United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

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Eighteenth plenary meeting

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in sub-paragraph (*b*) must be unambiguously determined and that the provision did not cover mere silence.

60. Mr. AMATAYAKUL (Thailand) said that in order to prevent his delegation's silence during the discussion of article 42 from being taken as implying its consent to the adoption of the article, he wished to state that his delegation maintained the view it had expressed at the 67th meeting of the Committee of the Whole and had therefore abstained from voting on the article.

61. Mr. BAYONA ORTIZ (Colombia) said that his delegation had voted against article 42 for the reasons it had given earlier in the meeting. It had intended to vote against sub-paragraph (*b*) but, since the request for a separate vote on that clause had been rejected, it had been obliged to vote against the article as a whole, without prejudice, however, to its views on sub-paragraph (*a*).

62. Mr. CARMONA (Venezuela) said he had received instructions from his Government to announce that the Republic of Venezuela would enter an express reservation in respect of article 42.

63. Mr. BIKOUTHA (Congo, Brazzaville) said that, in his delegation's opinion, the work of codifying the law of treaties should not be based on short-term political considerations or an selfish motives. His delegation had explained its views on article 42, especially on sub-paragraph (*b*), at the 67th meeting of the Committee of the Whole. It was not opposed to the principle laid down in sub-paragraph (*b*), but feared that the inclusion of the phrase " by reason of its conduct " might open the door to subjective and loose interpretations and, consequently, to abuse. It had therefore abstained in the vote on the article as a whole.

64. Mr. GALINDO-POHL (El Salvador) said that his delegation had voted against article 42, although it approved of the first part of it, because of the serious reservations it had to sub-paragraph (*b*). The Conference had, of course, exercised its right under the rules of procedure in rejecting the request for a separate vote on sub-paragraph (*b*), but his delegation could not help thinking that it had thereby shown a certain lack of flexibility. El Salvador had always upheld the view that it was inadvisable to deny delegations the opportunity of expressing their opinions by means of a separate vote on part of a text and thus to force them to vote against the whole provision. He would suggest that in future every effort be made to meet requests for separate votes.

65. Mr. SINHA (Nepal) said that his delegation had voted in favour of the Venezuelan motion for division and against article 42. Nepal supported a just and honourable international legal order, and did not want to be a party to any action which might create a possibility of that order being vitiated by coercion. Sub-paragraph (*b*) as now worded might open the door to legalizing treaties obtained by fraud and coercion, since even silence might be construed as acquiescence in the validity of an unjust treaty or in its maintenance in force or in operation.

66. U BA CHIT (Burma) said that his delegation approved of the first part of article 42, but had reservations concerning sub-paragraph (*b*). Since it had been given no opportunity to express its attitude towards that sub-paragraph, it had had no alternative but to vote against article 42 as a whole.

Message from the President of India

67. The PRESIDENT said that the Indian delegation had requested him to convey to the Conference a message received from the President, Government and people of India.

68. The President had been deeply touched by the expressions of condolence and the kind references by delegations to the United Nations Conference on the Law of Treaties on the sudden passing of Dr. Zakir Husain, the late President of India. The President wished to convey to the Conference, both on his own behalf and on behalf of the Government and people of India, his grateful thanks for their sympathy in India's great loss. The Conference's condolences had been conveyed to the family of the late President, who also wished to express their thank to the Conference.

The meeting rose at 6 p.m.

EIGHTEENTH PLENARY MEETING

Friday, 9 May 1969, at 3.15 p.m.

President: Mr. ZEMANEK (Austria)

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

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Statement by the Chairman of the Drafting Committee on articles 43-50

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 43 to 50 constituted Section 2 (Invalidity of treaties) of Part V of the convention.

2. The Drafting Committee had made several drafting changes in the titles prepared by the International Law Commission and in the texts adopted by the Committee of the Whole. Two of those changes affected all the language versions. The first related to the opening phrase of article 44, " If the authority of a representative to express the consent of his State ". As it had also done elsewhere, and in particular in article 7, the Committee had replaced the words " of his State " by the words " of a State ", since it was possible for a State to be represented by a person who was not a national of that State.

3. The second change related to article 46, on fraud. The article dealt with a situation which had some analogy with that envisaged in article 47, entitled " Corruption of a representative of a State ". The

Committee had considered that the texts of those two articles should have the same grammatical construction and so, without making any change in the terms of article 46, it had brought the structure of the article into line with that of article 47.

4. The other changes made by the Drafting Committee to Section 2 related only to questions of syntax or terminology affecting only one of the official languages of the Conference.

Article 43 [1]

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

5. Mr. PINTO (Ceylon) said that he wished to make some comments on the drafting of articles 43, 44 and 45. All three provided for situations in which certain facts essential to the validity of the consent of one party did not exist, and for the change that occurred when, in such situations, the other negotiating State received knowledge of the non-existence of those relevant facts. In all three situations, the non-existence of the particular fact could nullify the consent of the other party and avoid its contractual obligation, but equally, in all three cases, it was declared that if the other negotiating State had knowledge of the non-existence of the relevant fact, it could not plead that its consent had been vitiated. The three articles, however, approached the question of knowledge of the vitiating factor in different ways.

6. Article 43 required that the violation of internal law should be " manifest ", or " objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith ". In that case, knowledge could thus even be presumed on the part of the other negotiating State. It was not necessary that the other negotiating State could be actually aware of the lack of internal authority. It was considered to have been informed of the lack of authority if that lack would have been " evident " to " any State ", presumably after some inquiry demanded by ordinary prudence, but not necessarily after an exhaustive inquiry and extensive efforts to secure authoritative interpretations of the other State's constitution and practice. The required standard of conduct or investigation was far from clear. No point of time was specified, while non-existence of the fact might be " manifest " either before or after the giving of consent.

7. Article 44 required that the " other negotiating State " be " notified " of the restriction on the representative's authority. Nothing short of a formal act of notification would suffice for the " other negotiating State " to be held to have received knowledge of the non-existence of the relevant fact. Moreover, the timing was important: it was stated that notification must have been received before consent was given.

8. Under article 45, it was enough that circumstances should be such as to put the other negotiating State on notice of a possible error for the validity of the latter's consent to be held affirmed. No formal act of notification appeared possible in that case, and indeed both parties could well have been misled by the same error. No standard of diligence, however, was specified, unlike the case provided for in paragraph 2 of article 43, and no point of time was indicated, unlike the case provided for in article 44.

9. Lastly, there was the question of the degree of importance of the information which, if received, would preclude a plea of invalidity. Article 43 dealt with cases where the non-existence of constitutional authority was of " fundamental importance ". Article 44 indicated no degree of importance regarding the " restrictions on authority " that a representative had failed to observe. Article 45 referred to a fact or situation that formed an " essential basis " of a party's consent. There did not appear to be any real difference between the standards implied by the phrases " fundamental importance " and " essential basis ". Some uniforme terminology should be found.

10. He wished to draw the Drafting Committee's attention to those differences of approach on three points: first, the manner in which the other negotiating State became aware that something was wrong on its partner's side; secondly, the time when such information was to be received in order to preclude invalidation of consent; and thirdly, where no formal act of notification was possible or called for, the standard of conduct or diligence of investigation expected from a State. If some uniformity of approach, terminology and drafting was possible, it might be helpful to make the necessary changes so as to avoid difficulties of interpretation in the future.

11. Those observations were offered solely with the intention of assisting the Drafting Committee in its continuing reappraisal of the convention.

12. The PRESIDENT said that the comments of the representative of Ceylon would be taken into consideration by the Drafting Committee.

13. Mr. WERSHOF (Canada) said that his delegation wished to make a general statement applicable to many of the articles in Sections 2 and 3 of Part V of the convention.

14. Quite apart from his delegation's doubts regarding the substance of some of the articles in those sections, certain of those articles would be unacceptable to the Canadian Government in the absence of a satisfactory clause on the settlement of disputes, such as article 62 *bis* as recommended by the Committee of the Whole.

15. If, therefore, the Canadian delegation voted in favour of all or most of the articles in Sections 2 and 3 of Part V, it would be doing so on the assumption

[1] For the discussion of article 43 in the Committee of the Whole, see 43rd and 78th meetings.

that the Conference would adopt a satisfactory clause on the settlement of disputes.

16. If that assumption proved to be incorrect, the Canadian delegation reserved the right to reconsider its position on the question of the adoption of the convention as a whole. Similar declarations had been made by his delegation at the first session during the examination of Part V in the Committee of the Whole.

17. Mr. KRISHNA RAO (India) said he wished to place on record his delegation's view that no condition could be attached to any article in Part V. Every sovereign State was of course free to sign or not to sign the convention on the law of treaties. The Conference had been convened in order to find a text that would prove acceptable to all.

18. Mr. BILOA TANG (Cameroon) said that, during the discussion on article 5, his delegation had opposed the inclusion of the former paragraph 2, which the Conference had rejected at the 8th plenary meeting, because of the complications which would result from the need for one State to interpret the constitution of another State. A similar difficulty arose in connexion with article 43, paragraph 1, which referred to a violation of the internal law of a State, which " was manifest and concerned a rule of its internal law of fundamental importance ". In order to apply that provision, a State party to a treaty would have to consider the provisions of the internal law of another State and determine which were of " fundamental importance ". For those reasons, he was in favour of dropping the concluding words of the paragraph, " and concerned a rule of its internal law of fundamental importance ", and he requested a separate vote on those words.

19. Mr. GONZALEZ GALVEZ (Mexico) said that his delegation wished to make a general comment on the " Draft Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty " which the Committee of the Whole had submitted to the Conference for consideration in conjunction with article 49;[2] that article declared a treaty void if its conclusion had been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

20. It would be most incongruous if, after establishing the invalidity of treaties obtained by coercion of a representative, in article 48, or by coercion of the State by the threat or use of force, in article 49, and of treaties conflicting with a rule of *jus cogens,* in article 50, the Conference were to fail to specify that economic or political coercion constituted grounds of absolute nullity.

21. During the discussion at the first session on the nineteen-State proposal on the subject (A/CONF.39/C.1/L.67/Rev.1/Corr.1), it had been objected that the term " coercion " was very vague and hard to define, so that it was not possible to draw a distinction between lawful and unlawful pressure. It had also been objected that international relations would be impossible if countries were not allowed to exercise a minimum of pressure on each other.

22. International relations undoubtedly involved some element of pressure. For example, in a bilateral negotiation for the conclusion of a commercial treaty, it was normal for a State to withhold certain concessions in the hope of obtaining something in return for them. At the same time, it was possible to conceive of forms of economic pressure that were open to a State in the exercise of its sovereignty, but were obviously illicit. To take an example, it was doubtful whether it was legitimate for a State to bring pressure to bear by applying health or trade regulations in such a manner as to prevent the import of a certain product from a particular country while at the same time allowing the import of that product from another country in the same area. Such measures would be even more clearly illicit if it could be shown that the discrimination in question was intended to compel the exporting country to sign a treaty which had no connexion with the health or trade regulations in question. In the hypothetical example he had given, it would not be a valid reply to say that the State exerting the pressure had been acting within its sovereign rights; such a reply would perhaps have been admissible in the nineteenth century, but would now be incompatible with the letter and the spirit of the Charter, Articles 55 and 56 of which obliged Members to take joint and separate action to promote the solution of international economic and social problems. It would, moreover, run counter to the duty laid down by the Charter to perform international obligations in good faith, and it would be contrary to the general principle of law prohibiting what French legal doctrine referred to as " abuse of rights ".

23. The position was similar in the political field. It could of course be said that, throughout history, no dispute had been settled without some measure of pressure, but it had to be recognized that there were various types of pressure. No one would deny that the pressure exercised by Hitler on the President of Czechoslovakia to compel him to make certain territorial concessions had constituted a typical case of unlawful political coercion. In that well-known case, political coercion of the President as an organ of the State had been combined with physical coercion of the President as an individual, but one or other of those two grounds was sufficient to render void the agreement then imposed on Czechoslovakia.

24. He was not convinced by the argument that certain terms were not capable of clear legal definition and that it was therefore impossible to distinguish between lawful forms of pressure. As he had pointed out in another United Nations body, the fact that a term was vague, or that a principle was difficult to apply, was not sufficient reason for rejecting such terms or principles, since the political or judical organ entrusted with the application of the term or principle would not have any greater difficulties than those which faced any court of law in its daily work of applying legal rules. A great many important legal terms had only an

[2] For the text of this declaration, see 20th plenary meeting, para. 1.

approximate and imprecise meaning and required to be interpreted within reason, bearing in mind the time and place and the political, economic, social and legal circumstances in which they were applied. That argument was particularly important for those countries which, unlike Mexico, had indicated that their acceptance of the provisions of Part V was subject to the inclusion of a system for the compulsory settlement of disputes arising out of those provisions.

25. History provided many examples of notions which, at their inception, had seemed vague and imprecise, but which the passage of time, had been subsequently clarified, their scope and limits having been defined by practice. Thus, in the United States, the concept of " due process of law ", which had originated as a mere procedural safeguard, had ultimately developed into a whole system of political philosophy. In the course of that development, the meaning of that term had at times been extraordinarily fluid.

26. In international law, the expression " due diligence " was used in connexion with the duty of a neutral State to exercise vigilance in order to prevent its territory from being used to equip vessels for use against one of the belligerents. It appeared in the well-known Washington Rules, which had emerged from the famous *Alabama* case and which had exercised a considerable influence on the development of the law of neutrality on that point. But there was still no exact definition of the term " due diligence ".

27. The Charter of the United Nations itself provided another striking example. Article 4(1) made membership in the United Nations open to all " peace-loving States " which accepted the obligations of the Charter and which, in the judgement of the Organization, were able and willing to carry out those obligations. It would be extremly difficult to give any precise definition of the term " peace-loving State " and yet the political organs of the United Nations — the Security Council and the General Assembly — had applied that concept in more than seventy cases; in fact, on each occasion when a new Member was admitted.

28. In its judgement of 9 April 1949 in the *Corfu Channel* case the International Court of Justice had stated that " the present defects in international organization " — and, he would add, lack of precision in a term or in a rule — could not be invoked to justify failure to observe a legal rule. The relevant paragraph read: " The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law." [3]

29. For those reasons, his delegation suggested that the Conference give careful consideration to the possibility of including in Part V a new article reading: " A treaty is void if its conclusion has been procured by economic or political coercion in violation of the principles of the Charter of the United Nations". That article would fill a gap in the convention and would be no more difficult to interpret and apply than the rules embodied in articles 48, 49 and 50, which had already been approved by the Committee of the Whole.

30. For those States that were members of the inter-American system, it was appropriate to recall that article 16 of the Charter of the Organization of American States prohibited the use by a State of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.[4]

31. Mr. EUSTATHIADES (Greece) said that, following the statements made by certain representatives, his delegation must declare that it reserved its position regarding Part V and on the convention as a whole until a satisfactory decision was reached on the procedure for the settlement of disputes. Such a declaration would normally not have been necessary, but in view of what had been said by other speakers, he was obliged to place it on record.

32. Mr. SOLHEIM (Norway) said that his delegation also wished to make a general statement with respect to the articles which the Conference was now considering. Its views on the question were, on the whole, the same as those expressed by the Canadian representative.

33. When voting in favour of, and even when abstaining on, some of the articles in Sections 2 and 3 of Part V, his delegation's votes would be given on the assumption that the convention on the law of treaties would contain a solution in respect of the settlement of disputes which was considered satisfactory by his delegation. If that should prove not to be the case, the Norwegian delegation's final position and vote on the convention on the law of treaties as a whole would certainly be influenced thereby.

34. Mr. KRISHNA RAO (India) said the Conference should return to the discussion of article 43. At both the present and the previous meetings, a number of statements had been made which related particularly to article 62 *bis* and were more suited to a general debate. Every delegation was of course free to adopt whatever attitude it found appropriate, but the Indian delegation was not bound by a statement made by another delegation. Nor was the Conference itself bound by the statements of individual delegations.

35. Mr. EL DESSOUKI (United Arab Republic) said that the French version of paragraph 1 would be clearer if the words *" qu'elle "* were inserted to make the end of the sentence read *" qu'elle ne concerne une règle de son droit interne d'importance fondamentale"*.

36. The PRESIDENT said that the representative of Cameroon had asked for a separate vote on the words " and concerned a rule of its internal law of fundamental importance ".

37. Mr. USENKO (Union of Soviet Socialist Republics) said he believed that the Cameroonian representative's request was based on a misunderstanding, because if those words were deleted, the door would be opened to

[3] See *Corfu Channel case, Judgment of April 9th 1949: I.C.J. Reports, 1949*, p. 35.

[4] United Nations, *Treaty Series*, vol. 119, p. 56.

the possibility that even secondary rules of internal law might be invoked. The Soviet Union delegation accordingly could not support the request for a separate vote.

38. The PRESIDENT said that he would invite the Conference to vote first on the request by the representative of Cameroon for a separate vote on the words " and concerned a rule of its internal law of fundamental importance ".

The motion for a separate vote was defeated by 43 votes to 7, with 47 abstentions.

Article 43 was adopted by 94 votes to none, with 3 abstentions.

39. Mr. MATINE-DAFTARY (Iran) said that his delegation had abstained from voting on the article for the reasons it had given at the 43rd meeting of the Committee of the Whole. The text of the article was not satisfactory to Iran.

40. Mr. KEARNEY (United States of America) said he wished to explain why his delegation had voted for article 43. To the extent that the article dealt with invocation on the international plane of provisions of internal law, the comments made in explanation of the United States vote on article 23 *bis* at the 13th plenary meeting were relevant and he would not repeat them. His delegation wished to emphasize that article 43 in no way affected the internal law of a State regarding competence to conclude treaties; it dealt solely with the conditions under which a State might invoke internal law on the international plane to invalidate the State's consent to be bound.

41. Mr. SMALL (New Zealand) said that his delegation had voted for article 43, and would vote for the rest of the articles in Part V if they remained unchanged. Although New Zealand had doubts regarding some of those articles, particularly article 47, whose advisability was not quite clear, it would vote for the articles in the expectation that adequate procedure would be provided in the final convention for the settlement of disputes relating to Part V. The reasons for his delegation's attitude had been explained at the first session of the Conference, and he would merely add that New Zealand's acceptance of the convention as a whole would depend essentially on the view it took of whether there was a proper balance between the whole of Part V and the adequacy of procedural safeguards for the settlement of disputes, in the final text of the convention.

42. He would be unable to vote for article 50 because of its nature, and the special relevance in that case of a proper procedural machinery. For the same reason his delegation had abstained from voting on article 41, which included a reference to article 50.

43. Mr. BLIX (Sweden) said that his delegation had voted for article 43 on the understanding that it did not cover the case of treaties concluded by *de facto* governments. It was generally acknowledged in doctrine and practice that *de facto* governments, in other words those exercising effective power but disregarding constitutional rules, could bind their States in international law by treaties, because any other rule would not be practical.

44. Mr. FATTAL (Lebanon) said he wished to raise a point of procedure. As the Conference only had eight working days left in which to deal with a very large number of articles, as well as the preamble and the final clauses, he would suggest that from now on the length of statements be restricted, particularly since many representatives were repeating what they had already said more than once.

45. The PRESIDENT said that he did not think the time had yet come to take such a step, but he hoped that representatives would take note of the remarks of the representative of Lebanon.

Article 44 [5]

Specific restrictions on authority to express the consent of a State . .

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

46. The PRESIDENT invited the Conference to consider article 44. An amendment to that article had been submitted by Spain (A/CONF.39/L.26).

47. Mr. DE CASTRO (Spain) said that the Spanish amendment was in fact the same as that submitted by his delegation at the 44th meeting of the Committee of the Whole (A/CONF.39/C.1/L.288).[6] It was purely a matter of drafting, and he would accordingly suggest that the Drafting Committee reconsider the wording of article 44 in the light of his amendment, particularly the Spanish version of the article.

48. The PRESIDENT asked the representative of Spain if he wished the Drafting Committee to consider redrafting the article in the other language versions also.

49. Mr. DE CASTRO (Spain) said he would leave that to the Drafting Committee to decide.

50. The PRESIDENT suggested that the amendment by Spain should be referred to the Drafting Committee.

It was so agreed.[7]

Article 44 was adopted by 101 votes to none.

Article 45 [8]

Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist

[5] For the discussion of article 44 in the Committee of the Whole, see 44th and 78th meetings.

An amendment was submitted to the plenary Conference by Spain (A/CONF.39/L.26).

[6] See also 78th meeting of the Committee of the Whole, paras. 18-20.

[7] The Drafting Committee did not recommend the adoption of the amendment. See 30th plenary meeting.

[8] For the discussion of article 45 in the Committee of the Whole, see 44th, 45th and 78th meetings.

at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 74 then applies.

51. The PRESIDENT said that the United Kingdom amendment (A/CONF.39/L.19) had been withdrawn.

52. Sir Francis VALLAT (United Kingdom) said that the Conference had now come to a series of articles relating to error, fraud, corruption and so on, which, according to the provisions of the draft convention, established grounds which might be relied on by a State with a view to invalidating its consent or otherwise terminating a treaty or its participation in that treaty. His delegation had made it clear on earlier occasions that its attitude to the convention as a whole would largely depend on whether the reference to article 50 was retained in paragraph 5 of article 41, and whether, on the assumption that the series of articles referred to were retained, there would be satisfactory procedures for the settlement of disputes. The vote at the sixteenth plenary meeting on paragraph 5 of article 41 was therefore bound to have some effect on the United Kingdom's attitude; it would not by itself necessarily turn the United Kingdom against the convention, but it would be a material factor in determining its over-all attitude.

53. The Conference was now left with two major factors: the nature and content of the series of articles referred to, and the procedures governing their application. It had often been stated that many, if not all, of the articles merely put into writing existing principles or rules of international law, but his delegation very much doubted whether that was altogether true. Whether it was true or not, the articles undoubtedly contained a substantial element of progressive development, if only as regards their formulation and modalities and the procedures for their application. By any normal legislative standards the articles as drafted were in many respects broad and vague; such key words as " fraud " and " coercion ", difficult enough to interpret in municipal law, and not previously applied in international law, were left completely undefined. It therefore seemed most unwise to leave their interpretation and application to the discretion of individual States. It might be said that article 62 provided the necessary procedures to avoid that result, but unfortunately it was itself ambiguous as to the effect of an objection. Paragraph 3, which might have provided the necessary safeguards, merely reflected Article 33 of the United Nations Charter. Although that Article pointed in the right direction, experience had shown that it left the matter entirely to the choice of the individual State concerned; it clearly provided no safeguard.

54. The United Kingdom would have preferred to have the right ultimately to refer disputes as to the interpretation or application of the articles in question to the International Court of Justice, but that possibility had now been ruled out, as far as the convention was concerned. Article 62 *bis,* as adopted by 54 votes to 34 in the Committee of the Whole, now limited States to a final resort to arbitration. Though somewhat less than satisfactory, that was acceptable. However, it must be made clear that the United Kingdom required for itself, particularly in connexion with the series of articles referred to, the minimum protection of the right to resort to arbitration in the last analysis. The United Kingdom had no wish to impose that procedure on those who did not want that measure of protection, but equally it could not agree to the imposition of those articles on the United Kingdom without the minimum protection of resort to arbitration.

55. That was a reasonable position, since it was merely an application in the international field of elementary principles of justice universally recognized in internal law. The principle that no man should be " judge in his own cause " was applicable to provisions such as those referred to, some of which had a distinct tinge of criminal law. All his delegation asked was the common human right to a fair trial if differences could not be settled by negotiation or by other procedures falling short of arbitration.

56. He had spoken at some length because he thought it would be more appropriate to make a single statement on the whole series of articles referred to rather than to repeat the same views on successive articles. As the Conference could not yet take a final decision on the articles relating to settlement procedures adopted by the Committee of the Whole, his delegation would be obliged to abstain on those articles in that part of the convention which established substantive grounds of invalidity or termination, and which required for their effective application or interpretation the protection of satisfactory third-party procedures.

57. Mr. USENKO (Union of Soviet Socialist Republics) said he was surprised at the statements that had been made by some representatives, such as those of Canada and the United Kingdom. Surely the Conference was discussing article 45, not article 62 *bis*? Some speakers seemed to be examining the draft convention as a whole; he had the impression that the statements made were really an attempt to exert pressure on delegations that supported Part V of the convention but were opposed to article 62 *bis*. Questions such as those now being raised concerning article 62 *bis* should be considered when that article came to be examined. He would not deny that certain articles were interrelated, and that certain principles related to several different articles. For example, the principle of universality related to more than one article. If certain delegations did not respond to the appeal to proceed with the examination of the convention article by article, it was quite possible that other delegations might wish to return to a consideration of the principle of universality. As the representative of Lebanon had pointed out, the time remaining to the Conference was short; delegations must consider the texts of the articles in their proper order instead of embarking on general discussions of the draft convention as a whole.

58. The PRESIDENT invited the Conference to vote on article 45.

Article 45 was adopted by 95 votes to none, with 5 abstentions.

Article 46 [9]

Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 46 was adopted by 92 votes to none, with 7 abstentions.

59. Mr. VARGAS (Chile) said that he had abstained from voting on article 46 for the reasons he had given at the 45th meeting of the Committee of the Whole.

Article 47 [9]

Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

60. Mr. QUINTEROS (Chile) said that his delegation would vote against article 47 for the reasons stated at the 45th meeting of the Committee of the Whole, which had led Chile, Japan and Mexico to propose the deletion of the article.

Article 47 was adopted by 84 votes to 2, with 14 abstentions.

61. Mr. VARGAS CAMPOS (Mexico) said that his delegation, together with the delegations of Chile and Japan, had submitted an amendment (A/CONF.39/C.1/L.264 and Add.1) in the Committee of the Whole proposing the deletion of article 47. The Mexican delegation had argued at the 45th meeting that article 47 was unnecessary since a treaty signed by a corrupted representative was voidable under article 46, corruption being a form of fraud. In paragraph (1) of its commentary to article 47, the International Law Commission had pointed out that the draft articles on the invalidity of treaties provisionally adopted by the Commission in 1963 had not contained any provision dealing specifically with the corruption of a State's representative, and that the only provision of the 1963 text under which that might be subsumed was the article dealing with fraud. The Mexican delegation had therefore voted against article 47.

62. Mr. OTSUKA (Japan) said that his delegation had abstained from voting on article 47 as it still had some doubt whether the article should be included in the convention.

[9] For the discussion of articles 46 and 47 in the Committee of the Whole, see 45th, 46th, 47th and 78th meetings.

Article 48 [10]

Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

63. Mr. NETTEL (Austria), supported by Mr. BILOA TANG (Cameroon), asked for a separate vote on the word " personally " which, in his delegation's view, narrowed the scope of the article. For example, threats might be directed against the next-of-kin of the representative of a State.

64. The PRESIDENT invited the Conference to vote on the word " personally ".

It was decided, by 46 votes to 16, with 35 abstentions, to delete the word " personally ".

Article 48, as thus amended, was adopted by 93 votes to none, with 4 abstentions.

Article 49 [11]

Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

65. Mr. ESCUDERO (Ecuador) said that no article in the draft convention was as important to the future of mankind as article 49, which had been approved by a large majority in the Committee of the Whole at the first session of the Conference. At that time his delegation, together with those of thirteen other States, had introduced an amendment (A/CONF.39/C.1/L.289 and Add.1) to the effect that a treaty was void if its conclusion had been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations. The purpose of the amendment had been to emphasize that certain principles which had already existed before 1945 as treaty law derived from international custom had been " embodied " in the Charter.

66. Ever since the end of the days of barbarism, it had been agreed that the use of force should be outlawed, but it was not until the First World War in 1914 that the conscience of mankind had been moved to take action and to create the League of Nations. The Covenant of the League required the Contracting Parties to accept obligations not to resort to war and to establish firmly " the understandings of international law as the actual rule of conduct among Governments." The "understandings of international law " must certainly have included the outlawing of the use of force, since without that principle there would have been no justification for the existence of international law itself. Under Article 10 of the Covenant, Members undertook " to respect and preserve as against external aggression the territorial

[10] For the discussion of article 48 in the Committee of the Whole, see 47th, 48th and 78th meetings.

[11] For the discussion of article 49 in the Committee of the Whole, see 48th, 49th, 50th, 51st, 57th and 78th meetings.

integrity and existing political independence of all Members of the League ". The same Article specified that, " in case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled ". Articles 11, 12 and 16 of the Covenant also prohibited the use of force and provided for sanctions. Subsequently a number of defensive agreements and treaties had been entered into by States on the basis of that principle. They had culminated in the signing of the Briand-Kellogg Pact of 1928,[12] in which the contracting States renounced recourse to war as an instrument of national policy. The date of the Briand-Kellogg Pact was clearly the date from which the principles of international law now embodied in the United Nations Charter had come into force. Between 1928 and the signing of the Charter in 1945, the prohibition of the use of force had become a peremptory norm of international law. That norm was now embodied in Article 2(4) of the Charter.

67. The true meaning of the provision in the Briand-Kellogg Pact under which States renounced recourse to war as an instrument of national policy was clear. It was that recourse to armed action, not war, was a legitimate instrument of international policy for the purposes of legitimate defence and the collective punishment of the aggressor. Legitimate defence was permitted by Article 51 of the United Nations Charter. In point of fact, the Briand-Kellogg Pact had provided the grounds for the sentences at the Nuremberg war crimes trials, since they dealt with " crimes against peace ", such as the threat or use of force which had been prohibited by the Pact of Paris of 1928.

68. Consequently, if the prohibition of the threat or use of force existed before the Nuremberg sentences, thoses sentences were valid; if it had not existed, they would have been void. The fact the prohibition already existed and that the sentences were therefore valid was a matter for which the United States, France, the United Kingdom and the Soviet Union, who set up and were represented on the Nuremberg Tribunal, were responsible.

69. The principles of international law mentioned in Article 49 of the convention had been observed in inter-American law since 1826. The principles of the prohibition of force, the non-recognition of territorial acquisitions obtained by force, and the peaceful settlement of international disputes had been laid down in the various instruments drawn up at the Congress of Panama of 1826, the first Congress of Lima of 1847, the Pact of Washington of 1856, the second Congress of Lima of 1864, the first Bolivar Congress of 1883, the first Pan-American Conference of 1889, the sixth Pan-American Conference of 1928, the Declaration signed by nineteen American countries in 1932, the seventh Pan-American Conference of 1933, the Inter-American Conference for the Consolidation of Peace of 1936, the eighth Pan-American Conference of 1938 and in the first and second consultative meetings of American Foreign Ministers of 1939 and 1940. The Seventh International Conference of American States, which had met in Montevideo in 1933, had drawn up the Convention on Rights and Duties of States, article 11 of which lair down that territorial acquisitions or special advantages obtained by force would not be recognized.[13]

70. Those principles of international law, embodied in the inter-American instruments referred to, had the character of regional *jus cogens* and had existed before the entry into force of the United Nations Charter. It was therefore only natural that article 49 should have been approved by an overwhelming majority in the Committee of the Whole. It remained for the Conference itself to set its seal of approval on a precept which would contribute effectively to the maintenance of peace in the world.

71. Mr. WARIOBA (United Republic of Tanzania) said that at the first session his delegation had been one of the sponsors of an amendment (A/CONF.39/L.67/Rev.1/Corr.1) for the inclusion in article 49 of a reference to " economic or political pressure ". In the hope of reaching a general compromise, that amendment had subsequently been withdrawn. The delegations which had opposed it had stated that their final acceptance of all the articles in Part V would depend on the development of some satisfactory machinery for the settlement of disputes. But he wondered whether it was really necessary for those delegations to keep repeating that their wishes must be met. His delegation would vote for article 49, not because it considered it completely satisfactory, but because it considered that the views of the largest possible number of delegations should be taken into account.

72. Mr. BINDSCHEDLER (Switberland) said that his delegation would abstain from voting on article 49 because, like the United Kingdom delegation, it doubted whether the principle set forth in the article was in accordance with the teachings of history and because its adoption might endanger the stability of the entire system of international law. His delegation, however, was in complete agreement with those of Ecuador and the United Republic of Tanzania in opposing the coercion of States by the threat or use of force.

73. Mr. JACOVIDES (Cyprus) said that his delegation attached the greatest importance to article 49, which it fully supported in its present form, as supplemented by the declaration condemning the threat or use of pressure in any form in the conclusion of a treaty.

74. His delegation had expressed its views at length at the 49th meeting of the Committee of the Whole. It considered that the final adoption of the article, which formed part of *lex lata,* was a landmark in contemporary international law. It hoped that treaty relations in the future would be governed by the provisions of article 49 and of the declaration which accompanied it, thus helping to promote the fundamental purposes of the United Nations.

75. Mr. VARGAS (Chile) said that his delegation would vote for article 49, which it regarded as the corollary to

[12] League of Nations, *Treaty Series,* vol. XCIV, p. 57.

[13] League of Nations, *Treaty Series,* vol. CLXV, p. 27.

Article 2(4) of the United Nations Charter and an important contribution to the maintenance of international peace and security. The Chilean delegation disagreed, however, with some of the interpretations given to the text of article 49 as approved by the Committee of the Whole. Article 77, on the non-retroactivity of the convention on the law of treaties, made it clear that article 49 applied only to treaties concluded after the entry into force of the convention. As far as doctrine was concerned, moreover, the only thing it was possible to maintain with any certainty was that the prohibition of the threat or use of force in international relations dated from the United Nations Charter. Before that, the Covenant of the League of Nations and the Pact of Paris, although they represented a clear advance on traditional international law, did not specifically and categorically prohibit the threat or use of force in the way that the Charter did. Consequently, even in the absence of a provision on the non-retroactivity of the convention on the law of treaties, article 49 could not apply to situations dating from before the Charter. His delegation also considered that the invalidity referred to in article 49 and in all the other articles in Part V should affect treaties concluded in the future, in accordance with the procedures laid down in the convention itself.

76. In the light of those considerations, which had been confirmed by the adoption of other rules, and especially of the fact that, in his delegation's view, the proposed convention would be incomplete unless it contained some provision stating that a treaty was void if its conclusion was procured by the threat or use of force, the Chilean delegation would vote in favour of article 49.

77. Mr. SHUKRI (Syria) said that his delegation would vote for article 49 on the understanding that the expression " threat or use of force " was to be understood in its broadest sense as including the threat or use of pressure in any form, whether military, political, psychological or economic. In a spirit of compromise, his delegation, like that of Tanzania, would not press any amendment to that article but would accept it in the spirit of the draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty adopted by the Committee of the Whole at the first session.

78. Mr. HUBERT (France) said that his delegation had abstained in the votes on articles 45 to 48 because of its concern for the maintenance of the necessary balance between Part V of the convention and the clauses relating to the settlement of disputes. It would vote for article 49, however, since France attached the highest importance to the principle that there should be no resort to force in international relations.

79. Mr. HAYTA (Turkey) said that his delegation, while not opposed to the general aims of article 49, was unable to support it because it still had some doubts concerning the precise scope of the expression " the threat or use of force ".

80. Mr. EL DESSOUKI (United Arab Republic) said that his delegation would support article 49 in the spirit of the draft declaration which had been adopted by the Committee of the Whole at the first session.

81. Mr. TABIBI (Afghanistan) said that article 49 was one of the most important articles of the draft convention; in its present form, however, it was not entirely satisfactory to the smaller nations of Asia, Africa and Latin America. At the first session, the nineteen-State amendment, (A/CONF.39/C.1/L.67/Rev.1/Corr.1), of which his delegation had been a co-sponsor, had been withdrawn in favour of the draft declaration adopted by the Committee of the Whole. That draft declaration, however, contained a number of loopholes; in particular, the title made no mention of military coercion in addition to economic and political coercion. In view of the importance which article 49 had for the developing countries, therefore, he formally proposed, under rule 27 of the rules of procedure, that further discussion of article 49 be adjourned till the next meeting.

The motion for the adjournment was carried by 58 votes to 11, with 29 abstentions.

The meeting rose at 5.50 p.m.

NINETEENTH PLENARY MEETING

Monday, 12 May 1969, at 11 a.m.

President: Mr. AGO (Italy)

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)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Article 49 (Coercion of a State by the threat or use of force) *(continued)*

1. The PRESIDENT said that since there were no further speakers on article 49, he would put the article to the vote.

At the request of the representative of the United Republic of Tanzania, the vote was taken by roll-call.

Panama, having been drawn by lot by the President, was called upon to vote first.

In favour: Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Sudan, Sweden, Syria, Thailand, Trinidad and Tobago, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, United States of America, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Australia, Austria, Barbados, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, Chile, China, Colombia, Congo (Brazzaville),