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Summary record of the 827th meeting

Topic:
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wording would be tantamount to signing a blank cheque. The content of the rule of law would be left to be determined by the future votes of shifting majorities in a political body. Article 36 would declare void certain unspecified categories of treaties, leaving open the real content of the rule. In the absence of any machinery for the impartial determination of what constituted coercion and for applying the consequences of nullity or invalidity, the proposed provisions would involve a serious risk of the instability of treaties.

75. There were two ways of avoiding that result. The first was to adopt some such wording as:

> " Any treaty the conclusion of which is found by an international judicial tribunal to have been procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void. "

A formula of that type represented the most desirable way of dealing with the problem and the reasons given against such a proposal did not seem to him at all convincing.

76. There was, however, a second possibility: instead of proclaiming the automatic invalidity of treaties for vague reasons which it was unable to make precise, the Commission could adopt the same approach as it had adopted in other articles of the draft and say:

> " Where a treaty or any act expressing the consent of a State to be bound by a treaty has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations, a State claiming injury may invoke such a ground of invalidity in accordance with article 51 of these articles. "

77. Mr. ELIAS said that he found the 1963 formulation of article 36 more satisfactory than the one now proposed by the Special Rapporteur. The change of wording introduced in order to meet the point raised by the Government of Israel would create more problems than it would solve. Perhaps the Drafting Committee should consider whether the point could not be met by inserting, after the words " was procured ", some such wording as " or subsequent participation in which was procured ". He felt, however, that the 1963 draft was adequate to cover the point and that it would be sufficient to deal with the matter by means of an explanation in the commentary.

78. He was not in favour of introducing into article 36 any direct reference to article 51, or of mentioning the question of judicial adjudication. If such a change were made in article 36, it would also have to be made in such articles as article 32, on lack of authority to bind the State, article 33, on fraud, and article 34, on error, thereby rendering the whole draft more cumbersome.

79. He had assumed throughout the Commission's discussions on the draft articles on the law of treaties that any dispute regarding the correct interpretation of the articles would be submitted to adjudication by an international tribunal. The interpretation of the expression " threat or use of force in violation of the principles of the Charter " should therefore be left to a judicial body of that kind. The Commission could not make provision for every contingency of litigation that might arise under any of the draft articles.

80. It was true that the discussions of the Special Committee at its Mexico City session had not produced agreement on the definition of the expression " threat or use of force ", but that did not mean that the International Court of Justice, or any other judicial body, would be unable to give a definition of the rule laid down in Article 2 (4) of the Charter. The expression " threat or use of force in violation of the principles of the Charter " was not as imprecise as some thought, since it was taken from the Charter itself. It would remain to some extent imprecise only until it was interpreted by a Court.

81. He supported the Special Rapporteur's proposal to retain the 1963 text as the best way of dealing with the matter.

The meeting rose at 1 p.m.

827th MEETING

Monday, 10 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Co-operation with Other Bodies

[Item 7 of the agenda]

1. The CHAIRMAN said that the Secretary-General of the United Nations had received from the Secretary-General of the Council of Europe a letter, dated 16 December 1965, concerning the European Committee on Legal Co-operation, which read:

> "I have the honour to draw your attention to the fact that the Council of Europe set up in 1963 a special body for the purpose of dealing with co-operation of Member States in the legal field. This body, the European Committee on Legal Co-operation, whose statutory rules are enclosed herewith [Resolution (63) 29 of the Committee of Ministers] is at present composed of delegations of all the 18 Member States of the Council of Europe and of three delegates of the Consultative Assembly of the Council of Europe. Observers from Finland and Spain also attend the meetings and participate in the work of the Committee.
>
> " The Committee has at present various items under consideration which appear to be connected with the work of the International Law Commission. Examples are: the Immunity of States, Consular Functions, and Reservations to International Treaties.
>
> " In carrying out its work on these questions—as indeed on all other matters coming within its mandate—

the European Committee on Legal Co-operation has constant regard to the work undertaken by the International Law Commission. At the suggestion of Professor Monaco, Chairman of the European Committee on Legal Co-operation, I have the honour to put forward the idea of establishing a co-operative relationship between the International Law Commission and the European Committee on Legal Co-operation, along the lines of the agreements already existing between the Commission and the juridical body of the Organization of American States as well as the Asian-African Legal Consultative Committee.

" In the light of the above, I have instructed Dr. Golsong, Legal Director of the Council of Europe, to be present at Monte Carlo from 10th to 16th January 1966, during the next session of the I.L.C., to place himself at the disposal of the Commission in order to examine further details of such an arrangement and also to inform the Commission of the present work of the European Committee on Legal Co-operation in the field of public international law.

" Would you be kind enough to give instructions that any further correspondence regarding this question should be addressed to Dr. Golsong at the Council of Europe ?"

2. If there were no objection, he would take it that the Commission agreed to establish relations of co-operation with the European Committee on Legal Co-operation under article 26 of the Commission's Statute and to receive an observer for that Committee.

It was so agreed.

3. The CHAIRMAN said that a letter had been received from Mr. Elias, the General Rapporteur, informing the Commission that he had been called urgently to Lagos for the Commonwealth Conference on the Rhodesian question but would return as soon as possible to resume his work on the Commission.

4. He accordingly proposed that Mr. Ago be asked to preside over the Drafting Committee in the absence of the two Vice-Chairmen and the General Rapporteur.

It was so decided.

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 36 (Coercion of a State by the threat or use of force) *(continued)*.[1]

5. The CHAIRMAN invited the Commission to continue its consideration of article 36.

6. Mr. de LUNA said that, up to the First World War, positive international law had not taken cognizance of the coercion of States. Then, on 16 March 1921, the Russian Soviet Federal Socialist Republic and Turkey had concluded a treaty[2] by which each party had undertaken not to recognize as valid any peace treaty or other international obligation imposed on the other by force, and thus, for the first time, the principle that the illegitimate use of force could not be the source of an international obligation had been recognized. In the Free Zones case,[3] which had arisen out of the treaties of 1815, the Permanent Court of International Justice had still stated the law as it had existed at the time—namely, that a treaty procured by coercion was in no way invalidated thereby. The United States, however, in application of the Stimson Doctrine, had declared in its famous note of 7 January 1932[4] that it would not recognize a situation which resulted from a treaty concluded under the effects of coercion. From 1945, the date of the United Nations Charter, the principle had become accepted that a treaty procured by the use of force was void. That principle had been incorporated in the Geneva Conventions of 1949, which had laid it down that no derogation from their provisions should be made by special agreements between Powers, one of which was restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power was occupied.[5]

7. Nevertheless, although the principle was easy to state, it met with much resistance in practice. In their written comments and in the Sixth Committee, certain States had expressed the fear that its acceptance as a new principle of *lex lata* might create uncertainties in international relations. They were afraid that anarchy might result, since the international community was still organized according to a system of co-ordination and not of subordination : there was not as yet any executive or judicial authority set above the parties.

8. With regard to the type of coercion involved, he could see no difference between a threat to use the atomic bomb and a threat to starve the inhabitants of a country. Whatever form it took, such pressure was contrary to the spirit of the Charter. But the principle was so recent that it would be better not to be too specific, but to use a formulation that was objective and prudent. Much would already have been gained if it were accepted that a principle of the Charter had the force of an obligation. Moreover, the General Assembly had established a Special Committee to study the principle that States should refrain in their international relations from the threat or use of force, and that Committee had considered whether the obligation embraced economic, political and other forms of pressure. The Commission should therefore declare itself in favour of a flexible formula and leave it to the Special Committee, a political body, to decide how it was to be interpreted in practice.

9. The suggestion by the Government of Israel (A/CN. 4/183/Add.1, p. 3) was interesting, but it would be sufficient to mention in the commentary that article 36 covered cases where participation in a treaty had been obtained by means of coercion. There was no need to introduce the idea of an "act" expressing the consent of

[1] See 826th meeting, preceding para. 59, and para. 59.

[2] *British and Foreign State Papers*, 1923, Part II, Vol. CXVIII, p. 990.

[3] *P.C.I.J.*, Series A, No. 22.

[4] *Foreign Relations of the United States*, Diplomatic Papers, 1932, Vol. III, The Far East, p. 7.

[5] Article 10 of Conventions relating to armed forces and article 11 of Convention relating to civilians.

a State to be bound; first, the expression was not clear, and secondly, since it dealt with a unilateral legal transaction, it was out of place in a convention on the law of treaties, which was concerned with bilateral legal transactions.

10. Mr. YASSEEN said that article 36, while reflecting the development of international law, did not unfortunately reflect it completely. Whereas the intention should be to condemn coercion as vitiating consent, the article did no more than condemn the threat or use of force in violation of the principles of the Charter; thus it condemned only one form of coercion—the threat or use of force—whereas coercion could take other forms, such as economic or political pressure.

11. There was a difference in drafting between article 35 and article 36. Whereas article 35, which dealt with coercion of representatives of States, treated coercion as a general notion, article 36, which dealt with coercion of a State, regarded it in a particular manner only. The reason for the distinction was obscure. The Commission should not just state that Article 2 of the Charter was applicable in the law of treaties, it should formulate a general theory condemning coercion in all its forms.

12. It had been said that the word "force" in Article 2, paragraph 4, of the Charter, did not connote economic or political pressure and meant only armed force. Such a narrow interpretation was inconsistent with the spirit of the Charter. Even if "force" meant only armed force, it could hardly be argued that, under the other principles of the Charter, such as that of the sovereign equality of States or that of non-intervention in the domestic affairs of States, economic or political pressure was lawful. Actually, those principles were incompatible with any kind of pressure capable of affecting the will of a State and of obliging it to express something at variance with its will.

13. In his observations, the Special Rapporteur referred to the proceedings of the Special Committee appointed by the General Assembly, which had met at Mexico City. It was true that, according to that Committee's report, its members had been unable to agree that force, in the sense in which the term was used in Article 2, paragraph 4, of the Charter, included also the notion of economic and political pressure; but the Committee certainly had not said that according to the principles of the Charter, such pressure was permitted in international law. Consequently, it could not be argued from that Committee's failure that the definition of coercion of a State meant only the use of force in the narrow sense, which was the interpretation upheld by some States.

14. To an ever-increasing extent, economic and political pressure was incurring the censure of the modern international legal order. Many authors held that such pressure was reprehensible under the principles of international law, such as those of the sovereign equality of States and non-intervention. Official opinion was likewise moving in the same direction. About forty States which had attended the Conference of Non-aligned States held at Cairo in 1964 had condemned economic and political pressure and had made it quite clear that, in their opinion, the term "force" used in the Charter also covered such pressure. In their written comments and through the statements made by their delegations in the Sixth Committee, many States had similarly supported that interpretation.

15. Even if the force referred to in Article 2, paragraph 4, of the Charter meant only armed force, it could be said that the development of the law supported the interpretation which broadened the scope of the term to include economic and political pressure. For the purposes of the progressive development of international law and of establishing international relations and conventional law on a sound basis, it was indispensable that such forms of pressure should likewise be condemned.

16. Mr. ROSENNE said he endorsed the Special Rapporteur's approach to article 36 and agreed with the observations in his commentary, which were consistent with the Commission's frequently repeated decision not to attempt an interpretation of the United Nations Charter. Indeed it was neither required nor competent to define what kind of force or threat of force would bring a transaction within the scope of article 36. The Commission's function was to state the existing law, taking fully into account the principles laid down in the Charter. That would inevitably result in what the Special Rapporteur had described as an "open-ended" article, of which there were other examples in the draft where the Commission had found it necessary to note the impact on the law of treaties of some principle belonging to another branch of international law, without entering into the details of that other branch of the law.

17. The inclusion of an open-ended provision of that kind was not the same thing as giving a blank cheque to the vote of a shifting majority in a political body. Legislation in all democratic assemblies was, after all, the result of such a vote, and the Legal Committee at the San Francisco Conference had deliberately decided that interpretation of the Charter should not be exclusively by judicial means.

18. Several governments had indicated that article 36, and some others, would only be acceptable if made subject to what was called independent adjudication. He did not find that expression entirely clear but presumed it meant determination by a third party, although not necessarily judicial in character. Those who equated such determination with judicial settlement should not forget the serious lesson of the Customs Régime between Germany and Austria Case of 1931 in the Permanent Court of International Justice[6] and the Council of the League of Nations. Matters of high political moment, such as would underlie a case coming within article 36, could not easily or appropriately be referred to judicial settlement, and on that issue he remained of the opinion that he had expressed at the 682nd meeting,[7] that a regular procedure to establish that a treaty was void was essential, without that necessarily being a judicial procedure. The provision in article 51 was probably the maximum attainable for the purpose.

19. On the question of the drafting of article 36, he questioned whether the opening words "Any treaty and", of the Special Rapporteur's new text, were necessary,

[6] *P.C.I.J.*, Series A/B, No. 41.

[7] *Yearbook of the International Law Commission, 1963*, Vol. I, pp. 54-56, paras. 18-31.

since he interpreted the following words "any act" in the sense given to an international act in the revised version of article 1, paragraph 1(d), as one whereby a State established on the international plane its consent to be bound by a treaty.

20. At its fifteenth session, the Commission had taken an imaginative step forward when it had drafted article 36, which had been described by the Sixth Committee in its report to the General Assembly (A/5601) as an important achievement of the international community which had received general endorsement; he could see no justification for retreating from that position.

21. Mr. CASTRÉN said it was evident from the great interest which governments attached to article 36 in their written comments and through the statements made by their representatives in the Sixth Committee, that the article was of capital importance.

22. The Special Rapporteur had commented on it very fully and had analysed it very clearly. Of the suggestions for the amendment of the 1963 text of the article, he had accepted only those put forward by the Government of Israel. He (Mr. Castrén) accepted the Special Rapporteur's conclusions and his revised text. Several speakers had questioned the amendment proposed by Israel; his personal opinion was that it was based on a correct notion, would usefully supplement the article, and did not present any risks. It did not matter greatly whether the article used the expression "treaty and any act" or "treaty or any act"; that was a point which could be settled by the Drafting Committee.

23. At the same time, however, acceptance of the amendment proposed by Israel would perhaps necessitate an analogous addition to other articles in the section concerning the invalidity of treaties, notably article 33. Notwithstanding the proposals made by some governments, the Commission should keep the general language of article 36, without attempting to interpret or to develop the principles of the Charter of the United Nations referred to in the article; that would hardly be desirable at a time when another United Nations body had been asked to deal with the matter, which was still on the General Assembly's agenda.

24. The question of the time element in the operation of article 36, which had been raised by some governments, should also be left aside, for the reasons given by the Special Rapporteur.

25. Mr. VERDROSS said that he approved the Special Rapporteur's proposed formulation. The fact that all States had accepted the basic principle stated in the article showed what great changes had taken place in international law. In the past, up to the First World War, a distinction had been drawn between a treaty imposed on a State and a treaty imposed on the organ of a State; even a treaty procured by force had been regarded as valid, because the use of force had been accepted. The use of force having become unlawful, it followed that a treaty procured by force could not be lawful and was therefore void.

26. He could understand Mr. Yasseen's hesitations, but the Special Rapporteur's proposed formulation was very flexible in that it referred, not to Article 2, paragraph 4, of the Charter, but to "the principles of the Charter". As a national of a small State, he was naturally opposed to the use of political and economic pressure as a means of procuring the conclusion of a treaty. But that type of pressure was difficult to define; furthermore, the interpretation of the Charter was evolving. In any case, the Commission could not provide a complete interpretation of all the articles of the Charter.

27. When the Commission had adopted the draft articles on the interpretation of treaties, he had expressed the view that the rules stated in the articles were concerned with interpretation by the International Court of Justice or by a court of arbitration, not with interpretation by a quasi-legislative organ such as the General Assembly.

28. By stating that a treaty procured in violation of the principles of the Charter was void, article 36 left the door open for future developments in the interpretation of the Charter. The language it used could not be clearer, and in the present state of the law, the Commission could go no further.

29. Mr. TUNKIN said that he was in general agreement with the Special Rapporteur's conclusions and had noted with interest his reply to the somewhat troublesome question of the time element raised by the United States and Netherlands Governments.

30. At its fifteenth session, in its commentary to article 36, the Commission had rightly stated that "the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today".[8] Most governments which had submitted observations on it had not only agreed with the text proposed but had also emphasized the great importance of the rule laid down, which was the direct outcome of the principle of the prohibition of the use of force enshrined in Article 2, paragraph 4, of the Charter. The latter part of article 36, which referred to the use of force in violation of the principles of the Charter, was also of great importance.

31. Recently some West German writers had advanced the idea that any situation obtained by the use of force was illegal and had no legal effect. It was paradoxical that a new rule of international law prohibiting the use of force should be used to defend the actions of an aggressor State.

32. The conclusion stated by the Special Rapporteur in the last sentence of paragraph 6 of his observations was not entirely correct. Surely a peace treaty signed after the establishment of the rule laid down in article 36 would not always be invalidated; for example, when the force was used to impose the treaty on an aggressor State.

33. The second alternative suggested by Mr. Briggs at the previous meeting, to frame the article in such a way that a State might invoke the use of force as a ground of invalidity, would weaken the article. According to contemporary international law, the illegal use of force was not only a violation of law but something much graver, an international crime. The effect of Mr. Briggs's suggestion would be to render the treaty not void but voidable. In other words, as clearly pointed out by Mr. de Luna, in order to render the treaty void some action

[8] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 197.

would be necessary on the part of the injured party, and thus there might be some advantage to the State which had used force which it would not have if the treaty were regarded as void *ab initio*. The Commission's view, stated in paragraph (6) of the commentary drawn up in 1963, that "The prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State"[9] should lead it to reject a provision whereby a treaty procured by force would be merely voidable. Such treaties were objectively void.

34. Some of the comments that had been made about the absence of an international tribunal to adjudicate on any matters falling within the terms of article 36 seemed to be associated with an idea advocated by some authors that the prohibition of the use of force was premature because, with no instance capable of ruling that the use of force had been illegal, the injured State was left without means of redress, and the rules of international law were deprived of such means of enforcement as war. To make acceptance of a substantive rule dependent on some form of compulsory international adjudication would hamper the development of international law.

35. He entirely agreed with the suggestions by governments to mention political and economic pressure in article 36. Alternatively, he would agree to an amendment referring to "force in any form", and if neither of those alternatives was acceptable to the majority of the Commission, he would accept the text drawn up at the fifteenth session, provided it was understood to cover all forms of force in violation of the Charter and that it related to any act expressing consent to be bound by the treaty. The 1963 text was more concise than that now proposed by the Special Rapporteur.

36. He agreed with Mr. Elias that the change of wording proposed by the Government of Israel would create more problems than it would solve.

37. Mr. CADIEUX said that, on the whole, his views on the article were the same as the Special Rapporteur's.

38. So far as the definition of force was concerned, the solution adopted in 1963, and employed again by the Special Rapporteur in his new version, was a step forward in the development of international law and in general had been approved by States. Moreover, as Mr. Verdross had said, it had the advantage of being flexible and of not prejudging the future. Its content would be determined by the international community in accordance with procedures which that community would itself choose. The wording did not in fact rule out what Mr. Yasseen wished it to include; with the development of an international conscience, certain requirements could be given expression in collectively adopted instruments.

39. As to whether article 36 should state that a treaty procured by the threat or use of force was void or voidable, he agreed with the Special Rapporteur that such a treaty was clearly void. Since resort to coercion destroyed or disturbed the public order, it called for the gravest penalties.

40. His view on the relationship between the rule as stated and the procedure for determining the cases in which it was applicable was the same as that of Mr. Briggs. A rule was strengthened, not weakened, if a procedure for carrying it into effect was indicated. If there was no such indication, the rule might remain nugatory—for whoever had used force to procure a treaty would probably use it again to prevent any change in the result so obtained—and might constitute a danger for small States, which stood in particular need of protection by an independent body. The rule would be more effective if its application were determined objectively, instead of by the most powerful States. He was convinced that there was a connexion between the rules adopted by the Commission and the question of the procedure to be followed in applying them.

41. Mr. AGO said that article 36 was very important and marked a stage in the development of modern international law. The essence of the article was that it declared void treaties procured by the threat or use of force in violation of the law. It was therefore indispensable to specify that the rule laid down was concerned exclusively with cases where coercion was used unlawfully "in violation of the principles of the Charter of the United Nations". The reference to the principles of the Charter was a reference to the fundamental principles which were not only laid down in the Charter, but had become general rules of international law. States not Members of the United Nations should not, therefore, find it difficult to accept such an article. Similarly, if it were objected that there were certain principles of international law which were not laid down in the Charter, he would answer that one of the obligations mentioned in the Charter was the obligation to respect the rules of international law. Consequently, the reference to the principles of the Charter was fully adequate.

42. Like Mr. Tunkin, he considered that the coercion referred to in article 36 should be taken to mean coercion in violation of the principles of the Charter and not coercion employed in conformity with the law. Wars of aggression should be distinguished from wars of defence against aggression, and also from enforcement action by Member States against a State which had flagrantly violated the Charter.

43. Another essential point about article 36 was that it voided absolutely treaties concluded in the circumstances described. From the point of view of theory, he did not believe that article 36 conflicted with certain other articles which preceded it, in the sense that it would provide for the nullity of the treaty when concluded in certain circumstances, whereas the other articles provided only for its voidability; in his opinion, each of the articles in the sequence of provisions under discussion dealt with a case of nullity, but in some cases the nullity was absolute while in others some action by the interested party was needed for the nullity to be recognized. In the case contemplated in article 36, the nullity was absolute, and the treaty should be incapable of being retrieved even by some action by the interested party.

44. With regard to the question whether adoption of the rule laid down in article 36 should be made conditional on the existence of clauses indicating the procedure to be followed for the purpose of determining whether the rule did or did not apply to a particular case, he thought that rules of substance and rules of procedure

[9] *Ibid.*, p. 198.

should be kept separate. It would, admittedly, be desirable to provide some procedure for determining in what cases the important rule of substance laid down in article 36 operated; but much the same could be said of all the rules in the draft. It could even be said that, because article 36 referred to the principles of the Charter, there was rather less need for mention of an appropriate procedure than in other articles. The appropriate United Nations organs would probably have expressed an opinion on the violation of those principles in the particular case, and an objective verdict would then be at least discernible. If, nevertheless, a dispute did arise as to whether or not there had been an unlawful resort to force, the customary modes of settlement would have to be applied. It would be most regrettable if the Commission should hesitate to propose so important a rule of substance for no other reason than that the means of settling legal disputes did not satisfy it entirely.

45. In the opinion of some members, article 36 should be expanded to cover cases of political or economic pressure. Yet, as Mr. Verdross had said, the expression "the threat or use of force in violation of the principles of the Charter" was sufficiently broad to allow ample latitude for interpretation. The introduction of even vaguer notions would jeopardize the existence of a large number of treaties. There were surely very few treaties in the conclusion of which some pressure had not been exerted on one side or the other.

46. The reactions of States to the article as adopted by the Commission in 1963 were very encouraging. It was essential that in view of its novelty, the article should be adopted by a very large majority as a principle of international law. The ideas which some members thought should receive expression in the article would eventually prevail, without any special effort on the part of the Commission to elaborate the article.

47. The amendment proposed by the Special Rapporteur was not perhaps necessary. He hoped that the Commission would not change the text as adopted in 1963, which was lapidary and fully sufficient.

48. Mr. BRIGGS said that nothing could be further from his mind than to suggest any weakening of the rule embodied in article 36. The truth of the matter was that the rule itself was weak; the two alternative suggestions which he had put forward at the previous meeting were calculated to strengthen the rule by introducing a reference to orderly procedures, instead of leaving the whole matter to the subjective appreciation of individual States.

49. The Special Rapporteur had described the rule embodied in article 36 as an "open-ended" rule; personally, he found it far too open-ended. As he had pointed out at the previous meeting, there was even less agreement today than in 1963 on the meaning of the words "threat or use of force in violation of the principles of the Charter". It was therefore desirable that article 36 should state more precisely what the rule meant and his own proposals at the previous meeting had been made with that idea in mind.

50. Mr. BEDJAOUI said that article 36 was of fundamental importance and marked a turning point in modern international law.

51. With regard to the drafting, it was unfortunate that the Special Rapporteur's proposed new text was so awkwardly worded; at all events, the French text was almost unintelligible. It might be better to revert to the elegant brevity of the 1963 text; after all, the expression "the conclusion of which was procured" covered every case, including the one which the Special Rapporteur wanted to include. Indeed, the vigorous phraseology used in article 37—"A treaty is void . . ."—might well be used in article 36 also.

52. On the subject of the definition of force, he agreed with Mr. Tunkin and Mr. Yasseen. It was unfortunate that it had not been possible to cover cases other than the threat or use of armed force. It was true, as Mr. Ago had just said, that they would be difficult to define; but he did not think that Mr. Tunkin's proposed text was likely to give rise to serious difficulties and he therefore fully supported the suggestion for the insertion of some such phrase as "in any form whatsoever" or "of whatever nature", which would be the keystone of the whole article.

53. Mr. ROSENNE said that he had been impressed by Mr. Ago's description of the 1963 text as "lapidary". He noted that there was general agreement that the 1963 text of article 36 covered the case of a participation in an existing treaty procured by the threat or use of force in violation of the principles of the Charter. At the same time, there was a general desire not to overload the text by attempting to cover that point more specifically. In the circumstances, he would be content to see the matter dealt with in the commentary.

54. Mr. AMADO said that the Commission was very much aware of the progress made since the days when war had been an accepted method of achieving political aims and when such an article would have been unthinkable. He urged the Commission to accept the article, which was flawless and based on that sacrosanct instrument, the Charter.

55. Economic pressure would ultimately come to be included in the idea of the threat or use of force, but it would be for the practice of States and the jurisprudence of international tribunals to bring that about by means of interpretation.

56. The CHAIRMAN, speaking as a member of the Commission, said he was convinced that article 36, as adopted in 1963, even though it did not cover every situation, stated a general rule which promoted the progressive development of international law.

57. It would no doubt have been desirable to draft a more elaborate provision; but as it stood, the article was in keeping with existing conditions and at the same time allowed for future development. He therefore favoured the retention of the 1963 text unchanged. The spirit of the article had been accepted by States. The Commission could not retreat; but, in attempting to go further, it should beware of involuntarily taking a step backwards.

58. Sir Humphrey WALDOCK, Special Rapporteur, said he noted that the Commission as a whole favoured the 1963 text, which stated the rule in succinct terms. He would therefore withdraw the drafting amendment which he had proposed to meet the point raised by the Government of Israel; the 1963 text, in his view, covered that

point. It was, of course, possible to argue that there was a small legal gap in that text and it was perhaps also possible to argue that the text was too wide, in that it would make a whole treaty void if a subsequent act of participation in it was procured by the threat or use of force.

59. He agreed with Mr. Ago that it was important to obtain maximum support for the article which, as he had stressed, allowed for further development of the law in the United Nations.

60. He agreed with Mr. Tunkin's remarks on the subject of a peace treaty imposed on an aggressor; such a treaty was not in violation of the Charter of the United Nations and was not, therefore, invalid under article 36. That point had been made clear in paragraph 7 of his own commentary to his original proposal for article 36, then numbered article 12 and entitled "Consent to a treaty procured by the illegal use or threat of force", where he had stressed that "There is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor".[10] He suggested that, in the final commentary to article 36, a passage should be included on the same lines.

61. He shared the general views expressed by Mr. Briggs on the subject of independent adjudication, but did not think it was appropriate to take up that question with reference to each individual article. The procedural aspects of all the articles in the section now under discussion were covered in article 51. When the Commission came to consider that article, he would give his own reaction to the government comments thereon. On the whole, he was inclined to the view expressed by Mr. Rosenne, and doubted whether at the present stage it would be possible to go beyond what was said in article 51 as drafted in 1963.

62. He suggested that article 36 be referred to the Drafting Committee with the comments made during the discussion. It was his strong impression that the Commission on the whole wished to adhere to the brief lapidary statement of the very important rule adopted after a lengthy discussion in 1963.

63. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to refer article 36 to the Drafting Committee, on the terms suggested by the Special Rapporteur.

It was so agreed.[11]

The meeting rose at 5.45 p.m.

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

[11] For resumption of discussion, see 840th meeting, paras. 84-119.

828th MEETING

Tuesday, 11 January, 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. de Luna, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Also present: Mr. Golsong, Observer for the European Committee on Legal Co-operation.

Co-operation with Other Bodies

[Item 7 of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited Mr. Golsong, Observer for the European Committee on Legal Co-operation of the Council of Europe, which was the third regional international organization to enter into a working relationship with the Commission, to address the Commission.

2. Mr. GOLSONG said that, on behalf of the Council of Europe and the European Committee, he wished to thank the Committee for its decision to establish working relations with Strasbourg and for its cordial welcome. He was sure that co-operation between the Commission and the European Committee would contribute to the improvement of the international legal order.[1]

Law of Treaties

(A/CN.4/183 and Add.1-3, A/CN.4/L.107)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 37 (Treaties conflicting with a peremptory norm of general international law *(jus cogens)*)

Article 37

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (A/CN.4/L.107, p. 34)

3. The CHAIRMAN invited the Commisssion to consider article 37. It would be seen from paragraph 7 of the Special Rapporteur's observations (A/CN.4/183/Add.1, p. 26) that he was suggesting that the opening phrase be revised to read:

" A treaty is void *ab initio* if at the time of its conclusion it conflicts . . . ".

[1] For Mr. Golsong's address to the Commission, see 830th meeting.