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dealt only with cases of relative invalidity and did not cover fraud, which could not result in the same kind of invalidity. Some representatives had argued that cases of corruption were so rare that they did not merit the Committee's attention, but he himself believed that statistics would provide evidence to the contrary. And it was no more unseemly to mention corruption than it was to speak of fraud or error.

44. He did not agree with the Italian representative that fraud and corruption should be subject to the sanction of relative nullity, since instances were increasingly frequent and should entail absolute nullity, which would protect small States, the chief victims.

The meeting rose at 10.40 p.m.

FORTY-SEVENTH MEETING

Thursday, 2 May 1968, at 10.50 a.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. MWENDWA (Kenya) said that his delegation fully supported the International Law Commission's texts of articles 46 and 47. Some delegations had claimed the scarcity of precedents for fraud and corruption as a ground for deleting the articles, while others had put forward the integrity and honesty of high State officials for the same purpose. But the suggestion that fraud and corruption did not exist was unrealistic, and his delegation categorically rejected the idea that fraud and corruption should not be eliminated from international relations.

3. It was not surprising that there were few precedents in the matter, for fraudulent and corrupt agreements were made with extreme caution and great guile. No talk of lofty ideals could wipe out the memory of treaties induced through corruption to secure concessions, treaties induced through fraud to gain territorial advantage. Now that " gunboat " diplomacy was becoming a thing of the past, it was to be feared that fraud and corruption would be used more extensively as a substitute. Indeed, the intelligence services of some States seemed to be almost exclusively engaged in devising methods of corruptly and fraudulently imposing their will on other States, and it was hardly to be expected that in so doing, the sphere of treaties would remain unexploited. The Commission had therefore been right to include provisions on fraud and corruption among the elements which vitiated consent, since they affected the very essence of treaty relations.

4. The amendments submitted by Venezuela and the Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1 and L.261 and Add.1) had some technical merit, since consent to a treaty induced by fraud and corruption was worthless *ab initio* for the purpose of concluding a treaty. But the Commission's view that the treaty was voidable at the option of the State whose consent had been procured by fraud or corruption was more realistic, for the offending State should not be enabled to benefit in any way, even negatively, from its action; it was not impossible for a treaty fraudulently or corruptly induced to be a benefit to the aggrieved State and a burden to the State which had used fraud and corruption, and in such cases, if the treaty were declared void, the offending State would automatically be released from its obligations under the treaty. The Commission's proposal that such treaties should be voidable at the option of the aggrieved State was more practical, and the Kenyan delegation would accordingly abstain from the vote on the two Venezuelan amendments. It would vote against the other amendments, believing that they would impair the effectiveness of the Commission's draft.

5. Mr. EVRIGENIS (Greece) said that scarcity of precedents might at first sight appear to be a strong argument for deleting articles 46 and 47, as might the fact that the basic concepts of those provisions were so difficult to specify that attempts to invoke them might open the way to abuses liable to weaken international contractual obligations. That argument applied less to article 46, since the concept of fraud was already rooted in all national legal systems, than to article 47, which boldly inaugurated a new institution of international law.

6. Despite some hesitation, the Greek delegation would vote for the retention of the two articles as drafted by the International Law Commission, for two reasons. First, deletion of the provisions would upset the balance of Part V of the draft which, with the present wording of article 39, was intended to contain, in principle, an exhaustive list of the grounds of invalidity: even if some delegations attached little importance to some of those grounds and others none, the reasonable solution would be to retain them in accordance with the principle of exhaustive enumeration. Secondly, the moral effect of the articles in question on international relations should not be underestimated. His delegation nevertheless reserved the right to return to those provisions during the discussion of article 62, on the procedure for their application, since it attached great importance to the ultimate text of the guarantees for the implementation of Part V.

7. His delegation would vote for the Australian amendments (A/CONF.39/C.1/L.282 and L.283). The United States amendment to article 46 (A/CONF.39/C.1/L.276) was inspired by a legitimate concern to delimit fraud and base it on objective criteria. But the Commission's text should, he thought, itself be understood as relating to fraud involving some aspect of the object of the treaty of major importance, the importance to be determined by objective tests. If the Expert Consultant would confirm his interpretation of the Commission's text, his delegation would vote for it with greater confidence.

8. Mr. MATINE-DAFTARY (Iran) said his delegation could not agree with the arguments advanced in favour of deleting articles 46 and 47. The scepticism of the representatives of some western countries with regard to those articles was understandable, for they probably

considered cases of fraud and corruption to be rare in treaty relations among themselves; but the situation was very different in the history of diplomatic relations between the western countries and the countries of Asia and Africa.

9. His delegation could vote for the amendment submitted by Venezuela and the Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1), but did not consider that the other amendments would improve the International Law Commission's text.

10. One point in connexion with article 47 did not seem quite clear to his delegation. It was stated in paragraph (5) of the commentary that " the phrase ' directly or indirectly by another negotiating State ' is used in order to make it plain that the mere fact of the representative having been corrupted is not enough; corruption by another negotiating State, if it occurs, is unlikely to be overt. But in order to be a ground for invalidating the treaty, the corrupted acts must be shown to be directly or indirectly imputable to the other negotiating State. " In some cases, however, corruption could be imputable not to the contracting State, but to beneficiaries of certain provisions of a treaty, who might be individuals or large companies. It would be interesting to know whether the Commission's text covered such cases of corruption. Perhaps the Expert Consultant could clear up that point; otherwise the Drafting Committee could deal with it.

11. Mr. BREWER (Liberia) said it was essential to include in the draft convention a specific provision on fraud, which should be treated differently from other grounds for invalidating consent to be bound by a treaty. As the Commission had stated in paragraph (1) of its commentary to article 46, fraud, unlike error and corruption, " strikes at the root of agreement in a somewhat different way from innocent misrepresentation and error. It does not merely affect the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties ". Despite that statement, however, article 46 was placed on the same level as articles 45 and 47, on error and corruption, respectively, so that in all three cases a State had the same right to invoke the situation in order to invalidate a treaty. The Liberian delegation considered that fraud was a more serious offence than the other two, and that the effect of discovery of fraud should be to render the treaty void *ipso facto* with regard to the injured State.

12. Although the concept of fraud was not defined in international law, it was found in most national legal systems, and in any case, the Conference was concerned with both the codification and the progressive development of the law of treaties. The time had now come to make a distinction between the various grounds for invalidating a treaty. The Liberian delegation would therefore support the amendment by Venezuela and the Congo (Brazzaville) (A/CONF.39/C.1/L.259 and Add.1), provided it was reworded to read: " If the conclusion of a treaty has been procured by the fraudulent conduct of a negotiating State, it is void as regards the injured State. " If that modification were accepted, the Liberian delegation would vote for the amendment; if not, it would abstain from voting.

13. His delegation could also support the Chilean, Japanese and Mexican amendment (A/CONF.39/C.1/L.264 and Add.1) to delete article 47. The article as drafted seemed to refer to the corruption of a representative by another State with a view to obtaining the consent of the corrupted official's State to be bound by the treaty; it did not refer to the possibility of subsequent corruption of the official during negotiations. The Liberian delegation did not see how the representative of a State could be corrupted with a view to obtaining that State's consent to be bound by a treaty, especially since, under article 6, a person was considered as representing a State for the purpose of adopting or authenticating the text of a treaty, or for the purpose of expressing the consent of the State to be bound by a treaty, if he produced appropriate full powers: according to that provision, article 47 might be held to refer to corruption in obtaining the appropriate full powers. The Liberian delegation was therefore in favour of deleting article 47; if the three-State amendment were not adopted, it would vote for the Peruvian amendment (A/CONF.39/C.1/L.229).

14. Mr. KEBRETH (Ethiopia) said that, since the Treaty of Uccialli of 2 May 1889 between Ethiopia and Italy [1] had been cited by the USSR representative at the forty-fifth meeting as an example of a treaty procured by fraud, he would like to add a few details. It was of course unpleasant for any representative to have a treaty concluded by his country cited as one in which that country had appeared as the victim of fraud, particularly when the International Law Commission had spoken in its commentary of the paucity of precedents and lack of guidance either in practice or in the jurisprudence of international tribunals. The charge of fraud was harmful to the dignity of both States.

15. In denouncing the Treaty of Uccialli, the Emperor Menelik II had not made any allegation of fraud in so many words; indeed, for him to have done so would have been quite out of character. The treaty had been one of friendship and alliance, drawn up in Amharic and in Italian, both texts being considered equally authentic. After its conclusion, differences had arisen concerning the meaning to be given to article XVII of the treaty. The Emperor Menelik had argued, on the basis of the Amharic text, that the article did not bind him to avail himself of the intermediary of the King of Italy in his dealings with other governments, but the Italian Government, relying on the Italian text of the treaty,[2] had argued that the Emperor had agreed to avail himself of the King of Italy's intermediary in all his dealings with foreign governments. In Decembrr 1889, the Emperor Menelik had informed the governments of European countries of his coronation directly, and not through the intermediary of the King of Italy, an act at which the Government of Italy had taken offence. Some time later, the Emperor had formally denounced the treaty in a circular letter addressed to various European governments, and the treaty had subsequently been formally annulled under article II of the Treaty of Peace concluded between Ethiopia and Italy in 1896.

16. It was thus clear that the starting-point in the chain of events that had led the Emperor Menelik to denounce the treaty had been the difference between the Amharic and Italian texts, a difference which must have arisen

[1] *British and Foreign State Papers*, Vol. 81, p. 733.

[2] *Trattati e Convenzioni fra il regno d'Italia e gli altri Stati*, Vol. 12, p. 77.

from an error striking at the very root of the treaty and therefore representing an absence of *consensus ad idem* on a highly important point of that instrument.

17. But the Emperor had had an even stronger ground for denouncing the treaty, in connexion with which he had not alleged fraud, and that was that article XVII had been interpreted by the other party in a sense which could have implied the surrender of Ethiopia's treaty-making capacity. The Emperor's denunciation of the treaty had been prompted by a love of independence which, from the modern standpoint, might be regarded as an assertion of a principle of *jus cogens*.

18. The Ethiopian delegation would vote in favour of the International Law Commission's drafts of articles 46 and 47.

19. Mr. VEROSTA (Austria) said that his delegation would vote in favour of the International Law Commission's text for article 46, and for the Australian amendment to it (A/CONF.39/C.1/L.282). On the other hand, it would vote in favour of the Chilean, Japanese and Mexican proposal (A/CONF.39/C.1/L.264 and Add.1) to delete article 47.

20. The debate had shown that there was no clear agreement on whether the term " representative " meant a diplomatic official engaged in negotiation, or a member of a government. Whatever interpretation was accepted, the provision was unacceptable in the convention. Since all civil servants were exposed to certain professional risks, no professional discrimination should be made in the convention between members of the foreign service negotiating treaties and other civil servants. Moreover, where members of the Government were concerned as negotiators, the situation dealt with in article 47 should be left to the discretion of the negotiating State. The behaviour both of civil servants, including diplomats, and of members of the Government was a domestic matter for the negotiating State. The importance of the role of individual negotiators should not be over-estimated, for they always acted under instructions and returned with results which had to be approved by their governments. Vigilant governments would always notice it if their instructions had been disregarded.

21. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that diplomatic history provided a number of examples of fraud and corruption, so that rules against such practice were needed, although not all self-respecting governments would want to admit that they had been deceived. There was no doubt that the articles were difficult and called for scrutiny by experts.

22. He supported the amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.259/Add.1), which would render the article more precise, but he could not support the Chilean and Malaysian amendment to delete the article (A/CONF.39/C.1/L.263), or the United States amendment (A/CONF.39/C.1/L.276), which repeated the formula included in its rejected amendment to article 45 (A/CONF.39/C.1/L.275). For similar reasons he could not support the Australian amendment either.

23. Mr. RATTRAY (Jamaica) said the question was whether a treaty should stand despite the fact that a State's consent had been obtained through fraud or through the corruption of its representatives. The Committee had been proceeding on the premise that the grounds of invalidity to be laid down in the convention would be exhaustive, and if no provision were made about fraud or corruption as grounds of invalidity, such reprehensible forms of conduct would be encouraged. Notwithstanding the alleged scarcity of judicial decisions or examples in State practice of cases of fraud or corruption, their invalidating effect was generally recognized by civilized nations as a principle of law.

24. It had been argued that fraud was merely a causative factor giving rise to error and that corruption was an instance of fraudulent conduct, and that consequently both were already covered in article 49, but he doubted whether that was so. The fraud contemplated in article 45 was one in which the defrauded State was wholly innocent. If article 47 were deleted, the corruption of the State's representative could be imputed to the State in such a way that it would be unable to rely on fraud, including fraud by its own agent, as a ground for withdrawing from the treaty, and article 46 might not apply. There appeared to be no disagreement that fraud and corruption ought to be recognized as a ground for invalidating a treaty; the disagreement in the Committee seemed to be purely on the question whether it was necessary to make express provision for those two grounds in separate clauses in the light of the other clauses of the convention. Those who supported the deletion of article 46 would be gravely perturbed if it transpired that fraud was not covered in other articles of the convention. He therefore favoured express provisions on both fraud and corruption.

25. In its written observations on the Commission's text, his Government had supported the idea that a defrauded State should be able to take steps to invalidate its consent to a treaty within a stated time after the discovery of the fraud. It should not be at liberty to continue to adhere to a treaty for an indefinite period after the discovery of the fraud and at the same time retain the right to repudiate the treaty whenever it wished. The circumstances of fraud were so varied that it might be difficult to lay down *a priori* an acceptable time-limit, especially one of very short duration. The principle underlying the fixing of a time-limit was that a defrauded State which did not take steps to withdraw its consent should be deemed to have acquiesced. He would not oppose the Australian amendment (A/CONF.39/C.1/L.282) and would be content to rely on the principle of acquiescence set out in article 42.

26. The CHAIRMAN said he would put the various amendments to article 46 to the vote, beginning with the Chilean and Malaysian amendment (A/CONF.39/C.1/L.263 and Add.1).

The Chilean and Malaysian amendment was rejected by 74 votes to 8, with 8 abstentions.

27. The CHAIRMAN put the Venezuelan and Congo (Brazzaville) amendment (A/CONF.39/C.1/L.259/Add.1) to the vote.

The Venezuelan and Congo (Brazzaville) amendment was rejected by 51 votes to 22, with 16 abstentions.

28. The CHAIRMAN said that, since the representative of Ghana had asked for a separate vote on the words " or to the performance of the treaty " in the United States amendment (A/CONF.39/C.1/L.276), he would put that phrase to the vote first.

29. Mr. BRIGGS (United States of America) said that his delegation wished to withdraw that phrase.

30. The CHAIRMAN put to the vote the United States amendment (A/CONF.39/C.1/L.276) as thus modified.

The United States amendment was rejected by 46 votes to 18, with 27 abstentions.

31. The CHAIRMAN put the Australian amendment (A/CONF.39/C.1/L.282) to the vote.

The Australian amendment was rejected by 43 votes to 18, with 32 abstentions.

32. The CHAIRMAN put the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.234) to the vote.

The amendment of the Republic of Viet-Nam was rejected by 52 votes to 1, with 32 abstentions.

Article 46 was approved and referred to the Drafting Committee.[3]

33. The CHAIRMAN said he would now put the various amendments to article 47 to the vote.

At the request of the representative of Congo (Brazzaville), the vote on the Chilean, Japanese and Mexican amendment (A/CONF.39/C.1/L.264 and Add.1) to delete article 47 was taken by roll-call.

Uruguay, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Uruguay, Argentina, Australia, Austria, Belgium, Canada, Chile, Denmark, Federal Republic of Germany, France, Guyana, Italy, Japan, Lebanon, Liberia, Liechtenstein, Mexico, Monaco, New Zealand, Norway, Peru, Portugal, Republic of Korea, San Marino, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America.

Against: Afghanistan, Algeria, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cambodia, Central African Republic, Ceylon, China, Colombia, Congo (Brazzaville), Democratic Republic of the Congo, Cuba, Cyprus, Czechoslovakia, Dahomey, Ecuador, Ethiopia, Ghana, Guatemala, Guinea, Holy See, Hungary, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Jamaica, Kenya, Kuwait, Madagascar, Mali, Mongolia, Morocco, Netherlands, Nigeria, Pakistan, Philippines, Poland, Republic of Viet-Nam, Romania, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia, Zambia.

Abstaining: Finland, Gabon, Honduras, Turkey.

The Chilean, Japanese and Mexican amendment was rejected by 61 votes to 28, with 4 abstentions.

34. The CHAIRMAN put to the vote the amendment by Venezuela and Congo (Brazzaville) (A/CONF.39/C.1/L.261 and Add.1).

The amendment by Venezuela and Congo (Brazzaville) was rejected by 54 votes to 23, with 16 abstentions.

35. The CHAIRMAN put the Peruvian amendment (A/CONF.39/C.1/L.229) to the vote.

The Peruvian amendment was rejected by 54 votes to 10, with 27 abstentions.

36. The CHAIRMAN put the Australian amendment (A/CONF.39/C.1/L.283) to the vote.

The Australian amendment was rejected by 41 votes to 20, with 31 abstentions.

Article 47 was approved and referred to the Drafting Committee.[4]

37. Mr. WERSHOF (Canada) said that the kind of conduct contemplated in articles 46 and 47 was reprehensible and evil, but he did not think it was in the interests of world order for one party to a treaty, on a purely subjective basis, to allege fraud or corruption as a ground for unilaterally invalidating a treaty. Such a provision would not be compatible with the rule *pacta sunt servanda* which had already been approved.

38. The Canadian delegation had therefore voted in favour of the United States and Australian amendments to article 46 and against the Venezuelan amendment. It had abstained on the Chilean and Malaysian amendment to delete the article, because it considered that a suitably drafted provision on the subject of fraud should appear in the convention; the present article was not suitably drafted.

39. His delegation had voted in favour of the deletion of article 47 for the reasons given by those who had proposed such action but when that proposal had been rejected, it had voted for the Peruvian and Australian amendments but against the Venezuelan amendment.

40. His delegation's final attitude on those two articles would depend on what happened to article 62. If a reasonable procedure for the impartial adjudication of allegations of fraud and corruption could be included in the convention, that would make acceptance of articles 46 and 47 easier.

41. Mr. MATINE-DAFTARY (Iran) said that, as the Expert Consultant was absent, he hoped that in due course the Drafting Committee would be able to give some reply to his question about the scope of article 47.

Article 48 (Coercion of a representative of the State)

42. The CHAIRMAN invited the Committee to consider article 48.[5] The printed title of the article in the International Law Commission's report on its eighteenth session (A/6309/Rev.1, page 16) should be corrected to read "Coercion of a representative of the State".

43. Mr. BRIGGS (United States of America), introducing the United States amendment (A/CONF.39/C.1/L.277), said that there had unfortunately been cases in which coercion had been employed against the representative of a State in order to compel him to express the consent of his State to be bound by a treaty. His delegation therefore fully agreed that the future convention on the law of treaties should contain an article protecting States against so reprehensible a practice.

44. The Commission's text of article 48, however, was open to improvement in three respects and that was the

[3] For the resumption of the discussion on article 46, see 78th meeting.

[4] For the resumption of the discussion on article 47, see 78th meeting.

[5] The following amendments had been submitted: United States of America (A/CONF.39/C.1/L.277); Australia (A/CONF.39/C.1/L.284); France (A/CONF.39/C.1/L.300).

purpose his delegation's amendment was designed to fulfil. First, the amendment would make it clear that only the injured State could invoke coercion against its representative as a ground for invalidating the treaty. The present text, which merely provided that a treaty procured by such coercion " shall be without any legal effect ", would make it possible for the State guilty of coercion to invalidate the treaty. Secondly, the amendment would also make it clear that the coercion must have been exercised by another negotiating State, rather than by a third State or even by a third person. And thirdly, the amendment would have the effect of making the treaty voidable at the option of the injured State rather than void *ab initio*. The injured State should have the option either to take steps to invalidate the treaty or to retain it if it decided that, on balance, despite the vice of coercion, the benefits of maintaining the treaty in force outweighed the loss which it would incur if the treaty were terminated.

45. The case covered by article 48 was that of coercion directed against an individual who purported to give the consent of his State, and not against a State as such. Accordingly, there should be no automatic nullity, but the injured State should be allowed to decide where, on balance, its real interests might lie. That approach had been adopted in articles 43, 44, 45, 46 and 47, all of which dealt with very serious questions in which the injured State was given a choice of invoking, or not invoking, a ground of invalidity or termination.

46. In the International Law Commission's discussions, it had been argued that international law knew only the concept of absolute nullity and that the concept of voidability existed only in certain municipal law systems. In fact, the Commission, in adopting articles 43 to 47, had clearly recognized that some treaties were not necessarily void *ab initio*, but were voidable under international law in certain circumstances. The Committee should be careful not to limit the freedom of action of States by adopting a rule designed to apply mechanically the rigidities of a misconceived juristic logic.

47. Mr. HARRY (Australia) said that his delegation wished to modify its redraft of article 48 (A/CONF.39/C.1/L.284), by changing the concluding proviso to read " ... provided that it initiates the procedure for claiming invalidity without unreasonable delay after it discovers the coercion ". His delegation had originally proposed a twelve-month time-limit for article 48, as for previous articles, but had now decided to change the text of its redraft in order to give the Committee the opportunity to confirm that it would favour some flexible provision in article 42 or in article 62, both of which would be examined by the Committee at a later stage. Clearly something more was required than the provisions now contained in article 42 (*b*). The matter was not simply one of acquiescence; mere lapse of time did not of itself constitute acquiescence, although it could be an element in that process. The purpose of the Australian amendment was to defend the security of treaties by precluding the possibility that a State might delay indefinitely before taking action that might be open to it under article 48.

48. Articles 43 to 48 had a common theme in that each of them dealt with cases where the consent expressed by a State was defective. There was therefore no reason for the change of language and structure in article 48, compared to the other articles. In article 48, for the first and only time in that group of articles, the expression " without any legal effect " was used. The use of that expression was unnecessary because the point would be made clear under article 65 that a treaty established as void or invalid under the procedure of article 62 had no legal effect.

49. The Australian amendment, like the United States amendment (A/CONF.39/C.1/L.277), would bring article 48 more into harmony with the situation which existed under other articles in Part V; the ground of invalidity set forth in article 48, like all the other grounds in Part V, was subject to the procedure to be laid down in article 62. As now drafted, it might create the mistaken impression that a State could make its own unilateral judgment on whether a ground for invalidity existed.

50. With regard to article 62, his delegation shared the views of those who found the existing provisions of the article far from adequate. More suitable provisions for objective, impartial and prompt settlement of disputes would have to be formulated.

51. Mr. TALALAEV (Union of Soviet Socialist Republics) said he supported the International Law Commission's text of article 48, which corresponded to the existing international law in the matter and expressed a long standing rule. It had been recognized for centuries by writers on international law that a State should be released from all obligation in respect of a treaty signed by its representative when the latter was deprived of his personal freedom. History offered more than one example of such practices.

52. He was opposed to both the United States amendment (A/CONF.39/C.1/L.277) and the Australian amendment (A/CONF.39/C.1/L.284), which would introduce the concept of voidability into article 48. That suggestion was not new; it had already been made by a number of governments in their observations on article 35, the corresponding article of the 1963 draft, which stated that an expression of consent to a treaty obtained by the coercion of a representative " shall be without any legal effect ".[6] The International Law Commission had considered those comments and the suggestions to dilute that text during the second part of its seventeenth session in January 1966 and had decided to adopt the present text which made a treaty obtained through the coercion of a representative void *ab initio*. The text adopted by the Commission drew the appropriate conclusions from the fact that coercion was illegal under international law.

53. Mr. MENDOZA (Philippines) said he supported the United States and Australian amendments, which made coercion of a representative a ground of invalidity rather than a ground for declaring a treaty to " be without any legal effect ". Since the object of coercion was the representative and not the State itself, the case covered by article 48 was similar to that covered by article 47. The identity of the representative with his State was not absolute or permanent, and the coercion

[6] *Yearbook of the International Law Commission, 1963*, vol. II, p. 197.

of a representative was therefore one step removed from the coercion of the State itself. In the circumstances, it was appropriate to make the treaty voidable rather than void. The State must be presumed to have retained its free will, if not at the time of the conclusion of the treaty, then at least at a later stage, and should therefore be able to decide then on the conclusions to be drawn from the act of coercion with regard to the validity of the treaty.

54. It was suggested in the commentary that the gravity of the means employed in the case envisaged in article 48 warranted declaring the treaty null and void. It was essential, however, to take into account not only the gravity of the means but also the effect which the use of those means had. In the case in point, the effect was neither direct nor immediate and perhaps not even continuous. That being so, the circumstances mentioned in article 48 should be a basis only for invalidating the consent of the State concerned.

55. Mr. DE BRESSON (France), introducing his delegation's redraft of article 48 (A/CONF.39/C.1/L.300), said that it did not purport to alter either the scope or the substance of the article. His delegation considered that, where consent had been obtained by the coercion of a representative, it was just and right that the treaty should be invalid.

56. Article 48 dealt with a defect of consent which was in essence similar to those mentioned in the previous articles. For that reason, his delegation's redraft (A/CONF.39/C.1/L.300) did not use the expression " shall be without any legal effect ", which did not appear in any of the articles 45 to 47 and which would introduce an element of uncertainty with regard to the exact scope and implementation of the provisions of article 48. He feared that, if those words were retained, they might be construed, in combination with the wording of the second sentence of paragraph 1 of article 39, as indicating that, in the circumstances envisaged in article 48, the treaty was null and void *de plano* without the need to have recourse to the procedures set forth in article 62. Since that interpretation had been repudiated by the majority of delegations and was not favoured by the Expert Consultant, his delegation felt that it was necessary to remove all ambiguity on the subject.

57. His delegation's amendment (A/CONF.39/C.1/L.300) also made it clear that it was for the injured State, and the injured State alone, to decide on the inference to be drawn from the circumstances in question with regard to the treaty. In view of the many possible degrees of coercion and the varying effects of such acts on the behaviour of the representative concerned, the injured State might well feel that it was in its interest not to question the validity of the treaty. In any case, it was a matter for that State to decide.

58. By thus proposing a redraft of article 48 which would bring its wording more into line with articles 45 to 47, the French delegation did not wish to prejudge the question of the effects of the nullity set forth in article 48, in particular that of determining whether the case was one of relative nullity or of nullity *ab initio*. In his delegation's view, that question did not arise with respect to article 45 and the following articles, all of which were intended to enumerate cases of invalidity of treaties. The issue should be settled by including suitable provisions on the subject in article 65, a matter to which his delegation would revert at the appropriate time.

The meeting rose at 12.55 p.m.

FORTY-EIGHTH MEETING

Thursday, 2 May 1968, at 3.10 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 48 (Coercion of a representative of the State) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 48 of the International Law Commission's draft.

2. Mr. SINCLAIR (United Kingdom) said that whereas the commentary to article 47 contained no reference to historical examples, that on article 48 pointed out that history provided a number of instances of the employment of coercion against a representative to induce him to sign, accept or approve a treaty. The idea underlying article 48 therefore had its source in customary international law.

3. The United Kingdom delegation agreed with the views put forward by the French and United States representatives. He saw no reason for providing for absolute invalidity when the consent of a State was procured by the coercion of its representative, and only relative invalidity when it was obtained by fraud or the corruption of the representative. Coercion was obviously serious, but was it so serious as to deprive the consent expressed of any legal effect?

4. He assumed that in the case of a multilateral treaty, only the consent of the State procured by the coercion of its representative would be vitiated and that the treaty should remain in force with regard to the other contracting States. He therefore supported the amendments submitted by the United States (A/CONF.39/C.1/L.277), France (A/CONF.39/C.1/L.300) and Australia (A/CONF.39/C.1/L.284).

5. Mr. MARESCA (Italy) said that article 48 was necessary for the general economy of the convention and should follow the terminology employed in the articles which preceded it. It should take due account of the interests of the State whose representative had been coerced. Like a series of other articles related to it, it required the application of an appropriate procedure, without which there would be a great risk of arbitrary action.

6. He supported the amendments submitted by the United States (A/CONF.39/C.1/L.277), France (A/CONF.39/C.1/L.300) and Australia (A/CONF.39/C.1/L.284), which made the article clearer.

7. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that article 48 played the same part in the