Document:-
A/CN.4/SR.825

Summary record of the 825th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1966, vol. I(1)

825th MEETING

Thursday, 6 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

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

Law of Treaties

(A/CN.4/183 and Add.1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 34 (Error)

Article 34

Error

1. A state may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 above shall not apply if the State 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 State on notice of a possible error.

3. Under the conditions specified in article 46, an error which relates only to particular clauses of a treaty may be invoked as a ground for invalidating the consent of the State in question with respect to those clauses alone.

4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply. (A/CN.4/L.107, p. 33)

1. The CHAIRMAN invited the Commission to consider article 34, for which the Special Rapporteur, in his fifth report (A/CN.4/183, p. 36), had proposed a new text which read :

Error

1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 above shall not apply if the State 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 State on notice of a possible error.

3. When there is no error as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 34 raised two questions which were already under consideration by the Drafting Commission in connexion with article 33, dealing with fraud. The first was the suggestion by Mr. Briggs to replace the reference to invalidating a State's consent by the wording " grounds for invalidating consent ". The second was the important question of separability; in his own rewording, he had omitted the former paragraph 3, which dealt with that question, on the assumption that the whole matter would be covered by the general article on separability.

3. Government comments on the article were analysed on pages 32 and 33 of his report (A/CN.4/183), and he drew attention to the reasons he had given for not accepting certain suggestions put forward by the Government of Israel.

4. A number of governments had suggested that provision be made for mistakes of law as well as mistakes of fact. His own impression was that, during the Commission's 1963 discussion, the great majority of members had wished to confine the provisions of article 34 to mistakes of fact. It was of course realized that a mistake of law could in some measure contribute to a mistake of fact, and in that respect he drew attention to paragraph 7 of the Commission's commentary to the article, an extract from which was quoted in his report. His conclusion on that question was that no change should be made in the text of the article.

5. The Government of Thailand had expressed the view that the scope of the exception provided for in paragraph 2 was too wide and could have the effect of rendering paragraph 1 ineffective. That view was, of course, based on its experience in the Temple of Preah Vihear case.[1] Paragraph 2 did in fact provide for a rather sweeping exception to paragraph 1 and, unless restrictively interpreted, could deprive that paragraph of much of its substance. However, it repeated the language used by the International Court of Justice, albeit in relation to a special case, and the Commission might prefer to leave it unchanged, on the basis that it must be given a reasonable interpretation.

6. Mr. YASSEEN said that the Special Rapporteur proposed no other amendment than the deletion of the paragraph concerning the separability of a treaty. He would accept the article, as he had accepted the 1963 text.

7. In his opinion, the error dealt with in the article could only be an error as to facts. At an earlier stage, the Commission had discussed the possibility of taking into consideration errors of law as well. As an example of such an error, some members had spoken of an error concerning a particular rule of international law as between States, some of which recognized a rule as a rule of law whereas others did not; such an error could be regarded as an error as to fact. A possible error as to internal law should manifestly not be taken into account as an error of law for the purposes of international law. Consequently, it was evident from an analysis of the earlier debates in the Commission that the cases mentioned had always been errors as to fact, or as to a mixture of law and fact. In the latter case, it would be sufficient

[1] *I.C.J. Reports 1962*, p. 6.

that there should be some slight error as to fact for the machinery of the article to be brought into operation.

8. Mr. ROSENNE said that he agreed with the Special Rapporteur that it was essential to maintain in the draft articles an article on error, especially after the distinction which had been made by the Chairman and the Special Rapporteur himself between fraud committed by a contracting State and error induced by a third party.

9. He found it difficult to accept the analysis given by the Special Rapporteur in his fifth report (A/CN.4/183, p. 33) of the views expressed during the 1963 discussion. The question of errors of fact and errors of law had been discussed at length by the Commission, particularly at its 679th and 680th meetings, and he drew attention to a passage in the record of Mr. Amado's statement during that discussion: " In addition, the error must exist in fact, for the state of international law was such that there could, unfortunately, be no inquiry into the parties' intentions. The parties' intentions, which were a key factor in private law, could not carry equal weight in international law."[2]

10. That statement contained two distinct elements; the first was that the error must exist in fact; the second was that the rule could not be dependent on a possible inquiry into the intention of the parties, but must be dependent on an objective appreciation of the error. The impossibility of examining the psychological factors motivating the conduct of a State had been upheld by the International Court of Justice in a number of decisions, such as its advisory opinion in the Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) case in 1948,[3] and its judgment in the Asylum case in 1950.[4] He therefore suggested that the Commission refrain from introducing into article 34 any subtle distinctions drawn from private law, and from requiring any investigation into the state of mind of a State.

11. Nevertheless, he agreed with the Special Rapporteur's decision to leave the text of the article untouched, but urged that the commentary be carefully reviewed.

12. In the English text of the new paragraph 3, the word " mistake " had been replaced by the word " error ". He suggested that the Drafting Committee, perhaps with the help of the translation services of the United Nations, be asked to examine the terminology used, for the express purpose of trying to maintain a linguistic differentiation between errors of substance and mistakes of transcription, such distinction to be expressed, of course, in each of the Commission's three working languages and in the official languages of the United Nations.

13. When, at the first part of the present session, the Commission had discussed and adopted article 26, members had been unanimous in not wishing to give undue prominence to error, in the interests of the stability of treaties. The Drafting Committee and the Commission itself should also now examine the question whether paragraph 3 should be transferred to article 26, since it dealt not with a question of invalidity but rather with the effects of a mistake in transcription after it had been corrected.

14. On the point raised by the Government of Thailand, he had been impressed during the debates in the Sixth Committee of the twentieth General Assembly by the sensitivity of that Government with regard to some of the reasoning employed by the International Court of Justice in its decision in the Temple of Preah Vihear case.[5] It was of course proper for the Commission, and obligatory under its Statute, to make full use of relevant rulings of the Court, but he would urge that in the commentary, particularly where it referred to the rulings of the Court on error and estoppel in that case, the Commission should refrain from giving them undue prominence.

15. Mr. CASTRÉN said that the article was useful and should stand. In his opinion, the Special Rapporteur had rightly refrained from acting on proposals made by governments for the amendment of the article.

16. For the reasons he had given earlier in connexion with article 33, he supported the Special Rapporteur's proposal that paragraph 3 of the 1963 draft be omitted for the time being.

17. So far as error as to law was concerned, he shared the opinion of previous speakers; perhaps the commentary on that point should be revised.

18. The Commission might, as Mr. Rosenne proposed, remove the last paragraph of the article and incorporate its substance in another article; in any case the essence of the paragraph was its cross-reference to other articles.

19. Mr. ELIAS said he supported article 34 as proposed by the Special Rapporteur. The concluding words of paragraph 3, " and articles 26 and 27 then apply ", should, however, be corrected, since in 1965 the Commission had merged article 27 with article 26; the reference should therefore be to article 26 only.

20. Sir Humphrey WALDOCK, Special Rapporteur, thanking Mr. Elias for drawing attention to the need for that correction, said that his rewording of article 34 had been prepared before the Commission had taken its decision on articles 26 and 27.

21. Mr. PESSOU said that Mr. Rosenne had expressed a very pertinent warning about the use of decisions of the International Court of Justice. Those decisions always consisted of two parts: a legal part, in which the Court stated the law, and a philosophical part, in which the Court explained the import of its judgment. If it endorsed the less specifically legal part of those judgments, the Commission might add to the confusion instead of diminishing it.

22. He was not sure whether the word " error " had the same meaning in all legal systems; in some cases at least, the Commission should define in unambiguous language the terms it used.

23. He suggested that first two paragraphs be amended slightly to read:

" 1. Any State may invoke an error respecting the substance or object of a treaty if the error relates to a

[2] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 43, para. 56.

[3] *I.C.J. Reports 1948*, p. 57.

[4] *I.C.J. Reports 1950*, p. 266.

[5] *I.C.J. Reports 1962*, p. 6.

fact existing at the time of the conclusion of the treaty.

" 2. Nevertheless, paragraph 1 above shall not apply if the State concerned gives its consent to be bound by the treaty though aware of the existence of that error. "

24. The error referred to in paragraph 3 was one concerning the text, and consequently different in nature from the error dealt with in the previous two paragraphs. Paragraph 3 should therefore be either linked to article 26 or amended to form a homogeneous part of article 34.

25. Mr. BEDJAOUI said he supported the Special Rapporteur's revised text for article 34, but regretted that it did not expressly allow for an error as to law to be invoked. Admittedly, from the point of view of international law, internal law could not be regarded otherwise than as a fact and, since some learned authors likewise considered regional international law to be a fact, the scope of the provision concerning error as to law was very narrow. But if it disregarded error as to law altogether, the Commission would be forcing future interpreters, learned writers and the International Court of Justice to dress up errors of law as errors of fact. No doubt the commentary would explain that error as to law was not excluded from the scope of the article, but that did not mean that errors of law would be covered. Besides, commentaries were soon forgotten.

26. The reason why he thought that the article should be expanded to cover errors of law was that the newly independent States had not yet acquired the skill and experience to protect themselves against that kind of error. The intention was not, of course, to enable the States to evade the legal consequences of their own free acts, nor to compromise the stability of treaties or the continuity of the international legal order; the object was to recognize the scope of error as to law, because such errors could exist in the pure state.

27. In looking at the text, he had at one time thought that the rather vague expression " *erreur portant sur un état de choses* " might connote error as to law. Unfortunately, the English text, " error relating to a state of facts ", did not apparently admit that interpretation.

28. If it should be impossible to alter the text in the manner he had indicated, he would support the general opinion.

29. Mr. TUNKIN said he noted that paragraphs 1 and 2 were identical with the 1963 text and that there was only a very slight drafting change in the new paragraph 3, which corresponded to the former paragraph 4. He accepted that text, on the understanding that no decision was to be taken at the present stage on the former paragraph 3: the matter would be left open, to be dealt with by the Commission when it discussed article 46.

30. Mr. ROSENNE said that Mr. Pessou's remarks had drawn his attention to the awkward and ambiguous wording used in paragraph 1 " at the time when the treaty was entered into ". He suggested that the Drafting Committee be invited to re-examine that wording in the light of the Commission's decisions in 1965 on the articles of part I.

31. The CHAIRMAN, speaking as a member of the Commission, said he wished to make a few observations on the problem of error of fact and error of law. What was the " law " in international law? In his opinion, the law was drawn from the sources consulted by the International Court of Justice which were referred to in Article 38 of the Statute of the Court. The enumeration given in that article was clear enough: but were all the States in agreement concerning the content of the sources mentioned?

32. International conventions, whether general or particular, were known to the parties; and thanks to the practice of open diplomacy, to the registration of treaties and to the publication of treaties, either by the Secretariat of the United Nations or by the parties, those conventions were also known to other States. But there were special cases, in particular that of the operation of the most-favoured-nation clause, where a convention made between certain States produces effects on other States. Should an error concerning the existence of the law, as embodied in a most-favoured-nation clause, be held to be excusable?

33. The second source mentioned in Article 38 of the Statute of the Court—custom—raised an even thornier question. At what point could a general practice be said to have been accepted as law?

34. The third source consisted of the general principles of law. With regard to that source, there was controversy as to what formed and what did not form part of those principles, and learned authors were hesitant in distinguishing between general principles of law and general principles of international law.

35. He was by no means sure that the possibility of invoking an error respecting a rule of law should be rigidly and absolutely excluded. He agreed in principle that an error as to law should not be admitted except in serious cases, if States had some excuse for having fallen into the error—and by that remark he meant not only newly independent States but also States which possessed a diplomatic tradition and a sound knowledge of international law. Without wishing to be too categorical, he hoped that the Commission would reconsider the question.

36. Mr. BRIGGS said that he found the Special Rapporteur's text provided a satisfactory solution for the problems which had been raised during the 1963 discussion and in the comments made by governments. He would therefore suggest no change in the English text, except the insertion in paragraph 1 of the words " grounds for " before " invalidating its consent ", a suggestion which was already under consideration by the Drafting Committee.

37. The point raised by Mr. Rosenne regarding the words " when the treaty was entered into " could perhaps be solved by adopting language similar to that used in the French: " when the treaty was concluded ".

38. With regard to the use of phraseology from International Court of Justice decisions, he must point out that when the Court decided a case there was always one dissatisfied party. The sensitivity of the party that had lost a case should not cause the Commission to

refrain from using wording drawn from rulings of the Court.

39. Mr. AGO, referring to the question raised by Mr. Bedjaoui—the possible enlargement of article 34 to cover error as to law, by which was meant, of course, only an error of international law—said he must warn the Commission of the very serious danger of introducing into the draft a provision which would make it only too easy to call in question the existence of treaties. If, for example, an arbitral award defined a rule in a slightly different fashion from that in which it had been understood by a State when concluding the treaty, that would be sufficient to enable the State to raise the question, invoke its error and withdraw from participation in the treaty.

40. The Commission should not worry too much about the temporary difficulties at present being experienced by newly independent States; those difficulties would have largely disappeared by the time the convention being drafted by the Commission was adopted. Besides, article 34 as it stood offered a safeguard against flagrant and truly exceptional cases of the kind mentioned by Mr. Bedjaoui.

41. The French text of the article should be corrected. The expressions " *erreur sur la substance* " and " *sur la rédaction* " in paragraphs 1 and 3 gave the impression that the error in question was one of interpretation of the treaty and not an error made by a party at the time of the conclusion of the treaty. He suggested that the two expressions be replaced by " *erreur de substance* " and " *erreur de rédaction* ", respectively, or perhaps " *erreur dans la substance* " and " *erreur dans la rédaction* ".

42. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Ago, said that the English text had the same implications as the French. He suggested that the Drafting Committee consider the suggestion to use the expression " error in the substance of a treaty ".

43. On the delicate matter of errors of law, he agreed that in 1963 some members had contemplated such errors as possible grounds for invalidating consent. However, his impression was that the majority of the Commission had felt that a party to a treaty was entitled to invoke only an error of fact as grounds for invalidating its consent. The Commission realized that errors of law could be involved in errors of fact and the commentary covered that point to some extent; the commentary would be carefully reviewed.

44. He strongly opposed any amendment of the statement of the rule in paragraph 1, because he shared Mr. Ago's concern that it would be very dangerous to open the door to reliance on an error of law as grounds for invalidating consent. A number of suggestions had been made to cover the question of errors of law, but no clear-cut proposal had been made which would achieve that purpose without involving the dangers to which Mr. Ago had drawn attention.

45. In paragraph 2, he had found it convenient to use the language of the International Court of Justice, which constituted a recent statement of the rule in the matter. However, he sympathized with the view expressed by the Thai Government that the statement in the opening words of that paragraph was somewhat sweeping; there were few errors in the conclusion of treaties to which some kind of contribution would not be made by both parties. Therefore, while accepting the substance of paragraph 2, he suggested that the Drafting Committee be asked to examine whether the language was sufficiently tight to avoid inadmissible interpretations.

46. With regard to paragraph 3, he appreciated the point made by Mr. Rosenne and agreed that the Drafting Committee should consider whether there was any advantage in trying to draw a distinction between a mistake of the type envisaged in article 26 and " error " in article 33. The point was on the whole a psychological one, since there would be no confusion in the minds of lawyers as to what the two sets of provisions were intended to cover.

47. With regard to the question whether paragraph 3 should be retained in article 33 or its substance transferred to article 26, he did not have any strong feelings, but felt that there was some advantage in keeping the cross-reference in article 33, to indicate the clear distinction between the effect of error in the two cases. The point could safely be left to the Drafting Committee.

48. The CHAIRMAN said he noted that no member had formally proposed that the article deal expressly with errors of law, though one had asked the meaning of the expression " state of facts " *(état de choses)*.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that all the suggestions made during the discussion would be taken into consideration by the Drafting Committee. On the subject of errors of law, however, no clear proposal had been made for the inclusion of that notion with sufficient precision to avoid the very grave dangers involved.

50. The CHAIRMAN said that if there were no objection, he would consider that the Commission agreed to refer article 34 to the Drafting Committee for consideration in the light of the comments made during the discussion, the question of separability being reserved.[6]

It was so agreed.

ARTICLE 35 (Personal coercion of representatives of States)

Article 35

Personal coercion of representatives of States

1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

2. Under the conditions specified in article 46, the State whose representative has been coerced may invoke the coercion as invalidating its consent only with respect to the particular clauses of the treaty to which the coercion relates. (A/CN.4/L.107, p. 34)

51. The CHAIRMAN invited the Commission to consider article 35, for which the Special Rapporteur, in

[6] For resumption of discussion, see 840th meeting, paras. 19-44.

his fifth report (A/CN.4/183, p. 39), had proposed a revised text which read:

> If the signature of a representative of a State to a treaty has been procured by coercion, through acts or threats directed against him in his personal capacity, the State may invoke such coercion as invalidating its consent to be bound by the treaty.

52. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 35, said that the few government comments on that article were analysed in his report. The main point which had been raised was whether, in the event of coercion, the expression of consent should be regarded as " without any legal effect ", as stated in paragraph 1 of the 1963 text, or whether it should simply give the injured State a right to invoke the coercion as grounds for invalidating its consent.

53. During the 1963 discussion, the Commission had had very much in mind the historical instances of coercion against high officers of State of foreign countries by the Hitler régime. It should, however, be borne in mind that article 36 dealt with coercion of a State by the threat or use of force; that article declared that any treaty procured by such coercion " shall be void ".

54. The circumstances envisaged in article 35 were different; the case was one of coercion or blackmail against an individual representative, and it might well be that the State concerned would prefer to maintain the treaty while objecting to the coercion. In that event, the State would be ratifying the act of its representative. He had therefore, in his fifth report, suggested a rewording of article 35 which brought the language close to that of article 33, dealing with fraud.

55. As with the previous articles, the question of separability, previously dealt with in paragraph 2, would be reserved.

56. Mr. BRIGGS said that the Special Rapporteur had been somewhat misled by the comment of the United Kingdom Government that " it is not clear whether paragraph 1 would cover the case of signature of a treaty which is subject to ratification and, if so, whether a signature procured by coercion is capable of being ratified " (A/CN.4/183, p. 37). In fact, it was not the signature to a treaty which was ratified, but the treaty itself, as was clear from the text of article 12 adopted by the Commission in 1965.

57. The problem contemplated by the United Kingdom Government could not arise. The signature of a treaty subject to ratification was not binding. The State concerned could proceed or not to express its consent by ratification or otherwise. The situation envisaged in article 35 was that of personal coercion of the representative of a State when that representative expressed the consent of his State. That consent could be given in the form of a signature not subject to ratification, but it could also be given in the form of accession, approval, acceptance, or ratification.

58. For those reasons, he urged the retention of the language used in 1963, which referred to representatives being coerced " into expressing the consent of the State to be bound by a treaty ", instead of replacing it by the Special Rapporteur's rewording " if the signature of a representative of a State to a treaty has been procured by coercion ".

59. With regard to the concluding phrase, he agreed with the Special Rapporteur's proposal to replace the system of absolute nullity, embodied in the words " shall be without any legal effect ", by a system which would give the State concerned the right to invoke coercion as grounds for invalidating consent. However, he did not agree with the Special Rapporteur's idea of going so far as to make the provision identical with that which related to fraud. As far as the language was concerned, however, he preferred the formula suggested by the Government of Israel (A/CN.4/183, p. 36), " the State whose representative has been coerced may invoke the coercion as invalidating its consent to be bound by the treaty ".

60. Mr. YASSEEN said that the Special Rapporteur's remarks concerning the similarity between fraud and a certain type of coercion had failed to convince him. To his (Mr. Yasseen's) mind, fraud—a concealed violation—was of course reprehensible, but coercion was even more so; it was a flagrant violation and a defiance of the international legal order. He could not accept the Special Rapporteur's new formulation; he would prefer the Commission to return to the 1963 approach and to state that an expression of consent obtained by coercion was without any legal effect. Every form of international brigandage should be severely repressed.

61. It was better to refer to consent to bind the State than to signature, for what was involved was not the signature but an act which bound the State. It was precisely because it compelled a representative to perform an act which bound his State that coercion could be regarded as vitiating the treaty. In that connexion, the French text of the redraft was open to criticism: surely, a State whose representative had signed as a result of coercion was not really a " *partie à un traité* ".

62. Admittedly it might be to the interests of the State to adopt a treaty concluded in such conditions, but that must not affect in any way the consequences of the coercion. It certainly could not justify pushing the fiction so far as to permit the confirmation of consent which was non-existent and could by no manner of means be attributed to the State. If the State considered that the treaty might be to its interests, it could always conclude a fresh treaty similar to the one procured by coercion.

63. Mr. AGO said that, in his view, the crucial question posed by the coercion of the representative of the State was: should the coercion automatically nullify the treaty, or should the party concerned be left free to decide whether to claim that its consent was invalid or to confirm the treaty? The question was rather of academic interest, for instances of such coercion were happily infrequent, and a State was hardly likely to confirm a treaty signed under duress without requiring fresh negotiations.

64. It was for the Commission to decide where it wished to draw a distinction: between coercion and fraud, or between the personal coercion of representatives of States and the coercion of States referred to in article 36? The Special Rapporteur had preferred the second

approach, and he (Mr. Ago) was ready to support the Special Rapporteur's proposal if the majority did.

65. On the question of signature, he took the same view as Mr. Briggs and Mr. Yasseen; what the Special Rapporteur had clearly had in mind was not " signature " in the technical sense, but either the signature which expressed the definitive consent of the State or that given in the form of ratification. In order to forestall any ambiguity, however, it would be better to speak of the expression of the consent of the State.

66. He proposed that the article read;

> " If the representative of the State was coerced by acts or threats directed against him in his personal capacity into expressing the consent of the State to be bound by a treaty, the State may invoke the coercion as invalidating its consent to be bound by the treaty ".

If, however, the Commission preferred the idea of absolute nullity, then the article should end with the 1963 wording.

67. Mr. TUNKIN said that he could not accept the Special Rapporteur's new draft for article 35, which was inferior to the text drawn up at the fifteenth session.

68. There was, moreover, a legal difference between the two texts. The purport of the earlier one was that, if a representative of the State was coerced into expressing its consent to a treaty, no consent had been given because it had been vitiated by an illegal act of another party. That was a correct statement of the law. By contrast, the new text seemed to imply that a consent was given, but that the injured State could subsequently invoke the circumstances in which that consent had been given as grounds for invalidating it.

69. In the first sentence of paragraph (1) and in paragraph (3) of the commentary prepared at the fifteenth session, the Commission had explained its reasons for drafting article 35 in the form chosen and no new facts had been advanced by the Special Rapporteur to justify any change. It was surely not the Commission's opinion that an act of coercion was closely analogous to fraud.

70. The old international law had recognized the right of States to use force in international relations and many treaties obtained by force had not been regarded as null. The new international law prohibited the use of force and held States responsible for acts of aggression. The Special Rapporteur's new formula was at variance with the law as it now stood and did not correspond to its general line of development.

71. He agreed with Mr. Briggs that the new text proposed by the Special Rapporteur was unduly restrictive in referring only to a signature procured by coercion, whereas the earlier one had dealt with any act expressing consent to be bound. Indeed it would be preferable to revise the earlier text so as to mention only an act intended to bind the State, and not to speak of consent, since there could be none when coercion had taken place.

72. Mr. CASTRÉN said he noted that, in the light of the comments of governments, the Special Rapporteur was proposing quite far-reaching changes in the substance of article 35, which would greatly weaken the legal effects of the personal coercion of representatives of States.

73. The new version was more flexible than the previous one, inasmuch as it gave the aggrieved State a choice of several courses of action, but it might be wiser not to change the 1963 text, for the new wording might be criticized by certain governments.

74. With respect to the other points raised, he preferred the 1963 text, for the reasons given by previous speakers.

75. Mr. PESSOU said that he did not see how a single rule of law could encompass all the types of coercion exerted on representatives of States; coercion took many forms and was becoming increasingly subtle. Whatever the text proposed by the Drafting Committee, a representative of a State, conscious of his human dignity, was an independent being and must have the courage to resist any pressure to which he might be subjected and to reject intimidation and threats. A further risk he might run was that of being disavowed by his own Government as the result of other kinds of pressure, when its true nature was concealed by bad faith.

76. Mr. de LUNA said that the general theory of internal law on obligations could not be applied automatically to international law. What were the legal effects of coercion directed against the person of representatives of States ? There might be three different kinds of case, as had been made abundantly clear, not only in the pleadings but in the award and the opinions in the Case concerning the Arbitral Award made by the King of Spain between Honduras and Nicaragua which had been brought before the International Court of Justice.[7] The legal act, whether unilateral or bilateral, might be non-existent; or it might be null and void; or else it might be voidable. The first could be disregarded, but the second case and the third should be differentiated.

77. If a representative had been subjected to blackmail and, lacking the courage of which Mr. Pessou had spoken, had yielded, what would be the consequences ? So long as the blackmail remained secret, the act would have all the appearances of validity and would seem to give rise to valid obligations. The distinction appeared when the fact that he had been blackmailed was discovered. If in such a case the act was held to be void, it would not produce any effects. If, however, it was merely voidable, there would be no retrospective effects but there would be many other effects which would have to be accepted. The importance of the problem from the point of view of international law, and of international politics which were founded on international law, became immediately apparent.

78. Although he accepted some of the aspects of the Special Rapporteur's redraft, he preferred the 1963 version, which was less ambiguous. His view was that, if the coercion directed against the person of the representative of the State induced him to express his State's consent to be bound by a treaty, the discovery of the coercion produced only one effect, the nullity of the act.

79. Mr. AMADO said that at the 681st meeting he had stated that coercion was precisely the contrary of

[7] *I.C.J. Reports 1960*, p. 192.

fraud. So far from being characterized by trickery or concealment, coercion was an open, outright threat, a forcible display of power having the object of compelling the partner to yield to a stronger will and of preventing him from manifesting his own will. It was unquestionable, therefore, that an instrument signed under such conditions was void. A representative subjected to coercion could not be said to have a will of his own.[8] Consequently, it was inconceivable that coercion should be invoked as a reason for invalidating consent: coercion simply rendered the treaty void.

80. He therefore firmly supported the 1963 text. The modern world was governed by the United Nations Charter, and international law had undergone great changes. Force and coercion in international relations were relics of the past, and the time had come for an unambiguous statement that an act obtained through coercion had no legal effect.

81. Mr. AGO said that, at the beginning of the discussion, he had had no preference; but since the Commission seemed inclined to favour the view that the effect of coercion was absolute nullity of the act in question, he was prepared to accept that view.

82. Nevertheless, there were some notions which seemed to him to be mistaken, notably the idea that the legal position in cases of fraud and error differed from that in cases of coercion. Admittedly, coercion might be regarded as more serious, but he could not agree that error or fraud resulted in voidability, whereas coercion would result in nullity. In all cases the result was a nullity. Voidability was a concept that was applicable only in the context of internal law, where one could apply to an authority with power to void an instrument. Even in cases of fraud, the consent was not a genuine consent; if it was vitiated, it did not exist, and if the State concerned claimed that its consent was invalid, the nullity operated *ex tunc* and not *ex nunc*.

83. The real problem was different: was it intended that nullity should be absolute? Or was it to be left to the State concerned to decide either to plead nullity or to make good the act, whether by a subsequent declaration or by its silence?

84. Mr. ROSENNE said that he was unable to support the text of article 35 as adopted at the fifteenth session. Its two paragraphs contradicted each other and the purport of the article as a whole was ambiguous, especially when it was juxtaposed with articles 36 and 37.

85. Mr. Ago had put the matter in its right perspective when pointing out that the choice lay between relative and absolute nullity. It would be more prudent to adopt the view that personal coercion would lead to the relative nullity of a treaty and to leave absolute nullity to be a consequence of coercion of a State, in accordance with article 36, or conflict with a peremptory norm of international law, in accordance with article 37, as it was undesirable to allow too many reasons of absolute nullity *ab initio*.

86. He agreed with Mr. Briggs that the new text proposed by the Special Rapporteur should be amplified so as to cover all forms of act expressing consent to be bound, as it was incorrect to confine the provision to signature.

87. Mr. ELIAS said that he was in favour of retaining the text approved at the fifteenth session, though some drafting changes would be necessary in order to state the principle as clearly as possible. On that occasion the Commission had rightly condemned the use of force, either by means of moral pressure or by physical threats, for the purpose of obtaining consent to a treaty. The old rule of customary law, that even treaties concluded at pistol point should be upheld, could no longer be accepted. The provision whereby the effect of coercion would be to render the treaty null was a progressive one and he hoped the Commission would not re-open the discussion on the main issue of principle. Adoption of the 1963 text should make for better international relations.

The meeting rose at 1 p.m.

826th MEETING

Friday, 7 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

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

Law of Treaties

(A.CN.4/183 and Add.1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

1. The CHAIRMAN said that a letter had been received from Mr. Pal regretting that, for health reasons, he was unlikely to be able to attend the present session. He suggested that the Commission send a telegram to Mr. Pal, wishing him a speedy and complete recovery.

It was so agreed.

2. He invited the Commission to continue its consideration of article 35.

ARTICLE 35 (Personal coercion of representatives of States) *(continued)*[1]

3. Mr. CADIEUX said that he was inclined to favour the Special Rapporteur's new formulation, with the slight changes suggested by Mr. Briggs; it was an improvement on the previous version, mainly because it was more flexible and provided for the voidability of the instrument accepted by the representative under coercion, instead

[8] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 50.

[1] See 825th meeting, preceding para. 51, and para. 51.