1969 Vienna Convention

Article 51
COERCION OF A REPRESENTATIVE OF A STATE

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 shall be without any legal effect.

Bibliography: A. Cavaglieri, 'La violenza come motivo di nullità dei trattai' R.D.I., 1935, pp.4-23; F. De Visscher, 'Des traités imposés par la violence', R.D.I.L.C., 1931, pp.513-537; G. Napoletano, *Violenza e trattati nel diritto internazionale*, Milan, Giuffrè, 1977; E.Vitta, 'La validité des traités internationaux', *Bibliotheca Visseriana*, Vol. 14, Leyde, 1940, pp.1-250.

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I. Generalities

1. Object and Purpose

1. During the drafting process by the International Law Commission, Mr. Yasseen did not hesitate in qualifying coercion of a State representative as a form of "international brigandage" that should be punished as severely as possible.[1] This scathing condemnation illustrates well the spirit of Article 51 of the Vienna Convention that follows an old legal tradition of repressing the coercion of contract or treaty negotiators.

2. Among the defects that have classically been recognised as destroying free will, violence or coercion occupy – next to error – a prominent place. According to

[1] *Y.I.L.C.*, 1966, Vol.I, Part I, 825th meeting, p.22, §60. In a similar vein Ph. CAHIER ('Changements et continuité du droit international. Cours général de droit international public', R.D.A.D.I., 1985-VI, volume 195, p.191) notes that "[à] l'heure où l'on assiste à un développement considérable du terrorisme, l'article 51 […] semblerait le bienvenu" (at a time when there is a growing prevalence of terrorism, article 51 is welcomed).

Aristotle, a voluntary act is a manifestation of will expressed without compulsion *and* devoid of error.[2] The absence of violence – endogenous of a voluntary act – is a prerequisite for the existence of a manifestation of consent. Violence against an individual quintessentially affects the free will of this person.[3]

3. In Roman law, one recalls the principle of legal transaction concluded under the threat made by another person.[4] The *vis*, as moral violence (active aspect), is distinguished from the *vis*, as fear arising from a threat,[5] used to pressure another party into concluding a transaction (passive aspect). It is worth also distinguishing[6] moral violence – where the actor, although coerced, expresses his or her consent to conclude a transaction ("*coactus, tamen volui*")[7] – from physical violence – where the victim is unable to manifest consent in this sense, the brute force having practically eliminated his or her discretionary freedom to do so.[8]

4. Much later, when the classical legal science of people was making its first steps, Francisco de Vitoria maintained that the contracting State must be free at the moment of the conclusion of a treaty, which presupposes that its representative is not coerced into accepting it.[9] Grotius, one century later, noted that:

> "Not indeed that any receding fear, if justly inspired, ought to be removed, for that is outside of the contract; but that no fear should be unjustly inspired for the sake of making the contract, or, if such fear has been inspired, that it should be removed".[10]

The terminological and conceptual link to Roman law is picked up when Grotius spoke of 'fear' that caused the other party to accept the treaty.

5. Vattel defended, for his part, a different concept, when he maintained that

> "A treaty is valid if there be no defect in the manner in which it has been concluded: and for this purpose nothing more can be required than a sufficient power in the contracting parties, and their mutual consent sufficiently declared."[11]

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[2] *Nicomachean Ethics*, Book III, § 1, 1109b/35 – 1110a/01 and 1111b/21-25.

[3] *Cf.* W. MOMOGLIANO (*In tema di vizi di volontà et di trattatii imposti con violenza*, Turin, Ape, 1938, pp.18 and following), seems to follow the strict Aristotelian logic.

[4] See, for example: Digeste 4.2.3. (Ulpien XI *ad edictum*).

[5] These were threats that the Romans called *metus* or *timor* and that the successive schools referred to as *vis animo illata* or *compulsiva*. There is thus consent, but it is contaminated at its very core (*cf.* P. BONFANTE, *Istituzioni di diritto romano*, 8th ed., Milan, Vallardi, 1925).

[6] Even though this question will only be dealt with later (*infra* II.2).

[7] See *infra* § 6.

[8] In *jus civile*, no meaning was attributed to consent in the stipulation of legal transation. This only occurred later – in *jus gentium* and *jus honorarium*, that consent – and the defects that could invalidate it – began to play a more important role. Violence or fear (the "*metus*") was quite clearly featured among the three causes of invalidity, together with *dolus malus* (fraud) and *error factis* (error of fact).

[9] "Libere […] quisquis pascitur, pactis tamen tenetur", *De potestate civili*, § 21.

[10] The Law of War and Peace, Book II, chapter XII, Sect. 10. "Hence it follows that treaties made by force are as obligatory as those made by free consent […A] prince, who is always in that state in which he forces, or is forced, cannot complain of a treaty which he has been compelled to sign" (Translated by Thomas Nugent, revised by J. V. Prichard, 1914) Chapter 20

[11] E. VATTEL, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, Amsterdam, 1758, Book II, Chapter XII, § 157.

It thus appears that the moral coercion of a State, through the coercion of a physical person representing the State, was put to one side – together with two other causes of invalidity which remained permissible at this time – by one of the most respected jurists in diplomatic and chancellery circles towards the middle of eighteenth century. However this silence did not last long, and the posterior doctrine of Maitre de Neuchatel reintroduced as a basis for nullifying international treaties – in the wake of Roman law – violence against a representative of a State.

6. At the same time as this reintroduction, a distinction was drawn between violence against a representative of a State, and the State itself. Following the traditional approach – which dominated until the end of the Second World War – violence against a person representing a State was considered as a basis for nullifying an international treaty, whereas coercion against the State itself was not.[12] This is what is meant by the *regula juris "Quamvis, si liberum esset noluissem, tamen coactus volui…"*[13]!

7. This distinction was almost unanimously accepted by the doctrine of this period,[14] also confirmed by (the work that will constitute) the posterior doctrine.[15]

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[12] Please refer to the commentary to Article 52 in this book.

[13] The rule in question concerned moral violence exercised against an heir to make him accept the testamentary inheritance. The complete text is as follows: "*Si metu coactus adii hereditatem, puto me heredem offici, quia quamvis, si liberum esset, nouluissem, tamen coactus volui*" which may be translated as "If I accept an inheritance by violence (*metu*), I acknowledge that I have undertaken an act of inheritance, whereby even though it is true that I would not have accepted it had I been free, it is also true that finding myself pressured, I would have consented to accept" (D. 4.2.21.5, *Paulus lib. 11 ad edictum*).

[14] *Cf.* G. NAPOLETANO, *Violenza e trattati nel diritto internazionale*, Milan, Giuffrè, 1977, p. 13, note 20 and pp. 210 and following, and the Project on the codification of the law of treaties prepared by the *Harvard Law School* (*A.J.I.L.*, 1935, pp. 1150 – 1151) which provides quite an impressive list of the old doctrine that makes this distinction. See also in this respect: J. DE LOUTER, *Le droit international public positif*, Volume I, Oxford, Oxford University Press, 1920, p. 478; F. von LISZT, *Le droit international. Exposé systématique*, trans. from German to French (from the 9th edition), Paris, Pedone, 1928, § 20.6, p. 178; P. FIORE, *Il diritto internazionale codificato e la sua sanzione giuridica*, 4th ed., Turin, Utet, 1909, articles 752 and 753; G. CARNAZZA AMARI, *Trattato sul diritto internazionale pubblico di pace,* Milan, V. Maisner e compagnia, 1875, pp. 771 and following; K. STRUPP, 'Les règles générales du droit et la paix', *R.C.A.D.I.*, 1934-I, volume 47, pp. 366-367; J.-C. BLUNTSCHLI, *Le droit international codifié*, trans. from German into French by C. LARDY, 5th ed., Paris, Guillaumin, 1895, § 408 and 409; P. FAUCHILLE, *Traité de droit international public*, 8th ed., Paris, Rosseau, 1926, Volume I, third part, p.298; A. CAVAGLIERI, 'La violenza come motivo di nullità dei trattati', R.D.I., 1935, p. 8; C.H. BUTLER, 'Treaties made under Dures', in *Proceedings of the American Society of International Law*, Washington, 1932, p. 47. Against: F. LAGHI, *Teoria dei trattati internazionali*, Parma, L. Battei, 1882, p. 144; O. NIPPOLD, *Der Völkerrechtliche Vertrag, seine Stellung im Rechts-system und seine Bedeutung für das internationale Recht*, Bern, K.J. Wyss, 1894, p. 172; A. VERDROSS, 'Règles générales du droit international de la paix' R.C.A.D.I., 1929-V, volume 30, pp. 429-430; G. SCELLE, *Droit internationale public*, Paris, Domat, 1944, p. 499, § 24: this distinction demonstrates, according to the author, the "subtilité scolastique" (scholastic subtlety); Sir H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, London, Longmans, New York, Green and Co., 1927, § 73.

[15] F. CAPOTORTI, 'Cours général de droit international public', R.C.A.D.I., 1994-IV, volume 248, p. 182; F. PRZETACZNIK, 'The Validity of Treaties concluded under coercion', I.J.I.L., 1975, p. 178; R. QUADRI, *Diritto internazionale pubblico*, 5th ed., Naples, Priulla, 1968, p. 166; P.A. SERENI, *Diritto Internazionale*, Vol.II, Milan, Giufrè, 1962, p. 1313; M. GIULIANO, T. SCOVAZZI and T. TREVES, *Diritto internazionale*, 2nd ed., Milan, Giufrè, Vol. 1, p. 469; B. CONFORTI, *Diritto Internazionale*, 3rd ed., Naples, Priulla, 1987, p. 123; J. COMBACAU and S. SUR, *Droit international public*, 6th ed., Paris, Monchrétien, 2004, p. 130; Lord A. McNAIR, *The Law of Treaties*, Oxford, Clarendon, 1961, p.

These arguments, which provide support for making this distinction, betray their origin in the analogy with civil law of Romanist inspiration. Since the consent of a State does not exist without that if its representative, only violence directed against the latter may eventually determine the invalidity of an international treaty. It is thus the application of the theory of representation, which we shall revisit a little later. Also prevalent upstream however are the traditional analogies of Individual/State and Contract/Treaty.

8. Bluntschli,[16] in the commentary to article 309 of his code,[17] maintains:

> "Lorsque l'envoyé qui a reçu les pouvoirs nécessaires pour signer un traité est atteint de démence ou se trouve dans un état d'ivresse tel qu'il ne sait plus ce qu'il fait, l'Etat n'est pas obligé par la signature de son envoyé. La signature d'un souverain n'oblige pas non plus l'Etat, si on lui conduit la main en usant de violence envers lui, ou si on l'a contraint de signer en le menaçant de mort; ou bien si, comme à la diète de Pologne, la ratification d'une assemblée est extorquée en faisant occuper par des troupes des abords de la salle et en menaçant les votants de la mort ou de la prison. *Dans tous les cas ci-dessus, le traité est nul, non pas parce que l'Etat n'a pas sa libre volonté, mais parce que cette liberté fait défaut aux représentants de l'Etat.*"[18]

The historical episode concerning the Polish state assembly[19] is quite revealing of the reports that maintained and maintain violence against the State and violence against its representatives, the doctrine having almost universally categorised this event as forming part of the latter normative category. However, one may legitimately make the observation that if such pressure was considered by the old doctrine to have been directed against the State's representative and thus engendering on this basis – and on

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207; G. BARLIE, 'Structure de l'ordre juridique international', R.C.A.D.I., 1978-II, volume 161, p. 88; Report of 18 March 1958 by Sir Gerald Fitzmaurice, Doc. A/CN.4/115, *Y.I.L.C.*, 1958, vol.II, p. 22, § 3 and p. 40, § 62; E. VITTA, 'La validité des traités internationaux' in *Bibliotheca Visseriana*, Vol. 14, Leyde, 1940, pp. 107-108 (*passim*).

[16] *Op cit. supra* note 15, p. 241.

[17] Bluntschli's book, which aims to present international law from that period, is set out precisely as a code in which each article – supposedly providing a snapshot of general international law – is followed by a *commentary* by the author. Of course, the content of each disposition as well as the observations that follow are *doctrine* within the meaning of article 38 § 1 of the Statute of the International Court of Justice.

[18] "When an envoy, who has received the necessary powers to sign a treaty, is affected by madness or finds himself in a state of drunkenness in which he is no longer aware of his actions, the State is not bound by the signature of its envoy. The signature of a sovereign likewise does not bind a State if his hand is forced by the use of violence against him, or if one coerces him to sign under the threat of death; or even if, like the Polish State assembly, the ratification by those assembled is extorted by stationing troops along the sides of the room and threatening the voters with death or prison. *In all the above situations, the treaty is void, not because the State has not given its free consent, but because this freedom was defected on the basis of its representatives*" (unofficial translation from the French). Article 409 precisely concerned the invalidity of a treaty on the basis of the insanity of the State representative or violence exercised against his person. In the preceding article, article 408, Bluntschli refutes the possibility that a treaty may be considered void on the basis of coercion exercised against the State itself, and he adds in the correlating commentary that: "…en droit international…un état est toujours libre et sait ce qu'il veut, pourvu toutefois *que ses représentants ne soient libres*" ("in international law a State is always free and knows what it wants, even if its representatives are not free", unofficial translation from the French), *ibid.*, emphasis added.

[19] See *infra* § 19 for historical details.

this basis alone – the invalidity of an international treaty, it is precisely because at this period coercion against the State itself did not constitute a reason for invalidating a treaty. Thus, and thanks to the obvious affinities between these two types of coercion,[20] there was a tendency to stretch the normative category of violence against a State representative with the intention of including certain forms of coercion that were subsequently covered by the future article 52.[21] However, once coercion against the State itself – and not by the fiction, sometimes, of coercion against its representatives – was accepted as a reason for nullifying international treaties, a clear distinction between the two was no longer maintained. The introduction of article 52[22] in the Convention and its indisputable recognition in general international law,[23] is not only a great tribute to the international Commission in its entirety, but, moreover, allows a jurist to better differentiate between two normative situations which have in the past become amalgamated.[24] One has, on the one hand (article 51), a lack of consent in relation to the free will of the State, and on the other hand (article 52), the sanction, within the structure of the law of treaties, of the conventional legal act concluded following a violation of an imperative norm of international law, that is, the prohibition of a threat or use of force.

9. What are the reasons that have been invoked in order to establish coercion against a State representative as a basis for declaring a treaty void?[25] Historically, as

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[20] According to J. CAMBACAU and S. SUR (*op. cit. supra* note 15, p. 130), the two types of coercion in articles 51 and 52 share as a point in common, and consequently the same reason for their invalidity, the embodiment of "certaines principes fondamentaux, d'intérêt commun, que sont l'égalité des Etats et l'interdiction de l'emplois de la force dans les relations internationales" (certain fundamental principles, of common interest, namely the equality of States and the prohibition of the use of force in international relations). Violence, regardless of the target, perturbs in effect social order. It is thus only a slight exaggeration to maintain that article 51 reflects the first historical attempt of banishing force from international relations. Article 52 would probably not be what it is today without article 51: the possibility for violence – or rather, its sanction – in the law of treaties, which finds, it is true, its culminating point in article 52, operates on the reasoning of Article 51. In effect, according to Verdross (*Y.I.L.C.*, 1963, vol. 1, 681th meeting, p. 50, §§ 42-43), "the two forms of coercion were virtually indistinguishable where there was merely a threat to use force" both being in flagrant violation of the *jus cogens* international obligation codified in article 2 § 4 of the United Nations Charter. The Portuguese government, in its commentary to the draft articles on the law of treaties, did not hesitate however in noting that the two reasons of invalidity found their common *ratio juris* in the prohibition of the use of force itself – first, chronologically, against the State representative, and following (from 1945 onwards) against the State itself (*Y.I.L.C.*, 1966, Vol. II, pp. 326-327). Both violate "international public order" noted Mr. Bartos (*Y.I.L.C.*, 1966, Vol. I, Part I, 826th meeting, p. 27, § 41).

[21] Sir Humphrey Waldock, responding to questions from members of the I.L.C., maintained that "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" (*Y.I.L.C.*, Vol. I, Part I, 826th meeting, p. 27, § 36).

[22] From the beginning, discussions within the I.L.C. concentrated on the appropriateness, in terms of legislative policy and legal logic, of maintaining a separation between violence against a State representative and violence against the State itself, henceforth considered as a basis for invalidating an international treaty. Sir Humphrey Waldock had already resolved at the conclusion of the 681st meeting to treat separately the two bases of invalidity.

[23] See the commentary to article 52 in this book.

[24] Among those opposed to a distinction: Elias (*Y.I.L.C.*, 1963, vol. I, 681th meeting, p. 48, § 26), Tunkin (*ibid.*, § 27).

[25] G. NAPOLETANO (*op. cit.* note 14) was quite correct when he maintained that because the customary character of this reason for invalidating a treaty has never been contested, authors have not lavished explanations in relation to its *ratio juris*. R. REDSLOB (*Histoire des grands principes du droit des gens*, Paris, Rousseau, 1923, p. 439) also noted: "Les traités sont nulls quand leur signature est imposée par violence. Il est impossible de contester cette maxime. Elle a été reconnue de tout temps

has already been observed, the *ratio juris* of this reason for nullifying an international treaty resided in the theory of representation. A State representative having being *coerced* into accepting a treaty, the treaty was not a manifestation of the consent, properly understood, of the State. There was thus an appearance, an ectoplasm, of consent on the part of the State, behind which the coercion remained concealed. Violence directed against the personal interests of the representative was seen as being coerced into acting against the interests of his or her State. Since violence destroys consent (*vitium originis*) and since there is no State consent outside of that expressed by its representatives, every time that the manifestation of consent is negated by coercion, the treaty is marred by a reason to make it void.

10. According to the theory of representation, the State is an abstract entity that can only function, and demonstrate its own free will, through individuals – physical persons – namely, its representatives. The consent expressed by these real entities is consequently considered to constitute the effective consent of the State. The three defects of consent that the doctrine has traditionally accepted, namely error, fraud and coercion against a State representative, are not conceivable except in relation to real, thinking, beings.[26] The theory of representation appears again nowadays to be the justified basis upon which this reason for nullifying a treaty is grounded, as attested by Paul Reuter in this excerpt:

> "Comme la corruption, cette forme de contrainte tend à substituer, dans la tractation, une personne privée à une organe de l'Etat, elle dénature les données de la représentation juridique."[27]

11. Although often criticised,[28] the theory of representation thus appears to explain the *ratio juris* of this reason for treaty nullification. It is no less true, however, that article 51 equally sanctions the use of force against the State through its representative. What distinguishes – as will be discussed later – this reason for nullifying a treaty from what immediately preceded, is the existence of corruption and fraud. As was quite correctly observed:

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pace qu'elle découle de la nature même des conventions" ("Treaties are void when they are signed under violence. It is impossible to argue against this maxim. It is a maxim that has always been recognised because it follows from the very nature of treaties", unofficial translation).

[26] A. CAVAGLIERI, *op. cit.* note 14, p. 19.

[27] "Like corruption, this form of coercion strives to substitute, in the negotiation, a private person for an organ of the State, it distorts the elements of legal representation" (unofficial translation). P. REUTER, *Introduction au droit des traités*, 3rd ed., Paris, P.U.F., 1995, § 268. See also in relation to the similarities and differences between these two bases of invalidity (III.1).

[28] According to F. DE VISSCHER ('Des traités imposés par la violence', R.D.I.L.C., 1931, pp. 521): "nous avons trouvons ici en présence d'une conception absolument vieille et, je crois bien, aujourd'hui à peu près unanimement abandonnée, des rapports entre l'Etat et ses organes" ("we find ourselves here in the presence of an absolutely outdated conception, and, I strongly believe, today almost unanimously rejected, of relations between the State and its organs"). Advocating for the Gierke theory of organs and taking a narrow interpretative approach, this author refutes the theory of representation and in the wake of this approach – in a manner coherent with these premises – accepts coercion of a State as a basis for treaty invalidity. He thus recognises coercion of a State not as a consequence of an application of the principle of the prohibition of force in international relations, but grounded on the uniqueness of State consent. There is thus no separation of consent: one part being that of the organ, and the other that of the State. In contrast, there is only one consent, that of the State of course, that may be invalidated by coercion of individuals considered organs of the State, or "l'Etat ou la collectivité elle-même" ("the State or community itself") (p. 523) Similarly: E. VITTA, *op. vit. supra* note 15, pp. 118-119.

> "L'acte de contrainte ne touché pas seulement aux intérêts des sujets de droit directement intéressés. Il déborde le cercle contractuel. Portant atteinte à l'ordre public international, l'acte de contrainte lèse la société internationale."[29]

2. Customary Status

12. At the risk of stifling the suspense concerning the customary status of this basis for nullifying a treaty, we would like to cite the first part of the first paragraph of the I.L.C. commentary to the future article 51:

> "*There is a general agreement* that acts of coercion or threats applied to individuals with respect too their own persons or in their personal capacity in order to procure te signature, ratification, acceptance or approval of a treaty will *unquestionably invalidate* the consent so procured."[30]

This assertion is not surprising. In addition to the authors cited above,[31] as well as the scientific literature that preceded[32] and followed[33] the Convention – including the comments made by governments in relation to the I.L.C. drafts[34] – there is nothing less than complete agreement with the I.L.C. commentary. To use the words of Louis Le Fur:

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[29] "The act of coercion does not only concern the interests of the subjects of law directly involved. It goes beyond the contractual circle. By affecting international public order, the act of coercion hurts international society" (unofficial translation). G. TENEKIDES, 'Les effets de la contrainte sur les traités à la lumière de la Convention de Vienne du 23 mai 1969', *A.F.D.I.*, 1974, p. 86. See also (III.1) the differences – of size – between the between the basis for invalidity in article 51 and those of fraud (article 49) and of corruption (article 50) respectively.

[30] Draft Article 48 with Commentaries, *Y.I.L.C.*, 1966, Vol. II, pp. 246-247, § 1 [original emphasis deleted, emphasis added].

[31] Voy. *supra* notes 14 and 15.

[32] The list is by no means exhaustive: *International Law. A Treatise (L. Oppenheim)*, ed. by Sir Hersch Lauterpacht, 8th ed., Vol. 1 (Peace), 1955, London, Greenman, p. 891, § 499; P.A. SERENI, *op. cit. supra* note 14, p. 1314; Ch. De VISSCHER, *Théories et réalités en droit international public*, 3rd ed., Paris, Pedone, 1960, p. 313; W.L. GOULD, *An Introduction to International Law*, New York, Harper, 1957, p. 321; R. REDSLOB, *op cit. supra* note 25, p. 439.

[33] The list is by no means exhaustive: M. GIULIANO, T. SCOVAZZI et T. TREVES, *op. cit. supra* note 15, p. 469; A. VERDROSS et B. SIMMA, *Universelles Völkerrecht*, 3rd ed., Berlin, Duncker & Humblot, 1984, p. 477, § 784; I. BROWNLIE, *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, p. 615; J. COMBACAU et S. SUR, *op. cit. supra* note 15, p. 130 (who consider however that "la brièveté de la formulation retenue par l'article 51 contient une large part de développement progressif"); *Restatement of the Law, The Foreign Relations Law of the United States*, St. Paul, American Law Institute Publishers, 1987, § 331; *Oppenheim's International Law*, ed. by Sir Robert Jennings & sir Arthur Watts, Vol. 1 (2nd part), Harlow, Longman, 1992, p. 1290, § 641; T.O. ELIAS, *The Modern Law of Treaties*, New York, Oceana, 1974, p. 168; H. BROSCHE, *Zwang beim Abschlussvölkerrechtlicher Verträge: eine Untersuchung der in der Wiener Vertragsrechtkonvention von 1969 getrofennen Regelung*, Berlin, Duncker & Humblot, 1974, pp. 17-19; S.E. NAHLIK, 'The grounds of invalidity and termination of treaties', *A.J.I.L.*, 1971-5, p. 742; G. TENEKIDES, *op. cit. supra* note 29, p. 97; G. SCHWARZENBERGER, *A Manual of International Law*, 6th ed. (by E.D. Brown), London, Stevens, 1976, p. 128; C. PARRY, 'The Law of Treaties', in Manual of Public International Law, ed. by M. SØrenson New York, St. Martin's Press, 1968, p. 202; T. ELIAS, 'Problems concerning the validity of treaties' *R.C.A.D.I.*, 1971-III, vol. 134, p. 379.

[34] Israel (Report of the International Law Commission to the United Nations General Assembly, *Y.I.L.C.*, 1966, Vol. II, p. 295), Netherlands (*ibid.*, p. 317), Portugal (*ibid.*, pp. 326-327), Sweden (*ibid.*, p. 340), Czechoslovakia (*ibid.*, p. 286).

> "Ici, il est certes impossible de prétendre que ce vice de consentement soit sans exemples en droit international. Ils sont malheureusement, au contraire, trop nombreux."[35]

13. We will move quickly to review the numerous events pleaded in the international life of States upon which the *consensus omnium* has been constructed. The origin is the customary rule providing that a treaty is void if coercion is exerted against the State representative.

14. It is appropriate to begin by mentioning the case in point of the sovereign held captive. Clearly, this example has but academic and historical value, but the doctrine argued for some time over whether, in such circumstances, one could speak of coercion against a State representative and, consequently, the treaty being void.[36] Reference is often made to one of the episodes that marks the sixteenth century, the Treaty of Madrid, signed on 14 January 1526 between Francois I and Charles Quint, the former finding himself the prisoner of the latter.[37] France never executed the treaty,[38] alleging in this regard two reasons, which it had already communicated to the Emperor's Chancellor the day preceding the signing of the treaty. The treaty was void because: a) it had been extorted by coercion; b) the 'States' of Bourgogne (which through the Treaty were attributed to the Emperor) had not ratified the said agreement. The Treaty of Cambrai (called the "Paix des Dames") of 5 August affirmed the invalidity as it explicitly "rénover et modifier" ("reformed and changed") the Treaty of Madrid of 1526.[39] However, according to Grotius, if the captive king grounds his sovereignty in the people, the treaty is simply nonexistent as:

> "It is, in fact, not credible that sovereignty was conferred by a people on such terms that it could be exercised by one who is not free."[40]

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[35] "Here, it is clearly impossible to suggest that there are no examples of this basis for invalidating consent in international law. Quite the contrary, there are, unfortunately, too many such examples" (unofficial translation). 'Le développement historique du droit international: de l'anarchie internationale à une communauté internationale organisée' *R.C.A.D.I.*, 1932, III, vol. 41, p. 576.

[36] Among the dissenters: F. von LISZT, *op. cit. supra* note 14, p. 178, § 20.6; J. DE LOUTER, *op. cit. supra* note 14, p. 479 (where the Treaty of Madrid of 1526 is considered by this author as being an example of both coercion against the State representative and the State itself, and this void on both grounds); P. FIORE, *op. cit. supra* note 14, § 753; F. PRZEETACZNIK, *op. cit. supra* note 15, p. 174; E. VITTA, *op. cit. supra* note 15, p. 106; Among the against: P.A. SERENI, *op. cit. supra* note 15, p. 1314; R. QUADRI, *op. cit. supra* note 15, p. 167 (the author considers this type of coercion to be a real *vis absoluta*, and consequently as a non-existent international treaty, see. *Infra* II.3); P. FAUCHILLE, *op. cit. supra* note 14, p. 299; E. de VATTEL, *op. cit. supra* note 14, Book IV, Ch. IV, § 13. According to GENTILI (*De iure belli*, Book VI, Ch. XIV, § 595-6) the treaty is void if the war was carried out on the basis of a just cause, and valid if the victor nevertheless had a just cause to go to war.

[37] Much later, the Emperor of France, Napoléon I, presented a draft treaty to Louis Napoléon, king of the Netherlands, for him to sign (this signature amounted to an expression of an intention to be bound). The latter, practically a prisoner in Paris, was subject to pressure and could nothing but sign. *Cf.* J.B. MOORE, *Digest of International Law*, Vol. 1, Washington, G.P.O., 1906, p. 253.

[38] Comment by Mr. de Luna (*Y.I.L.C.*, 1966, Vol. I, 826th meeting, p. 26, § 19): "…French jurists, anticipating the provisions of article 35 [which became article 51 of the Convention], had rightly held to be void."

[39] *Cf.* E. FUETER, *Geschichte des europäschen Staatensystems von 1492 bis 1559*, München-Berlin, Oldenbourg, 1919, § 120-122.

[40] *Op. cit. supra* note 10, Book III, Chap. XX, Sect. 3.1.

15. Apart from this case in point, it is appropriate to cite the outright "shocking case"[41] of the coercion exercised against Dr. Hacha, president of Czechoslovakia, who was physically threatened by Nazi dignitaries[42] during a night time meeting specifically requested by the Chancellor of the Third Reich.[43] President Hacha was thus physically *coerced* into signing a treaty in which he placed Bohemia and Moravia under the German protectorate.[44] The validity of this treaty was immediately contested, amongst others, by France and the U.S.S.R.[45]

16. The oldest example cited by the doctrine is that of the Concordat taken from Pope Pascal II in 1111 by Henry I of England. This was obtained after the Pope was imprisoned for sixty days. The treaty, according to which the King was given the privilege of granting investitures, was finally annulled by the Latran Council on the grounds that it was obtained by coercion. The bishop Gérard d'Angoulême reasoned this invalidity as follows:

> "Ce privilège, qui n'est pas un privilege mais pravilège, arraché au pape Pascal par la violence du roi Henry, nous tous, réunis dans ce saint concile, nous le condamnins et nous le jugeons nul, parce qu'il y est dit que le candidat élu ne pourra être consacré caabiquement qu'après avoir reçu l'investitute du roi."[46]

17. Also mentioned[47] is the Treaty of Bardo (Kassar Saïd) of 12 May 1881 according to which the French Republic established, after having won on the battlefield, the protectorate over Tunis. One recalls that the Bey of Tunis was in effect *coerced* into signing the said treaty, the French troops having completely encircled his residence and physically put in place a state of siege.[48]

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[41] To use the expression of Lord A. McNAIR, *op. cit. supra* note 15, p. 208.

[42] Hitler made threats directed against the person of Mr. Hacha and that he would bomb Prague. It is one of the typical examples where the two types of coercion, against the State and against its representative, are used to obtain the same result. However it is nevertheless necessary to distinguish between the two types. See *infra* II.2.

[43] "The Czechoslovak signatories…had been locked up without food and subjected to constant threats until they signed" (Comment by Sir Humphrey Waldock, *Y.I.L.C.*, 1966, Vol. I, Part II, 890th meeting, p. 308, § 22). According to Mr. Coulondre, Ambassador of France: "Les ministres allemands (Goering and Ribbentrop) se sont montres impitoyables, Ils ont littéralement pourchasse Mr. Hacha and Mr. Chvalkovsky [Czechoslovakian minister of foreign affairs] autour de la table sur laquelle se trouvaient étendus les documents, les ramenant toujours devant ceux-ci, leur mettant la plume en mains…" or again, according to the memoirs of Dr. Schmidt, Hitler's personal doctor who was strangely present during the meeting: "Hacha and Chvalkovsky [following the Führer threats] semblaient changés en statues de pierre. Seuls leurs yeux montraient qu'ils étaient vivants", cited in: W.L. SHIRER, *Le Troisième Reich. Des origines à la chute*, trans. from the French, Paris, Stock, 1962, pp. 483 and 482.

[44] It is interesting to note that some days before Hitler made Hacha convene the Slovak state assembly which rushed to proclaim the independence of Slovakia. *Cf.* J.-B. DUROSELLE, *Histoire diplomatique de 1919 à nos jours*, 9th ed., Paris, Dalloz, 1985, pp. 230-231.

[45] *Cf.* The respective diplomatic notes sent to the German government in: R. LANGER, *Seizure of Territory. The Stimson doctrine and Related Principles*, Princeton, Princeton University Press, 1947, pp. 221 and following.

[46] "This privilege, which is not a privilege but a pravilège, taken from Pope Pascal by violence by king Henry, we all, gathered in this holy council, we condemn it and we judge it void, because it is said that an elected candidate can only be canonically consecrated after having received the investiture of the king" (unofficial translation). Cited in G. WENNER, *Willensmängel im Völkerrecht*, Zurich, Polygraphischer Verlag, 1940, p. 183, note 18. *Cf.* also A. CAVAGLIERI, *op. cit. supra* note 14, p. 9.

[47] In this vein: R. REDSLOB, *op. cit. supra* note 25, pp. 439-440.

[48] The French General, Beart, was given as a mission the task of presenting the treaty to the Bey of Tunis, Mohammed-ès-Sadok, and of forcing him to sign it. If the Bey, by misfortune, had refused this

18. The Treaty of Bayonne of 8 and 10 May 1808 – according to which Charles IV and his son Ferdinand de Bourbon renounced the Spanish throne in favour of Bonaparte – also seems to have been deemed void. This was in fact later confirmed after the battle of Leipzig on 19 October 1813, when the treaty clearly fell into obsolescence.

19. The doctrine also recalls the coercion of the Polish state assembly during the first[49] and second[50] partition of Poland by Russia, Prussia and Austria. During the first partition, the soldiery of these three Powers in effect encircled the premises where the state assembly ("Sejm") held its sessions, thus placing the members in an uncomfortable situation by having to choose between their physical integrity – and the possession of their personal assets – and the ratification of partition treaties with the three powers (Russia, Prussia and Austria). The coercion eventually produced its intended effect.[51]

20. The New World did not provide any innovations in this area, and recourse to such practices of intimidation was relatively frequent. We shall limit ourselves here to recalling the sufficiently real threats directed in 1915 and 1916 by the United States of America against representatives of Haiti,[52] and Santo Domingo, respectively in order to make them ratify certain treaties conferring exclusive privileges on the American

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request from France, then the General was to make him understand "les conséquences funestes" ("the fatal consequences") of such a refusal. The General arrived at the Bardo Palace on 11 May in the evening, escorted by his major–in-command and a platoon. Two hours later, the Bey of Tunis signed the treaty establishing the French protectorate. *Cf.* A GIACCARDI, *La conquista di Tunisi. Storia diplomatica dal Congresso di Berlino al trattato del Bardo*, Milan, Albertom, 1940, pp. 337-338.

[49] The state assembly in Warsaw from 19 April 1772 to 11 April 1775, even though a large part of the Polish territory was under foreign occupation. The violence at the meeting of the organ ahead of *expressing the consent of the Polish State to be bound by the treaty* immediately jumps out at the reader upon perusing the note (drafted as an ultimatum) from the Russian ambassador to the state assembly: "L'ambassadeur soussigné croit de son devoir d'avertir la Confédération générale qu'il donnera l'ordre aux armées de l'Impératrice de séquestrer *les biens des personne* qui manifestent si ouvertement leurs desseins hostiles en imprimant et en publiant des protestations, et qu'il séquestrera dorénavant *les biens des membres de la Confédération générale*, qui se seront permis élever encore une protestation contre les déclarations des Puissances alliées" cited in K. LUTOST 'ANSKI, *Les partages de la Pologne et la lutte pour l'indépendance*, Paris-Lausanne, Payot, 1918, Vol. I, No. 106 [emphasis added].

[50] It was called for the occasion the "muted state assembly" and sat in Grodno in the year 1793. The same forms of *intimidation* or moreover simple violence were used on this occasion: "Its deliberations [i.e. that of the state assembly], conducted under *the sights of Russian guns, were a charade* […] The King was persuaded to sign. The nobility, *threatened with the wholesale sequestration of their states*, were obliged to assent. Here was another brilliant operation of decisive surgery", N. DAVIES, *God's playground. A History of Poland*, Vol. I, Oxford, Clarendon, 1981, p. 537 [emphasis added]. The treaties were finally signed on 11/22 July 1793 respectively, with Russia, at on 25 September of the same year with Prussia.

[51] "*Legal niceties were observed* to the end […] No one seemed to notice the sleight of hand which concealed a *sophisticated form of international violence*", N. DAVIES, *op. cit. supra* note 50, p. 523 [emphasis added].

[52] E. VITTA (*op. cit. supra* note 15, p. 125, note 1), citing Hershey, wrote that "le Secrétaire d'Etat [des Etats-Unis d'Amérique] Daniel, menaça, au cas où le traité ne serait pas ratifié, de les [le Président, les ministres et d'autres fonctionnaires d'Haiti] faire priver de leur salaire et de faire occuper Haiti [contrainte contre l'Etat lui-même] jusqu'à ce qu'il naurait obtenu ce qu'il désirait" ("the Secretary of State [of the United States of America] Daniel, threatened that if the treaty was not ratified their [the President, the ministers and other Haiti civil servants] salaries would be withheld and Haiti would be occupied [coercion against the State itself] until he had obtained what he wanted", unofficial translation).

authorities in the areas of political, economic and financial management.[53] Asia[54] has also known similar episodes such as when the Japanese plenipotentiaries exerted physical coercion against the Emperor of Korea and his ministers by encircling the chamber in which they were meeting in order to make them ratify the treaty of 17 November 1905 according to which Japan would be established as the protectorate of Korea.[55]

21. According to some authors, the Treaty of Bucharest (7 May 1918) and the Treaty of Brest Litovsk (3 March 1918) were extorted by the central powers of Romania and Russia respectively, through the exertion of violence by their plenipotentiaries.[56]

22. Lastly, three other treaties may be listed that may have been affected by this defect in consent. In effect, the pressure exerted by the U.S.S.R. against the plenipotentiaries of Czechoslovakia in order to bring about the conclusion of a treaty allowing Soviet troops to settle in the latter's territory, may be qualified as coercion exercised against a State representative.[57] The same remark can also be made in relation to the treaty between the Free State of Ireland and Great Britain of 6 December 1921.[58] One may also recall the coercion exerted against the Emir de Sharjah, Scheik Khalid M. Al-Qasimi, head of the State of the homonymous Emirates in order to make him accept a treaty ("Memorandum of Understanding") concluded in Tehran with the Iranian government on 29 November 1971. According to the terms of this treaty, the Emir de Sharjah authorised the establishment of Iranian troops on the Abou Muss islands – over which there had already been a violent disagreement over its territorial sovereignty. The Arab League, as well as the United Arab Emirates, have since invoked coercion against the Emir de Sharjah as the basis for voiding the treaty of November 1971.[59]

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[53] For details, *cf. Law of Treaties. Draft convention*, *op. cit. supra* note 14, pp. 1157 and following.

[54] The denunciation on 23 August 1950 (*R.T.N.U.*, vol. 85, p. 356) by Pakistan of the 'Inter-Dominion Agreement' of 4 May 1948 (*R.T.N.U.*, Vol. 54, p. 45) was more complex. *Cf. Keesing's Contemporary Archives*, pp. 11647 A and following. Pakistan in fact claimed that the treaty in question was invalid because it was concluded under the threat of force directed against its representatives.

[55] This treaty, for which was sacrificed the independence "du vieil Empire au Japon, fut extorqué aux ministres coréens en les enfermant dans les salles des délibérations et en les menaçant de peines corporelles" ("of the old Japanese empire, was extorted from Korean ministers by shutting them in a negotiation room and threatening them with bodily harm", unofficial translation), J. DE LOUTER, *op. cit. supra* note 14, p. 478.

[56] *Cf.* A.S. HERSHEY, 'Legal status of the Brest-Litovsk and Bucharest Treaties on the Light of Recent Disclosures and of International Law', *A.J.I.L.*, 1918, p. 819. In relation to the Brest-Litovsk treaty, Germany moreover undertook to recognise its invalidity through the Peace Treaty of Versailles of 28 June 1919 (article 116).

[57] Treaty concluded on 16-23 November 1968. *Cf. Oppenheim's International Law*, *op. cit. supra* note 33, p. 1290, § 641, note 1.

[58] In this vein: Sir R. JENNINGS, 'Le Traité Anglo-Irlandais de 1921 et son interprétation', *R.D.I.L.C.*, 1932, p. 495.

[59] See: H-AL-BAHARNA, *The Arabian Gulf states*, 2nd ed., Manchester-Beyrouth, M.U.P., 1975, pp. 345-347. In his essay dedicated to this territorial dispute ("The Three Occupied UAE Islands. The Tunbs and Abu Musa", Abu Dhabi, ECSSR, 2005, p. 176), Dr. Th. Mattair grossly misinterpreted the legal situation as he subsumed this form of coercion under Art. 52 of the VCLT in lieu of Art. 51 VCLT.

23. The jurisprudence does not offer us a similarly fruitful harvest, although it should! We note two cases in which a judicial organ has upheld, in *obiter dictum*, the customary character of this basis for nullifying a treaty. First, in the case of Border between Dubai and Sharjah of 1981, the tribunal held that:

> "Article 51 and 52 of the Vienna Convention of 1969 *reflect, in the view of the Court, customary rules of international law* which are binding upon States even in the absence of any ratification of that Convention."[60]

In the same vein, the mixed Iranian-American Tribunal noted that:

> "There is no evidence, and it has not been contended, that the Treaty was executed under *duress*, or by fraud, within the meaning or Articles 49, 51 and 52 of the Vienna Convention on the Law of Treaties."[61]

II. Features of the coercion envisaged: the scope of application of article 51

24. The scope of application of article 51 will be considered in two stages. First we will consider the sort of individuals that can be victims of coercion (1). Following, the different forms that the material act of coercion may take will be examined (2).

1. Victims of coercion: the scope of application *ratione personae*

25. It suffices to cast a glance, even fleeting, upon the formulation of article 51 to realise that it distinguishes not only between different bases of relative invalidity that have preceded it – with the exception of article 50 (which however comes from its rib, like Eve from Adam's) – but also other bases of absolute invalidity, perhaps in testimony to its borderline character.[62] State representatives at the Conference did not hesitate in noting this characteristic.[63]

26. The peculiar way in which article 51 is drafted turns on the phrase "expression of a State to be bound by a treaty",[64] which deserves a brief analysis.[65] What do we understand by this, and what is the legal meaning? In other words, who are the *victims* of this coercion? Certainly the(se) individual(s) must have "treaty-making power", but is it sufficient that such individuals are only entrusted with the negotiation of the treaty? According to the first I.L.C. rapporteur to deal with the issue, Sir Gerald Fitzmaurice, this question should be answered in the affirmative.[66] The next rapporteur that followed in his wake, Sir Humphrey Waldock,[67] distinguished the case

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[60] Arbitral sentence given on 19 October 1981, *I.L.R.*, Vol. 91, p. 569 [emphasis added].
[61] Arbitral sentence given on 15 June 1990, *I.L.R.*, Vol. 83, p. 534 [emphasis added].
[62] Voy. *infra* III.1.
[63] Doc. off., C.R.A., 1st meeting., 47th s., p. 290, § 48 (Australia), p. 290, § 56 (France).
[64] See the commentary to article 11 of the Convention in this book.
[65] Reference must be made to the passage in the 1986 Convention (see *infra*) which uses a different wording that inverts the terms of the same phrase: "Cette dernière formule [*i.e.* the one eventually adopted by the 1986 Convention] est même plus correcte que celle de la Convention de Vienne, et elle permet de résoudre plusieurs difficultés", Commentary to article 50 of the I.L.C.'s draft articles on treaties concluded between States and international organisations, *Y.I.L.C.*, 1979, vol. II, p. 147. See *infra* note 6 (commentary to article 51 of the 1989 Convention).
[66] Third Report, *op. cit. supra* note 15, p. 26, § 1 of article 14 of the Code. See also: G. TENEKIDES, *op. cit. supra* note 29, p. 85.
[67] Second Report, Doc. A/CN.4/156 and Add.1-3, *Y.I.L.C.*, 1963, vol. II, § 1 of the Commentary, p. 50.

in point with that corresponding to the coercion of the State organs responsible for "expressing the consent of the State to be bound by the treaty", which was considered tantamount to the coercion of the State itself and consequently coming under the future article 52.[68] For this reason, the special rapporteur submitted a text in which only the "signature" appeared.[69]

27. This question is tangled up with the question concerning the form of conclusion of an international treaty: simplified or formal.[70] The wording eventually adopted by the I.L.C. – and which has remained unchanged ever since – is the fruit of a proposition made by Mr. Ago,[71] according to which the term 'signature' used by the special rapporteur, is understood as meaning the definitive consent (expressed as a signature or in the form of ratification) of a State to be bound by a treaty.[72] Finally, in concern for terminological and conceptual rigour, this expression ("the expression of a State's consent to be bound") was preferred, advisedly, over the narrower and technically erroneous, 'signature'.[73] This new wording was not the subject of discussions during the diplomatic Vienna Conference. Thus, a negotiated treaty signed under coercion against the State representative, but presented for ratification (a treaty concluded in a formal way), cannot be invalid on the basis of article 51, precisely because there has not been any coercion against the State organ "expressing the consent of the State to be bound by the treaty."[74] Those treaties that could be the object of a claim to void a treaty under article 51 are: a) treaties concluded in a simplified form; b) treaties concluded in a formal manner on the condition that the coercion is (equally) directed against towards the organ "expressing the consent of the State to be bound by the treaty". In this second case, in the absence of any indications furnished by either the travaux préparatoires or subsequent practice of States and

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[68] In response to Sir Humphrey Waldock (705th meeting, *Y.I.L.C.*, vol. I, 1963, p.211, § 27) Mr. Verdross commented (*ibid.*, § 24) that he thought that the future article 51 would cover both coercion against negotiators *and* coercion against organs with ratifying power. Such a treaty, he added, could not be *valid* by "a subsequent ratification", contrary to the opinion of Sir Humphrey Waldock. In a similar vein to the latter: P. GUGGENHEIM, *Traité de droit international public*, Vol.1, Geneva, Georg, 1967, pp. 181 and following.

[69] Fifth Report, Doc. A/CN.4/183 and Add 1 – 4, *Y.I.L.C.*, 1966, Vol. II, p. 15.

[70] Refer to the relevant commentaries: articles 11 to 15. This overlapping was highlighted in the comments of the United Kingdom government, which noted that "It is not clear whether paragraph 1 of this article would cover signature of a treaty which is subject to ratification and, if so, whether a signature procured by coercion is capable of being ratified" (*op. cit. supra* note 34, p. 344).

[71] *Y.I.L.C.*, 1966, Vol. 1, Part I, 825th meeting, p. 23, § 65. In the same vein: Mr. Briggs (*ibid.*, § 57) and Yasseen (*ibid.*, § 60).

[72] The articles constituting the posterior doctrine support this interpretation: G. NAPOLETANO, *op. cit. supra* note 14, pp. 48 and following; R. MONACO, *Manuale di diretto internazionale pubblico*, 2nd ed., Torino, Utet, 1971, p. 112, § 45; F. PRZETACZNIK, *op. cit supra* note 15, pp. 183-184. Against: Sir I. SINCLAIR, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester, M.U.P., 1984, p. 176.

[73] Revised draft articles, Doc. A/CN.4/L.117 and Add.1, *Y.I.L.C.*, 1966, vol. II, p. 120. In this vein, and before the codification by the I.L.C.: Lord A. McNAIR, *op. cit. supra* note 15, p. 207; A. CAVAGLIERI, *op. cit. supra* note 14 p. 21; I. TOMSIC, *La reconstruction du droit international en matière des* (sic) *traités*, Paris, L.G.D.J., 1931, pp. 94-95.

[74] According to G. NAPOLETANO (*op. cit. supra* note 14, p. 53) and A. ROSS (*A Textbook of International Law. General part*, London, Longmans, New York, Green, 1947, p. 210), it is nevertheless possible to have invalidity based on fraud. The international agreement is ratified in effect under the influence of an erroneous representation of the effective reality, induced by the fraudulent behaviour conducted against the signatory State. According to the first author, this conclusion is supported by the fact that often, within the I.L.C., violence against a state representative has been considered similar to fraud.

international tribunals, the question of the proportion (*i.e.* how many members of the organ must be affected by the coercion?) remains in suspense. On may nevertheless put forward a hypothesis by maintaining that a certain "quota" is required in order to consider a decision of this sort to have sufficiently affected by the coercion.[75]

28. May we speak, in relation to the wording of article 52, of a difference in the sanctions envisaged by the international legal order? According to Cambacau:

> "le premier [article 51] invalid[e] l'engagement et le second affect[e] la validité du traité dans son ensemble."[76]

In article 51, the emphasis is thus placed on what is immediately obtained by the coercion, that is to say, the consent. Whereas in article 52, the emphasis is placed on what is consequently obtained by the coercion, namely the treaty! However, the consequences are exactly the same, namely absolute invalidity, for – as we shall see later – in both cases the sticking point is the same article of the Convention, article 69 (and in particular, § 3), which regulates the legal effects of coercion of an international treaty.[77]

29. The I.L.C. debated for a long time over the issue of whether the threat to bomb the State representative's country could fall within the scope of application of article 51. According to Sir Gerald Fitzmaurice[78] and his successor, Sir Humphrey Waldock,[79] such a threat does not fall within the category envisaged under article 51.[80] It is rather article 52 that is in play, resulting not only from an examination of State practice,[81] but also and moreover of judicial logic, which considers coercion of a State as a specific basis for invalidating international treaties. In order to fall within the scope of article 51, it is thus necessary to demonstrate *a fear directly experienced by the representative himself*.[82] Article 51 conceives of the State representative only as a human being and not a State organ; only the personal interests of the representative can be taken into account. Only the *fear* that he feels as a human being is relevant for the purposes of this article. For, as has been quite correctly observed:

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[75] See the episode of the Polish state assembly (§ 19) and of the Haiti senate (§ 20).
[76] ("the first [article 51] invalidates the commitment and the second affects the validity of the treaty in its whole", unofficial translation) J. COMBACAU and S. SUR, *op. cit. supra* note 15, p. 130. In the same vein: G. BARLIE, *op cit. supra* note 15, p. 88; G. TENEKIDES, *op. cit supra* note 29, p. 95; Comments by the Portuguese government, *op. cit. supra* note 20, p. 371.
[77] Voy. *Infra* III.2.
[78] Third Report, *op. cit. supra* note 14, p. 39, § 61.
[79] Second Report, *op. cit. supra* note 67, p. 52, § 2 of the Commentary.
[80] Comment by Mr. Bartos (826th meeting, *Y.I.L.C.*, 1963, vol. I, p. 28, § 40): "Exercer un chantage à l'égard d'un plénipotentiaire en le menaçant de dévoiler des faits de sa vie privée et menacer de bombarder les villes d'un pays sont deux choses complètement différentes". Against: Mr. Paredes (705th meeting, *Y.I.L.C.*, 1963, vol. I, pp. 211, § 22).
[81] *Law of Treaties. Draft Convention*, *op. cit. supra* note 14, pp. 1152-1154.
[82] To highlight further the difference in relation to the case in point of article 52, in the 717th meeting the adverb "personnellement [in their personal capacities]" was added (*Y.I.L.C.*, 1963, vol. I, p. 312), but was eventually not included in the final version following the Austrian proposal at the Vienna Conference. Austria was of the opinion that it was limited to "la portée de cet article. On peut, par exemple, exercer des menaces contre un member de la famille su répresentant s'un Etat" (Doc. Off., C.R.A., 2nd s., p. 96, § 63).That was the contribution of the Vienna Conference to the codification of article 51! For curiosity's sake, it is worth noting that a rude drafting error slipped into the text that was submitted for final adoption: we are speaking of here of 'coercion exercised *by* a representative' instead of '*against* a representative'!

> "…l'individu seul éprouve la pression exercée sur sa volonté, lui seul peut mesurer la portée du mal dont il subit la menace, et peut adapter sa conduite dans le but d'éviter."[83]

Threats against the country, against the State itself having been excluded from the scope of application of article 51, it is thus envisaged that

> "…toute forme de contrainte matérielle ou menace exercée contre un représentant pris en tant qu'individu et non pas en tant qu'organe de l'Etat qu'il représente. Elle englobe donc non seulement les menaces contre la personne de ce représentant, mais encore la menace de ruiner sa carrière en révélant des faits de caractère privé, comme aussi la menace de nuire a un membre de la famille de ce représentant, faite dans l'intention d'exercer une contrainte contre ce représentant lui - même."[84]

30. Coercion must therefore affect the private sphere of the individual – organ: his life, his affections, his patrimony, the lives of others that are dear to him, his reputation, his dignity, his career, etc. Of course, there must be a causal link between the threat, the fear felt afterwards by the State representative, *and* the 'expression of consent' to be bound to the treaty. However, it is not necessary – following the example of article 52 – that the coercion is *alone* in determining the expression of the representative.[85] The State claiming to be victim carries the burden of proof, and must demonstrate that because of the existence of this fear, its representative found himself coerced into accepting the treaty.[86] Both the preceding,[87] and posterior doctrine[88] to the Convention appear to support the choice made by the I.L.C. in relation to the forms of violence, that follow the pre-existing customary rule. In conclusion it must be highlighted that, as Sir Gerald Fitmaurice has so well put, forms of pressure that do not contain an element of fear, do not fall within the scope of article 51.[89]

<u>2. Forms of coercion: the scope of application *ratione materiae*</u>

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[83] ("the individual alone feels the pressure exerted on his free will, only he can measure the extent to which he is under threat, and can adapt his behaviour in order to avoid it", unofficial translation) E. VITTA, *op. cit. supra* note 15, p. 120.

[84] ("…all forms of material coercion or threats exerted against a representative are taken in respect of the individual and not against the State organ that he represents. Coercion thus encompasses not only threats against the person of the representative, but also threats to ruin his career by revealing facts of a private nature, and similarly threats to harm members of the representative's family, done with the intention of exerting coercion against the representative himself", unofficial translation) I.L.C. draft articles, commentary to article 35 (*Y.I.L.C.*, 1963, vol. II, pp. 197). This passage was not subject to any changes and was adopted in the way it appears by the I.L.C and by the Vienna Conference.

[85] See the commentary to article 52 of this book.

[86] *Ibidem*.

[87] J. DE LOUTER, *op. cit supra* note 14, p. 478; G. BALLADORE PALLIERI, *Diritto internazionale pubblico*, 8th ed., Milan, Giuffrè, 1962, p. 243; *Law of Treaties. Draft Convention*, *op. cit. supra* note 14, pp. 1152 and 1154; G. MORELLI, *Nozioni di diritto internazionale*, 7th ed., Padoue, Cedam, 1967, p. 285; A. CAVAGLIERI, *op. cit. supra* note 14, pp. 21-22.

[88] G. NAPOLETANO, *op. cit. supra* note 12, pp. 45 and following; R. MONACO, *op. cit. supra* note 72, p. 112; P. REUTER, *op. cit. supra* note 27, § 267; F. CAPOTORTI, *op. cit. supra* note 15, p. 182; T. ELIAS, *op. cit. supra* note 33, p. 169; Sir I. SINCLAIR, *op. cit. supra* note 72, p. 177. Against: G. TENEKIDES, *op. cit. supra* note 29, p. 85; However, this argument is very difficult to sustain in view of, among other elements, the travaux préparatoires of the I.L.C and the Vienna Conference.

[89] Third Report, *op. cit. supra* note 14, p. 26 (§ 2 of article 14 of the Code).

31. First some words about the forms that coercion assumes. The legal science of international law[90] distinguishes between two forms of violence derived from Roman civil law: physical violence and moral violence.[91] In relation to the former, reference may be made to brute force, whereas for the latter we return to the notion of fear ("*metus*"). In the first case, we are concerned with almost emptying the body of the coerced person of all its free will, and substituting this for another's will. The civil law considers moral violence as a basis of invalidity because it is a defect of consent; it thus presupposes the existence of a "consenting being". However, physical violence cannot be considered as a basis for invalidity – in the absence of a real "consenting being", but rather as a basis for the inexistence of the legal act.[92] In the latter case it is simply the destruction of free will. This dichotomy is also made in the common law, where it is a question of absolute violence ('physical compulsion') and relative violence ('duress' properly so-called):

> "Under the general principles of contract law relating to assent, if a victim acts under physical compulsion, for instance, if he signs a writing under such force that he is a 'mere mechanical instrument', his actions are not effective to manifest his assent."[93]

Does article 51 cover both types of violence? On the basis of an analysis of the I.L.C. *travaux préparatoires*, in which *fear* is discussed, we are inclined to affirm that only moral violence may be invoked in the application of article 51.[94] In effect, although the 1958 draft of Sir Gerald Fitzmaurice appeared to support a version in which the two types of violence were included, [95] the final draft of the I.L.C., as well as the Vienna Convention on the law of treaties, only include moral violence. What is imported and integrated into the notion of coercion is, consequently, *intimidation*. Moreover, the 1963 Waldock Report[96] only refers to "effective coercion or the threat of coercion",[97] terms that are difficult to associate with physical or absolute violence.

33. The significance of the above is that a treaty concluded by a State representative under a form of physical violence may be considered as valid. The treaty will not be valid, not because there was a defect in consent, but because the free will of the actor substitutes that of the State. Absolute violence does not therefore

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[90] *Cf.* R. QUADRI, *op. cit. supra* note 15, p. 166; E. VITTA, *op. cit. supra* note 15, pp. 102-103; G. MORELLI, *op. cit. supra* note 907, pp. 283-284; A. CAVAGLIERI, *op. cit. supra* note 14, p.4.

[91] Respectively: *vis absoluta* and *vis compulsiva*. *Cf.* P. BONFANTE, *op. cit. supra* note 5, p. 92.

[92] *Cf.* A TORRENTE et P. SCHLESINGER, *Manuale du diritto privato*, 14th ed., Milan, Giuffrè, 1994, § 97, p. 162 (and article 1434 of the Italian civil code).

[93] A.E. FARNSWORTH, *Contracts*, Boston, Aspen, 1982, § 4.16, p. 257. In the same vein: G. CRISCUOLI, *Il contratto nel diritto inglese*, Padova, Cedam, 1990, p. 262; *Restatement of the Law*, 2nd ed., 1981, Vol. 1, § § 174-175.

[94] *Cf.* G. NAPOLETANO, *op. cit. supra* note 14, pp. 39 and following; Comment by Mr. El Rian (681th meeting, *Y.I.L.C.*, 1963, vol. I, p. 51, § 53). According to Mr. Paredes (*ibid.*, p. 47, § 9), whose proposal was rejected by the I.L.C., there would nevertheless be an act of coercion that would invalidate consent to the extent that the treaty would be null. However, he argued it is still coercion within the meaning of article 51.

[95] *Op. cit. supra* note 15, p. 40, § 62. See also: *Law of Treaties. Draft Convention*, *op. cit. supra* note 14, p. 1151.

[96] § 1 of article 11, *op. cit. supra* note 67, p. 50.

[97] The first refers to coercion already swallowed, consumed, and the second only to the threat of this occurring. It is precisely what is understood by the term of 'duress' in Anglo-Saxon legal lexica. *Cf. Black's Law Dictionary*, 6th ed., St Paul, West Publi. Co., 1991, p. 504.

feature among the reasons for invalidating an international agreement, but rather as a cause of their non-existence.[98] For it will not be a real conventional legal act, but rather a unilateral act imposed by the violence of another State.

34. A final clarification on the subject of the origin of coercion.[99] Article 51 differs from the other causes of invalidity that precede it, insofar as there is no indication of the origin of coercion in the clause itself, nor in the corresponding commentary. This is hardly surprising, as this question was never raised during the I.L.C. debates – and even less so during the *travaux préparatoires* at the Vienna Conference. It matters little from whence coercion comes as long as it is sufficiently well sketched to make its profile clearly discernible. One could imagine it as a third State – even an international organization – in relation to a treaty or negotiation, that undertakes to carry out the dirty job; one could also envisage private individuals, regardless of their nationality, who threaten a State representative. The origin of coercion is thus absolutely without pertinence for the application of article 51. The rare comments that have attempted to explore this issue confirm this point of view.[100] The difference between article 51 and the preceding reasons for invalidating international treaties, in relation to the origin of the illegal act causing a defect in the consent, is explained by the fact that, for article 51, we reach the limited category of reasons for absolutely invalidating a treaty.

III. Type of invalidity and legal effects of coercion

1. Type of invalidity

35. Article 51 is situated on the dividing line between reasons for relatively invalidating a treaty, and reasons for absolutely invalidating a treaty.[101] The definite swing of 'coercion against a State representative' into the category of absolute invalidity finally allows us to clarify the original (almost revolutionary) distinction drawn between relative and absolute invalidity.[102] The emergence of this distinction was not without difficulties. 'Coercion against a State representative' became a

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[98] *Cf.* G NAPOLETANO, *op cit. supra* note 14, p. 44.

[99] By this expression reference is made to the authors of the coercion. That is to say, to those (States participating on negotiation, simple individuals, moral persons, etc.) from which the coercion directed against a State representative emanates.

[100] *Cf.* G. TENEKIDES*, op cit. supra* note 29, p. 86; P. REUTER, *op cit. supra* note 27, § 269.

[101] R. AGO (commenting during the *Y.I.L.C.*, 1966, Vol. I, Part I, 825th meeting, p. 22, § 64) was quite conscious of what was at stake when he said that "[i]t was for the Commission to decide *where* to draw a distinction : between coercion and fraud, or between the personal coercion of representatives of States referred to in article 36 ?" [emphasis added].

[102] For coercion as a reason for absolute invalidity: Comment by Mr. M Yasseen (681th meeting, *Y.I.L.C.*,1963, vol. I, p. 50, § 46), Amado (*ibid.*, p. 50, § 49), de Luna (825th meeting, *Y.I.L.C.*, 1966, vol. I, 1st part, p. 23, § 78), Amado (*ibid.*, pp. 23-24, § 79), Ago (*ibid.*, p. 24, § 81), Bedjaoui (826th s., *ibid.*, p. 25, §12), Bartos (*ibid.*, § 15), Tunkin (*ibid.*, p. 26, § 20-21), Elias (*ibid.*, p. 28, §46), similarly the comment by the Portuguese government (*Y.I.L.C.*, 1966, Vol. II, p. 327) and the Thai delegation (*Y.I.L.C.*, 1966, Vol. II, p. 18). *Against*: Castren (681st s., *Y.I.L.C.*, 1963, vol. I, p. 51, § 56), Sir Humphrey Waldock (*ibid.*, p. 51, § 59), Cadieux (*Y.I.L.C.*, 1966, Vol. I, Part I, 826th meeting, p. 25, § 4), Rosenne (*ibid.*, p. 26, § 23) similarly the comment by the Israeli government (*A.C.D.I.*, 1966, vol. II, p.295), United States (*ibid*, p. 353) and the Pakistani delegation (*ibid.*, p. 323). By five votes for relative invalidity against nine votes for absolute invalidity, the I.L.C. finally decided at the conclusion of the 826th meeting.

separate reason for invalidity, set out in its own distinct article, during the simultaneous growth of its false twin.

36. Corruption, precisely. Its emergence among the reasons for invalidity codified by the I.L.C. in its draft articles is due to the successive – and definitive – tendency to draw together and align it with coercion. [103] Thus, the birth of a new basis for invalidity. [104] In this way the forces of repulsion / attraction sparked a conceptual *friction* between the two notions, bringing to light the profound differences that characterised each one respectively. It may be said that in a certain way the 'self separation' of corruption allowed coercion of a State representative to lose any connotations to relative invalidity – not numerous it must be said – and to affirm its connotation to violence (and thus absolute invalidity). It should be noted in passing that the discussion concerning corruption was brought about almost by chance, during a session set aside for the drafting of a future article 51,[105] and that, nevertheless, the decision concerning its fate was made quite quickly. Coercion thus definitively left the category of reasons for relative invalidity, to join reasons for absolute invalidity, a new fragment – in the law of treaties – of the future public international order.

37. The choice taken by the I.L.C. – and confirmed by the Vienna Conference – perfectly agrees with the preceding[106] and posterior[107] doctrine, thereby demonstrating the soundness of the decision.[108] An explicit reference to absolute invalidity was included by the use of the wording "shall be without legal effect" instead of "State…may".

2. Legal effects of coercion

38. Absolute invalidity it is then! What however does this mean in the jargon of the I.L.C.? We will examine this notion in relation to the prism of the 4 attributes of

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[103] Notably from the 840th meeting onwards (*A.C.D.I.*, 1966, vol. I, 1st part, pp. 122-123) and during the whole of the 862nd meeting (*ibid.*, 2nd part, pp. 155-164) in which the final act of fission was completed. See, for example, the commentary to article 50 in this book.

[104] S.E. NAHLIK, *op. cit supra* note 33, p. 743.

[105] 840th s., *A.C.D.I.*, 1966, vol. I, 1st part, pp. 122 and following.

[106] C. PARRY, *op. cit supra* note 333, p. 203; G. MORELLI, *op. cit. supra* note 907, p. 285; P.A. SERENI, *op cit. supra* note 15, Vol. 3, pp. 1312 and 1314; G. BALLADORE PALLIERI, *op. cit. supra* note 877, p. 243. *Against*: *Law of Treaties. Draft Convention*, *op. cit. supra* note 14, p. 1159; P. GUGGENHEIM, 'La validité et la nullité des actes juridiques internationaux' *R.C.A.D.I.*, 1949, I. vol. 74, p. 209 [although, following this approach, relative invalidity as conceived of by this author is singularly close to absolute invalidity as this concept is understood in the Convention].

[107] *Restatement of the Law*. *The Foreign Relations Law of the United States*, *op. cit. supra* note 33, § 331 (article 2 a); T.O. ELIAS *op. cit supra* note 33, p. 380; P. CAHIER, 'Les caractéristiques de la nullité en droit international' *R.G.D.I.P.*, ., 1972-73, p. 682; G. BARLIE, *op. cit supra* note 15, p. 87; A. GOMEZ ROBLEDO, 'Le *ius cojens* international: sa genèse, sa nature, ses fonctions', *R.C.A.D.I.*, 1981, III, vol. 172, p. 142; F. CAPOTORTI, *op. cit supra* note 15, p. 182; T.O. ELIAS, *op cit. supra* note 33, p. 169; M. GUILIANO, T. SCOVAZZI and T. TREVES, *op. cit. supra* note 14, p. 469; A. VERDROSS et B. SIMMA, *op. cit. supra* note 33, p.784, § 477; J. COMBACAU, *Le droit des traités*, Paris, P.U.F., 1991 (Collection 'Que sais-je', no. 2613), p. 112. *Against*: G. SCHWARZENBERGER, *op. cit. supra* note 33, p. 128.

[108] During the Vienna Conference an amendment was proposed *in extremis* by the United States of America (looking to include the term 'If' before 'expression' and consequently, "peut invoquer cette contrainte comme viciant son consentement à être liés par le traité") but it was rejected – including the Australian and French clones – by forty-four votes to twenty-six with eighteen abstentions (Doc. Off., C.R.A., 1st meeting, p. 184).

absolute invalidity that differentiate article 51 from the relative bases of invalidity, namely: a) the title holder, b) the impossibility to cure the defect in consent, c) the separability, and d) the consequences of this invalidity.

39. 'Title holder' may be understood as the question as to which State(s) have the capacity to invoke article 51 as a basis of invalidity. Before entering into this analysis it is noted that in the preceding bases for invalidating a treaty, no condition is specified in this respect. It follows that any State – party to a treaty or having participated in the negotiation – may claim the treaty to be void. May a third State to the treaty invoke such as basis of invalidity? In light of articles 65 and 66 – that prescribe the procedure to follow – nothing is less certain. In effect, the only legal interest that a third State may have would be to sanction or coerce a representative of a State, that is by questioning the formation of a conventional legal act.[109] This is however a question that concerns international responsibility and, as such, escapes regulation under the Convention.[110]

40. The second attribute of this invalidity concerns the impossibility for a State-victim to cure and rehabilitate the defect in its consent, and consequently the impossibility to keep and to resuscitate the treaty in conformity with article 45 of the Convention.[111] This is perhaps the essential attribute of the notion of absolute invalidity.[112] For a long time the I.L.C debated this question and its solutions frequently oscillated between two opposing poles, but it finally adopted the impossibility for the State, the consent of which had been obtained under coercion, to cure the invalidity.

41. In effect, under pressure from the majority of the I.L.C. members, the article 11 proposed[113] by Sir Humphrey Waldock[114] reappeared completely transformed during the 705th session, whereas its ancestor had constituted only one paragraph and, moreover, was drafted in objective, absolute and radical terms:

> "If individual representatives of a State are coerced, by acts or threats directed against them on their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect"[115]

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[109] *Cf.* the comment by Mr. Tunkin (681st s., *A.C.D.I.*, 1963, vol. I, p. 48, § 29).
[110] *Cf.* the comment concerning article 73 of the Convention in this book.
[111] *Cf.* the comment concerning article 45 of the Convention in this book.
[112] One can however ask oneself if this is a rule on the merits – really allowing for the cleaning up of the vice – or a procedural rule - being an obstacle to the act of declaring null a treaty.
[113] Article 11 as well as article 35 are the *forerunners*, in the line of different numerations of what would eventually become article 51 of the Convention.
[114] "Si la coercition effective ou la menace de coercition physique or morale, a été exercée contre des représentants d'un Etat ou des membres d'un organe de l'Etat en ce qui concerne leur personne ou leurs intérêts personnels, en vue de es amener à signer ratifier, accepter ou approuver un traité ou à y adhérer, l'Etat est intéressée est en droit après avoir découvert le fait: De déclarer que la coercition rend non avenu l'acte de son représentant, ou que ledit acte est nul *ab initio*", Article 11 of the Second Report of 20 March 1963, Doc.A/CN.4/156, *Y.I.L.C.*, 1963, vol. II, pp. 50-51.
[115] 705th meeting, *Y.I.L.C.*, 1963, vol. I, p. 211, § 19.

42. We now only speak of “expression of consent for a state to be bound by a treaty” and it is at this moment that we swing – in a rather hesitant way[116] – between relative invalidity and absolute invalidity, on the basis of the following reasoning: a) the deletion of § 2 (which allowed for the subsequent ratification of an act expressed under coercion), and b) the objectification of the wording employed: from “A State may…” to “…the expression is…”. Article 11 thus became article 35, which was finally adopted without comment by the I.L.C. in its 893rd session.[117]

43. This approach is even more innovative than that taken by the special rapporteurs who had resolutely foreseen the possibility, for the benefit of the State-victim, of curing the invalidity of such a treaty.[118] However, the approach taken by the special rapporteurs was not favoured[119] by the majority of the I.L.C. members who joined in condemning such a cure of the treaty – which is should rather be qualified as the resurrection of a dead-born treaty.[120]

44. In conclusion, the State-victim – if we may continue to call it as such – may not subsequently approve a treaty in relation to which it had previously been tied to by an act of its State representative performed under coercion (article 45(a)). Analogously, the same State, as well as any State party or State that participated in the negotiation, never loses its right to invoke the invalidity of an international treaty, which is to say that there is no time-limit to making such a claim (b). However, as Mr. Yasseen rightly pointed out,

> “If the State considered that the treaty might be to its interests, it could always conclude a fresh treaty similar to the one procured by coercion.”[121]

45. The third attribute of absolute invalidity insofar as it characterises article 51, is the notion of separability. Namely, the possibility – or the obligation – for a State-victim to invoke the invalidity of a treaty solely in respect of certain parties to the

[116] During the 717th meeting, a new paragraph was drafted, allowing for the seperability of a treaty in the case of invalidity (*Y.I.L.C.*, 1963, vol. I, p. 288, § 9) but the new commentary (Report of the I.L.C. to the General Assembly of the United Nations, *Y.I.L.C.*, 1963, vol. II, pp. 197) did not appear to clarify the legislative choice operated by the I.L.C. The contradiction between these two paragraphs was raised again, with raison, in the comment of the Israeli government (*Y.I.L.C.*, 1966, Vol. II, p. 295) and, among the other members of the I.L.C., by Rosenne (*Y.I.L.C.*, 1966, Vol. I, Part I, 826th meeting, p. 26, § 22) who supported the *relative* and not *absolute* character of this basis for invalidating a treaty.
[117] The latter mutation transformed, without however affecting the wording, into article 48 and as proposed during the Vienna Conference.
[118] Third Report of Sir Gerald Fitzmaurice, *op. cit supra* note 15, § 5 of article 14 of the Code (p. 26) and corresponding commentary: “L’accord est général sur ce point et la raison d’être de ce paragraphe est évidente” (p. 40, § 64). Second Report of Sir Humphrey Waldock, *op. cit. supra* note 69, p. 18. During the Vienna Conference, the Australian delegation had submitted a proposal (looking to specify a deadline – twelve months following the discovery of the coercion – after which time the State, whose consent was invalidated by coercion, could no longer invoke article 51), but this was rejected by 56 votes to 17 and 13 abstentions.
[119] Article 35 of the draft articles adopted by the I.L.C. in 1963, *opt. cit supra* note 844; Article 35 of the revised draft articles presented at the I.L.C. in 1966 by the special rapporteur, *op. cit. supra* note 73; Article 48 of the draft articles definitively adopted by the I.L.C. in 1966, *op. cit. supra* note 30.
[120] In chronological order: Paredes (681st s., *Y.I.L.C.*, 1963, vol. I, p. 47, § 9), Tunkin (*ibid.*, p. 48, § 28), Ago (*ibid.*, p. 49, § 39), Verdross (*ibid.*, p. 50, § 43), Bedjaoui (*Y.I.L.C.*, 1966, Vol. I, Part I, 826th meeting, p. 25, § 11), de Luna (*ibid.*, p. 26, § 19), Bartos (*ibid.*, § 25), Elias (*ibid.*, p. 28, § 47). *Against*: Cadieux (*Y.I.L.C.*, 1966, Vol. I, Part I, 826th meeting, p. 26, § 24).
[121] *Y.I.L.C.*, 1966, Vol. I, Part I, 825th meeting, p. 22, § 62.

treaty or in relation to certain treaty clauses. This question is closely tied to that analysed above. There also, we noted an opposition between the majority of the I.L.C. members – who opted for the principle of inseparability of the treaty – and the special rapporteur, Sir Humphrey Waldock.[122] We will not unnecessarily tarry over this question, as it had already been the subject of a detailed analysis.[123] It was finally decided, on the basis of a proposition put forward by the rapporteur himself, that the question of separability would be regulated in a general manner for all bases of invalidity, suspension and extinguishment, in one common article, the future article 44 of the Convention.[124]

46. There remains to examine the question of the effects of the invalidity of the treaty[125] as well as the procedure to follow to obtain such a determination.[126] It should first be noted that in relation to a basis of absolute invalidity, the consequences are more severe than those for relative invalidity. Following the example of the discussion as to the relative or absolute character of this basis of invalidity, the debates over the formulation of article 51 catalysed many problems concerning the automatic invalidity in relation to which the draft was finally retained. The rapporteur had in effect maintained – among other arguments – his opposition to considering article 51 as a reason for absolutely invalidity, on the basis that this would signify in his eyes a "nullitie d'office" giving place to:

> "…unilateral assertions might be made which would seriously undermine the stability of the treaty-making process and, in the absence of an international judge, would give free rein to subjective judgment by the State concerned."[127]

47. The special rapporteur appeared to amalgamate two distinct frameworks. Even in clear situations of invalidity on the basis of error, for example, a State-victim may, by unilateral declaration, bring a claim to stabilise conventional relations. It is thus the case that invalidity, even absolute invalidity, does not exist *de plano*: the State bringing a claim must follow a procedure.

48. We therefore believe that the real question is not one of the specific bases of invalidity nor the category to which they belong – absolute or relative – but is rather a procedural problem[128]. As Mr. Ago stated:

> "In the case of coercion…whether it was directed against a person or against the State, or whether it involved conflict with a *jus cogens* rule, the

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[122] A second paragraph was added to his article 11, that precisely foresaw the separability (717th s., *Y.I.L.C.*, 1963, vol. I, p. 290, § 9). This addition constituted in effect the last rampart against the final swing of the future article 51 into the category of absolute invalidity; it remained article 35 § 2 until the draft articles of 1963 (*op. cit. supra* note 844, p. 206, § 4 of the commentary).
[123] Se the commentary to article 44 of the Convention in this book.
[124] Fifth Report, *op. cit. supra* note 69, p. 17 (§ 4 – 5 of the commentary).
[125] This will be a very cursory summary as it was the object of a meticulous study elsewhere: see the commentary to article 69 of this book.
[126] This will be a very cursory summary as it was the object of a meticulous study elsewhere: see the commentary to articles 65 to 68 of this book.
[127] 681st meeting, *Y.I.L.C.*, 1963, vol. I, p. 51, § 59.
[128] See, with regard of the difference between the ground of invalidity invoked and the right to activate the procedure: « Le Protocole de Londres du 17 janvier 1871 : miroir du droit international », *Revue d'histoire du droit international / Journal of the History of International Law*, Vol. 6 (2004-1), pp. 113-126.

> Commission had not wished the nullity to depend on the will of one party; it took effect *ex lege and erga omnes*. Of course some form or procedure for recognition of the fact would also have to be followed in the latter case; but the distinction was fundamental and it should not be lost sight of merely because there was a procedure to be followed."[129]

49. In the specific case of article 51, the consent *obtained* by coercion of a State representative "shall be without any legal effect"; the treaty is void.[130] The legal consequences of this invalidity are addressed in the commentary to article 69 of the Convention (in particular at § 3).

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[129] 719th meeting, *Y.I.L.C.*, 1963, vol. I, p. 312, § 57.
[130] See *supra* § 28.
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