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the article referred to errors " in a treaty ", but there might be errors not involving fraudulent conduct concerning the basis of a treaty which might not be covered by the Commission's text. His delegation therefore supported the United States amendment (A/CONF.39/C.1/L.275) to delete the phrase " in a treaty ".

60. It also supported the United States amendment because it seemed to develop the effect of error on the validity of treaties more fully than did the original article. It was clear from the commentary, particularly from paragraph (4), that the *dicta* quoted from the *Eastern Greenland* and *Temple* cases merely threw light on the conditions under which error would not vitiate consent, rather than on those under which it would do so. That made it most important to consider the exact wording of the article very carefully. His delegation had some hesitation over the phrase " formed an essential basis of its consent to be bound by the treaty " for, although the phrase had been used in other provisions of the draft, the criterion was rather subjective. It seemed preferable to clarify the idea by adding a clause along the lines of the sub-paragraph 1 (*b*) proposed by the United States.

61. It also seemed desirable to include in paragraph 2 a rule to the effect that a State might not invoke an error if it could have avoided it by the exercise of reasonable diligence. Since, however, such an addition might give rise to further difficulties of interpretation, his delegation wished to re-emphasize the need to establish some objective machinery for the settlement of disputes which might arise in connexion with the interpretation or application of article 45, as well as of other provisions in Part V.

62. The United Kingdom delegation supported the Australian amendment (A/CONF.39/C.1/L.281), for the reasons which it had advanced in connexion with article 43. It should be noted that the proposed time-limit would begin to run only from the date when the State in question discovered the error, so that the interests of any State wishing to invoke that ground of invalidity were fully protected. Although the Ghanaian representative's comments on the relevance of sub-paragraph (*b*) of article 42 were pertinent, the United Kingdom delegation considered that there was some advantage in setting a definite time-limit.

63. Mr. WERSHOF (Canada) said that his delegation could support the United States amendment (A/CONF.39/C.1/L.275) for the reasons given by its authors and subsequently by the United Kingdom representative. The Canadian delegation could also support the Australian amendment (A/CONF.39/C.1/L.281).

64. The main reason why the Canadian delegation had asked to speak was that article 45 was the first of a series of provisions in Part V setting out grounds for invalidating a treaty. Although Canada supported some of those articles, including article 45, in principle, that support was conditional on the Committee's final decision on article 62: the Canadian Government wanted to be sure that adequate provisions for adjudication on disputes relating to those articles would be provided for in revised article 62. His delegation had thought it advisable to enter that caveat at the outset of the Committee's consideration of that group of articles, in order to avoid having to repeat it in subsequent debates.

65. Mr. MARESCA (Italy) said that error could be invoked as a ground for the invalidation of a treaty if it was excusable, but not in cases of serious negligence, which might be regarded as deliberate error. Moreover, from the practical point of view, a situation where error was discovered could not be maintained indefinitely while the State concerned made up its mind whether or not to claim invalidity.

66. The Italian delegation could therefore support the United States amendment (A/CONF.39/C.1/L.275) to delete the phrase " in the treaty ", which was rather more than a drafting amendment. It could also vote for the United States amendment to add a new sub-paragraph 1 (*b*); the reference to the performance of the treaty was perfectly relevant, since the will of the State to invalidate a treaty extended beyond consent to be bound to performance. Further, the proposal to add the criterion of the exercise of reasonable diligence was sound, particularly since that criterion had constituted the basis of a decision of the International Court of Justice. Finally, the Italian delegation could support the Australian amendment (A/CONF.39/C.1/L.281), for although the International Law Commission had decided against including any time-limit in the draft, the gravity of any prolonged delay in claiming invalidity warranted an exception to that negative rule.

The meeting rose at 1 p.m.

FORTY-FIFTH MEETING

Tuesday, 30 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 45 (Error) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 45 of the International Law Commission's draft.

2. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that the United States amendment (A/CONF.39/C.1/L.275) raised important problems. The deletion of the words " in a treaty " in paragraph 1 was not a drafting amendment; it was linked with paragraph 1 (*b*) of the amendment and was tantamount to saying that the error might relate not only to the treaty, but also to its performance. That was a new element and was dangerous, especially for the principle *pacta sunt servanda*. A State wishing to avoid performance of a treaty might claim that the treaty had not brought it the advantages expected.

3. With regard to the second part of the amendment, which introduced the idea of " reasonable diligence " into paragraph 2, practice in internal law and in private law had shown that it was extremely difficult to determine whether a person had shown diligence or not. The United States representative had himself acknowledged

that machinery involving subjective elements would be required to settle disputes.

4. The Ukrainian delegation considered that article 45 as drafted by the International Law Commission was satisfactory and reflected the present state of the law in a realistic manner.

5. With regard to the Australian amendment (A/CONF. 39/C.1/L.281), the Ukrainian delegation considered that a procedure as complicated as that it provided for could hardly be carried through within twelve months.

6. Mr. IPSARIDES (Cyprus) said he was in favour of article 45 as drafted by the International Law Commission.

7. With regard to the United States amendment (A/CONF.39/C.1/L.275), he was not against the deletion of certain words, purely for drafting purposes, in order to improve the text. That part of the amendment could be referred to the Drafting Committee. He had reservations, however, about the addition of the proposed sub-paragraph (*b*). The notion of " material importance " was already contained in the expression " essential basis ", which it thus duplicated, while making the text unduly rigid.

8. The idea of " reasonable diligence ", to be inserted in paragraph 2, would not be appropriate in the convention, as it would make matters more complicated and difficult. That proposal could be considered in greater detail by the Drafting Committee.

9. He supported the Australian amendment (A/CONF. 39/C.1/L.281) because it described the application of the procedure contemplated in article 45 more precisely and introduced an element of stability. That amendment too should be referred to the Drafting Committee.

10. Mr. REUTER (France) said that the French delegation endorsed the comments made by the Canadian delegation on the articles dealing with invalidation of consent. In the Commission's draft, those articles were based on principles of private law in force in every country in the world. The French delegation was not against the transference of private law to public international law, but in all systems of private law there were impartial bodies to apply the rules of law. The French delegation's final position would therefore be determined by the solution adopted for procedure, particularly in article 62.

11. The French delegation fully supported article 45 as drafted by the International Law Commission. Nevertheless, the amendments submitted by Australia (A/CONF.39/C.1/L.281) and the United States (A/CONF. 39/C.1/L.275), though not absolutely essential, were worth considering. The Australian amendment would introduce the formalism of a time-limit into the operation of the principles. The safeguard of formalism had to be weighed against the flexibility of the Commission's formula.

12. The first part of the United States amendment to paragraph 1, to delete the words " in a treaty ", was acceptable because it simplified the text. The second part, to add a sub-paragraph 1 (*b*), seemed to be intended to introduce an objective element into the determination of the essential nature of the error. But that objective character was self-evident; it must be assessed from the joint negotiations, not from any concealed or unknown intentions. The French delegation could accept the principle of the United States amendment, but if the principle was adopted, the wording should be referred to the Drafting Committee, for the text was not explicit enough, especially in the French version.

13. The United States amendment to paragraph 2 was implicit in the Commission's text, but it might be as well to make it explicit.

14. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that his delegation approved article 45 of the Commission's draft and was opposed to the amendments submitted.

15. The United States amendment (A/CONF.39/C.1/ L.275) was unsatisfactory because it would delete the words " in a treaty ", and it was precisely in the text of a treaty that an error appeared most clearly. In paragraph 2, the amendment introduced the notion of " reasonable diligence ", which must be interpreted subjectively and was not a legal expression. And who could decide what constituted " diligence " ?

16. The Australian amendment (A/CONF.39/C.1/L.281) was not acceptable either. It contained a contradiction, for it provided that the State in question must initiate the procedure " without delay " and then stipulated an arbitrary time-limit of twelve months.

17. Mr. MOUDILENO (Congo, Brazzaville) said that his delegation, while recognizing the need to take error into account, did not approve of the way in which the International Law Commission had formulated the idea. The Commission had considered only one element, the " essential basis " of consent, whereas there was a much more fundamental basis, namely, the object and purpose of the treaty. That gap should be filled by including a strong provision stipulating the invalidity of a treaty when there had been an error relating to its object and purpose.

18. He subscribed to the principle of relative nullity embodied in paragraph 2, but did not approve of its formulation, which was ambiguous. He did not see how the two elements " conduct " and " circumstances " could be separated in practice, since conduct was deduced from an analysis of the circumstances. The amendments to paragraph 2 did not remove its ambiguity, as the Cuban representative had very clearly explained, so the delegation of the Congo (Brazzaville) did not support them. It would vote against paragraph 2.

19. Mr. DELPECH (Argentina) said he supported article 45 as drafted by the International Law Commission. Two points in the article should be stressed: first, an error did not invalidate consent unless it concerned an essential element; secondly, an error did not *ipso facto* avoid the treaty, but entitled the party misled by it to invoke the error as invalidating its consent, in the same way as in the cases covered by articles 46 and 47, for example. His delegation could not support the United States amendment (A/CONF.39/C.1/L.275) because in its paragraphs 1 and 2 it introduced two eminently subjective concepts which added nothing to the article and whose interpretation might have consequences that were difficult to foresee.

20. On the other hand, his delegation supported the Australian amendment (A/CONF.39/C.1/L.281), because the stipulation of a time-limit would be a useful contribution to the stability of law.

21. Mr. SEVILLA-BORJA (Ecuador) said that, on the whole, he approved of article 45 of the draft which contained no element of progressive development, but simply codified the practice established in various judgments of the Permanent Court and the International Court of Justice. The text of the article clearly brought out the right of a State to invoke an error in a treaty as invalidating its consent, if that error related to a fact or situation which had been assumed in good faith by that State to exist at the time when the treaty was concluded.

22. However, the words " formed an essential basis of its consent " were rather vague and imprecise; the United States amendment (A/CONF.39/C.1/L.275) improved the text in that respect by stipulating that the assumed fact or situation must be " of material importance to (the State's) consent to be bound or the performance of the treaty ". His delegation would therefore vote in favour of that amendment. There was no reason not to express clearly a State's right to invoke the invalidity of its consent when, the treaty having been concluded in good faith, it subsequently proved impossible to perform by reason of an error.

23. He agreed with the Cuban representative that the concluding words of paragraph 2 should be deleted because they might give rise to dangerous interpretation.

24. His delegation did not support the Australian amendment (A/CONF.39/C.1/L.281).

25. Mr. HARRY (Australia) said he should explain that the time-limit of twelve months proposed in his delegation's amendment would run from the day the error was discovered.

26. Sir Humphrey WALDOCK (Expert Consultant) said he would reply first to the question put to him concerning innocent misrepresentation. The International Law Commission had considered that innocent misrepresentation, as opposed to fraudulent misrepresentation, would not affect validity unless it led to an error invalidating consent. In other words, it had considered that cases of misrepresentation would naturally be covered by the provisions relating to error. Of course, when the other State had to some extent contributed to the error the situation could be said to be slightly different from a purely unilateral error. His own opinion was that, in such a case, innocent misrepresentation could have effect under paragraph 2 by helping to defeat the suggestion that the misled State ought to have discovered the error or otherwise ought not to have allowed itself to be misled.

27. The United States amendment (A/CONF.39/C.1/L.275) raised an important point of substance, for if the words " in a treaty " were deleted in paragraph 1 and at the same time the proposed new paragraph 1 (*b*) were added, the scope of article 45 would be dangerously extended. The International Law Commission had included the words " in a treaty " to make it clear that the error must relate to the treaty; if cases of error were not confined to questions relating to the treaty, there was a danger that States might invoke errors of fact totally unrelated to the treaty as having played an important part in their consenting to it. Consequently, the deletion of the words " in a treaty ", far from being a drafting amendment, raised a broad question of interpretation of the article, especially if the deletion was considered in conjunction with the new paragraph 1 (*b*), which provided that an error could be invoked if it was of material importance for the performance of the treaty. That amendment would excessively extend the scope of article 45, which would then go far beyond the normal concept of *error in substantia*. By " essential basis of its consent ", the Commission had meant " which was of the essence of its consent ". He did not think that the repetition of that idea in a different form in the new paragraph 1 (*b*) made it more objective; besides, the words " material importance " contained the same subjective element as the word " essential ". On the other hand, the words " or the performance of the treaty " would make the idea more specific; but, again, it might be doubted whether a fact of material importance for the performance of the treaty could be taken into consideration in that context unless, by reason of its role in the performance of the treaty, it had contributed to the formation of consent, for that was the very basis of the rule of invalidity on the ground of error. The United States amendment to paragraph 1 should therefore be viewed with caution.

28. In paragraph 2, the International Law Commission had at first intended to include the full formula used by the International Court of Justice in the *Temple of Preah Vihear* case,[1] including the phrase " or could have avoided it ", so as to cover all the three cases in which the right to invoke an error was rejected by the Court. But later it had decided that legitimate examples of that type of case were sufficiently covered by the other two phrases and that if it used all the Court's three phrases, article 45 might be largely deprived of value, for there were few errors that could not be avoided in one way or another. The United States amendment reintroduced that formula and attempted to make it easier to apply by adding the words " by the exercise of reasonable diligence ". The International Law Commission had discussed such a solution, but had been unable to agree on a form of words and objection had been taken by some members to including a formula of that kind in an international instrument.

29. Mr. KEARNEY (United States of America) said that, in view of the Expert Consultant's explanations concerning the words " in a treaty ", his delegation was prepared to agree to the retention of those words in article 45, paragraph 1. The United States amendment relating to that particular point was therefore withdrawn.

30. The CHAIRMAN said he would now put to the vote the remainder of the United States amendment (A/CONF.39/C.1/L.275). Since the representative of Ghana had asked for a separate vote on the words " or the performance of the treaty " in paragraph 1 (*b*) of the amendment, in accordance with rule 40 of the rules of procedure, that part of the amendment must be put to the vote first.

The words " or the performance of the treaty " were rejected by 45 votes to 12, with 30 abstentions.

[1] *I.C.J. Reports 1962*, p. 26.

31. The CHAIRMAN put to the vote the remainder of paragraph 1 of the United States amendment and then paragraph 2 of the United States amendment.

The remainder of paragraph 1 of the United States amendment was rejected by 38 votes to 20, with 31 abstentions.

Paragraph 2 of the United States amendment was rejected by 45 votes to 25, with 20 abstentions.

32. The CHAIRMAN put the Australian amendment (A/CONF.39/C.1/L.281) to the vote.

The Australian amendment was rejected by 40 votes to 23, with 27 abstentions.

33. Mr. ALVAREZ TABIO (Cuba) said that, at the previous meeting, he had asked for a separate vote on the second clause of paragraph 2, reading " or if the circumstances were such as to put that State on notice of a possible error ", which should be deleted.

34. The CHAIRMAN put the Cuban oral amendment for the deletion of the second clause in paragraph 2 to the vote.

The Cuban amendment was rejected by 69 votes to 8, with 7 abstentions.

35. The CHAIRMAN said that draft article 45 would be referred to the Drafting Committee.[2]

36. Mr. MOUDILENO (Congo, Brazzaville) said that, when he had spoken earlier in the meeting, he had asked the Committee to consider including in article 45 a provision stipulating the invalidity of the treaty if the error related to its object and purpose. Such a provision could read: "An error is a ground of invalidity of a treaty if it relates to the object and purpose of the treaty ". The error referred to was of a particular nature and could not be assimilated to other errors. His amendment could be referred to the Drafting Committee.

37. The CHAIRMAN said that, under rule 30 of the rules of procedure, since the delegation of Congo (Brazzaville) had not submitted its amendment in writing, it could not be discussed at that time.

Article 46 (Fraud) and *Article 47* (Corruption of a representative of the State)

38. The CHAIRMAN invited the Committee to consider articles 46 and 47 together.[3]

39. Mr. CARMONA (Venezuela) said that some delegations had already pointed out in the Sixth Committee of the General Assembly that the terms used in articles 46-50 of the draft were obscure, vague and confused. In article 45, error, article 46, fraud, and article 47, corruption of a representative of the State, it was said that the State " may invoke ", which suggested relative nullity. In article 48, the wording used was " shall be without any legal effect ", and in articles 49 and 50, "A treaty is void ".

40. The doctrine generally accepted internationally was that an act became a relative nullity in less serious cases such as fraud, and an absolute nullity, *ab initio*, in more serious cases of deliberate fraud involving fraudulent intent, such as the *dolus malus* of Roman law and the " wilful misconduct " of English law, in cases of corruption of officials, or coercion of a representative of a State, or violation of the international public order. The effects of the invalidity of a treaty might thus be different and should not be confused, as they were in articles 65 and 39 of the draft. It was therefore important to use precise and uncontroversial terms.

41. Where the nullity was absolute, the treaty was void *ab initio*, regardless of when the nullity was recognized, and the act was without any legal effect. The previous situation had to be restored unless that was physically impossible. There could be neither confirmation of the treaty nor any act remedying the invalidity. A new instrument would have to be concluded. That had been the doctrine supported by the Special Rapporteur in 1963, but it had unfortunately been abandoned by the Commission in the 1966 draft.

42. When the act was tainted with relative nullity, the injured party was free to invoke or not to invoke the invalidity of its consent; it could agree to confirm the act and, in addition, third parties were entitled to recognition of acts concerning them already performed in good faith. In that case, the provisions of article 65, paragraphs 2, 3 and 4 were justified, whereas they were not justified in the case of absolute nullity, which had effect *erga omnes*. Articles 43, 44 and 45 could apply to cases of relative nullity, whereas the cases of absolute nullity covered by articles 46-50 ought to be classed together as being subject to the same procedure and having the same consequences. Aggravated fraud, resulting from the fraudulent conduct of a State, was an extremely serious matter in public and private law, and in international and internal law, since it invalidated consent and made the act null and void *ab initio*. That was not true of either minor misconduct or major misconduct, which did not prevent the act from being confirmed and could not therefore be included in the article on fraud proposed by Venezuela.

43. Corruption of officials was a form of fraud and should have the same consequences. It had been said that it did not occur but that was unduly optimistic. Because of its seriousness it should be mentioned in the convention.

44. Those were the reasons why the Venezuelan delegation had submitted amendments to articles 46 (A/CONF. 39/C.1/L.259 and Add.1) and 47 (A/CONF.39/C.1/L.261 and Add.1). The two amendments could perhaps be combined.

45. Mr. HARRY (Australia) said that the amendments to articles 46 and 47 submitted by his delegation (A/CONF.39/C.1/L.282 and L.283) had the same purpose as its amendments to articles 43 and 45. The Australian delegation would support the joint amendment by Chile, Japan and Mexico to delete article 47 on corruption of a representative of the State (A/CONF.39/C.1/L.264 and Add.1), and its own amendment to that article need be considered only if the article was retained.

[2] For the resumption of the discussion of article 45, see 78th meeting.

[3] The following amendments had been submitted:

To article 46—Republic of Viet-Nam (A/CONF.39/C.1/L.234/Rev.1); Congo (Brazzaville) and Venezuela (A/CONF.39/C.1/L.259 and Add.1); Chile and Malaysia (A/CONF.39/C.1/L.263 and Add.1); United States of America (A/CONF.39/C.1/L.276); Australia (A/CONF.39/C.1/L.282).

To article 47—Peru (A/CONF.39/C.1/L.229), Congo (Brazzaville) and Venezuela (A/CONF.39/C.1/L.261 and Add.1); Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1); Australia (A/CONF.39/C.1/L.283).

46. Mr. PHAN-VAN THINH (Republic of Viet-Nam) said that his delegation had submitted an amendment to article 46 (A/CONF.39/C.1/L.234/Rev.1) because the title " Fraud " did not correspond to the content of the article, which referred to " fraudulent conduct ". In French law there was a difference between " *dol* " and " *fraude* ". The word " *frauduleux* " might therefore be replaced by the word " dolosif ". In addition, the word " conduct " did not seem precise enough. It might cover various elements: not only facts and acts, but also intentions. Some States might take advantage of the latitude that left them to evade their obligations. The word " devices " therefore seemed preferable.

47. The Viet-Namese delegation had suggested that the word " through " be substituted for the word " by ", in order to stress cause and effect and to show clearly that it must be the fraudulent devices which had induced the State to conclude the treaty.

48. Mr. VARGAS (Chile) introducing his amendment to article 46 (A/CONF.39/C.1/L.263), said that the Chilean delegation had already expressed its apprehension about the mechanical and unconsidered application of rules of internal private law to public international law. There was indeed no precedent, either in doctrine or in practice or in international jurisprudence to justify the introduction of a provision on fraud into a convention on the law of treaties. There was no analogy with private law in that instance. The complex procedure for the conclusion of treaties and the necessity of ensuring the stability of treaties called for a treatment of fraud different from that applied to fraudulent conduct in private law. A treaty was an instrument of fundamental importance, in the negotiation and signature of which officials participated who were usually more capable and experienced than the private persons who signed contracts. It was for governments to take the necessary precautions to protect their interests, and that was what they did in practice. Moreover, even if a State had been deceived, it would be reluctant to admit publicly that its officials had been incompetent. What might happen was that a government might claim that the previous government had been duped, in order to discredit it.

49. In its commentary, the International Law Commission, referring to " fraudulent conduct ", said that that expression was designed to include any false statements, misrepresentations or other deceitful proceedings. What was really involved was errors relating to a fact or situation which a State had assumed to exist at the time when the treaty was concluded, and that case was dealt with in article 45. Article 46 therefore appeared unnecessary.

50. Moreover, there was no definition of fraud in the International Law Commission's draft. The concept was not always the same in internal law and that gave rise to considerable difficulties. The Chilean delegation considered that it was the duty of international tribunals to apply or interpret an agreement when it had been concluded, not to perform the functions of subsidiary legislators. Consequently it was not for them to define the concept of fraud, as the International Law Commission suggested in its commentary. It was in the light of those considerations that the Chilean delegation had proposed the deletion of article 46.

51. Mr. KEARNEY (United States of America) said that the amendment to article 46 submitted by his delegation (A/CONF.39/C.1/L.276) was motivated by the same concerns as its amendment to article 45. It should be clearly stated that a State invoking error or fraud could do so only if it had acted reasonably in the circumstances. The additions proposed were even more important in article 46, which might give rise to divisive claims if some limitations were not incorporated in the very loose language of the draft. The suggestions made were largely drafting changes which could be considered by the Drafting Committee, but the United States delegation was not opposed to a vote on its amendment.

52. The requirement that the fraudulent conduct must relate to " a fact or situation " had been adopted by the International Law Commission in article 45 for the reasons explained in paragraph (6) of its commentary to that article. That requirement had been left out of article 46, apparently because the Commission had thought that the expression " fraudulent conduct " was a sufficiently precise guide in itself. In fact, the present text of article 46 would dangerously weaken the stability of treaties.

53. It was well known that internal law was a fact in the international context. It was also known that international law might be the subject of different interpretations by the parties during the negotiations. It would therefore be disruptive of stable treaty relations to allow a State to invalidate its consent to be bound on the ground that another State had misled it concerning the relevant rules of international law.

54. Mr. CALLE Y CALLE (Peru) said that it was possible to imagine the corruption of a representative during negotiations or at the time of signature, but hardly so in the case of ratification or accession. For it was the organs of a State which decided to ratify or accede to a treaty and it was impossible to imagine the corruption of all the persons who took part collectively in the acceptance of a treaty. The Peruvian delegation had therefore submitted an amendment (A/CONF.39/C.1/L.229) which stipulated that corruption of a representative might not be invoked as invalidating consent if the treaty had been subsequently ratified by the State concerned.

55. It could be argued that article 42 implied that corruption of the representative of a State could not be invoked as invalidating consent if the State, after becoming aware of the facts " shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation ". Acceptance was not, however, as formal an act as ratification. It was therefore preferable to state clearly that if a treaty had been ratified, the corruption of an official could no longer be invoked as invalidating the consent of the State to be bound by the treaty.

56. Mr. SUAREZ (Mexico), speaking on behalf of the co-sponsors of the amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1), said that article 47 was unnecessary, since it was obvious that a treaty obtained by the corruption of a representative was voidable. It was true that there had been cases in the past in which the representatives of certain States had received valuable gifts as an inducement to act against

the interests of the State they represented, so that the rule was not unnecessary in itself. But the matter was already dealt with in article 46, for corruption was only another form of fraud. Nobody could maintain that corruption was a legal act—a lawful means of negotiation. Moreover, corruption was so rare nowadays that it was unnecessary to devote a special article to it. If a case did occur, recourse to article 46 would suffice.

57. In its commentary the International Law Commission had emphasized that a small courtesy or favour could not be invoked as a pretext for invalidating a treaty. Representatives of States often received decorations at the end of important negotiations. In the eyes of a true diplomat, however, that was not a small courtesy or favour, but rather a mark of esteem. There could be no question of corruption in such cases, for the State giving the decoration was not rewarding the representative for his docility, but for his honesty and good faith. Since article 47 was unnecessary, it should not be included in the convention.

58. Mr. NAHLIK (Poland) said that articles 45, 46, 47 and 48 formed a homogeneous and indivisible whole, since they dealt with the three classical grounds for invalidating consent which had been invoked from Roman law times. In its commentary, the International Law Commission drew attention to the rarity, in international practice, of cases in which it had been possible to invoke one of those three grounds. That was no doubt why certain governments had contested the need to include all or some of those articles in the convention.

59. His own opinion was that no advanced system of law could regard as valid legal acts based on essential error, fraud or coercion. That might be said to be one of the general principles of law referred to in Article 38 of the Statute of the International Court of Justice. Consequently, if any one of those grounds for invalidity were omitted from the convention, it would be deduced that there were grounds for invalidity other than those mentioned in it, and doubt would be cast on the principle stated at the beginning of article 39, that " the validity of a treaty may be impeached only through the application of the present articles ". Such an omission might thus represent a far greater danger to the stability of treaties than that apparently feared by those delegations which wished to limit the enumeration of grounds of invalidity.

60. It had been stated that the grounds of invalidity referred to in those articles had been borrowed from civil law. That was only because civil law had come into existence much earlier than international law; if the chronological order had been reversed, civil law would have had to borrow those grounds from international law.

61. At a pinch, corruption could be regarded as a special case of fraud, coming under article 46. But as the unfortunate experience of some countries had shown, cases of corruption were more frequent than any of the other cases mentioned in that group of articles. It was therefore important to devote a special article to that particular ground for invalidity.

62. Unlike certain delegations, he did not think it advisable to go into too much detail in those articles. The basic principle was certainly common to all legal systems, though its formulation might differ from one system to another, so that going into detail would make it difficult to agree on a common formulation. In his view, the International Law Commission's text was perfectly satisfactory and should not be changed. The Polish delegation was opposed to the deletion of any of those articles, and therefore to the Chilean amendment (A/CONF.39/C.1/L.263) to delete article 46 and the joint amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1) to delete article 47. With regard to the Peruvian amendment (A/CONF.39/C.1/L.229), the case was sufficiently covered by article 42. The amendments by Venezuela (A/CONF.39/C.1/L.261 and Add.1) and the Republic of Viet-Nam (A/CONF.39/C.1/L.234/Rev.1) did not appear to make any appreciable improvement in the text of article 46. The same applied to the United States amendment (A/CONF.39/C.1/L.276), which complicated the problem which the International Law Commission had presented as clearly as could be wished. The text proposed in that amendment would raise serious difficulties of interpretation and unduly reduce the scope of article 46. The addition to articles 46 and 47 proposed by Australia (A/CONF.39/C.1/L.282 and L.283), fixing a twelve-months' time-limit, made the procedure too rigid. Further, the conditions in which a State could be deprived of its right to invoke a ground for invalidity were set forth in article 42. With regard to the amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1), which referred to the " deliberately fraudulent conduct of a negotiating State ", he would point out that if the fraudulent act was not deliberate, it was no longer a case of fraud, but of error.

63. Mr. QUINTEROS (Chile), speaking as the co-sponsor of the amendment to delete article 47 (A/CONF.39/C.1/L.264 and Add.1), said he shared the views expressed by the Mexican representative. In his opinion, the article should be deleted because of its imprecision and of the unfortunate consequences it might have for treaty relations. The definition of the term " corruption " given in the commentary confirmed his fears; for how was it to be determined whether the influence was substantial and whether it had been exercised, directly or indirectly, on the disposition of a representative to conclude the treaty? The constituent elements of corruption could be of a moral or even a psychological nature; consequently, its assessment as a ground of invalidity could only be based on vague and uncertain criteria. Moreover, it was difficult, both for a State alleging corruption and for a State claiming injury, to establish a presumption of moral integrity of the representative who had been corrupted. Similarly, the establishment of responsibility raised serious difficulties, and there was no international body competent to rule on the application of article 47.

64. In its present form, article 47 represented a constant threat to the stability of inter-State relations. Its adoption might lead to serious abuses on the part of governments, which would be tempted to invoke corruption as having invalidated their consent to the conclusion of a treaty they wished to terminate. Though his delegation might accept the principle of article 47 from the moral standpoint, it could not, for the reasons he had explained, accept it as a ground of the invalidity of an international treaty *ab initio*, and accordingly proposed that article 47 be dropped from Part V of the draft.

65. Mr. PLANA (Philippines) said he noted that some delegations supported the use of the phrase " fraudulent conduct " in the text proposed by the International Law Commission for article 46, whereas others wished to substitute the words " fraudulent devices ". In his opinion, the problem might be solved by amending the text of article 46 to read: " A State which has been induced to conclude a treaty by fraud committed by another negotiating State may invoke such fraud as invalidating its consent to be bound by the treaty ". The term " fraud " bore a precise meaning: it suggested deceit or wilful misrepresentation. It suggested a deliberate act committed with full awareness of the effect and consequences. It connoted the intention of one party to gain something at the expense of another.

66. In his view, fraud as contemplated in the article only existed when the fraudulent act was so serious that it would have ended the negotiations if it had been discovered before the conclusion of the treaty. Consequently, there was no need to go into further detail on the general concept of fraud applicable in the law of treaties. It would be preferable, as stated in the commentary to article 46, " to leave its precise scope to be worked out in practice and in the decisions of international tribunals ".

67. Mr. TALALAEV (Union of Soviet Socialist Republics) said he did not agree with the representatives of Chile and the United States of America that cases of fraud and corruption were very unlikely to occur in contractual relations between States. From the earliest times, States had often had recourse to fraud and corruption, as well as to force, in order to conclude iniquitous treaties which were characterized by a disproportion between the rights and obligations of the two parties. The history of international law testified to that fact.

68. A well-known example quoted by Professor Guggenheim in his treatise on international law *Lehrbuch des Völkerrechts* [6] was the treaty concluded between Italy and Ethiopia in 1889. That treaty had been drawn up in Italian and Amharic. The Amharic text of article 17 said that the Emperor of Ethiopia " may " have recourse to the services of the Italian Government for all matters to be negotiated with other governments, whereas the Italian text used the word " shall " instead of " may ". Italy had taken advantage of the Italian version to establish its protectorate over Ethiopia. Another example was given by Professor Alfaro in his study of relations between Panama and the United States, [7] in which he explained how, and in what circumstances, the Government of Panama had been deliberately misled about the treaty on the Panama Canal which it had been made to sign in 1903. Among the judicial precedents was the decision of the Nuremberg Military Tribunal, which had declared void *ab initio* certain treaties whose conclusion Nazi Germany had obtained by fraudulent devices.

69. Some delegations had argued that the notion of fraud did not exist in international law. However, Sir Gerald Fitzmaurice had given a very interesting definition of fraud in his third report. [8] In any event, it was impossible to require a State whose representative had been deceived or corrupted to perform a treaty. Such a requirement would undermine the legality of international relations and would be tantamount to protecting neo-colonialism. Fraud and corruption were little better than the use of force. Treaties thus concluded could not have any legal effect and should be declared void *ab initio*.

70. The amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1) improved the text of articles 46 and 47 because it took account of the fact that dependent States were not in a position to invoke fraud or corruption to invalidate a treaty. If it were adopted, articles 41 and 42 would have to be amended consequentially.

71. It followed from what he had said that the Soviet delegation could not accept the amendment by Chile, Japan and Mexico (A/CONF.39/C.1/L.264 and Add.1) to delete article 47. Nor could it accept the Australian amendment (A/CONF.39/C.1/L.283), for it weakened the provisions of the draft article. The Soviet delegation would also vote against the United States amendment to article 46 (A/CONF.39/C.1/L.276).

72. Mr. DUPUY (Holy See) said that he would like to make a few general remarks not specifically related to articles 46 and 47.

73. The draft convention met a fundamental need of the modern world. The universality of the law of nations had been challenged in recent years as a result of the disruption of the structure of international society. The establishment of a régime for the conclusion of treaties accepted by all nations would provide them with a common language. That showed how desirable it was that the draft convention should secure general assent.

74. Part V of the draft restated the doctrine of defects in consent which had been evolved in national systems from ancient times. The text proposed by the International Law Commission introduced into the law of treaties notions which hitherto had appeared in it only occasionally. The Holy See was bound to support any attempt to subordinate power to certain fundamental principles. It took the view that that role belonged to natural law. Of course, *jus cogens* must not be confused with natural law, since its rules were not immutable, although it contained natural law. Principles such as the prohibition of slavery and genocide had entered positive law; but those rules of natural law had been ratified and sanctioned by positive law without losing their value as fundamental dictates of the universal conscience. It could even be said that such progressive integration of natural into positive law was highly desirable, because of the increased precision it gave to positive law.

75. With regard to article 50, he wondered whether it might not be possible, even without enumerating the norms constituting *jus cogens*, to derive a principle of interpretation which would give that concept a more concrete value. The Holy See saw such a common denominator in the principle of the primacy of human rights, to which the United Nations had given universal recognition and to which it had devoted the year 1968. The convention on the law of treaties provided an opportunity of further promoting human rights in the sphere of international treaties. Why not interpret article 50 as referring essentially to human rights, since contemporary

[6] Vol. I, p. 88.

[7] " Medio Siglo de Relaciones entre Panama y los Estados Unidos ", in *Lotería*, February-March 1964.

[8] *Yearbook of the International Law Commission 1958*, vol. II, p. 26.

international law tended to repudiate practices inspired by discrimination and domination and to replace them by arrangements based on mutual understanding and collaboration? Such an interpretation would come close to the common ideal of justice shared by all men of goodwill regardless of their differences.

The meeting rose at 5.55 p.m.

FORTY-SIXTH MEETING

Tuesday, 30 April 1968, at 8.55 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 46 (Fraud) and *Article 47* (Corruption of a representative of the State) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of articles 46 and 47 of the International Law Commission's draft.

2. Mr. TABIBI (Afghanistan) said that the International Law Commission had been right in allotting an important place to the notion of fraud, thereby following the advice of three special rapporteurs on the law of treaties. Fraud had always existed and the growing number of technical and scientific treaties, together with the low technological level of the developing countries that were primarily affected by those treaties, increased the opportunities for fraudulent practices. The International Law Commission had rightly drawn a distinction between fraud and error. Fraud was characterized by the element of intention. It was normal that such an intentional act should make it possible for the injured party to terminate the treaty. Consequently, his delegation was in favour of retaining the text of article 46 as drafted by the International Law Commission.

3. Mr. GYEKE-DARKO (Ghana) said he approved of the principle in article 46. It was confirmed by eminent authorities such as McNair, and the International Law Commission had rightly noted in its commentary that fraud " destroys the whole basis of mutual confidence between the parties ". Fraud was a legal reality and the Commission had done right to formulate an article on it.

4. Those delegations that advocated the deletion of article 46 had based themselves on the paucity of precedents and on the fact that doctrine offered little guidance. Aware of those limitations, the International Law Commission had confined itself to formulating the broad notion of fraud, using the expression to include any false statements, misrepresentations or other deceitful proceedings intended to inveigle a State into giving its consent to a treaty. In defining the notion of fraud in international law, it had acted as a pioneer.

5. He was not in favour of the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.234/Rev.1), since the expression " fraudulent devices " seemed less precise than that of " fraudulent conduct " used in the draft of article 46.

6. He was opposed to the Venezuelan amendments (A/CONF.39/C.1/L.259 and Add.1) and A/CONF.39/C.1/L.261 and Add.1), which, in the case of a multilateral treaty, would vitiate the treaty vis-à-vis all parties, whereas the Commission's text of articles 46 and 47 had the merit of saving the treaty as between the other parties, whose consent had not been obtained either by fraud or corruption. The Commission's text was also preferable in that it subordinated the invalidation of a treaty to the exercise by the injured State of the right to invoke defective consent. Finally, it was pointless to qualify fraudulent conduct by the adverb " deliberately ", as intention was implicit in the notion of fraud.

7. Although he understood the concern felt by the United States delegation, he could not support its amendment (A/CONF.39/C.1/L.276) for the reasons already explained in connexion with article 45. Difficulties would arise when it came to defining what was meant by the words " in reasonable reliance upon ". For the same reasons as those given in connexion with paragraph 1 (*b*) of article 45, his delegation would ask for a separate vote on the expression " or to the performance of the treaty " in the United States amendment.

8. With reference to the Australian amendments (A/CONF.39/C.1/L.282 and L.283), he believed that the adoption of article 42 would meet the situation envisaged in those amendments.

9. His delegation was in favour of retaining articles 46 and 47 of the draft, although the Peruvian amendment (A/CONF.39/C.1/L.229) to article 47 would be acceptable.

10. Mr. FUJISAKI (Japan) said that his delegation, with those of Chile and Mexico, proposed the deletion of article 47 (A/CONF.39/C.1/L.264 and Add.1) for three reasons. First, the idea of corruption was quite new in international law; the International Law Commission's commentary did not cite any case that could justify such an innovation. Secondly, it was to be expected that sovereign States would be represented by men of integrity. In contrast with the case of coercion, a person could not be corrupted against his will. Therefore the State that had chosen a representative who was susceptible to temptation should suffer the consequences of its mistaken choice. Thirdly, in the absence of precedents and universally accepted criteria, it might be difficult to differentiate between acts intended to weigh heavily on the will of the representative, and normal acts of courtesy or small favours. His delegation was opposed to a provision which it deemed not only unnecessary and unfair, but, to say the least, undignified.

11. Mr. POP (Romania) said that the rules defining the consequences of fraud, the purpose of which was not only to invalidate acts resulting from such practices but also to prevent them, were inherent in every legal system, including, of course, the international legal system. Since international relations were increasingly based on ethics, and in particular on good faith, it was consistent with that trend to include the notion of fraud as a ground of invalidity in the future convention. The intention was to eliminate the methods of so-called traditional diplomacy. The International Law Commission had merely applied the well-known maxim *fraus omnia corrumpit.*

12. Fraud was distinct from error and should therefore be the subject of a separate provision. Not only was the notion of fraud discussed at great length in international