

Document:-
A/CN.4/SR.679

Summary record of the 679th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1963, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

55. He did not wish to be dogmatic, but he was in favour of deleting the article, which would strike a discordant note in the Commission's work.

56. Mr. ROSENNE said he assumed from the discussion that there was general assent to the proposition underlying article 7, and that the real problem was to be sure that the parties had really given their consent to the treaty. As Sir Gerald Fitzmaurice had put it in article 4, paragraph 2, in his first report, "For the obligation to exist, the consent must be true consent."³

57. The question confronting the Commission was whether the insertion of an article on fraud was desirable, and in considering the matter he was guided by three main considerations. First, international lawyers must exercise the greatest caution in transferring to the international plane analogies from municipal law; secondly, if international law was to perform its real function of upholding peace between nations it must, as far as possible, eschew formulations which, for their application in concrete cases, required pejorative assertions; and thirdly, its rules must be capable of practical application.

58. He could not agree with previous speakers that questions of substance must be kept distinct from questions of procedure, for in international law and relations, there was a real identity between the substantive rules and the procedure for their application. For example, article 7 raised important problems of imputability and proof, especially of psychological factors such as knowledge and intention. For example, to whom was the making of false statements or representations of fact to be ascribed; was it to the negotiators or to those from whom their instructions had emanated? He had had personal experience of the kind of difficulty to which that problem could give rise when he was asked to interpret the intention behind an agreement he had himself negotiated and signed. He has been unable to give a satisfactory answer to that question; while he might have been able to recollect his own intentions, that was of secondary importance since he had had no knowledge of the psychological reasons that had prompted his government's instructions.

59. He feared that a provision framed in such emphatic terms as that contained in paragraph 2 (a) would either remain a dead letter, and possibly bring the Commission's work into disrepute, or would render the conduct of international negotiations impossible. The only way to achieve the object in view was to devise a provision containing an objective criterion to determine when fraud was present.

60. Broadly speaking, he agreed with the views expressed by Mr. Elias and Mr. Ago and suggested that the Commission should forthwith take up articles 8 and 9 and discuss them in conjunction with article 7. He also sympathized with the position taken by the Special Rapporteur.

61. In conclusion, he asked whether the term "*dol*" used in the French text accurately rendered the sense of the word "fraud".

³ *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), p. 108.

62. Mr. VERDROSS agreed with Mr. Gros and Mr. Ago that true instances of fraud were very rare, since all States could protect themselves against deceit by calling upon the services of experts. Nor was there any doubt that certain general principles of law applied in international relations, one of them being, precisely, *fraus omnia corrumpit*. The statement by the International Court of Justice regarding error in the *Temple* case⁴ recognized that general principles of law could be applied to international relations; the same applied to fraud.

63. The objection that in private law it was the court which decided and that there was no such authority in international law showed up a deplorable weakness in the latter—the lack of compulsory jurisdiction. That objection might be validly made in regard to all the articles, but it did not mean that the principle did not exist.

64. It had also been stated that where there was fraud, the other contracting party was led into error and that, consequently, the case of fraud was identical with that of error. But fraud was the means, whereas error was the consequence; the two should be kept separate.

65. He was not opposed to the suggestion that the substance of article 7 should be combined with that of articles 8 and 9, but it was important that fraud should be covered in one way or another.

The meeting rose at 5.55 p.m.

⁴ *I.C.J. Reports, 1962*, p. 26.

679th MEETING

Tuesday, 14 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 7 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 7 (FRAUD INDUCING CONSENT TO A TREATY) (*continued*)

2. Mr. EL-ERIAN said he was surprised that the question of including article 7 should have led to controversy. After listening carefully to the arguments for and against, he was convinced that the article should be retained. During the discussion on article 6, in reply to the argument that the Commission was inclined to go into too much detail, the Special Rapporteur had rightly said that if a point needed to be covered the Commission should not omit it from the draft merely for fear of being accused of going into excessive detail. Personally, he thought that no draft on the law of treaties would be complete without a provision on fraud, which was

one of the most serious causes of vitiation of consent to a legal transaction.

3. The Special Rapporteur's manner of dealing with the question in article 7 was generally acceptable, in that his formulation took a middle course between two extreme positions: the complete omission of any definition of fraud and an over-elaborate definition which might prove too rigid.

4. He noted that article 7 did not make a treaty voidable if obtained by fraud, but made it void. Article 25 of Part II, however, provided elaborate machinery for the annulment of treaty obligations under a right arising by operation of law. Article 31 (fraud) of the Harvard Research draft convention on the law of treaties did not contain any definition of fraud but did specify that, pending a decision by a competent international tribunal or authority, a party which sought a declaration that a treaty was void could provisionally suspend performance of its obligations under the treaty.¹

5. In a matter like fraud the Commission should not be unduly concerned about the possibility of arbitrary action by a government. The charge that a fraud had been committed in connexion with the conclusion of a treaty was a very serious charge indeed and one which no government would lightly bring against another government. He had not been impressed by the argument that fraud depended on certain subjective elements which were difficult to prove; there was some subjective element in almost any legal concept.

6. It had been suggested that it was difficult to attach a charge of fraud to a State. He saw no reason why such a charge could not be brought against a State when the United Nations Charter itself, in Article 6, provided for the expulsion of a Member of the United Nations for persistent violation of the principles of the Charter. Under the Charter, a State could be charged with aggression. If such grave charges as aggression and persistent violation of the Charter could be brought against a State, there was nothing inappropriate in providing for the possibility of a charge of fraud.

7. It had been argued that, because fraud resulted in error, the Commission could dispense with article 7 and rely on the elaborate provisions on error contained in articles 8 and 9. In fact, the concept of error covered a much wider field than fraud; moreover, an error produced by fraud was a much more serious matter than an error which did not arise from the deliberate action of the other party.

8. But although fraud as a concept should be distinguished from error, Mr. Elias' suggestion that articles 7, 8 and 9 should be combined could be referred to the Drafting Committee.

9. Mr. TUNKIN, replying to the remarks made by Mr. Ago at the previous meeting, said he fully agreed that concepts drawn from internal law should not be transferred, by analogy, to international law. International law and municipal law were two different systems; nonetheless, international law was a form of

law and was therefore bound to have some elements in common even with municipal law. It would be a mistake to discard a rule of international law merely on the ground that it resembled a rule of municipal law to some extent.

10. There could be no doubt that the problem of fraud was a very real one in international relations. Mr. Rosenne had asked the question, whose fraud? But there was no necessity to delve into theoretical questions about whether the State constituted a reality or a legal fiction, or whether a State could be said to act and to incur responsibility or liability. Questions of that kind could be raised in connexion with each and every one of the articles being discussed by the Commission. The Commission had to work on the basis of realities. In the article under discussion, any reference to fraud meant a fraud committed by the State itself, though of course a State only acted through its appropriate authorities.

11. At the previous meeting, Mr. Gros had said that the retention of article 7 would be tantamount to casting doubt on the good faith of the negotiators of a treaty. But the law very often contemplated the possibility of improper action by an individual or, in the case of public international law, by a State. It was quite common for a legal norm to state that, if a certain wrongful act were committed, certain consequences would follow. Mr. El-Erian had already pointed out that international law contained rules stating the consequences of such violations of international law as aggression, which were much more serious than fraud. It was a regrettable fact that violations of international law did sometimes occur and provision should be made for their consequences.

12. At the previous meeting he had quoted two examples of fraud in international relations, but they had been contested by Mr. Ago. Although he had listened with attention to Mr. Ago's remarks, he did not feel that his two examples could be so easily dismissed, provided they were not approached with a preconceived notion of fraud based on private law analogies.

13. Considering fraud as it occurred in international relations and bearing in mind the basic principles of international law, there could be no doubt that the Munich Agreement of September 1938, leaving aside other aspects of that agreement, had been obtained by fraud. False statements had been made during the negotiations regarding the intentions of one of the parties. The intention of a party was a fact and false statements with regard to a party's real intentions therefore constituted fraud since, in the words of the Special Rapporteur, the false statements were made "for the purpose of procuring the consent of a State to be found by the terms of a treaty".

14. The other example which he had quoted, that of the Italo-Abyssinian Treaty of 2 May 1889, had been equally appropriate. The fact was that there had been two different texts of that treaty. Had the difference been due to a mere mistake, the question would have been one of error, but historical evidence showed that a wilful deception had been practised and the case was therefore clearly one of fraud.

¹ *American Journal of International Law*, 1935, vol. 29, Supplement, Part III, p. 1144.

15. Fraud was a separate phenomenon which called for separate treatment, though from the point of view of drafting, the Drafting Committee could consider Mr. Elias' suggestion that articles 7, 8 and 9 should be combined.

16. Mr. GROS said he must make it clear that when he had referred to skill in negotiation, he had of course meant only skill exercised fairly. No-one would think of arguing that it was right to deceive a negotiating partner, and there was complete agreement on the principle *fraus omnia corrumpit*. But that maxim stated a general principle applicable to international relations as a whole, whereas fraud was something quite special, which it was proposed to recognize in the case of treaties only. There were many other general principles, but the Commission was not examining each of them in turn in order to see how it applied to the law of treaties and to devote a special article to it in the draft convention. A breach of good faith should naturally be punished, but no-one proposed making that an article of the law of treaties, for the generality of the principle implied the generality of its applications.

17. It was said that the difficulty of providing proof and the lack of a competent court were external problems that could be solved in due course; but then surely the same applied to the principle *fraus omnia corrumpit*. If it could be proved before a court that one party had deceived the other and induced it to enter into a treaty by that means, the court would undoubtedly declare the treaty invalid. The members of the Commission in fact differed only on the question whether a special kind of misrepresentation relating to treaties should be recognized as fraud in a special legal category, sanctionable by absolute nullity on the mere declaration of a State.

18. He therefore agreed with other members that it would be wise to consider article 7 in conjunction with article 9. The reference to "fraud" already included in article 9, paragraph 1, was probably sufficient. The Commission could always explain the different points of view in the commentary without drafting a special provision on the subject.

19. Mr. PAL proposed that articles 7 to 11 and article 25 should be dealt with together.

20. The fact that recorded cases of fraud appeared to be rather scarce was perhaps a comfort, but it was an argument of limited value with regard to the question whether or not to make provision for fraud in the draft articles. Personally, he was more impressed by the difficulty of establishing fraud — a difficulty which existed even in municipal law.

21. In view, too, of the present state of international law and international relations, article 7 might well create a new subject of tension which it would be almost impossible to relieve. One party would allege that its consent to a treaty had been obtained by fraud and the other party would deny the allegation. There would be no solution to the problem, and no end to the assertions and counter-assertions of the parties.

22. The position would be different if article 7 were taken in conjunction with article 25, the provisions of

which constituted an effort to bring the subject to the level of national systems of law. Under article 25, it would not be left to the parties to decide whether fraud existed or not, but to some independent tribunal. The question of determining whether fraud had been committed was a difficult one; but it should not in any event be left to be determined by one of the parties to the dispute. It was hardly given to man to avoid the error of pretending to a capacity for self-transcendence and of thinking that his decision was in no way influenced by any effort to hide and obscure the taint of interest or passion. He therefore believed that, without the safeguards contained in article 25, article 7 would create a new field of discord in international relations and he would oppose its inclusion in the draft without the provisions of article 25.

23. It was very relevant to that aspect of the question that there were few recorded cases of fraud inducing consent to a treaty. If, therefore, up to the present time, the question of fraud had not led to any international tension, it was undesirable to introduce it now, only to create a new source of tension of dangerous potentiality in international relations.

24. Apart from the reasons given by Mr. Ago, an additional difficulty arose from the fact that the provisions of article 7 purported to apply also to multilateral treaties. Those provisions would nullify the consent given by a party to a multilateral treaty if that consent had been obtained as a result of a fraud by only one other party to the multilateral treaty. It was true that the effects of the nullification as formulated were confined to the defrauded party, but the difficulties might not stop there in the case of a multilateral treaty. In view of the difficulties which would probably result, he was disinclined to introduce the mischief of fraud at all. Further, the repudiation of a treaty would not stand on the same footing as that of a contract: the former would give rise to much more complex problems. In the meantime historical forces might have pressed on far beyond the *status quo*, perhaps towards higher forms of human community.

25. Mr. BARTOŠ said he quite understood that Mr. Gros was opposed to the idea of taking fraud into consideration as an element vitiating consent to treaties, on the theory of the freedom of skilful negotiators. He himself maintained his own view. He did not think it was a matter of invoking *faute* in the general sense by one of the parties, as Mr. Gros had suggested. On the contrary, it was a matter of fraud definitely established — of *dolus*, fraud or *fraus*, terms which meant a specific *faute* with specific consequences. The maxim *fraus omnia corrumpit* has a specific meaning in the law of treaties; if a party's consent was based on unawareness that a fact or idea had been misrepresented and such unawareness or mistake was noticed or exploited by the other party in order to obtain consent, then there had been deceit or fraud, and in that case it was not permissible to depart from the theory of *fraus omnia corrumpit* and adopt a theory of general *faute*.

26. He had already advocated greater precision in the concept of fraud as a determining cause of invalidation

of treaties through vitiation of consent and entered reservations as to the exact formulation of the rules that should be adopted for defining the concept of fraud, in order to draw the necessary inferences from the recognition of that principle and to fix the penalties. He agreed with Mr. Pal that fraud was difficult to determine in the case of multilateral treaties; fraud must be individualized and its recognition confined to bilateral treaties applying directly to the subject-matter, and it was with those that the Commission should concern itself.

27. He did not agree with the view that fraud was a general concept and the theory of *fraus omnia corrumpit* a general principle, and that being generally of a mandatory nature such principles should not be embodied in the draft articles. On the contrary, recognizing that general principles were applicable *ipso jure* in public international law (article 38, paragraph 1 (c) of the statute of the International Court of Justice) he thought that a distinction must be made between the general principles of law as a whole and those of them which should be applied to the case in point. The latter should be specified in the text and adapted as required by the institutions of the law of treaties.

28. Mr. PADILLA NERVO said he would not discuss the desirability of treating fraud as a factor invalidating consent to a treaty, but would confine his remarks to the desirability of including an article devoted exclusively to fraud inducing consent to a treaty.

29. The Commission was not preparing a code but a draft convention, and was at present discussing a section of part II which dealt with "principles governing the essential validity of treaties". In considering essential validity, it was important to determine the effects of lack of consent, and consent could be vitiated by fraud, error or duress. Where fraud had induced a party to consent to a treaty, the effects, as stated in paragraph 1, sub-paragraphs (a), (b) and (c) of article 7 were similar to those of error, stated in article 8, paragraph 2, and article 9, paragraph 2, as already pointed out by Mr. Elias.

30. In answering the question whether a definition of fraud should be included, either in a separate article or in article 9, the deciding factors should be practical utility and the prospects of securing the approval of governments at a conference of plenipotentiaries. Another point was whether it was possible to formulate a definition that was sufficiently complete and offered non-subjective criteria of evidence.

31. It should also be considered whether it was in the interests of a State to claim that a treaty was invalid on the grounds that its consent had been obtained by fraud. To that question a decisive answer would appear to have been given by the Special Rapporteur in the first sentence of his commentary to article 7: "There does not appear to be any recorded instance of a State claiming to annul or denounce a treaty on the ground that it had been induced to enter into the treaty by the fraud of the other party".

32. It was agreed by all that *fraus omnia corrumpit*, but like Mr. Pal, he felt that it would not be advisable

to make separate provision for the case of fraud, because such a provision would not help international relations.

33. Sir Gerald Fitzmaurice, in his third report, had made separate provision for the case of fraud and misrepresentation in his draft article 13,² which laid down that fraud must relate "to a material particular" and must have "induced, or contributed to inducing, the other party to conclude or participate in the treaty, in such a way that that party would not otherwise have done so...". Under the definition adopted by the present Special Rapporteur fraud was the deliberate misrepresentation of facts "for the purpose of procuring the consent of a State to be bound by the terms of a treaty". It was always difficult to prove an intention, but in international relations there was the additional difficulty that the effectiveness of a treaty and its successful implementation depended on the respect of the parties for their pledged word; there could be no question of a treaty being executed by coercion.

34. Sir Gerald Fitzmaurice, in his third report, had included an article 12³ on the subject of the effects of "error and lack of *consensus ad idem*", paragraph 2 of which provided that an error, in addition to being a material one "in some essential particular affecting the basis of the treaty" must possess certain characteristics, such as that of being "an error of fact and not of law". Paragraph 3 of the article then went on:

"Although, as provided in paragraph 1 (c) above, an error made by one party only is not a ground of invalidity unless induced by the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence of the other yet, if the treaty is a plurilateral or multilateral one, an error made by a party which did not take part in the original conclusion of the treaty, affecting the fundamental basis of its own subsequent participation, will constitute a ground on which the invalidity of that participation may be claimed, provided the error in other respects conforms to the conditions of paragraph 2 above."

35. There was no doubt in his own mind as to the close connexion between the provisions of article 7 on fraud and those of articles 8 and 9 on error, and he therefore urged that no decision should be taken on article 7 at that stage; the question of the possible inclusion of a provision on fraud, and the difficult problem of formulating a complete and effective definition, should be settled when the Commission took a decision on articles 8 and 9.

36. Mr. GROS considered that a theory of nullity of treaties on the ground of defective consent was unnecessary in international law. The question had no great practical implications if the same result could be achieved by a different juridical approach, which was precisely the case, but it was worth examining because a principle was involved. A treaty was quite different from a contract, and one should not automatically transfer to international law concepts recognized in private law, that was to say in a society organized round an authority

² *Yearbook of the International Law Commission, 1958, Vol. II* (United Nations publication, Sales No.: 58, V.1, Vol., II), pp. 25-26.

³ *Ibid.*, p. 25.

recognized by everyone and enforced by the courts. International law, having no common authority and no compulsory jurisdiction, was more flexible, and should remain so.

37. In paragraph 5 of his commentary on articles 8 and 9 the Special Rapporteur emphasized, in connexion with error, the need to settle each case in the light of its circumstances. Although in two cases the International Court of Justice had taken a position which could be cited in support of Mr. Bartoš' argument, it had used very cautious terms. In the case concerning *Sovereignty over certain Frontier Land* (Belgium - Netherlands) it had stated that: "The only question is whether a mistake, such as would vitiate the Convention, has been established by convincing evidence."⁴ And in the Case concerning the Temple of Preah Vihear it had stated that "the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given".⁵ Thus the Court believed that there was a connection between error and evidence, and between error and substantive conditions to be verified.

38. Moreover, there was an inconsistency in the draft of article 7 submitted to the Commission; for after stating the possibility of declaring that fraud nullified consent to be bound by a treaty, it mentioned the possibility of affirming the treaty. In fact it recognized that there was no absolute nullity. It was significant that the word "nullity" was not found in the relevant cases. In the *Legal Status of Eastern Greenland* case, the Permanent Court of International Justice had decided that the steps taken by the Norwegian Government had been "unlawful and invalid".⁶ Elsewhere, case-law relied on the notion of an instrument which could not be invoked against another State. In the absence of a common authority and of a compulsory jurisdiction, the principle that a State could not rely on its fraudulent transaction could achieve the same result as a theory of nullity.

39. Mr. TSURUOKA said that the concept of fraud was undoubtedly important. The general principle that fraud affected the reality of consent, which was recognized in the law of many countries, was implicit in international law. The question was simply whether it was worth mentioning, in view of the rarity of cases of fraud and the difficulty of defining the scope of the question precisely. No member of the Commission insisted on the inclusion of an article dealing specifically with fraud, but many thought that fraud should be mentioned somewhere in the draft articles.

40. The Commission should find a compromise between codification *simpliciter* and the progressive development of law. A defrauded State should be protected and justice be safeguarded no doubt, but at the same time any wrongful application of the principle should be avoided.

41. The Commission should therefore choose one of two possible approaches. Either it could decide that

fraud could be pleaded only before an international court; the difficulty then would be to win acceptance of that solution by a majority of States. Such a solution would certainly protect the defrauded State, for, as Mr. Gros had said, a State which considered itself defrauded and whose complaint was well founded would convince the court. It might perhaps also forestall reckless charges of fraud, and thus make for harmony in international relations. Or, despite the almost total lack of precedents, the Commission might try to develop the law, by defining fraud, determining its effects in law, and deciding how the principle should be applied in practice. It would then be faced with the difficulty of finding objective criteria in a domain ruled principally by subjective criteria.

42. The Drafting Committee should try to define the limits of the concept of fraud; if that proved too hard, then the only alternative, however difficult, would be to fall back on the idea of an international court exclusively competent to rule on cases in which consent to a treaty was alleged to have been induced by fraud.

43. Mr. AGO said he agreed with Mr. Tunkin that there were certain principles which were valid in any system of law. What he had meant to say at the previous meeting was that the same principles might operate differently in different circumstances and that international relations were a very different matter from relations between private persons.

44. One of the difficulties raised by the notion of fraud was linguistic. The French word "*dol*" did not perhaps mean exactly the same thing as the English word "fraud". Moreover, the Latin words *fraus* and *dolus* had different meanings. In *dol*, jurists placed the emphasis on intention. The concept of *dol* applied not only to contracts, but also to unlawful acts. In the case of an offence, the fraudulent intention was not the same thing as *faute* or negligence. There could be no *dol* without deliberately pursued intention. In the conclusion of a treaty, there was *dol* only if one party deliberately induced the other party to acknowledge as true something that was false and at the same time material to the formation of consent to the treaty. Such a situation, though not impossible in international relations, was much rarer than in relations between individuals, because States had certain safeguards which individuals lacked.

45. The cases which had been cited could not be presented as examples of consent procured by fraud. In the case of the Italo-Abyssinian Treaty of 1889, as he had already pointed out, there had been two texts which differed. Was the difference due to a misunderstanding or had it been introduced intentionally? The question was of no importance in that context, since in any case it could not be said that consent had been induced by fraud, for the lack of concordance between the texts had resulted in absence of consent.

46. If the Commission wished to prepare a complete draft convention and include in it a theory of defects in consent, then it should deal with the question of fraud. But he warned his colleagues against the danger of opening the door too wide to the ingenuity of States seeking to evade treaty obligations. In fact, fraud was

⁴ *I.C.J. Reports*, 1959, p. 222.

⁵ *Idem*, 1961, p. 30.

⁶ *P.C.I.J.*, Series A/B, No. 53, p. 75.

more likely to be pleaded to secure the voidance of a treaty than to secure a partner's consent to a new treaty.

47. The best approach would probably be to draft a single article dealing with whatever factors might vitiate consent; in that way the subject would not receive too much prominence in the draft.

48. Mr. YASSEEN said the rule that fraud vitiated consent existed in international law because it was a general principle of law. It was accepted in every system of national law. A State could not argue that fraud did not invalidate consent to a treaty. The principle was part of positive international law, in accordance with Article 38 of the Statute of the International Court of Justice, which treated the general principles of law as an autonomous source of international law.

49. The controversy on *laesio* could be cited in support of that argument. It was generally maintained that in international law *laesio* was not recognized as vitiating consent. And in attempting to fill that gap, some writers had invoked the general principles of law to show that *laesio* vitiated consent to the conclusion of a treaty. But it had been replied that there was a rule of international law which laid down that *laesio* was not recognized as vitiating consent to treaties. It was true that that argument could hardly be invoked in the case of fraud, for it could not be said that there was a rule of international law to the effect that fraud did not vitiate consent to a treaty.

50. As to the question whether an article on fraud should appear in a convention on the law of treaties, he thought that such an important matter should certainly not be disregarded; otherwise, the draft might give the impression that the Commission did not believe that fraud invalidated consent.

51. Some speakers had referred to the difficulty of proving fraud in the absence of a court. The institutions of international life had obviously not progressed as far as national institutions, but means of settling international disputes did exist. In his statement immediately after his appointment the Secretary-General had said: "We live in an imperfect world, and have to accept imperfect solutions, which become more acceptable as we learn to live with them and as time passes by."⁷

52. He was still convinced that article 7 should be retained. Even though solutions as satisfactory as those existing in national law were impossible, that was no reason for abandoning the principle.

53. Sir Humphrey WALDOCK, Special Rapporteur, summarizing the discussion, said that a few members were evidently opposed to the inclusion of an article on fraud and Mr. Gros had voiced objections that went beyond the issue of whether fraud was in fact attributable to States. Most members, however, including himself, could not subscribe to the view that the question of the reality of consent did not have any place in treaties between States and was a matter which lay outside the scope of the draft articles.

54. The majority view seemed to be that some provision concerning fraud was necessary; the question to be decided was exactly how much emphasis it should be given. Some members had suggested that the matter could be dealt with among the causes of error covered by article 9, while others favoured a separate article on the subject.

55. Clearly some definition of fraud was needed, but the one he had attempted to incorporate in article 7 might be wider than that commonly accepted in continental systems of law. It followed fairly closely the concept of fraud in English law, which comprised the deliberate intent to deceive, mentioned by Mr. Ago as an essential element in the definition, but also went further to include reckless mistakes intended to obtain the consent of the other party without regard to whether the statements were true or false; if such statements were found to be untrue, they fell within the law of deceit.

56. After reflecting on the discussion, he had come to the conclusion that that particular aspect of the doctrine of fraud, which was specially relevant to commercial transactions, had perhaps little place in the context of relations between States, and having heard something of the continental concept of "*dol*" he had come round to the view that a comparatively narrow definition was advisable. A narrow definition would at the same time serve to obviate the dangers of abuse whereby States would seek to invoke fraud as a mere pretext to free themselves from obligations deriving from treaties which had proved less advantageous than originally expected. It was also desirable in order to maintain a clear distinction between fraud and other elements vitiating consent, such as coercion.

57. Certain other issues, such as proof of fraud and by what procedures it should be determined, as well as the question of severance, though highly relevant, might perhaps be left aside until the Commission took up section IV of his report. He had deliberately dealt with substance and procedure separately, since whatever view was taken of those other matters, it was necessary to formulate the law relating to the substance of the question.

58. With regard to some of the points raised, in particular by Mr. Tsuruoka, on the remedies proposed in article 7, he had provided for an element of choice in paragraph 1. In his own view the differences between the formulations in paragraph 1 (a) on the one hand, and in paragraphs 1 (b) and 1 (c) on the other, were not of prime importance.

59. His personal opinion was that the best solution would be to follow Mr. Elias' suggestion and deal with the question of fraud in article 9, adopting a strict definition of the kind advocated by Mr. Ago. For the time being, article 7 could be referred to the Drafting Committee for consideration after the Commission had dealt with the two following articles; it would then be in a position to harmonize the Commission's views on all those three articles.

60. The CHAIRMAN said he believed that the division of opinion in the Commission was more apparent than

⁷ *Official Records of the General Assembly, seventeenth session, plenary meetings, 1182nd meeting, para. 23.*

real and accordingly suggested that article 7 be referred to the Drafting Committee for consideration in the light of the discussion on articles 8 and 9. That would leave the Drafting Committee some discretion as to how the question of fraud was to be handled, but the Commission's final decision in the matter would be reserved.

It was so agreed.

61. The CHAIRMAN invited the Commission to consider articles 8 and 9 together.

ARTICLE 8 (MUTUAL ERROR RESPECTING
THE SUBSTANCE OF A TREATY)

ARTICLE 9 (ERROR BY ONE PARTY ONLY RESPECTING
THE SUBSTANCE OF A TREATY)

62. Sir Humphrey WALDOCK, Special Rapporteur, introducing the articles, said that article 8 dealt with the case in which both Parties had been in error and article 9 with the case in which one of them had suffered from an error induced by acts, statements or omissions by the other, whether through fraud, innocent misrepresentation or negligence. The position of the Parties was different in the two cases and he had accordingly dealt with them in separate articles. Another reason for so doing, apart from drafting considerations, was that the provision contained in article 8, paragraph 3, was inapplicable to article 9. The Commission would have to decide whether or not it wished to maintain the distinction between mutual and unilateral error; if not, the two articles could be combined.

63. Mr. PAREDES said he held to the view that international law had been greatly influenced in its formation and development by the principles of private law, which had stimulated and guided it within the limits imposed, of course, by the differences between those two branches of law arising from the subjects they governed. That was more clearly evident as soon as the primitive concept of sovereignty began to be replaced by the principle of the interdependence of nations; it was the only way of understanding many of the ideas embodied in the United Nations Charter, including, of course, the concept of State responsibility. Consequently, he was not afraid to seek clarification of international law in the principles of internal law.

64. On the other hand, in view of the great value of Mr. Tsuruoka's opinions, he had felt alarm and anxiety on hearing him say that in international affairs only the formal and external aspect of treaties was important, not the intrinsic content. He himself believed the opposite: the outward appearance was the form taken by the substance and realization, or by the object in view.

65. With regard to fraud in international relations it had been said that there were very few recorded cases and that it was difficult for one party to deceive the other because they both had adequate means of ascertaining the truth: technical experts, maps of all kinds, explorers, etc. Such statements were understandable if historical events in Europe alone were considered, without taking the other continents into account; but

on a comprehensive view of history it would be found that in the last third of the previous century a great number of treaties had been concluded by flagrantly fraudulent means: those establishing protectorates and concessions in Africa and Asia. The statement that it was easy to obtain information about the land, which was true of Europe, was not true of the immense and tangled rain-forests and steep terrains of other parts of the world; there the conquerors and the conquered people were not on equal footing.

66. The Special Rapporteur had made an admirable synthesis of the contemporary doctrine of error in articles 8 and 9. Error was one of the factors that could vitiate consent, since consent depended on knowledge of the subject-matter and the object of the agreement, and the free decision to conclude it. If one of those elements was lacking, neither consent nor the treaty resulting from it existed.

67. He had no objections to the drafting of articles 8 and 9, but in order to make the idea more precise and the provision more effective, he suggested that in article 8, paragraph 1 (c), a sentence should be added to the effect that "This circumstance shall be presumed to exist when the error prevents implementation of all or part of the provisions of the Treaty."

68. In spite of what had been said he saw no justification for the different consequences ascribed to mutual error in article 8 and error by one party only in article 9, under which the other parties must have contributed to causing the error. Whatever course the proceedings had taken, the error, since it remained one of the elements of consent, invalidated the treaty. The intervention of the other party in inducing error corresponded to the element of fraud, which was being studied separately.

69. Mr. VERDROSS said he had some doubt about the problem of error of law referred to in article 8. International law was so complex that a rule as rigid as rules of national law could not be accepted. For example, two States had held that League of Nations mandates had lapsed with the League's disappearance; but the International Court of Justice had later given a contrary judgement. The two States in question could, however, hardly be said to have committed an inexcusable error of law. Judge Anzilotti's opinion in the *Eastern Greenland* case had been cited in support of the idea of inexcusable error of law; but in holding that a government could not be ignorant of the legitimate consequences following upon an extension of sovereignty, Judge Anzilotti had been speaking only about the particular case then before the Court. That opinion could not form the basis for a general rule that an error of law was never excusable.

70. Mr. ROSENNE said that, in articles 8 and 9, the Special Rapporteur had accomplished a piece of codification and had been guided by practical considerations. He (Mr. Rosenne) shared the doubts expressed by Mr. Verdross regarding the exclusion of error of law from the scope of the draft. He suggested that paragraph 1 (a) of article 8 be dropped, since in any case the point was adequately covered by paragraph 1 (b).

71. After hearing Mr. Verdross' interpretation of Judge Anzilotti's opinion in the *Eastern Greenland* case he wished to add that in the *Temple* case (preliminary objections) the International Court of Justice had not rejected *a priori* an argument based on an alleged error of law, but had disposed of the contentions on different grounds altogether. Its pronouncement that "Furthermore the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given"⁸ should appear in the commentary alongside the passage from the judgement on the Merits reproduced by the Special Rapporteur at the end of paragraph 3 in his combined commentary on articles 8 and 9.

72. In order to bring paragraph 3 (a) of article 8 into closer conformity with the language used by the International Court in the *Temple* case, the words "by the exercise of due diligence" should be deleted. That requirement was borrowed from municipal law but, was difficult to apply even on the domestic plane and added little to the text.

73. He had some misgivings about the purport of paragraph 3 of article 9, as he doubted whether it was appropriate to speak of error being invoked by a State acceding to a treaty when the error would have been made at the stage of negotiation. He also enquired whether it was international that only accession, and not acceptance and approval, had been mentioned in that provision.

74. Recalling a discussion on terminology which had taken place at the previous session (657th meeting paras 70-72), he suggested using different words for "mistake" denoting errors of substance as in articles 8, 9 and 10, and "error", denoting the types of error or omission which were the subject of articles 26 and 27 of Part I and article 10 of Part II. He assumed that all the official languages of the United Nations and other important languages possessed two equivalent words.

75. He was not fully convinced of the need for two separate articles on the matters under consideration, but that could be regarded as a drafting point and left to the Drafting Committee.

The meeting rose at 1 p.m.

⁸ *I.C.J. Reports*, 1961, p. 30.

680th MEETING

Wednesday, 15 May 1963, at 10 a.m.

Chairman: Mr Eduardo JIMÉNEZ de ARÉCHAGA

INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN said that he had received a communication from the Inter-American Juridical Committee stating that Mr. Caicedo Castilla had been nominated to attend the Commission's fifteenth session as an observer.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

(resumed from the previous meeting)

2. The CHAIRMAN invited the Commission to continue consideration of articles 8 and 9 in section II of the Special Rapporteur's second report (A.CN.4/156).

ARTICLE 8 (MUTUAL ERROR RESPECTING THE SUBSTANCE OF A TREATY) (continued)

ARTICLE 9 (ERROR BY ONE PARTY ONLY RESPECTING THE SUBSTANCE OF A TREATY) (continued)

3. Mr. BRIGGS said he was not greatly concerned at the fact that paragraph 3 (a) of article 8 largely nullified paragraph 1, as he preferred paragraph 3 (a).

4. The provision contained in paragraph 2 (a) was too extreme since it established a unilateral right to denounce a treaty when none existed in contemporary international law.

5. With those points in mind and in order to bring article 8 more into harmony with the case-law referred to in the commentary, he suggested that it be redrafted on the following lines:

"1. Where a treaty has been entered into by the parties under a mutual error respecting the substance of the treaty, no party shall be entitled to invoke an error as invalidating its consent to be bound where

- (a) the party in question contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of the possibility of the error; or
- (b) the party in question has so conducted itself as to bring the case within the provisions of article 4 of this Part.

"2. However, if

- (a) the error was one of fact and not law;
- (b) the error related to a fact or state of facts assumed by the parties to exist at the time that the treaty was entered into;
- (c) the assumed existence of such fact or state of facts was material in inducing the consent of the States concerned to be bound by the terms of the treaty;

then in any such case the party in question may, by mutual agreement with the other party or parties concerned, either (i) denounce the treaty as from such date as may be decided, or (ii) confirm its consent to be bound by the treaty subject to any modifications that may be decided upon in order to take account of the error."

6. The Drafting Committee should perhaps give some thought to the wording of the last part of paragraph 2 in the Special Rapporteur's draft; it should be made clear that it was not the treaty that was to be affirmed,