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Summary record of the 837th meeting

Topic:
Law of Treaties

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delegation's—that the right to revoke a notice should be linked to the " clear consent " of the other party—for it spoke merely of " consent ", a term which did not necessarily mean express agreement. He agreed with Mr. Yasseen's interpretation of " consent " as meaning also tacit consent. In substance, therefore, his own proposal was not very different from the negative formula suggested by Mr. Reuter, but he would not object if the Drafting Committee were asked to consider the possibility of a less drastic formulation. He realized that Mr. Briggs and Mr. Castrén were not yet wholly convinced, but he hoped the Drafting Committee would be able to produce a generally acceptable text.

90. On the subject of the terms " communication " and " notification ", he said that he had followed the terminology of article 29 (*bis*). He had had in mind a formal notice, but the point deserved the attention of the Drafting Committee, in connexion not only with article 50 but with other articles as well.

91. He suggested that article 50 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[8]

The meeting rose at 12.55 p.m.

[8] For the decision with regard to further consideration of article 50, see 842nd meeting, para. 107.

837th MEETING

Monday, 24 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

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

[Item 2 of the agenda]

(continued)

ARTICLE 46 (Separability of treaty provisions for the purposes of the operation of the present articles) *(resumed from the previous meeting)*[1]

1. The CHAIRMAN invited the Commission to resume its consideration of article 46.

2. Mr. YASSEEN said that the Special Rapporteur's excellent redraft of article 46 took into account the importance of the rule and the possibilities of its general application. It was preferable to set forth once and for all the principle of the separability of treaty provisions and the criteria governing its application.

3. The arguments in support of the rule had been discussed thoroughly in 1963, and the essential point then made was that whatever could be saved of the treaty should be saved. If there was a reason for the nullity or termination of part of the treaty only, it should affect that part only, and the rest of the treaty should remain in force as far as possible.

4. The next problem was that of the general scope of the principle of the separability of treaties. Should the principle be accepted in all cases? It could be admitted without difficulty in all cases involving the termination of a treaty. But where the question was that of the nullity of a treaty, greater caution was needed, for in some cases the nullity of a treaty was the result of events which constituted a challenge to the international legal order, or which seriously jeopardized the climate of trust necessary for good international relations. The sanction for such cases of international brigandage should be commensurate with the seriousness of the act; the sanction should be the disappearance of the entire treaty, though the parties wishing to salve the treaty would be at liberty to make a fresh treaty which would avoid causes of nullity.

5. It seemed to him that, in the application of that criterion, the rule concerning the separability of treaty provisions should apply in the case of fraud only, but should not apply in cases of coercion, even if directed against the representative of the State. That conclusion would be consistent with the unequivocal attitude adopted by the Commission with regard to coercion, the effect of which was to render the treaty void *ab initio*.

6. He had no criticism to make concerning the redraft of article 46; it was not really indispensable to introduce the notion of good faith into the article, for that notion permeated the entire law of treaties. Finally, he considered that not only article 37, on conflict with a rule of *jus cogens*, and article 36, on coercion of a State, but also article 35, on coercion of the representative of a State, should be covered by the exception in paragraph 3 of the new article 46.

7. Mr. TUNKIN said he could in general accept the Special Rapporteur's new text for article 46. In 1963 the Commission had dealt with the separability of treaty provisions in somewhat piecemeal fashion and, having had no time for detailed study, had reached no firm conclusion about the scope of the article's application. The Special Rapporteur had shown how a general rule could be framed which made it possible to dispense with repetitive provisions in each of the articles dealing with cases in which the principle might operate.

8. He agreed that the rule of the separability of treaty provisions should apply to the cases covered by articles 31, 32, 39, 40 and 41, but he was unable to support the Special Rapporteur's proposal that it should apply to treaties entered into under personal coercion (article 35). On that point he was largely of the same opinion as Mr. Yasseen.

9. It was clearly the majority view in the Commission that a treaty obtained by the personal coercion of the representative of a State was void. The use of force or

[1] See 836th meeting, after para. 1, and para. 2.

threats against a State's representative was a dangerous violation of international law which came close to the use of force against the State itself, and in such cases the result should be the nullity of the treaty. Accordingly, article 35 should be mentioned in addition to the others referred to in paragraph 3 of the Special Rapporteur's new text for article 46.

10. Mr. CASTRÉN said that the Special Rapporteur's latest redraft of article 46 was on the whole acceptable to him from the point of view of both substance and form. Nevertheless, as several speakers had mentioned, the Drafting Committee should look at each article in section 2 for the purpose of determining whether and how the rule concerning the separability of treaty provisions operated in the case of each particular article. Mr. Jiménez de Aréchaga had proposed a number of amendments which seemed justified.

11. So far as the placing of article 46 was concerned, he agreed with the Special Rapporteur's proposal that it should be transferred to a new section to be entitled " General rules ", to follow articles 30 and 49.

12. Mr. RUDA said that the Special Rapporteur was to be commended on the careful way in which he had worked out a difficult article. The fundamental idea in the article as adopted in 1963 was that the nullity, termination or suspension of the operation of a treaty related to the treaty as a whole. That general proposition might be subject to certain objective and subjective exceptions if specified conditions were fulfilled.

13. A treaty secured by coercion against a State, or one which conflicted with a rule of *jus cogens*, was void, but in the case of a treaty obtained by the coercion of a representative, the injured State could choose whether or not to invoke the principle of the separability of the treaty provisions.

14. As to the place of article 46, if the Commission accepted the scheme proposed by the Special Rapporteur, the article should remain where it was, but if the Commission decided to revert to the Special Rapporteur's proposal made at the fifteenth session, then the article should be transferred to a section entitled " General rules ", at the beginning of part II of the draft.

15. In his opinion, the principle of the separability of treaty provisions could not apply in cases of failure to comply with provisions of internal law (article 31), since such failure could hardly affect part of a treaty only.

16. As far as the drafting of the article was concerned, he thought that some such wording as that proposed by the Netherlands Government for paragraph 1 could be accepted because, though the proposition that nullity, termination and suspension in principle affected the entire treaty was implicit in the Special Rapporteur's new text, it did not receive sufficient emphasis. The word " clearly " in paragraph 1 (*a*) should be dropped as too vague, and so should the word " essential " in paragraph 1 (*b*), because what might be regarded as essential by one party might not be so regarded by another.

17. While he approved of the general structure of the Special Rapporteur's new draft of paragraph 2, he shared the doubts expressed by Mr. Yasseen and Mr. Tunkin as to its substance.

18. He considered that paragraph 3 should be retained.

19. Mr. de LUNA said that the Special Rapporteur had produced a very good redraft. He could accept the proposal that article 46 should form part of a section to be entitled " General rules ", in which event it would become unnecessary to make express reference to the " separability " rule in the substantive articles setting out grounds of invalidity, termination, etc.

20. He shared the opinions expressed by Mr. Yasseen, Mr. Tunkin and Mr. Ruda concerning the addition of a cross-reference to the article dealing with treaties obtained by coercion directed against the representative of a State. There was a manifest difference between duress exerted on the organ of a State in person and duress exerted against the State itself. In the course of history, international law had happily evolved to the point where duress against the State was outlawed, inasmuch as a war of aggression had been declared an international crime. He was therefore a little surprised that it should be proposed in article 46, paragraph 3, to provide for an exception concerning article 36 but not also for an exception concerning article 35.

21. A great controversy had arisen, in theory and in practice, regarding cases like that of the treaty of Madrid of 1526, which Francis I, King of France, who had been taken prisoner, had been forced to sign. Whatever opinions might have been held over the centuries, even in the age of absolute monarchy, it had never been held that a treaty concluded at a time when the sovereign had been a prisoner and under personal duress was valid. Consequently, since throughout the history of international law a treaty entered into through duress exerted on an organ of the State had been void, and a treaty obtained through coercion directed against the State itself had not been void, it would surely be wrong to give special treatment to the case covered by article 36 and not to that contemplated in article 35.

22. His view was supported by the terms of article 35 which, correctly, spoke only of coercion directed against the person of the representatives of a State, without differentiating between the two possible kinds of threat. Clearly, the most general case was that of *vis compulsiva*, the moral duress brought to bear on a representative. The effect of that kind of duress was to vitiate the will and to render the treaty void. Mr. Yasseen and Mr. Tunkin had rightly said that the Commission had recognized that a treaty was void if there had been no genuine will. As it stood, the new text of the article did not exclude the idea of absolute coercion which nullified the legal act. Was the Commission proposing to admit and to apply the principle of the separability of treaties to a case which was in fact a mere hypothesis, but which was not expressly excluded from article 35? Was it proposing to provide the legal means for retrieving a non-existent act? Article 46, paragraph 3, should contain a cross-reference to article 35, which dealt both with *vis compulsiva* and with coercion directed against the organ of a State.

23. Another question was whether article 46, paragraph 3, should contain a cross-reference to article 31. In

the opinion of Mr. Ruda, it was hardly conceivable that cases could occur in which the nullity did not affect the treaty in its entirety. That opinion was debatable. Apart from the case where there had been some infringement of the constitution, a situation could be visualized where a representative was authorized to conclude a specified type of treaty. Treaties could contain provisions of very different kinds, some relating to a cession of territory, others relating to trade. The representative in question might possess powers which sufficed, under the constitution, for the purpose of entering into some of the clauses of the treaty but not for the purpose of entering into others. Admittedly, the case was rare but it could occur. Accordingly, he endorsed the Netherlands Government's suggestion that article 46 should contain a cross-reference to article 31.

24. Mr. BRIGGS said he could accept the Special Rapporteur's proposal that article 46 should be transferred to a section 1 (General rules) of part II of the draft, and his proposal that provisions concerning the " separability " rule should be omitted from individual articles.

25. He questioned whether the principle of the separability of treaty provisions applied to the cases covered in articles 31, 32 and possibly others, but he would have thought that, in view of the generality of the terms of paragraph 1 of article 46, an enumeration would be unnecessary.

26. The word " clearly " could be dropped from paragraph 1 (*a*), but the qualification " essential " in paragraph 1 (*b*) had some significance and should be kept.

27. Paragraph 2 was acceptable and in his opinion the Special Rapporteur had rightly decided that the " separability " rule could apply to treaties obtained by the personal coercion of State representatives. Paragraph 3 was acceptable, but perhaps the reference to article 37, on conflict with *jus cogens*, should be deleted, since the point could be covered by paragraph 1.

28. As to the question whether the new draft reversed the presumption by making separability the rule rather than the exception, he was not sure that the new text made it sufficiently clear that, if the ground for invalidity, termination, etc., related to the treaty as a whole, that treaty's provisions were not severable. Perhaps it would be wise, as suggested by Mr. Rosenne, to retain the 1963 version of paragraph 1 as the opening paragraph, so as to emphasize the principle of the indivisibility of treaties. The new text of paragraph 1 would then follow.

29. Mr. REUTER said that, although he associated himself with the congratulations addressed to the Special Rapporteur, he wished for reasons of clarity to dissociate himself from the views expressed on several questions of principle which he regarded as being of great importance.

30. It was apparently intended to declare that certain treaties obtained by reprehensible means would not be severable. The idea was a lofty one and would be entirely appropriate in a society in which State sovereignty no longer existed. But where such sovereignty existed, the maintenance in certain circumstances of treaty provisions which were not affected by grounds of nullity was in fact tantamount to a sanction; and if the Commission drafted its text in such a way that certain treaty provisions could not remain in force at all, it might well be removing a sanction that had a certain efficacy. In other words, he opposed the views expressed concerning the effect of article 46 on cases covered by article 35, and he also opposed the Commission's approach to the question of the separability of treaty provisions conflicting with *jus cogens*. For instance, a peace treaty might incorporate a clause which later clashed with a rule of *jus cogens*, for example, the right of self-determination; the rules which the Commission was about to adopt would destroy the peace treaty itself. Such consequences were serious and should be pondered.

31. Mr. TUNKIN said he supported the suggestion that paragraph 1 of the 1963 text should be retained, as it was a clearer expression of the principle underlying article 46. He particularly favoured the inclusion of the phrase " except as provided in the treaty itself ".

32. Mr. LACHS said that the Special Rapporteur in his excellent new draft had succeeded in eliminating many of the defects of the earlier version.

33. Some members had advocated the omission of the reference to article 35 from paragraph 2 of article 46 on the grounds that a treaty obtained by personal coercion of a representative was void. However, there might be cases where different criteria would apply to the different provisions of such a treaty and the injured State might not necessarily wish to declare the treaty void *ab initio*, but might try to secure compensation under the terms of the treaty itself and accept those elements which had been freely negotiated and reject those which had been imposed. Although in the majority of cases it would probably not avail itself of the option, it was of paramount importance to consider the interests of the injured State within the general framework of article 35.

34. Mr. ROSENNE said that during the discussion reference had been made to such concepts as absolute and relative nullity, and now a new one had crept in, that of a treaty that was " objectively " void. He wondered precisely what meaning was to be attributed to that phrase.

35. In his opinion the Special Rapporteur had been right to mention article 35 in paragraph 2 of the new text for article 46.

36. Mr. TUNKIN said that, if the idea of objective existence was admitted, then there could be such a thing as objective nullity, but of course Kantians who claimed that we did not know anything of objective reality would dispute that view.

37. He was unable to agree with Mr. Lachs, who had described a very exceptional situation. The Commission's main object should be to discourage as forcefully as possible the coercion of representatives and the use of force, by declaring any treaty obtained by such means void *ab initio*. No purpose would be served by drafting a provision which allowed an injured State an option to declare that the principle of separability applied to such treaties, because that State might not dare to invoke coercion as a ground of partial invalidity. The cases

falling under article 35 should be excluded from the application of article 46.

38. Mr. ROSENNE said that the Commission had enough on its hands with theoretical legal problems without entering into philosophical considerations.

39. One of the difficulties connected with article 35 was that there were many different types of coercion, including coercion by a third State which the Commission had agreed would come within the scope of the provisions concerning error. The question of where a reference to article 35 should appear in the present article could only be settled when a decision had been reached about the text of article 35, and after the Commission had decided whether article 46 should be stated in the form of a general rule to the effect that in principle treaties were indivisible, with the provisions on separability forming exceptions to the rule.

40. Mr. de LUNA said that he had made his remarks concerning articles 35 and 36 because of a desire for consistency in legal thinking throughout the draft. Wherever there was a reason in a particular article for admitting the separability of treaty provisions, then it had to be admitted in every article where that reason existed. Conversely, if the rule of separability was not admitted in the context of any article, then it should likewise not be admitted in any other article where the same reason existed.

41. With regard to the question of terminology raised by Mr. Rosenne, he said that three types of nullity had been recognized for long enough in international law for the Commission to be able to accept them. A treaty could be deemed never to have existed; or it could automatically be declared void absolutely; or it could, at the request of the parties, be declared partially void. If the Commission had decided that a particular juridical instrument did not exist or was void absolutely, it necessarily followed that, in the article on separability, the Commission could not revive that instrument.

42. He had no strong views on the subject of terminology; whether a nullity was absolute, *ab initio* or objective, it was not so declared at the request of the parties and the nullity was effective *erga omnes*. Mr. Reuter had rightly described that consequence as a sanction. It was hardly surprising that, at the stage which international law had reached, the use of force against an organ of the State or against the State, or a violation of *jus cogens*, should have the consequence of rendering the instrument in question void. He would be in favour of even harsher sanctions with a view to eliminating, as far as possible, the use of force from international relations. The rule was in no way surprising since it was reminiscent of the maxim *fraus omnia corrumpit*: the corruption affected not just part of the legal instrument but the instrument as a whole.

43. In his opinion, the use of force resulted in the absolute nullity of the treaty in the cases considered by the Commission. It followed that the Commission's draft should not leave any choice open, not even to the injured party, which would be at liberty to resort to other procedures.

44. Mr. AGO said he was disturbed by some of the ideas voiced during the discussion. In the circumstances contemplated in article 35, it was hard to see how a rule of nullity that was not only absolute, *erga omnes*, but left no possibility of salving anything from the treaty, could be more favourable to the injured State than a rule which would leave it open to that State to choose whether to regard the treaty as absolutely void or only partially void. If, as a result of the personal coercion of its representative, a wholly unacceptable treaty had been imposed on the State, that State could maintain that the whole treaty was void. But that was an extreme case; what could also happen was that the treaty was the result of very complicated negotiations and that, in addition to a clause imposed by coercion, it contained a set of perfectly valid provisions which might even be favourable to the State that had suffered the coercion with regard to a single point. Surely it would be unjust to place the aggrieved State in the position of having to claim that the whole treaty was void and so to lose whatever advantages that treaty might have conferred on it, simply because of one single defective clause.

45. Mr. de Luna had referred to the maxim *fraus omnia corrumpit*; but article 33, on fraud, had been so drafted as to reflect the Commission's decision that the State which had been the victim of the fraud should be free to decide whether or not to invoke the fraud as invalidating its consent. The rule stated in article 35, on personal coercion, was more strict than that stated in article 33.

46. He supported Mr. Reuter's remark that it might create difficulties if the Commission's draft provided that the entire treaty would be void simply because it contained a clause conflicting with a peremptory rule of international law; the clause in question might, after all, constitute an entirely separate matter in a very complex treaty. Cases of the breach of peremptory rules were, admittedly, very serious, but they were also very rare.

47. In general, the Commission should refrain from extending unduly the number of cases of the absolute nullity of a treaty.

48. Mr. TUNKIN said that he had been surprised by some of Mr. Ago's arguments about the need to salvage at least part of a treaty. It was far more important to discourage the use of force and the personal coercion of representatives, which were an international crime and a threat to peace and friendly relations between States. Such coercion had often been employed by the colonial Powers in the past, and the Commission should not be tolerant of such practices. If an injured State wished to pursue the subject of the treaty, the original one obtained by force should first be destroyed. Nothing short of strong sanctions against the use of force would do.

49. Mr. Reuter's argument that cases might occur in which only one provision of a treaty might conflict with *jus cogens* seemed far-fetched. The rules of *jus cogens* were not numerous but they were of fundamental importance, and in the interests of peace the sanction for the breach of such rules should be the nullity of the whole treaty.

50. Mr. CASTRÉN said that the Commission could hardly settle the questions arising out of article 46 until it had drafted the other articles to which article 46

referred. He proposed, therefore, that article 46 be referred to the Drafting Committee.

51. Mr. AGO, replying to Mr. Tunkin, said that no member of the Commission would wish to maintain in a treaty anything which had been obtained as a result of the coercion referred to in article 35. The issue in article 46 was simply that of the separability of the provisions of the treaty. In other words, should the injured State have the option either of having the whole treaty declared void, or of having declared void only the part obtained through coercion? Whatever had been obtained through coercion would in any case be jettisoned. If the rule was laid down that the injured State had to abandon the whole treaty, it might suffer prejudice twice over, since it would be constrained to lose the benefit of whatever part of the treaty had been favourable to it and had been fairly negotiated. In fact, the rule of absolute nullity might operate to the advantage of the State which had used coercion.

52. Whereas cases in which a single clause of a treaty conflicted with a norm of *jus cogens* were of somewhat academic interest, the same could not be said of clauses obtained through the personal coercion of representatives of States. The Commission should, therefore, endeavour to work out the rule which would produce the most beneficial effects in practice.

53. The CHAIRMAN, speaking as a member of the Commission, said that he was prepared to admit that in some cases it was desirable to salve what could be salved from a treaty. Nevertheless, he was thoroughly opposed to the idea of making the slightest concession in cases where a treaty had been obtained as a result of the personal coercion of a representative of the State, or of the State itself. Even if the coercion had been used in respect of a single clause only, the whole of the rest of the treaty was necessarily suspect. It might be that the other clauses which appeared to offer advantages to the injured State had been conceded only in order to secure acceptance of the part which had been the subject of coercion. The diplomatic history of the nineteenth and early twentieth centuries, notably that of his own country, showed that the great Powers had used the type of coercion referred to in articles 35 and 36, and that many treaties included not only clauses which were the result of direct coercion but also clauses which were the result of indirect coercion. It was impossible to say in the case of a given instrument what was the result of coercion and what was not. The only solution was to declare the entire treaty void.

54. Mr. REUTER said that he wished to put two questions: was article 46 concerned with multilateral treaties as well as with bilateral treaties? And did the principles stated in article 46 apply also to territorial clauses? An answer to the second of those two questions was indispensable.

55. Mr. YASSEEN said that in his earlier observations he had tried to formulate a criterion for determining in what cases treaties were severable and in what cases they were not. His view was that there were some acts constituting grounds for nullity which flouted the international legal order and jeopardized the atmosphere of mutual confidence necessary to the conduct of international relations. Where acts of that nature had occurred in the negotiation of a treaty, it was not just one clause of the treaty, but the entire treaty which was void.

56. The instances referred to by some members of the Commission, in which it might be to the interest of the injured State to retrieve some of the clauses of the treaty, were rare and exceptional. Like Mr. Tunkin, he considered that the Commission's object in article 46 was not so much to protect one State as to safeguard the international legal order and the international community as a whole. In juxtaposing the reference to article 35 and the references to articles 36 and 37, to which article 46 did not apply, the Commission would be providing a sanction in conformity with recent developments in international law, which did not countenance any resort to violence and coercion in international relations.

57. Mr. AMADO said that he was firmly of the opinion that the provisions of a treaty concluded under the conditions described in article 35 should not be severable. A treaty which had been tainted by the personal coercion of representatives of States could not be even partially salved: it could only be void in its entirety.

58. Sir Humphrey WALDOCK, Special Rapporteur, said he noted that members as a whole favoured the idea embodied in the text of article 46 and also his suggestion for the inclusion of article 46 in a section containing general rules concerning the invalidity and termination of treaties.

59. Several members thought that a provision on the lines of the former paragraph 1 of the 1963 text of article 46 should be reintroduced in order to emphasize that, normally, any ground of invalidity or termination would apply to the treaty as a whole. He had no objection to the introduction, in a suitable form, of that general rule of the non-divisibility of treaties.

60. He did not favour Mr. Tunkin's suggestion that the words " Except as provided in the treaty itself ", used in the 1963 text of article 46, should be restored. It was hardly conceivable that a treaty would contain provisions relating to its own invalidity. It should be remembered that article 46 did not relate to cases of termination under a right provided for in the treaty itself.

61. The suggestion that the word " clearly " should be omitted from paragraph 1 (*a*) of his new text could be referred to the Drafting Committee. That qualification had been introduced in 1963, in paragraph 2 (*a*) of the 1963 text of article 46, to stress that a treaty was normally indivisible.

62. He strongly favoured the retention of the word " essential " in paragraph 1 (*b*) of his new text, for the reasons given by Mr. Briggs.

63. With regard to the substantive question which articles should be specified in the new paragraphs 2 and 3 respectively, he said he had been surprised at the liveliness of the debate. The question had been discussed at length in 1963; at the current winter session, there had been a full discussion on the provisions of article 35 and the Commission had clearly indicated that article 35 should provide that, in principle, a treaty was void if the

expression of the State's consent had been obtained through coercion directed against the individual representatives.

64. However, merely because article 35 would make the treaty void if it had been obtained through personal coercion, it did not logically follow that separability could not be applied. Even in the cases covered by articles 36 and 37, separability would have been logically possible, but the Commission had considered that it was not advisable on grounds of policy.

65. The debate had shown that some members wished treaties negotiated under the conditions described in article 35 to be treated, for purposes of separability, in the same manner as those covered by article 36.

66. There was no question of not condemning as essentially void the act of procuring consent by means of the personal coercion of representatives. The intention was simply to give the injured State an option to maintain part of the treaty in force if it considered it in its interest to do so. That option could properly be left to the injured State, because the coercion only affected its representatives as individuals; the situation was not the same as that described in article 36, where the State itself had been subjected to coercion. The Commission had taken the view that, where the State itself had been coerced, the whole treaty should be declared void, and that if the States concerned wished to establish a treaty relationship, they should start with a clean slate.

67. However, the substantive question whether article 36 should be mentioned in paragraph 2 or in paragraph 3 of article 46 could well be settled at a later stage, after the Commission had finally adopted those two articles, as suggested by Mr. Castrén. The Drafting Committee could meanwhile prepare the text of article 46, since the changes in that text which would result from the Commission's decision on the substance would be easy to make.

68. During the discussion, some members had suggested that it was unnecessary to except from the operation of the separability rule the case of treaties conflicting with *jus cogens* (article 37). He would point out, however, that in 1963 the view had prevailed in the Commission that the separability rule should not operate in the case of treaties conflicting with a subsequent norm of *jus cogens*.

69. The point raised by Mr. Ruda concerning article 31, on failure to comply with internal law, should be referred to the Drafting Committee.

70. In conclusion, he proposed that article 46 be referred to the Drafting Committee for consideration in the light of the discussion.

71. Mr. de LUNA said that he had not confused the cases coming under articles 35 and 36. In cases where a treaty had been obtained through the personal coercion of representatives, the long-standing practice of States had been absolutely consistent in declaring the treaty void. On the other hand, treaties obtained through duress applied to the State itself used to be considered valid under the old rules of international law. Only recently had the principle been recognized that an international act procured by the use of force or the threat of force was null and void.

72. As had been pointed out by Mr. Yasseen, the distinction between the absolute nullity and the relative nullity of treaties depended on the degree of importance attached to the matter by the international community. Cases of nullity which were of vital importance to the international legal order could not be condoned by the injured party; the nullity in these cases was absolute, and could be declared as a matter of course. As he had pointed out, the coercion of a representative resulted in the absolute nullity of the treaty in question.

73. Apart from those considerations of principle, there were practical reasons for not allowing the separability rule to operate in cases where a treaty had been obtained through the personal coercion of representatives. Such coercion would invariably be the result of an abuse by a powerful State; if such a treaty was severable there was every danger that the strong State would use the principle of separability as a lever to exert pressure upon the weak State in order to save part of the treaty, ostensibly in the interest of that weak State.

74. Mr. LACHS said he agreed with the Chairman that it would be extremely difficult to say that personal coercion related to only part of a treaty. However, as indicated by Mr. Castrén, the whole question could be decided after the Commission had settled the final text of article 35.

75. Mr. TSURUOKA said that the discussion seemed to have reached a stage at which the article could be referred to the Drafting Committee for examination in an atmosphere of calm.

76. With regard to paragraph 2 of the new text, the main question was how States would behave in practice. A State which considered itself to be the victim of coercion of the kind referred to in article 35 and which wished to salve that part of the treaty which had not resulted from coercion could equally well invoke fraud as a ground for nullity. If, on the other hand, it preferred to regard the whole treaty as void, it could, even in cases of fraud, invoke the fact of coercion. It followed that, whatever decision the Commission reached on a matter which had been the subject of such lively discussion, the practical result would be much the same.

77. Mr. CASTRÉN said that, in his view, the attempt to distinguish between the coercion of a State and the coercion of its representative was somewhat artificial. A State could act only through its representatives and, in the final analysis, it was always the State itself which was the injured party.

78. Mr. VERDROSS said that he could not accept that argument. There was a great deal of difference between bringing pressure to bear on an individual through his private interests and bringing pressure to bear on him through the interests of the State he represented.

79. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to the Special Rapporteur's proposal that article 46 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[2]

[2] For resumption of discussion, see 842nd meeting, paras. 79-97 and 843rd meeting, paras. 1-13.

ARTICLE 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty) *(resumed from the previous meeting)*[3]

80. The CHAIRMAN invited the Commission to resume its consideration of article 47.

81. Mr. JIMÉNEZ de ARÉCHAGA said that, in 1963, the formula proposed by the Special Rapporteur for sub-paragraph (*b*) had been interpreted by some members as giving effect to the common law doctrine of estoppel, to which reference was made in paragraph (5) of the commentary.[4] One member, Mr. Elias, had even urged that the term " estoppel " should be used in the actual text of the article.[5]

82. Other members had indicated, however, that it was not advisable to use, even in the commentary, the term " estoppel ", which was peculiar to the common law. As was pointed out in the separate opinion of Judge Alfaro in the *Temple of Preah Vihear* case, " there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features " of the " Anglo-Saxon doctrine of estoppel ".[6]

83. In order to avoid that difficulty, the Commission had decided not to include in the 1963 text any reference either to " estoppel " or to "*forclusion* "; instead, it had deliberately used the expression " shall have so conducted itself as to be debarred from denying ".

84. In so doing, the Commission had not intended to reject but rather to retain the essential principle of estoppel as accepted in international law. It was for that reason that the Commission had adopted a formulation embodying objective criteria, a formulation which had not given rise to any government comment, other than the Israel Government's comment that the phrase " debarred from denying " appeared " awkward " (A/CN.4/183, p. 12). Apparently as a result of that mere objection of form, the Special Rapporteur had proposed a redraft of sub-paragraph (*b*) which would introduce a new and different formula to express the principle adopted by the Commission in 1963. That redraft replaced the objective formula of 1963 by a subjective one, since it spoke of a State which " must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid ".

85. That formula had the defect of referring only to one type of omission: undue delay in invoking the ground for invalidating or terminating the treaty. Other omissions could be relevant, such as the omission to protest at the appropriate time, as had been held in the *Arbitral Award by the King of Spain* case.[7]

86. However, the proposed new text had a more serious implication : under its provisions, it would be necessary to show that the State must be considered as having agreed to regard the treaty as valid or as continuing in force. It would not be sufficient to establish the conduct of the State; a purely subjective element was introduced.

87. In the *Temple of Preah Vihear* case, the International Court of Justice had held that Thailand had " for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map ". From those two objective determinations of fact, and without examining whether there was any element of consent on the part of Thailand, the Court had concluded that " Thailand is now precluded by her conduct from asserting that she did not accept it [the map] ".[8]

88. Likewise, in the *Arbitral Award by the King of Spain* case, the Court had relied on " Nicaragua's failure to raise any question with regard to the validity of the award for several years " to infer, not that there had been any consent, but merely that " it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the award ".[9]

89. The result in those cases was that the State was deprived of the right to challenge or, as the Commission had said in the 1963 text of article 47, " debarred from denying ", the binding force of a treaty, and not a tacit agreement.

90. For those reasons, he urged that the Drafting Committee should draft the article in terms embodying a more objective criterion, on the lines of the rulings of the International Court of Justice and of the 1963 text.

91. Mr. de LUNA said that he agreed with the Special Rapporteur's decision not to use the term " estoppel ", not because the term was unknown in international law, but rather for the reason given by Lord McNair, that " It is open to doubt whether the conception of estoppel which appears to be gaining recognition in international law will be the same as the common law conception, and there is no reason why the international formulation of the rule should be identical with that of national law ".[10]

92. Apart from the *Temple* case, to which reference had been made, there was the *Eastern Greenland* case, in which the Permanent Court of International Justice had said : " In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland and, in consequence, from proceeding to occupy it ".[11] Again, in the *Serbian Loans* case, the Permanent Court had stressed that the international law concept of estoppel was different from the common law conception.[12]

93. It was easy to see why both the Permanent Court and the International Court of Justice had stressed the distinct character of the international law conception of the matter. The common law doctrine of estoppel

[3] See 836th meeting, preceding para. 21, and para. 21.

[4] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 213.

[5] *Ibid.*, Vol. I, p. 186, para. 56.

[6] *I.C.J. Reports 1962*, p. 39.

[7] *I.C.J. Reports 1960*, p. 213.

[8] *I.C.J. Reports 1962*, p. 32.

[9] *I.C.J. Reports 1960*, p. 213.

[10] McNair, *The Law of Treaties*, 1961, p. 487.

[11] *P.C.I.J.* Series A, No. 53, p. 68.

[12] *P.C.I.J.* Series A, Nos. 20/21, pp. 38, 39.

had resulted from a long history of judicial decisions. On the continent, the subject was governed by rules which had their origin in the Roman law maxims *nemo contra factum suum proprium venire potest* and *allegans contraria non audiendus est*. The rules which derived from those maxims in the laws of the various European countries were not identical with the common law rules of estoppel.

94. With regard to the redraft proposed by the Special Rapporteur, he said he could not accept the introduction of a provision referring to consent or agreement if the provision could be construed to imply a reference to bilateral agreement. In international law, the typical minimum effect of a unilateral act was to create an estoppel: that was true not only of acts but also of omissions. In the *Oscar Chinn* case, for example, the Permanent Court had not declared invalid the Convention of St. Germain of 1919 in relation to the General Act of Berlin of 1885, which it purported to modify; the reason was the omission to protest on the part of those parties to the General Act which were not parties to the Convention of St. Germain.[13] In that connexion, it was also appropriate to recall Max Huber's award in the *Island of Palmas* case in 1928;[14] in that award, the failure by the Netherlands to protest when notified of the Treaty of Paris between Spain and the United States of America had been construed as an acceptance.

95. For those reasons, he urged that the Drafting Committee should make it clear in article 47 that the intention was to cover also the case of recognition resulting from the failure to protest.

The meeting rose at 6.5 p.m.

[13] *P.C.I.J.* Series A/B, No. 63.

[14] *Reports of International Arbitral Awards*, Vol. 2.

838th MEETING

Tuesday, 25 January 1966, at 11.30 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

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

[Item 2 of the agenda]

(continued)

ARTICLE 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty) *(continued)*[1]

[1] See 836th meeting, preceding para. 21, and para. 21.

1. The CHAIRMAN invited the Commission to continue its consideration of article 47.

2. Mr. YASSEEN said that, in adopting article 47 in 1963, the Commission had shown that to some extent it recognized the doctrine of " estoppel ". The principle underlying the rule was unquestioned, and governments had not challenged it in their comments. But now that the Commission had defined its attitude towards certain cases of nullity, it seemed that the scope of article 47 should be slightly different. In its new form it was based, not on the idea of tacit consent, but on that of tacit confirmation, and it was only applicable to cases where confirmation was possible.

3. Since the Commission had provided in article 35 that the effect of the personal coercion of representatives of States was to render the treaty in question absolutely void *ab initio*, a treaty obtained through coercion was incapable of being confirmed. Consequently, article 35 should be excluded from the scope of article 47.

4. The Special Rapporteur's new text for article 47 was an improvement, because it placed the rule on a much more acceptable basis, namely, the explicit or tacit confirmation of a voidable act.

5. Mr. TUNKIN said that he too preferred the Special Rapporteur's new text for article 47. It had been criticized on the ground that the clause " the State ... must be considered ... as having agreed to regard the treaty as valid or ... as remaining in force " would involve difficulties of interpretation. In his opinion, the 1963 text might prove even more difficult to interpret, particularly because no criterion was laid down to determine what was meant by the phrase " so conducted itself as to be debarred from denying that it has elected ... ". At least the new text did contain some kind of criterion in sub-paragraph (*a*), even though it was rather general in character. Under its terms, only such acts as implied consent to the treaty as being valid or remaining in force would be taken into consideration, so that some limitation was imposed on the application of the rule.

6. He agreed with the proposal to insert the word " omissions " after the word " acts " in sub-paragraph (*b*).

7. The kind of case that would be covered by article 47 would be one where, despite the manifest violation of the provisions of internal law regarding competence to enter into treaties by a representative, the legislature of his country subsequently ratified or authorized the ratification of the treaty and the instruments of ratification were deposited. But for the same reasons as for articles 36 or 37, he was strongly opposed to including article 35 amongst those to which article 47 would apply.

8. Mr. VERDROSS said that he supported the Special Rapporteur's idea that the article should be based not on the theory of estoppel or " *forclusion* ", but on a more general rule. Estoppel was a rule of procedure, whereas in international law the issue was not whether a right could no longer be invoked: the right ceased to exist if there was tacit recognition or implied agreement. That important distinction had been pointed out in an article by an Italian writer, published in *Diritto Internazionale* some years previously, in which he had clearly demonstrated that, in international law, it was unnecessary to rely on estoppel or " *forclusion* ":