

Document:-
A/CN.4/SR.744

Summary record of the 744th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1964, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

graph 3 (a) was unnecessary and could be dropped, as its substance was already covered in article 41. The provision in paragraph 4 (b) also concerned a situation in which the rule in paragraph 3 (b) was applicable. Paragraph 4 (b) should therefore be worded so as to make that rule applicable there also.

61. With regard to terminology, he said that the Chairman's objection to the word "conflict" might perhaps be due to the fact that he was thinking of the word in terms of conflict of laws in private international law. However, the word had been used in the draft article in the same general sense as in Article 103 of the Charter and in certain other treaties. Its use in that sense was in fact normal in treaty practice, but as it had given rise to criticism he would be prepared to replace it by the word "incompatible". He would have no objection, either, to substituting the word "applies" for the word "prevails" in paragraph 4.

62. Although, on a purely theoretical plane, it was possible to reach the conclusion that the statements in paragraph 4 (a) and (c) were self-evident, in practice it often did not seem so. For example, what would be the position when States A and B had concluded one treaty and States A and C another, and State B invoked its obligations under the second treaty, which might be a general multilateral treaty. The performance by State B of treaty obligations *vis-à-vis* State A might entail violation of the multilateral treaty. Yet, equally, non-performance of State B's obligations towards State A would constitute a violation of the State A's right unless the provisions of the general multilateral treaty were of a *jus cogens* character. Thus it seemed desirable to spell out the legal position of the various parties to the two treaties as in paragraph 4 (a).

63. He agreed with Mr. Rosenne that at some later stage the Commission would have to examine all its draft articles carefully, so as to ensure that they were properly dovetailed and co-ordinated.

64. In view of the concern that had been expressed in the Commission lest the draft should appear to condone, or pass over as normal, the conclusion of treaties which were clearly contrary to earlier obligations, particularly those of the "interdependent" type, perhaps it would be advisable to insert a general provision to the effect that article 65 was without prejudice to any issue of State responsibility that might arise out of the conclusion of the later treaty.

65. With regard to the point raised by Mr. Tunkin about treaties imposing "integral" or "interdependent" obligations, he did not believe it made any difference whether or not they contained an express stipulation forbidding the parties to contract out, because the very object and purpose of the treaty would bring out sufficiently the fact that such contracting out constituted a potential violation. In that connexion the Chairman had rightly distinguished between the conclusion of a treaty and its application. There could be cases in which, if there were an express undertaking not to contract out, it would be a violation to conclude the treaty at all. In such cases the State entering into the second treaty might be doing so for the purpose of cancelling or modifying its obligations under the

earlier instrument, and doing so without prior reference to the other parties to that instrument.

66. He would be glad to follow the suggestion made by Mr. Elias at the previous meeting and mention in the commentary the recent developments concerning the Niger River regime.

67. Article 65 could now be referred to the Drafting Committee for re-drafting more or less on its present lines, but bringing out its relationship with article 41.

68. At some later time the Commission would no doubt wish to discuss the position of the article in the draft. It had been convenient, for purposes of discussion, to consider the question of conflicting treaty provisions in close connexion with the effect of treaties on non-parties and with the revision of treaties. In the same way, it had been convenient to study the invalidity and the termination of treaties in Part II at the previous session, though to deal with the termination of treaties immediately after their conclusion and validity was not altogether logical. At a later stage of its work the Commission would have to go carefully into the whole question of the arrangement and order of the various articles.

69. The CHAIRMAN said the Commission had made definite progress towards solving the difficult problems raised by article 65, which should now be referred to the Drafting Committee to be formulated as concisely as possible, taking the provisions of article 41 and certain other articles into account. The Drafting Committee would also have to consider whether a general reservation on State responsibility should be inserted in the text.

It was so agreed.

The meeting rose at 1 p.m.

744th MEETING

Friday, 12 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167/Add.1)

(continued)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a treaty)

1. The CHAIRMAN invited the Commission to take up section II of Part III in the Special Rapporteur's third report (A/CN.4/167/Add.1).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the section on the amendment and revision

of treaties to some extent broke new ground, though the problem was an old one. So far no very comprehensive attempt had been made to formulate basic rules on the subject, but some recent studies had dealt, in particular, with new forms of revision clause inserted in multilateral treaties. Many authorities regarded amendment and revision mainly as a political matter.

3. As revision was essentially one aspect of the treaty-making process, the provisions in Part I of the draft were in principle applicable to it.

4. Among the questions the Commission should consider was whether a party, by virtue of being a party, had the right to be consulted on revision — an issue which had caused friction in the past. Personally, he did not subscribe to the view held by some authorities that there was no general right to be consulted.

5. Although he had used the two terms “amendment” and “revision” in articles 67 to 69, the distinction between them was not very clear and the legal process was the same for both. It would be helpful if the Commission chose one term or the other as that would simplify the drafting.

6. Mr. VERDROSS said that in principle he approved of the ideas underlying the rules stated in section II; for international life, like all life, was dynamic, and provision should be made for amending or revising international treaties peacefully.

7. With regard more particularly to article 67, however, he thought it was rather dangerous to provide, as in sub-paragraph (a), that a party to a treaty might “at any time” propose its amendment to the other parties. That rule might detract from the value of international treaties, for one of the parties might propose an amendment to the others immediately after a treaty had been concluded. It would therefore be preferable either to delete the words “at any time” or to specify that a party proposing an amendment must give serious reasons why the treaty should not be executed.

8. Mr. LACHS said that section II of Part III of the Special Rapporteur’s report provided a sound basis for discussion. Although there was a theoretical difference between amendment and revision, for practical purposes it might be preferable to speak of amendment.

9. Although it could be argued, as McNair did, that treaty revision was a matter for politics and diplomacy — an argument that could apply to any phase of the treaty-making process from start to finish — the Commission should concern itself with the legal aspects.

10. The statement mentioned in paragraph (8) of the commentary, that the rule requiring the unanimous consent of all the original parties for revision had in the past been honoured more in the breach than in the observance, was not a ground for denying the existence of such a rule; the same could be said of some other rules of international law too. Although there were certainly numerous examples of States not upholding the rule, on closer examination of the facts it became clear that they were made uneasy by their failure to do so. For instance, after the Conference

held in 1928 to revise the convention regulating the status of Tangier, the signatories to the new document¹ had sought the consent of some of the parties to the original treaty *post factum*, and that consent had been given by Belgium, the Netherlands and Portugal. He did not subscribe to the view that the existence of such a principle was in doubt, and he believed that its observance was important for the stability of treaties; he therefore agreed with the statement made by the Special Rapporteur in the last sentence of paragraph (13) of the commentary.

11. If the consent of all the parties could not be secured, however, the procedure for termination of the treaty should be set in motion and a new treaty concluded by the parties which wished to do so. It was extremely important to maintain a clear distinction between the institutions of termination and amendment, lest States should attempt, under the guise of revision, to do away with existing treaties in order to create new treaty obligations.

12. There were, however, certain exceptions to the unanimity rule; for instance, where the treaty made provision for agreements *inter se* concerning revision or where, in the original instrument, the parties had delegated the right to amend to an international organization, to a majority of the parties or to some of them only.

13. Mr. CASTRÉN said that he would confine himself for the time being to answering the preliminary question put by the Special Rapporteur in paragraph (9) of the commentary — whether rules regarding the revision of treaties should or should not be included in the Commission’s draft articles. Some writers, such as Rousseau, held that the revision of treaties was essentially a political matter. And it was true that, apart from some special cases, such as those in which the *rebus sic stantibus* clause applied, there was no right of revision that would enable certain parties to a treaty to amend it against the will of another party. There remained the possibility of revision by an agreement *inter se* among certain parties to the treaty, and it seemed advisable to regulate the details or some aspects of that question.

14. As could be seen from the Special Rapporteur’s commentary, practice had shown the need for revision in that form at least; but the procedure was not uniform, so that one could not speak of a customary right. It was a case for progressive codification, but that should not cause any great anxiety, for the Special Rapporteur had not intended to propose fundamental rules, but only to settle certain procedural matters and draw some conclusions on the effects of a revision *inter se* for the other parties to the treaty.

15. The parties to a treaty should be given a minimum of rights, such as the right to propose a revision or to be consulted about such a proposal; and it was legitimate to require that a party to a treaty should not refuse to negotiate seriously concerning its revision. But States had frequently broken the fundamental rule that a treaty could not be amended without the consent of all the parties, and some authorities had

¹ League of Nations *Treaty Series*, Vol. XXVIII, p. 543.

even defended such irregular proceedings. Consequently, the *pacta sunt servanda* rule should be strengthened in that particular case.

16. The League of Nations Covenant had contained an article on the revision of certain treaties. It was regrettable that the United Nations Charter did not mention the matter expressly, though Article 14 empowered the General Assembly to intervene in certain cases. The fact that certain aspects of treaty revision had already been contemplated in several articles of the Commission's draft was no obstacle to the adoption of new, supplementary provisions if they were considered necessary.

17. With regard to terminology, he agreed with the Special Rapporteur that there was only a difference in degree between the amendment of a treaty and the revision of a treaty. The three articles submitted by the Special Rapporteur settled most of the questions arising in that context, but he thought that perhaps the Commission should also deal with the question of the possible right of third States to participate in the revision of certain treaties. According to the commentary, there had already been several cases in which such participation had been accepted.

18. Mr. LIANG, Secretary to the Commission, said it was not clear whether sub-paragraph (a) meant that a party had a right to notify other parties of a proposal for amendment, or simply that it could initiate action in that regard; personally he doubted whether any such *a priori* right existed.

19. He also doubted whether it was a normal function of a depositary to transmit notifications by a party concerning amendment, unless an express provision to that effect had been inserted in the treaty; no explanation on that point had been offered in the commentary.

20. Although clauses on amendment and revision had been grouped under two different headings in the Handbook of Final Clauses (ST/LEG/6) that had been done merely for convenience and no theoretical distinction was made between the two processes. So far as he could judge, the general usage seemed to be to speak of amending the constitutional instruments of international organizations and of revising bilateral or multilateral treaties, but the distinction seemed somewhat artificial. It would be noted that the term "amendment" was used in Chapter XVIII of the Charter, which seemed to envisage a process of general review prior to deciding whether the review should be followed by amendment. If both terms were used in the Commission's text, a definition of their precise meaning should be included.

21. The CHAIRMAN, speaking as a member of the Commission, said that the question of terminology should be settled first. In practice, the word "revision" had finally acquired a very special meaning; it signified a political necessity, affirmed by some and generally denied by others. Between the two world wars, there had been many examples of that concept—an affirmation of the need to revise treaties in order to adapt them to changes in circumstances said to have occurred in the meantime.

22. From the legal and technical point of view, it would therefore be better to keep to the word "amendment". In the constituent instruments of international organizations, such as the League of Nations Covenant and the United Nations Charter, it was for the authors to decide whether or not they wished to introduce a rule on the periodic revision of treaties, for example. But the Commission, which was performing a technical task, should confine itself to considering the consequences of a possible procedure for amending a treaty; it was not called upon to give an opinion on a purely political question, such as the revision of treaties.

23. He was not sure whether the Special Rapporteur had really considered article 67 necessary in itself, or whether he had regarded it as a sort of introduction to the more necessary provisions of articles 68 and 69. But article 67 raised several problems.

24. The Special Rapporteur had very prudently refrained from saying that a party to a treaty had the right to propose an amendment; he had used the word "may" in English, which had been translated into French by the word "*peut*". Was there really a right? It might be thought so, for the Commission had to formulate rules that prescribed rights and obligations. But the possibility of proposing an amendment to a treaty was more of a faculty, not a right in the sense in which a subjective right was ordinarily understood. If it was a possibility, it might either derive from the article itself or belong normally to every State. That being so, as the Special Rapporteur had clearly noted in his commentary, it might be asked whether a third State should not also be able to propose the conclusion of a new treaty amending a treaty already concluded between other parties, if, for example, it thought that it might thus be able to accede to the treaty.

25. The opening words of article 67, "Subject to the provisions of the treaty", raised another problem. Whatever the provisions of the treaty, a State could always, at least, propose an amendment to the particular provision applicable. Hence it was open to question whether it was really possible to say "Subject to the provisions of the treaty".

26. The Special Rapporteur had tried to counter-balance the possibility of a State's proposing an amendment to a treaty by imposing a sort of corresponding obligation—that of considering in good faith what action should be taken in regard to such a proposal. Mr. Verdross had objected to the words "at any time"; but he (Mr. Ago) did not see any reason for imposing a kind of time-limit and thought that that possibility really did exist at any time. A State might happen to propose some change even immediately after the conclusion of a treaty, not necessarily in order to limit its scope, but perhaps to improve some of its provisions or to achieve subsequent progress. But he feared the possible consequences of such an obligation on another party, even if it were cautiously described as an obligation to consider the proposed amendment "in good faith". It might happen that the other State did not take the proposal of the requesting State into consideration because it thought it had good reasons for not doing so. In that case, could the requesting State claim

that the other State had broken its international obligations? It might perhaps use that excuse for not carrying out the treaty or for terminating it. Thus to speak of an obligation in that context seemed to introduce an element of risk.

27. Mr. ROSENNE said he had very much the same doubts as the Chairman about article 67. The process surely started with a proposal to examine a treaty rather than with a proposal to amend it, and if the provision were worded in that way perhaps some controversial issues would be avoided and Mr. Verdross's point about the phrase "at any time" might be met, at least in part.

28. It was important to strike a balance between the requirements of the *pacta sunt servanda* rule and the need to safeguard the force of treaties against being weakened by too easy a process of revision. Although a strict parallelism between rights and obligations was a concept that was deeply rooted in private law, in the present context it was not really necessary, because the process of amendment was essentially one that was governed by political considerations. It was always open to any State to make a proposal to the other parties concerning a treaty; the problem that arose was whether the parties were obliged to take any action on such a proposal. Perhaps the Commission should also consider whether States which under the terms of the treaty were entitled to become parties to it should not also be given a similar right to be consulted, since they could be expected to be interested in a revision that would enable them to become parties. However, an exception would have to be made for the constituent instruments of international organizations, admission to which was different from participation in a treaty.

29. Finally, he suggested that if a rule of unanimity was to be included it was important to ensure that it did not operate too rigidly, like a veto.

30. Mr. VERDROSS, referring to the point made by Mr. Castrén concerning the existence of a customary right to revise treaties, said that several different situations were possible. The right to propose an amendment to a treaty certainly existed. He agreed with the Chairman that the word "revision" had a political connotation and that it would be preferable to refer only to the modification or amendment of a treaty.

31. His own proposal that it should be provided that a party could only propose an amendment if there were serious grounds for not executing the treaty, related to sub-paragraph (b). If that sub-paragraph were deleted, he would withdraw his proposal, which derived from the idea of good faith being required of the other parties.

32. Mr. de LUNA said that on the whole he approved of the Special Rapporteur's proposals.

33. As to terminology, he thought the three words "revision", "modification" and "amendment" were almost synonymous, even in theory. It was possible to make a distinction between revision and amendment, in that revision applied to the whole treaty; but against

that it could be argued that in some cases a revision had affected only particular articles. The Commission could, of course, find ample documentation on the terminological aspect of the question in the archives of the League of Nations, but the sensible course was to choose a single term and define it clearly in an explanatory note.

34. The term he would prefer was "amendment", which was very widely used in internal public law, where it involved a special procedure. An amendment in fact entailed some degree of value judgment and denoted a change intended to make some improvement. Moreover, the word "amendment" would make it possible to avoid the danger pointed out by Mr. Lachs, that revision might provide a disguised method of terminating a treaty, whereas termination ought to take place by a direct method laid down in other articles of the treaty.

35. He noted that in sub-paragraph (a) the Special Rapporteur had not referred to a right, but that in sub-paragraph (b) he had specified an obligation to negotiate. What usually happened in international practice, however, was that, for compelling political reasons, States were reluctant to start formal negotiations.

36. The CHAIRMAN, speaking as a member of the Commission, said that to make the possibility of proposing an amendment to a treaty contingent upon difficulty of performance might be too restrictive. Even if a treaty was quite easy to perform, there might still be good reasons for amending it. For instance, one of the Parties to the Treaty of Rome establishing the Common Market might propose an amendment which constituted an advance.

37. Sir Humphrey WALDOCK said that there might be some differences in the initiation of the procedure for amendment and the procedure for revision, but that since the process was essentially the same in both cases, it would be convenient to drop the reference to revision in section II.

38. Although, in a sense, the provisions in article 67 might be regarded as self-evident, the problem of revision had exercised the minds of both politicians and lawyers, as had the danger of stagnation in treaty relations. Some treaties contained provisions permitting a proposal for amendment by any one party at any given moment, whereas others laid down that amendments could only be proposed at specified intervals or at the instance of more than one party.

39. If sub-paragraph (b) were dropped, as the majority seemed to think desirable, there would not be much left of the article. He thought that sub-paragraph (b) did deal with a real point in so far as it must be presumed that a proposal to amend would be based on some solid foundation and that, consequently, the other parties were bound to examine the proposal in good faith and give some answer. In the absence of a recognized right to propose revision, or of any international legislative machinery, such a provision should encourage good relations between States.

40. Perhaps if the article were redrafted in the manner suggested by Mr. Rosenne, it could still serve a useful purpose and not be open to the kind of objections mentioned during the discussion.

41. Mr. AMADO said it would be remembered that at the San Francisco Conference, Brazil, Egypt and Mexico had proposed that a provision similar to Article 19 of the League of Nations Covenant² should be included in the United Nations Charter. He himself attached a precise meaning to the word "revision". He was worried by the Special Rapporteur's statement in the first sentence of paragraph (2) of the commentary that the substantive aspects of the revision of treaties were to a large extent covered by previous articles — namely, articles 41, 43, 44, 62, 63 and 65. The Commission's task was to determine the rules which already existed in international law and were confirmed by State practice, and to state them clearly and precisely.

42. Article 67, which had been attacked from the beginning of the discussion, proposed a procedure for the revision of treaties; it tended to confirm dubious principles such as *rebus sic stantibus*. In his opinion, the Commission should adopt quite a different approach, stressing the inviolability of the instrument and increasing the stability of treaties.

43. He was inclined to give a negative answer to the question put by the Special Rapporteur in paragraph (9) of the commentary. For the time being, he was opposing article 67, but he thought that the three articles were linked.

44. Mr. ELIAS said that the brief discussion on article 67 had already given rise to at least five controversial issues. First, the problem raised by the words "at any time" in sub-paragraph (a); secondly the reference to the depositary in the same sub-paragraph; thirdly, the concept of obligation in sub-paragraph (b); fourthly, the difficulties caused by the expression "in good faith"; and fifthly, the obligation to consult the party concerned, laid down in sub-paragraph (b). In view of the many difficulties it involved, he suggested that article 67 should be dropped, especially as its essential idea was already expressed in article 68, paragraph 1. He would leave aside for the time being the problems raised by the words "to amend or revise" and Mr. Rosenne's suggestion of the term "to review".

45. The right of a party to a treaty to set in motion the machinery for its revision would be better assumed than expressed. There was nothing in customary international law to prevent a party from calling upon the other parties to set that machinery in motion. Article 67 could therefore be deleted, and that would avoid all the doctrinal problems that had been raised. As the Special Rapporteur had pointed out, it would be very difficult to substitute a satisfactory formulation which

said anything not already contained in article 68, paragraph 1, or in various articles in Parts I and II.

46. Sir Humphrey WALDOCK, Special Rapporteur, said that there were two alternatives before the Commission. The first was to delete article 67, in which case the idea embodied in sub-paragraph (a) could be incorporated in article 68 in the form of a new opening paragraph which might read: "Subject to the provisions of the treaty a party may propose its amendment to the other parties" or "Subject to the provisions of the treaty, a party may notify the other parties of a proposal for its amendment". The word "amendment" could be replaced by the word "modification" if desired.

47. The second alternative was to retain the idea expressed in sub-paragraph (b), though the Commission seemed to be against that course. What was suggested in sub-paragraph (b) was that the treaty relationship involved the modest obligation to give proper consideration to any proposal to amend or improve the treaty.

48. There was some value in the idea expressed in sub-paragraph (a), and since many treaties at present included provisions regulating the faculty of the parties to propose amendments, the opening words of the article, "Subject to the provisions of the treaty", should be retained.

49. Mr. BRIGGS said he was surprised that there should be so much objection to what seemed to him innocuous provisions. The intention of article 67 was to state that a party to a treaty could make a proposal for revision and that the other parties should consider that proposal. With the passage of time and changes in circumstances, the problem of the revision of treaties was becoming more acute. The Commission could make a useful contribution to its solution by adopting a set of articles on the lines proposed by the Special Rapporteur.

50. There was no rule of international law which prevented a party from proposing an amendment to a treaty; that was true even if amendments were excluded by a clause in the treaty, for clearly it was open to a party to propose the amendment of that particular clause. As he read sub-paragraph (a), it merely stated the obvious fact that a party to a treaty could make a proposal for its amendment to the other parties. He had no objection to the words "or through the depositary"; if the party concerned could make a proposal direct, the notification of the proposal could surely be made through the depositary.

51. In sub-paragraph (b), the words "in good faith" could be dropped; it was true that the other parties should consider the proposal in good faith, but it was equally true that the proposal itself should be made in good faith, and those words did not appear in sub-paragraph (a). The concept of good faith could be taken for granted in both cases. The words "and in consultation with the party concerned" could also be dropped if it was thought that they implied a duty to negotiate with the proposing party.

52. The words "if any" which qualified the provisions of sub-paragraph (b) were very important. The other

² "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

parties were not obliged to take action, but merely to consider what action, if any, should be taken in regard to the proposal.

53. He could accept article 67 if it were redrafted so as to meet some of the objections made to the wording. If it were decided to delete the article it was possible, as Mr. Elias had suggested, that article 68 would suffice to express the essential idea it contained.

54. Mr. TUNKIN said he agreed with Mr. Briggs that there was no rule of international law preventing any party from making a proposal to amend a treaty. But that did not always mean that a party had a right to make such a proposal.

55. The real question was not whether there was a right to propose the amendment of the treaty. If a proposal for amendment was in fact made by a party, there arose the problem of determining its legal consequences. That problem would arise even if the treaty contained a revision clause. For example, if a bilateral treaty specified that a proposal for its revision could not be made before a certain period had elapsed, there was nothing to prevent one of the parties from proposing to the other that the revision clause be amended, so as to permit the amendment of other provisions of the treaty before the end of the stipulated period.

56. Consequently, while he did not consider the provisions of sub-paragraph (a) necessary, he believed that the idea expressed in sub-paragraph (b) should be retained in some form; perhaps it could be included in article 68, so that article 67 could be deleted.

57. Mr. LACHS said he shared the doubts expressed by other members regarding the usefulness of article 67: its contents were largely self-evident, but it had connotations which raised some difficulties. He therefore supported the suggestion that it should be deleted and its essential idea included in article 68.

58. If that were done, it would be advisable to introduce a reference to the point raised by Mr. Rosenne, namely, that it might be open to some States not parties to the treaty, but entitled to accede to it, to propose its revision in certain cases precisely for the purpose of facilitating their accession to the treaty. Some of the ideas contained in article 67 should be transferred to the commentary.

59. Mr. BARTOŠ said that in his opinion the wording of article 67 was not contrary to the rule *pacta sunt servanda*. If a treaty was to be faithfully executed, it must be executable. From time to time, however, the parties might wish to improve not only the treaty itself, but their mutual relations. States were constantly trying to improve on existing arrangements, and the progressive development of international law called for recognition of that dynamic process. Every State party to a contractual legal relationship had the right to try to improve that relationship. In his view — and there he differed from Mr. Tunkin — States had an actual right to propose, but not of course to impose, an amendment.

60. Parallel with the right of a contracting State to propose an amendment, the other parties to the treaty

had a corresponding obligation to consider the proposal seriously and to examine it with the party making it. There was nothing more in sub-paragraph (b); in particular, there was no suggestion that the proposal itself imposed a choice between the existing situation under the treaty and the situation that would result from adoption of the proposal.

61. The Commission should confirm both the right and the obligation. It should state clearly that the exercise of that right must not be automatically regarded *a priori* as a delaying manoeuvre or an attempt to impede the normal application of a treaty. The submission of the proposal did not affect the validity of the contractual provisions. They remained in force until the proposal had been disposed of. It was accordingly necessary to distinguish between two ideas: on the one hand the rule giving the right to submit the proposal (the sole purpose of the draft article); on the other hand the idea (not in the draft) that the proposing State, by making its proposal, acquired the right to challenge the obligations deriving from the treaty. For the reasons indicated, he thought that the rules proposed by the Special Rapporteur were necessary rules of conduct in international society; he approved of them as a whole, and thought they should be raised to the rank of positive rules of international law.

62. The opening clause of article 67, "Subject to the provisions of the treaty", was not acceptable if it referred to a treaty provision barring all revision; such a provision would conflict with *jus cogens*, for every State was free to hold its own opinion on the development of international relations. On the other hand, the opening clause was acceptable and justified if it referred to cases in which the treaty itself laid down procedure for revision; the parties must then follow that procedure when exercising the right accorded to them in sub-paragraph (a). Whether notification was made direct or through the depositary of the treaty was a question of form rather than of substance.

63. To stipulate the need for formal consultation with the party proposing the amendment, as was done in sub-paragraph (b), might perhaps complicate matters unnecessarily. The essential was that the party's arguments should be considered. Consultations were obviously useless when a State was convinced in good faith that any change would be contrary to its own interests and to the common interest. He agreed with Mr. Tunkin that the question was rather abstract; it really involved situations in which the parties could exercise their discretionary power to take a decision on the proposal. As a matter of courtesy, at least, a State party to a treaty should not arbitrarily reject out of hand a request made by another party. Article 67 should leave the door open for negotiation and give parties wishing to amend a treaty legal authority to propose its amendment under a rule of international conduct; and that rule should be recognized as having legal effect also in positive international law.

64. There was a technical distinction between amendment and revision. An amendment related to a particular provision, not to the basic idea of a treaty, whereas revision involved reconsideration of its whole

foundation. A request for revision was thus a much more serious matter; it must be based not only on valid grounds, but also on a radical change in the material basis on which the treaty had been concluded.

65. Mr. TUNKIN said that the attempt to define the situation contemplated in sub-paragraph (a) as a matter of right reflected an unduly rigid attitude to a very flexible situation in international relations. To define the situation in that way was absolutely unnecessary. Of course, there was a theoretical problem. Some claimed that all actions of human beings or States were based on rights or obligations. According to that theory — an erroneous one, as had been demonstrated by Karl Marx — society was based on law. But according to another theory, law was a system of rules — legal rules — for the regulation of social relations. There was, however, no need to discuss that theoretical problem. All the Commission had to do was to develop those principles which were essential in practice, in other words, to deal with the practical problem of the legal consequences of a proposal to amend a treaty.

66. There were two possibilities. Either the treaty contained provisions concerning its amendment, in which case, if the treaty was valid, it must be assumed that those provisions would prevail; or the treaty contained no provisions concerning its amendment, in which case the question to be considered was what the legal position would be when an amendment was proposed. The matter dealt with in sub-paragraph (b) should be viewed in the light of those two possible situations.

67. Mr. PAL said he had the impression that there was little objection to the substance of the articles in section II; the main problem was the formulation of the ideas expressed in them.

68. As he saw it, the main significance of article 67 lay in the initial proviso "Subject to the provisions of the treaty", which qualified both the right or faculty conferred in sub-paragraph (a) and the obligation imposed in sub-paragraph (b). In fact, the discussion had shown that, even if the faculty to seek amendment of a treaty were limited by an amendment clause in the treaty, it was permissible for one of the parties to propose the revision of, precisely, that amendment clause. The provisions of sub-paragraph (a), subject as they were to the initial proviso, therefore seemed pointless.

69. Perhaps the proper subject of sub-paragraph (a), and the most material point in its provisions, should be the obligation to notify all the parties to a treaty of any proposal that might be made for its amendment. As pointed out by Mr. Elias, that idea was already contained in article 68, paragraph 1. The obligation "to consider in good faith" imposed in sub-paragraph (b) would be of no real use as a norm of law. He would therefore agree to the deletion of article 67 and to the introduction of the residue of the idea it embodied into article 68.

70. Mr. ROSENNE said that although Mr. Elias's suggestion had the advantage of enabling the Com-

mission to avoid doctrinal controversy, the important opening words "Subject to the provisions of the treaty" would disappear. But as Mr. Tunkin had said, if a treaty contained provisions concerning its amendment or revision, those provisions should prevail; that was implicit in the *pacta sunt servanda* rule. Revision of a treaty could not be independent of the treaty itself.

71. The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone contained a revision clause (article 30), which read:

"1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

"2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request".

Identical clauses were to be found in the 1958 Geneva Conventions on the High Seas (article 35), Fishing and Conservation of the Living Resources of the High Seas (article 20) and the Continental Shelf (article 13).³ The approach adopted in that revision clause was different from the approach in article 67, in that the decision on any action to be taken was left to the General Assembly. There were other examples of multilateral treaties which left that decision to an international organ, thereby covering the question of consultation with the other interested parties.

72. It was essential to retain the idea of the opening proviso of article 67. Any attempt to introduce an element of *jus cogens* into the revision of treaties would lead to undesirable fluidity and undermine the stability provided by the draft articles on the law of treaties.

73. The CHAIRMAN noted that opinion in the Commission was divided. Disagreement on the use of the word "right", in particular, was more serious than it appeared.

74. Speaking as a member of the Commission, he said that the term "right" could be understood either in the usual, broad sense of the faculty to carry out any lawful action, or in the technical sense of a subjective right, in other words the faculty to demand of another a certain service or conduct. If sub-paragraph (a) was understood as giving any party an actual right to propose the amendment of the treaty, that right must be accompanied by an obligation on the other parties, such as was stipulated in sub-paragraph (b). If that obligation did not exist, sub-paragraph (a) would provide not for a right, but merely for a faculty.

75. He did not believe, however, that any obligation of the kind envisaged in sub-paragraph (b) existed in customary law. Besides, what exactly would that obligation be? If it was the obligation to enter into consultation, it would be objected that the mere fact of agreeing to discuss a proposal for amendment amounted

³ For these conventions see *United Nations Conference on the Law of the Sea, 1958, Official Records*, Vol. II, pp. 132 et seq.

to accepting, to some extent, the idea that amendment was advisable. If the Commission was obliged to confine itself to such a vague expression as "to take the proposal seriously", the provision would not have much meaning but could none the less have unfortunate effects. In international practice, States which were preparing for an act of aggression, for example, began by proposing the amendment of a treaty: such a proposal could not be taken seriously. A State was bound to take cognizance of any proposal for revision, but it should be free to react as it saw fit, and the Commission would be wrong to limit that freedom.

76. If the Commission decided not to impose an obligation in sub-paragraph (b), sub-paragraph (a) would only provide for a faculty. But the question then arose whether that faculty should be unrestricted. It was then that the initial clause, "Subject to the provisions of the treaty", became really important. It would be useful to retain that proviso if, as the Special Rapporteur had suggested, the Commission decided to incorporate the basic idea of article 67 in article 68, paragraph 1.

77. Mr. AMADO said that, instead of proposing arrangements to facilitate the revision of treaties, the Commission would do better to provide for a sanction in the event of denunciation of a treaty.

78. Mr. BARTOS said he was still firmly convinced that present practice showed that certain States needed to be legally entitled to request the amendment of a treaty without being suspected of trying to evade their obligations. As a counterpart to that right, the obligation of the other parties to consider the request already existed in practice as an embryonic legal duty. Consequently, he thought it was the Commission's duty to draft legal rules in that sense, so as to further the progressive development of international law.

79. Mr. de LUNA said he well understood Mr. Bartos's concern. A happy medium had to be found between the static character of the treaty and the dynamic character of international life; anarchy should not be condoned, but neither should a treaty be preserved at all costs when it had become unjust because it no longer corresponded to the existing situation.

80. As Mr. Amado had rightly pointed out, the question under consideration was connected with the denunciation and termination of treaties, which had been dealt with in other articles.

81. No matter how it was drafted, the provision in sub-paragraph (b) would change nothing in practice and would in no way facilitate the peaceful development of international relations. The Commission should propose clearer and more definite rules which conferred not only a faculty, but a right.

82. Mr. RUDA said he agreed with the Chairman. Sub-paragraph (b) provided that there was an obligation to consider in good faith, and in consultation with the party concerned, not merely the proposal for amendment, but what action should be taken in regard to that proposal. It thus suggested that there was an

obligation to negotiate, and he found that suggestion very dangerous. Circumstances could and frequently did arise, in which it was better not to negotiate at all than to negotiate under unsatisfactory conditions.

83. With regard to sub-paragraph (a), he endorsed the distinction that had been made between a right and a faculty.

84. If the Commission decided to drop article 67, it should include in article 68 the idea expressed in paragraph (10) of the commentary, that in the case of a multilateral treaty, it could be open not only to the parties, but also to States which had taken part in the adoption of the treaty to make a proposal for its amendment.

85. Mr. TUNKIN suggested that the Special Rapporteur should consider approaching the whole subject of revision in the same way as the Commission had approached that of termination. In article 38 the Commission had dealt with the termination of treaties through the operation of their own provisions, in article 39 with treaties containing no provisions regarding their termination and in article 40 with the termination or suspension of the operation of treaties by agreement.⁴ Article 40 provided that "A treaty may be terminated at any time by agreement of all the parties." It had not been considered necessary to provide that a party to a treaty had a right to propose its termination. A similar system could be adopted for the articles on revision.

86. Sir Humphrey WALDOCK, Special Rapporteur, said he had already given some thought to that possibility, but it raised extremely difficult problems. One was the application of the procedural provisions, and another was that such an approach would involve treating the subject of revision like that of the *rebus sic stantibus* clause, whereas the two notions should be kept separate.

The meeting rose at 1 p.m.

745th MEETING

Monday, 15 June 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Co-operation with other Bodies

[Item 8 of the agenda]

1. The CHAIRMAN invited Mr. Sabek, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

2. Mr. SABEK (Observer for the Asia-African Legal Consultative Committee) said that the Committee had

⁴ Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, pp. 12-15.