Vanderbilt Journal of Transnational Law

Volume 4
Issue 1 *Winter 1970*

Article 1

1972

A New Concept of Consent and World Public Order

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A NEW CONCEPT OF CONSENT AND WORLD PUBLIC ORDER: "COERCED TREATIES" AND THE CONVENTION ON THE LAW OF TREATIES

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I. Introduction — The New Concept of Consent in Treaty Law and Traditional International Law.

Generally, the basis of obligation under traditional international legal theory has been consent of the state in assuming the obligation.[1] Professor Brierly stated in 1928 in his lectures delivered at the Hague Academy of International Law,

> The doctrine that consent may be a basis of legal obligation is at least as old as the Digest, where Hermogenianus is quoted for the proposition that rules which have been approved by long custom and observed for very many years, are observed no less than those which are written . . . and it would be possible to collect an imposing array of authority to a similar effect from subsequent legal literature.[2]

The Permanent Court in the Lotus Case stated a judicial version of Professor Brierly's observation when it noted,

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1. This is a basic tenet of the positivist school of international law. A major dissenter from this proposition during the inter-war period was Professor Brierly. See J. BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 1-66 (H. Lauterpacht & C. Waldock eds. 1958). For the original French verson, see Brierly, Le Fondement du Caractere Obligatoire du Droit International, 23 RECUEIL DES COURS (NETH.) 463 (1928).

2. Id. at 9. Professor Brierly rejected the positivist notion that consent forms the basis of international obligations

> The rules of law building upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[3]

There have been, however, many instances under traditional international legal theory when a state's consent has not been required. Professor Brierly, in a trenchant critique, has stated that consent as the basic concept of obligation under customary international law has involved no more than the use of a legal fiction.[4] Moreover, the traditional notion of consent in treaty law has stated that any form of coercion on the state does not invalidate a treaty; freely given consent is not required.[5] Furthermore consent by new states to

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in international law. "The attempt to build the state out of a social contract has been abandoned by political philosophy for at least a century, and the attempt to base international law on the consenting wills of individual states alone is merely a survival in the international field of this discredited doctrine." Id. at 16.

3. The Case of the S.S. "Lotus", [1927] P.C.I.J., ser. A, No. 9, at 18; 2 M. HUDSON, WORLD COURT REPORTS 35 (1935); see Green, The Impact of the New States on International Law, 4 ISRAEL L. REV. 27 (1969).

4. "The truth is that the doctrine that tacit consent can be the ultimate basis of obligation in customary law has always involved a fiction, for it requires us to assume from the mere fact that a rule is observed and treated as obligatory that those who recognize its obligatory force have consented to it, and this may or may not be true in fact." J. BRIERLY, supra note 1, at 12. Mr. Oscar Schacter identified a "baker's dozen of [theories] which have been put forward as the basis (or as one of the bases) of obligation in international law . . . ." Schacter, Towards a Theory of International Obligation, 8 VA. J. INT'L L. 300, 301 (1968). In addition to consent of states, which is listed first, he adds in part, customary practice, natural law, consensus of the international community, social necessity, systemic goals, shared expectations and rules of recognition. Id.

5. Professor Whitton stated in 1935, "The law of nations permits, indeed even sanctions certain agreements which lack an

existing rules of customary international law has been implied regardless of any actual consent. The positivist theorists have presumed that the states which came into existence in 1919 implicitly consented to the existing international law when committing their first state acts.[6]

More recently, however, the Afro-Asian states that have come into existence since 1945 have challenged this traditional notion of consent that obligates states to observe rules of international law to which they have never actually consented.[7] These states, as well as the Latin American and Communist states,[8] have also objected to those legal rules that do not require freely given consent as a prerequisite to treaty obligations. In an effort to establish a requirement of actual and freely given consent as the basis of international obligations, these "new states"[9] have attempted to translate the principle of sovereign equality into specific rules of international law and to apply these rules to the traditional notions

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element considered in all legal systems as indispensible to the validity of a contract: the will of the parties freely expressed. As is well known, a treaty obtained under duress may be legitimate in international law, and this anomaly is the direct consequence of another peculiarity of the international system: the prevalence of wars, which end almost inevitably in a treaty imposed by force." Whitton, The Sanctity of Treaties (Pacta Sunt Servanda), 313 INT'L CONCILIATION 393, 406 (1935).

6. J. BRIERLY, supra note 1, at 12. Professor Brierly discussing W. HALL, INTERNATIONAL LAW 48 (8th ed. 1924).

7. S. SINHA, NEW NATIONS AND THE LAW OF NATIONS 84 (1967); J. SYATAUW, SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW 230-34 (1961) (Yale J.S.D. thesis).

8. Freeman, Some Aspects of Soviet Influence on International Law, 62 AM. J. INT'L L. 710 (1968); see K. GORZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW 445, 448 (1970).

9. In this essay, the term "new states" refers to the underdeveloped states and, in addition, to states of the Communist bloc. It will be used interchangeably with the term "dissatisfied" or underdeveloped states. For a recent discussion of the conflict between the "new" and "old" states, see Friedmann, The Confrontation of Equality and Equalitarianism: Institution-Building Through International Law, in THE RELEVANCE OF INTERNATIONAL LAW 175 (K. Deutsch & S. Hoffmann eds. 1968).

of consent. It is these rules, derived from the legal fiction of absolute sovereign equality,[10] that are being translated into rules of treaty law governing the formulation and interpretation of treaties.[11] The technique of inferring or implying consent as a basis of obligation in conventional international law[12] is specifically rejected. Instead, the new states want rights contracted away to be limited to those rights explicitly contracted away without any coercion. Consent, they argue, must be expressed and narrowly construed. Evidence of this new concept of consent is induced from the work surrounding Article 52 (Coerced Consent Invalidates Treaties) of the United Nations' recently concluded Vienna Convention on the Law of Treaties as it was developed first by the International Law Commission and then by the Vienna

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10. "The principle of state equality in international law was a creation of the publicists. It was derived from the application to nations of theories of natural law, the state of nature, and natural equality . . . . It had its beginning as a naturalist doctrine in the writings of that school of publicists who acknowledged the leadership of Pufendorf and the inspiration of Thomas Hobbes . . . . [T]he principle was reenforced by theories of sovereignty. The absolute equality of sovereign states became one of the primary postulates of le droit des gens theorique." E. DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW 334 (1920).

11. The discussion of Article 52 (Coerced Consent Invalidates Treaties) of the 1969 Convention on the Law of Treaties can be considered a case study in analyzing the difference between the "satisfied" and the "dissatisfied" states. Friedheim, The "Satisfied" and "Dissatisfied" States Negotiate International Law: A Case Study, 18 WORLD POL. 20 (1965).

12. The dissatisfied states' adherence to a strict positivist notion of consent is both paradoxical and a perversion of the inductive approach to international law. These states allege that obligations explicitly induced from contemporary customary practice or treaty practice can bind a state. Yet, they adhere to the concept of sovereign equality, which is a fiction deduced from naturalist theories. "[T]he inductive treatment of international law is . . . . to safeguard international law against the subjectivism of deductive speculation and eclectic caprice, and the vested interests prone to use -- and abuse -- both." G. SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 6 (1965).

Conference of 1968-1969.[13]

The theme of this essay is that this new emerging concept of consent, as evidenced by Article 52, is detrimental to the development of a peaceful international system. The essay's conclusion is that, given this new notion of consent, procedures and rules must be developed for the effective future use of international peacekeeping forces and for treaties to settle international crises.

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13. The International Law Commission began its efforts to codify the law of treaties in 1949. After several interruptions and preliminary drafts the Commission presented its final draft articles to the United Nations General Assembly in 1966. The General Assembly approved the Commission's work and voted to hold the Vienna Convention on the Law of Treaties in 1968-69. Out of this conference 85 Articles were adopted including Article 52 discussed in this essay. See generally Comment, A Background Report on Codification of the Law of Treaties at the Vienna Conference, 43 TUL. L. REV. 798 (1969).

Another development that evidences a new concept of consent pertaining to rules of treaty law under customary international law is the United Nations' practice relating to the interpretation of the governing agreement and the subsequent withdrawal of the United Nations' first peacekeeping forces in May 1967, the United Nations Emergency Force. "[I]t should not be forgotten that international organizations, like states, make law not only by what they say, but also by what they do. Their practice constitutes today one area where customary law is growing at a pace sufficiently rapid for our times." Fatouros, Participation of the 'New' States in the International Legal Order of the Future, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER -- TRENDS AND PATTERNS 317, 361 n.92 (R. Falk & C. Black eds. 1969). Professor Clive Parry argued that the practice of international organizations represents a new authoritative source of international law, even though this source is not mentioned by Article 38 of the Statute of the International Court of Justice. Professor Parry stated, "That this is the case is admirably demonstrated in Mrs. Higgins' recent study of the development of international law through the political organs of the United Nations." [R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963).] C. PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 115 (1965). The practice of the United Nations is that of the

The approach of the essay is to apply a policy-oriented framework of analysis to the discussion of Article 52. This posits a limited contextual approach emphasizing the maintenance of a minimal world public order by managing regional conflict.[14] The point ought to be emphasized that the international legal order is decentralized and reflects a horizontal structure of authority. Such a diverse system necessitates utilizing a limited contextual approach for the purpose of taking into account as many variables as possible.

The essay first attempts to identify the new emerging concept of consent by an analysis of Article 52.[15] Secondly, by the use of a model of a regional conflict, it makes an effort to identify the implications of this new notion of

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withdrawal of UNEF by the Secretary-General under delegated authority from the General Assembly. See generally Elaraby, United Nations Peacekeeping by Consent: A Case Study of the Withdrawal of the United Nations Emergency Force, 1 N.Y.U.J. INT'L L. & POL. 148 (1968). For a convenient collection of documents on the withdrawal of UNEF and all documents relating to the history of UNEF, see R. HIGGINS, UNITED NATIONS PEACEKEEPING, 1946-1967 -- DOCUMENTS AND COMMENTARY 221, 338-49 (1969). Rosalyn Higgins states, "The question of the consent of Egypt . . . was at issue in respect to the establishment of UNEF . . . and its [the host state's] ability to determine the appropriate moment of withdrawal . . . . The need to test the concept of consent arose in dramatic form in May 1967 when President Nassar asked UNEF to withdraw." Id. at 336, 338.

14. FALK, International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order, 32 TEMP. L.Q. 295 (1959). "The principal point . . . is to consider the impact of the extralegal setting of international society upon the tasks of and prospects for international legal order." R. FALK, LEGAL ORDER IN A VIOLENT WORLD at vii (1968) [hereinafter cited as FALK, LEGAL ORDER]. See also R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 513-33 (1970) [hereinafter cited as FALK, STATUS].

15. See S. ROSENNE, LAW OF TREATIES, GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION (1970); Rosenne, The Temporal Application of the Vienna Convention on the Law of Treaties, 4 CORNELL INT'L L.J. 1 (1970). Although the United Nations organs offer considerable assistance, one basic problem in any study of international conduct of the new states is the

consent for international organizations and states as they attempt to utilize peace treaties and treaties governing peacekeeping forces to manage regional conflict. The Arab-Israeli conflict is used as the empirical referent of a model of a regional conflict. Thirdly, it offers several tentative suggestions to counteract the detrimental implications of this new notion of consent and fourthly, the essay concludes by discussing the role of the "new" states in the recent developments in international law.[16]

II. Article 52 (Coerced Consent Invalidates Treaties) of the Convention on the Law of Treaties.

A. General Background

Professor Friedmann has described the general attitude of the new or "dissatisfied"[17] states toward the "outdated" rules of law and participation in codification conventions:

> [New] states feared that they would be subject to the customary rules of international law which they did not recognize and which they had played no part in forming. Others [felt] . . . that the

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"scarcity of relevant materials and documents." Fatouros, supra note 13, at 321.

16. An underlying assumption of the essay's methodology is that state practice in international organizations is authoritative evidence of the concept of consent in rules of treaty law. This essay assumes, also, that the positivist notion of consent can be correctly identified as the "traditional" concept of consent accepted by states prior to World War II. An attempt is first made to analyze recent developments in the international system, specifically the practice of the United Nations and states in the United Nations, in the context of this older notion of consent. Secondly, the essay makes an essentially two-dimensional analysis discussing the impact of Article 52 on the management of regional conflicts and examining the role of the new states in the developing international legal order through the "Commission-Conference" codification process.

17. See note 9 and 11 supra.

> codification and progressive development of international law would facilitate the elimination of outdated and unjust treaties by which the colonial powers were guaranteed advantageous positions.[18]

This general attitude of the new states was manifest at the Vienna Conference of 1968-1969 as it conflicted with the desire of the "older" or industralized states to maintain existing rules. Delegates at the Conference and Commission hearings, by their statements and their votes on Article 52, demonstrated a voting alliance in which the new and underdeveloped states often opposed the older and industrialized states. The Communist states voted with the former group, as did the Latin American states.[19]

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18. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 206 (1964) (emphasis added). See also Stanford, United Nations Law of Treaties Conference: First Session, 19 U. TORONTO L.J. 59 (1969); 574 INT'L CONCILIATION 171 (1969) (discussing Vienna Convention); Comment, A Background Report on Codification of the Law of Treaties at the Vienna Conference, 43 TUL. L. REV. 798 (1969). Professor Percy Corbett has stated: "In the clarification, development and codification of public international law, the United Nations performance already exceeds the entire record of the nineteenth century plus that of the League of Nations. . . . [V]aluable will be the agreement on the Law of Treaties. . . . In the years of scholarly labor devoted to the monumental draft and commentary submitted to the prepatory conference of 1968, the International Law Commission again demonstrated its merits not only as an agency for coordinated international research but as a reconciler of contending theses. To have cleared away ambiguities and filled gaps that abounded in the customary rules on treaties must stand as a major contribution to the peaceful intercourse of states." P. CORBETT, FROM INTERNATIONAL TO WORLD LAW 7-8 (Monograph No. 1, Lehigh University, Dep't of Int'l Relations 1969). "The creative effort of reconstructing international law can produce a general atmosphere of respect for it, if it is revised in such a way that. . . [it cuts] down to an absolute minimum the factors likely in practice to destroy the theoretical equality of states." R. DHOKALIA, THE CODIFICATION OF PUBLIC INTERNATIONAL LAW 334 (1970).

19. Green, supra note 3, at 30-31 (emphasis added). Although this article appeared in 1969, Mr. Green never discussed the Vienna Conference.

In treating Article 52 of the Convention, this section will place particular emphasis on developments since the Committee presented its Final Draft Articles to the General Council in 1966 to the Convention's adoption of Article 52.[20] Pre-1966 developments will be only briefly treated.[21] Article 52 provides: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[22] The treaty was adopted on 22 May 1969 and opened for signature the following day.[23]

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20. See note 13 supra.

21. For an extensive analysis of Article 52 from 1952 to 1966 see, Stone, Approaches to the Notion of International Justice, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER -- TRENDS AND PATTERNS 372 (R. Falk & C. Black eds. 1969) [hereinafter cited as Stone, Approaches]; Stone, De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace, 8 VA. J. INT'L L. 356 (1968) [hereinafter cited as Stone, De Victorious Victis]. The works by Professor Stone discuss the Article 52 prohibition primarily in terms of a prohibition against "imposed treaties." The significance of this shift of emphasis is that it was the new states' participation in the Vienna Conference of 1968-1969 which redefined the prohibition in a manner not intended by the previous Special Rapporteurs or the International Law Commission. This is evidenced by the series of compromises that led to the Final Declaration and Dissemination Resolution in May of 1969.

22. Convention on the Law of Treaties, 8 INT'L LEGAL MATERIALS 679, 698 (1969), U.N. Doc. A/Conf.39/27 (1969). For a discussion of Article 46 see, Kearney, Internal Limitations on External Commitments — Article 46 of the Treaties Convention, 4 INT'L LAWYER 1 (1969). "The United Nations Conference on the Law of Treaties has completed for submission to the nations of the world the most far-reaching codification effort in the field of international law that has thus far been attempted." Id.

23. As of October 1969, the only states that had signed the treaty were the initial 32 states that had signed the Convention in May of 1969, which did not include a major power, and Arab state, or the State of Israel.

It is significant to note that 79 states originally voted in favor of adopting the Convention, 1 against with 17 abstentions. Israel voted in favor of the Convention, France

There are two definitional problems and two underlying non-definitional problems inherent in Article 52. The definitional problems involve the meaning of the phrases "A treaty" and "threat or use of force." The two underlying problems are: how far is the prohibition retroactive, and what are the essential underlying situations intended for regulation. This section discusses these problems as they were considered by the Conference-Commission process of codification.

B. "Codification or Progessive Development" -- The Problem of Retroactivity

At the Vienna Conference the delegates from the Latin American states were in favor of Article 52. The delegate from Ecuador stated at the 1969 Conference: "[N]o article in the draft convention was as important to the future of mankind as Article 49 [52]. . . ."[24] Moreover, these states favored making the Article retroactive. The Ecuadorian delegate pointed out that Article 52 is not a new principle of international law, but a principle that has been a part of treaty law and confirmed by international custom since long before 1945.[25] The rule against coerced treaties, he argued, was implicit in the Covenant of the League of Nations,

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voted against the Convention, the United Arab Republic (the only Arab state), the Communist bloc, and a few other states abstained on the vote. Convention on the Law of Treaties, supra note 22, at 679.

The vote on Article 52 (then numbered Article 49) is of particular significance. Article 52 was adopted by 98 votes to none, with 5 abstentions (Switzerland, United Kingdom, Turkey, Tunisia and Belgium). Both Israel and the United Arab Republic voted for its adoption. United Nations Conference on the Law of Treaties, Second Session Vienna, 9 April - 22 May 1969, Official Records, U.N. Doc. A/Conf. 39/11/Add.1 at 92-93 (1970) [hereinafter cited as Second Session Official Records].

24. Statement by Mr. Escudero, Delegate from Ecuador, Second Session Official Records, supra note 23, at 90.

25. The Latin American states argued that the prohibition against the use of force and its implicit corollary of no coerced treaties has been a rule of regional (inter-American)

as demonstrated by Article 10 wherein League members undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." He further maintained that the Briand-Kellogg Pact might be taken as the date from which the prohibition on the threat or use of force has been applied. Moreover, he suggested that between 1928 and 1945, this prohibition of the use of force had become a preemptory norm, for which Article 2(4) of the United Nations Charter is merely a codification.[26]

It is interesting to note the support given to the Latin American states by the Communist states. At the First Session of the Conference in 1968, for example, the delegate from Bulgaria argued that the principle against coerced treaties has been formulated since long before the establishment of the United Nations at which time the nullity of a treaty procured by the threat or unlawful use of force had already become lex lata in modern international law.[27]

It is also significant to note the objections raised by some of the states that abstained in the voting on Article 52.[28] The Swiss delegate, for instance, stated:

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international law, established considerably before 1969 or 1945. "The . . . [principle of] Article 49 [52] of the convention had been observed in inter-American law since 1826 . . . . [T]he peaceful settlement of international disputes had been laid down in various instruments drawn up [since] the Congress of Panama of 1826. . . . Those principles of international law, embodied in the inter-American instruments referred to, had the character of regional jus cogens and had existed before the entry into force of the United Nations Charter." Statement by Mr. Escudero, Delegate from Ecuador, Second Session Official Records, supra note 23, at 91.

26. Second Session Official Records, supra note 23, at 91.

27. Statement by Mr. Strezov, Delegate from Bulgaria, United Nations Conference on the Law of Treaties, First Session Vienna, 26 March - 24 May 1968, Official Records, U.N. Doc. A/Conf.39/11 (1969) at 276 [hereinafter cited as First Session Official Records].

28. See note 23 supra.

> [H]is delegation would abstain from voting on Article 49 [52] because, like the United Kingdom delegation, it doubted whether the principle set forth in the article was in accordance with the teachings of history and because its adoption might endanger the stability of the entire system of international law.[29]

He implicitly argued that the prohibition was not an international jus cogen and that the Convention was neither codifying nor providing for the progressive development of international law. The recognition of the prohibition, he contended, would weaken the basic principle of pacta sunt servanda, and undermine the system of treaty law. Thus, he concluded, Article 52 could certainly not be effective prior to the ratification of the Convention. The United Kingdom shared Switzerland's and the other more industrialized states' objection to the Latin American position. The delegate from Turkey stated that he also "was unable to support it [Article 52] because [the Delegation] still had some doubts concerning the precise scope of the expression 'the treat or use of force.'"[30] He implicitly argued that the vagueness as to the effective date of the prohibition would undermine the sanctity of treaties.

Prior to the 1968-1969 Conference, governments made formal comments in 1968 on the 1966 Draft Articles on the Law of Treaties proposed by the International Law Commission. The position taken by the Egyptian delegate on the problem of retroactivity evidences the Arab states' support of the arguments raised by the Latin American and Communist states. The underlying intent and purpose of the Draft Articles, he argued, was to adapt the traditional rules of international law pertaining to international agreements to the United Nations Charter, especially, the Charter's prohibition against the use of force. The primacy of the Charter was manifest in the Draft Article's prohibition against coerced treaties. The Charter gives practical form to those fundamental principles of general and universal international law and invalidates those rules that are incompatible with them. The Draft

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29. Statement by Mr. Bindschedler, Delegate from Switzerland, Second Session Official Records, supra note 23, at 91 (emphasis added).

30. Statement by Mr. Hayta, Delegate from Turkey, Second Session Official Records, supra note 23, at 92.

Articles, he contended, achieved a synthesis between codification and progressive development of international law.[31] Regarding the prohibition against coerced treaties, the Egyptian delegate continued, the principle of retroactivity was incorrectly dismissed by the Commission's Commentary to the Draft Articles. The Commentary stated that the prohibition was not necessarily retroactive to void treaties that were in effect prior to 1945. The Egyptian delegate alleged that Article 49 [52] was a codification of a norm existing prior to 1945; therefore, it could be used to void treaties existing prior to 1945.[32]

The International Law Commission's Commentary on the Draft Law of Treaties had commented upon the time element of the then numbered Article 49.

> The Commission considered that there is no question of the Article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law. "A juridical fact must be appreciated in the light of the law contemporary with it". . . . The rule codified in the present article cannot therefore be properly understood as depriving of validity ab initio a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force.[33]
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> As to the date from which the modern law should be considered as in force . . . the Commission considered that it would be illogical and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties.[34]

The Commission stated that, since the Charter codifies

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31. Statement by Mr. El-Erian, Delegate from the United Arab Republic, States' Comments to the Draft Articles, U.N. Doc. 39/5 (Vol. I) (1968) at 203.

32. Id.

33. Report of the Commission to the General Assembly, 61 AM. J. INT'L L. 253, 408 (1967), U.N. Doc. A/6309/Rev.1 (emphasis added).

34. Id. at 409.

much modern customary international law and Article 52 incorporates Article 2(4) phrase of the Charter, Article 52 would certainly pertain to all treaties concluded after 1945. But the Commission did not specify the precise date in the past upon which an existing general rule in another branch of international law would be deemed to have been established. In light of the comments by the delegates to the Conference and the position of the Commentary, treaties concluded conceivably back to the League Covenant could be questioned since the Commentary considered the prohibition against coerced treaties as a "codification" of existing law, rather than as a new rule or a "progressive development."[35]

At the 1966 Commission meeting,[36] there was sizeable support among the states for making the Article 52 prohibition against coercion retroactive to a date earlier than 1945. A few states were willing to suggest the precise date. The Spanish delegate, for example, pinpointed what he considered the first date on which at least one system of regional international law had taken cognizance of coercion of states in a treaty law context. He said it was on March 16, 1921. By that date the Russian Socialist Federated Soviet Republic and Turkey had concluded a treaty[37] by which each party undertook not to recognize the validity of any peace treaty or other international obligation imposed on the other by force. Thus,

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35. The Commission stated that the Convention or the then Draft Articles were "both codification and progressive development of international law." Id. at 262.

36. In the meetings of 1963 and 1966, the members commented on a number of important points inherent in the 1969 Convention's prohibition against coerced treaties. These comments are quite instructive since the delegates enjoyed a comparable air of reflection and were not pressed for time as were the delegates to the 1968-1969 Vienna Conference. This is especially true since the Commission had requested a series of Special Rapporteurs to prepare preliminary reports as early as 1952. Thus, the discussion in the Commission raised problems in greater depth than did the delegates to the Conference. Needless to say, by the time the Draft Articles got to the Conference in 1968-1969, many of the drafting problems had been discussed in the Commission to great lengths and were considered settled.

37. 118 BRITISH AND FOREIGN STATE PAPERS, pt. 2 at 900 (1923).

for the first time, the principle that the illegitimate use of force could not be the source of an international obligation was recognized.[38]

The Spanish delegate recalled that this principle had met with much resistance in the Sixth Committee (Legal Committee), to which the International Law Commission annually reports.[39] The states in the Sixth Committee had expressed the fear that the acceptance of the prohibition against coercion in treaty relations as a principle of lex lata might create uncertainties in international relations. They were afraid anarchy might result since the international community was still organized according to a system of "co-ordination" and not of "sub-ordination;" there was not as yet any executive or judicial authority set above the parties.[40]

Although many states now share the Commentary's reluctance to isolate the precise effective date of the norm represented by Article 52, the majority of states argue that it is some date between the World Wars.[41] Of those states at the Vienna Convention, a majority argue that Article 52 is retroactive until at least the signing of the Charter in 1945. Only a small minority of states of the "older order" -- the more industrialized states of Western Europe -- take the position that Article 52 is not a codification of an existing rule of law and therefore not retroactive.[42]

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38. Statement by Mr. Luna, Delegate from Spain, Summary Records of the International Law Commission, 1966, [1966] 1 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/CN.4/SR.822-843 (1966) [hereinafter cited as ILC Summary Records 1966].

39. Memorandum by the Secretary-General, U.N. Doc. A/C.6/371 (1966).

40. ILC Summary Records 1966, supra note 38, at 31.

41. "As to the date from which the modern law should be considered as in force for the purpose of [Article 52], the Commission was of the opinion that it would be illogical and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties." Rosenne, The Temporal Application of the Vienna Convention on the Law of Treaties, 4 CORNELL INT'L L.J. 1, 14 (1970).

42. "It is important to ensure that article 4 of the Vienna Convention is given a meaning consonant with the

C. "Threat or Use of Force" — The Definitional Problem of "Force"

The failure of Article 52 to clearly delineate the limits of the term "threat or use of force" has precipitated conflicting positions concerning the type of "force" sufficient to invalidate a treaty if threatened or used to procure the conclusion of that treaty. The conflict has been evidenced both at the Convention and throughout the Commission-Conference process. At the First Session of the Conference delegates from the Arab states voiced their preference for a broad definition of the Article 2(4) phrase "threat or use of force" used in Article 52. Mr. El-Dessouki, the delegate from the United Arab Republic argued that the prohibition against coerced treaties should expressly mention economic and political pressure. He contended that the International Law Commission had not provided for sufficient scope to the notion of coercion to include this type of pressure. In support of his position he pointed out that economic pressure could be more effective than the threat or use of military pressure in reducing the country's power of self-determination, especially if its economy depended on a single crop or the export of a single product.[43]

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intention of the Conference and that it should not, by an excess of literalism, be deprived of all reasonable sense. Taken literally, article 4, including that part of it which safeguards the rules of international law in general, would not have any force until the Convention itself had entered into force . . . . There is nothing that indicates this to have been the intention of the Conference when it adopted article 4 and it is believed that too literal an interpretation of its text, in the context of the Convention as a whole, may easily lead to results which are manifestly absurb or unreasonable." Id. at 21-22.

43. Statement by Mr. El-Dessouki, Delegate from United Arab Republic, First Session Official Records, supra note 27, at 274. The position of the United Arab Republic on Article 52 takes on even greater significance when one tries to determine the definition of Charter Article 51, which provides for self-defense in case of "armed attack." The term "armed attack" could conceivably be interpreted in the light of the Article 2(4) prohibition. Thus, defining broadly the phrase "threat or use of force" in the context of treaty law would weigh heavily in evidencing the correct interpretation of Article 2(4) in the context of the law of unilateral response to force.

Other Arab states argued along similar lines. Mr. Nachabe the delegate from Syria stated:

> To attempt to limit that term [force] to the strict meaning of "armed force" was to exclude from the rule stated in Article 49 [52] essential elements such as economic and political pressure, the importance of which must not be underestimated . . . the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had not succeeded in defining the word "force" in connection with the principle that States must refrain from its use.[44]

In addition to the Arab states, the Afro-Asian, Soviet bloc and the Latin American states favored a broad definition to be given to the phrase, the "threat or use of force." They alleged the prohibition against the use of economic and political pressure had already become a rule of customary international law.[45] A draft amendment (the Nineteen-State Amendment) introduced by these states at the First Session requested that Article 49 [52] explicitly include in the Charter Article 2(4) phrase, economic and political pressure.

For failure of support, however, this draft amendment was never pressed to a vote.[46] Instead, a compromise was arrived at between the sponsors and those states that preferred a more restrictive interpretation of the "threat or use of force" phrase. The agreement was that a draft declaration would be introduced denouncing the use of economic force. The Conference would eventually issue a declaration accepting the broad definition of force, but it would not be incorporated into the

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44. Statement by Mr. Nachabe, Delegate from Syria, First Session Official Records, supra note 7, at 274.

45. Statement by Mr. Tabibi, Delegate from Afghanistan, citing the OAS Charter (Articles 15 & 16), the Declaration of Non-Aligned Countries (Belgrade, 1961) and a similar declaration made in Cairo in 1964, Second Session Official Records, supra note 3, at 93.

46. Draft Report of the Committee of the Whole on Its Work at the First Session of the Conference, U.N. Doc. A/Conf.39/C.1/L.370/Rev.1/Vol.II (1969) at 250.

text of the Convention. The Netherlands submitted the "Draft Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty,"[47] and it was adopted without a formal vote.[48] The Draft Declaration stated:

> The United Nations Conference on the Law of Treaties . . . condemns the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent. . . .[49]

Thus, the Conference in the First Session refused to accept into the test of the Vienna Convention the broad definition of the Article 2(4) phrase. But in a compromise solution, the Draft Declaration was accepted, which extended the juridical concept of absolute sovereign equality to the question of validity of treaties. The Draft Declaration in its final form was intended to be a resolution of the Conference and not a provision of the Convention, open to signature or ratification. Depending, however, on a restrictive or broad interpretation of the Convention, the broad definition of "force" may or may not be considered a rule of law.

In the Second Session of May, 1969, the Draft Declaration was discussed and adopted by a vote of 102 to nothing with four abstentions.[50] It was argued by the same states which supported the Nineteen-State Amendment that the Draft Declaration interpreted the

> . . . word "force" as employed in the United Nations Charter and in Article 49 [52] of the draft covered all forms of force starting with threats and including, in addition to bombardment, military occupation, invasion or terrorism, more subtle forms such as

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47. Id. at 251.
48. Id. at 252.
49. Id. at 254.
50. Id. at 5. See Final Act of the United Nations Conference on the Law of Treaties, 8 INT'L LEGAL MATERIALS 729, 733 (1969), U.N. Doc. A/Conf.39/26 (1969).

technical and financial assistance or economic pressure in the conclusion of treaties.[51]

In support, the Cuban delegate argued that "a restrictive interpretation of the expression 'use of force' was incompatible with the spirit of the Charter."[52]

Other states, primarily industrial, pointed out that the Declaration in no way may be equated with the passage of an amendment. Moreover the Japanese delegate stated that although exercise of political or economic pressure is a violation of the concept of sovereign equality of states and of freedom of consent and ought to be condemned, Japan

> . . . had nevertheless been unable to support the proposed amendment in its original form as an amendment to Article 49, for the very reason that the notion of "political and economic pressure," however reprehensible it might be, had not yet been sufficiently established in law to be incorporated into the convention as a ground for invalidating a treaty. His delegation had therefore welcomed the constructive initiative of the sponsors of the amendment in withdrawing it and replacing it by a declaration [of condemnation].[53]

Representing two of the abstentions, the delegates from France and Canada alleged that the term "force" as used in the Charter and in Article 49 [52] of the Convention did not include political or economic pressure, but referred only to military force. The delegate from Holland stated a similar view:

> [T]he word "force" as used in Article 2(4) of the United Nations Charter and in article 49 [52] of

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51. Statement by Mr. Mutale, Delegate from Democratic Republic of the Congo, Second Session Official Records, supra note 23, at 100 (emphasis added).

52. Statement by Mr. Alvarez Tabio, Delegate from Cuba, Second Session Official Records, supra note 23, at 100.

53. Statement by Mr. Tesuruoka, Delegate from Japan, Second Session Official Records, supra note 23, at 101.

> the convention referred to armed force alone. In fact, it could be argued that, if the term had been meant to cover economic or political coercion, there would have been no need for the draft declaration.[54]

As an additional component to the compromise in 1969 a draft resolution was introduced requesting member states to give to the declaration the widest possible publicity and dissemination. The resolution was adopted by a vote of 99 in favor and four abstentions[55] and incorporated into a second resolution, the "Final Act of the United Nations Conference on the Law of Treaties."[56] This resolution requiring wide-spread dissemination stated that the Declaration on the "Prohibition of the Threat or Use of Military, Economic and Political Coercion in Concluding a Treaty," should be brought to the attention of all member states as well as organs of the United Nations.[57]

Although the Declaration and the subsequent "Dissemination Resolution" evidenced the great concern of the delegates to the Convention with the prohibition against coerced treaties, the debates in 1968-1969 evidenced neither consensus nor unanimity,[58] but only a poorly understood compromise over the

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54. Statement by Mr. Eschauzier, Delegate from the Netherlands, Second Session Official Records, supra note 23, at 101. Mr. Kearney, the Delegate from the United States stated, "Instant declarations and paper resolutions did not establish customary international law, much less did they give it a peremptory character." Id. at 102. This reflects upon the nature of the entire Convention on the Law of Treaties, which has remained unratified by most of the signatories.

55. Second Session Official Records, supra note 23, at 101. See statement by Mr. Yassen, Delegate from Iraq and Chairman of the Drafting Committee at the Second Session, Second Session Official Records, supra note 23, at 169, 174.

56. Final Act of the United Nations Conference on the Law of Treaties, supra note 50, at 735.

57. Second Session Official Records, supra note 23, at 168.

58. See generally States' Comments to the Draft Articles, supra note 31; Comments by Governments submitted in 1968 in advance of the Conference, U.N. Doc. A/Conf.39/6 and Add. 1-2

Nineteen-State Amendment that made more uncertain an already uncertain future. A review of the 1966 Commentary of the International Law Commission on the Draft Articles on the Law of Treaties and work of the Commission in 1963 further substantiates the confusion. The Commission's Commentary contrasted the content of the traditional doctrine of consent and treaty law with the existing principle of international law. The Commentary stated the following:

> The traditional doctrine prior to the Convenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. . . . The commission considers . . . that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is lex lata in the international law today.[59]

In addressing the fear of many jurists that to recognize the prohibition against coerced treaties as a legal rule may "open the door to the evasion of treaties by encouraging unfounded assertions of coercion,"[60] the Commission stated that their apprehension is not a valid ground for refusing to bring treaty law up to date with other branches of law, notably, the law of war.

The Commentary explicitly stated, however, that the Commission deliberately left the phrase "threat or use of force" undefined and decided that the acts covered by this term should be determined by subsequent United Nations interpretations of the relevant provisions of the Charter.[61]

(1968); Comments by specialized agencies, U.N. Doc. A/Conf. 39/7 and Add.1-2 (1968). For a general discussion of "imposed" and "unequal" treaties see, Detter, The Problem of Unequal Treaties, 15 INT'L & COMP. L.Q. 1069 (1966).

59. Report of the Commission to the General Assembly, supra note 33, at 408-09.

60. Report of the Commission to the General Assembly, supra note 33, at 408-09.

61. Report of the Commission to the General Assembly, supra note 33, at 408.

Thus, the Commission deliberately created a vague loophole in the Draft Article 49 [52]. This intentional vagueness was maintained in the Convention when the Nineteen-State Amendment was not pressed to a vote in the First Session of the Vienna Conference of 1968 and when the compromise was given final form in the Declaration and Dissemination Resolution at the Second Session in 1969.

The meetings of the Commission in 1963 give additional insight into the intention of the Commentary. It was at these meetings that the Special Rapporteur, Sir Waldock, presented the Commentary to the Draft Articles,[62] and discussed the ideas of the two previous Special Rapporteurs on the law of treaties.[63] Sir Waldock explained that Sir Lauterpacht in 1953 had submitted a strongly reasoned argument in favor of a prohibition against coerced treaties. In doing so, Sir Lauterpacht stated that the Commission would be "codifying not developing the law of nations in one of its most essential aspects."[64] Sir Lauterpacht pointed out, however, that to allow states too easily to denounce treaties by making unilateral assertions of coercion might open the door to the evasion of treaties. Sir Waldock further explained that Sir G. Fitzmaurice in 1958 considered practical difficulties in permitting coercion of the state as a ground for the invalidity of a treaty as too great. Thus, Sir Fitzmaurice argued against adopting such a prohibition:

> The case must evidently be confined to the use of threat of <u>physical</u> force [emphasis in original], since there are all too numerous ways in which a State might allege that it had been induced to enter

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62. In the 1963 Draft on the Law of Treaties the prohibition against coerced treaties was Article 36. This provision was renumbered Article 49 in the 1966 Draft and renumbered Article 52 in the 1969 Convention.

63. Waldock, <u>(Second) Report on the Law of Treaties</u>, [1963] 2 Y.B. INT'L L. COMM'N 36, U.N. Doc. A/CN.4/156 and Add.1-3 (1963).

64. Lauterpacht, <u>(First) Report on the Law of Treaties</u>, [1953] 2 Y.B. INT'L L. COMM'N 90, U.N. Doc. A/CN.4/63 (1953). When may codification not be progressive development of international law?

> into a treaty by pressure of some kind (for example, economic). On this latter basis a dangerously wide door to the invalidation of treaties, and hence a threat to the stability of the treaty-making process would be opened. If, however, the case is confined (as it obviously must be) to the use of threat of physical force, what follows? Either the demand for the treaty in question is acceded to, or it is not. If it is not, then cadit quaestio. If, per contra, it is then the same compulsions or threat that procured the conclusion of the treaty will insure its execution; it will have been carried out, and many steps taken under it will be irreversible, or reversible, if at all, only by further acts of violence [emphasis added] . . . . [T]hat if peace is a permanent consideration, it must follow logically that peace may, in certain circumstances, have to take precedence for the time being over abstract justice.[65]

Sir Waldock, himself, argued in 1963 that the prohibition against coerced treaties would not involve undue risks to the general security of international treaties, unless "coercion" is extended to cover other acts than the use or threat of physical force. He emphasized that the risk was in unilateral and mal fide assertions of "coercion" as a pretext for denouncing treaties thought to be disadvantageous. If "coercion" was to be regarded as extending to political and economic pressure, the door to evasion of treaty obligations might be opened very wide because these forms of coercion are much less capable of definition and much more liable to subjective interpretations. Sir Waldock suggested that the operation of political and economic pressure is part of the normal working of the relations between states, especially in international economic relations. Moreover, international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treates.[66]

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65. Fitzmaurice, (Third) Report on the Law of Treaties, [1958] 2 Y.B. INT'L L. COMM'N 20, 38, U.N. Doc. A/CN.4/115 (1958).

66. Waldock, supra note 63.

Thus, the Special Rapporteurs were split over whether the prohibition should be adopted, but all argued against giving the Article 2(4) phrase a broad definition. There was a common concern that the prohibition against coerced treaties might cause greater violence among nations. Moreover, the emphasis of this prohibition was restricted to voiding a treaty coerced upon a militarily threatened or defeated state or a victim of an actual armed attack. Little attention was devoted to treaties coerced upon parties to a regional conflict by a third party, be it an international organization or a super-power.

An analysis of the work of the Commission-Conference codification process that treated the question of defining force in the context of coerced treaties highlights the conflict between the developed states and undeveloped states even better than did the meetings that discussed the problem of retroactivity. Clearly, the underdeveloped states supported a broad definition of "force," while the more industrialized states favored a restrictive definition proffered by the three Special Rapporteurs.

If restrictive definition of "force," suggested by the failure of the dissatisfied states to press the Nineteen-State Amendment to a vote and the statements of Sir Waldock and the other Special Rapporteurs, is accepted "force" will be limited to military force. This approach would consider Article 52 as prohibiting only "imposed treaties" coerced by the fact or threat of military aggression. On the other hand, if a broad interpretation based on the Declaration of Condemnation of economic and political force and the subsequent Dissemination Resolution is adopted, then defining "force" as economic and political, as well as military, would be justifiable. This interpretation would consider Article 52 as prohibiting all "unequal treaties." The view of the developed states and the Special Rapporteurs was that the Article 52 prohibition was a prohibition against "imposed treaties." The view of the "new" states, based primarily on their practice at the Vienna Conference, was that the Article 52 prohibition was against all "unequal treaties."[67] Both these interpretations are

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67. Professor Stone only identified in a passing sense the existence of the problems relating to "unequal treaties," rather than "imposed treaties," in Article 52. Professor Stone

available to the "new" and "old" states. "[T]he new voting distribution in the United Nations [including the U.N. Conference on the Law of Treaties] makes it possible for the new States to ensure that their view prevails and they are able to contend that . . . [d]eclarations carry the force of law."[68]

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wrote prior to the 1968-1969 Vienna Conference. Prior to the Conference, the then Article 49 prohibition was viewed by the Special Rapporteur to apply to "physical force." The new states at the Conference have conceivably widened the scope of the prohibition to include economic and political coercion. Thus, the new states widened the Article 52 prohibition, from one merely against "imposed treaties" to all "unequal treaties." Professor Stone stated, "There is another irony here. This relates to so-called 'unequal treaties' when juxtaposed with the treaties imposed by duress just discussed. In relation to the latter, all three Rapporteurs, with their deeply divergent philosophies, seemed to agree in one respect. This was that the risks to general stability of treaty relations imported by a rule nullifying duress -- induced treaties would be least in the case of the extreme physical duress of military defeat. Correspondingly, they seem to agree that risks become greater as lesser pressures and coercions become involved, such as merely economic and political." Stone, Approaches, supra note 21, at 396. The term "coerced treaties" is used in this essay as a "neutral" term, referring to both "imposed treaties" and "unequal treaties."

68. Green, supra note 3, at 43. Voting procedures followed by the United Nations have allowed the new states to use its organs, conferences and agencies, to pass resolutions and draft treaties conforming to their point of view. "[I]t is possible to secure a two-thirds majority of U. N. members who represent only ten percent of the world's population and pay only five percent of the organization's costs." Emerson, The New Higher Law of Anti-Colonialism, in THE RELEVANCE OF INTERNATIONAL LAW 156 (K. Deutsch & S. Hoffmann eds. 1968); see Henkin, International Organizations and the Rule of Law, 23 INT'L ORGANIZATION 656 (1969). "[International organizations] have sometimes sacrificed legal principle to the ad hoc judgment of majorities. . . . I do not forsee dramatic rededication by nations to law observance, and in some areas some international organizations -- the U.N. -- may again encourage violations by those who are confident that majorities will condone or approve them. . . . [T]he U.N. in particular

D. Subsequent Third-Party Acceptance of an Existing Treaty — The Definitional Problem of "A Treaty"

During the 1963 and 1966 Commission meetings the Israeli delegate suggested changing Article 49 [52] from "A treaty" to "Any treaty or act." This problem was raised and considered in the 1963 and 1966 meetings of the International Law Commission and not considered during the Vienna Conference.[69] However during the Commission meetings of 1966, the suggestion of the Government of Israel regarding third-party adherences to existing treaties was discussed. The Spanish delegate objected to the suggestion. He argued there was no need to introduce the idea of an "act" expressing the consent of a state to be bound to an existing treaty. The expression, "A treaty or act," was not clear and since it dealt with a unilateral legal transaction, it was out of place in a convention which was concerned with bilateral legal transactions.[70]

The Israeli delegate, on the other hand, argued that the text of the draft article should specifically include a provision that would cover the case of subsequent participation, which is procured by the threat or use of force in an existing treaty. However, due to the general desire not to overload the text by attempting to cover the point more specifically and confuse the meaning, he consented to see the matter dealt with in the Commentary. Therefore, it was agreed that

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[has] sought to create law (without the concurrence of the United States) which the United States rejects. . . . Many nations seem bent on using law to solve 'insoluble' political problems. . . ." Id. at 679-81.

69. U.N. Doc. A/CN.4/183/Add.1 (1966) at 3.

70. Statement by Mr. Luna, Delegate from Spain, ILC Summary Records 1966, supra note 38, at 32. This seems to miss the point. A unilateral transaction (accession) has legal significance in the law of treaties. Subsequent consent of a third-party to an already existing treaty that was intended to be "open-ended," creates both obligations and responsibilities on the new state and the states already adhering to the bilateral or multilateral treaty. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 74 (1943); The Research in International Law of the Harvard Law School, Draft Convention on the Law of Treaties, with Comment, 29 AM. J. INT'L L. 653, 812 (Supp. (1935).

Sir Waldock should withdraw the amendment.[71] Waldock noted that the existing text might be too broad inasmuch as it seemingly allows states to claim an entire treaty is void if a subsequent act of participation in it is procured by the threat or use of force.[72] The ambiguity still exists, at least as understood by the Spanish delegate.

The solution offered by the Commission to the problem of third-party acceptance to an existing treaty was vague. Since the Israeli delegate agreed to the withdrawal of his sponsored draft amendment, it can be argued that third-party acceptance to an existing treaty is not covered by Article 52. Other states can argue that the statement by Sir Waldock on the encompassing nature of Article 52 incorporated the Israeli drafting point. Thus, "A treaty" can refer to a subsequent act by a state to an existing treaty; a subsequent acceptance of an existing treaty may be void if it is brought about by coercion.

It is clear that the problem of whether or not the coercion of a third-party to subsequently accept an existing treaty voids the existing treaty is solved only in a similarly vague fashion.

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71. Statement by Mr. Rosenne, Delegate from Israel, ILC Summary Records 1966, supra note 38, at 35. This request was the primary request Israel made consistently in regards to the prohibition against coerced treaties. The 1963 Draft Article 36 read, "Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void." Report of the Commission to the General Assembly, [1963] 2 Y.B. INT'L L. COMM'N 187, 197, U.N. Doc. A/5509 (1963) (emphasis added). The Chairman of the Commission invited the delegates to consider the Special Rapporteur's proposal, based upon the Israeli suggestion that would add the phrase "or any act" after the phrase, "Any treaty." The article would then read "Any treaty or any act expressing the consent of a state . . . ." This was withdrawn by the Special Rapporteur when Israel agreed with him that this was implicit in the original wording and there was a general desire to keep the article succinct. U.N. Doc. A/CN.4/183/Add.1 (1967) at 14-16.

72. Report of the Commission to the General Assembly, supra note 71, at 197.

States may argue either way on the questions of whether Article 52 voids an existing treaty because of subsequent coercion on a third-party and whether Article 52 applies to the accession. While the definitional problem of "A treaty" does not bear directly upon the role of the new states, or the developing versus the developed states in the international legal order, it does bear upon Article 52 and the management of regional conflict.

E. The Underlying Assumption -- Victorious Aggressor or Unequal Persuader

There are at least two plausible underlying assumptions of Article 52 depending on whether a restrictive or broad interpretation is adopted. The situation represented by the German-Czechoslovakian Treaty of 1938 is one situation intended by the Special Rapporteurs to be made unlawful by Article 52. Subsequent to the Munich Conference of September 1938, with France and Britain refusing to fulfill their prior legal obligations to Czechoslovakia, German troops threatened to enter Czechoslovakia and forced the Czechoslovakian government to sign a treaty ceding the Sudatenland. It is this historical example that is favored by the developed states as the model situation that Article 52 intended to declare illegal.[73] The new states, however, would have the prohibition of Article 52 applied further to encompass the type of situation represented by the treaties relating to granting of extraterritoriality in China to the foreign powers in the late 1890's or by the oil concessions granted by the states

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73. The treaty of 1939 between Nazi Germany and Czechoslovakia is generally regarded as invalid by reason of the coercion both of the delegates and of the State. Ratz-Lienert & Klein v. Nederlands Beheers-Instituut, 24 I.L.R. 536, 539 (Council for the Restoration of Legal Rights, Neth. 1956); see Stone, De Victoribus Victis, supra note 21, at 357. "The question posed usually arises when there has been a war between states, and one state bears the guilt of war-making. If that guilty state was defeated and had unfavorable terms imposed upon it (as is likely to be the outcome of the Egyptian and Syrian adventures which led up to the Middle East crisis of 1967) there is little problem (at any rate for present purposes).

of the Arab Middle East to Western States. In both of these situations economic or political coercion was employed to gain treaty rights. The new states' underlying assumption is that Article 52 is a prohibition against "coerced treaties" rather than the more restricted category of "imposed treaties."[74]

Thus, there are two plausible underlying and partially contradictory assumptions of Article 52. The underlying assumption of Article 52 as perceived by the Special Rapporteurs was the necessity to outlaw imposed peace treaties by victorious aggressors on victims of actual military actions or threatened military actions. The underlying assumption as perceived by the new states was the necessity to outlaw all unequal treaties. It should also be noted that Article 52 clearly fails to emphasize the viability of the prohibition on the international system's ability to manage regional conflict. The Commentary never mentioned the need to settle regional disputes, but only the need not to legitimize the imposition of a treaty on a victim of a threat of coercion or of actual coercion. The conflict between the new and the developed states as to the scope of Article 52 represents further evidence of their competing visions of the international legal order and of the problem of conflict management.

III. Article 52 and the Management of Regional Conflict.

A. Note on the Contextual Approach

There are primarily two interpretative approaches to the articles of the Vienna Convention: the textual approach restricting interpretation to the written treaty and the contextual approach of interpreting the articles in the context

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The state got no fruits from its wrong, only burdens and penalties possibly according to its deserts. But if the quilty state is the victor (aggressor-victor), it will usually stipulate for benefits from the defeated state, often involving deep suffering on that state's people. We are all agreed that it is morally outrageous for the law to give effect to such a treaty. But our question is, how is the law to avoid giving effect to it?" Stone, Approaches, supra note 21, at 393.

74. See note 67 supra.

of their entirety, including contemporary international norms extrinsic to the written words. While one of the two articles on treaty interpretation in the Convention utilized the term "context," it did not adopt the contextual approach as understood by Professor McDougal, Professor Falk, or as argued by Ambassador Rosenne.[75] The Convention explicitly adopted a "textual" approach that required the language of a convention provision to be interpreted primarily within the context of the written treaty. The Convention did not require the interpretation of the treaty in the context of international systemic variables tending to foster conflict. The guide in interpretation was not to be the "intention of the parties," nor the necessity of maintaining a "minimum world public order" by managing regional conflict, but to determine the "ordinary meaning" of the text of the treaty "in the light of its object and purpose."

This adopted approach was not without its critics. The delegate from Israel argued that a contextual approach ought to be adopted by the International Law Commission's Draft Articles in formulating its provisions.

> It must always be born in mind that they were closely integrated and constituted a single whole . . . each provision must be considered on its own intrinsic merits, in its context in the articles as a whole and

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75. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context. . . ." Vienna Convention on the Law of Treaties, art. 31, 8 INT'L LEGAL MATERIALS 679, 691 (1969), U.N. Doc. A/Conf.39/27 (1969); see Schwarzenburger, Myths and Realities of Treaty Interpretation, 9 VA. J. INT'L L. 1 (1968). For critical reviews of the contextual approach of Myres McDougal see, Gottlieb, The Conceptual World of the Yale School of International Law, 21 WORLD POL. 108 (1968); Weisstub, Conceptual Foundations of the Interpretation of Agreements, 22 WORLD POL. 255 (1970); Weston, Book Review, 119 U. PA. L. REV. 647 (1969); Book Review, 23 REV. EGYPTIENNE DE DROIT INT'L 147 (1967). See also Jacobs, Varieties of Approaches to Treaty Interpretation -- Treaty on the Law of Treaties, 18 INT'L & COMP. L.Q. 318 (1969).

> in the light of the requirements of contemporary international society, and not on the basis of preconceived and possibly outdated notions of what the law was or purely idealistic conceptions of what it ought to be. . . .[76]

This essay will utilize a limited contextual approach in order to determine what the implications are when Article 52 is applied to a situation, other than the victorious-aggressor situation that is clearly within the prohibition of Article 52. A limited contextual approach is one that establishes a certain objective as a goal or as an overriding community policy, and events ought to be interpreted with the posited objective as a standard. The goal to be established is the settlement of regional conflict, rather than the advancement of one particular ideology.[77] The failure of the Conference to adopt contextual rules of treaty interpretation will be shown to be analogous to the failure of the Conference to relate adequately to the prohibition against coerced treaties to the needs of the international system.

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76. Statement by Mr. Rosenne, Delegate from Israel, U.N. Doc. A/Conf.39/27 (1969) at 203 (emphasis added).

77. As a policy-oriented approach it advocates strongly the fostering of peaceful solutions to regional conflict as national policy. FALK, LEGAL ORDER, supra note 14. "A limited contextual approach . . . [is] one to which Falk appears sympathetic." Rovine, Book Review, 54 CORNELL L. REV. 970, 976 (1969). The emphasis of this essay is on the management by states and international organizations of inter-state regional conflict. Professor Linda Miller in a recent essay has emphasized the regulation of intra-state regional conflict by regional organizations. Miller, Regional Organizations and the Regulation of International Conflict, 19 WORLD POL. 582 (1967). "The specter of unilateral military responses to internal violence raises the most serious issues for world order." Id. In context of recent developments in the Middle East and Central America it appears that Professor Miller may have over-stated the importance of internal conflict, while understanding the significance of inter-state conflict. The Syrian based guerrilla operations against Israel, as well as Lebanon and Jordan, and the flare-up between El Salvador and Honduras evidence the continuing danger of inter-state regional conflict.

B. General

The solutions to the problems of Article 52 as formulated by this Commission-Conference process of generating international consensus between the developed and underdeveloped states have been very vague. These solutions must be analyzed to determine their effect on the ability of the international system to promote regional peace. Specifically, they must be analyzed in order to determine the effect of the new concept of consent on the role that international agreements outlining peace settlements and international organizations through peacekeeping forces can perform in limiting regional conflict.

Even though the Convention on the Law of Treaties was concluded and signed by 32 states in May 1969 and has not yet come into force, it would be quite correct to induce from the seventeen year "legislative" history of Article 52 that customary international law governing inter-state agreements and state agreements with international organizations requires rules of treaty law to include the Article 52 prohibition. The work of the Commission and the Conference sponsored by the United Nations ought to be considered the most authoritative statement on the problem of coerced treaties.[78] In turn, the prohibition ought to be considered evidence of the development of a new general notion of consent and theory of obligation in international law.

In light of the compromise in the Conference involving the Nineteen-State Amendment, the Declaration of Condemnation of political and economic coercion, and the Dissemination Resolution, states seem to be free to define what constitutes coercion. There is clear contradictory evidence that can be used to support a restrictive or a broad definition of "threat or use of force." The new nations have favored a broad interpretation of the Article 2(4) phrase. While the Declaration and the Resolution

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78. Professor Parry argued the drafts of the International Law Commission evidence international law under Article 38 of the Statute of the International Court of Justice, as being works of international legal scholars. C. PARRY, supra note 13. However, the I.C.J. refused to recognize one article of the Geneva Convention of 1958 on the Continental Shelf as being part of the customary international law because of the hesitancy of the Commission in making its proposals. North Sea Continental Shelf Cases [1969] I.C.J. 3, 38; see Rosenne, supra note 41, at 20.

are not technically international treaty law, the new states can argue they are authoritative statements of the international community and in a decentralized legal system should be considered binding as statements creating expectations and norms of behavior.[79]

Professor Stone feels that Article 52 is limited by the power structure of the international system. Any nation which has the power to impose such a treaty will also have the power to perpetuate its terms despite the fact that the treaty may be declared void. Professor Stone feels that this situation will not really change until force is no longer used by nations or until international law becomes so powerful that it can counteract a strong aggressor. He also believes that Article 52 does not help a victim state. In reality, even if a peace treaty is void, the victim state would have to initiate action in order to change the treaty. From a different point of view, if the aggressor state is beaten, it could use Article 52 as an

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79. Percy Corbett has stated, "Conventions, when ratified, impose legal obligations. It is not generally admitted that declarations, [unratified conventions], or resolutions have the same effect. . . . [T]hey express a majority view of what international law requires and, in the absence of a court with general and final jurisdiction, there can be no more authoritative statement of what the law is." P. CORBETT, supra note 18, at 11-12.

Certainly a draft approved by the General Assembly, by an international conference and then signed as a treaty which is not yet in force, is more authoritative evidence of international law than a mere draft of the Commission. See generally Jennings, Recent Developments in the International Law Commission: Its Relations to the Sources of International Law, 13 INT'L & COMP. L.Q. 385 (1964). The above is highly relevant. The Convention on the Law of Treaties does not apply to treaties concluded by international organizations and states under the terms of Articles 1(a) and 2. This essay assumes, notwithstanding Articles 1(a) and 2, the Article 52 prohibition would apply to treaties concluded by international organizations and states, e.g., an agreement between the United Nations and a host state allowing for the stationing of an international peacekeeping force. This is so, first, since Article 52 represents a specific jus cogens under the general provision of recognizing the effect of jus cogens under Article 53. Law of Treaties, 574 INT'L CONCILIATION 171, 173 (1969). Secondly, the Vienna Convention is authoritative evidence of

excuse to justify renewed aggression instead of truly seeking a settlement.[80] To summarize Professor Stone's argument, he assumes Article 52 is a prohibition against "imposed treaties" by military force and concludes that it seems to destroy any finality to treaty settlement and to jeopardize world public order.[81]

C. Model of Inter-State Regional Conflict

A model of regional conflict involving a border dispute has a degree of historical importance. The outbreaks of regional conflict in Central America, between Honduras and El Salvador, and in the Middle East, between Syria and

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an existing customary international law. C. PARRY, supra note 13. Finally, Article 3 of the Convention states, "The fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law . . . shall not affect . . . the application to them [international organizations] of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention." Vienna Convention on the Law of Treaties, supra note 69. See also FALK, STATUS, supra note 14, at 126. Professor D'Amato, relying on the North Sea Continental Shelf Cases, [1969] I.C.J. 3, has argued "the actual intent of the framers of the convention or of the subsequent adherents is irrelevant. . . . If the treaty manifests an intent to have a particular provision create customary [international] law, that manifested intent is controlling." D'Amato, Manifest Intent and the Generation by Treaty of Customary Rules of International Law, 64 AM. J. INT'L L. 892, 895 (1970).

80. E.g., the recent threats by the El Fatah directed against the United Nations Observers at the Suez Canal. Stone, De Victoribus Victis, supra note 21, at 358. "[I]t must be recognized that this whole problem of imposed treaties of peace represents what we have elsewhere described as a 'limit situation' for international law. . . . The effect, in these circumstances, of refusing the limited accommodation will be put to destroy in whole or in part the international legal order generally." Stone, Approaches, supra note 21, at 384, 386.

81. The posited model reflects actual solutions that have been discussed by the super-powers. "They [the Soviet Union and the United States] indicated agreement . . . for the need of a permanent settlement rather than armistice; for an international military force to act as a buffer, and for a 'Rhodes-type' negotiation between Israel and the Arabs, which would

Lebanon,[82] are only recent examples. The Sino-Indian War, out of which China has continued to occupy extensive territory claimed by India; the Sino-Soviet border war over territory previously ceded to Tsarist Russia;[83] and the border war between India and Pakistan all illustrate the relevance of a model of a regional conflict emphasizing a border dispute.

If one extracts certain essential factors of the Arab-Israeli conflict and posits them as the variables of a model of a regional dispute, one can utilize the model to analyze the effects of Article 52 on the international system and to reflect upon Professor Stone's analysis. The following is a model of a regional dispute.

Assume: States "A" and "I" were recently involved in an outbreak of military activity. State "I" initiated the military activity and has gained limited military advantages, including occupation of territory. State "A" is still independent and has quickly regained its loss of military strength, although it still suffers a loss of territory. State "A" desires to regain its lost territory, but State "I" is interested in retaining its military advantage. Although State "I" is greatly interested in formalizing its new position in the form of an international agreement, State "A" refuses to negotiate with State "I" any agreement that would ratify its losses. Consequently, "A" and "I" have not been able to reach a peaceful settlement of their dispute.

The United Nations has decided upon a seemingly equitable solution: the creation of a peacekeeping force and substantive proposals incorporated into an international agreement. States "A" and "I" are reluctant. By political and economic persuasion, State "A" in a compromise solution accepts the imposition of the peacekeeping forces on its territory by concluding a bilateral agreement with the United Nations. State "A" also signs

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permit the two sides to negotiate either directly or indirectly. . . ." N.Y. Times, Nov. 9, 1969, § 1, at 12, col. 4.

82. This assumes that the guerrilla movements were under the control of the Syrian government to such a degree that the Syrian government was an active participant in the military activities against Lebanon in the fall of 1969.

83. See N.Y. Times, Oct. 8, 1969, at 10, col. 1. See generally A. CUKWURAH, THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW (1967).

an international agreement with the U.N. incorporating substantive compromises. Shortly afterwards, due to similar economic and political pressure as exerted on State "A", State "I" offers a formal unilateral declaration. State "I" offers a declaration to the general international agreement previously signed by State "A".[84]

A few years after the above compromise was effectuated, State "A", feeling ready to upset the previously established status quo, revokes the consent given to the imposition of the peacekeeping forces on its territory. She alleges the United Nations practice surrounding the withdrawal of UNEF as establishing the right of the host state to request unilaterally the withdrawal of peacekeeping forces and demands the immediate withdrawal of the forces stationed on her territory. What is the impact of Article 52 of consent on the above posited model and hypothetical developments?

If the consent of State "A" was no greater than the type of consent given by Egypt in 1956, the only lawful action would be to recognize the sovereign nature of State "A"'s request and immediately withdraw. On the other hand, if State "A" gave broader consent than that given by Egypt in 1956, State "A" could seemingly still demand the withdrawal of the peacekeeping forces by alleging the Article 52 prohibition against threatened imposition of economic and political force. State "A" relies on the Final Act of the Conference, especially the Declaration of Condemnation concerning military, economic and political coercion and the Resolution on Dissemination as the elements of the compromise over the Nineteen-State Amendment. State "A" also alleges the statements of the delegates to the Vienna Conference 1968-1969 as evidencing the validity of its interpretation. Without deciding the legality of its request, State "A" has apparently stated a prima facie case, since the technical non-legal effect of the above has often been considered authoritative by both legal writers and states.[85]

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84. "General" is defined here to mean agreements encompassing substantive compromises involved in the regional conflict.

85. R. HIGGINS, supra note 13. While the Declaration of Condemnation (concerning political and economic coercion) and the Dissemination Resolution are not technically treaty law, states can argue that these documents ought to be considered

The United Nations practice concerning the withdrawal of UNEF in 1967 and Article 52 of the Convention on the Law of Treaties seem to provide ample evidence to support the lawfulness of a host state's unilateral request to withdraw an international peacekeeping force from its territory. Despite the fact that the force was there for the purpose of peacefully settling a regional conflict, it may be withdrawn by a state party to the conflict. Means of peaceful settlement of regional conflict, treaties incorporating substantive proposals, and peacekeeping forces pursuant to international agreements must certainly entail the threat of economic or

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in interpreting Article 52. Since the definition of "force" is ambiguous in the context of the Convention, the articles of interpretation contained in the Convention being applied to the Convention, would seemingly permit looking at the other documents of the Conference. These articles require interpreting a treaty in light of the "ordinary meaning" of the text of the treaty. Even though the articles accept a "textual" approach to treaty interpretation, they permit considering the preparatory work in cases of ambiguity. Article 32 states, "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure. . . ." (Emphasis added). For a criticism of the textual approach for foreclosing the consideration of related documents see, McDougal, The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus, 61 AM. J. INT'L L. 992 (1967). "The great defect, and tragedy, in the International Law Commission's final recommendations about the interpretation of treaties is in their insistent emphasis upon an impossible, confirmity-imposing textuality." Id. at 992. For a similar conclusion see, Briggs, Book Review, 53 CORNELL L. REV. 543 (1968). But Professor Briggs disagrees with Professor McDougal's contextual approach that relies upon "the intention of the parties" or the "shared expectations of the parties." "What is regrettable is that they have dressed up in the guise of modern "communication analysis" a decrepit and often-challenged view that it is the intention of the parties (their 'genuine shared expectations' . . .) which is subject to interpretation, rather than the text of the treaty. . . ." Id. at 546.

political coercion by international organizations or major powers. The consensual basis of United Nations peacekeeping forces, however, was in part negated by Article 52. The only solution would be to resort to enforcement actions which are the basis of police actions under Chapter VII rather than peacekeeping operations.

If the peace treaty described in the model was effective prior to the coming into effect of the Convention, would a state be entitled to allege Article 52 as a defense? The answer is uncertain. What if a peace treaty was concluded before 1914? 1945? The Commentary states that Article 52 is retroactive, but it does not set any effective date. Statements of the delegates on the Commentary seem to indicate the prohibition became a part of the lex lata some time during the inter-war period (1919-1939). Consequently, the effect of Article 52 is not only to call into question contemporary or future peace settlements but also settlements that are generations old.

The technique of State "A"'s concluding a treaty with the United Nations and declaring certain concessions as well as State "I"'s offering a subsequent acceptance, was obviously intended to take into consideration the extremely important domestic factor of public opinion. This method was apparently intended to save face for both States "A" and "I" in the domestic arena, as well as the international arena. However, there is a dual question of the validity of the consent of State "A" to the agreement and of the validity of the subsequent acceptance by State "I". Omitting from consideration a possible objection by State "A", can State "I" allege, due to political and economic coercion, that its subsequent acceptance is void under Article 52?

Most likely, Article 52 covers this situation and declares the subsequent act of a state adhering to an existing treaty void when coercion is exerted on the third-party state. But what about the existing treaty? It is conceivable, as pointed out by Sir Waldock, that this could also be alleged to be void with some measure of correctness, even though there may have been no political or economic coercion at the formation of the original treaty.

It seems apparent that the actions of State "A" and State "I" in denouncing the previously worked out compromise

settlement are valid, even if economic and political pressure were the only pressures applied. The new states' view of Article 52 as a prohibition against "unequal treaties" appears to validate the claims of State "A" and State "I". It seems that in a border conflict similar to the above model, which perhaps may be represented by the recent Lebanon-Syrian conflict of 1969, the new concpet of consent may perform a very negative role.

The issue revolves around the effect of Article 52 on the ability of the international organizations or states for managing regional conflict by using "general" treaties -- i.e., those treaties containing substantive compromises -- and peacekeeping operations pursuant to international agreements. The old notion of consent, in the context of treaty relations, held that coercion, whether military, economic, or political, did not invalidate or void an international agreement. The new concept of consent voids any treaty brought about by any coercion. The change jeopardizes the validity and viability of United Nations' action formerly considered valid under Chapter VI. Thus, U Thant's acceptance of the Egyptian's view of consent and rule of narrow construction in the withdrawal of UNEF, and the adoption of Article 52 by the United Nations Conference on the Law of Treaties, have severly limited the viability of treaties in settling inter-state regional conflict.

IV. Suggestions for the Future.

Having noted the dangerous implications of Article 52, some suggestions can be made to alter this provision in such a way that it can be practically applied to maintaining regional and international peace. First, a more concrete definition of "force" is needed to provide the national decision-maker with a guide for determining the lawfulness of his decision in voiding a treaty. Secondly, the definition of "force" should be given a restrictive definition, referring only to military force. Article 52 should be a prohibition against only "imposed treaties," not all "unequal treaties." Thirdly, an "adequate" procedure for the arbitration or third-party determination of this question must be provided. This need not refer to a judicial organ.[86] Even the delegates to

86. "Adequate" does not mean compulsory, in the sense of a binding judgment. It means a provision requiring recourse to

the San Francisco Conference in 1945 reached the same conclusion. "[Some] advocated giving the Court authority to pronounce treaties invalid. Eventually this thought was dropped on the ground it could lead to serious dissension and that the proposed action on treaties was a political and not a judicial function."[87]

Detailed discussion of procedures required to make Article 52 a viable formulation in the context of either of its underlying assumptions -- the necessity of voiding peace treaties imposed by aggressors on their defeated victims or the necessity of voiding all unequal treaties -- or under the assumption of this essay is outside the scope of this essay. One ought to note, however, that in the absence of a clear definition of "force" in Article 52, and in the absence of compulsory jurisdiction in the international system, some kind of initial third-party recourse should be explicitly required. This would at least temporarily restrict the state from unilaterally declaring a treaty void and may influence the other contracting state to negotiate a new treaty. Thus, while such a provision may tend to restate the pacific settlement requirements of the Charter, it would foster a peaceful solution by the parties to the conflict by imposing upon them specific means of third-party recourse.[88]

Another suggestion involves the creation by the United Nations of a relatively informal process of fostering international agreements between states party to a conflict. The United Nations could establish the proper rules to allow states to deposit and register any unilateral statements approving a United Nations resolution. Thus, states could come to a formal consensus through an informal process that would not necessitate the signing of the same document.

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a specific means of submission, which must be resorted to at least initially. Therefore, the procedure should act as a breaking influence, not one that renders a binding decision.

87. Padelford, The Composition of the International Court of Justice: Background and Practice, in THE RELEVANCE OF INTERNATIONAL LAW 223 (K. Deutsch & S. Hoffmann eds. 1968).

88. For a discussion of the procedures under the Draft Law of Treaties see, Briggs, Procedures for Establishing the Invalidity or Termination of Treaties Under the International Law Commission's 1966 Draft Articles on the Law of Treaties, 61 AM. J. INT'L L. 976 (1967).

V. Conclusion.

Article 52 seems to be logically correct but politically mistaken. The primary purpose of international law is to maintain a minimal world public order. Article 52 makes both the settling of a regional conflict more precarious and the start of a conflict more easily justifiable. The rule pacta sunt servanda is sacrificed as is peace for logical consistency.

The international system ought to realize that the limitations on recourse to war cannot be applied as limitations on treaties. While the purpose of international law is to limit recourse to war, once such recourse is had the international system must have procedures available to manage conflict. Treaties and peacekeeping forces must be available to the international system in such a way that they can be used to limit conflict in both the short-run and the long-run.

The emphasis of the Special Rapporteurs in drafting Article 52 rested upon a prohibition that would apply to a model of aggression which was clear-cut and resulted in a peace treaty imposed on the victim of aggression. In addition to this assumption, however, the new states accepted the assumption that Article 52 was a prohibition against more subtle forms of coercion. The application of Article 52 to a treaty imposed upon the parties to a regional conflict was clearly not adequately anticipated. Yet the implications of Article 52 for the settlement of regional conflicts are great.

Assuming that the new states influence international law to accept Article 52 out of national interest, this exercise of influence will represent the success of short-term national interest over the long-term interest of the new states of the international system in achieving peaceful settlement of regional conflicts. This assumption of the supremacy of national interest has been the theme of a recent study by Prakash Sinha:

> [N]ot all the existing rules of international law are wholly acceptable to the newly independent states of Asia and Africa, which today constitute the majority of sovereign states. They accept some of its rules and they tend to reject others. . . . [T]hese attitudes are conditioned by the demands of the national interests of these states. Therefore, they accept those rules of

> international law which promote their national interests and they are critical of those rules which are not helpful in promotion of their national interests.[89]

The conclusions of Mr. Sinha relating to the attitudes of the new states on coercion in treaty law made prior to the 1968-1969 Vienna Conference are mostly validated by an analysis of Article 52 of the Convention on the Law of Treaties. Professor Sinha has noted:

> Certain Asian and African states have expressed their denunciation of the traditional rule which upheld the validity of a treaty concluded by means of coercion of a state as belonging to an era when many principles of international law had been formulated and used for the benefit of a small group of powerful nations against others which happened to be weaker and smaller. . . . A treaty imposed by force is void because, not merely the contracting parties, but the entire international community is involved. The treaty may be renegotiated, but it cannot have legal validity as it stands. . . . Although they have shown acceptance of the principle of pacta sunt servanda, certain new states would like to see a rule which would enable them to terminate unilaterally a treaty involving interests of a state which are vital to it.[90]

Suggestions have been made to alleviate the paradoxical situation created by an excessively broad interpretation of Article 52. One may only hope the use of violence will be limited by the adoption of either one of these or other suggestions. Professor Green has summarized the dilemma as follows:

> There can be no quarrel with the African or the "uncommitted" states if they restrict their new views of international law to their relations inter se. . . . The potential result of a universalization of [their new concepts]. . . could result in international anarchy par excellence. Moreover patience has its limits, and

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89. S. SINHA, supra note 7, at 11.
90. S. SINHA, supra note 7, at 85, 138.

> the older states may eventually refuse any longer to acknowledge the established rules under which the new ones claim their right to exist. . . . If the traditionalists and the innovators -- the old and the new States -- fail to come to terms . . . there can be no prospect of a rule of law.[91]

The only viable developments in international law toward the creation of an effective international legal order are, as Professors Deutsch and Hoffmann have stated, "[A] faithful repression of political realities and hence in the interests of international law itself."[92] Professor Karl Deutsch wrote further, "[T]he smaller countries may have to prize a flexible peace more highly than strict law."[93]

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91. Green, supra note 3, at 58, 60.

92. THE RELEVANCE OF INTERNATIONAL LAW 3 (K. Deutsch & S. Hoffmann eds. 1968).

93. Id. at 74.