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Summary record of the 853rd meeting

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lem of principle and a problem of form, both of which called for further consideration by the Commission. If the Commission endorsed the idea that the draft should cover the case of aggression, it would not be enough to deal with the case in which the aggressor State was not party to the treaty concluded between the victorious Powers; it would also be necessary to provide for the simpler case in which a defeated aggressor State had become a party to the treaty, but later claimed that it had not acted freely.

90. International law had not so far provided any very convincing reason why a treaty imposed on a defeated State should be binding on that State. One of the less inadequate reasons advanced was that of the *de facto* international government established by the victors. But would not a provision on that subject be better placed among the provisions relating to invalidity of consent? In drafting those provisions, the Commission had shown that it was not very optimistic, since it had found it necessary to state as a rule that a treaty imposed by a victorious aggressor was void. It might perhaps add, in the same article, that a defeated aggressor could not evade the obligations imposed on it by a peace treaty by invoking either the fact that it had been forced to become a party, or the fact that it was not a party to the treaty. In that way, the whole problem would be dealt with at once.

91. As to referring to State responsibility, he agreed with the Chairman that it would be going beyond the scope of the law of treaties. It was also open to question whether the article should mention only "the principles" of the Charter, or the "principles and rules" of the Charter—a broader formula which would include the machinery for determining the existence of aggression.

92. Mr. BARTOŠ said he wished to express his opinion on the question of substance. It was true, as a number of delegations and several members of the Commission had pointed out, that history provided examples of cases in which a treaty had imposed obligations on a State without its express consent. But even if, in the cases mentioned, the solution had been dictated by considerations of equity, he did not think that a rule on the subject came within the scope of the law of treaties as the Commission had conceived it. The United Nations Charter itself (Article 107) authorized the nations which had united in the fight against fascism during the Second World War to take certain measures incompatible with the principles of the Charter, in order to ensure that those principles would be better applied in the future. But that derogation was valid only for the past. Any future derogation from the principle of free determination by States as subjects of international law could only be for the purpose of safeguarding international public order. The object of any measures taken by the international community—in the Security Council, for instance—would be to put an end to aggression and to force the aggressor to make reparation. They would not constitute a treaty and would not impose contractual obligations, since the latter always required an expression of the free will of the State concerned.

93. After the Second World War, under the authority conferred by the Charter on the Allied Powers, treaties had been imposed on certain States regarded either as

direct aggressors or as having collaborated with the aggressors. Those of the victorious Powers which had ratified the treaties had been authorized to enforce them, but those which had not ratified the treaties could not invoke them. The ex-enemy States had in fact ratified the treaties, which had consequently assumed the aspect of genuine treaties, but had they not done so, the treaties would have been executed as treaties between the allies. That example clearly showed that the treaties in question had not created contractual obligations for the ex-enemy States, but had constituted executory decisions of the Allied Powers. The Charter regarded them not as treaties but as "action . . . taken or authorized".

94. He would not express any opinion on the Special Rapporteur's suggested additional paragraph for the moment, but would merely point out that, if it refrained from adding the proposed rule, the Commission would leave unimpaired the principle embodied in the Charter from which it followed that obligations could be imposed on a State, not on a contractual basis, but by virtue of the international law concerning responsibility.

The meeting rose at 6 p.m.

853rd MEETING

Tuesday, 17 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Co-operation with Other Bodies

(resumed from the 849th meeting)

[Item 5 of the agenda]

1. The CHAIRMAN welcomed the observer for the Inter-American Juridical Committee.

2. Mr. CAICEDO-CASTILLA (Observer for the Inter-American Juridical Committee) said that he hoped later to give the Commission an account of the progress made in revising the Charter of the Organization of American States. During the preparatory work at Panama in March 1966, agreement had been reached on a number of points, but there were still differences of opinion between the United States and the Latin American countries on the economic clauses. The Juridical Committee had met at Rio de Janeiro in April and had adopted resolutions on three subjects: a Brazilian proposal for an inter-American peace council; a draft submitted by Ecuador on the peaceful settlement of disputes; and a statute for political refugees.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 59 (Treaties providing for obligations for third States) *(resumed from the previous meeting)*¹

3. The CHAIRMAN invited the Commission to resume consideration of article 59.

4. Mr. JIMÉNEZ de ARÉCHAGA said that, as the Commission was not concerned with political questions, the difficult problem raised by the suggested additional proviso to article 59 (A/CN.4/186/Add.2) ought to be examined from the legal standpoint of whether it had any proper place in the structure of the draft articles. Mr. de Luna had pertinently asked whether it might not interrupt the logical sequence.

5. Mr. Tunkin had pleaded for a progressive attitude in the interests of developing contemporary international law, but it was precisely for that reason that the Commission ought not to concern itself with providing a legal justification for any act performed, or to be performed, in connexion with the peace treaties concluded after the Second World War. Such a justification had already been provided in a collective decision of States and expressed in Article 107 of the United Nations Charter which, as Mr. Bartoš had said, constituted a general dispensation for action taken or authorized as a result of that war.

6. There was nothing the Commission could or need add by way of additional legal justification in its draft on the law of treaties. It must look to the future, not the past, and take care lest any *post facto* justification it attempted to provide be interpreted as applying to acts of aggression which had occurred or might occur after the establishment of the United Nations in 1945. The way in which an act of aggression occurring after 1945 should be dealt with on the legal plane was not within the scope of the Commission's task of codification; it was the concern of the United Nations which, by virtue of its Charter, had been legally equipped to handle such problems in a manner that did not affect the law of treaties, or affected it only slightly.

7. Under Article 24 of the Charter, the Security Council was primarily responsible for action in cases of aggression, and under the provisions of Article 39 such action could consist of recommendations or decisions on measures which, in accordance with Article 25, would be compulsory for all Member States, including one which might be the aggressor. If the aggressor were not a Member State, then the provisions of Article 2, paragraph 6 applied. Two consequences could be inferred from that series of provisions. First, that the fundamental element of consent to any action taken by the Security Council had already been given by Member States when they had accepted Articles 24 and 25, and secondly, that the way in which an aggressor was to be treated was no longer a "*diktat*".

8. The suggested proviso for article 59 might imply that a peace treaty of the kind contemplated would be an

imposed treaty, whereas in fact it would be the result of a collective United Nations decision adopted by the required majority and binding on all States including the aggressor State. The issue no longer belonged to treaty law, but to the law of international organizations, with which the Commission was not concerned for the time being.

9. Mr. Tunkin had been apprehensive about the effects that article 59 might have on any attempt to impose a provision on an aggressor State by means of a treaty not accepted by it, but if a Security Council decision took that form, the decision would override any provision in the Commission's draft. Article 103 of the Charter contained sufficient safeguards, and there was no need to provide for any exceptions in article 59 of the draft. The formula suggested by the Special Rapporteur to meet the point made by the four governments (A/CN.4/186/Add.2) was not entirely consistent with the substantive rules of law governing the way in which the United Nations must deal with an aggressor, and could give the impression that an aggressor State, on committing an act of aggression, would be deprived of any legal protection and become, as it were, *alieni juris*, so that anything could be imposed on it and its consent would not be required for any kind of obligation or duty.

10. In reality, the system established by the Charter was rather different and the aggressor State would only be *alieni juris* during the period covered by the provisions of Chapter VII, when the Organization would be engaged in restoring international peace and security. In Article 1, paragraph 1, of the Charter a careful distinction had been drawn between, on the one hand, effective collective measures for suppressing acts of aggression and, on the other hand, the peaceful settlement of disputes, which must be brought about in conformity with the principles of international law. Thus the United Nations did possess discretionary powers for the suppression of aggression, but once that had been accomplished, the rules of international law again came into play, including the principle of the sovereign equality of all States.

11. Once aggression had been stopped, even the aggressor State retained certain rights and neither the United Nations, nor Member States which had taken part in restoring international peace and security on behalf of the United Nations, could partition the territory of the aggressor among themselves, since the Charter referred to the suppression of acts of aggression, but not to the suppression of an aggressor State. The suspension or expulsion of an aggressor State from membership of the United Nations was authorized, but not its physical elimination from the international community. Thus there were limitations on the imposition of treaty obligations without the consent of an aggressor State. An example of the way in which the Charter's provisions operated in such a situation was the case in which, in 1950, the northern part of a State had been declared an aggressor by the Security Council on the ground that it had attempted to unify a divided State by force. The United Nations had succeeded in suppressing the aggression, but had refrained from effecting the unification by force, and an agreement had been entered into in the normal way on the basis of the equality of the parties and not on the basis of a "*diktat*", as might be

¹ See 852nd meeting, preceding para. 53.

inferred from the additional paragraph suggested for article 59.

12. As Mr. Verdross had pointed out at the previous meeting, the suggested text was vague in regard to the beneficiary State that became authorized to impose obligations on an aggressor without its consent. It was admissible that the United Nations might dictate terms to an aggressor under the Charter's provisions during the initial stage of restoring peace; but that was quite a different thing from granting such a right in the case of rival coalitions of States, for they might enter a conflict with different views as to which State was the aggressor and the results of the conflict would determine the terms to be imposed by the victors. No such blank cheque must be given, and the final clause in the suggested paragraph did not provide a sufficient safeguard, because the law of State responsibility in the matter of sanctions was new and far from settled. So far as the principles of the Charter were concerned, the words were open to subjective interpretation, as had been shown by the differing interpretations of Article 2, paragraph 4.

13. For all those reasons he was opposed to the inclusion of the additional paragraph in article 59. Paragraph (3) of the 1964 commentary² should be retained and the Commission should not attempt to go further.

14. Mr. EL-ERIAN said that the discussion on article 59 (then article 62) at the sixteenth session³ had revealed differences of approach. Some members considered that it dealt with an exceptional situation, because the institution of treaties creating obligations for third States was beginning to disappear and the modern trend was towards wide participation in the conclusion of international instruments. Those members regarded the institution as belonging to the era of the European law of nations, when a group of States had acted as self-appointed guardians of the international community. An example of such action was the declaration in the 1856 Treaty of Paris⁴ to the effect that the Sublime Porte should be admitted to participate in the benefits of the public law and the Concert of Europe.

15. Other members had favoured the inclusion of provisions concerning stipulations in favour of third States in treaties based on the principle of the sovereign equality of the parties, merely for the sake of completeness.

16. Agreement had ultimately been reached and he hoped the Commission would now be able to agree on a proviso to article 59 concerning the position of an aggressor State, again preserving a delicate balance between different points of view.

17. At the sixteenth session the Commission had been divided over the question whether a rule on the effects of treaties *vis-à-vis* third parties should be based on analogies with private law, or whether it should be based on public law and, particularly, on the principle of the sovereign equality and independence of States. The commentary on article 58⁵ had shown that, while the

principle *pacta tertiis nec nocent nec prosunt* appeared originally to have been derived from Roman law, in international law the justification for the rule did not rest simply on a general concept of the law of contract, but on the sovereignty and independence of States.

18. Attention was now being concentrated on what bearing article 59 would have on situations arising from acts of aggression and it had been argued, on technical grounds, that the matter did not properly belong to the law of treaties. As always, the Special Rapporteur had carefully analyzed all the comments by governments and delegations, and he had put forward a formula for an additional paragraph.

19. Although both the titles of the articles and the commentaries would disappear if a convention were drawn up, the legal significance of the commentary as part of the *travaux préparatoires* would remain and it would shed light on the interpretation of the articles.

20. To the argument that a rule of the kind suggested by the four governments did not belong to the law of treaties, but to the law of State responsibility and to responsibility in regard to the application of the relevant provisions of the United Nations Charter, he would answer that, when drafting article 36, the Commission had been anxious to make it clear that not every form of coercion of a State would render a treaty void, but only the threat or use of force in violation of the Charter. In other words, force used to carry out collective security measures and the consent procured by such use of force could not be invoked as grounds of invalidity by a party to the treaty. The Commission had not found it difficult to approve article 36, although the rule it stated was not based on consent, which was a fundamental element in the law of treaties.

21. The difficulty that had arisen was due to disagreement about the distinctions to be drawn between various aspects of the use of force. With the adoption of the Charter, a legal concept of aggression had come into being and its legal consequences had been recognized in General Assembly resolution 95(I), when the Nuremberg principles had been affirmed as principles of international law.

22. The proposal to amplify article 59 was certainly not prompted by a desire to introduce a political element into the law of treaties; on the contrary, it provided the Commission with an opportunity of covering one aspect of the legal consequences of aggression. Certain provisions of the Charter itself, such as Article 2, paragraph 6, had caused difficulties of interpretation, in regard to the obligations of non-member States; there, Kelsen⁶ had not hesitated to pronounce that the Charter was the higher law. Furthermore, the language of Article 103 of the Charter was absolute when it stated that, in the event of a conflict between the obligations of Member States under the Charter and their obligations under any other international agreement, the Charter would prevail.

23. It was difficult to formulate an additional proviso to article 59, but the problem was not merely a technical one. It would be reading too much into the suggested text to argue, as Mr. Jiménez de Aréchaga had done,

² *Yearbook of the International Law Commission, 1964*, vol. II, pp. 181 and 182.

³ *Op. cit.*, vol. I, pp. 66 *et seq.* and p. 176.

⁴ *British and Foreign State Papers*, vol. XLVI, p. 12, article VII.

⁵ *Yearbook of the International Law Commission, 1964*, vol. II, p. 180.

⁶ Kelsen. H., *The Law of the United Nations*, London, 1950, pp. 106 *et seq.*

that it would place the aggressor State outside the law. The proviso was necessary in order to make article 59 complete and to regulate future cases of aggression; the problem was not confined to that raised by the peace treaties concluded after the Second World War.

24. Mr. AMADO said he welcomed the proposal before the Commission, the idea of which had originated with the USSR and the United States, among other countries, as a fine example of peaceful co-existence. If only for that reason, he would have liked to agree with those who advocated the inclusion of the additional paragraph suggested by the Special Rapporteur in order to express, in article form, the ideas contained in the 1964 commentary. But he could not find any convincing argument for adding to the draft articles a provision so heavily influenced by private law and of a nature which had made it necessary for able jurists to invent the fiction of the collateral treaty in an attempt to secure its acceptance in international law.

25. In his view, consent was the essential element, and to qualify it as "express" or "free" was superfluous; a treaty to which the parties had not given their consent was not a treaty. He would be glad if the Commission did not accept the suggested addition, with which he was entirely out of sympathy. In view of the misgivings expressed by such important States, he had, of course, considered the matter with all due respect, but the attitude resulting from a certain psychological make-up and years of intellectual and legal training was not easily changed.

26. Mr. TUNKIN said that article 59 was so important that he felt bound to reply to some of the objections made to the proviso suggested by the Special Rapporteur. The issue was a crucial one because, under modern international law, an aggressor State was not in the same position as in the past, and the consequence, for the law of treaties, was that treaties imposed on an aggressor State, which would constitute exceptions to the principle laid down in article 59, did not require the consent of that State in order to be valid treaties.

27. Nearly all the members of the Commission were agreed on the issue of substance, but many seemed hesitant to include the proposed additional rule on the ground that it did not fit in with the system of the draft as a whole and that it belonged to the topic of State responsibility. Admittedly certain aspects of the matter were within the province of State responsibility, but the particular proviso suggested for article 59 was part of the law of treaties and must be stated as a very clear-cut exception to the rule that any treaty, to be effective for third States, required their consent. A treaty dealing with an aggressor State might impose sanctions and affect that State's rights and obligations, but it would still be valid. That was the proposition expressed in the 1964 commentary and accepted by the Commission. The Commission must be consistent with its own opinions.

28. Mr. Jiménez de Aréchaga wished the Commission to look ahead and that was precisely what the proviso did. The action taken with respect to the aggressor States in the Second World War had been accepted by the United Nations in Article 107 of the Charter, but there was no guarantee that aggression would not recur. The Commission must face reality and create rules that would

be effective in preventing aggression. Modern international law was becoming increasingly strict against any breach of the peace and that development should be reflected in the draft articles.

29. It had been argued that the proviso might encroach on the Security Council's special prerogative, but that argument was without foundation in view of the safeguards in Article 103 of the Charter. Mr. Jiménez de Aréchaga had rightly pointed out that the Security Council had to deal with acts of aggression, and it was to be hoped that it would do so, but that did not exclude the possibility of agreements being reached between Member States on a Security Council recommendation, and such agreements must be regarded as valid.

30. Mr. Jiménez de Aréchaga seemed to think that the additional proviso would open the door to arbitrary action against an aggressor and to be following the old principle that in every war the two sides were on an equal footing. That principle had no place in contemporary international law, because the aggressor was not on the same level as the victim. A State guilty of starting a war was performing illegal acts, whereas the victim was using force legitimately, so that the two sides were no longer on the same footing. And when the war was ended the victor would no longer dictate terms to the vanquished as in the past. Only States which had taken part in resisting aggression were entitled to dictate or impose terms on the aggressor; that was the element which belonged to the law of treaties. The question of sanctions, their character and scope, belonged to the law of State responsibility. The argument that the additional proviso would lead to arbitrary action was not justified.

31. He could only deplore the Commission's hesitation. The rule had never been clearly formulated and might seem sweeping to many lawyers, but it was important to realize that contemporary international law was radically different from the law of the past, both in regard to peace-keeping operations and in many other respects. The Commission had a chance of showing that it was not too timid to take a step forward when the defence of international peace so required.

32. Mr. TSURUOKA said he would give his opinion from the practical standpoint and with an eye to the future, for it was in the future that any clauses adopted by the Commission would be applied.

33. Considering the cases in which the suggested proviso would operate, he found it hard to see how it could be applied on legal grounds that were based on justice. The first difficulty was to define "aggression", a task which the Commission itself had attempted and found no easy matter. It would then be necessary to define the obligations which could be imposed on an aggressor, and that would obviously be an arduous undertaking.

34. Suppose two States A and B, which claimed to be victims of aggression by State C, had won the war started by C; that was the only case in which obligations could in fact be imposed upon the aggressor State, since it was the victors which were in a position to impose obligations. To begin with, had the events been as alleged by A and B and was C really the aggressor? Then, to carry the hypothesis to the extreme limit, A and B might decide to divide up C between themselves under

the terms of a treaty they had concluded. State C would then cease to exist, as indeed would States A and B, leaving only two new States, D and E. In the absence of any definition accepted by all States, and in the absence of obligations accepted by all, the proper application of such a clause would thus come up against very great difficulties.

35. The case would be rather different if it were stated that the aggression the Commission had in mind was aggression as defined by the Charter, in conformity with the letter and spirit of that instrument and with the procedures established by the United Nations. Placed in the context of the United Nations and of its activities and purposes, the obligations which it was permissible to impose on an aggressor State could be determined, and even though practical difficulties would remain, there would be possibilities of application which would be in conformity with justice, would safeguard future peace and the well-being of peoples, and would be guaranteed by the Charter.

36. Consequently, if the Commission decided to draft a clause of that kind, he asked that it should contain a very clear statement of the idea he had expressed; for he thought that the Special Rapporteur's proposal, even if it already incorporated that idea, might give rise to more disputes than it would settle.

37. The CHAIRMAN pointed out that the Special Rapporteur's proposal did not permit the imposition of any and every obligation; it referred only to obligations imposed "in accordance with the law of State responsibility and with the principles of the Charter of the United Nations".

38. Mr. JIMÉNEZ de ARÉCHAGA said that in his previous intervention he had not been defending the traditional concept of the two parties to a dispute being on an equal footing. He was as much against aggression as any other member of the Commission and considered that an aggressor State was subject to binding decisions of the Security Council for the suppression of aggression, including those involving the use of force.

39. The difference of opinion lay not in the view of aggression, but in the interpretation of the methods established by contemporary international law to deal with aggression. The old system of dictating a peace treaty at a conference table had been superseded by methods established in the United Nations Charter, whereby the decisions of an international organization had binding force by virtue of having been accepted by all Member States, including the aggressor State. Only if that State ceased to be an aggressor, owing to a change of heart or of government, would the normal procedures of treaty-making based on the equality of the parties and requirements regarding consent be applicable. As Mr. Tunkin had pointed out, during the period while aggression was being suppressed, the Security Council might resort to treaty procedures, as had happened over armistice agreements; nevertheless, the binding force of such agreements would not derive from any rule of the law of treaties, but from the provisions of Article 25 of the Charter.

40. There was no need, in article 59 of the Commission's draft, to attempt to interfere with the Charter's machinery

by referring to the old system of dictated peace treaties. Article 103 of the Charter already provided adequate safeguards against any possibility of article 59 coming into conflict with the Charter.

41. Mr. AGO said that opposition to aggression was not at issue; all the members of the Commission were opposed to aggression and there was not the slightest difference of opinion among them on the need to establish every possible safeguard against an aggressor. Nor should the Commission allow itself to be diverted from the real problem by the difficulty of determining, in any specific case, whether or not aggression had been committed and by which side.

42. What mattered was the rule, already laid down by the Commission in article 36, that the coercion of a State in violation of the principles of the Charter constituted a ground for the nullity of any treaty that an aggressor might succeed in imposing on its victim. By simply stating that rule, which was a notable innovation compared with classical international law, the Commission had thenceforth established the principle of inequality as between the aggressor State and the others, and he agreed with Mr. Tunkin that in contemporary international law, an aggressor State was no longer to be regarded as being on an equal footing with other States. It followed logically from the principle stated in article 36 that coercion invalidated consent only if the State which had suffered it was not an aggressor, and that a treaty imposed upon an aggressor was a perfectly valid treaty, even if it disregarded the will of the State upon which it was imposed.

43. If, however, the Commission thought it had not established that principle clearly enough in article 36 and that some addition was necessary, he would be prepared to agree. What he doubted was whether the Commission need concern itself with that problem in connexion with treaties and third States. A treaty imposed on an aggressor might be a bilateral treaty between a victim of aggression, which had succeeded in defending itself, and the aggressor State, upon which it imposed a treaty that had to be accepted under coercion and was a valid treaty. In such circumstances, the question of a third State did not arise.

44. In other cases, which partly accounted for the proposal before the Commission, peace treaties were concerted among States which had resisted aggression and had formed a coalition against it at some particular time. There were then two different parties to the peace treaties concluded: the aggressor State, and the group of States which had resisted the aggression. No obligations were imposed upon a third State, since the aggressor State, which could not be regarded as a third State, became a party to the treaty imposed on it. Its consent was given under coercion, but it was given and it was valid.

45. It would even be dangerous to use an expression such as "without its consent", which would seem to cast doubt on the proposition that consent given under duress, and not freely and voluntarily, was consent. But it was consent; it was perfectly valid and the coercion was perfectly lawful.

46. Of course, an aggressor State which had lost the war might no longer have a government capable of

entering into an undertaking for it, or its government might even refuse to sign the treaty, but it would be wrong to believe that the treaty would then impose obligations on the defeated State as a third State. In the cases contemplated, peace would not be re-established and obligations could be imposed on the recalcitrant State on the basis of responsibility or of the coercion of war, but not by the treaty in question. It would only be when the defeated State finally gave its consent that the treaty as such would impose obligations on the aggressor State as a party and not as a third State. He therefore considered that the suggested proviso contained an error and should be rejected.

47. The wording also called for comment. For example, if a treaty were concluded between States which had resisted aggression, and the aggressor State was not a party, various groups might be formed among the States which had joined together against the aggression and the members of those groups might conclude separate treaties between each other, the provisions of which concerning the aggressor State were contradictory. If those different treaties could impose obligations on the aggressor State as a third State, what would its obligations be? The exact meaning of the reference to the law of State responsibility was also open to question. But those were only secondary matters. The essential point was that the suggested rule belonged among the provisions relating to aggression, not among those concerning the effects of treaties on third States.

48. Mr. BRIGGS said he was puzzled by the insistence of Mr. Lachs and Mr. Tunkin on the validity of a treaty concluded by a number of States for the purpose of imposing a particular policy on an aggressor State. He saw no reason to doubt the validity of instruments such as the agreements concluded by the victims of aggression during the Second World War. Where a peace treaty was imposed on an aggressor State, that State was a party to the treaty and article 59 had no application. The case envisaged in the suggested additional paragraph was different: it concerned an agreement to impose a policy on the aggressor. Such an agreement was undoubtedly valid, but its validity did not depend on making the aggressor a silent party to the agreement.

49. Since the establishment of the United Nations, contemporary international law concerning peace-keeping activities had changed and developed. The subtlety of certain United Nations actions in the face of breaches of the peace made the word "aggressor" seem a little old-fashioned. In looking towards the future, it was essential to bear in mind those more refined devices which had been developed to meet new problems.

50. As he had pointed out at the previous meeting,⁷ the suggested additional paragraph had nothing to do with the law of treaties. He saw no need to introduce an irrelevant provision into the draft articles merely in order to emphasize the obvious unanimity of the Commission in its condemnation of aggression.

51. Mr. EL-ERIAN said that the suggested additional proviso was very limited in scope, since it was made subject to both the law of State responsibility and the

principles of the Charter; no action could be taken unless it was consistent with both.

52. The proviso was in the nature of an estoppel based on the concept of good faith, which was not a new idea in the Commission's discussions. He recalled that in 1957 and 1958, when the Commission had discussed its draft on arbitral procedure, Sir Gerald Fitzmaurice had drawn attention to the notion of estoppel with regard to certain types of inadmissible evidence. Introduction of the suggested proviso would not mean going completely outside the law of treaties.

53. Mr. REUTER said that, while references to the past were of some value, the Commission should look to the future. There were two ways in which it could solve the problem under discussion: by strengthening article 36 with additional provisions, as Mr. Ago had just suggested, or by inserting a provision in article 59 itself. If the Commission preferred the latter solution, it should omit all reference to the theory of State responsibility, and should take account of the point made by Mr. Jiménez de Aréchaga, that whenever the Commission was trying to develop existing law it should keep within certain limits in order to ensure that it was not directly or indirectly revising the Charter. The Commission was a United Nations body, but its members were not representatives of governments, and he therefore preferred to refrain from expressing opinions on questions—no matter how important—which were being discussed in other bodies, such as the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.

54. If the Commission decided to deal with the problem in article 59, he could only accept a very cautious and negative formula, such as: "Paragraph 1 shall be without prejudice to any consequences which may follow from the Charter regarding the effects of the condemnation of an aggressor". A formula on those lines would avoid various pitfalls, such as the question who was to pronounce the condemnation. Of course, it added nothing and was of little practical value, but if certain members, for psychological or political reasons, thought that a provision of that kind should be inserted in article 59, it would perhaps be a way of meeting their wishes.

55. Mr. LACHS said that all the Commission were devoted to the cause of preventing lawlessness; the differences of opinion concerned methods of achieving that purpose. The question was of particular significance because, in law, prevention was more important than repression.

56. There was also general agreement on the need to look to the future rather than to the past. But certain recent events could not be ignored, because they had helped to shape contemporary international law. Recent history showed that there was no danger of an aggressor being outlawed and thereby deprived of all legal protection. In all the declarations made by the Allied Powers during and immediately after the Second World War, it had been made clear that nothing was further from their minds than subjugation or conquest.

57. The Commission should adopt a scientific approach, but that did not mean abstract contemplation and ignoring reality; law and fact were closely interdependent.

⁷ Para. 66.

58. Several references had been made to the Charter, in particular, to Article 107. In the past 150 years, three fundamentally different systems had been adopted for what were called peace settlements: the first was that of the Congress of Vienna of 1815; the second, that of the Treaty of Versailles of 1919; and the third, that of the San Francisco and Potsdam Conferences of 1945. Under the system adopted after the Second World War, as the provisions of Article 107 of the Charter showed, one procedure had been established for liquidating the remnants of war and another for maintaining peace in the future. The adoption of those special arrangements had been due to the changes which international law had undergone in character and scope. In the collective security system adopted at the San Francisco Conference and embodied in the Charter, however, great care had been taken to ensure that even an aggressor would have the protection of international law. Gradually, ex-enemy States had been admitted to the United Nations to take part in what was meant to be a common effort to maintain peace within a system of collective security.

59. In view of the provisions of such articles of the Charter as Article 39, on United Nations action to maintain or restore peace, and Article 107, it was necessary to include in article 59 of the Commission's draft a stipulation on the lines of the suggested additional paragraph. Since the Commission had already agreed on the matter when it had adopted paragraph (3) of the commentary, the question was not one of substance, but merely one of emphasis; by lifting the provision from the commentary to the text, the Commission would be stressing its importance.

60. At the previous meeting he had drawn attention to the different types of agreements imposing obligations on an aggressor State. The examples he had given did not exhaust all the possibilities and the suggested additional paragraph would leave the way open for other similar cases.

61. With regard to the drafting of the additional paragraph, he agreed that the reference to the law of State responsibility should be dropped. Moreover, he did not think the provision should be confined to agreements to which the aggressor State was not a party; it should also cover agreements to which the aggressor was a party.

62. He also had serious doubts about the use of the word "imposed". If, for example, the Security Council were to take a decision overriding a minority view, the decision could not be said to have been "imposed" on the minority, since all Member States had agreed to be bound by the decisions of the Security Council. He would go even further and say that the very fact that a State was a member of the international community made it incumbent upon it to accept the rules of *jus cogens*, in particular, those relating to the maintenance of peace. He would therefore prefer some more suitable term than the word "imposed". What the Commission had to consider was in fact an obligation which arose for an aggressor State as the result of measures taken in consequence of the act of aggression, in conformity with international law and, in particular, with the United Nations Charter.

63. In his opinion, the subject of the paragraph under discussion was linked with the contents both of article 36 and of article 59.

64. Mr. ROSENNE said that the point raised by the four governments—Hungary, the USSR, the United States and the Ukraine—was a challenge to the Commission to examine whether the draft articles on the law of treaties as a whole covered all the treaty situations that might arise in the future. It was in response to a similar challenge that, in 1963, the Special Rapporteur had formulated the articles which had ultimately been adopted by the Commission as articles 36 and 37 (A/CN.4/L.115).

65. In the comments by governments and in the views expressed by members during the discussion, a convincing case had been made for including in the draft articles a reservation in general terms on the lines suggested by the Special Rapporteur, provided that it was limited to the United Nations Charter and did not stray into the unprobed realm of State responsibility.

66. Such a reservation was needed in order to complete the thought embodied in article 36. But at the present stage he was supporting only the principle of including such a reservation; its wording and position in the draft would have to be decided later. *Ex hypothesi*, the reservation referred to a treaty to which the aggressor State was not a party in any manner of form. If the aggressor State was a party, article 59 would not apply; the question should be dealt with in article 36.

67. Some reference to Article 107 of the Charter should be included in the commentary so as to make it clear that the Commission did not countenance certain views which had been expressed outside it, and that it had no intention of prejudicing the continuing legal validity of situations created following the Second World War.

68. Mr. BARTOŠ said he wished to clarify the statement he had made at the previous meeting. His personal view was that the additional paragraph suggested by the Special Rapporteur, on the basis of comments by certain governments, should be considered first and foremost from the legal standpoint.

69. If the paragraph was to reflect the practice after the Second World War, it must be brought into line with the legal system existing at that time. The practice had been based not only on the rights of the victor, but also on authority conferred on the war-time coalition of nations by the United Nations Charter. For, as Mr. Lachs had pointed out, the authors of the Charter had tried not to repeat the mistake made in the Treaty of Versailles; they had accordingly decided that the war-time coalition of States, not the United Nations, should be responsible for the measures to be taken with respect to the defeated States. One result had been that the peace treaties concluded at Paris had come into force on ratification by the victorious Powers. Italy, Finland, Romania, Bulgaria and Hungary had also ratified those treaties, so that a question which might have arisen in theory had not arisen in practice. But the fact remained that that practice was based on an exception.

70. As Mr. Reuter had pointed out, the Commission was working for the future. But could it state rules for the future which, so far as aggressor States were con-

cerned, were exceptions to the law of treaties? He thought it could, though not on the basis of the law of treaties, but on the basis of the provisions of the Charter concerning the authorities competent to take measures and apply sanctions in cases of aggression. The Security Council—and even, some believed, the General Assembly—could authorize certain States to deal with an aggressor by a treaty concluded between them. In such cases it was immaterial whether the aggressor State was or was not a party to the treaty; there was a delegation of powers by the international community to the States which concluded the treaty.

71. The suggested provision did not clearly establish who was to be regarded as an aggressor. In spite of the efforts made by the Special Committee, of which he approved, there was no definition of aggression or of an aggressor. The suggested paragraph did not say, either, who would be competent to declare a State an aggressor. Discussions in the General Assembly and the Security Council had repeatedly shown that that question was not only a legal one, but involved numerous political considerations. Thus the proposal made use of concepts which were not legally defined.

72. There was no doubt that an aggressor State deserved special treatment that was particularly severe; but it was also essential to ensure that a State which was not an aggressor could not be declared to be one. In the cases referred to the Security Council, the States concerned often accused each other of aggression, and sometimes no decision was taken against States whose aggression was established. Sometimes, too, one State would accuse another State of aggression in order to justify its own use of force by presenting it as legitimate self-defence.

73. Furthermore, the proposal contained no safeguard concerning the number of States which would be required to participate in a treaty dealing with an aggressor. If the treaty were concluded by a large number of States, it would acquire the force of *jus cogens* and the Security Council—or, in spite of constitutional objections, the General Assembly—could authorize such a treaty. But, once again, care should be taken not to formulate a rule which, though designed to serve the noble cause of preventing aggression, could be used for the opposite purpose. In practice, a treaty could not be imposed on an aggressor State unless the aggression was beyond doubt and there was no dispute regarding the identity of the aggressor.

74. The special authorization in the Charter concerning the settlement at the end of the Second World War had already fallen into desuetude, except perhaps in regard to Germany; he could find no rule in the Charter which allowed treaties to be imposed on certain States, and he did not wish to raise the very important question of the revision of the Charter, whether direct or indirect.

75. Efforts to prevent aggression should certainly be intensified but they should also be canalized; and from the legal standpoint it was necessary to consider what was the basis of the obligations arising from treaties of the kind envisaged in the proposal. The treaty itself could not be the basis if the State on which it was imposed did not accept it, for consent was not merely a formality, but a constituent element of the treaty;

without consent, there was no treaty. It had happened, and it would happen again, that obligations were imposed in certain situations or for certain proven or assumed responsibilities; but that was a question which was not within the province of the law of treaties.

76. In short, very severe sanctions should be applied against an aggressor State; the problem was to decide in what instrument those sanctions should be prescribed.

77. Mr. de LUNA said that, like all the other members of the Commission, he was anxious to see effective sanctions applied against aggressors.

78. The case the Commission was now considering was one in which collective sanctions were applied against an aggressor under a treaty with respect to which the aggressor was a third party. In a case of that kind, the source of the obligations imposed should be sought not in the treaty itself or in its specific character, but in other norms of international law—norms forming part of a higher law, namely, the United Nations Charter.

79. If collective sanctions were imposed by a treaty to which the aggressor State was a party, the situation would be governed not by article 59, but by article 36. It should be noted that it was by virtue of a higher law, and not of the treaty provisions, that the 1947 Peace Treaties had been applicable to the defeated aggressor States during the period between their entry into force on ratification by the four Great Powers, and their ratification by the defeated States themselves.

80. Sanctions could also be imposed by means of a declaration subscribed to by the States resisting the aggressor. When a treaty was used, it was largely in order to avoid piecemeal negotiations, which might lead to separate settlements by the different victors, or groups of victors, each seeking some particular advantage. For example, in the 1814 peace settlement, to which Mr. Lachs had referred, the diplomatic skill of Talleyrand had secured for France, the defeated nation, advantages superior to those obtained by Spain, a member of the coalition against Napoleonic aggression.

81. Although he did not believe there was any necessity for the suggested additional paragraph, he would be prepared to abide by the decision of the majority if it wished to include a reservation to the effect that, by virtue of other norms of international law, obligations could be imposed upon an aggressor State. He could accept such a reservation provided that no mention was made of State responsibility and it was made perfectly clear that the case was not an exception to the general rule that a treaty could not impose obligations upon third States without their consent. The reservation should merely serve to show that the provisions of article 59 did not stand in the way of other norms of international law which imposed obligations upon an aggressor State.

82. Mr. AGO said he agreed with Mr. Rosenne that the Special Rapporteur's suggested text referred not so much to a treaty which was imposed on the aggressor and to which the aggressor became a party even if it had not participated in the negotiations, as to another class of treaties—those to which the aggressor State was not a party. The reason why he had specially mentioned the first situation in his earlier statement was that, in practice, the victorious States normally laid the treaty before

the defeated aggressor State, which had no choice but to accept it. With regard to treaties of that kind, it would certainly be useful to stress that the aggressor State could not challenge the validity of the treaty itself on the ground that it had been subjected to coercion. That aspect of the matter should obviously be dealt with in article 36 rather than in article 59.

83. In the other case—that in which the defeated aggressor State was not party to the treaty—the treaty might have been concluded between the finally victorious States during the period of hostilities. Such a treaty created mutual obligations and rights between the victorious States, and its object might be to specify the terms to be imposed on the defeated State and the sanctions to be applied to it. But even in such cases, as he had said in his first statement, the obligations imposed on the aggressor State did not derive from the treaty as such, and could not be represented as effects of the treaty for a third State. Consequently, a provision of the kind suggested had no place in that part of the draft.

84. On the other hand, he would have no objection to the insertion of a provision on the subject in article 59, provided that it was very clearly worded, that it did not give the impression that the obligations imposed on the aggressor State might derive from the treaty, and that it did not have the appearance of an exception to the rule that treaties had no effects on third States. Consideration might accordingly be given to a text of the kind suggested by Mr. Reuter or by the Chairman at the previous meeting.⁸

85. Mr. TUNKIN said he could not agree with the view put forward by Mr. Ago in his 1939 lectures at The Hague,⁹ that a State on which sanctions were imposed was not under any obligation to comply with them. His own view was that if collective sanctions were agreed upon by treaty, they were binding on an aggressor State.

86. It had been pointed out by some members that the basis of the obligation of the aggressor State was the fundamental rule of international law governing the responsibility of aggressors for acts of aggression. The fact that the obligation thus had its foundation in a basic principle of international law should be no obstacle to the inclusion of the suggested proviso. The position was no different from that in regard to article 36, which proclaimed null and void any treaty concluded in violation of the prohibition of the threat or use of force. The basic principles of international law had their repercussions on all its branches; hence it was not possible to ignore them when formulating draft articles on the law of treaties.

87. The lack of a definition of aggression had been mentioned during the discussion. Apart from the fact that history showed that it was the potential aggressors who had prevented the acceptance of any definition of aggression, the lack of such a definition ought not to be allowed to stand in the way of the adoption of the proviso. The fact that there was no definition of the “threat or use of force” had not prevented the Commission from adopting article 36.

⁸ Para. 87.

⁹ R. Ago, “Le délit international”, *Académie de droit international, Recueil des cours, 1939*, vol. II, p. 415.

88. It had also been asked who would decide whether a State was an aggressor. He had little patience with that type of argument, which could be used with regard to any question of international law. In the absence of compulsory jurisdiction of the International Court and of a higher political authority than States to decide whether a violation of international law had been committed, it was possible to use the same argument with regard to any other matter, such as fraud or coercion. If that approach were adopted, the whole work of codification of international law would have to be abandoned and international law itself would be completely undermined.

The meeting rose at 1.5 p.m.

854th MEETING

Wednesday, 18 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(continued)

[Item 1 of the agenda]

ARTICLE 59 (Treaties providing for obligations for third States) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 59.

2. Mr. CASTRÉN said he still doubted the advisability of inserting in the draft a provision authorizing, in respect of a treaty imposed on an aggressor State, a derogation from the principles stated in articles 58 and 59; for if one exception were allowed, it would open the way for others and that would weaken the fundamental rule.

3. He did not deny that certain contractual provisions could be imposed on an aggressor, but everything depended on the content and scope of those provisions. A free hand to deal with the aggressor State could not be given to a State which was a victim of aggression, and still less—as Mr. Verdross had pointed out—to other States. It was therefore necessary to specify the obligations that could legitimately be imposed on an aggressor State; but that was an extremely complicated matter which required thorough study.

4. The wording proposed by the Special Rapporteur did not seem to be satisfactory and had already been

¹ See 852nd meeting, preceding para. 53.