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FORTY-NINTH MEETING

Thursday, 2 May 1968, at 8.40 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 49 (Coercion of a State by the threat or use of force) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 49 of the International Law Commission's draft.

2. Mr. NACHABE (Syria) said that the articles in Part V relating to the invalidity, termination and suspension of the operation of treaties, represented the minimum required for the progressive development of international law. The Committee should not destroy that minimum by trying to limit its scope, and should endeavour to build on the basis it provided. It was with that aim in view that his delegation had joined with other delegations from Asia, Africa and Latin America in submitting a joint amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

3. That amendment would not have been necessary if all the participants in the Conference had been agreed on the meaning to be given to the term " force ". To attempt to limit that term to the strict meaning of " armed force " was to exclude from the rule stated in article 49 essential elements such as economic and political pressure, the importance of which must not be under-estimated. Such pressure had proved just as dangerous and harmful to inter-State relations as the use of armed force. That was why it had been condemned by the United Nations General Assembly, several regional organizations and a number of international conferences. The Asian, African and Latin American States which had taken part in the Conference of non-aligned Countries in Cairo in 1964 had been unanimous in declaring that the word " force ", as used in Article 2, paragraph 4, of the United Nations Charter, should be interpreted as including such pressure. Since that time, the representatives of an increasing number of States had reiterated that view in the United Nations, in particular in the Sixth Committee, thus preparing the way for a complete and adequate formulation of the legal rule.

4. Some members of the International Law Commission had said that the wording of article 49 was flexible enough to allow of a broad interpretation; they had also maintained that the present text of the Charter did not prevent the United Nations from developing. That was an attractive and even reassuring argument, but it should not be allowed to obscure the point that the legal rule must be adequate to prevent situations that were now unacceptable.

5. Other delegations had referred to the difficulty of defining those pressures and had pointed out that the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had not succeeded in defining the word " force " in connexion with the principle that States must refrain from its use. But even though it was difficult to define those pressures, an economic pressure was not a subjective phenomenon, but a concrete fact; it was manifested in acts that could be identified. Moreover, it was an exaggeration to say that the Special Committee had failed; it could have achieved positive results if, as it was entitled to do, it had decided to settle the question by a majority vote.

6. As to the other amendments to article 49, he supported the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) on the understanding that the word " force " should be interpreted, not in the strictest sense, but as he had suggested. On the other hand, he could not accept the Peruvian amendment (A/CONF.39/C.1/L.230) or the Japanese amendment (A/CONF.39/C.1/L.298), which weakened the content of the article.

7. Mr. EL DESSOUKI (United Arab Republic), speaking as a co-sponsor of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), said he thought that the rule in article 49 should expressly mention economic and political pressures. Article 49 marked a turning point in modern international law. Its adoption might do away with the old idea that coercion invalided consent when it was used against a representative, but not when it was used against the State itself.

8. Article 49 showed that the International Law Commission had tried to widen the notion of coercion, but unfortunately it had not gone far enough. As forms of coercion invalidating the consent of a State, article 49 mentioned only the threat or use of force in violation of the principles of the United Nations Charter. But coercion could be exercised by other means, such as economic or political pressure, which were all the more to be feared because they might pass unperceived. Economic pressure could be more effective than the threat or use of force in reducing a country's power of self-determination, especially if its economy depended on a single crop or the export of a single product.

9. The recognition of economic and political pressure as a ground for the invalidity of treaties would increase the confidence of the newly-independent States in international law. The States which had taken part in the Conference of non-aligned Countries in Cairo in 1964 had condemned economic and political pressure, and declared that the word " force ", as used in Article 2, paragraph 4, of the United Nations Charter, should be interpreted as including such pressure.

10. His delegation was not yet in a position to give an opinion on the other amendments to article 49, but would study them carefully. It would, however, be unable to accept any substantive amendment to the text proposed for article 49 in the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

11. Mr. ALVAREZ TABÍO (Cuba) said that, since the fourteen-State amendment of which he was a co-sponsor (A/CONF.39/C.1/L.289 and Add.1) had been admirably defended by the representatives of Czechoslovakia and Ecuador, he would confine himself to a few points concerning article 49, which stated what was already recognized as a norm of *jus cogens*.

12. By stating that the principles referred to in article 49 were " principles of *international law embodied in* the Charter of the United Nations ", the amendment showed that the principle of absolute nullity of a treaty whose conclusion had been procured by the threat or use of force

had been recognized before the establishment of the United Nations. Since the League of Nations Covenant and the Pact of Paris, the threat or use of force were no longer accepted as a legitimate basis for international relations. Since the adoption of those instruments, threats and coercion had come under international criminal law and the *jus ad bellum* had become *jus contra bellum*. Then, in formulating that ground for a treaty being void *ab initio*, it was logical to refer to the general principles of international law, which had been further strengthened by their incorporation in the United Nations Charter.

13. The exceptional importance of article 49 lay in the fact that it abolished the long-established practices of the ruling powers, which jurists had treated as universally accepted doctrine, and rejected as contrary to international law all treaty provisions based on a relationship of subjection imposed by strong and unjust pressure.

14. In defining the forms of coercion or threat, care should be taken not to restrict the practical effects of the principle; for contemporary neo-colonialism resorted to subtle means of applying pressure in order to create unjust situations. Economic and political pressure should therefore be mentioned in article 49 on the same footing as the threat or use of force not for purely theoretical reasons, but to take account of facts. The progressive development of international law called for the unequivocal condemnation of all forms of pressure, in order to place international relations and treaty law on a firm and equitable basis.

15. The Cuban delegation would therefore vote for the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), which included economic and political pressure among the forms of coercion which made a treaty void.

16. Mr. RIPHAGEN (Netherlands) said that the comments he wished to make on article 49 also applied to article 50.

17. A treaty concluded and applied in accordance with articles 5-22 of the draft convention was *prima facie* a valid treaty, and as such should produce all the legal effects summarized in the title of article 23 in the words *pacta sunt servanda*. The rules laid down by such a treaty were " the law " between the parties. Two kinds of grounds might nevertheless be invoked for not giving all those legal effects to a treaty which was *prima facie* valid: first, certain circumstances surrounding the conclusion of the treaty, such as fraud and corruption, and secondly, certain circumstances connected with the application of the treaty, such as the permanent disappearance or destruction of an object indispensable for the execution of the treaty. In both cases, the legal consequences could be the same, namely, that the rules laid down in the treaty were no longer, or no longer fully, the law between the parties; in other words, the " pactum " was no longer " servandum ".

18. Such a deviation from the very basis of the law of treaties could only be founded on the argument that application of the rules laid down by the treaty would conflict with the application of other rules independent of the treaty, which should prevail. That was particularly apparent from articles 49 and 50. According to article 49, the application of a treaty whose conclusion had been procured by the threat or use of force conflicted with the norm which stated that the threat or use of force otherwise than in self-defence was illegal. According to article 50, the application of a treaty conflicting with a peremptory norm of general international law was a breach of a rule of *jus cogens*.

19. In law, such a hierarchy of norms was not exceptional; it existed in all national legal systems. However, the establishment of hierarchies in the sphere of international law presented certain difficulties due to the very structure of international society, which consisted of sovereign and independent States. With some degree of oversimplification, it could be asked whether a hierarchy of international rules could be established when there was no hierarchy in the relations between the States or group of States forming the international community. But the real problem was to determine which rules should prevail and who would decide whether they were applicable in a particular case. If those questions were not answered clearly and conclusively, the adoption of the principle of hierarchy, which was implicit in articles 49 and 50, would undermine the fundamental rule of *pacta sunt servanda*, which was the pivot of the whole of the law of treaties.

20. It was obviously extremely difficult to enumerate in advance the whole range of rules of international law which prevailed over rules laid down in particular treaties concluded by two or more States. Nevertheless, it was necessary to make sure that the invalidation of a particular treaty rule was not left to the unilateral decision of one of the parties to the treaty. Without that safeguard, the principle *pacta sunt servanda* would be reduced to a pious wish.

21. In itself, the rule stated in article 49 was perfectly clear and precise. He supported the principle underlying the article, namely, the principle that an aggressor State should not, in law, benefit from a treaty it had forced its victim to accept. Nevertheless, it must be borne in mind that there was a fundamental difference of opinion as to the meaning of the words " threat or use of force " in Article 2, paragraph 4, of the United Nations Charter. If those words could be interpreted as including all forms of pressure exerted by one State on another, and not just the threat or use of armed force, the scope of article 49 would be so wide as to make it a serious danger to the stability of treaty relations. To condemn pressure was one thing; to declare void treaties allegedly concluded under pressure was another thing. Even in municipal systems, where the stability of contractual relations was of far less importance than in the international society, it was only the judiciary which could grant relief in cases of undue influence of one party on the other, and even then the judge had to strike a delicate balance between the interests of sanctioning reprehensible behaviour of one of the parties to a contract, and the interests of upholding the validity of contracts.

22. His delegation could therefore accept article 49 as proposed by the International Law Commission only if it was limited to treaties whose conclusion had been procured by the threat or use of armed force, and if the invalidation of the treaty was not left to the unilateral assertion of one of the parties.

23. With regard to article 50, he was firmly convinced that international law contained rules of *jus cogens* which should prevail over any obligation a State might contract under a treaty. On the one hand, those rules prohibited

any act constituting a threat to peace and any act of aggression, and on the other they prescribed respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion. Any treaty conflicting with either of those peremptory norms should be without legal effect. He could not accept article 50 as it stood, however, because it gave no indication of the content or sources of the rules of *jus cogens*, so that a State which had concluded a treaty could always invoke *jus cogens* to evade the obligations it had accepted under the treaty. That danger was all the more serious because, under the system adopted in Part V, Section 4, of the draft articles, a State was not bound to accept an objective determination of the existence of the rule of *jus cogens* it invoked or of the applicability of that rule.

24. His delegation had not yet submitted any amendments, as it thought it was still too early to do so; he hoped, however, that the Committee would take his remarks into consideration. The concept of *jus cogens* should be more accurately defined in the draft, and a procedure should be established for the objective determination of the invalidity of a treaty regarded by one of the parties to it as being in conflict with a peremptory norm of international law.

25. Mr. HADDAD (Algeria) said that as a co-sponsor of the amendment submitted by a number of African, Asian and Latin American countries (A/CONF.39/C.1/L.67/Rev.1/Corr.1), he shared the views expressed by the representative of Afghanistan. He would like to have seen countries from other continents co-sponsoring the amendment, and hoped they would at least give it favourable consideration.

26. The action of the International Law Commission in adopting the principle of the invalidity of any treaty whose conclusion had been procured by the threat or use of force in violation of the principles of the United Nations Charter, marked a step forward in international law. Unfortunately, some delegations hesitated or refused to accept the principle as a rule of law, on the pretext that it would open the door for any State wishing to evade its obligations under a treaty. He himself thought that the article proposed by the International Law Commission would constitute a real advance if it referred expressly to economic pressure as a ground for absolute nullity, on the same footing as the threat or use of force. Economic pressure took many forms, and its effects on the victim were obviously of the same nature as those of the threat or use of force.

27. It was true that the era of the colonial treaty was past or disappearing, but there was no overlooking the fact that some countries had resorted to new and more insidious methods, suited to the present state of international relations, in an attempt to maintain and perpetuate bonds of subjection. Economic pressure, which was a characteristic of neo-colonialism, was becoming increasingly common in relations between certain countries and the newly independent States.

28. Political independence could not be an end in itself; it was even illusory if it was not backed by genuine economic independence. That was why some countries had chosen the political, economic and social system they regarded as best calculated to overcome under-development as quickly as possible. That choice provoked intense opposition from certain interests which saw their privileges threatened and then sought through economic pressure to abolish or at least restrict the right of peoples to self-determination. Such neo-colonialist practices, which affected more than two-thirds of the world's population and were retarding or nullifying all efforts to overcome under-development, should therefore be denounced with the utmost rigour.

29. It could never be sufficiently repeated that it was in the interests of all the nations of the world that the fight against under-development should be won. To achieve that end, honest and fruitful collaboration serving the mutual interests of the parties must be established in international relations, on the basis of the equality of States. Such collaboration was bound to increase the stability of international relations, ensure real and lasting peace and open the way to progress.

30. For all those reasons, the Algerian delegation considered that a provision on economic pressure as a ground for the absolute nullity of treaties should be included in article 49.

31. Mr. STREZOV (Bulgaria) said that the amendment of which his delegation was one of the co-sponsors (A/CONF.39/C.1/L.289 and Add.1) was intended to make the text of article 49 more precise. The words " in violation of the principles of the Charter of the United Nations " did not reflect the facts as accurately as was desirable. The principle stated in article 49 had been formulated long before the establishment of the United Nations. At San Francisco the authors of the Charter had incorporated in it recognized principles of international law. The nullity of a treaty procured by the threat or unlawful use of force had at that time already become *lex lata* in modern international law. It was therefore important to state in article 49 that the " principles of international law embodied " in the Charter of the United Nations were intended.

32. He believed that article 49 fulfilled the requirements of international law and hoped that the Conference would adopt its substance unanimously. The text could undoubtedly be improved, and he had therefore examined the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) with great care. The Bulgarian delegation could not accept the Peruvian amendment (A/CONF.39/C.1/L.230), since it introduced elements of imprecision and doubt. That also applied to the Japanese amendment (A/CONF.39/C.1/L.298), which would only complicate rather than clarify the problem.

33. Mr. JIMÉNEZ DE ARÉCHAGA (Uruguay) said that his delegation was in favour of article 49 as drafted by the International Law Commission or, alternatively, of the formulation proposed in the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), which did not make any radical change in the article and preserved its main merit. The article was a compromise between differing points of view and offered a text which alone was likely to secure the general agreement needed for effective recognition of the principle that a treaty was void if its conclusion had been procured by coercion. Such a remarkable advance should not be hampered by an excessive desire for perfection.

34. The Uruguayan delegation would find it hard to vote for the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) for five reasons.

35. First, the notion of economic and political pressure was too vague to rank as a defect in consent. It was not always the greatest Power which exerted that form of pressure. A member of the International Law Commission from a large industrial country had said that his country had negotiated many trade agreements from a position of weakness, because it had had to provide a country with a large population and a small territory with raw materials and food.

36. Secondly, the expression " the threat or use of force " was a time-honoured and broad term embodied in the United Nations Charter, which did not exclude particularly serious cases of economic or political coercion, such as economic blockade, for example, to which the Afghanistan amendment (A/CONF.39/C.1/L.67) specifically referred in its written explanation of reasons; economic blockade was one of the means of coercion expressly mentioned as such in the Charter.

37. Thirdly, the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), by expressly introducing a reference to economic and political pressure, might give the impression *a contrario* that those forms of pressure, if of a grave character, were not at present covered by Article 2, paragraph 4, of the Charter. On the other hand, the wording used by the International Law Commission was flexible enough and did not prejudge the content of the Charter. It could be interpreted progressively in accordance with the particular circumstances of each case, in harmony with the conditions and opinions prevailing from time to time. The resolutions of United Nations organs would naturally be taken into account in the settlement of any dispute which might arise over the application of the article. Care must be taken that the formula adopted with respect to the invalidity of treaties did not weaken a rule which governed the even more important and delicate affairs of collective security.

38. Fourthly, the principle of non-intervention which was laid down in the Charter of the Organization of American States and was the foundation of the international law of the American continent, had been cited in support of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1). But the principle of non-intervention in political and economic affairs had no relevance to article 49, and the need for expressly specifying economic and political pressure in that article as a ground for the voidance of a treaty was not deduced from it. If a treaty had been concluded by a State with all the safeguards required by the present convention, that was to say, if there had been no resort either to the threat or use of force, nor fraud, nor corruption, nor coercion of a representative of that State, the principle invoked did not apply, because then it was a case not of intervention, but of a treaty freely consented to.

39. Fifthly, in a conference for the codification of international law, the legitimate economic and social claims of the developing countries—claims which were fully supported by Uruguay—were out of place. Care should be taken to avoid establishing legal norms liable to vary with the economic power of States. Roman law had protected the weaker by the theory of " *lésion* " but, in practice, since that protection had become exaggerated, no State was willing any longer to enter into contracts with States enjoying such protection, since it established at their expense a form of *de facto* contractual incapacity. The nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) might lead to a discriminatory legal system. But the codification of international law was based on the principle of the equality of all States before the law, regardless of their power, and in article 5, which had already been adopted, the draft convention recognized the full capacity of all States to conclude treaties and protect their own interests.

40. Mr. KASHBAT (Mongolia) said that his delegation attached great importance to the principle stated in article 49 and considered that the very fact that the principle was stated in a separate article emphasized that importance, both for international law in general and for the law of treaties in particular. Though couched in general terms, the article well expressed the basic idea that the unlawful use of force or the threat of force was prohibited, particularly in concluding international agreements.

41. In the light of contemporary realities, however, the idea of coercion could not be restricted to armed force. Other forms of coercion, particularly economic and political forms, must be taken into account, as they were just as dangerous and perhaps more frequent than resort to armed force. Such an interpretation of the idea of coercion was wholly consistent not only with Article 2, paragraph 4 of the United Nations Charter, but also with the principles or provisions of many international instruments subsequent to the Second World War, in particular with General Assembly resolution 2160 (XXI), of 30 November 1966, which stated that " armed attack by one State against another or the use of force in any other form contrary to the Charter of the United Nations constitutes a violation of international law ". His delegation considered that in article 49 the notion of force covered all forms of coercion, including economic coercion, and it therefore supported the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1).

42. His delegation strongly supported the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) for the reasons given earlier by the Czechoslovak representative. The principle of prohibiting resort to force had been in existence in international law before the establishment of the United Nations; the Charter had merely taken it over and developed it. The amendment in no way limited the principle in the Charter by adding that further detail; on the contrary it made it more universal.

43. His delegation could not support the Japanese amendment (A/CONF.39/C.1/L.298) especially because under Article 39 of the Charter it was only the Security Council, not simply any organ, that was competent to determine the existence of any threat to peace and to decide what measures should be taken. Nor could it support the Australian amendment (A/CONF.39/C.1/L.296), which did not improve the International Law Commission's text. The Peruvian amendment (A/CONF.39/C.1/L.230) required that it should be established that the conclusion of a treaty had been procured by the threat or use of force, but did not specify how it was to be established.

44. Mr. CRUCHO DE ALMEIDA (Portugal) said that article 49 raised three basic questions, namely the content of the word " force ", the sanction for the use of force, and the limits of application of the article *ratione temporis*.

45. Apart from some very personal opinions, it had always been agreed that " force " in international law meant " armed force ", whether used overtly or in well-known indirect forms. The nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1), however, reflected a recent trend towards extending that traditional interpretation to include the notion of other forms of pressure, both economic and political.

46. The Portuguese delegation could not support the amendment because, first, no method of interpretation, textual, historical or teleological, gave any ground for deducing such an extended meaning of the word " force " from the provisions of the Charter; any such extension would deprive of all meaning the solemn assertion by the Committee of the *pacta sunt servanda* rule and the principle of good faith. The purpose of the amendment was, it was said, to protect smaller States; but it must be remembered that in Europe, for example, powerful and weak States had always existed and that nevertheless no one had ever contemplated protecting the weak States by introducing principles which might undermine the stability of treaties and afford a pretext for the breach of obligations which had been assumed in due form.

47. Secondly, it might reasonably be asked whether the sanction of absolute nullity laid down in article 49 was compatible with the special structure of international law. Absolute nullity had three particularly important effects. First, an act subject to absolute nullity could not be confirmed. Draft article 49 accepted that effect of nullity, but in international law the difference between confirmation and the conclusion of a new treaty had no real significance in practice. Secondly, absolute nullity operated *ipso jure*, in other words, automatically or, as some preferred to call it, *ab initio*. That effect was explicitly rejected in the International Law Commission's draft, which implied that any ground of nullity must be subject to the verification procedure set out in article 62. Article 2, paragraph 3, of the Charter imposed on States the duty to settle their disputes by the peaceful means enumerated in Article 33 of the Charter. Those Articles manifestly excluded any possibility of unilateral action.

48. Thirdly, absolute nullity had effects *erga omnes*. That appeared to have been accepted by the International Law Commission, which had accordingly used a special wording in articles 49 and 50. The Commission, however, was thereby embarking on a dangerous course which might lead not to the progressive development of international law but to the partial denial of one of its fundamental principles, namely non-intervention. Any State or international body might use that effect of nullity as a pretext for intervening in a dispute between two States regarding an alleged ground of absolute nullity. The two Hague Conventions for the Pacific Settlement of International Disputes recognized that an offer of mediation, and that alone, was not to be regarded as an unfriendly act, and those Conventions, as well as the Statutes of the Permanent Court of International Justice and the International Court of Justice made the intervention of third States before an international court subject to very restrictive conditions. Lastly, India, the United Arab Republic and other States had submitted to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States a text (A/AC.125/L.12/Rev.1 and Corr.1) which affirmed that no State had the right to intervene directly or indirectly in the internal or external affairs of another State. For those reasons, which also applied to article 50, the attempt to introduce into international law the notion of absolute nullity seemed debatable. His delegation, therefore, strongly supported the Australian amendment.

49. With regard to the application *ratione temporis* of article 49, the International Law Commission's report indicated that the use of force had been condemned by modern international law, but it had refrained from specifying the date when that law had been established. The Portuguese delegation considered that certainty on that point had been attained only after the formation of the law of the United Nations Charter, which stated the principle explicitly in Article 2, paragraph 4.

50. In view of the foregoing, and also in view of the links between the article and the acceptance of the arbitral safeguards essential for its operation, the Portuguese delegation considered that it would be wiser to refer article 49 to a working party with a view to removing the ambiguities and doubts to which, as at present drafted, it gave rise.

51. Mr. BLIX (Sweden) said that his delegation supported the rule in article 49, which was the logical consequence of the modern outlawing of the threat or use of force. To recognize the validity of treaties whose conclusion had been procured by such means would put an inconceivable premium on their use. The rule was therefore necessary. It might further serve to put States on notice that any treaty they sought to procure by those prohibited means would constitute a precarious gain.

52. Nevertheless, his delegation was aware that although that rule deprived treaties procured by such actions of all legal force, it did not prevent recourse being had to such actions. It shared the weakness of all policies of non-recognition: if such policies did not yield results within a reasonable time, they were liable to be interpreted as refusals to recognize not only illegal acts, but also realities.

53. With regard to the application in time of article 49, the International Law Commission, basing itself on Article 2, paragraph 4, of the Charter, considered that the principle formed part of *lex lata* and that it was applicable at any rate to all treaties concluded since the entry into force of the Charter. Without wishing to go into the question of exactly when the principle had become a principle of international law, he thought it would be wise to decide, at some stage of the Conference's work, that the articles of the convention on the law of treaties would be applicable only after the entry into force of the Convention. In that case, article 49 would not have retroactive effect. That would not, however, prevent States from invoking the principle laid down in the article, in connexion with any treaty the conclusion of which had been procured by the threat or use of force after that principle had become *lex lata*, but before the entry into force of the convention.

54. Unfortunately the threat or use of force in violation of the principles of the Charter of the United Nations was not a well-defined notion, and the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) did not help in that respect, though the meaning of the text,

according to paragraph (5) of the commentary, was definitely that stated in the amendment.

55. The Japanese amendment (A/CONF.39/C.1/L.298) might, by the qualification it introduced in article 49, reduce the risk of a State's invoking the article in an unjustified manner simply to escape from undesirable obligations. But cases of the threat or use of force might arise which, even though they had not been notified to the United Nations, might nevertheless have existed. The Japanese amendment deserved, however, to be considered during the process of consultation and conciliation to which it would be indispensable to have recourse for the purposes of the article.

56. The nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) also developed the notion of the threat or use of force by extending it to cases of economic or political pressure. That proposal rested on a disputed interpretation of the Charter and gave rise to a divergence of views which there was little hope of reconciling at the present stage. For that reason, the International Law Commission had preferred to leave it to practice to determine the forms of coercion covered by article 49. His delegation thought it would be just as controversial to introduce expressly the notion of economic and political pressure as to limit expressly the formulation of article 49 to the use of armed force. In any case, on a question of such importance, it would be unwise to impose a majority decision which would not have the support of all the groups of States. Accordingly, his delegation hoped that the sponsors of the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) would not insist that it be put to the vote. On the other hand, it might be considered along with the other amendments in the process of consultation.

57. If, as his delegation would suggest, the scope of the notion of the threat or use of force should be left to be settled by practice, it would be most important to have available a mechanism for the settlement of disputes which would contribute to the solution of the problem raised by that definition.

58. His delegation thought that the Peruvian amendment (A/CONF.39/C.1/L.230) was unnecessary. It was true that there was a difference in the terminology used in articles 43 to 47, on the one hand, and articles 49 and 50 on the other. But that did not entail any legal consequence, for in both cases the ground of invalidity must be invoked—whether it had been correctly invoked would only appear if that fact was established in accordance with the procedure laid down in article 65, in which case nullity would always operate *ex tunc*.

59. The Australian amendment (A/CONF.39/C.1/L.296) would slightly improve the text by making the terminology used in the English version of the articles more consistent, without, however, changing the substance; even with the use of the word " invalid ", nullity would have to be established, and once established, would operate *ex tunc*.

60. His delegation considered that it was essential to effect a considerable improvement in the procedure for establishing nullity, and at the appropriate time it would consider the desirability of establishing conciliation and arbitration machinery. Questions of terminology were of secondary importance.

61. Mr. JACOVIDES (Cyprus) said that he attached great importance to maintaining and strengthening the principle of article 49. Whereas before the Covenant of the League of Nations, traditional doctrine did not consider the threat or use of force as a ground for invalidating a treaty the conclusion of which had been procured by such means, several international instruments, in particular the Charter of the United Nations, had since established that principle as *lex lata*. As early as 1963, in commenting on the relevant draft article, his delegation had expressed the view, before the Sixth Committee, that " if a treaty was imposed upon a State without its free consent, contrary to the spirit of the Charter and its fundamental principles, it would be for the State concerned to take its free decision in regard to the maintenance or not of that treaty, once it found itself in a position of legal equality with the other State ". In general, it was the view of his delegation that the private law analogy of contracts concluded under duress or undue influence should be borne in mind in determining the validity of international agreements arrived at when the parties were in an unequal bargaining position.

62. The notion of force had been the subject of diverse interpretations in the past. It clearly included armed force and any coercion short of the use of armed force which precluded freedom of choice. His delegation approved the nineteen-State amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) which expressly stated that the term " force " also included economic and political pressure. Political pressure, in particular, should be expressly covered to the extent that, even without the use of armed force, it constituted coercion which violated the principles of the Charter, such as sovereign equality or self-determination. He was especially in favour of that amendment (A/CONF.39/C.1/L.67/Rev.1/Corr.1) because certain States had tried to give the word " force " an excessively restrictive interpretation, and the amendment would remove all shadow of doubt on that point. Moreover, that approach corresponded to the attitude adopted by the participants at the Cairo Conference in 1964.

63. The Cypriot delegation was one of the co-sponsors of the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1), which slightly altered the text of the article in order to emphasize that the principle of the prohibition of the use of force in international relations existed before the Charter, since it had been affirmed in various international instruments already mentioned, and was a valid rule of customary international law. The adoption of that amendment could only strengthen the juridical value of that principle.

64. Without wishing to discuss the juridical force of General Assembly resolutions as rules of law, he would remind the Committee that resolution 2160 (XXI) had stressed the principle in question. That showed that it was a living principle, capable of evolution and development by interpretation.

65. His delegation regretted that it was unable to support the Australian amendment (A/CONF.39/C.1/L.296), as it considered that a treaty procured by force should be void *ab initio*. It approved the position adopted by the International Law Commission on that point.

66. With regard to the amendments by Peru (A/CONF.39/C.1/L.230), Japan (A/CONF.39/C.1/L.298) and China

(A/CONF.39/C.1/L.301), he thought that, with the exception of paragraph 1 of the last-mentioned, they did not improve the present text. Paragraph 1 of the Chinese amendment, which proposed the addition of the words "*ab initio*" after the word "void" in the first line, represented a drafting improvement.

67. Mr. DE LA GUARDIA (Argentina) said that he had moderate views on article 49. He had no doubt that the principle was *lex lata* in international law and could therefore be included in the convention. On the other hand, the terms used by the International Law Commission showed a serious lack of precision. There were, in fact, cases where the use of force might be legitimate, for example, when it was used on behalf of the international community in conformity with the Charter of the United Nations. There was no definition of aggression in international law and therefore the application of the principle of the condemnation of the use of force was hazardous.

68. Moreover, the notion of force was itself badly defined. His delegation did not think that it could be extended to all types of economic and political pressure and did not favour proposals to that effect. Such an extension would only enlarge the area of imprecision. In his second report, Sir Humphrey Waldock had stated in paragraph 6 of his commentary to article 12 that "if 'coercion' were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure for example, the door to the evasion of treaty obligations might be opened very wide".[1]

69. On the other hand, his delegation had carefully considered those amendments which sought to give juridical meaning to the formulation or application of that principle, for example, the fourteen-State amendment (A/CONF.39/C.1/L.289 and Add.1) and the Peruvian amendment (A/CONF.39/C.1/L.230). As for the arguments that certain delegations believed they could deduce from the juridical institutions of the inter-American system, he agreed with the reply given by the representative of Uruguay.

70. The area of application *ratione temporis* of article 49 was another matter requiring solution. His delegation approved of the view expressed in the International Law Commission's commentary, that the article should not be applicable to treaties the conclusion of which had been procured by the threat or use of force at a time when the prohibition of those methods had not yet been introduced into international law, for a juridical act should be interpreted in terms of the law of its time, but the text of article 49 did not express that criterion clearly and thus opened the door to interpretation and doubt. There was a choice between the date of entry into force of the Charter of the United Nations and that of the convention on the law of treaties as the point of departure for applying the principle of article 49. He did not propose to submit a formal proposal to that effect, so as not to complicate the debate, but his delegation was willing to co-operate with those delegations who shared the same concern, in order to find a solution.

The meeting rose at 10.35 p.m.

[1] *Yearbook of the International Law Commission 1963*, Vol. II, p. 52.

FIFTIETH MEETING

Friday, 3 May 1968, at 10.45 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 49 (Coercion of a State by the threat or use of force) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 49 of the International Law Commission's draft.

2. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that the provisions of article 49 were the outcome of the progressive development of international law during the past decade. The principle of the sovereign equality of States, which was at the basis of modern international law, involved a new approach to the problem of unequal treaties obtained by coercion and in violation of *jus cogens* rules of international law. In accordance with the principles of the Charter of the United Nations, a treaty procured by the threat or use of force in any form was void. Contrary to what had been suggested, the duty of States to "refrain in their international relations from the threat or use of force" set forth in Article 2 paragraph 4, of the Charter, applied to all forms of force and not merely to armed force. It included, in particular, economic and political pressure. The language of Article 2, paragraph 4, was quite different from that used in such provisions as Article 51, on the right of self-defence, where the reference was specifically to "armed attack", in other words, to the use of military force as distinct from other forms of force.

3. Of course, it was only the threat or use of force in a manner inconsistent with the principles and purposes of the United Nations which was illegal. The use of force was legal if it was resorted to in accordance with the United Nations Charter, whence article 70 of the draft dealing with obligations imposed on an aggressor State in consequence of measures taken in conformity with the Charter. A treaty imposed by the threat of force on an aggressor in such circumstances was valid and must be respected. The position was quite the reverse where a treaty had been procured by an aggressor and incorporated the results of the aggression. For example, the cession of territory to an aggressor by virtue of such an imposed treaty was null and void.

4. The text of article 49 was generally acceptable but could still be improved. His delegation had therefore joined those of thirteen other States in sponsoring an amendment (A/CONF.39/C.1/L.289 and Add.1) for that purpose. His delegation opposed amendments such as the one by Japan (A/CONF.39/C.1/L.298) which dealt essentially with matters of procedure, which fell within the competence of the Security Council.

5. Mr. WERSHOF (Canada) said that if his delegation were to vote in favour of some version of article 49, its vote would be subject to reconsideration by the Canadian Government on the basis of the outcome of the discussion on article 62, the present provisions of which were inadequate. Article 49, which was intended to give