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Summary record of the 826th meeting

Topic:

Law of Treaties

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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.

of for its nullity *ab initio*. The Commission should offer to the international community a rule that was better suited to its requirements; there was no intention of setting contemporary against traditional law, or of encouraging reprehensible practices.

4. Pressure brought to bear on the representative of a State was usually of a clandestine nature and could only be proved long after the event. So far as the injured State and third parties were concerned, quite a long period might elapse between accession to the treaty and the time when the grounds for invalidating the consent could be invoked. *De facto* situations and interests might have been created in good faith. Consequently, it would be imprudent not to give to those concerned a chance to consider the situation with care before they applied the necessary remedy, and it would be inadvisable to stipulate that, in all such cases, the treaty would be void. It was true that the injured State could ask to be relieved of its obligations, but why should it be compelled to do so ? Surely it was better to leave it free to choose between annulling the treaty and proposing, or even demanding, some other form of compensation.

5. Furthermore, the Commission should take into account the complexity and delicacy of the circumstances. When it had finally been proved that the representative's will had been coerced, the injured State might not always deem it desirable to give the case a great deal of publicity, since that might damage the good name of the representative concerned and render political relations with the guilty State difficult, or even jeopardize them. Such a course might not always be consonant with the interests of the injured State, or even with those of the international community.

6. A comparable problem arose when a diplomatic agent was guilty of behaviour that was incompatible with his status. The receiving State could declare him *persona non grata* and require him to leave the country, but it would realize that such action would have political repercussions. Alternatively, it could act more discreetly; it could transmit its complaint through the diplomatic channel and ask the other State to withdraw the official concerned. In his opinion, a less categorical approach of that kind was better adapted to the needs of diplomacy.

7. He had no intention of introducing a political note into the discussion, but he was anxious that the Commission should not take up a position which some persons might find rather too dogmatic and unrealistic. It might well happen that the injured State was not entirely guiltless. Naturally, the Commission was bound to condemn the use of coercion; but it should prefer the simpler, wiser and more effective formula it had adopted in 1963.

8. It was also necessary to examine with care by what independent means, judicial or other, it would be possible to determine whether the rule applied in particular cases. If the Commission allowed States to repudiate their contractual obligations by unilaterally claiming that their representatives had been subjected to pressure, it would open the way to so many abuses that, in the absence of some kind of objective control, the whole edifice it was constructing would be extremely fragile.

9. Mr. BEDJAOUI said that on the whole he preferred the 1963 text to the Special Rapporteur's new formulation.

10. He agreed with Mr. Briggs that the reference to signature *stricto sensu* gave the new text too narrow a meaning. What troubled him, however, was the question of nullity. Ever since the beginning of the session, the Commission had wavered between absolute nullity and voidability. It had been said that the discussion was purely academic and that instances of the personal coercion of representatives of States were rare. While that was true, the Commission, which would not wish to create difficulties for States in daily practice, should not abandon the principle itself: if the result was absolute nullity, it should say so, instead of producing a vaguely-defined rule which made it impossible to picture the problem clearly.

11. Even so, he was not entirely satisfied with the article adopted in 1963. It was paradoxical to say that an act without any legal effect could regain legal effect simply by being confirmed. An act void *ab initio* should be regarded as such: a fresh legal transaction was required to revive the act.

12. The Commission should therefore revert to the 1963 text, paragraph 1 of which was self-sufficient. It would perhaps be inadvisable to retain paragraph 2, which gave the injured State an opportunity to cure the defect of the consent.

13. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had no doubt wished to contribute to the stability of treaties by providing that the treaty, even one procured by force or threats, could be restored to life. His personal view of the principle of the stability of treaties was different, perhaps because he was a strong partisan of the traditional theory of will and of the new trends enshrined in the United Nations Charter.

14. His view was that the will of a body corporate, such as a State, could not be expressed except by an individual. Where force had been threatened, there might perhaps have been an expression of will, but in fact no real will had existed, since it had not been expressed in freedom. A false expression of will was invalid *ab initio*, and the act had no existence: it was impossible to confirm or validate such an act.

15. Furthermore, the Charter contained new positive rules of international law. Where there had been coercion, there was a clearly defined separation between the will expressed by the representative and the will of the State. Coercion of the representative of the State was an unlawful interference in the internal organization of that State. The use of coercion could not possibly be regarded as admissible in international law. Merely because it wished to promote the stability of treaties, the Commission could not maintain that there was no such thing in international law as the stability of the freedom of the individual and of the State. It was the Commission's duty to try to ensure stability in international relations, of which treaties were merely the instruments. The Commission should accordingly revert to the 1963 text.

16. Mr. de LUNA said that there was a big difference between the Special Rapporteur's new formulation and the article as adopted in 1963.

17. Admittedly, international law had developed through the ages, but it had also developed so far as

concerned the effects and defects of will and consent; the Croft case of 1856[2] was typical of a distressing period in the history of international law, when the notion of defective consent had been unknown and when might had been right. The development to which he had referred had started under the League of Nations, had expanded under the rule of the United Nations Charter, and would continue. Every day it brought out more clearly the effects of coercion on the consent of States.

18. He was not unaware of the dangers to which some speakers had drawn attention. The principle of the stability of treaties conflicted not only with the nullity but also with the voidability of an international legal act. There had been references in the discussion to relative nullity and absolute nullity; such notions probably belonged to English law and were difficult for a continental jurist to understand. It seemed to him that the difference was merely that absolute nullity could be invoked by anyone and could be declared *ex officio* by a judge, whereas relative nullity could be invoked only at the request of the injured party.

19. Although cases of nullity were exceptional, they nevertheless existed; an instance was the Treaty of Madrid forced upon the French king, Francis I, in 1526, which French jurists, anticipating the provisions of article 35, had rightly held to be void.

20. Mr. TUNKIN said that he was unable to agree with Mr. Rosenne that the Commission should be careful before providing that absolute nullity would ensue from the personal coercion of a representative, since the aim should be to set up legal barriers against international brigandage.

21. He had also been surprised to hear from Mr. Cadieux that the Special Rapporteur's new text was better adapted to the needs of contemporary diplomacy. It was not correct to argue, as had been done by some supporters of the new draft, that if a treaty secured by personal coercion were regarded as an absolute nullity, the injured State would be deprived of the possibility of accepting the treaty. As jurists, the first duty of members of the Commission was to state the legal consequence of personal coercion, which was the absolute nullity of the resulting treaty, but that did not mean that the injured State could not sign a new instrument drafted in precisely the same terms. A perusal of the third, fourth and fifth sentences of paragraph (6) of the commentary to article 36, as approved at the fifteenth session, would reveal that such had been the Commission's opinion at that time.[3]

22. Mr. ROSENNE said that the reason why he considered the Special Rapporteur's new approach to article 35 preferable to that adopted in 1963 was that a provision on the lines he was now suggesting would diminish the possibility of charges and counter-charges concerning personal coercion which, in the absence of an established system for the objective determination of the dispute, might result in exacerbating rather than reducing international tension. He shared the Chairman's view that the question at issue was stability in international relations rather than merely the stability of treaties.

23. He was uncertain whether in fact there would be any need for an article in the form apparently desired by many members and providing for absolute nullity *ab initio* of the treaty. Even if the internal contradiction between the two paragraphs of article 35 and the contradiction between article 35 and articles 36 and 37 were eliminated, any case of the kind contemplated would in fact be indistinguishable from that covered by article 36.

24. Mr. CADIEUX, referring to Mr. Tunkin's remarks, said that the difference in practice between the two possible consequences of coercion—the nullity or the voidability of the treaty—should not be exaggerated. Even if article 35 provided that any treaty obtained by coercion of a representative was void, the nullity would only take effect if the injured State demonstrated that coercion had been applied. Actually, the State would do that only if it wanted to, if it considered it in its interests to do so. If, in article 35, the Commission confined itself to the statement that it was open to the injured State to invoke such coercion as invalidating its consent to be bound by the treaty, it would be saying all that could usefully be said.

25. The CHAIRMAN, speaking as a member of the Commission, said he strongly opposed Mr. Cadieux's reasoning. If article 35 stated that the treaty obtained under the conditions mentioned was void, then the parties would not be able to rely on any right or insist on the performance of any obligation under that treaty, and non-performance of the treaty could not give rise to any international action. A treaty obtained under such conditions was void absolutely, and nothing had to be done to declare it so. Consequently, the point was of great importance not only in theory but also in practice.

26. Mr. AMADO said that he entirely agreed with the Chairman. In drafting article 35 in non-categorical language, the Special Rapporteur had no doubt had in mind the case of fraud. In paragraph 2 of his observations on the article, the Special Rapporteur said that "the State whose representative had been subjected to personal coercion should have the option to accept the treaty as valid, or to reject it as invalidated by the coercion or, in appropriate cases, to regard as invalid only the particular clauses to which the coercion relates" (A/CN.4/183, p. 39). Such delicate distinctions were quite unacceptable. A treaty where the expression of the will of the State was not genuine, where another will was substituted for the will of the State, was not a treaty at all and could not produce any effects in law. Such a treaty could not be anything else but void.

27. Sir Humphrey WALDOCK, Special Rapporteur, said that the real problem dealt with in article 35 had perhaps not been seen in proper perspective because not enough attention had been given to the existence of article 36.

28. The Chairman had not been quite right in saying that, as Special Rapporteur, his primary concern in the present instance had been to safeguard the stability of treaties. Although he certainly attached great importance to safeguarding the security and stability of treaties, in the present instance his chief object had been to set out

[2] A. de Lapradelle et N. Politis, *Recueil des arbitrages internationaux*, Vol. II, pp. 1-37.

[3] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 198.

the law as accurately as possible and to draw a distinction between the personal coercion of a representative and the coercion of a State.

29. At the fifteenth session, the Commission had been fully aware that article 35 might cover the same ground as article 36 and had realized that most of the historic examples of the coercion of representatives, some of which had been mentioned in paragraph (1) of the commentary to article 35,[4] would in fact fall under the provisions of article 36 unless the latter were interpreted in a very restrictive sense.

30. Coercion of an individual could take different forms, especially if the individual were a diplomatic representative residing in the country where the negotiations were taking place. He had always been, and he remained, of the opinion that there was no substantial difference between bribery and undermining the resistance of an agent by recourse to drugs or blackmail, all of which seemed to him to have much in common with fraud; such acts were, however, materially different from coercion directed against the State itself.

31. Like certain governments, he felt that the Commission should re-examine article 35 in order to decide whether it had been right in imposing the sanction of absolute nullity in those cases as a matter of public order. The result then would be a clean slate with both parties beginning any new negotiations from the same position. The question was whether an option should not be given to the injured State to uphold the treaty.

32. He did not fully share Mr. Amado's views about paragraph 2 of the text approved in 1963. The Commission had inserted the paragraph precisely because the coercion might relate only to particular clauses.

33. It was arguable that the sanction contemplated in the new draft was more severe than that imposed in the early draft, because it gave the injured State an option.

34. If the early draft were retained, the contradiction resulting from the element of option which had crept into paragraph 2 would have to be removed.

35. He agreed that not signature but the expression of consent was the focal point of the article. It was nevertheless conceivable that a signature would be subject to ratification and that a State might ratify in good faith only to discover later that coercion had taken place. Surely it ought then to have the right to declare the treaty a nullity. Yet such a case would not fall under an article such as had been adopted in 1963 and was now advocated by members of the Commission, because the coercion would relate not to the expression of consent but to the negotiation.

36. In reality, the article was not of great moment because the main issue—coercion of the State—was covered in article 36. The reason why instances of personal coercion had received prominence in the textbooks probably was that they had occurred at a time when coercion of a State was not a ground in international law for nullifying a treaty.

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

37. As there was some division of opinion about the proper approach to adopt, the Commission should define its position so as to give the Drafting Committee adequate guidance.

38. The CHAIRMAN, speaking as a member of the Commission, said he wished to comment on the two questions asked by the Special Rapporteur.

39. The first was to what extent article 35 was useful, and the Special Rapporteur had intimated that the subject could perhaps be dealt with in article 36. But in his (the Chairman's) opinion, article 35 should not be deleted.

40. The relationship between article 35 and article 36 had been discussed in 1963. Cases were by no means rare where entirely private factors, touching the person of a representative of the State, had been used to influence the expression of the will of the State, independently of any question concerning the State's own interests. There was a big difference between blackmailing a plenipotentiary by threatening to disclose details of his private life, and threatening to bomb cities. For example, Austria-Hungary had threatened certain measures against the personal property of King Milan of Serbia in order to influence him to sign a secret convention whereby Austria-Hungary had secured recognition of its right to intervene in Serbia's internal affairs.

41. With regard to the second question—whether, instead of the complete disappearance of the treaty, some possibility should be left of maintaining the treaty—that approach, although the easier one, should be rejected, for it would be tantamount to accepting the situation created by the coercion, and endorsing the action of the State which had violated the international public order. Instead of showing an indulgence which would be contrary to the principles adopted in San Francisco, the Commission should condemn, at least morally, whoever was responsible for such flagrant misconduct.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that as far as article 36 was concerned, it was important to ensure that the injured State wishing to negotiate afresh should do so from a position of complete equality with the other State. The situation in regard to article 35 was different, because it was concerned with the case where an individual had been coerced but not the State. Because of the disgrace to the State guilty of coercion and of having indulged in reprehensible procedures, the injured State might indeed be able to extract concessions once it had discovered that coercion had occurred and that the treaty was invalid.

43. He had not been particularly impressed by certain observations concerning sanctions as he believed that the forms of personal coercion were analogous to bribery and corruption, all of which were highly disreputable acts, and he was unable to see why they should give rise to different kinds of sanctions.

44. The CHAIRMAN, speaking as a member of the Commission, said that after the Second World War some States had on several occasions tried to induce ambassadors to sign certain arrangements without their governments' authority, and for that purpose had threatened to publish compromising documents; in

return, they had promised to give the ambassadors political asylum once the arrangements had been signed. He asked whether the Special Rapporteur would consider such machinations as a case of serious personal coercion.

45. Sir Humphrey WALDOCK, Special Rapporteur, replied in the affirmative.

46. Mr. ELIAS said that the Commission must give a firm directive to the Drafting Committee either to provide in article 35, paragraph 1, for the absolute nullity of a treaty obtained by any form of coercion of a representative, or to reconsider the whole question on the lines of the Special Rapporteur's new text or of that proposed by the Government of Israel.

47. His personal opinion was that the injured State should be firmly advised against ratifying any treaty procured by coercion, whether of a representative or of a State, as the use of force was equally reprehensible in either case.

48. Mr. ROSENNE said that, as the majority view had emerged fairly clearly, there was no need for any formal decision at that stage and the article should be referred to the Drafting Committee in the light of the discussion.

49. Mr. BRIGGS said he agreed with Mr. Rosenne. It was the Commission's custom to refer any issue as a whole to the Drafting Committee, and in the present instance it would be preferable to defer the vote until a new text had been circulated.

50. Mr. TUNKIN said he had no objection to the article being referred to the Drafting Committee, on the understanding that a clear majority had pronounced itself in favour of providing for the absolute nullity of a treaty secured by the personal coercion of representatives.

51. Sir Humphrey WALDOCK, Special Rapporteur said that in the circumstances he would propose a new text to the Drafting Committee based on that approved at the fifteenth session. He hoped that the question of article 35 could be referred in general terms to the Drafting Committee, as it was important to eliminate from the 1963 text the element of contradiction.

52. The CHAIRMAN said he noted that at most five members of the Commission, if Mr. Ago were included, had expressed support for the new text, whereas nine had expressed a preference for the earlier text.

53. Mr. YASSEEN said he would not object if article 35 were referred to the Drafting Committee without precise instructions as to the drafting problems which had been raised. On the other hand, the Commission should itself settle the fundamental problem of the choice between the view that the coercion referred to in article 35 had the effect of voiding the treaty *ab initio*, and the view that such coercion should have the effect only of making the treaty voidable. Since the majority favoured the former view, the Commission should ask the Drafting Committee to revise the article accordingly.

54. The CHAIRMAN said that the proposals before the Committee—that of the Special Rapporteur, and that of Mr. Elias which was supported by Mr. Yasseen—were not irreconcilable, since the majority view had crystallized in the course of debate and the Drafting Committee would certainly take that view into account.

55. Sir Humphrey WALDOCK, Special Rapporteur, said that at its fifteenth session, by providing in article 47 for the possibility of a waiver of the right to allege nullity in the circumstances covered by article 35, the Commission had failed to give full effect to the principle of absolute nullity in article 35. It had also decided that the principle of separability could apply in cases of personal coercion, but not in cases of coercion against a State. If the principle of absolute nullity were now to be adopted, the Drafting Committee would have to examine the implications of those decisions.

56. The CHAIRMAN said that in 1963 the Commission had accepted the principle of the separability of treaties for the purposes of article 35; he consequently saw no reason why the Special Rapporteur should not submit his comments on that point to the Drafting Committee.

57. Mr. de LUNA said that the Drafting Committee should standardize the terminology of the articles dealing with related matters and providing for analogous consequences. For example, if the Commission wished to provide that, in the case contemplated in article 35, the treaty was void, it might employ the phraseology of article 36 as adopted in 1963: " Any treaty ... shall be void ".

58. The CHAIRMAN suggested that article 35 be referred to the Drafting Committee.

It was so agreed.[5]

ARTICLE 36 (Coercion of a State by the threat or use of force)

Article 36

Coercion of a State by the threat or use of force

Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void. (A/CN.4/L.107, p. 34)

59. The CHAIRMAN invited the Commission to consider article 36, for which the Special Rapporteur had proposed the following rewording:

Any treaty and any act expressing the consent of a State to be bound by a treaty which is procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void. (A/CN.4/183/Add.1, p. 14)

60. Sir Humphrey WALDOCK, Special Rapporteur, said that his rewording of article 36 took into account a small but valid drafting point raised by the Government of Israel.

61. Some governments had suggested in their comments that there should be some further definition of the notion of coercion so as to cover, for example, cases of economic coercion. He had dealt with those comments in paragraphs 1 to 5 of his observations (A/CN.4/183/Add.1), where he had recalled the Commission's conclusion in 1963 that the precise scope of the acts covered

[5] For resumption of discussion, see 840th meeting, paras. 45-83.

by the words " threat or use of force in violation of the principles of the Charter " should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

62. As he had pointed out in paragraph 5 of his observations, the formulation of the article was, as it were, " open-ended " : any interpretation of the principle that States must refrain from the threat or use of force which became generally accepted as authoritative would automatically have its effects on the scope of the rule laid down in article 36. The text thus did not exclude any developments in United Nations practice in the matter. Since 1963, the principle had been remitted by the General Assembly to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which had studied it at its session in Mexico City in November 1964 but had not been able to arrive at any definite conclusion. The item was, however, still on the agenda of the Special Committee and it would therefore not be appropriate for the Commission to take it up. In the circumstances, the best course was to retain the 1963 text.

63. Some governments had raised the interesting legal point of the temporal application of the rule in article 36. As he had pointed out in his observations, the Commission had already to a large extent taken the time element into account in the context of article 37, by laying down two separate rules : first, the rule covering conflict with an existing rule of *jus cogens*, embodied in article 37 and, secondly, the rule covering invalidity resulting from a new rule of *jus cogens*, contained in article 45. The present article, in any event, concerned the formation of the treaty, and the validity of the consent must be governed by the law in force at the time of the treaty's conclusion.

64. The United States Government had specifically raised the point whether it ought not to be provided that the rule in the present article should only become operative as from the time when the draft articles were finally adopted (A/CN.4/183/Add.1, p. 5). Personally, he felt that it would be illogical to formulate a rule which was of *jus cogens* character on the basis that it was an existing rule and at the same time to say that it would operate only from some future date. He would urge, therefore, that no change be made in article 36, but that the Commission bear the matter in mind when it came to consider the related questions dealt with in article 52, dealing with the legal consequences of the nullity of a treaty, and article 53, dealing with the legal consequences of the termination of a treaty.

65. The CHAIRMAN said that, during earlier discussions in the Commission, Mr. Paredes had spoken at length on the subject of economic coercion, but although several members would have preferred that the draft mention that kind of coercion, the Commission had not accepted the idea.

66. In his opinion, the difference between article 36 and article 37 was that, in the case contemplated by article 36, the treaty was void because the will of the State had been expressed under a coercion consisting of the threat or use of force in violation of the principles of the Charter, whereas in the case contemplated by article 37, the treaty was void by reason of its actual substance, where it conflicted with *jus cogens*.

67. Mr. TUNKIN asked what was the implication of the replacement of the words " was procured " by the words " is procured " in the Special Rapporteur's new formulation.

68. He also asked whether the 1963 formulation would not cover the case, contemplated by the Government of Israel, of participation in an existing treaty procured by the threat or use of force in violation of the principles of the Charter.

69. Sir Humphrey WALDOCK, Special Rapporteur, replied that the change in the tense of the auxiliary verb was not intended to alter the meaning in any way. From the point of view of legal drafting, it was more normal and more correct to use the present tense. The rule as thus expressed would cover any treaty procured in the manner described, regardless of the time at which it was concluded.

70. On the second point, the case envisaged by the Government of Israel was that of illegitimate pressure being brought on a particular State to accede to an existing treaty which had been validly concluded previously. A liberal interpretation of the 1963 text would probably cover the point, but an improvement in the wording was advisable in order to make the position absolutely clear.

71. Mr. BRIGGS said that, on reflection, he was very much concerned at the effect of the system of absolute nullity embodied in articles 36 and 37, which made certain categories of treaties void and not merely voidable.

72. All members of the Commission were agreed in condemning certain objectionable practices, but it was not the Commission's function to issue a resounding manifesto in favour of righteousness; its function was to formulate precise legal rules that were capable of being applied through the appropriate procedures. In 1963, the Special Rapporteur had proposed an article which would have enabled the injured State to invoke coercion as a ground of invalidity. However, the Commission had preferred to adopt the system of absolute nullity on the mistaken assumption that absolute nullity need not be invoked. In fact, a subjective claim still needed to be made : a State wishing to be released from its treaty obligations must put forward a claim to that effect; that result did not occur by itself.

73. In 1963, he had stressed the necessity of a forum for the determination of what constituted a " threat or use of force in violation of the principles of the Charter ", so as not to leave the matter to the subjective judgment of each individual State.[6] He had examined with care the proceedings of the Special Committee at its Mexico City session in 1964, and those of the Sixth Committee at the twentieth session of the General Assembly, and the conclusion was forced upon him that there was perhaps even less agreement today on the scope and the precise meaning of that expression than there had been in 1963 when the Commission had drafted article 36.

74. In the circumstances, adoption of the proposed

[6] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 54, paras. 16 and 17.

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—