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Summary record of the 840th meeting

Topic:
Law of Treaties

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54. He was prepared to consider the suggestions made during the discussion for the amendment of the text, though he had been surprised at the enthusiasm shown for re-inserting the phrase *mutatis mutandis*, which the Commission was usually anxious to drop, and he questioned whether it was strictly necessary.

55. Mr. Tunkin's suggestion concerning paragraph 2 was acceptable.

56. As the article had been discussed at considerable length, it would be a pity to postpone its drafting until the eighteenth session. He was now in a position to put forward a new text to the Drafting Committee, which might be able to work out something acceptable, so that the results of the discussion would not be lost. He hoped, therefore, that the article could be referred to the Drafting Committee, whether its reconsideration by the Commission took place at the present session or was left over until the eighteenth session.

57. Mr. AGO said it was unfortunate that his proposal, intended to cut short the discussion, had in fact prolonged it. He was convinced that it was absolutely necessary that the draft should contain an article on the lines of article 49 and that it was a subject into which the Commission might well be able to introduce some order. He did not believe, however, that the difficulty could be overcome merely by inserting a reference to article 4. He proposed, therefore, that the Commission postpone further consideration of article 49 and refer the article to the Drafting Committee; the Committee would not have time to consider it forthwith but would do so in May.

58. The CHAIRMAN suggested that article 49 be referred to the Drafting Committee in accordance with Mr. Ago's proposal.[6]

It was so agreed.

ARTICLE 51 (Procedure in other cases)

59. Mr. JIMÉNEZ de ARÉCHAGA said that article 51 was an important one to which the Commission should do full justice, and as little time remained, he proposed that its consideration be deferred until the eighteenth session.

It was so agreed.

The meeting rose at 1.15 p.m.

[6] For the decision with regard to further consideration of article 49, see 842nd meeting, para. 107.

840th MEETING

Wednesday, 26 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

[Item 2 of the agenda]

(continued)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 4 (*bis*) [formerly paragraph 1 of article 32] (Subsequent confirmation of an act performed without authority)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee, following the Commission's decision to divide the former article 32[1] into two parts and to transfer the content of what had been paragraph 1 to a provision which would follow article 4 (concerning full powers), had prepared the following text for the new article 4 (*bis*):

Article 4 (bis)

Subsequent confirmation of an act performed without authority

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 4 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

3. The Commission had taken that decision because the case of an act by a person who could not be regarded as representing a State within the meaning of article 4 should logically be dealt with immediately after that article. The right place for a provision stating that, although such an act had no legal effect it could be subsequently confirmed, was not the section concerning the invalidity of treaties but that concerning the representation of a State for purposes of concluding a treaty.

4. The CHAIRMAN put article 4 (*bis*) to the vote.

Article 4 (bis) *was adopted by 17 votes to none.*

ARTICLE 32 (Specific restriction on authority to express the consent of the State)

5. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for what had formerly constituted the second paragraph of article 32:[1]

Article 32

Specific restriction on authority to express the consent of the State

If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was brought to the notice of the other contracting States prior to his expressing such consent.

6. The main change was the greater emphasis on the point that the authority of a representative related to

[1] For earlier discussion on article 32, see 824th meeting, paras. 1-51.

the conclusion of a *particular* treaty was subject to a *particular* restriction.

7. Mr. CASTRÉN proposed that the words " a consent expressed by him " be replaced by the words " that consent ".

8. Mr. ROSENNE said he doubted whether Mr. Castrén's amendment was justified.

9. Mr. TUNKIN said that the Drafting Committee had discussed the point and decided that the word " consent " should be qualified by the words " expressed by him ".

10. Mr. YASSEEN said that the wording " a consent expressed by him " should stand, because the consent of the State did not correspond exactly with that expressed by the representative.

11. Sir Humphrey WALDOCK, Special Rapporteur, said that in the interests of clarity, the Drafting Committee's text, in both the English and the French versions, ought to be retained.

12. Mr. CASTRÉN withdrew his amendment.

13. The CHAIRMAN put article 32 to the vote.

Article 32 was adopted by 17 votes to none.

ARTICLE 33 (Fraud)[2]

14. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 33:

> A State which has been induced to conclude a treaty by the fraudulent conduct of another contracting State may invoke the fraud as invalidating its consent to be bound by the treaty.

15. The new text was essentially the same as that in paragraph 1 of the 1963 version. The Drafting Committee had considered the question, raised at the fifteenth session, whether the phrase " fraudulent conduct " would cover a single act of fraud, and the majority view had been that it would.

16. The question of the separability of treaty provisions entered into under the influence of fraud, which had formerly been dealt with in paragraph 2, was to be covered in a general article on the subject of the separability of treaties.

17. Mr. YASSEEN said he still had some doubts as to the scope of the expression " fraudulent conduct ". He would not, however, oppose the article as drafted if the majority of the Commission thought that the expression could mean one single act.

18. The CHAIRMAN put article 33 to the vote.

Article 33 was adopted by 17 votes to none.

ARTICLE 34 (Error)[3]

19. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 34:

> 1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
>
> 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error, or if the circumstances were such as to put that State on notice of a possible error.
>
> 3. An error relating only to the wording of the text of a treaty does not affect its validity, and article 26 then applies.

20. The phrase " an error respecting the substance of a treaty ", used in paragraph 1 of the 1963 text, had been criticized on the ground that it might be read as including a wrong interpretation of the treaty, and the Drafting Committee had accordingly decided to replace it by the phrase " an error in a treaty ".

21. The Thai delegation in the Sixth Committee had with some justification pointed out that the scope of the exception provided for in the former paragraph 2 was too wide and might have the effect of almost rendering paragraph 1 nugatory. The Drafting Committee had dropped the words " or could have avoided it ", which seemed to it to be susceptible of rather wide interpretations, and a few minor drafting changes had been introduced in paragraph 3.

22. Mr. VERDROSS proposed that, in paragraph 2, the words " a possible error " be replaced by the words " the error ", and that in paragraph 3 the word " and " be omitted and replaced by a semi-colon.

23. Mr. REUTER, with regard to Mr. Verdross's second amendment, proposed that in the French text of paragraph 3 the words " *est applicable* " be replaced by the word " *s'applique* ".

24. Mr. AGO said he noted that the English expression " essential basis " in paragraph 1 was rendered in French by the words " *motif essentiel* ", but in article 44 by " *base essentielle* ". Since in a number of passages in the Commission's draft the English word " ground " was translated into French by " *motif* ", some confusion was bound to arise unless the French translation were made uniform.

25. Mr. REUTER said that the word " *motif* " was the more usual; the adjective " *essentiel* " was very strong.

26. Mr. JIMÉNEZ de ARÉCHAGA, with regard to the first proposal by Mr. Verdross, said that the wording of the English text of paragraph 2 was taken from the judgment by the International Court of Justice in the case concerning the *Temple of Preah Vihear* and for that reason should be retained.

27. Mr. VERDROSS said that in that case he would withdraw his amendment to paragraph 2.

28. Mr. de LUNA said that the French and Spanish texts should be brought into line with the English.

29. Mr. REUTER said that, with all due deference to the International Court of Justice, in the particular context the Commission could depart somewhat from that wording in order to reflect faithfully what the Court had had in mind, which was clearly that the party in question should be aware of the risk of error.

[2] For earlier discussion, see 824th meeting, paras. 52-107.

[3] For earlier discussion, see 825th meeting, paras. 1-50.

30. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Reuter; it was for jurists to take the degree of risk into account.

31. Mr. TSURUOKA said he had been about to propose the wording "*une erreur éventuelle*", but would support Mr. Reuter's suggestion.

32. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Verdross had raised a point of substance in connexion with paragraph 2. The question was whether the exception should apply when there had been notice of an error, or only when there was a possibility of error. The latter conception was wider.

33. Mr. YASSEEN said he thought Mr. Verdross was right. The error in question was one which had actually occurred but would not be invoked; it was not "a possible" error.

34. Mr. JIMÉNEZ de ARÉCHAGA said he still thought that the wording of the Court ought to be kept, not only because it was authoritative but because it was reasonable. The Court had stated: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error".[4]

35. An example of a case where a party had been on notice of a possible error was the 1923 arbitration case between Costa Rica and Great Britain, in which Chief Justice Taft had been the arbitrator.[5]

36. Mr. AGO pointed out that, in the French text, the relevant passage from the advisory opinion of the International Court was not reproduced verbatim. Whereas the English text borrowed the language of the Court ("to put it on notice of a possible error"), the French text as proposed by the Drafting Committee did not convey exactly the same meaning.

37. Sir Humphrey WALDOCK, Special Rapporteur, referring to Mr. Ago's point about the expression "essential basis" in paragraph 1, said that in the English text the term "basis" was the correct one.

38. Mr. REUTER said he realized that the expression "*base essentielle*" was not very elegant but it was correct. Since the Commission was in agreement concerning the English text and since the Special Rapporteur did not object, the French text might follow the English, even though for once the French would be slightly less perfect.

39. The CHAIRMAN asked the Commission to decide whether in paragraph 2 it wished to follow the language of the Court and, if so, whether the English and French texts corresponded.

40. Mr. AGO said that the relevant passage in the French text of the Court's advisory opinion read "*les circonstances étaient telles qu'elle avait été avertie de la possibilité d'une erreur*".

41. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the wording used by the Court must be used in the French text.

42. Mr. REUTER said he would not press his point, provided it was explained in the commentary that the Commission had drawn on the language of the International Court of Justice.

43. Sir Humphrey WALDOCK, Special Rapporteur, said he could agree to that.

44. The CHAIRMAN put article 34 to the vote subject to amendment of the French version.

Article 34 was adopted by 17 votes to none.

ARTICLE 35 (Personal coercion of a representative)[6]

45. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for article 35:

Personal coercion of a representative

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

46. It was substantially the same text as that he had proposed in his fifth report, but some modification had been made to its presentation. The rule was now stated in positive form.

47. The Drafting Committee had decided that it would be more appropriate to refer to the representative of a State in the singular, rather than in the plural as had been done in the 1963 text. The phrase "in his personal capacity" had now been replaced by the word "personally", but that did not involve any change of meaning.

48. After considerable discussion, the Drafting Committee had decided to use the words "without any legal effect" rather than the word "void", which had been favoured by some members of the Commission.

49. Mr. VERDROSS suggested that the words "acts or threats directed against him personally" be replaced by the words "acts or threats against his person or his family".

50. Mr. CASTRÉN suggested that, in the title, the words "of a State" be added after the word "representative".

51. Mr. de LUNA said that in Spanish the formula "*intereses personales*" ("personal interests") traditionally covered acts which affected the representative's reputation, material interests and family.

52. With regard to the concluding words, he saw no reason to use language different from that in article 36, particularly as "shall be without any legal effect" had the same meaning as "shall be void".

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission might need to give some thought to the question whether or not the corruption of a representative should be covered in article 35 as a possible ground of invalidity. It might be argued that it was included in the English concept of fraud, but as it was an act committed against a representative it probably fell within article 35.

[4] *I.C.J. Reports 1962*, p. 26.

[5] *American Journal of International Law*, Vol. 18, pp. 147-174.

[6] For earlier discussion, see 825th meeting, paras. 51-87 and 826th meeting, paras. 2-58.

54. The CHAIRMAN, speaking as a member of the Commission, suggested that it might be advisable for consideration of the clause relating to corruption to be postponed until the eighteenth session, since the Commission was not yet in agreement on the subject, and a discussion might upset the entire text.

55. Mr. AGO said he would not object to the Chairman's suggestion. The Commission had considered the question of fraud, but corruption was an entirely different subject, even though it could occur in practice, and it would be dangerous to ignore it altogether.

56. Mr. RUDA pointed out that the titles of the English and French texts did not correspond.

57. If the word " personal " covered threats against the representative's person, professional career and family, then the scope of the text was clear.

58. Mr. YASSEEN said that the Commission's draft should definitely deal with the question of the corruption of a representative of a State. Corruption could hardly be said to be covered by the provisions concerning fraud or coercion. The Commission did not need to examine the question and its consequences immediately, but it should take an immediate decision on the principle that the question should be dealt with in the draft.

59. Mr. JIMÉNEZ de ARÉCHAGA said he was in favour of postponing consideration of whether or not to include a provision concerning corruption until the eighteenth session, because the matter was delicate and needed careful thought. Governments might object to widening the grounds of invalidity. In private law, corruption was not regarded as vitiating consent but as raising the issue of the responsibility of a representative to his principal.

60. The CHAIRMAN, speaking as a member of the Commission, said that his intention had been that the Commission should not act hastily in introducing the concept of corruption into its draft forthwith. Many civil codes did, however, provide that consent was vitiated if the representative had been corrupted to the prejudice of the interests of his principal. He suggested that the Special Rapporteur be asked to prepare a provision on the effect of corruption, in the context of the law of treaties, in time for the eighteenth session.

61. Mr. TSURUOKA said that he had some doubts concerning the words " of its representative ". The representative in question was manifestly the one who would express a State's consent to be bound, but the expression might be misinterpreted to mean some unspecified representative who was more or less interested in the matter.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be reluctant to make corruption the subject of a separate article, because that would appear unduly to inflate the grounds of invalidity. If it was to be covered at all, it should preferably be in article 35, possibly in a separate paragraph.

63. The CHAIRMAN said that the Special Rapporteur had given very wise advice. The Commission should ask the Special Rapporteur to think about the matter and to submit for the eighteenth session a proposal for adding, either to article 33 or to article 35, a provision concerning corruption, a fraudulent act amounting to fraud properly so called. It was true that it might be slightly distasteful to States to include in the draft an article dealing with the corruption of their representatives, but cases of corruption, though rare, nevertheless did occur in practice.

64. Mr. TSURUOKA said he supported the suggestion that the Special Rapporteur be asked to prepare an article dealing with the question, in time for the eighteenth session. From the point of view of the apportionment of responsibility, allowance should be made for the fault of the State in giving full powers to a representative who was open to corruption.

65. Mr. de LUNA proposed that, in the Spanish version, the words " *contra él personalmente* " (" against him personally ") be replaced by the words " *contra los intereses personales de éste* " (" against his personal interests ").

66. The CHAIRMAN asked the Commission to reach a decision on the various amendments already proposed to the article.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that he had no objection to adding the words " of a State " in the title of the article, as suggested by Mr. Castrén.

68. The word " personal " could be dropped from the English text of the title, as it created translation difficulties for the French version.

69. Mr. RUDA said he supported the Special Rapporteur's suggestions to drop the word " personal " from the title.

70. Mr. de LUNA said that his amendment contained the traditional language used to distinguish between coercion of a representative and coercion directed against a representative's personal interests.

71. The CHAIRMAN, speaking as a member of the Commission, said that the provision was concerned with the means employed to bring pressure to bear. He suggested that the passage in question be amended to read " acts or threats directed against the personal interests [of the representative] ".

72. Mr. VERDROSS said he could support that wording.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that the expression " personal interests " could not be used in the English text. The expression " in his personal capacity " would have been satisfactory, but in fact the word " personally " was quite sufficient.

74. Coercion of the family as such was not relevant. What mattered was coercion of the representative through pressure on the family.

75. Mr. REUTER said that Mr. de Luna's proposal affected the substance and would make for greater precision in the text.

76. The CHAIRMAN, speaking as a member of the Commission, said that the provision dealt with what was generally recognized to be a very real possibility, coercion by means of acts directed against the representative's interests. The expression " personal capacity " would convey the idea that the representative was

affected as a private person, whereas the case under discussion was that where the representative's interests were involved.

77. Mr. de LUNA said that the word " capacity " always had a legal meaning.

78. Mr. TUNKIN said it might be wise to accept the Drafting Committee's text, since nothing better had been suggested. The word " personally " was sufficiently comprehensive, and wider than the phrase " personal capacity ".

79. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin. It was meaningless to speak of acts or threats directed against personal interests, because coercion was exercised against the person.

80. Mr. AMADO said he had never liked the formula " personal interests ", which was at once too broad and too narrow. He could accept the formula " against him personally ".

81. Mr. de LUNA said he would withdraw his amendment.

82. Mr. TSURUOKA said he would not press his objection to the words " of its representative ", although he would have preferred the expression to be replaced by some such words as " of the representative who formulated the consent ".

83. The CHAIRMAN put article 35, as amended by the addition to the title, to the vote.

Article 35, as thus amended, was adopted by 17 votes to none.

ARTICLE 36 (Coercion of a State by the threat or use of force)[7]

84. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee read:

> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.

In substance it was identical with the one adopted by the Commission in 1963.

85. Mr. YASSEEN said he proposed, for reasons of substance, that article 36 be amended to read:

> " A treaty is void if its conclusion has been procured by the coercion of a State by acts or threats in violation of the principles of the Charter of the United Nations ".

86. Other means of coercion than the threat or use of force could be used to compel a State to express a will that was not its own. The use of such means was prohibited by several of the fundamental principles of the Charter, in particular by the principle of the sovereign equality of States and the principle of non-intervention in the domestic affairs of States. His proposal was thus in conformity with the development of international law and reflected the opinion of the majority of States.

87. The fact that he had made the proposal did not mean that, if it were rejected, he would not vote for the Drafting Committee's text. His view was that, although the Drafting Committee's text reflected the position in international law, it did so incompletely.

88. The Commission's decision on his proposal would determine his attitude towards article 30, in which the Commission proposed to state that the grounds for the invalidity of a treaty were enumerated exhaustively in the draft articles.

89. Mr. REUTER asked whether the word " principles " as used in the Drafting Committee's proposal should be construed to mean " rules ".

90. Sir Humphrey WALDOCK, Special Rapporteur, said that the expression " principles of the Charter of the United Nations " had been carefully chosen to indicate the fundamental underlying principles of the Charter, without bringing in every procedural rule embodied in it. For the purposes of the article, the words covered the essential principles of the Charter, including rules.

91. Mr. REUTER said he gathered from that explanation that the term " principles " was used to designate the fundamental rules of the Charter.

92. Mr. RUDA pointed out that, in the Charter itself, the term " Principles " with a capital " P " was used—for example in Articles 2, 6 and 24—to denote the principles set out in the seven paragraphs of Article 2. The question of the use of the initial capital had been discussed at length at the San Francisco Conference and it had been decided that " Principles " meant the principles set out in Article 2. If the initial capital was not used, the reference would be to the general philosophy of the Charter.

93. Mr. LACHS said he noticed that Mr. Yasseen's amendment omitted any reference to the " use of force ". Perhaps he would explain that omission.

94. Mr. YASSEEN said that he had deliberately refrained from referring to the threat or use of force in his proposal because he took the view that article 36 should refer to coercion in a wider sense. The expression " the threat or use of force " inevitably made the reader think of Article 2, paragraph 4, of the Charter, but there were other principles of the Charter which prohibited other forms of coercion.

95. Mr. LACHS said that Mr. Yasseen's reply was satisfactory for an understanding of his proposal, but he still thought that article 36 should contain a specific reference to the use of force; it would not be satisfactory to mention minor forms of coercion and not major ones.

96. Mr. TUNKIN said that he sympathized with Mr. Yasseen's proposal but, like Mr. Lachs, thought it essential to retain the reference to the prohibition of the threat and of the use of force, which represented a major achievement of international law.

97. Opinions were divided on the meaning of the term " force "; like some other members, he considered that the term covered not only military force but also economic pressure and any other manifestation of force that violated the principles of the Charter.

98. Mr. YASSEEN said that he was prepared to alter the form, though not the meaning, of his proposal by amending it to read:

[7] For earlier discussion, see 826th meeting, paras. 59-81 and 827th meeting, paras. 5-63.

" A treaty is void if its conclusion has been procured by the coercion of a State by the threat or use of force or by any act or threat in violation of the principles of the Charter of the United Nations ".

99. Mr. AGO said it would be dangerous to weaken the language of so solemn a rule by making it too cumbersome. What the Commission and the Drafting Committee wished to emphasize by referring to " the principles " rather than to " the rules " of the Charter was that the reference was to a general prohibition which applied even to States not Members of the United Nations, and even though the principles in question were enunciated in the United Nations Charter.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that there had been a very thorough discussion on article 36 at the present session. As a result, the Commission had agreed upon a formula which could be unanimously adopted. However, that formula represented a delicate balance between differing opinions and if any amendment were made to the text proposed by the Drafting Committee, the result might be very unimpressive. Some members might feel obliged to withdraw their support for the article and the value of the achievement represented by the unanimous adoption of that formula in 1963 would then be lost. The text was open-ended in the sense that any future interpretation of the law of the Charter would affect the rule embodied in article 36. The provision, which had been worked out so carefully in 1963 and very thoroughly discussed at the current session, represented the best that the Commission could achieve in the matter.

101. Mr. YASSEEN said that, for reasons of expediency, not of principle, he would not press his proposal to a vote, although he did not withdraw it.

102. Mr. de LUNA said that although he agreed with the spirit of Mr. Yasseen's proposal, he was satisfied with the text proposed by the Drafting Committee, which would leave to the interpretation of the Charter a problem which was not yet completely ripe.

103. As he understood it, the term " force " included economic force.

104. Mr. AMADO said that, while appreciating Mr. Yasseen's desire for precision, he considered that the Drafting Committee's text should be adopted. Article 36 was governed by Article 2, paragraph 4, of the Charter, the last phrase of which, " or in any other manner inconsistent with the Purposes of the United Nations ", seemed clear enough.

105. The CHAIRMAN, speaking as a member of the Commission, said that, while sharing Mr. Yasseen's sentiments, he would vote for the Drafting Committee's text because the expression " the principles of the Charter " did not just mean, as some States claimed, the principles enunciated in its preamble and Article 2, nor did it just mean the provisions of the Charter: it meant the general rules on which those provisions were based.

106. Mr. REUTER said that, in the light of the explanations he had received, he would vote for the Drafting Committee's text. Nevertheless, he noted that the members of the Commission were not in agreement on what the text meant.

107. Mr. BRIGGS said that the idea of a treaty being procured by the threat or use of force was repugnant to him. However, he would be obliged to abstain from voting on article 36 because the discussion had shown that members were not agreed on the meaning of the words used in the text which the Commission was about to adopt.

108. Before the Commission adopted any provisions such as articles 36 or 37 providing for the absolute nullity of treaties, two conditions would, in his opinion, have to be fulfilled. First, there would have to be precision in the criteria for determining in what cases a treaty was void; the proposed text of article 36 was an omnibus clause or open-ended formula which he could not accept. Secondly, provision would have to be made for adjudication by an international court.

109. Mr. TUNKIN said that the opinion had been expressed, sometimes very sincerely, that States were agreed only on a few rules of international law; that opinion, which had been held by the late Sir Hersch Lauterpacht, did not seem to him correct. Even in municipal law, it was rare to find two jurists who placed exactly the same interpretation on a particular rule of law; there was always room for disagreement on interpretation.

110. As far as the substance of article 36 was concerned, there was general agreement in the Commission that a treaty was void if it had been procured by the threat or use of force in violation of the principles of the Charter. The Principles set out in Article 2 of the Charter had been accepted by all States. Despite unavoidable differences of opinion on interpretation, it could not be said that the members were not agreed on what they accepted. In a sense, article 36 was a consequence of Article 2, paragraph 4, of the Charter, in so far as the law of treaties was concerned.

111. Mr. JIMÉNEZ de ARÉCHAGA said that the description of article 36 as an omnibus clause or as an open-ended provision should not lead anyone to the conclusion that the Commission was approving an article that was open to subjective interpretation. The Commission had decided to use in article 36 wording taken from Article 2, paragraph 4, of the Charter, not because of any inability to arrive at a more precise formulation, but because it was codifying the law of treaties and not the law of the Charter on international security.

112. The Commission would adopt article 36, confident in the interpretation and application of the Charter as a living instrument. There could be no question of a unilateral interpretation of article 36; it was for the competent organs of the United Nations to interpret the principles of the Charter, and any such interpretation would be taken into account in settling any disagreement on the application of the rule embodied in article 36.

113. Mr. RUDA said that he would vote in favour of article 36 in any event. He would, however, like to know the true meaning of the provision for which he was going to vote. If the intention was to refer to the Principles of the Charter, with a capital " P ", then article 36 was governed by the provisions of Article 2 of the Charter. If the intention was to refer to the principles of the Charter, with a small " p ", then the article was

governed by the general philosophy of the United Nations.

114. Mr. TUNKIN said that not all the principles of the Charter which applied in the article were to be found in Article 2 of the Charter; those in Article 5, for example, on self-defence and the legal use of force, were also applicable.

115. Sir Humphrey WALDOCK, Special Rapporteur, said that it was not possible to use the initial capital and refer to the " Principles of the Charter " in article 36; such a formulation might even involve a violation of the Charter, which referred, in Article 2, paragraph 4, to the " Purposes " of the United Nations. The expression " principles of the Charter of the United Nations " in the text proposed by the Drafting Committee was intended to refer to the essential rules underlying the relevant Charter provisions, in other words to the law of the Charter governing the use of force.

116. Mr. TUNKIN said that the principles in question would be in the first place those set out in Article 2, paragraph 4, of the Charter, which referred specifically to the " Purposes " of the United Nations.

117. Mr. RUDA, thanking the Special Rapporteur for his explanation, said he would vote for article 36 in the knowledge that it referred to the general philosophy of the United Nations.

118. The CHAIRMAN put article 36 to the vote.

Article 36 was adopted by 15 votes to none, with 1 abstention.

119. Mr. TSURUOKA said that he had voted for article 36 because he approved the text as it stood, without reading into it any more or any less than it said.

ARTICLE 37 (Treaties conflicting with a peremptory norm of general international law *(jus cogens)*)[8]

120. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee for article 37 read:

> A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The article had been left in the form in which the Commission had adopted it in 1963.

121. There had been some discussion in the Commission on the advisability of retaining the adjective " peremptory " before " norm ", but the majority of the members had thought that its deletion would create language difficulties. It was better to resort to a pleonasm in one or other of the languages than to risk an incomplete statement in one of them. Moreover, the text had not attracted any objection from governments in their comments.

122. Mr. VERDROSS said that the wording of the article was too repetitive; he suggested that it would be less pleonastic if it read " ... a norm of general international law from which no derogation is permitted " with, after that, the words " a peremptory norm which can be modified only ... " in brackets.

123. Mr. REUTER said that, despite some hesitation, he had voted for article 36 because he was convinced that, in a specific case, all the members of the Commission would be in agreement on its interpretation. In the case of article 37, however, it seemed to him that there was too great a difference of opinion on what was meant by " a peremptory norm of general international law ". For that reason he would have abstained in the vote on article 37 if it had consisted only of the opening sentence.

124. The second part of the article, (" and which can be modified only by a subsequent norm of general international law having the same character "), raised difficulties of an even more serious nature. It was impossible to set down such a notion without explaining how a subsequent norm of general international law could come into being. If the majority held that the Commission could not deal with such a problem of constitutional law, he would abide by that decision; but he personally could not ignore the problem, and consequently would vote against article 37.

125. Mr. TUNKIN said that there was no need to reopen the discussion on the substance of article 37, which had been fully discussed in 1963 and again at the beginning of the current winter session.

126. Mr. AGO said that it seemed to him that Mr. Reuter's objection applied rather to article 45, on the emergence of a new peremptory norm, than to article 37, which dealt with the situation where a treaty conflicted with a peremptory norm existing at the time of its conclusion.

127. The CHAIRMAN said that he had understood Mr. Reuter to have asked how a peremptory norm could be modified by a subsequent norm having the same character. The question of the development of international law and of the modification of peremptory norms had been discussed at length at the Commission's fifteenth session and the discussion could not now be reopened.

128. Mr. REUTER said that his remarks should be regarded as an explanation of vote.

129. The CHAIRMAN put article 37 to the vote.

Article 37 was adopted by 14 votes to 1, with 1 abstention.

130. Mr. BRIGGS explained that he had abstained from voting on article 37 for reasons similar to those stated by him in explanation of his abstention on article 36.

131. Mr. TSURUOKA said that he had voted for article 37 despite the fact that he was not fully satisfied with it. He reserved the right at the appropriate time to submit further observations on both the substance and the form of the article.

The meeting rose at 5.30 p.m.

[8] For earlier discussion, see 828th meeting, paras. 3-64.