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LAW OF TREATIES

Report of the Secretary-General

Addendum

CONTENTS

COMMENTS ON THE FINAL DRAFT ARTICLES ON THE LAW OF TREATIES PREPARED BY THE INTERNATIONAL LAW COMMISSION

1/ For the comments of other Governments see A/6827 and A/6827/Add.1 and for those of the Secretary-General of the United Nations, the specialized agencies and the International Atomic Energy Agency see A/6827/Add.1

UNITED STATES OF AMERICA

Transmitted by a note verbale of 2 October 1967 of the Permanent Representative to the United Nations

[Original: English]

The Government of the United States congratulates the International Law Commission on the completion of its long and arduous labours on the law of treaties. The draft articles, which reflect the thought and care devoted to this subject by the Commission, provide a substantial basis for the adoption of a convention on the law of treaties.

The United States Government approves the substantive approach adopted by the Commission in a great many of the proposed articles. From the point of view of drafting and technical detail it considers further improvement is possible and will make detailed proposals for amendments of this character at the appropriate time. In addition, it will make a number of proposals for substantive improvement in certain articles. At this time, the United States Government will limit its comments to certain problems which require consideration in light of their over-all relationship to the establishment of a body of rules on the law of treaties.

The first basic problem is whether the proposed convention on the law of treaties is to provide the body of law which governs treaties generally. The issue is raised by article 1, article 2, paragraph 1 (a) and article 4. Under article 1 and article 2, paragraph 1 (a), treaties between States and those other international persons, such as international organizations, which are generally considered to have treaty-making capacity, would be excluded from application of the provisions of the convention. This class of treaties is now substantial and will continue to increase in size. Some of the treaties concerned are of considerable importance, such as the trilateral safeguards agreements in the atomic energy field to which the International Atomic Energy Agency is a party. The International Law Commission decided to exclude treaties of this character apparently because they have "many special characteristics" so that ... "it would both unduly complicate and delay the drafting of the present articles..." to

include them.[2/] The United States Government suggests that this decision could well be reviewed in order to determine whether the articles of the draft convention do, in fact, conflict with "special characteristics" of agreements to which international organizations are parties.

In addition to article 1 and article 2, paragraph 1 (a) which have a limiting effect upon the coverage of the proposed convention, article 4 could be construed as permitting any international organization, no matter how restricted in membership or limited in purpose, to exclude the application of the convention to any or all treaties adopted within the organization. The number of multilateral treaties which are adopted within international organizations is continually increasing. To confer upon these organizations the power to abrogate what should be the generally accepted rules of international law respecting treaties is a radical step which could be justified only on the basis of a very strong case of necessity. The United States Government is not aware that any such case has been made. The Commission apparently was motivated by the same considerations of convenience as gave rise to the limitations in article 1, and article 2, paragraph 1 (a). But convenience is not enough to justify weakening to such an extent the developing frameworks of world law. International organizations should be requested to establish, article by article, why the convention should not be applicable to their treaties. Special provisions, if required, could then be made on the basis of demonstrated need, and not by blanket exclusion.

Section 2, containing articles 16 through 20 regarding reservations to multilateral treaties, establishes a system which has both advantages and disadvantages. The flexible system advocated by the International Law Commission for dealing with reservations to multilateral treaties in a world of numerous States with widely variant social, political and economic systems permits a large degree of tolerance for accommodating the special positions which may result from those variances. There may be a question, however, whether the general applicability of the system advocated would be appropriate in all circumstances. This could become a serious question since several provisions in articles 16 and 17 seem to inhibit negotiators from specifying procedures and other requirements regarding the acceptability of reservations.

2/ Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), paragraph 2 of the commentary on article 1, p. 20.

The relationship between articles 16 and 17 is confusing, particularly in view of the opening phrase of paragraph 4 of article 17, which refers only to the preceding paragraphs of that article. That limited reference and the wording of article 17 as a whole give rise to a question whether the prohibitions in article 16 are applicable to the provisions of article 17, especially paragraphs 4 (a) and 4 (c) of the latter. In view of this situation it seems desirable to combine the major requirements of articles 16 and 17 in a single article.

Several provisions in the two articles should also be amended.

The rule in sub-paragraph (b) of article 16 - that where a treaty authorizes specified reservations no other reservations can be made - may be too rigid. It is very difficult - if not impossible - for negotiators to anticipate all the reservations that may be necessary for particular States to become parties to a treaty, and in many instances the essential purpose of including such a provision may, accordingly, be to facilitate reservations with respect to certain provisions of the treaty but not to exclude reservations to other provisions. It is believed that the rule in sub-paragraph (b) would be found in the course of time to be more of an impediment than an aid in the drafting, bringing into force and application of treaties, and should therefore be deleted.

The words "object and purpose" in sub-paragraph (c) of article 16 and in paragraph 2 of article 17 are, as the Commission recognized, highly subjective. Reliance solely upon these words is especially inadvisable because of the uncertainty as to whether or not they encompass the "nature and character" of the treaty. The commentary on paragraph 4 (d) of article 16 cites the advisory opinion of the International Court of Justice on the Genocide Convention, in which the Court stressed the importance of the character of the treaty involved. The United States suggests, accordingly, that the phrase "object and purpose" be replaced by "character and purpose". At the same time, the "limited number" criterion in paragraph 2 of article 17 seems to ignore the character of the treaty involved. A treaty may involve a large number of States and still be of such a character that a reservation would be permissible, only if accepted by all of the parties. Accordingly, it is suggested that the reference to the limited number of negotiating States be omitted.

In paragraph 4 both sub-paragraphs (a) and (c) would seem to prevent the inclusion in a treaty of a provision specifying that any reservation or a specified reservation would be effective only after it had been accepted by a given number of parties. Paragraph 5 of article 17 would seem to inhibit the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months. It would seem desirable to provide for variations if the treaty concerned so permits.

The United States Government considers that articles 27 and 28 on the interpretation of treaties lay down overly rigid and unnecessarily restricted requirements. One criterion of interpretation "in accordance with the ordinary meaning to be given the terms of the treaty" is accorded primacy over all other criteria. But as Lord McNair succinctly states: "... this so-called rule of interpretation like others is merely a starting point, a prima facie guide, and cannot be allowed to obstruct the essential question in the application of treaties, namely, to search for the real intention of the contracting parties in using the language employed by them".3/

The draft articles, unfortunately, do obstruct the essential quest to determine what was the common intent of the parties in using particular language because the ordinary meaning of terms in the treaty is made, not a starting point, but the centre point about which all other aspects of the process of interpretation must revolve like satellites. Thus, consideration of context and of the object and purpose of the treaty as provided in paragraph 1 of article 27 is specifically limited to determining the ordinary meaning to be given the treaty terms while investigation into the factors indicating the genuine purpose of the parties in selecting those terms and the community context in which they are employed is implicitly excluded.

The subordinate position to which "preparatory work" on the treaty "and the circumstances of its conclusion" are relegated by article 28 aptly illustrates the extent to which the Commission's rule of interpretation ignores the intentions of the parties. What guides can be more helpful in deciding the effect a particular clause in a treaty was intended to produce than the official records of the negotiations in which the language was agreed and the documents relating to the

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3/ McNair, Arnold Duncan, Law of Treaties (Oxford: Oxford University Press, 1961), p. 366.

clause which were submitted or produced in the course of negotiations as well as the other circumstances of its conclusion? This is the almost invariable practice of Foreign Offices in the interpretation and application of treaties. The basic problem is that words can have many meanings, and what may be an ordinary meaning in one set of circumstances, may be an extraordinary one in another. To resolve this difficulty there should be free access to all pertinent sources of information. But article 27 permits recourse only to the treaty, to documents made part thereof by agreement of all the parties, subsequent practice in the application of the treaty, or to relevant rules of international law. This narrow definition of the context that may be examined in determining the meaning of the treaty terms serves to reduce drastically the means available for determining what is the true meaning of a particular word or phrase or clause while broadening considerably the field of choice in which any of several available meanings can be applied to a treaty term as the "ordinary" meaning.

The Government of the United States considers that this series of restrictions upon the interpretation process should be eliminated and that the artificial separation between articles 27 and 28 should be discarded. All of the various elements of articles 27 and 28 should be arranged to avoid any fixed hierarchy so that whatever elements of interpretation are of importance in a particular set of circumstances may be given their appropriate weight, whether it be "ordinary meaning" or "subsequent practice" or "preparatory work" or any of the other elements that facilitate correct interpretation.

Part V of the draft articles raises issues of significance to the maintenance of international stability and order. It is a truism that an effective and peaceful international community can only be built upon the basis of world agreement and the treaty process is the most effective method for securing such agreement.

The objectives of establishing peace and prosperity for all peoples demand that great care should be taken to avoid undermining the validity of treaty commitments. While individual States may momentarily believe an advantage can be derived by escape from particular treaty obligations, rules which permit easy avoidance of treaty obligations are in the final analysis detrimental to all States.

The basic question is whether the requirements for good faith fulfillment of treaty obligations set out in article 23 are not substantially impaired by permitting claims of invalidity to be advanced on insubstantial grounds under certain of the articles in section 2 of part V. The difficulty, in a number of instances, lies not in the fundamental principle giving rise to a claim of invalidity but in the sweeping fashion in which the principle is expressed and the lack of safeguards respecting its application. Articles 45, 46 and 47, for example, are all couched in the most general terms. Under article 45 any error in a treaty, relating to a fact assumed by a State to exist when it concludes a treaty, may then support a claim of invalidity by that State if the fact "formed an essential basis of its consent to be bound by the treaty". The requirements set up are highly subjective. Whether a State assumed a fact to exist and whether that fact formed an essential basis of consent are matters primarily within the knowledge and control of the State claiming that the treaty should be terminated. There is not even the requirement that the erroneous fact be of material importance to the treaty or its execution, which would supply at least one objective test.

Article 46 permits a State to invalidate a treaty which it has been induced to conclude "by the fraudulent conduct of another negotiating party". The International Law Commission admits "that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept."[4/]

In view of this lack of guidance the failure to produce any guide-posts at all to what is "fraudulent conduct" also tends to undermine the stability of treaties. Definitions of fraud can and do vary enormously over such issues as whether conscious deception is required or whether reckless disregard for the factual basis of representations made is sufficient; the circumstances under which the misrepresentation of an agent is considered the fraud of the principal; the extent of reliance upon a misrepresentation which is required to support the claim of fraud. There may not be any real requirement for an article on fraud in view of the lack of precedent but if there is to be one, it should be designed to develop the Law of Treaties, not to undercut it.

4/ Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), paragraph 2 of the commentary on article 46, p. 73.

In article 47, the operative fact is "the corruption" of a State's representative by another negotiating State. There is no definition of "corruption" given and it is not a term which has any precise meaning in international law. The article in its present form thus lends itself to avoidance of treaty obligations by distorting normal courtesies into attempts to corrupt. If protection against such acts as bribery, which has a specific legal content, is intended, then the article should list and define those acts.

Article 49 presents the same problem but in a different context. The operative clause in this article makes a treaty void if procured "by the threat or use of force in violation of the principles of the Charter of the United Nations". The result is a reference from the article to the United Nations Charter as the means for determining the meaning of "threat or use of force". If a definite meaning had been given this phrase in United Nations usage, this would have aided in supplying protection against possible use of the article for unwarranted attempts to evade treaty obligations. But it is common knowledge that there are very substantial differences as to what is a use of force in violation of the Charter of the United Nations. It has been erroneously urged from some quarters that adverse propaganda or economic measures against a State constitute a threat or use of force in violation of Charter principles. Consequently unless the "threat or use of force" is more clearly defined in article 49, such as making clear that the threat or use of armed force is required, it too could serve to destroy the stability of treaty relationships.

Article 50, as at present drafted, is a perfect example of the principle which is undeniable as an abstract proposition but is so lacking in legal content that there is no way of judging its effects. No attempt is made to define "a peremptory norm of general international law from which no derogation is permitted..." There is no effort made to distinguish a "peremptory norm" from other norms. There is no guide to determine when "no derogation is permitted" from a norm of general international law. The dangers of such a loose formulation might be less if there were consensus in international law which establishes either what the nature and content of "peremptory norms" are, or, at the least, what are the tests for determining a "peremptory norm" and what the nature and content of any particular norm is.

There is no such consensus. The ILC commentary gives as an example "a treaty contemplating an unlawful use of force contrary to the principles of the Charter".5/ As the discussion of article 49 points out there are substantial differences of view as to what kind of force is unlawful and what uses of force are contrary to the principles of the Charter. These differences are such that to say this is a norm from which no derogation is permissible would be meaningless because no one would be sure what was being derogated from. As for tests to determine when a norm is peremptory, the United States is aware of none.

For jus cogens to serve as a basis for voiding a treaty more than philosophical agreement on the existence of the principle is essential. It will be necessary to determine what are the peremptory norms of general international law now in effect. It will be necessary to define those norms so that their scope and content are established. It will be necessary to determine whether or not any exceptions are permitted to the general principle of the norm so that the area of the norm from which derogation is not permitted can be established. Slavery offers a simple example. Confinement at hard labor as punishment for a serious crime should be excluded from any decision that involuntary servitude was a violation of a peremptory norm of international law prohibiting slavery.

If such careful and meticulous delineation of existing peremptory norms is not carried out article 50 might have a most disastrous effect upon international co-operation and harmony because it could radically weaken the treaty structure upon which that harmony and co-operation depend so heavily.

The same objections apply to article 61, which voids any treaty in conflict with a "new peremptory norm of general international law". In the absence of any accepted criteria for deciding how and when a new norm is established, the way is open for any State seeking to discard its treaty obligations to claim the emergence of a norm of international law which overrides those obligations. The total effect of articles 50 and 61 is to create a substantial area of uncertainty with regard to the validity of treaty obligations.

Article 59, which permits a State to withdraw from treaty obligations on the ground of a fundamental change of circumstances, is burdened with the same threat to the stability of treaty obligations. That the International Law Commission recognized this danger is apparent from the negative manner in which the article is expressed and the limitations upon its application contained in article 59.

5/ Ibid., paragraph 2 of the commentary on article 52, p. 77.

Thus paragraph 2 (a) of the article excludes boundary treaties from the operation of the rule, and the reason given in the commentary is... "because otherwise the rule, instead of becoming an instrument of peaceful change, might become a source of dangerous frictions".[6/] The implication of this statement is that it is only boundary treaties whose unilateral termination might become a source of dangerous friction. But there are a wide range of international settlements which are not boundary treaties - but whose unilateral denunciation would give rise to dangerous friction. Peace treaties without territorial clauses, cease-fire agreements, treaty provisions for passage through straits, are a few of the areas where there are obvious dangers inherent in the unilateral application of this provision.

The rule of fundamental change of circumstances or rebus sic stantibus has had at the most a theoretical existence in the writings of jurists and a debatable existence in the practice of States. There are no decisions of international tribunals upholding the rule. The Commission's commentary also states that there are no municipal court cases which have upheld application of the rule.[7/] And State practice, which generally consists of ex parte statements or actions designed to achieve immediate advantage, does not supply any reasoned set of principles which could be adopted as a basic tenet of treaty law.

The United States Government considers that when the dangers implicit in article 59 are weighed against the advantage of providing "a safety valve in the law of treaties",[8/] the balance is against the article as drafted. The claim of fundamental change in circumstances has been made too often on inadequate grounds and is too easily distorted for partisan advantage to anticipate that it will be raised but seldom and only as a last resort. Certainly if this theory is to be included in a convention on the law of treaties as a binding rule, and neither the need for or the desirability of this course has been established, its scope and effect must be much more sharply delimited.

Over and above the internal weaknesses in these articles on invalidity and termination is the all-important question of the limitations which should be imposed to prevent abuse of the articles. No matter how precisely articles of

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6/ Ibid., paragraph 11 of the commentary on article 59, p. 87.

7/ Ibid., paragraph 3 of the commentary on article 59, p. 85.

8/ Ibid., paragraph 6 of the commentary on article 59, p. 86.

this character may be drafted, no matter how carefully the requirements for action may be defined, if the decision with respect to invalidity or termination is left to the sole decision of one of the parties to a treaty, these articles will weaken rather than strengthen the structure of treaty law. States seeking to avoid carrying out treaty commitments will be ingenious in fashioning arguments based on claims of error, or corruption or change of circumstances or jus cogens. If these arguments are subject to impartial review, if there are required procedures for determining the validity of these claims, the danger of abuse would be substantially curtailed. Article 62 on the procedure to be followed in dealing with such claims requires nothing more than a three months' waiting period after formal notice before a party to a treaty can assert it is terminating, suspending or declaring the treaty invalid. Paragraph 3 of the article specifies that if another party to the treaty objects to the proposed action, the parties must "seek a solution through the means indicated in Article 33 of the United Nations Charter". But there is nothing in article 62 which prohibits the claimant party from terminating or withdrawing from the treaty while one or more of the procedures under Article 33 of the Charter are carried out. In addition, Article 33 of the Charter offers a wide choice of means for solving a dispute but does not require the settlement of the dispute. It may accordingly be asked whether the net effect of article 62 is not to permit a claimant to judge his own case after a lapse of three months.

The Government of the United States does not consider that the procedures in article 62 are adequate. If a convention on the law of treaties is to further the development of international law it must do so by ensuring greater respect for international obligations. If such a convention is to further international peace and security it should not encourage disputes. To establish a whole series of grounds for claiming avoidance of treaty obligations and then to place no actual limitation upon the power of the interested State to decide whether it is entitled to avoid its treaty obligations is not the way to uphold the integrity of treaties or to avoid threats to the peace.

If the proposed convention is to contain provisions which authorize withdrawal from and termination of treaty obligations, then the convention should contain provisions to ensure the fair and honest application of those provisions.

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There is but one way to achieve this result and that is by some form of impartial determination. The United States Government is not wedded to any particular method of making the necessary impartial determination. It could envisage resort to the International Court of Justice or to arbitration; in appropriate cases, to some generally acceptable form of fact-finding. But it is fundamentally opposed to entering into a convention so potentially disruptive of treaty obligations without an effective provision for the settlement of disputes.

While it is the articles on validity which most clearly underscore the need for third party adjudication, other sections of the draft convention are replete with provisions which will result in disputes. To list but a few:

(a) What are "acts tending to frustrate the object of a proposed treaty" under article 15?

(b) When is a reservation "incompatible with the object and purpose of the treaty" under article 16?

(c) What determines whether a "fact or act took place or a situation ceased to exist" under article 24?

(d) How is the intent of the parties to accord third States' rights determined under article 32?

(e) Who decides whether a derogation from a provision "is incompatible with the effective execution of the object and purpose of the treaty as a whole" under article 37?

The Government of the United States fully supports the development of a universal international law of treaties. A convention on the law of treaties which lays down definite, clear and reasonable rules, and which provides a procedure that ensures the settlement of disputes regarding the application of those rules, will be a notable contribution toward the building of a peaceful international society. It is because of these great possibilities that the Government of the United States has directed attention to some weaknesses in the draft articles in the hope that the weaknesses will be corrected or eliminated. But if a convention on the law of treaties is produced with provisions that are imprecise and unclear, with language that conceals differences rather than resolves them, and with no substantial procedural safeguards for settling disputes, the result could be to increase rather than reduce controversies among States, thus weakening the most cohesive force in the international community - treaty relationships among nations.
