

**WITHDRAWAL FROM**  
**UNITED NATIONS**

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# WITHDRAWAL FROM UNITED NATIONS

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## TABLE OF INDEX

1. Abstract.....	2
2. Introduction.....	3-6
• <i>Rudimentary Proposition of essay</i> .....	3-4
• <i>Reason for selection of this topic</i> .....	4
• <i>Literature Review</i> .....	5-6
3. Structure of essay.....	7-19
• <i>Deconstructing Syntax of ‘Withdrawal from United Nations’</i> .....	7-8
• <i>Various Nuances attached to it</i> .....	8-16
• <i>Juxtaposition with other treaty</i> .....	16-17
• <i>Indonesia Precedent</i> .....	17-19
4. Conclusion of essay.....	20-21

# WITHDRAWAL FROM UNITED NATIONS

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## ABSTRACT

The major thrust of this essay lies on appraising 'whether there exist a right to withdrawal from United Nations'. It summarizes those exceptional circumstances when that right could be exercised and also lays the bare procedure which ought to be kept in mind while exercising this right, as it cannot be unilaterally exercised. The role of Vienna Convention on Law of Treaties, 1969 and Customary International Law has also been appreciated in context of giving meaning as well as dimension to this unique concept. The charter of United Nations is also juxtaposed with some well-known treaties, so as to infer what practices are laid down, in reference to this subject, under those treaties. Though many path breaking scholarly work have been completed, on this subject, but finality to this debate seems to be ongoing and never ending, especially in light of no concrete legislation in this regards.

# WITHDRAWAL FROM UNITED NATIONS

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## INTRODUCTION<sup>1</sup>

*An old adage says that no one likes to talk about divorce before a wedding. Yet that is, in effect, precisely what States do when they negotiate new treaties. Buried in the back of most international agreements are provisions that describe procedures for the treaty parties to end their relationship<sup>2</sup>. These ‘exit’ provisions share a distinctive attribute: they authorize one treaty member acting unilaterally or all treaty parties acting collectively to end their obligations under an international agreement<sup>3</sup>. The act of exiting pursuant to these provisions is thus distinguishable from a termination or withdrawal in response to breach by another treaty party<sup>4</sup>.*

### Rudimentary Proposition of essay:

Every sovereign state is left with choice “whether it would wish to be part of particular treaty or not”<sup>5</sup>. But, whether deliberately or inadvertently, the subject of withdrawal from treaty has been

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<sup>1</sup>This article is an extensive work on assessing the situation wherein members of the United Nation would be allowed to voluntarily withdraw from this organization. Author would like to thanks Dr. Nafees Ahmed (Ph.D. from Aligarh Muslim University, in 2006), Associate professor, Faculty of Legal Studies, South Asian University, Delhi, under whose guidance this essay was undertaken and completed.

<sup>2</sup> Laurence R Helfer, ‘Terminating Treaties’ (2012), Oxford University Publication 654.

<sup>3</sup> LR Helfer, ‘Exiting Treaties’ (2005) 91 Virginia L R 1579, 1582 (explaining that ‘exit clauses create a lawful, public mechanism for a state to terminate its treaty obligations or withdraw from membership in an intergovernmental organization’).

<sup>4</sup> E.g. MM Gomaa, Suspension or Termination of Treaties on Grounds of Breach (Martinus Nijhoff, The Hague 1996) 167–8; S Rosenne, Breach of Treaty (Grotius, Cambridge 1985) 117–25; AE David, The Strategy of Treaty Termination: Lawful Breaches and Retaliations (Yale University Press, New Haven 1975) 159–202. For a discussion of treaty breach, see Chapter 23. It is also important to distinguish denunciation, withdrawal, and termination of a treaty pursuant to its terms from the termination or suspension of a treaty due to supervening impossibility or fundamental change of circumstances. For further discussion of those topics, see Chapter 24. For a review of the literature on the design and use of treaty suspension and derogation clauses, see LR Helfer, ‘Flexibility in International Agreements’ in J Dunoff and M Pollack (eds.), International Law and International Relations: Taking Stock: Synthesizing Insights from Interdisciplinary Scholarship (CUP, Cambridge 2012).

<sup>5</sup> Preamble, Vienna Convention on Law of Treaty, 1969 (‘Noting that the *principles of free consent* and of good faith and the *pacta sunt servanda* rule are universally recognized.....’)

## WITHDRAWAL FROM UNITED NATIONS

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tacitly camouflaged in most of the treaties<sup>6</sup>. One such treaty, of global significance, is United Nation Charter, 1945 which is part of discussion in this essay.

This essay flesh out the basic ideas pertaining to withdrawal from united nation, through answering various questions, in second section of this essay. These questions range from what is *the meaning of the term withdrawal, what are the difference between involuntary and voluntary withdrawal, weighing possibility of withdrawal from united nation, what are the grounds for withdrawal, what are the implications of withdrawal, how to seek withdrawal when treaty oversights the clause to this extent, etc.*<sup>7</sup>. These question are necessary to be answered because no concrete legislation is their under United Nation Charter, 1945 which specifically deals with this issue and to rest this debate *between allowed or not*.

### Reasons for selection of this topic:

On 21 August 2016 at a press conference at his home city of Davao **President Rodrigo Duterte** threatened to pull the Philippines out of the United Nation in response to criticism by United Nation observers who demanded more respect for human rights following ongoing extra-judicial killings initiated by the Philippine Drug War. He followed these comments by criticizing the United Nation stating “Maybe we’ll just have to decide to separate from the United Nations” adding he would "Take us out of your organization. You have done nothing anyway."<sup>8</sup>This statement is quite critical considering the fact a member-nation of United Nation is claiming to take a unilateral action of withdrawal from this union, which makes this topic contentious under Public International law.

The other reason is ‘lack of concrete legislation’ on this subject, while it is very rich in jurisprudence<sup>9</sup>. It is because of extensive commentary on the United Nations Conference on International Organization (Hereinafter UNCIO)<sup>10</sup>. Also this subject is unprecedented, as no case

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<sup>6</sup> Laurence R Helfer, ‘Terminating Treaties’ (2012), OXFORD UNIVERSITY PUBLICATION 654.

<sup>7</sup> United Nations Conference on International Organization (Hereinafter quoted UNCIO), Summary Report of Sixth Meeting of Committee 1/2, May 14, 1945, Doc. 314, p. 2.

<sup>8</sup> Philippines President Threatens to Quit UN, Published on 09:50 A.M. Dated 21/08/2016:<https://sputniknews.com/asia/201608211044480440-un-threats-crime-law/> (last visited on 03/12/2016).

<sup>9</sup> Frances Livingstone, ‘Withdrawal from the United Nations: Indonesia’ (1965), the International and Comparative Law Quarterly, Vol. 14, No. 2, pp 637-646.

<sup>10</sup> UNCIO, Report of the Rapporteur of Committee 1/2 on Chapter III, Membership, June 24, 1945, Doc. 1178, p. 4.

## WITHDRAWAL FROM UNITED NATIONS

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pertaining to this issue ever went to International Court of Justice. Hence, selection of this topic for this essay.

### Literature review:

The core issue which has been discussed under this article has been anomaly relating to withdrawal from United Nation due to lack of concrete legislation, which has been demonstrated by *Egon Schwelb*<sup>11</sup> in his work as:

“The charter of the United Nations does not contain an express provision prohibiting, permitting or regulating question of withdrawal from the organization. The absence of such a provision from the text of the charter has caused uncertainty, confusion and controversy.”

To which *UNCIO, subcommittee of Commission I/2*<sup>12</sup>, commented in its report in following manner:

“The 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 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. It is obvious, particularly, that withdrawals or some other forms of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organization was revealed to

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<sup>11</sup> Egon Schwelb, ‘Withdrawal From The United Nation The Indonesia Intermezzo’ (1967), *The American Journal of International Law*, Vol. 61, No. 3, pp. 661-672.

<sup>12</sup> UNCIO, Report of the Rapporteur of Committee 1/2 on Chapter III, Membership, June 24, 1945, Doc. 1178, p.5.

## WITHDRAWAL FROM UNITED NATIONS

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be unable to maintain peace or could do so only at the expense of law and justice.-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.”

The International Law Commission<sup>13</sup> examined the question of unilateral termination of treaties during their Fifteenth Session and concluded that

“A treaty which contains no provision regarding its termination and which does not provide for to denunciation or withdrawal of the treaty is not subject to denunciation and withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statement of the parties that the parties intended to admit the possibility of denunciation or withdrawal. In the latter case, a party may denounce or withdraw from the treaty upon giving to other parties or to the depository not less than twelve months’ to that effect.”

The drawing of this legal distinction between a State's right to withdraw and its power to do so is not a merely academic exercise; the practical consequences become evident when considering the effects of attempted withdrawal from an international organization<sup>14</sup>.

With this we must gauge as to what are the implication of withdrawal and how can state effectuate it’s withdrawal from this organization, if at all it possible, in next section of this essay.

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<sup>13</sup> United Nation General Assembly, 18th Session, Official Records, Supplement No. 9. Document A/5509, Art. 39.

<sup>14</sup> Frances Livingstone, ‘Withdrawal from the United Nations: Indonesia’ (1965), the International and Comparative Law Quarterly, Vol. 14, No. 2, pp 637-646.

# WITHDRAWAL FROM UNITED NATIONS

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## STRUCTURE OF ESSAY

This section of essay deals with essence of withdrawal of nation from United Nation, inter alia, numerous gradations which are relating to this process, juxtaposing it with other treaty for comparative study, and appreciating Indonesia precedent..

### Deconstructing Syntax of ‘Withdrawal from United Nations’:

The literal meaning of the term ‘withdrawal’<sup>15</sup> is “the act of taking back or away something that has been granted or possessed”. Withdrawal in this parlance could either be autarchic or involuntary. But in reference to United Nation, this proposition is *easier said than done*. The convoluted lies in voluntary withdrawal. The reason behind this intricacy is unlike League of Nation<sup>16</sup>, which under its covenant provided for voluntary withdrawal<sup>17</sup>, United Nation Charter, 1945 has deliberately missed out this point under its article<sup>18</sup>.

As far as, involuntary (i.e. against the will) withdrawal is concern United Nation Charter, 1945 is quite comprehensive under its relevant article<sup>19</sup>, can cause expulsion of a member nation, which is stimulated by General Assembly<sup>20</sup>. Therefore it is not the matter of debate for this essay.

The reason behind neglecting such an important subject from the charter of United Nation was spell out in UNCIO, subcommittee of Committee I/2, *which was of the opinion that the Dumbarton Oaks Proposal*<sup>21</sup> *deliberately omitted provisions for withdrawal in order to avoid the*

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<sup>15</sup> Definition of withdrawal, <https://www.merriam-webster.com/dictionary/withdrawal>, (last visited on 4/12/2016).

<sup>16</sup> The League of Nations, 1920 (The League of Nations was an international organization, headquartered in Geneva, Switzerland, created after the First World War to provide a forum for resolving international disputes.).

<sup>17</sup> ARTICLE 1, The League of Nations Covenant, 1920 (Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.), <https://history.state.gov/milestones/1914-1920/league>, (last visited on 04/12/2016).

<sup>18</sup> Hans Kelsen, Withdrawal from the United Nations (1948), *The Western Political Quarterly*, Vol. 1, No. 1, pp. 29-43.

<sup>19</sup> Article 6, CHARTER OF THE UNITED NATIONS, 1945 (A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

<sup>20</sup> Hans Kelsen, Withdrawal from the United Nations (1948), *The Western Political Quarterly*, Vol. 1, No. 1, pp. 29-43.

<sup>21</sup> The Dumbarton Oaks Conference or, more formally, the Washington Conversations on International Peace and Security Organization was an international conference at which the United Nations was formulated and negotiated



## WITHDRAWAL FROM UNITED NATIONS

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*weakness of the League's Covenant*<sup>22</sup>. The Dumbarton Oaks Proposals<sup>23</sup>, it was asserted, intended to establish a really permanent organization. It was argued, among other things, that the possibility of withdrawal would give recalcitrant members the opportunity of securing concessions from the Organization by threatening to leave it<sup>24</sup>. This weakness of League of Nations<sup>25</sup> was first exposed by Germany<sup>26</sup> which was followed by Japan and Italy<sup>27</sup> leaving it in complete dismay.

Since there is in the Charter no provision for or prohibition of withdrawal, whether or not the *right to withdrawal* from United Nations exists, depends upon an interpretive reading of the Charter<sup>28</sup>. Aids to interpretation are the analogy of the *travaux pre'paratoires* of the Charter, 1945, Vienna Convention on Law of Treaties, 1969, customary international law and juxtaposition with other well-known treaties. These shall be effectuated in subsequent parts of this section.

### Various Nuances attached to it:

There are numerous gradations fastened with right to withdrawal, which shall be discussed exclusively in details, hereinafter.

### 1. Right to withdrawal *vis-à-vis* United Nation Charter, 1945 and its Travaux Pre'paratoires:

When the idea of right to withdrawal from United Nation to be contextualized within Charter, 1945 was posed before committee I/2<sup>29</sup>, 19 states voted affirmatively and 26 states voted

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among international leaders. The conference was held at Dumbarton Oaks from August 21, 1944, to October 7, 1944.

<sup>22</sup> UNCIO, Summary Report of Sixth Meeting of Committee 1/2, May 14, 1945, Doc. 314, p. 2.

<sup>23</sup> The Dumbarton Oaks Conference or, more formally, the Washington Conversations on International Peace and Security Organization was an international conference at which the United Nations was formulated and negotiated among international leaders. The conference was held at Dumbarton Oaks from August 21, 1944, to October 7, 1944.

<sup>24</sup> UNCIO, Report of the Rapporteur of Committee 1/2 on Chapter III, Membership, June 24, 1945, Doc. 1178, p. 4.

<sup>25</sup> The League of Nations, 1920 (The League of Nations was an international organization, headquartered in Geneva, Switzerland, created after the First World War to provide a forum for resolving international disputes.).

<sup>26</sup> Withdrawal of Germany from the League of Nations. Letter from Konstantin von Neurath, <https://www.wdl.org/en/item/11598/> (last visited on 04/12/2016).

<sup>27</sup> Japan left League of Nations in 1933 and Italy in 1937.

<sup>28</sup> Frances Livingstone, 'Withdrawal from the United Nations: Indonesia' (1965), the International and Comparative Law Quarterly, Vol. 14, No. 2, pp 637-646.

<sup>29</sup> UNCIO, Summary Report of Sixth Meeting of Committee 1/2.

## WITHDRAWAL FROM UNITED NATIONS

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negatively<sup>30</sup>. In the report of Committee<sup>31</sup> (with 38 states voted to insert this expression) following ideas were expressed:

- The Committee deems 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.
- Even after that states feels, due to exceptional circumstances, constrained and want to leave this organization, it would not be the purpose of organization to compel that member to continue its co-operation in the organization.
- Such exceptional circumstances are:
  - I. The Organization was revealed to be unable to maintain peace or could do at the expense of law.
  - II. 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.
  - III. 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.

The statement of the Committee was accepted by the States in the Plenary Session of the Conference and this acceptance has been said to be as binding on States as insertion in the Charter itself would have been<sup>32</sup>.

These aforementioned exceptions seem to be flawed because it fails to appreciate certain narratives such as:

A. Who is competent to answer or decide whether any of these ‘exceptional circumstances’ exist or not?

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<sup>30</sup> Hans Kelsen, *Withdrawal from the United Nations* (1948), *The Western Political Quarterly*, Vol. 1, No. 1, pp. 29-43.

<sup>31</sup> UNCIO, Report of the Rapporteur of Committee 1/2 on Chapter III, Membership, June 24, 1945, Doc. 1178, p.5

<sup>32</sup> UNCIO, Doc. 1086, June 19, 1945, Vol. VII, p. 266. Representative of Greece said there was “little difference from the legal point of view.”-UNCIO Doc. 1086, June 19, 1945, Vol. VII, p. 266. Fernand Dehouse, "Le Droit de Retrait," (1965) 1 *Revue Belge de Droit International* 38 said of the declaration: “En droit, elle a la meme valeur obligatoire que si elle 6tait insirde dans le corps de la charte. Schwarzenberger, letter to The Times, Jan. 11, 1965

## WITHDRAWAL FROM UNITED NATIONS

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B. The second exception is in direct contradiction to Article 108 and 109<sup>33</sup> of Charter, 1945 which lays out 'when an amendment shall come into force'. According to the Charter, 1945 there is no difference between original text of the charter and the text carried through an amendment. Therefore the amendment has binding force upon those members who have not voted for it and it cannot withdraw because it is unable to accept this amendment.

C. The third flaw co-relate to third exception which fails to answer this question that, since charter does not specify the time period within which an amendment is to be ratified by the member states, 'when does this right comes into existence'<sup>34</sup>.

Hence, the statement of the commentary that "it is not the purpose Organization to compel that Member to continue its cooperation in Organization," is incompatible with the possibilities established by above mentioned flaws.

The principle of sovereign equality<sup>35</sup> has been guaranteed in Charter, 1945 which became a bone of contention for some countries for entreating the right of withdrawal from United Nations. When, on June 25, 1945, the report of Commission I embodying commentary of Committee 1/2 was presented at the Ninth Plenary Session of the Conference, the delegate of the Soviet Union dissented by declaring that:

“The opinion of the Soviet Delegation is that it is wrong to condemn beforehand the grounds on which any state might find it necessary to exercise its right of withdrawal from the Organization. Such right is an expression of state sovereignty and should not be reviled, in advance, by the International Organization. May I cite as an example of un- conditional acknowledgment of this right of sovereign states Article 17 of the Constitution of U.S.S.R., which

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<sup>33</sup> Articles 108 and 109 of the Charter, according to which amendments to the Charter shall come into force "for all Members of the United Nations" when they have been adopted by a vote of two- thirds of the members of the General Assembly or recommended by a two- thirds vote of the General Conference, and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

<sup>34</sup> Hans Kelsen, *Withdrawal from the United Nations* (1948), *The Western Political Quarterly*, Vol. 1, No. 1, pp. 29-43.

<sup>35</sup> Article 2 Section 1 of Charter of United Nation, 1945 (The Organization is based on the principle of the sovereign equality of all its Members).

## WITHDRAWAL FROM UNITED NATIONS

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reads as follows: "To every Union Republic is reserved the right freely to secede from U.S.S.R." It is common knowledge that this right is a most striking manifestation of democracy on which the organization of the Soviet State is founded. The U.S.S.R. is formed on the basis of voluntary accession. It would be still less justifiable to condemn in advance the reasons for a state's withdrawing from the International Organization, which is also founded on voluntarily participation of sovereign states. To deny or to revile such a right would be a violation of principles of democracy and sovereignty"<sup>36</sup>.

One of the chief official advisors of the United States Delegation to the San Francisco Conference, Mr. Dulles, declared, when testifying before the Senate Committee, that:

"It was my view from the beginning, and I so advised the United States delegation, that under the original Dumbarton Oaks proposals, where there was no provision either to allow withdrawal or to veto withdrawal, it followed, as a matter of law, that there was a right of withdrawal, the reason being that the agreement was not of a type which in any sense merged the member states into a new government or under which they give up any of their independence. That being so, the arrangement was in the nature of a joint adventure, you might say, and not one whereby the member states lost their independence of action in any respect by merging it and creating a new government, as was done under the Constitution of the United States. So it was and is my view that, quite apart from any interpretation, there is a general right of withdrawal"<sup>37</sup>.

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<sup>36</sup> UNCIO, Verbatim Minutes of the Ninth Plenary Session, June 25, 1945, Doc. 1210 P/20, p. 9.

<sup>37</sup> United States Congress-Senate Committee on Foreign Relations. Hearings before the Committee on Foreign Relations, United States Senate, 79th Congress, First Session, on the Charter of the United Nations for the Maintenance of International Peace and Security, submitted by the President of the United States on July 2, 1945.

## WITHDRAWAL FROM UNITED NATIONS

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But the Rapporteur of Commission I in its meeting held on June 23, 1945, introduced the commentary by saying:

“The Commission does not recommend any text on withdrawal for inclusion in the Charter. However, the absence of such a clause is not intended to impair the right of withdrawal, which each state possesses on the basis of sovereign equality of the members”<sup>38</sup>.

The principle of "equality" of Members is in no way impaired if all the Members, large and small; do not have the right to withdraw from the Organization by a unilateral act. The same is true with respect to the principle of democracy in so far as the principle of democracy in the relationship among states is identical with that of equality<sup>39</sup>.

Kelsen's argument may be undeniably true as far as the legal right of withdrawal is concerned. 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 and the assertion of the principle of sovereign equality cannot be taken to justify such an implication<sup>40</sup>.

The other aspect of the right to withdrawal from the United Nations is that whether this right could be effectuated unilaterally by the member state or is subject to certain procedure, which ought to be followed. The United Nations Charter, 1945 has almost 196 member states in its organization. It has been incorporated with the General Assembly<sup>41</sup> which has been authorized certain powers and functions to be performed<sup>42</sup>. It becomes imperative from these notions that any such unilateral step would not be legitimate under the Charter, 1945.

Though a fixed procedure has not been established under its charter, nor any additional protocol to that effect has been signed or ratified by the state, still it holds relevance because member states

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Washington, D.C., Government Printing Office, 1945, p. 647. (As quoted from Hans Kelsen, *Withdrawal from the United Nations* (1948), *The Western Political Quarterly*, Vol. 1, No. 1, pp. 29-43.).

<sup>38</sup> UNCIO, *Verbatim Minutes of the Fifth Meeting of Commission I*, Doc. 1187, p. 5.

<sup>39</sup> Hans Kelsen, *Withdrawal from the United Nations* (1948), *The Western Political Quarterly*, Vol. 1, No. 1, pp. 29-43.

<sup>40</sup> Frances Livingstone, 'Withdrawal from the United Nations: Indonesia' (1965), *The International and Comparative Law Quarterly*, Vol. 14, No. 2, pp. 637-646.

<sup>41</sup> Article 7 of the United Nations Charter, 1945 ('there are established as the principal organs of the United Nations: a General Assembly.....').

<sup>42</sup> Article 10-17 of the United Nations Charter, 1945 (Functions and Powers).

## WITHDRAWAL FROM UNITED NATIONS

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must prove some sets of exceptional circumstances, in order to leave this nexus. Such state must also then, request from the Organization to be released from membership, and if this request is refused, the dispute should be submitted to the principal judicial organ of the Organization, the International Court of Justice. But there is no provision in the Charter which authorizes Security Council or the General Assembly to release a state from membership, and the International Court of Justice has no jurisdiction between the Organization and a Member. The Member that wishes to withdraw has to address its request to all the other Members of the organization; and the Member is allowed to exercise its right of after it has waited a reasonable period of time for an answer, unless the other Members suggest that the case be submitted to the decision of an international tribunal<sup>43</sup>.

It leads us to very important aspect, i.e. what is the legal relevance of Travaux Pre'paratoires of United Nations Charter, 1945. The commentary on withdrawal included in the report of Commission 1 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, it would have been necessary to insert the principles, expounded in the commentary into the text of the Charter, or to make them the substance of another treaty concluded by all the states which were contracting parties to the Charter, especially of a so-called additional protocol, to be formulated as reservation attached to the signature or to the ratification<sup>44</sup>.

2. Right to withdrawal in context of Vienna Convention on Law of Treaty, 1969 and Customary International Law<sup>45</sup>: Part V Section 3<sup>46</sup> of Vienna Convention on Law of Treaties, 1969 deals with termination of the operation of treaties. Where a treaty contains no provisions regarding its termination, the existence of a right of denunciation depends on the intention of the parties, which can be inferred from the terms of treaty and its subject matter, but, according to the Vienna Convention on Law of Treaties, 1969, the presumption is that terms of treaty is not

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<sup>43</sup> Hans Kelsen, *Withdrawal from the United Nations* (1948), *The Western Political Quarterly*, Vol. 1, No. 1, pp. 29-43.

<sup>44</sup> *Ibid.*

<sup>45</sup> Article 38 of Statute of International Court of Justice (Sources of International Law).

<sup>46</sup> Article 54-75 of Vienna Convention on Law of Treaties, 1969 (TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES).

## WITHDRAWAL FROM UNITED NATIONS

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subject to denunciation or withdrawal<sup>47</sup>. *At least in certain circumstances denunciation is conditional upon a reasonable period of notice. Some important law making treaties contain no denunciation clause. Treaties of peace are not open to unilateral denunciation*<sup>48</sup>. In the case of multilateral agreements, denunciation or withdrawal generally does not affect the treaty's continuation in force for the remaining parties<sup>49</sup>. But it must be cautioned that provisions of this treaty shall be applicable only upon those states, who have been parties to the Charter, 1945 after coming into force of this treaty<sup>50</sup>.

Article 56 reflected an uneasy compromise among the members of the International Law Commission (Hereinafter 'ILC') as to whether States may exit from treaties that do not contain an express denunciation or withdrawal clause. In his 1957 report to the ILC, Sir Gerald Fitzmaurice wrote that such treaties should be assumed to be of 'indefinite duration, and only terminable . . . by mutual agreement on the part of all the parties'<sup>51</sup>. Fitzmaurice also acknowledged, however, the possibility of several exceptions:

“This assumption, however, may be negated in any case (a) by necessary inference to be derived from the terms of the treaty generally, indicating its expiry in certain events, or an intention to permit unilateral termination or withdrawal; (b) should the treaty belong to a class in respect of which, *ex naturae*, a faculty of unilateral termination or withdrawal must be deemed to exist for

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<sup>47</sup> Article 56 of Vienna Convention on Law of Treaties, 1969 (DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL).

<sup>48</sup> James Crawford, 'Brownlie's Principles of Public International Law, Eight Edition (2012), Oxford University Press (U.K.).

<sup>49</sup> There are a number of exceptions. If a multilateral agreement, such as the Comprehensive Nuclear-Test-Ban Treaty (adopted 10 September 1996, not yet in force) [1996] 35 ILM 1439, Article XIV(1), requires a particular State to join the agreement as a condition of its entry into force and that State subsequently withdraws from the treaty, 'it can be assumed that . . . the treaty would be terminated'. ME Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff, Leiden 2009) 694. Termination also occurs when a multilateral treaty specifies that it shall no longer be in force if denunciations reduce the parties to below a specified number. E.g. Convention on the Political Rights of Women (adopted 20 December 1952, entered into force 7 July 1954) 193 UNTS 135, Art 8(2) (providing that the convention 'shall cease to be in force as from the date when the denunciation which reduces the number of Parties to less than six becomes effective'). However, the default rule in VCLT Art 55 allows the treaty to continue in force unless it specifies a minimum number of required parties.

<sup>50</sup> Article 4 of Vienna Convention on Law of Treaties, 1969 (NON-RETROACTIVITY OF THE PRESENT CONVENTION)

<sup>51</sup> GG Fitzmaurice, 'Second Report on the Law of Treaties' [1957] YBILC, vol. II, 16, 22.

## WITHDRAWAL FROM UNITED NATIONS

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the parties if the contrary is not indicated—such as treaties of alliance, or treaties of a commercial character”<sup>52</sup>.

A recent and high profile dispute involving Article 56 of the Vienna Convention on Law of Treaties, 1969 concerns North Korea’s attempt to denounce the International Covenant on Civil and Political Rights (Hereinafter ‘ICCPR’) in 1997. In response to the State’s action, the UN Human Rights Committee (Hereinafter ‘UNHRC’) issued a General Comment concluding that the ICCPR was not capable of denunciation or withdrawal<sup>53</sup>. Tracking Article 56’s two-part inquiry, the Committee first explained that the absence of an exit clause was not an oversight, inasmuch as the ICCPR’s First Optional Protocol and other contemporaneously negotiated human rights conventions expressly provided for withdrawal<sup>54</sup>.

Customary International Law provides for the exception to the rule of *pacta sunt servanda* which is application of *clausula rebus sic stantibus*. The meaning of the *clausula* is supposed to be only that "a vital change of circumstances may be of such kind as to justify a party in demanding to be released from the obligations of an unnotifiable treaty."<sup>55</sup> "Vital change of circumstances" means that the obligations stipulated in the treaty imperil the existence of the party which demands to release. When a state is of the opinion that a vital change of circumstances has occurred, it must first request the other party or parties to abrogate the treaty. If such abrogation, together with the suggestion to submit the case to an international court, is refused, the state may declare itself to be longer bound by the treaty<sup>56</sup>.

This principle has been codified under Vienna Convention on Law of Treaties, 1969 under the head ‘Fundamental change of circumstances’<sup>57</sup>. An example of a fundamental change would be the case where a party to a military and political alliance, involving exchange of military intelligence and information, has a change of government incompatible with the basis of

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<sup>52</sup> Ibid.

<sup>53</sup> UNHRC, ‘General Comment 26’ (1997) UN Doc CCPR/C/21/Rev1/Add8/Rev1 [5].

<sup>54</sup> Ibid.

<sup>55</sup> Oppenheim, Lassa F. L., International Law, Vol. I (Fifth Edition), New York, 1937, pp. 738 ff.

<sup>56</sup> Hans Kelsen, Withdrawal from the United Nations (1948), The Western Political Quarterly, Vol. 1, No. 1, pp. 29-43.

<sup>57</sup> Article 62 of Vienna Convention on Law of Treaties, 1969 (FUNDAMENTAL CHANGE OF CIRCUMSTANCES).



## WITHDRAWAL FROM UNITED NATIONS

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alliance<sup>58</sup>. In *Fisheries Jurisdiction case (UK v Iceland)* the International Court of Justice accepted Article 62 as a statement of customary international law but decided that the dangers to Icelandic interests resulting from new fishing techniques ‘cannot constitute a fundamental change with respect to the lapse or subsistence’ of the jurisdictional clause in a bilateral agreement<sup>59</sup>.

### Juxtaposition with other treaty:

This part of the section deals with comparative analysis of right to withdrawal in context of other treaty. International practice lends some support to this attitude to withdrawal from international organization, although the history of those organizations is not rich with examples since voluntary termination of membership is usually expressly provided for<sup>60</sup>.

The constitution of World Health Organization (commonly known as WHO) is one of the few exceptions to this practice and, in that Organization, the U.S. accepted membership with a reservation as to a right of withdrawal at one year’s notice and the Communist States subsequently withdrew without any such reservations in their acceptance of membership. It has been suggested that it is possible to regard these withdrawal as absenteeism rather than permanent decisions since the withdrawing States later re-entered as members. Nevertheless these withdrawals do provide evidence that some States have considered themselves free to withdraw despite an absence of express provision in the constitutional agreement of the members and further such withdrawal was effective<sup>61</sup>.

In the constitution of the League, although there was provision for withdrawal, the effectiveness of such withdrawal was made conditional upon the fulfilment by the withdrawing members of their financial and other obligations under the Covenant and at international law. Even so, Germany, Japan and Paraguay all succeeded in leaving the League without entirely fulfilling

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<sup>58</sup> James Crawford, ‘Brownlie’s Principles of Public International Law, Eight Edition (2012), Oxford University Press (U.K.).

<sup>59</sup> Jurisdiction, ICJ Reports 1973 p 3, 20-1.

<sup>60</sup> For instance the constitutions of ILO, FAO, ITU, UPU, ICAO, WMO, IMF, UNESCO.

<sup>61</sup> Frances Livingstone, ‘Withdrawal from the United Nations: Indonesia’ (1965), the International and Comparative Law Quarterly, Vol. 14, No. 2, pp 637-646.

## WITHDRAWAL FROM UNITED NATIONS

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those obligations and so effectively left the Organization when they had no strict legal right to withdraw<sup>62</sup>.

Unlike United Nation Charter, 1945 Treaty of Lisbon under Article 50<sup>63</sup> provides for the procedure and steps for member states to withdraw from European Union. It was recently invoked by Britain (it is still in process to be finalized) to leave European Union, which is commonly known as Brexit<sup>64</sup>.

It could be infer that, practice relating to right of withdrawal ought to be necessarily observed where treaties are not embed with clause to that effect. Also, such practice could be gauged from the treaty like Treaty of Lisbon, 2007 to form logic as to the procedure and steps to be followed while leaving the obligation under any treaty or charter.

### Indonesia Precedent:

*On 31 December 1964, the Head of our Permanent Mission in New York conveyed to Your Excellency the content of President Sukarno's statement on that date, to the effect that Indonesia would withdraw from the United Nations if neo-colonialist "Malaysia" be seated in the Security Council. Pursuant to that statement I have to inform you that on 7 January 1965, after the seating of "Malaysia" as member of the Security Council, our Government, after very careful consideration, has taken the decision to withdraw from the United Nations<sup>65</sup>. The letter claimed that the seating of 'this Malaysia' on the Security Council made "a mockery of the sense of the security council itself<sup>66</sup>". It admitted that the decision to withdraw from the United Nation was "of course a revolutionary one, unprecedented as it may be." The deputy Prime and Foreign*

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<sup>62</sup> For further discussion of withdrawals from the League see Nagendra Termination of Membership of International Organizations, and pp. 38-42.

<sup>63</sup> Article 50 of Treaty of Lisbon, 2007 (Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements).

<sup>64</sup> The United Kingdom's withdrawal from the European Union is widely known as Brexit, a portmanteau of "British exit". Following a referendum held in June 2016, in which 52% of votes were cast in favor of leaving the EU, the UK government intends to invoke Article 50 of the Treaty on European Union, the formal procedure for withdrawing, by the end of March 2017.

<sup>65</sup> LETTER DATED 20 JANUARY 1965 FROM THE FIRST DEPUTY PRIME MINISTER AND MINISTER FOR FOREIGN AFFAIRS OF INDONESIA ADDRESSED TO THE SECRETARY-GENERAL.

<sup>66</sup> Egon Schwelb, 'Withdrawal From The United Nation The Indonesia Intermezzo' (1967), The American Journal of International Law, Vol. 61, No. 3, pp. 661-672.

## WITHDRAWAL FROM UNITED NATIONS

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Minister announced that Indonesia had decided to withdraw “also from specialized agencies like FAO, UNICEF and UNESCO<sup>67</sup>”.

Upon receipt of the foregoing letter, the Secretary-General circulated it to the Security Council (S/6157) and to the General Assembly (A/5857), these being the two bodies concerned with membership questions, and transmitted it directly to all Governments of Member States, as the Governments of the States Parties to the Charter. He also held private consultations with Members of the Organization (i.e. members of the Security Council and heads of regional groups). Neither the Security Council, nor the General Assembly, took any formal action on the Indonesian letter<sup>68</sup>.

By telegram of 19 September 1966<sup>69</sup>, the Ambassador of Indonesia to the United States of America transmitted the following message to the Secretary-General: "With reference to the letter of 20 January 1965 from the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia and to your letter of 26 February 1965 in answer thereto, I hereby have the honor upon instruction of my Government to inform you that my Government has 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. A delegation headed by the Foreign Minister will arrive to attend the Assembly." Upon receipt of this telegram, the Secretary-General circulated it to the Security Council (S/7498) and to the General Assembly (A/6419)<sup>70</sup>.

From the telegram, which refers to the decision of the Government of Indonesia "to resume full co-operation with the United Nations", it would appear that that Government considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of co-operation. The action taken by the United Nations in the past on this matter would not appear to preclude this view. After it has been ascertained whether this is the general view of the membership, the Secretary-General would give instructions for the necessary administrative actions to be taken for Indonesia to participate once again in the proceedings of the Organization. It may be assumed

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<sup>67</sup> U.N. Doc. A/5857; S/6157, Jan. 21, 1965.

<sup>68</sup> U.N. Doc. A/5899; S/6202, Feb. 26, 1965; UNITED NATIONS JURIDICAL YEARBOOK, Extract from: Chapter VI. Selected legal opinions of the Secretariats of the United Nations and related inter-governmental organizations 1966; Part Two. Legal activities of the United Nations and related inter-governmental organizations.

<sup>69</sup> Telegram dates 19 September 1966 from the Ambassador of Indonesia to the United States of America Addressed to the Secretary General.

<sup>70</sup> UNITED NATIONS JURIDICAL YEARBOOK, Extract from: Chapter VI. Selected legal opinions of the Secretariats of the United Nations and related inter-governmental organizations 1966; Part Two. Legal activities of the United Nations and related inter-governmental organizations.

## WITHDRAWAL FROM UNITED NATIONS

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that, from the time that Indonesia resumes participation, it will meet in full its budgetary obligations. For the period of non-participation, if it is the general view that the bond of membership continued, it would be the intention of the Secretary-General to negotiate a requisite payment with the representatives of Indonesia<sup>71</sup>.

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<sup>71</sup> Ibid.

# WITHDRAWAL FROM UNITED NATIONS

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## CONCLUSION

It would be in the fitness of things to quote following passage from J.L. Brierly, *Laws of Nations*<sup>72</sup>:

“... There is certainly no general right of denunciation of a treat of indefinite duration; there are many such treaties in which the obvious intention of the parties is to establish a permanent state of things—for example, the *Pact of Paris*<sup>73</sup>—but there are some which we may fairly presume were intended to be susceptible of denunciation, even though they contain no express term to that effect. A *modus vivendi* is an obvious illustration: treaties of alliance and of commerce are probably in the same case”.

The Charter of the United Nations does certainly intend to establish a no less permanent state of things than the *Pact of Paris*<sup>74</sup> which does not contain a provision of withdrawal<sup>75</sup>. In spite of that, it would not serve the purpose of organization to compel its member to fulfill its obligation under its charter, in times of hardships as enumerated under exceptional circumstances.

For the sake of assumption, a hypothetical scenario, if matter's goes to the International Court of Justice, it would lack the jurisdiction to entertain the dispute. As it would not be entitled to take dispute between organization and state. But if two states are involved, with regards to same subject, then in that scenario the International Court of Justice shall decide whether there was any 'vital change of circumstances' as alleged by member states and its decision in this regard shall be final. Then it will be upon either organization (through Security Council and General Assembly) or member state to implement that decision. Even to gauge this 'vital change of circumstances', is not a simple task as International Court of Justice has to rely upon the sources

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<sup>72</sup> J.L. Brierly, 'Laws of Nations' (2<sup>nd</sup> ed. 1936), p. 201.

<sup>73</sup> The Kellogg–Briand Pact (or Pact of Paris, officially General Treaty for Renunciation of War as an Instrument of National Policy) is a 1928 international agreement in which signatory states promised not to use war to resolve "disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them."

<sup>74</sup> *Ibid.*

<sup>75</sup> Hans Kelsen, *Withdrawal from the United Nations* (1948), *The Western Political Quarterly*, Vol. 1, No. 1, pp. 29-43.

## WITHDRAWAL FROM UNITED NATIONS

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of international law<sup>76</sup>, other than treaty and customary international law, as they are hardly of any use, due to their absence in concretizing this issue or subject.

It could also be inferred that through juxtaposition, the width and the horizon of our observation has been magnified, as it lend to us some sort of concretization, even if it relates to state practice only. Also Indonesia precedent paves the way for future course of action on member states of the organization, as to right of withdrawal.

It can finally be reiterated and inferred that as a general rule, a member state shall not be allowed to leave its obligation set out under the charter of the United Nation, 1945 as leaving obligation under United Nation Charter, 1945 is made virtually not possible and it also authenticate the intent of drafters of this charter. But if their exists certain exceptional circumstances then this rigidity could be relaxed and rights could be invoked, as it is not within the comity of nations to force reluctant member to comply with its obligation even during the time of hardship due to fundamental changes in circumstances. But those rights may not be unilaterally invoked rather through proper procedure as conveyed through this essay.

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<sup>76</sup> Article 38 of Statute of International Court of Justice, 1945 (sources of international law).

## WITHDRAWAL FROM UNITED NATIONS

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