

Meanwhile, the Government of the United States of America earnestly requests the Government of the Democratic People's Republic of Korea to deal leniently with the former crew members of the USS Pueblo confiscated by the Democratic People's Republic of Korea side, taking into consideration the fact that these crew members have confessed honestly to their crimes and petitioned the Government of the Democratic People's Republic of Korea for leniency.

Simultaneously with the signing of this document, the undersigned acknowledges receipt of 82 former crew members of the Pueblo and one corpse.

On behalf of the Government  
of the United States of America  
GILBERT H. WOODWARD, *Major General, USA*  
(Dept. of State Press Releases 280, 281, Dec. 22, 1968;  
60 Dept. of State Bulletin 1, 2 (1969).)

### THIRD-PARTY DECISION

#### STATEMENT BEFORE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, TENTH SESSION, KARACHI, ON WEDNESDAY, JANUARY 22, 1969

By Myres S. McDougal

*Observer from the American Society of International Law*

Mr. President, distinguished delegates, and fellow observers:

It is a great honor and pleasure to be permitted to be an observer at this tenth session of the Asian-African Legal Consultative Committee. Mr. Oscar Schachter, the President of the American Society of International Law, has asked me to express his deep appreciation of your courtesy in allowing us to be present here, and I should like to add my own warm thanks.

For more than two years the American Society of International Law has had a special committee, of which I have been a member, studying this draft convention upon the law of treaties and making recommendations to the United States Delegation to the Vienna Conference. It was my privilege also to be a member of the United States Delegation to the first Vienna Conference. Insofar as possible, however, on this occasion I should like to follow the advice given yesterday by Dr. Nagendra Singh and to try to divest myself of all special identities. I hope, with appropriate humility and with awareness of my position as an observer, simply to speak to you as one human being to another and as a citizen of the larger community of mankind.

From this perspective, it has seemed to me that those of us who favor provision of some ultimate recourse to third-party decision-making for application of the new treaties' convention, when negotiations between the parties break down, have not begun to make as strong a case for our

position as we might make. It seems to me that the grounds for providing some ultimate recourse to third-party decision are much more fundamental than fears about the vagaries of Part V on Invalidity. These grounds cut deep into our common interests in establishing and applying any law of international agreements and into the complexities and difficulties in applying any general law to particular instances of conflict.

The excellent documentation upon this problem prepared by your Secretariat has come to my hand too late for me to consider it in making this statement. I did, however, attend some of the sessions in Vienna and I have just reviewed the summary record of the discussions of articles 62 and 62 *bis*.<sup>1</sup> I have also listened with appreciation and enlightenment to the eloquent statements made here yesterday and this morning.

The arguments against the provision of some ultimate recourse to third-party decision-making would appear to build upon five different themes. In the brief time available to me, I should like to advert to each of these types of arguments, indicating what seem to me to be persuasive reasons for rejecting each, and then to sketch in broad outline certain more positive, fundamental reasons for the establishment of some form of third-party decision for last resort when negotiations fail.

The first argument against the establishment of some form of ultimate third-party decision-making is that such decision-making in some mysterious way impairs the sovereignty of states. With all deference, it is submitted that this is not so. One might with equal realism argue that the establishment of courts within our national communities impairs the freedom of individuals. It is no more an impairment of the sovereignty of a state for it to agree to appropriate procedures for the settlement of disputes with other states than for it to agree to certain substantive provisions, such as in the draft convention, for regulating such settlement. For most peoples today sovereignty is defined as the freedom which states enjoy under international law, and it is regarded as the highest expression—not the impairment—of sovereignty for a state to engage with other states in the making and application of law. Even within our national communities a “lawful” decision is regarded as one made not merely in accord with certain policies but also by certain established procedures—whether in courts, administrative bodies, arbitration boards, and so on.

Certainly the procedures proposed in Articles 62 and 62 *bis* do not interfere with any genuine freedom of choice of states. The principal thrust of these articles is to keep the parties in negotiation as long as possible and then, when negotiation fails, to provide them the widest measure of choice among modalities of settlement. It is only when consensus falters, and one or both of the parties seeks to impose a unilateral will upon the other, that recourse to third-party assistance is stipulated.

The second argument against ultimate recourse to third-party decision-making is that it may be partial or biased and take extra-legal considerations into account. Again, it is submitted with deference, the facts cut

<sup>1</sup> Appended at end of this statement.

exactly the opposite way. If there is to be no resort to a third party when there is ultimate disagreement between the parties, then the state with greatest effective power is left free to impose its will upon the other. From the standpoint of the state so imposed upon, no decision could be more partial, arbitrary, and unequal. When decisions are taken by unilateral choice only, naked power and not law is the governor. When there is only unilateral appreciation of facts and law, certainly partiality and extra-legal considerations are afforded their freest sway. Since it is not to be supposed that any one state, or group of states, or type of state—new or old, large or small, located in one part of the world or another—will always have the naked power to secure what it regards as its special interests, there would appear a common interest in all states in reducing this type of decision.

The third principal argument against ultimate recourse to third-party decision is that there is no modern, acceptable law for such decision-maker to apply. This argument, again, would appear to be belied by the facts. This new convention, in the drafting and prescribing of which so many states have had a hand offers a relevant and comprehensive formulation, adequately reflecting common interest.

The gravest danger is not that there will be no law, but that there will be no procedures for the application of what could otherwise be good law. The danger is that the broad policy formulations in the new convention may be stillborn because they are not complemented by appropriate procedures for their application.

It has been suggested that procedures for application are not necessary parts of a law of agreements. This would appear profoundly mistaken. Many branches of the law within our national communities require unique procedures and are incomplete without such procedures: witness the law of crimes or that of torts or delicts. Similarly, a law adequate to regulate the making, interpretation, performance and termination of agreements—whether within national or international arenas—must require its own economic and especially adapted procedures.

The fourth argument against ultimate recourse to third-party decision is that such decision might be employed to keep parties subjected to out-moded, oppressive agreements based more on coercion than on genuine mutual commitment. This fear, again, would appear unfounded. The new convention has many flexibilities written into it and embodies concepts about consent to be bound and invalidity, at least as old as Roman law, designed to secure and protect the genuine mutual consent of the parties. Similarly, the formulations of the convention about termination are most generous in taking into account the relevance of change, making explicit provision for fundamental change in circumstances and for supervening impossibility of performance.

It is common ground in most legal systems today that there is no virtue in authority, law or agreement *per se*. The virtue of authority, law, and agreement is in the common purposes and interests they serve, and when conditions so change that common purposes and interests can no longer

be served, authoritative arrangements should also be changed. Law, appropriately conceived, has no built-in preference for the *status quo*.

It would appear that the new convention is adequately expressive of these contemporary conceptions of authority and affords full opportunity for a changing response to changing conditions. Certainly third-party decision guided by its generous provisions is likely to be less destructive of the common interest than unilateral appreciation of the relevance of change by any particular state which happens at any given time to have the effective power to make its will prevail.

The fifth and final major argument against the establishment of third-party decision for the ultimate application of the convention on treaties is based on precedent: we should not do in the future what we have not done in the past. It is argued that compulsory third-party decision has not been stipulated in many great conventions of the past, such as those with respect to the law of the sea, diplomatic and consular immunities, and so on; hence there should be no such stipulation in this convention. This argument reminds me of what is known in my country as "the Goofus bird." The Goofus bird flies backwards: though he doesn't care where he is going, he likes to know where he has been.

The states of the world, and particularly the Asian-African states, have been bold in their demands for provision of a new substantive content for the law of treaties. Why should they not be equally bold in their demands for new procedures to assure that this new substantive content will in fact be put into controlling practice in particular instances. If boldness halts at mere aspiration for new policy, it may turn out to be symbolic gesture only rather than movement toward genuine reform.

In controversies relating to the law of the sea and to diplomatic and consular immunities, third-party decision is not so immediately required, since each party has within its effective control certain potentialities for reciprocity and retaliation which it can invoke to secure common interest. In controversies relating to the law of treaties, one party is likely always to be at a disadvantage and no state can be sure of always being the party with advantage. In shaping a law for the future we should be guided not so much by the mistakes and failures of the past as by the urgent necessities of securing common interest under the conditions of the future.

In the few moments that I may be permitted to continue to trespass upon your patience I should like to turn from this negative rebutting of the arguments of others to the brief outline of a more positive, affirmative case for third-party decision. It is frequently urged that third-party decision is indispensable to minimize the dangers of abuse in unilateral appreciation of the many vague concepts employed in the "Invalidity" sections of the convention and to afford a disinterested procedure for the creation of a more precise reference for these concepts in terms of common interest. It is obvious that this suggestion has some basis in realism. It seems to me, however, that a much stronger case derives from the importance of agreement-making generally to the establishment and maintenance of world public order and from the complexities and difficulties of applying

any law, not merely that relating to validity or invalidity, to the ambiguous features of any particular case.

In world public order, as in our national communities, agreement serves the function of organizing an economy or society for the production and distribution of goods and services and other values. In the world arena, however, agreement serves still other, more explicitly governmental or constitutive functions. It is a principal modality by which law is made and by which constitutions—universal, regional, or specialized—are established and maintained.

Agreement can serve these important functions and maintain an increasingly productive world society only if a certain stability in peoples' expectations about the performance of agreements is secured and maintained. Even large states, which might otherwise rely upon their naked power to secure their special interests, have an abiding, common interest with all states, large and small, in securing this stability. In an interdependent world, the advantages in an arbitrary, unilateral repudiation of agreements can never reside wholly on one side, or with a few states, or even with certain types of states. The security and internal prosperity of all states are irrevocably bound together, and not even the strongest state can make itself secure in all its values by the exercise of naked power. Neither large states nor small states can have a permanent interest in securing a special share of a melting block of ice: their permanent, common interest is in an ever-expanding, more secure, and more abundant world society.

Similarly, the application of a law of international agreements designed to secure an appropriate stability in peoples' expectations can never be easy or automatic. The dangers which are anticipated in the application of the invalidity sections of the new convention are but dramatic examples of the delicate nature of the application of general concepts to specific facts in any case. In any instance in which claim is made for the application of a general prescription to the facts of a particular case, a series of delicate appreciations is required: the potential facts and potentially relevant laws must be explored, and the relevant laws must be interpreted and appraised in terms of basic constitutional policy (*e.g.*, *ius cogens*); the facts must be finally characterized and the relevant laws carefully related to these facts; a choice or decision must be made in terms of the projection of a future policy; and, finally, appropriate measures must be taken or recommended to secure conformity of the parties to the decision. It should require little argument that all these delicate appreciations are more likely to be made in terms of common interest through the assistance of third-party decision than by the unilateral, naked-power decisions of either party.

I thank you for your great patience; I wish you the greatest success in your conference; and I very much hope that your boldness of vision in the creation of new policies will be matched by an equal boldness and realism in inventing and establishing new procedures to make these policies effective.

*Article 62**[Procedure to be followed in cases of invalidity,  
termination, withdrawal from or suspension  
of the operation of a treaty]*

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

*Proposed Article 62 bis*<sup>2</sup>

62 bis If the parties have been unable to agree, as provided in article 62, upon any means of reaching a solution within four months following the date on which the objection was raised, or if they have agreed upon any means of settlement other than adjudication or arbitration and that means of settlement has not led to a solution within twelve months after such agreement, either party may request the Secretary-General of the United Nations to set in motion the procedures specified in annex 1 to the present Convention.

*Annex I* (1) A permanent list of conciliators consisting of qualified jurists shall be drawn up by the Secretary-General of the United Nations. To this end every State Member of the United Nations and every party to the present Convention shall be invited to nominate two conciliators for a period of 5 years, which may be renewed.

<sup>2</sup> Proposed by Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Netherlands, Peru, Sweden and Tunisia. Doc. A/CONF.39/C.1/L.352/Rev.2.

- (2) In the event of a dispute, each party shall appoint:
- (a) one conciliator of its own nationality chosen either from the list referred to in paragraph 1 above or from outside that list;
  - (b) one conciliator not of its own nationality chosen from the list.

The Commission thus constituted shall appoint a Chairman chosen from the list.

The conciliators chosen by the parties shall be appointed within a period of three months after the opening of the conciliation procedure by the party requesting it.

The conciliators shall appoint their Chairman within two months after their own appointment.

If the appointment of the conciliators or of the Chairman has not been made within the above-mentioned periods, it shall be made by the Secretary-General of the United Nations.

(3) The Commission thus constituted shall establish the facts and shall make proposals to the parties with a view to arriving at a friendly settlement of the dispute. The Commission shall establish its own procedure. Decisions and recommendations of the Commission shall be taken by a majority vote. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

(4) The Commission shall be required to report within twelve months of its constitution. Its reports shall be transmitted to the Secretary-General and to the parties.

(5) In the event of failure of the conciliation procedure and if the parties have not agreed on a means of judicial settlement within three months from the date when it is established that the conciliation procedure has failed, the dispute shall, at the request of either party to it, be brought before an arbitral tribunal.

The arbitral tribunal shall consist of two arbitrators, one appointed by each party, and a Chairman appointed by agreement between the arbitrators.

The arbitrators shall be appointed within a period of six months from the date when it is established that the conciliation procedure has failed.

The Chairman shall also be appointed within a period of six months from the date of the appointment of the arbitrators by the parties.

If the Chairman or arbitrators are not appointed within the above-mentioned period, the appointment shall be made by the Secretary-General of the United Nations.

(6) The arbitral tribunal shall establish its own procedure. The decisions of the arbitral tribunal shall be taken by a majority vote. The award shall be binding and definitive.

(7) The Secretary-General shall provide the arbitral tribunal with such assistance and facilities as it may require. The expenses of the arbitral tribunal shall be borne by the United Nations.