

INTERVIEW V

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INTERVIEWER: T. H. Baker

PLACE: Mr. Wozencraft's office, Department of Justice, Washington, D.C.

Tape 1 of 1

B: This is the fifth interview with Frank M. Wozencraft, and the subject matter is the UN Conference on the Law of Treaties.

W: One of the functions of the Office of Legal Counsel in the Department of Justice is to represent the department in matters involving international law and United Nations-related international organizations. In this capacity, I was invited by Dick Kearney, our ambassador to the UN Conference on the Law of Treaties, to become a member of a study group organized by the American Society of International Law to consult with him and with our delegation as to the positions that our government should take in connection with a proposed convention, which would, in effect, codify and, in the process, substantially revise the international law doctrines which govern the interpretation of treaties and their validity [or] invalidity in termination. This group was composed primarily of law professors of international law. There were a couple of private practitioners and veteran international lawyers present as well. I approached it from a standing start with very little background of the overall field of international law. I had,

Wozencraft -- V -- 2

however, already come into contact with the importance of questions that arise where international law intersects domestic law, and this is the area where the Justice Department and the Office of Legal Counsel become at least as involved as the State Department and the Legal Advisor's office there.

The history of this proposed convention or a multilateral treaty, which is what a convention is in this sense, is that the international law commission had come up with a draft of about seventy-five articles which had been referred to a conference called by the United Nations. And this conference was to be in two sessions, both to be held in Vienna, the first in April and May of 1968 and the second in April and May of 1969. The 1968 meeting was a committee of the whole, and its project was to go over the ILC [International Law Commission] text and vote up or down various provisions for presentation to the second session at which point it would be determined whether or not the convention would contain the specific provisions and whether it would be adopted.

There were over a hundred nations represented at the conference. Our delegation was headed by Ambassador Kearney and had about four or five other members. I was not a member of the delegation itself at the beginning because the convention was to last about two months, and I couldn't conceivably be away that long. At the end of April, however, it became clear that the negotiations on the articles on invalidity, what and how treaties would be invalidated and terminated, would be very crucial, and that things were not going at all well for us in Vienna. I had agreed earlier that if this kind of situation arose, I would be glad to come over for a short period to do what I could to help, and I

Wozencraft -- V -- 3

was invited to do so. My time over there was limited to about two weeks. Fortunately, it was the two weeks when the action had really reached the highly interesting level.

My work on the study group had given me some familiarity with the rather extensive ways in which the proposed convention would enable countries claiming that a treaty was invalid because of fraud or duress or bribery or economic pressure or threat of force to claim that it was invalid. There were several articles that concerned us greatly because we were afraid that they would be invoked by countries seeking to upset established relationships, and any threat to stability in the world becomes a threat to world peace. It also becomes a threat to our own position, because, as has been shown time after time after time, arguments between other small nations very frequently can pull the larger nations into the vortex. Also, any time there is real chaos, there is more opportunity for forces like the Chinese Communists, for instance, to come in and try to make hay out of it, and if they're two of our friends, an argument between them can only result in at least one of them becoming indignant at us. So it was for this kind of reason, as well as our own treaty situations, that led us to be very concerned about the provisions of the convention itself.

In the meeting of the study group, however, we had been looking at it almost entirely from the standpoint of what changes did we think should be made in this often deficient ILC text. The same process was going on in every other country, including the communist countries and including, in particular, the Afro-Asian countries. They had their own ideas of how the ILC ought to be changed and in the reverse direction usually from what we had in mind. As a result our study group had had a rather two-dimensional

Wozencraft -- V -- 4

view of it, which I think was probably something that couldn't have been avoided, but which, at least, resulted in a bit of limitation in the usefulness of the study group itself.

I followed the cables as they came back from the conference during the early months, and I found it very difficult to keep track of exactly what was going on. The one thing that was very clear was that we were losing a great many votes by about twenty-five for us to seventy-five against us on issues where, from our viewpoint, our position was entirely correct, and really, we should have been getting a majority.

When I got over there, I began to understand how this was happening and to appreciate that in this kind of a situation cables cannot reflect with nearly the detail that is necessary for a full perspective all of the votes and all of the changes of all of the positions. It's just almost impossible to do. One consequence of this is that instructions from Washington tend to be not as useful as they might otherwise be. There has to be a certain amount of leeway and flexibility given to the delegation itself, and particularly its ambassador, to roll with the punch, to know when to get in touch with State in Washington and find out what to do, but to be able to react on the spur of the moment when it needs to and also be able to say, "I'm sorry, I can't give you a view on this until I've had a chance to check with the department at home." It takes both kinds of abilities--the ability to move quickly and the ability to delay for further views.

In any event, when I got over there, I found that things were reaching the crisis stage. And the first real evidence to me of how bad the crisis was, from our political standpoint, came the second evening I was there. The sessions would go on from about ten in the morning until one, and then from three until six. The delegations' day,

Wozencraft -- V -- 5

however, would start at 8:15, getting ready for the morning session. The lunch hour would be occupied almost always by preparing speeches or positions for the afternoon or in meeting with the representatives of other countries. And then, at six there would be a cocktail party, which would mainly be a lobbying session. And two nights a week at 8:30, there were evening sessions following the cocktail party.

It was at the first of these evening sessions that I attended that we made a motion to defer for a day or two the crucial vote on Article 50, an article which would have embodied the quite new and quite controversial doctrine of *jus cogens*. This article worried us because, in essence, it said that any treaty which violated a peremptory norm, a peremptory international norm, would be invalid. Nobody quite knew what a peremptory international norm was in its then form, and even to this point, the convention did not provide any satisfactory method of finding out what it was, in terms of third-party settlement in the form of either conciliation or arbitration. Our ambassador was willing to accept the concept if we could pin it down a little more precisely and make it less free-wheeling and open to abuse, unlike England and France, both of whom opposed it completely. I say our ambassador--that also includes our State Department and our delegation. It wasn't that we liked it too much; it was simply that we knew it was inevitable, and that we acknowledged that something like this was going to get in the convention, and we ought to try to make it as palatable as we could. Also we recognized the validity of the overall concept that there are times when treaties can be invalid because they simply are contrary to the overwhelming sentiment of the world. This is the way international law forms, as a matter of fact. Unlike domestic law, where court

Wozencraft -- V -- 6

decisions are the guide or legislation, we're dealing in a world where treaties exist as the equivalent of legislation, but where the equivalent of court decisions, with the exception of a few international court of justice decisions, is simply the question of what do the countries of the world recognize as the law? So our motion to delay for a day or two the final decision to try to work out a language that we could support seemed to me in the context to be about as reasonable a request as we could possibly make in an effort to try to get together a valid position.

We lost that vote by a tie vote, forty-two to forty-two, with seven abstentions. It's interesting that a great number of the forty-two nations that opposed us on this have probably as their mainstay financially our foreign aid programs. This did not affect their judgment at all on these questions, even when it was a matter almost of comity of whether they would try to let us work something out. One never expects another country to depart from its national interest simply because you have loaned or given them some money. However, when it comes to a matter of a day or two's deferral, it did seem to our delegation an eminently reasonable idea.

The communist bloc was against us; most of the Afro-Asian states were against us; some of the South American states were against us. And after I had been there a couple of weeks more, I realized that maybe we had been pretty lucky to get forty-two votes. But at the time, at least, I was appalled, and I think all of the rest of our group were, at that particular vote. I kept a record of that vote and, parenthetically, on the recent trip that I made to Morocco and Tunisia, I met with foreign ministry officials at appointments set up by the State Department, and I pulled this ballot on them. Morocco

Wozencraft -- V -- 7

had voted against us; Tunisia had abstained. Any change in either of these votes and we would have won that particular vote. And yet these are two of our best friends in Africa. Now partly we would have done better if we had been in better touch with the French-speaking countries. The budget cuts that were imposed throughout the government, and particularly on foreign conferences, had cut down the State Department delegation, and they had cut out the political representative who would have been in touch with the Asian, African, and South American countries. And particularly in the French-speaking area, we were not at all strong, in either our French-speakers or our representation in dealing with these countries and keeping them informed of what we regarded as important. However, when you make a motion like that, I think it's pretty clear you regard it as important. When you've made a speech on it, they know you think it's important, and I'm not sure what we could have told them before that would have changed their view at the conference itself. At the same time, it was an indication of the kind of way that the cards were stacked against us.

Let me talk a little about the way these conference votes are taken, because I think this goes to the core of the whole United Nations problem and our whole problem in international organizations. There've already been a good many speeches and addresses focusing attention on this, but nobody has come up with anything resembling a solution. The sovereign equality of states is the basic concept in any of these international organizations. They do not care who contributes how much money or who has how much power. The result is that, in one of these votes, the Maldiv Islands, or Malta, has just as much of a say as Spain or Italy or the United States.

Wozencraft -- V -- 8

The second problem was that every nation was reviewing the law of treaties from the standpoint of its own treaties. Spain, for instance, voted as if it were a communist state throughout the conference. The reason was that they wanted anything that would upset treaty relationships, because they wanted to upset the treaty on Gibraltar. And every vote that they made had Gibraltar in mind.

Venezuela voted almost like a Communist state because they were after 40 per cent of Guiana, which they could get by upsetting an arbitration of 1890 or something between the British, Guiana's predecessor in Venezuela, where the Russian arbiter was supposed to have been bribed by the British, an event that came to light considerably later. Guiana, naturally, was not prepared to give up 40 per cent of its current territory because of what some Englishman might have given some Russian in 1890.

This is the kind of way your lines formed. In one case, for instance, the Ethiopian delegate said to me, "I'm sorry, I would like to be with you on this; I think you're right as a matter of law, but we have a grazing rights problem with Somalia." And so you had every nation looking after its own interest and each with an equal vote. On top of that, you had two quite cohesive blocs. One of course was the communist bloc. When the Russian delegate gave orders, there were about ten countries that would instantly vote exactly as he wished; they didn't even have to be told. They just watched and listened and knew when to do what.

The other group that was really organized was the Afro-Asian bloc. They had had a meeting in Delhi in the previous December and had agreed to vote as a unit on most things in order to maximize their position in upsetting what they regarded as the

Wozencraft -- V -- 9

international law of colonial days. They wanted to get the kind of international law that they would like more, and they regarded this as their great opportunity. I might say I think they were exactly correct in this; it was their great opportunity. And they are succeeding in doing exactly what they set out to do. They voted almost in unison unless there were particular interests involved that led them apart. But there was a presumption that they would go along with each other. The result of this was that very solid bloc of little states casting a very large number of votes, and it was only a rare situation when we really succeeded in denting this bloc on anything important.

Well, the consequence of--against these, the only thing we had to offer would have been a base of Latin American countries or a base of Western European countries. The Latin American countries were completely divided. There was nothing resembling a Latin American position. Ecuador and Venezuela were voting pretty much with the Communists; Argentina and Peru were much more friendly to us; Uruguay had a delegation headed by a distinguished international lawyer Arrechaga, and they voted about as Arrechaga would want them to, regardless of a particular national position. There were cases where individuals decided the national position and cases where, rather in contrast, the foreign minister was calling the shots and the ambassador was nothing but a front man. But there was no unified support at all that we could hope for from Latin America. About the best that we could hope for there was a draw. Of course, Cuba was there and voting against us at all times on general principles, whether we were right, wrong, or indifferent.

Wozencraft -- V -- 10

Western Europe, surprisingly, was almost equally splintered. You had U.K. and France each following its own pet directions. U.K. was vigorously opposed to *jus cogens*, the Article 50 that I have just described to you, and to anything that had not involved the international court of justice as a settlement tribunal or adjudicating tribunal in the case that nothing could be settled. France was really opposed to the convention as a whole and would like to have done everything it could to upset it, but had very little luck in doing so. Both of them managed to sound quite neocolonial to the rest of the world. The Afro-Asians resented almost every position that they took.

We had solid support from Australia and New Zealand and usually Canada, and from some of our East Asian friends, although you couldn't always count on South Korea to even show up. The Philippines would get in a fight with Malaysia, and they'd have an argument going, and so sometimes they would get on opposite sides from each other. But we just had no real group that we could count on automatically.

In Western Europe the Spanish, as I mentioned earlier, were voting straight with the communist bloc. Switzerland was cleaving under the international court of justice. And the Netherlands and Sweden and Denmark and Norway were attempting to become a third force, an organization in between us and the Soviet bloc, and therefore not too closely aligned with us. The result was that we were just losing vote after vote after vote, regardless of whether our position was right.

B: May I ask a question here? Given the time of this meeting, is there any hint in this activity of resentment against the American-Vietnamese policy?

Wozencraft -- V -- 11

W: There was remarkably little evidence of that on the surface. Whether there were currents and undercurrents is a little difficult to say. I'm inclined to think that the undercurrents probably existed but were probably relatively slight. Obviously a country like Cuba or a country like North Korea--North Korea wasn't represented, but a country like Cuba, a country like Mongolia, is going to be opposed to us in this kind of a--

B: I was thinking mostly from the standpoint of the Afro-Asian countries, if that that may have been one of their--

W: No, they don't--the African countries didn't care that much about it frankly. The Asian countries--India has been vehemently opposed to us in all of this anyway. I think that the Vietnam issue was less significant than any of us expected it to be, at least on the surface. And there were other better, stronger reasons for the position that these countries were taking. Their basic position had nothing to do, really, with the present war or present peace settlement. These were talking about treaties, how do we interpret treaties, when do we invalidate oppressive treaties, and the major interest of the Afro-Asian group was to be able to invalidate a treaty whenever they didn't think it was a good treaty, whenever they didn't like it. That was their core position.

The Russians tended to go along with this because they don't care much about what a treaty says anyway. As far as they're concerned, as they proved in Czechoslovakia very shortly thereafter, they're going to do what they want to do anyway. Then they'll rewrite the treaty. If somebody declares it invalid, let him come in and try to prove it's invalid or implement its invalidity and he'll run into some tanks. Anyway, the Russians were fairly anxious to go ahead and pose as the friends of the Afro-Asians on this.

Wozencraft -- V -- 12

Now there was one article, Article 49, that provided for invalidity in the event of coercion or force or the threat of force. The Afghanistan delegate, with the support of a lot of Afro-Asian countries, proposed an amendment to this to include economic pressure as a threat of force. We didn't like this because everywhere we have an aid program somebody could be saying that we were exercising economic pressure whether we were or not, and we tried to make it clear quietly to some of these people that if this went through, it might cause us to have to reevaluate some of our aid programs to be sure that they couldn't be misinterpreted and thereby have to cut back on aid to them. This didn't make much impact on anybody.

The Russians, however, didn't like this much either, because they know a little about economic pressure. And eventually, this amendment was withdrawn in exchange for a resolution condemning economic pressure, but not becoming part of the convention. There are some who seem to have felt that we won a victory here. My feeling is that the reason we won it is because the Russians wanted it that way. And whenever our views and the Russians really coincided, as in this case, you would probably get a good result, unless it was something where the Afro-Asian many-state [ministate?] concept simply had all of them voting with you, [at] which point either the Russians or we would probably go fairly quietly anyway.

But it was really interesting to see who were our friends and who were our enemies. And, as I say, a lot of countries that I would have thought would have been our friends and very sympathetic with our desire to retain the stability of the general international pattern were on the opposite side. And I think in a lot of cases, as in

Wozencraft -- V -- 13

Venezuela and Spain, you're looking at reasons that were very discernible as to their own national self-interests. In other cases, however, it was simply the desire of these countries to loosen up the whole realm of international law to enable them to get out from under patterns that they felt had been formed in days when they were colonies and when the colonial powers had been shaping the laws. One of them, in fact, said to me that international law, as we had all known it, was really shaped by the colonial empires and the oppressors, and it needed to be reshaped entirely, and that was the purpose of this convention. In truth, it doesn't reshape things that much. It's not all that different from present law. The main problem is that there is so much vagueness and ambiguity that unless you have a third party settle with procedure that can resolve disputes, it's an open invitation to one country to invoke one of these provisions as invalidating a treaty that it does not like.

Therefore, we have focused our attention on trying to get appropriate third-party settlement procedures that will string it out and get the picture out on the boards enough to where the world can look at it and evaluate this claim. Now the article that deals with third-party settlement procedures is Article 62. It was very close to the end of my stay there when this article was coming up for discussion. I was due to go home and just about that time, Ambassador Kearney had an attack of colitis which laid him up for three or four days. Part of the consequences of cutting away our political representatives from the delegation was that Kearney had no truly effective deputy to whom he could turn over the managing role, who could really speak for the United States and negotiate for the United States. There were a couple of very able law professors, but they were not of our

Wozencraft -- V -- 14

government, and it was a little difficult to put them in that position. There were a couple of very able younger State Department people, but it was a little unfair to put them in that position. As a result, simply by being there, I ended up during Kearney's absence as being almost an acting head of the delegation, not literally, because I always could check back with him. Again, decisions had to be made on the spot. Here comes the vote; how do you vote? And I was waving our card by which each country cast its vote at one of these conventions--raising its card while they are counting.

Let me digress one moment more here. It's interesting that in all of these conferences I had not understood how much more slowly one must speak in order to permit simultaneous translation to be effective. When you think you're going slow, you're not going slowly enough. And after you dart in and out of three or four languages on the earphones, you find that the slower, the better. You also find that this business of attending an international conference isn't nearly as glamorous as a lot of people back in the United States think it is. After being all day in the hall with earphones on and then going out and negotiating in languages that you don't know too well or with people that don't know English too well, it comes under the heading of a very hard day's work. I lost about seven or eight pounds, maybe ten pounds, in the two weeks--two and one-half weeks--I was over there.

B: Do you ever worry about the translation, whether or not you're being translated accurately and receiving accurately all the nuances?

W: Yes, and this is one reason it's a great help to know a little about other languages. When you're speaking yourself, you can't tell what's happening to you, of course. You have

Wozencraft -- V -- 15

other members of the delegation who can. However, your real defense is in copies of your speeches--as they are transcribed you get a chance to look at them or at words of the resolutions, but there is no really effective check on a really bad translation that I ever found. I speak a little French and Spanish, but not well enough to be sure that I was catching all the nuances.

While I was so-called acting head of the delegation--I repeat again, that is a bit of an overstatement--different delegations from different countries would invite me to participate in discussions on Article 62, the third-party settlement provisions. And there was one conference in particular that I think is worth preserving for the record. It was the last day that I was to be there, on Thursday, and I was to leave that afternoon. It became clear to me in the morning that the question on Article 62 would be reached immediately after lunch break, and that there therefore would be negotiating approaches to us in the morning, near the end of the morning, and as this became apparent, I called asking Dick Kearney, who was due to show up that afternoon, to try to come before lunch to be available for these possible confrontations. He replied that he thought it would be unwise to do so in view of the fact that he had been back ill and it would look funny for him to come in just before the break instead of just afterwards, so for me to go ahead and field them if they developed.

Well, indeed they did develop. There had been about five different amendments proposed to the ILC version, the text version, of 62, which was a very weak provision that countries having disputes about validity of treaties will simply seek to work them out pursuant to Article 33 of the United Nations Charter, which is itself exceedingly bad. We

Wozencraft -- V -- 16

had an amendment that we wanted to have adopted that would have included compulsory conciliation and arbitration. There were thirteen states headed by Sweden and the Netherlands and Central African Republic, Tunisia, Lebanon, Finland, and a few others that would have in more cursory form accomplished the same thing, not as well, but a lot better than the present version. And the Swedes in particular thought that they could make this work, and that it could be adopted. The Czechs and most of the Soviet nations were interested in particular in putting off a decision on this issue until the second session, to be held in 1969. The Soviets had as their main aim throughout the whole conference the addition of an article which they called 5 bis, an amendment that they submitted, and which our good old study group back here would never have imagined or known was coming up, that I think [was] called the all-states formula, which would say that any state can become a party to any treaty, and all of them could sign this treaty, any multilateral treaty. Their main aim here was to secure recognition for East Germany and North Korea as separate states, mainly East Germany. On the other hand, the West German republic obviously was vigorously opposed to this, and it became a keystone of our foreign policy to oppose it as well on a political basis, regardless of the convention on the law of treaties. Japan was very strongly with us here because they didn't want North Korea recognized. And you ended up having a Western European position against 5 bis, and you had the Russians trying to make almost any kind of a trade to get us to either adopt 5 bis or at least adopt an all-state signing formula which would permit countries like East Germany and North Korea to become parties of this convention.

Wozencraft -- V -- 17

There is more than one view on this in our own State Department. You can get a lot of arguments that there's no reason why we ought to follow the West German position on this, at least as to signatures on this convention. The forthcoming conference will decide this one way or the other. I am confident that the Soviets will have made a good deal of progress on this by the next conference, and I wouldn't be at all surprised to see some sort of compromise go through that will enable East Germany, in some fashion or other, to sign this convention. In fact, I might say I rather expect that. I don't think it will go as far as an article 5 bis that would have all of the applicability to other treaties.

B: Were East Germany and North Korea represented at this--?

W: They had observers and so did Red China, but they're not members of the UN, and only UN members are actually represented officially at the conference. But there were over a hundred of those, so it was a large, chaotic conference. But the chair of the committee on the whole was held by [Taslim] Elias of Nigeria. The rapporteur of the ILC [International Law Commission], Sir Humphrey Waldock, exercised a great deal of influence and gutted us at every conceivable opportunity. The UN Secretariat was represented by a Soviet man who might as well have been part of the Soviet delegation and an American who might as well have been a complete neutral. This is the way we usually draw our cards in this kind of thing, and it's not much of a help. We got a little more help from one English member of the Secretariat's staff, but the only way we could keep up with what was coming up next was to be asking at all times. Nobody ever volunteered information to us, and our information connections again were seriously hampered by the lack of political personnel in our delegation.

Wozencraft -- V -- 18

Another thing that hampered us was, as part of our austerity program, the entertainment allowance for our entire two-month conference was \$500, this in a conference where the major way that you were communicating with people is at cocktail parties or dinners or entertainment kind of functions. The ambassador did have an apartment that he was provided--Ambassador Kearney--and he entertained in small dinners of about ten as often as he could, but it's hard to dent a hundred-nation conference this way. And even if you're getting one person from a delegation, you may not be getting the one that is going to be formulating the position. Also from a protocol standpoint, you could never get below the figurehead in that kind of a situation.

Our ambassador to Austria was requested to make available the embassy or the embassy residence for a party that Kearney could give with a little bit of his \$500 and refused to do so on the ground that Kearney was an ambassador, too; he could provide his own hall. I hope that this will be changed before the next session, but I couldn't bet on it.

One of the things I did, in an effort to do what I could to offset this, was to give a party myself. The Immigration Service representative had a very nice apartment on St. Stephansplatz, and we arranged that I, as host, would invite members of delegations who were members of the department of justice of other countries or the supreme courts of other countries as my guests. This enabled us to get below the top protocol level and to hit in particular those countries which were not large enough to have independent large state department/foreign ministry legal advisory staffs, and therefore were relying on their justice department or supreme court personnel, their top judicial and legal minds. And this turned out to be a very successful party. We had about thirty-five people. And we

Wozencraft -- V -- 19

served a great deal of rice and a great deal of lettuce, which they wolfed down, as well as other things, of course, but rice and lettuce were their staple diet at home, and they hadn't been getting much of it in Vienna, so it was a very successful lunch. And it gave us contact with a great number of the African and Asian delegates that became very useful to us in just the next couple of days, as we approached these critical negotiations. The total cost of our party was \$90, which shows what can be done when we have a hall and the Immigration [Service] people pitched in and cooked and helped wait on the tables and everything else. And it wasn't easy for them, but I think it performed a real function. At a party like this, you can sound out how people are feeling about these various issues.

Now back to where I was before on the day that I left. Before Kearney came, I was approached by the U.K. delegate who told me that there was a meeting outside that they would like very much for me to attend where the Czechoslovak delegate was going to present a compromise on Article 62.

[Hans] Blix of Sweden was particularly active in this and [Willem] Riphagen of the Netherlands. And they were the European people who were in on the thirteen-state resolution, headed up by Central African Republic nominally, but with a great many French-speaking countries and Scandinavian countries involved. I went out, and there indeed came the Czech delegate to present the compromise, and the compromise consisted of nothing but a resolution that he earlier had introduced, which would, in effect, have recognized [that] both 5 bis and 62 presented serious problems which should be kicked over to the next session. An acknowledgement by the conference that 5 bis

Wozencraft -- V -- 20

presented a serious problem would in itself have been a great win as far as the Soviets were concerned.

Blix and Riphagen felt that they still could get the thirteen-nation resolution through. It ended up with a confrontation really directly between the Czech delegate and myself, as he presented the compromise. I asked him in what respect this differed from the amendment that he had already introduced. His reply was that the amendment he had already introduced was a compromise, and that he would indeed have trouble getting his friends to go that far again. And I told him that we viewed a compromise as something which receded from a previous position, it did not simply resupport it, [and] that by that light I thought our suggestion on Article 62 was also a compromise and we would propose that. He made it clear that this was entirely unsatisfactory, and I told him that I would relay every nuance of this to Ambassador Kearney, who, of course, would be making the final decision, but that I thought he realized we'd already taken a position on his earlier amendment. He said that he hoped we would change this position and then seeing that he wasn't getting very far, resorted to a very thinly-veiled threat that if we did not come around and go along with this approach that he would not answer for the consequences, which would be very serious. And, in fact, "extreme measures," his exact phrase, would be called for.

B: What did that mean, in that context?

W: That meant in that context that they would stampede and steamroller us on other provisions and would not try to work out anything that we could live with but, in fact, would try to make it as tough as possible on us. At least that was the way I interpreted it.

Wozencraft -- V -- 21

My reply was that I trusted he understood that extreme measures in one direction usually evoked extreme measures in the other direction, and that a chasm rarely opens from one side. This was all very polite, and he acquiesced to that, and then he said, in what was already somewhat prophetic tone, that he could not answer for what the situation would be a year from May. His own Czechoslovak government by a year from May might be able to join us on our position on conciliation and arbitration, but that they could not do so now. And he implored us to kick over the settlement of these problems for a year in the hope that things could then be worked out better. But, of course, he did this in the context of also what he recognized as a major problem, the 5 bis point that was literally the crown jewel for the Soviets. I don't know where this particular gentleman is today; I do feel quite confident that at the forthcoming conference in Vienna, the Czechoslovak government will continue to be voting with the Soviets, and in opposition to our views.

B: Yes, in context that was the spring of 1968 when the Czech government was taking those very cautious steps as to--

W: Yes, this was early May, almost mid-May. In fact, that very day when I left, I found that you couldn't go home from Vienna to Washington without stopping and changing planes somewhere, and I chose to do so at Prague, spending the night at Prague. About eighteen hours there was all I had, but it was enough to get a feel of the ferment that was in existence in that country. But as far as this man was concerned from Czechoslovakia, and the Czech delegation, they were completely under [the] Soviet thumb at that very time.

Wozencraft -- V -- 22

There were no tentative efforts of independence in Vienna. The closest that he ever came to it was this statement.

Interestingly, at an earlier cocktail party I had met him and had told him that I was, after looking for the right neutral phrase, that I was watching with interest the developments in his country. His eyes came alive, and he started to say, "Yes, yes, this is very important--not only to Czechoslovakia, not only to Eastern Europe, but to the world." Just then, he turned around to see who was nearby, and he found within hearing distance Molshon, [?] the UN Secretariat man, that great neutral, who just happened to be from Russia. He abruptly terminated the conversation, told me that he trusted I would understand that he had to go see somebody else right away, and never talked to me again anymore than he could help during the entire conference until this quite official confrontation just before I left.

Another interesting kind of technique that the Russians used was at a cocktail party at the Spanish Embassy while Kearny was ill. There was a professor from the University of Kiev, a law professor who had as his assignment making friends with the American and Western European delegates. He was a very nice fellow indeed. And I had just completed a rather long conversation with Sir Francis Vallat, the U.K. representative, and was heading toward the hors d'oeuvre table when our friend from Kiev came and asked to speak with me just a minute. And he guided me from the hors d'oeuvre table out into an adjoining room. And at the same time, there emerged from another part of the crowd the Soviet Ambassador Kleshtov, [?] and it was one of the brilliant cutting-horse

Wozencraft -- V -- 23

operations that I've ever seen, in the great Texas tradition. He had cut me out of the herd and over came the Soviet Ambassador to do the branding.

What he really wanted to do was to find out if I would be any softer touch than Kearney on this all-states formula. And we spent about twenty-five minutes in very interesting conversation, which helped him in that he found he couldn't get anywhere with me that he couldn't get with Kearney and where I found out that this all-states formula was what they really were after. And I relayed that to our delegation, and it's still my conviction that that is the main name of the game from their standpoint. They care much less what the treaties provide than that there be some sort of political recognition from East Germany, and I believe this is still true today. But this gave me a good context for understanding the nature of their compromise--why they were doing it; what they were really after; and how it was really not a compromise from our standpoint at all.

After this confrontation with the Czech, the Swedish and Netherlands delegates got with the U.K. people and myself and started deciding what to do about their resolution that was coming up that afternoon. And they felt that they could win if they could just get one good leader of the African group who was not presently on their resolution. Not one of the French African countries, but one of the English--and we might call them the more radical--countries in terms of the convention itself. And I asked them who they thought they were going to get to do that, and they suggested Mwandwa [?] of Kenya.

I had had dinner with Mwandwa at Kearney's and had met him again at this luncheon. And I knew perfectly well that Mwandwa was not going to vote with them on

Wozencraft -- V -- 24

this. And I told them as much. And they asked me who I suggested. Well, I suggested two or three other people without knowing who the best ones would be. One was Ethiopia, I remember. And for everyone, there was an answer: the Ethiopian wasn't regarded as important enough within the African group and so forth. So I told them that they'd been there for two months, and I'd been there for two weeks, and I couldn't tell them who to get. All I could tell them was that if they were counting on Mwandwa, they were going to lose.

Well, they put it to Mwandwa, and they lost. And what happened was, eventually, very much as the Czechs had proposed in their so-called compromise, both the third party settlement and the all-states formula were kicked over to the 1969 session. The difference was that they did not succeed in getting a resolution saying that everybody acknowledged that this all-states question was a very important and difficult question. So they didn't get what they were after in that sense. And the interesting thing institutionally was to watch the thirteen-state position erode, from one where the Swedish and Dutch people felt they could do it to one where it was perfectly clear that they could not. And this happened basically with the Soviet position coming out that we don't give anything here unless we get something on all-states. And when the Russian bear rears on his hind legs and bellows, the little animals head for the tall trees. And you will find a great number of abstentions by countries who don't want to make the Russians mad, or us if they can help it. If they have to choose, they prefer to make us mad because we won't hurt them as much as the Russians will. At least that's their basic position. The Soviets had made a very ultimatum-like speech that had announced that they did not intend to

Wozencraft -- V -- 25

approve anything that involved compulsory arbitration, which was part of the thirteen-state package and which therefore condemned the thirteen-state package.

Now I had a meeting this past Saturday of the study group which again reconvened in New York with a good deal more perspective this time. Myers MacDougall, who had attended the beginning of the convention--professor of law at Yale--had attended the most recent meeting of the Afro-Asian bloc, this time in Karachi, as an observer for the American Society of International Law. And I had dropped in and talked, as I mentioned earlier, with the Tunisian and Moroccan foreign ministries and with the chairman of the permanent conference Dr. [?] Ago of Italy in Rome. And we were able to approach the problem in a good deal more practical terms than we did before last year's session. We also had met once in the early fall, where we had reported on the events of Vienna itself.

I hope that this year we will be better prepared, both in our budget and our personnel and our expectations, for what will happen. Of course, it's much easier to be prepared this year because there now is a draft convention that everybody has before them. And we have been making considerable effort to communicate to other countries this year in advance the importance that we attach to third-party settlement procedures. And this has been done on an ambassador-to-foreign minister level, with the instructions of the undersecretary involved, and we just have a lot more beef behind it than we used to.

Yet I think we must recognize that we have here going on every year I don't know how many conferences like this. There's a fantastic number of them. They're most of

Wozencraft -- V -- 26

them quite important. They spread to a thin membrane our own strength and facilities.

The reason we don't have more depth in the delegations is because we have too many delegations to staff all of them. Yet this comes back to another of my basic convictions and themes throughout several of these discussions, which is that each one of these countries is able to approach each of these conferences as one of its major enterprises. And they can call on the best people in their country, throughout the country, to serve on them. And they don't have to worry about how many government employees they have available; they can get whoever they need. That doesn't mean that they pay full attention to every conference, but they are able to staff themselves a lot better than we are.

Another problem of our budget was that we were living in a *pension* [guesthouse] or, in the case of a couple of us who were there for a shorter time, a perfectly nice but non-central hotel called the Hotel France. The African and Asian delegations, the crossroad where you run into people in the halls and have a chance to visit, were at the big downtown hotels with a per diem at least 50 percent higher than our meager sixteen dollars a day, on which you simply cannot live in Vienna. I had one pleasant conversation with a representative of an underdeveloped country who couldn't understand why we weren't spending more to live up to our big-power status. I explained to him that we couldn't afford the downtown hotels for both their country and ours, or, in fact, all of the underdeveloped countries. He was a nice fellow and I did it with a smile, and he smiled back; he wasn't upset.

But it is rather true that the countries that we are supporting go to these conferences in quite good style with a vote that equals ours and does not necessarily

Wozencraft -- V -- 27

follow ours at all, and in fact quite rarely follows ours. And this is a basic dilemma, I think, illustrating this whole problem of the international organization syndrome, the UN arithmetic based on sovereign equality of states. The fact that we have got to find some way of coping with this, where these many law-making conferences sponsored by the UN, which we, in turn, support, will be producing laws in an international sense that depart seriously from where our best interests lie. And then we're in a box of we're either the dog in the manger that won't go along, or we're signing onto something that we can't really live with. And sometimes we sign it but know the Senate won't ratify, in which case we get accused of bad faith. No matter how we work it at the moment, we lose. I don't know how we go about changing this.

There are some organizations where voting power is measured by economic contribution. For example, the INTELSAT [International Telecommunications Satellite Organization] Executive Agreement, which is now being renegotiated, and may not do that when we're through. The World Bank and other inter-American development organizations are basing votes on contributions or investments rather than sheer separate identity. But under the present rules, the only way we can compete with the mini-states where the votes count instead of the basic power and the basic economic contribution would be by spinning off our fifty states and letting each one of them be a separate nation. Most of them would be bigger than a lot of these nations that are doing the voting today. Obviously, that's not going to happen. I say that facetiously, yet it would take something like that in order to enable us to come out even. But we can't do that.

Wozencraft -- V -- 28

The only other alternative is much more effective organization. The real secret in a conference like this is to have a party whip who rallies the votes and gathers them just as you do in Congress. You're not making a man vote your way, but you're at least letting him know how you would like him to vote and letting him know that you're keeping track of how he does vote. This, in itself, can make a great deal of difference.

But the whole emergence of the Afro-Asian bloc, the fairly cynical, but quite effective, way the Soviets play it, and the handicaps under which we labor with our economic inability to have decent entertainment or housing facilities, all add up to a very serious group of problems that are going to call for increasing national attention.

B: Has anyone ever gotten any place with a population basis for voting?

W: No and if you tried that, you're going to pass the mantle to India, for instance, which is not a place I'd like to have it, or Red China if it ever comes in. I would personally like to see explored some concept where votes might be weighted either by contribution to the UN, to the finances of the UN. You wouldn't make this the only criterion, but perhaps it could be *a* criterion. A country who hadn't paid its dues can't vote, or something like that. But this has very limited promise. I don't mean to advertise it as too promising, because when Russia or France decide not to pay their dues, what are you going to do? Leave them out? If you do, you've undercut the whole effectiveness of any international convention you have, although I'd like very much to cut them out of a few things I can think of.

Another interesting aspect of this conference is that there is the committee of the whole, and then there is the drafting committee. The drafting committee is where you can

Wozencraft -- V -- 29

shape your actual language. It had about twenty-five members, and there you could do a good deal more detailed work than you possibly could on the floor. On the floor the parliamentary situation on whether to sever one proposal into two and then which should be voted on first became absolutely bewildering. It's a game of procedure, and it calls for a very quick and experienced mind to be handling it as you go, particularly in the multi-language situation. It calls for about as much agility as I've seen called for, and yet we just don't pay that much attention to it. In the drafting committee, we've got a good deal of mileage in it. There you can do a little trading, which is almost impossible to do in the maelstrom of the floor. Yet if you get too far away from what came out of the floor, or even if you get a little bit far away on a controversial point, you will be reminded on the floor that the drafting committee has exceeded its jurisdiction, and that it should again be voted on.

And the Soviets are extremely able, particularly with these various people that they have like the Czechs, the Algerians, the Mongolians, who will come in and with a bit of team play like a hockey team or a soccer team, pass the ball back and forth, leaving the fullback standing there and getting a clear shot at the goal. It takes pretty good goaltending under those circumstances to keep them from scoring.

So there are a lot of levels on which this thing works. We were really disappointed in a lot of the caliber of the Western European delegations. We were double-crossed twice by the British, clear-cut situations where they knew we would oppose them and therefore did not let us know in advance what they were going to do. On one vote, where despite their agreement to let us know if they were ever going to

Wozencraft -- V -- 30

come up with anything like this, they came up with it without letting us know. And U.K. and New Zealand--New Zealand and Australia, as part of the old school tie of the Commonwealth, abstained even they knew U.K. was wrong on this. And as a result of those abstentions, U.K. won by one vote. We voted against, but we didn't have any opportunity to rally our forces, which was exactly what U.K. had in mind when they failed to tell us about it.

I won't bother with the details of another case--well, I will. It was a case where we proposed an amendment to Article 57, I think it was, that probably would have carried. They suggested that it would have been more appropriate to an amendment to 43, which was going to be considered later owing to deferment of consideration of that article. Our ambassador agreed to go along with this on the idea that we would then get U.K. support in 43 and would succeed in getting it there. After we withdrew it, without the favorable vote that we very well might have gotten in 57, it came up in a less appropriate context in 43. U.K. did not support it anyway, and we lost anyway. "Put not your faith in princes."

B: Does this kind of thing ever involve the White House? In this case, did the White House take any sort of direct or indirect interest in it?

W: No, one of the problems here is that there are so many of these conferences that it is impossible for the White House to get interested in it. They never have an opportunity to focus on it or know about it. And, in fact, ordinarily, I would not. If it had not been for this study group, I would not have been over there at all. And I wouldn't have known enough to be of any help. It's a very technical business.

Wozencraft -- V -- 31

It turned out, I believe, that my presence was quite useful, particularly because of Ambassador Kearney's illness. If I hadn't been there, it would have been a serious problem. But also just plain to have a Justice Department man there with the perspective of what will the Senate buy, what can we domestically hope for, what would the impact be on us as a country and on our political processes, I think was very useful.

B: And the implication of all this is that the State Department was not all that directly concerned either.

W: The State Department freely acknowledges that they have five hundred of these things going on, and they can't pay that much attention to all of them. And when I came back, I gave a very detailed report of this to Undersecretary [Eugene] Rostow, in particular, and to a lesser degree to others. And Rostow, for the first time, got the feel of what was happening and was very concerned by it. And we've done a lot better job, I think, since then. This was another function, incidentally, that I think my presence served. For the ambassador of that delegation or any State Department employee to come back and say, "This was a very difficult thing, and we had a hard time," would have made very little impact. He would have had to do it through channels, which basically were either the assistant secretary for international organizations or the legal adviser or both, but never to an undersecretary. And then those people have to sort this out along with infinitely more crucial problems that they're confronting, and something like this just gets the short end of the stick. I was able to come in from outside and say, "Now listen, gentlemen, this is really serious, and you should give your people more support," and make a good deal more impact than they could ever have done from within the framework.

Wozencraft -- V -- 32

B: In the broader sense, is there ever really going to be an international law until such time as there is an accepted international court, and more important, an international police force?

W: Well, there is international law now, not of the kind that you're talking about--

B: For all practical purposes, it really is what the big guys say it is, except in special things like commercial law and so on.

W: In terms of power politics, that's true. But in terms of innumerable other areas, treaties really do control. Let me take [as] an example that safety of life at sea convention. Have I talked earlier about the dispute between State and Commerce on that?

B: Yes.

W: I thought I had. Well, this is the kind of thing where the treaty governs, and countries are going to follow it. Incidentally, I mentioned earlier Article 49 and its invalidation of any treaty obtained by a threat of force.

One of the problems that Rostow encountered very soon after this was when the UN was trying to work out a settlement for the Israeli-Arab dispute. Any settlement that was achieved would have certainly been by pressure. And they started worrying about whether any such treaty could be negated by the claim of one party, that it is was, in fact, achieved by force and was not their free and voluntary will--a very real problem. And so I think State is a lot more focused now on how dangerous this is than they were before. People who have been directly involved with it have always been focused on it, but there are just so many other problems that have taken priority. This is one of these peripheral undertakings that doesn't have the sex appeal or the immediacy of a crisis that must be

Wozencraft -- V -- 33

met. When I talked to people about being a member of our delegation to the conference on the law of treaties, their initial reaction is invariably, "What's that?" It's as unknown as the administrative conference. I seem to have made a specialty of participating in quite unknown organizations which, to me at least, seem to me quite important. I think that this increase in the knowledge of what's going on and what is important becomes very relevant.

I might add that this particular convention has one additional aspect that makes it unusually serious. In the ordinary convention, if we don't like it, we don't have to sign it. That's true in theory at least, although in practice we seem to feel obligated on almost all occasions to try to get in there and sign as long as we've negotiated through to the end on it, which we usually have. Yet international law--and you said, will there be any international law before there's a court and before there's a police force--there is an international law which is the consensus of countries as to what international law is. This is not expressed simply in treaties, nor is it expressed in court decisions. I would say the treaty is the equivalent of our legislation, and the court decision equivalent is international custom. A good example of this is the question of contiguous fishery zones. Did I talk about that at all, the fishery zone dispute between Navy and State and fisheries in Interior and Justice?

B: I'm not sure whether you have or not.

W: I'll go back to that after I finish this up. It probably is another good example of how these things work within our own government.

Wozencraft -- V -- 34

In any event, this custom is determined by the practice of states. Now let's say there is a new convention on the law of treaties duly ratified by forty-five states, maybe fifty, and with the sanction of the International Law Commission and of the UN sponsors. And we don't sign it. It is still probable that most of those provisions will by the very adoption of that convention, whether we sign it or not, become an international law by custom, even if not by treaty, so that we lose and are affected by it whether we sign it or not. This is one reason why, to me, it is particularly important for us to do everything we can to make it read as well as we can, whether or not we will ever execute it. And my hunch is that eventually something will come out of it that we will feel--certainly it will be adopted by other countries and that I think we will probably in the long run execute.

In terms of an international court to make this law, there is the International Court of Justice, but that court has lost complete credence with the entire Afro-Asian world. It is, in effect, useless because of the Southwest Africa decision, where, by the vote of one justice, it decided the court did not have jurisdiction to take Southwest Africa away from South Africa--that's what it amounted to. Our representative on the court, Jessup, voted with the minority. The Polish judge was the deciding vote for the majority, and the Afro-Asian countries have not forgiven Poland. They do not look at these judges as simply individuals, but as the representatives of their country. And if our judge, over whom we had absolutely no control in all probability as far as I know--a very able fellow, Phillip Jessup--if he had voted otherwise, these countries would be just as down on us. And we know this, and this is why a lot of the votes that we make in the UN, I think, are made with this burning racial situation in Africa well in mind, much more acutely than our own

Wozencraft -- V -- 35

racial situation, just as we also domestically have an Arab-Israeli position which no government could change if it wanted to, regardless of its merits. But all of these things conjoin to make it an exceedingly difficult world for us any time there is an international vote. The Arabs are down on us. Basically speaking, the black African states are down on us, with a few exceptions, fortunately. And it's just very hard to collect a majority.

But with the International Court of Justice out, there is no other established tribunal that can fill this role. One of the things that I am hoping is that there can be something [that] emerge[s] from this conference in April and May which at least through conciliation will permit an interpretive group, if not the ICJ, then another group of leading jurists to decide what these various concepts mean and how these articles of this convention should be applied. Once you've gotten that far, you have the force of moral opinion, of world opinion, coming into play, as you have had in the case of Czechoslovakia and with about the same results. The moral opinion does not remove the tanks; it does make the country a little more leery of using tanks again. I think the world reaction to Czechoslovakia probably has been responsible for no similar steps having been taken in Rumania or Yugoslavia.

B: But still, any nation, including ours, I presume, will always maintain its own national prerogatives. If it feels its national interests are hurt badly enough, then world opinion--

W: That's absolutely right, and no nation is going to submit those vital national interests to any court, ICJ or any other, at this point in time and space as far as I can see.

B: Which I suppose is the ultimate stumbling block in international law?

Wozencraft -- V -- 36

W: Yes. Not international law. International law is a bit of a term of art here. The law by which nations govern their international affairs. But let's say world peace or world government. And here again, I think you're going to find very different views, depending upon who is on the court. If, for example, you get a majority of black African nations represented on the world court, the International Court of Justice--I use black Africa to differentiate it from Arab-Africa. I think you'd find a quite different view of these countries toward the court. And you might also find a very different view among the European countries toward the court that presently have people that they have confidence in. So that you're going to find a lot of varied views, depending upon who the judges are and who the court is. And this is the real stumbling block to world government. Nobody really wants to turn over his vital interests to a group that he may not control.

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