the expenditures were chosen, three possible courses of action might be envisaged, from the theoretical point of view, with regard to the programme.

150. The first approach would consist in eliminating—or putting into abeyance—entire parts of the programme (major programme, programme or possibly subprogrammes). The effect of this course of action would be to limit the action taken to certain groups of programmes. In such a case, it would be easy to identify the posts which would need to be abolished, since they would correspond to the programmes eliminated. There would, however, be difficulties of several kinds: in the first place, there would be a danger that international cooperation would no longer extend to fields regarded as essential by certain or by several member States and, secondly, cooperation between UNESCO and sizeable sectors of the intellectual educational, scientific and cultural communities would be interrupted.

151. The second approach would consist in choosing, in each major programme or in each programme, programme elements of varying importance which would be eliminated or implementation of which would be delayed. This approach would make it possible to maintain the organization's activity in practically all the fields in which it operates—and therefore to safeguard not only the greater part of the programme, but also the links with the intellectual educational, scientific and cultural communities which cooperate with UNESCO. It would be less easy to identify those posts which it could be decided to suppress, since the activities eliminated might correspond only to part of the duties linked to any given post.

152. The third approach, which is a variant of the second, would consist in reducing the resources of each major programme by a given, identical percentage. Such a solution would respect the previous decisions of the General Conference concerning the relative distribution of resources between the programmes; it would also, like the previous solution, make it possible to safeguard the links of cooperation with outside bodies and individuals. The problem of identifying the posts to be suppressed would arise in much the same terms as in the second approach. However, the redeployment of staff might more easily be sought within each major programme sector, without excluding the possibility of seeking solutions outside each of the sectors employing what is deemed to be excess staff.

Working Capital Fund

153. With regard to the Working Capital Fund, article 6.2 of the Financial Regulations states:

> "6.2 There shall be established a Working Capital Fund in an amount and for purposes to be determined from time to time by the General Conference. The source of moneys of the Working Capital Fund shall be advances from member States, and these advances made in accordance with the scale of assessments as determined by the General Conference for the apportionment of the expenses of UNESCO shall be carried to the credit of the member States which have made such advances."

154. Since the source of moneys in the Working Capital Fund is derived from advances made by member States, these moneys remain the property of each individual member State. Consequently, the advance to the Working Capital Fund made by a member State would be repayable to the member State in the event of its withdrawal from the organization. However, in cases where there are unpaid contributions due, it is considered a normal procedure to deduct any amounts due in respect of such arrears from the advances made by the same member State to the Working Capital Fund. The same procedure would apply equally to any other amounts due to the organization by the withdrawing member State.

155. On the other hand, if the amount of the Working Capital Fund is to be maintained at the approved level (i.e., not decreased in total) an additional assessment would have to be made on the remaining member States to bring the Working Capital Fund up to its approved level.

156. *With regard to the measures taken by ILO following the withdrawal of the United States*, the following information may be found useful: the International Labour Conference had approved in June 1977 (i.e., some months before the actual withdrawal of the United States) a programme and budget for 1978-1979 based on the assumption of receiving contributions from all member States, that is to say, not taking account of the possibility of the United States' withdrawal.

157. After having received confirmation of the United States' withdrawal, in November 1977 the Director-General submitted to the 204th session of the Governing Body of ILO, which was being

held at the very time when the withdrawal became effective, a document entitled "Measures to deal with the financial situation resulting from the withdrawal of the United States".

158. In that document, after having pointed out that "the United States withdrawal already implies a loss of income in 1977, since no contribution will be received from the United States for the last two months of [that] year", and that that shortfall could be covered thanks to economies which had already been made, particularly through the freezing of some posts, the Director-General of ILO proposed, for the budgetary period 1978-1979, reductions in the programme amounting to some $32.5 million, or 19.2 per cent of the Approved Programme and Budget for 1978-1979, which amounted to $169,074,000. In the Director-General's words, those reductions would imply "the cancellation or postponement of a number of important meetings; a considerable slowing down of ILO's technical work; reducing the Organisation's ability to provide concrete and practical advice and assistance for its member States; reducing the administrative programmes to a level at which they will, at best, only be able to provide and maintain essential services; and the separation of a number of staff members, including, no doubt, several permanent officials, which means that ILO will have to lose the services of many competent and devoted officials".

159. These reductions were apportioned among almost all the programmes of the Organisation, some of them undergoing particularly large cuts.

160. The Governing Body, after having examined these proposals, decided on even greater programme reductions, amounting to $36.6 million, i.e., 21.7 per cent of the Approved Programme and Budget for 1978-1979. It noted that the Director-General would seek to cover the difference between these reductions and the shortfall in income due to the departure of the United States (a difference representing $5.7 million for the biennium), by means of voluntary contributions and further measures of rationalization.

161. At its 205th session, in February-March 1978, the Governing Body of ILO definitively approved the reductions in the programme. These reductions included a cut-back in staff resources corresponding to 263/6 work-years among the Professional staff and 342/6 work-years among the General Service staff, i.e., resources corresponding to 302 officials.

162. The Director-General of ILO informed the Governing Body at its 212th session in February-March 1980 that it had been possible, by means of the budget cuts approved by that body together with voluntary contributions, to balance the budget for the 1978-1979 financial period.

NOTES

[1]A/9179/Add.1.

[2]For the text, see General Assembly resolution 34/180, annex; see also United Nations, *Treaty Series*, vol. 1249, p. 13.

[3]See *Juridical Yearbook, 1972*, p. 178.

[4]Judgement No. 273 of the United Nations Administrative Tribunal. For a summary of the judgement, see *Juridical Yearbook, 1981*, p. 115. The judgement was affirmed by the International Court of Justice in its advisory opinion of 20 July 1982, *I.C.J. Reports 1982*, p. 325; see also *Juridical Yearbook, 1982*, p. 225.

[5]For the summary of the judgement, see chapter V, p. 122 of the present *Yearbook*.

[6]United Nations, *Treaty Series*, vol. 500, p. 95.

[7]Sir Ernest Satow, *Satow's Guide to Diplomatic Practice*, edited by Lord Gore-Booth, 5th ed. (London and New York, Longman, 1979), p. 137.

[8]United Nations, *Treaty Series*, vol. 1, p. 163.

[9]Ibid., vol. 1, p. 15.

[10]See *Juridical Yearbook, 1968*, p. 184.

[11]"Pratique suisse en matière de droit international public, 1977", in *Annuaire suisse de droit international*, vol. XXXIV (1978), pp. 138-144.

[12]United Kingdom Treaty Series 33/185; see also Command Paper 9557.

[13]United Nations, *Treaty Series*, vol. 600, p. 93.

[14]Ibid., vol. 33, p. 261.

[15]General Assembly resolution 34/96 of 13 December 1979.

[16]A/38/141, annex, para. 29.

[17]United Nations, *Treaty Series*, vol. 11, p. 11.

[18]Ibid., vol. 1, p. 15.

[19]Public Law 79-291, December 1945.

[20]United Nations, *Treaty Series*, vol. 11, p. 11.

[21]*Yearbook of the International Law Commission, 1967*, vol. II (United Nations publication, Sales No. E.68.V.2), document A/CN.4/L.118 and Add.1 and 2.

[22]*Juridical Yearbook, 1969*, p. 226, and ibid., 1973, p. 168.

[23]Public Law 94-583, 90 STAT. 2891.

[24]The full contents of the exchange of notes were set out in information circulars ST/IC/85/48 of 12 September 1985 and ST/IC/85/74 and Corr.1 of 17 December 1985.

[25]United Nations, *Treaty Series*, vol. 1, p. 15.

[26]Ibid., vol. 500, p. 95.

[27]UNESCO document 4 X/EX/2 of 28 January 1985 and Corr.1, 2 and 4.

[28]Decision of the San Francisco Conference meeting in plenary session on the report of its Committee 1/2. Cf. UNCIO documents.

[29]The text of the amendment submitted by Belgium is as follows:

"Replace the sentence: 'Such notice shall take effect one year after the date of its receipt by the Director-General', by the following:

" 'Such notice shall take effect on 31 December of the year following that during which the notice was given'."

[30]The text of the amendment submitted by the delegation of the United States of America, to be added at the end of the first paragraph, is as follows:

"The financial obligation to the organization of a member State or associate member State which has given notice of withdrawal shall include the entire financial period in which the notice takes effect."