LEGALITY OF WITHDRAWAL FROM THE UNITED NATIONS.

By

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ABSTRACT

The emergence of United Nations and its charter came as a result of the need to restore international peace and security at the end of the two world wars. In order to achieve this objective, the drafters of charter made no express provisions permitting or prohibiting member states from leaving the organization. This begs the question as to the implications of the absence of such express provision. Does the absence of a provision allowing for withdrawal automatically mean that a state has no right to withdraw? Does it mean that the right to withdraw is inherent in member states as sovereign nations and as such needs not tobe expressly provided? This paper attempts to answer these questions after our perusal of the charter, its historical background and travaux preparatoire.

KEYWORDS: United Nations, Charter, Right, Withdrawal

INTRODUCTION

In January 2017, a bill referred to as the American Sovereignty Restoration Act of 2017 was introduced in the United States Congress. The bill sought to terminate the United States' membership in the United Nations (the UN), including any organ, specialized agency, commission, or other formally affiliated body. It also sought to prohibit any contribution to the U.N. This comes under what has been termed as the "the withdrawal doctrine"[1] under President Trump's administration whereby the United States of America has withdrawn or threatened to withdraw from several international treaties under its "America First" policy[2].

Earlier, in August 2016, the President of The Philippines, Rodrigo Duterte threatened that his country will just have to decide to separate from the United Nations[3]. This threat came following a widespread condemnation by the United Nations Special Rapporteur on the Right to Health and on Extra-Judicial, Summary and Arbitrary Executions on the Philippine's governments extra-judicial killings of suspected drug dealers in the country. However, the Philippines Foreign Affairs Minister later stated that the country had no intention of

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[1] Cyril Julien, America First or America Alone? Trump's Withdrawal Doctrine – www.timesofisrael.com/America-first-or-america-alone-trumps-withdrawal-doctrine/ <Accessed 14th October 2017>

[2] Ibid

[3] Euan Mckirdy, 'Philippines President Rodrigo Duterte insults UN, threatens to leave over criticism' CNN News (Asia, 21st August 2016) <http://edition.cnn.com/2016/08/21/asia/philippines-duterte-threatens-to-leave-un/> Accessed 21st September 2016.

"decoupling" from the United Nations and was committed to the organization. This retraction brought an end to what would have been an interesting episode under International Law. Although, for President Duterte, his threat was merely a joke[4], the occurrence alongside the recent bill by the United States of America raises questions as to whether a member state of the United Nations has a right to withdraw from the Organization.

The situation of the purported withdrawal by The Philippines is distinguishable from the United Kingdom's (the UK) recent referendum in favour of withdrawal and the UK's ongoing exit negotiations with the European Union.[5] Unlike the United Kingdom's withdrawal which was brought pursuant to Article 50 of the Lisbon Treaty which expressly allows members to voluntarily leave the European Union, the United Nations Charter which is the grundnorm of the United Nations lacks similar express provision.

This paper seeks to examine whether in the absence of an express provision in the United Nations Charter, the United States of America, the Philippines or any other member state has a right to voluntarily withdraw from the United Nations.

THE UNITED NATIONS CHARTER ON WITHDRAWAL

Article 6 of the United Nations Charter provides that a Member of the United Nations which has persistently violated the Principles contained in the Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council. While this provision makes clear the circumstances in which a member state may be removed from the United Nations, the charter of the United Nations does not contain an express provision prohibiting, permitting or regulating the question of voluntary withdrawal from the organization by a member state[6].

The absence of such express provision seems to have been an intentional act on the part of the drafters of the Charter. The Covenant of the League of Nations which metamorphosed into the United Nations contained an express right of withdrawal for members. It provided that "any Member of the League may, after two years' notice of its intention to so do, withdraw from the League, provided that all its international obligations and all its obligations under the

[4] AFP,'Philippines' Duterte: UN pull-out threat a 'joke'', (London, 24 August 2016) http://www.dailymail.co.uk/wires/afp/article-3755877/Philippines-Duterte-UN-pull-threat-joke.html Accessed 21st September 2016b

[5] The **UK European Union membership referendum (EU referendum** or **Brexit referendum)**, took place on 23 June 2016 in the UK and Gibraltar under the provisions of the European Union Referendum Act 2015 and also the Political Parties, Elections and Referendums Act 2000. The referendum resulted in a simple majority of 51.9% of people voting in favour of leaving the EU. Although legally the referendum was non-binding, the government had promised to implement the result and it initiated the official EU withdrawal process on 29 March 2017, which put the UK on course to leave the EU by 30 March 2019, after a period of negotiation with the EU.

[6] Egon Schwelb, 'Withdrawal From The United Nation The Indonesia Intermezzo' (1967), The American Journal of International Law, Vol. 61, No. 3, pp. 661-672, 661

Covenant shall have been fulfilled at the time of its withdrawal[7]. The right however "was abused by a number of states which put their narrow nationalistic interests over and above those interests to which they had subscribed when they first joined the League"[8]. For example, Japan withdrew from the League in 1933 after a unanimous resolution was passed condemning its occupation of Manchuria. Germany also withdrew in 1933 as it was not in support of military disarmament as proposed by the League. By April 1942, seventeen States out of a total membership of sixty-three had exercised their right to withdraw. This however weakened the organization and contributed to its eventual collapse.

The 1944 Dumbarton Oaks meeting which was where the blueprint for a world international organization was deliberated upon by representatives of the United States, Soviet Union, China and Great Britain developed a proposal for the structure of workings of the organization. It was clear from the deliberations that the states had different positions on whether there was a right to withdraw. The United States and the Soviet Union were of the view that all members would possess the faculty of withdrawal as such right was an expression of state sovereignty[9]. The United Kingdom however took the position that "States would have no right to withdrawal voluntarily; the intention is that membership of the Organization shall be permanent"[10]. Eventually, the proposal which emanated from the Dumbarton Oaks meeting was silent on the issue of withdrawal and merely stated that "membership of the organization should be opened to all peace loving states".

Similarly, during the deliberations at the 1945 San Francisco Conference where the United Nations Charter was eventually formulated, there was no consensus amongst member states on the issue of withdrawal. Some member states argued that granting a right of withdrawal would be contrary to the conception of universality envisaged for the organization while others were of the view that a sovereign nation could not be compelled to remain in the organization against its will[11]. After deliberations, Commission one of the San Francisco Conference and its subcommittee, Committee I/2 which were responsible for making recommendations decided against the inclusion in the Charter of a withdrawal clause. According to the Commission's recommendation

> " (t)he Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their

[7] Article 1(3) of the Charter of League of Nations

[8] Magliveras, Konstantin D. (1991) "The Withdrawal From the League of Nations Revisited, "Penn State International Law Review: Vol. 10: No. 1, Article 3.25, 71 Available at < http://elibrary.law.psu.edu/psilr/vol10/iss1/3>

[9] Egon Schwelb, 661 -662

[10] ibid

[11] *Yearbook of The United Nations, Origin and Evolution of The United Nations*, page 21 Available at http://cdn.un.org/unyearbook/yun/chapter_pdf/1946-47YUN/1946-47_P1_SEC1.pdf. Accessed on 14th November 2017

> 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.
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> It is obvious, particularly, that withdrawal or some other forms of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice.
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> Nor would a Member be bound to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect. It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal."[12]

Based on this commentary, the drafters excluded the inclusion of any express clause on withdrawal from the organization. The implication of this omission however meant that recommendations of the Commission (also referred to as "interpretative declaration" or "commentary") became the primary text on the question of withdrawal from the United Nations.

CRITICAL ANALYSIS OF THE INTERPRETATIVE DECLARATION

A critical reading of the interpretative declaration however raises more questions than it answers on the issue of withdrawal. One of such questions is as to the legal effect of the commentary. Did the statement have a binding force such that it forms part of *the travaux préparatoires* of the Charter, and may therefore be used to interpret the Charter? Could it be considered to have "taken the place of an explicit provision on withdrawal to which it might therefore truly be deemed that the charter had been silent on the matter on withdrawal?"[13].

The opinions of Scholars of International Law vary as to the status and effect of the commentary. Some scholars are of the opinion that the declaration is authoritative on the question of withdrawal hence it is binding on member states. According to Schwarzenberger "like the Charter itself, the interpretative Resolution is part of the United Nations *lex societatis*

[12]*Yearbook of The United Nations, Origin and Evolution of The United Nations*, page 21 Available at http://cdn.un.org/unyearbook/yun/chapter_pdf/1946-47YUN/1946-47_P1_SEC1.pdf. Accessed on 14th November 2017

[13] Djura Nincic, *The Problem of Sovereignty In The Charter And In The Practice of The United Nations*, Brill Archive, p 286

and all Members of the United Nations, whether original members or subsequently admitted, are bound by it."[14] According to Goodrich & Hambro, "the meaning and manner in which the declaration was adopted would seem to justify its being considered a generally accepted reservation with the same binding force as the charter"[15]. Similarly, Soder took the position that the commentary was an authentic interpretation with contractual legal force and from a legal view; it has the same value as the charter.[16]

This view is arguably supported by Art. 56(1) of the Vienna Convention on the Law of Treaties which provides that where a treaty does not explicitly provide for the possibility of withdrawal, withdrawal is not legally permissible unless it is established that the parties intended to admit the possibility of a withdrawal. The drafting history of the Charter indicates quite clearly that the parties intended to admit of the possibility of withdrawal and that despite the permanent nature of the Organization created by the Charter, the treaty was not regarded as one that would admit of no right of withdrawal. It envisioned that Member states will be able to withdraw from the organization where there are exceptional circumstances. Such circumstances were that the Organization was revealed to be unable to maintain peace or could do at the expense of law; member would not be bound to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept; if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.

However, according to Kelsen, the commentary lacked any legal importance and as such could not serve as an interpretative tool for determining whether the right to withdraw was intended. He took the position that

> "the Commentary on withdrawal included in the report of Commission I is of no legal importance. In order to get legal effect, that is to say, in order to have the character of an authentic interpretation of the Charter, the principles expounded in the commentary were to be inserted into the text of the Charter or be made the substance of another treaty concluded by all the states contracting parties to the Charter, especially of a so-called additional protocol, or be formulated as a reservation attached to the signature or to the ratification. None of these procedures was adopted"[17].

Kelsen also flawed the provision of the commentary that member states could withdraw from the organization in the event of "some exceptional circumstances". According to Kelsen, the

[14] Georg Schwarzenberger, "Letter to The Times", Times (London), 11 January 1965, quoted in Schwelb, p. 664
[15] Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (Boston: World Peace Foundation, 1949), p. 144
[16] Soder, *Die Vereinten United Nation en Und Dire Nichtmitglieder* (Bonn, 1956) , P.127
[17] Hans Kelsen, "The Law of The United Nations: A Critical Analysis of Its Fundamental Problem", (Stevens & Sons Limited, London, 1956*)*, 122-123

Commentary failed to establish who is competent to decide the question as to whether ' exceptional circumstances ' exist. The implication of this is that "Since the Charter does not confer this competence upon a special organ, any Member is authorized to decide this question for itself"[18]. It means that a member state has the right to withdraw from the Organization whenever it deems it necessary to withdraw. Similarly, one of the grounds of exceptional circumstances upon which a member state could withdraw were that Organization was revealed to be unable to maintain peace or could do only at the expense of law and justice. Again, the commentary failed to decide who is competent to decide that the Organization was unable to maintain peace and this means that any Member has the right to decide this question using its own discretion.

Another criticism by Kelsen was on the argument of member states that there was an inalienable right to withdraw from the United Nations on the grounds of state sovereignty[19]. He took the position that interpreting the concept of sovereignty to mean that a sovereign state is bound by a treaty to which it is a party only as long as it pleases is incompatible with any idea of international law binding upon the states[20]. If the concept of unrestricted sovereignty were really at the basis of the Charter, none of its provisions would have binding force upon the contracting parties. It would be extraordinarily difficult to interpret the Charter as giving members an unrestricted right to withdraw if it is to be considered as being an international instrument of any significance The charter on its own arguably restricts the sovereignty of states and eliminates the idea of unrestricted sovereignty[21]. This is because the Charter is not a treaty of just any organization. It can be argued to be the basis of contemporary international law and any withdrawal from it would amount to withdrawal from international community as a whole and even from contemporary international law

Feinberg also took similar position as Kelsen. In his view, "It cannot be denied that all international organizations have been established on the basis of voluntary membership, and to this day no international organization has emerged to which adherence is compulsory. Sovereignty is thus given full expression in the right of any State to join a particular organization, or not. But once a State decides to enter an organization it is no longer free, and its own wishes are no longer decisive".[22]

In contradiction to Kelsen's narrow formalistic approach, the position elucidated under the Vienna Convention on the Law of Treaties and by Schwarzenberger et al is certainly preferable to Kelsen's negative view, which disregards the intention of the parties.

[18] Kelsen, 125
[19] ibid
[20] ibid
[21] ibid
[22] Nathan Feinberg, *Unilateral Withdrawal from an International Organization*, 39 Brit. Y.B. Int'l L. 189, 213

INDONESIAN WITHDRAWAL

The case which would have served as precedence on this question was the attempted withdrawal by Indonesia from the United Nations and its agencies in January 1965. The Indonesian Government gave notice of its decision to withdraw from the United Nations because Malaysia was made a member of the Security Council. The United Kingdom Government criticized the move by the Indonesian government and took the position that the reason for the withdrawal, "namely the election of a non-permanent member of the Security Council which the Government of Indonesia unilaterally considers as not fulfilling the requirements of Article 23 of the Charter-is not a circumstance so exceptional in nature as to justify the Government of Indonesia in withdrawing from the Organization."[23]

In response to Indonesia's notice, the United Nations neither challenged nor affirmed the legality of the proposed withdrawal but merely acknowledged receipt of the notice[24] and "hoped that in due time, it will resume full co-operation with the United Nations"[25]. According to Schwelb, the response of the United Nations was cleverly drafted "in such a way that it might be interpreted to mean that Indonesia had not ceased to be a Member, because a non-Member could not "resume full co-operation" unless it had been admitted or, in this case, re-admitted to the Organization"[26].

However, in September 1966, the Indonesian Government "decided to resume full co-operation with the United Nations and to resume participation in its activities starting with the Twenty-First Session of the General Assembly." The United Nations however made it clear that Indonesia's absence from the Organization was based not upon a withdrawal from the organization but upon a cessation of co-operation. Although the intention of Indonesia was to withdraw and not merely to cease cooperation, the stance of the United Nations was probably influenced by the fact that the supposed withdrawal could not have been valid as the grounds given by Indonesia could not be regarded as falling into the exceptional circumstances provided for by the Commentary on withdrawal. However, by not formally recognizing the withdrawal notice and instead treating the instance as a case of non-cooperation, the United Nations missed the opportunity to establish or create a policy for exit.

CONCLUSION

It was the intention of the drafters of the United Nations Charter that there should be no express provision on withdrawal in the Charter in order to avoid a reoccurrence of what happened under the Covenant of the League of Nations. The position of the drafters was highlighted in

[23] U.N. Doc. A/5899; S/6202, Feb. 26, 1965.
[24] U.N. Doc. A/5899; S/6202, Feb. 26, 1965.
[24] U.N. Doc. A/5911; S/6229, March 12, 1965.
[25] Egon Schwelb, 'Withdrawal From The United Nation The Indonesia Intermezzo' (1967), The American Journal of International Law, Vol. 61, No. 3, pp. 661-672, 668
[26] ibid

the Interpretative declaration adopted at the San Francisco conference where it was agreed that although the Charter does not contain a right to withdraw, member states shall be able to withdraw in exceptional circumstances. This is the position of the law on withdrawal from the United Nations.

However, while Kelsen's approach to the interpretative declaration is quite overly formalistic, he raises some fundamental issues on the shortcomings of the declaration. Similar concern was raised by the Italian Government after the withdrawal of the Indonesian Government from the United Nations. According to the Italian Government, "the Commentary appear to be not entirely adequate in so far as it does not contain any definition of the circumstances which might justify withdrawal of a Member State, and it does not specify any procedure for determining those circumstances in the future. It does not indicate any procedure whereby the withdrawal of a Member State may be considered effective".[27]

Similarly, the law on withdrawal can be akin to a toothless dog that cannot bite as it lacks the necessary enforcement mechanism to compel a member state to remain in the organization. Assuming the Philippines did actually withdraw from the organization on the grounds that it was criticized by the United Nations, there would have been no sanction against the Philippines for the breach. Hence, "the rule that a Member must not withdraw for reasons other than those coming within the terms of the interpretative commentary remains therefore a *lex imperfecta*, a legal norm for the breach of which no effective legal sanction is provided".[28]

[27] U.N. Doc. A/5914; S/6356, May 17, 1965.
[28] Egon Schwelb, Withdrawal From the United Nations: The Indonesian Intermezzo, 61 AJIL 661–672 (1967). 672