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Summary record of the 745th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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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. BARTOŠ 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. Bartoš'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.

greatly appreciated the presence at its fourth, fifth and sixth sessions of observers from the International Law Commission. It had also welcomed the Commission's discussion at its fifteenth session on co-operation between the two bodies,[1] which had stressed the need for a more regular and complete exchange of documents.

3. The progressive development of international law was of particular interest to Asian and African countries, which in the past had been unable to make their views known, having long suffered under imperialism and inequitable treaties concluded without regard to their interests and needs. They were anxious to eradicate all vestiges of colonialism and foreign domination. One of the functions of the Asian-African Legal Consultative Committee was to consider questions under examination by the Commission and to assist in the development of law and its adjustment to the requirements of a world-wide community. The Committee appreciated the way in which the Commission took account of the views of Asian and African countries.

4. At its last session the Committee had held a general discussion on the law of treaties and had decided to take up the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. It had also considered the problem of refugees and hoped that its recommendations would prove to be a practical contribution towards the legal protection of their rights. That subject was to be taken up again at the next session, together with the right of asylum, repatriation and compensation.

5. When discussing the United Nations Charter, the Committee had noted with satisfaction the resolutions adopted by the General Assembly in 1963 on the question of equitable representation on the Security Council and the Economic and Social Council.[2] It believed, however, that the time had come to review the Charter in accordance with article 109, since many new States had not taken part in its negotiation, so that it could not reflect the consensus of opinion of the present members of the United Nations.

6. The Asian-African Legal Consultative Committee had completed its report on the legality of nuclear weapon tests and had unanimously decided that, by reason of their scientifically established harmful effects, whether carried out by a State in its own territory, in trust or non-self-governing territories, on the high seas or in the air space above them, such tests constituted an international wrong for which the State concerned was absolutely liable. The Committee considered that tests carried out in trust or non-self-governing territories constituted a breach of the principles of the Charter and of the Universal Declaration of Human Rights.

7. The Committee would also be discussing at its next session the status of aliens, including the question of diplomatic protection by their home States and the responsibility of States arising out of their maltreatment; the law of the territorial sea; and the recognition and enforcement of foreign judgments, together with the question of process serving and the recording of evidence in civil and criminal cases.

8. The Secretariat of the Committee had been instructed to make studies and collect material on State succession and the legal aspects of outer space, both of which topics would probably also be included on the agenda.

9. He had been asked to extend a standing invitation to the Commission to send an observer to all future sessions of the Committee.

10. The CHAIRMAN, thanking Mr. Sabek for the information he had given on the work being done by his Committee, said that the Commission attached great importance to collaboration with bodies working in the same field as itself and welcomed the Committee's decision to include on its agenda certain topics to which the Commission had given priority. The Commission thanked the Committee for the standing invitation to be represented at its sessions.

Law of Treaties

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

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a treaty) *(continued)*,

ARTICLE 68 (Right of a party to be consulted in regard to the amendment or revision of a treaty) and

ARTICLE 69 (Effect of an amending or revising instrument on the rights and obligations of the parties)

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

12. Mr. TUNKIN suggested that, as articles 67-69 were closely linked, members should be allowed to comment on them together, if they so wished.

It was so agreed.

13. Mr. PAREDES said he thought it was his duty to state his position on what he considered to be the main questions discussed by the Commission and he would do so with regard to the matters under study at present. A right was the power or faculty of a person protected by the law, but it did not immediately require a particular person to assume the corresponding obligation — the passive subject — nor was it necessarily a right in being, since it might be a potential right. Real rights, as opposed to personal rights, availed against everyone without distinction, though not at all times, but only when the circumstances required. Every free act of a subject did not involve a right in the strict technical sense, but a right could come into

[1] *Yearbook of the International Law Commission, 1963*, Vol. I, 715th meeting, pp. 283 *et seq.*

[2] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 15*, Resolution 1991 (XVIII), pp. 21-22.

being if obstacles were placed in the way of the act. If anyone obstructed a lawful act by a person, that person could apply to the competent authorities to have the obstruction removed.

14. It was therefore necessary to ask in respect of every action, whether the agent had the faculty to perform it, who was affected or bound by it and whether he could oppose it or must accept and complete it. To answer those questions with certainty it was necessary to distinguish between the various types of treaty and their effects with regard to the matter under discussion. That was all the more necessary because the reason why many problems could not be solved was that unlike things were lumped together in one mental compartment. The differences must be examined.

15. A contract was the expression of the will of the parties on one or more matters, and that will might be extinguished and terminated when the object of the contract was finally settled by drawing up a dispositive treaty to regulate the question and stabilize it by creating a definitely established right. That was not a matter of amending or revising a treaty, but of signing a new treaty. The same did not apply when the treaty imposed obligations on the parties to perform, or refrain from, certain acts in the future. There was then a continuous will in operation and duties to perform. But such perpetual obligations, which bound a free will to situations that could not be liquidated however much the circumstances had changed, were being rejected throughout the legal order. In municipal law the contracting of services for life was prohibited and in international law the way was being opened for rights of revision and amendment. He accordingly believed that the parties had a right to ask for the revision or propose the amendment of a treaty. They could do so by a peaceful proposal to negotiate or by application to the competent authority when the principle of *rebus sic stantibus* applied. The parties notified of the proposal had a duty to reply, accepting or rejecting it, and that was not a mere act of courtesy. He therefore agreed that, when a treaty imposed certain future conduct on the parties, they were legally entitled to propose its revision or amendment as provided in article 67.

16. As to the use of the terms "revision" and "amendment", he thought there were real differences in legal content: to "revise" was to reconsider the basic elements of the treaty with a view to deciding whether they should be retained or not, in whole or in part; whereas "amendment" applied to points of detail or to additions or deletions to be made to the original text.

17. The first sentence of article 67 did not even seem to correspond to the Special Rapporteur's idea, for the words "subject to the provisions of the treaty" suggested that the parties were prohibited from exercising their right with respect to those provisions; thus the proviso must refer only to the form of the proposal or to procedure, as could be gathered from the commentary. To avoid misunderstandings, he suggested that those words should be deleted. Nor did he approve of the reference to good faith, which in that context seemed to be merely an empty admonition.

18. Paragraph 1 of article 68 should, in his opinion, be removed from that article and embodied in article 67 for the following reasons: first, the right to have a proposal for revision or amendment considered by the other parties to the treaty had its logical counterpart in the right of the other parties to be notified of the proposal; secondly, the considerations that followed in article 68 were of a different order, in that some of the parties separated themselves from the rest to make a separate complementary or additional agreement between themselves alone.

19. Mr. CASTRÉN said that he had expressed his opinion on articles 67 to 69 as a whole at the previous meeting.

20. Both the substance and the form of the Special Rapporteur's proposals for article 67 were, in general, acceptable. He agreed with Mr. Briggs that article 67 was useful and cautiously worded. The obligations and rights it provided for were very modest. States were required to act in good faith and to observe the rules of good conduct in the international community. As Mr. Bartoš had pointed out at the previous meeting, there was a great difference between the denunciation of a treaty and a mere proposal to amend it. If the Commission decided to delete the words "and in consultation with the party concerned" in sub-paragraph (*b*) — and he thought those words could be dropped — the other party's only obligation would be to consider the proposal for amendment in good faith. True, all obligations based on good faith were weak; they were *lex imperfecta*, for it was very hard to judge whether a party had violated such an obligation, and the effective sanction, which would be to authorize a party to denounce the treaty if the other party had acted in bad faith, could not be adopted. The expression "in good faith" already appeared in article 55, as redrafted by the Drafting Committee, and in article 17, paragraph 1, adopted at the fourteenth session.[3]

21. He was prepared to accept sub-paragraph (*a*) as it stood. Like Mr. Bartoš and Mr. Briggs, he considered that a party to a treaty could always propose amendments to the other parties even if it was stipulated in the treaty that it could not be amended before a certain period of time had elapsed. But the other parties were not bound to negotiate in such circumstances. Hence the proviso in the opening words of the article had its full force so far as sub-paragraph (*b*) was concerned, but applied to sub-paragraph (*a*) only in the sense indicated by the Special Rapporteur in paragraph (11) of his commentary, namely, that the submission of a proposal to amend a treaty might be subject to procedural requirements prescribed by the treaty itself.

22. The words "or through the depositary" could be retained in sub-paragraph (*a*), for paragraph 3 (*d*) of article 29 on the functions of a depositary, adopted at the fourteenth session,[4] gave some support to the view

[3] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 175.

[4] *Ibid.*, p. 185.

that a State could address the proposal to the depositary. If that provision of article 29 was not sufficiently clear on the point, it could be amended on second reading.

23. It had been said that the whole of sub-paragraph (*a*) was unnecessary because it stated an obvious fact and because the same principle was implied in article 68. Sub-paragraph (*a*) did, however, specify certain details about the right in question and prescribe certain procedures.

24. If the Commission decided to delete article 67, the obligation in sub-paragraph (*b*) should certainly be embodied in the following article.

25. Paragraph 1 of article 68 stated a rule at least as obvious as that stated in sub-paragraph (*a*) of article 67; it was a rule to which there should be no exceptions.

26. Paragraph 2, however, provided for an exception where certain of the parties to a treaty wished to modify its application as between themselves. Such a modification was certainly quite legitimate, provided that the rules laid down in the paragraph were complied with; but he thought that in that case too all the parties to the treaty should be consulted. If some of the parties to the treaty wished to exclude the others, on the ground that they were not amending the treaty but concluding a new treaty, the matter should be settled by interpretation, with due regard to the requirement of good faith. Participation in a treaty created common interests and solidarity between the parties. All the States parties to the treaty should have an opportunity of stating their opinion on whether the special arrangements *inter se* contemplated by some of the parties were compatible with the treaty as a whole and did not prevent the other parties from enjoying the rights conferred on them by the treaty. He therefore proposed that paragraph 2 should be deleted and that the substance of sub-paragraphs (*a*), (*b*) and (*c*) should be transferred to article 69, paragraph 2.

27. Paragraphs 1 and 3 of article 69 were acceptable, but paragraph 2 should be supplemented by the provisions of article 68, paragraph 2, sub-paragraphs (*a*), (*b*) and (*c*). Those three sub-paragraphs referred, negatively, to cases in which the amendment of the treaty manifestly violated the rights of the parties which had not taken part in amending it. Those three objective criteria should be mentioned for the first time in article 69, paragraph 2. It might be added that the States parties to the treaty which had taken part in adopting the amending instrument, or which had not raised any objection to the proposal to amend after being consulted in accordance with the provisions of article 68, were debarred from invoking the violations referred to.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that as the Commission had now embarked on a wider discussion of articles 68 and 69, he would have to make some further remarks by way of introduction. Those two articles posed the important problem of unanimity in the special context of revision. As far as the adoption of the text of the amending or revising instrument was concerned, the rules laid down in article 6 [5] would apply.

29. Under article 68, paragraph 3, the rules for entry into force stated in article 23 [6] would be applicable.

30. The fundamental rule expressed in article 69 was that an amending or revising instrument was not binding on States that had not become parties to it.

31. He was anxious for the Commission to pronounce on whether he had adopted the right approach in those articles, which were of a tentative character. The alternative would have been to treat revision as somewhat analogous to termination and it would be remembered that, under article 40, termination required the agreement of all the parties. But it seemed to him that the two situations were radically different, because termination put an end to the treaty whereas revision did not, though it might in certain cases render it unworkable.

32. The possibility of extending to non-parties the right to be consulted on a proposal to amend had been mooted at the previous meeting. It had been suggested that a provision on the lines of article 40, paragraph 2,[7] should be included. But he wondered whether that might not introduce an undesirable complication.

33. Mr. BRIGGS said that for too long there had been too much room for arbitrary action in matters of revision and it would be a real contribution to the progressive development of international law if the Commission could provide firm rules for the guidance of States.

34. As he had already said, he was in favour of retaining the whole of article 67.

35. Article 68 should consist of paragraph 1 alone, with suitable drafting changes. That paragraph stated the sound principle that all the parties had an absolute right to be notified of any proposal for amendment or revision. Its scope should be limited to the parties, as there was no ground for extending such a right to non-parties; that might put a premium on delay in the ratification of treaties. It had been considerations of a different kind that had prompted the Commission to insert the provision in article 40, paragraph 2, in its draft.

36. Paragraph 2 should be dropped. It did not prohibit *inter se* amendments contrary to the conditions laid down in sub-paragraphs (*a*), (*b*) and (*c*), but made them subject to the obligation to notify. No such obligation was laid down for *inter se* amendments which were not contrary to those conditions. Moreover, the question whether an amendment deprived other parties of their rights, prevented the effective execution of the treaty or was prohibited, could lead to disputes. Another, more forceful reason for deleting paragraph 2 was its relationship with article 69, paragraph 2, according to which failure to object to an amending or revising instrument

[5] *Ibid.*, p. 166.

[6] *Ibid.*, p. 182.

[7] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 15.

would debar a State from considering it as a violation of rights under the treaty — a provision that went too far. Nor did article 69, paragraph 2, indicate what would be the legal effects of a timely objection. If it would permit any party to veto an *inter se* amendment, he would oppose such a stipulation as contrary to State practice and inimical to progressive development. Indeed, it would constitute one of the most objectionable manifestations of the unanimity principle, which the Commission had condemned when discussing reservations to multilateral treaties. Since the provision in article 69, paragraph 1, denied effect to *inter se* amendments in relation to non-parties to the amending instrument, no further clause on the subject was necessary. That paragraph set out an acceptable principle.

37. Thus he was in favour of retaining article 68, paragraph 1, and article 69, paragraph 1. Article 68, paragraph 2, should be re-drafted as a separate article, which might read:

"An amendment by which certain of the parties modify the application of the treaty as between themselves alone is permissible, if such amendment

"(*a*) does not affect the enjoyment by the other parties of their rights under the treaty;

"(*b*) does not relate to a provision, derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

"(*c*) is not prohibited by the treaty."

38. There should then follow two separate articles embodying the principles contained in article 69, paragraph 3, and article 68, paragraph 3. His proposals would thus lay down the absolute right of every party to a treaty to be notified of any proposal for amendment, and would provide that an amending instrument was without legal effect on the rights and obligations of non-parties to that instrument, and that there was a right to make certain *inter se* agreements.

39. Article 69, paragraph 3 (*b*), was undesirable and he would have some comments to make on it at a later stage.

40. Mr. YASSEEN thought it essential that the Commission, in its draft general convention on the law of treaties, should propose solutions to the problems arising out of the amendment and revision of treaties. Treaties were the fundamental source of the international legal order. Because of the sovereign equality of States, there was still no other means of amending or revising treaties than the unanimous agreement of the parties. But that gave rise to many difficulties and sometimes to disputes. Accordingly, solutions should be offered which did not attack the fundamental principles on which the law of treaties was based — the rule *pacta sunt servanda* and the rule that a treaty could not be invoked against third States. The three articles proposed by the Special Rapporteur reconciled the demands of a dynamic international order with respect for the fundamental principles; their general structure was acceptable.

41. With regard to article 67, more particularly sub-paragraph (*a*), it was certain that any party to a treaty had the right, or the faculty, to propose an amendment to it. That right or faculty was actually based on *jus cogens*, for as Mr. Bartoš had pointed out, it could not be stipulated in a treaty that the parties could not propose amendments to it. But since the Commission was dealing with a new subject and with a question not governed by any general rule, it would be useful to mention that right in an article of the draft. Nevertheless, he agreed with Mr. Verdross that the words "at any time" should be deleted.

42. He approved of the wording of sub-paragraph (*b*), except for the words "and in consultation with the party concerned", for the time had not yet come to impose such an obligation.

43. With regard to article 68, he stressed that a treaty could not be a matter of indifference to any of the contracting parties. Any proposal for its amendment concerned all the parties and should therefore be communicated to all the parties. Moreover, the machinery of *inter se* amendment should be able to function in spite of the opposition of another party which had been duly notified and had refused to take part in the consultations. *Inter se* revision did not violate the *pacta sunt servanda* rule, since the amending instrument could not be invoked against parties which did not accept it. He did not believe that the obligation to notify all the parties of any proposed amendment was calculated to cause stagnation in international law; but to require all the parties to take part in the consultations on revision might introduce an element of stagnation.

44. Some treaties, by their nature, did not admit derogations. The Commission should provide for that case, but in rather less detail than in article 68, paragraph 2. It would be sufficient to refer to the provisions of the treaty itself, and in that connexion he suggested that the words "expressly or implicitly" should be added before the word "prohibited" in paragraph 2 (*c*).

45. Like Mr. Castrén and Mr. Briggs, he thought that article 68, paragraph 3, should form a separate article.

46. Article 69 was acceptable as a whole. Paragraph 1 stated an existing right; its wording was correct and in accordance with practice.

47. He had some doubts about paragraph 2, however, under which a party to the original treaty might find itself debarred from claiming that the new treaty violated the original treaty. He could accept the Special Rapporteur's text as far as sub-paragraph (*a*), for a State which had taken part in the adoption of an amending instrument had made its position clearly known and should be considered as having admitted that that instrument was not a violation of the original treaty. But sub-paragraph (*b*) went too far; the fact that a party had made no objection was not sufficient reason for debarring it from claiming its rights under the original treaty.

48. Lastly, the effects of a fundamental change of circumstances in regard to revision which did not involve the termination of the treaty but only the amendment of some of its clauses, should be provided for in another article, which would be based more on article 44 of the section on termination of treaties adopted at the

fifteenth session [8] and would refer back to the procedure provided for in article 46.[9]

49. Mr. EL-ERIAN said that the Special Rapporteur had made a courageous attempt to provide the Commission with a basis for working out rules on a matter which many writers regarded as political rather than legal. The importance of the subject needed no emphasis; it involved reconciling the need to safeguard the stability of treaties with the requirements of peaceful change. As the Chairman of the United States delegation had aptly said in his report to the President on the results of the San Francisco Conference: "Those who seek to develop procedures for the peaceful settlement of international disputes always confront the hard task of striking a balance between the necessity of assuring stability and security on the one hand and of providing room for growth and adaptation on the other.[10]

50. The Commission was faced with the task described by Rousseau in the words "Le problème posé — est le problème fondamental du droit international, celui de la revision des règles juridiques conventionnelles. La loi de l'évolution gouverne, en effet, les traités comme les autres actes de la vie sociale; le juriste ne connaît pas d'actes intangibles, que ce soit dans l'ordre interne ou dans l'ordre inter-étatique".[11] ("The problem raised — is the fundamental problem of international law, that of the revision of conventional legal rules. For the law of evolution governs treaties just as it governs the other instruments of social relations; the jurist recognizes no immutable instruments, whether in internal or in inter-State relations".)

51. The problems created by revision differed according to the type of treaty: it might be a bilateral treaty, a contractual multilateral treaty that really consisted of a series of interlocking bilateral treaties, a normative multilateral treaty in the sense defined in article 1 (*c*) of the draft, or a general convention. The process of revision also varied: apart from ordinary amendment by negotiation between the parties, there was revision by a duly authorized organ of an international organization or by judicial decision.

52. With regard to article 67, it was difficult to subscribe to the view of Lord McNair, quoted in paragraph (3) of the commentary, that as a matter of principle, no State had a legal right to demand the revision of a treaty in the absence of some provision to that effect contained in the treaty. Personally, he would have thought that whether there was such an express clause or not, any party was entitled to initiate the procedure for amendment or revision, but of course no other party was forced to accept the proposed change. After the First World War instances of provisions governing revision, which had previously been rare, had become much more common and were to be found in, among other instruments, the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws,[12] the 1930 Agreement concerning Maritime Signals,[13] the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs,[14] the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[15] the 1951 Convention relating to the Status of Refugees [16] and the 1958 Conventions on the Law of the Sea.[17]

53. Recognition of the need for peaceful change was a fundamental feature of the system which the San Francisco Conference had aimed to create, and with that in mind the Egyptian delegation had proposed an addition to chapter II of the Dumbarton Oaks proposals that read "All members of the Organization undertake to respect agreements and treaties to which they have become contracting parties without prejudice to the right of revision". A more general formulation had been adopted at the San Francisco Conference and embodied in Article 14 of the United Nations Charter. The reason for that had been explained by certain writers in the words: "Since the objective was not solely the revision of treaties, but rather the consideration of any situation or condition which might impair the general welfare or friendly relations among nations, without regard to whether it has relation to a treaty or not, the more general phraseology was introduced".[18] It was equally important to ensure that arbitrary obstacles were not allowed to impede the process of change. There had been many instances in the past of States, by their stubborn refusal to consider modifying a treaty, forcing others to denounce it.

54. The proviso at the beginning of article 67 must be understood in the sense that the treaty could regulate the process of revision by, for example, stipulating a time-limit; it could not be understood as in any way derogating from the right of revision itself. The obligation on other parties to consider in good faith any proposal to amend or revise was essential, and it was parallel to the obligation already provided for in articles 17 and 55. The provision in article 67, subparagraph (*b*) must therefore be retained as a safeguard against wilful frustration of amendment or revision by a party.

55. He was in general agreement with the way article 67 had been framed; he would comment on articles 68 and 69 later.

56. Mr. TUNKIN said it was essential to include in the draft articles some provisions on the amendment of treaties, and for that purpose a distinction must be made between bilateral and multilateral treaties.

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[8] *Ibid.*, p. 20.

[9] *Ibid.*, p. 23.

[10] Department of State *Publication 2349, Conference Series 71* (1945), p. 166.

[11] Rousseau, C. *Principes généraux du droit international public, 1944*, Tome 1, p. 616.

[12] League of Nations *Treaty Series*, Vol. CLXXIX, p. 91

[13] League of Nations *Treaty Series*, Vol. CXXV, p. 97.

[14] League of Nations *Treaty Series*, Vol. CXXXIX, p. 303.

[15] United Nations *Treaty Series*, Vol. 78, p. 278.

[16] United Nations *Treaty Series*, Vol. 189, p. 150.

[17] *United Nations Conference on the Law of the Sea, 1958, Official Records*, Vol. II, pp. 132 *et seq.*

[18] Goodrich, L. M., and Hambro, E., *Charter of the United Nations*, 2nd edition, 1949, p. 179.

57. Where multilateral treaties were concerned, the position was that if the treaty itself contained a revision clause, the provisions of that clause must apply. The Commission had adopted that principle for the termination of treaties and it was logical to adopt the same principle for their amendment. It was usual for a multilateral treaty to specify a period after which any of the parties could make to the others a proposal for its amendment. For instance, the four Geneva Conventions of 1958 on the law of the sea specified a period of five years; clearly, before the expiry of that period, the States parties to those conventions could not propose their amendment. Occasionally treaties, especially those of a technical nature, specified a simplified procedure. Very often an amendment clause provided that any State party could present an amendment to the depositary. The depositary circulated the proposed amendment to all the States parties and if a specified number of them agreed, the amendment entered into force as between the accepting States.

58. Where a treaty was silent with regard to its amendment, the parties should be able to amend it by agreement at any time. That rule was laid in article 40 for termination and it was obviously appropriate for amendment as well. But article 40 provided that the termination of a multilateral treaty containing no termination clause would require, in addition to the agreement of all the parties, the consent of not less than two-thirds of all the States which had drawn up the treaty. He was inclined to agree with the Special Rapporteur that, in the case of amendment, it was probably desirable to limit the right to the actual parties to the treaty.

59. The amendment of a treaty involved problems both of procedure and of substance. But where a State took the initiative for the amendment of a treaty, it would often not only propose the convening of a Conference, but actually suggest specific amendments. That situation, which arose in practice, should be covered by the draft articles. In his opinion, if the treaty was silent on the subject, it was better to adhere to the unanimity rule and to require the consent of all the States parties for convening the Conference.

60. Much had been said about the so-called *inter se* revision of treaties. On that matter, he agreed with Mr. Lachs on the need to draw a clear distinction between the amendment or revision of a treaty and the conclusion of a new treaty. The revision of a treaty was a process whereby a new or revised text was substituted for the original text, which was then dropped, and the revised treaty took the place of the original treaty. In the case of an *inter se* agreement, the original treaty subsisted, but some of the States parties concluded a supplementary agreement containing different provisions. Such a situation was permissible if the treaty itself did not preclude it, but the original treaty continued in force and the new agreement constitued an additional treaty binding only on the parties thereto. The problem which arose was not that of revision, but that of conflicting treaty provisions, which was dealt with in article 65.

61. Viewed in that light, it was clear that articles 68 and 69 did not, in fact, deal with the amendment or revision of treaties but with the conclusion of new treaties, a problem which was outside the scope of the present discussion.

62. In the articles on revision, the Commission should deal with the procedure for adopting a new or revised text of a treaty. It should be provided that the consent of all the parties to the treaty was required for convening a conference — he was, of course, referring to multilateral treaties, since bilateral treaties required separate treatment. States which had taken part in drawing up the treaty should be given the right to be invited to the conference, but their consent should not be necessary for convening it. The conference would decide on its own rules of procedure; it was customary in such cases to require a two-thirds majority for amendments. The problem of the entry into force of any amendments adopted would then arise and the draft articles could specify that ratification by two-thirds of the parties was required. The amendments would then be binding on the States which had ratified them, but it remained to be determined what would be the position of the other parties. One possible solution would be to provide that States which did not wish to ratify the amendments had the right to withdraw from the treaty. Such a right of withdrawal would appear to be logical.

63. If the approach he suggested were adopted by the Commission, the provisions of article 67 would apply only to bilateral treaties.

64. Mr. de LUNA said that the problem was to reconcile the need for stability of treaties with the dynamic needs of international relations. In addition to the exceptional remedy provided by the *rebus sic stantibus* rule, the draft articles should contain provisions on the amendment of treaties which would minimize the chances of international conflict.

65. He agreed with the Chairman on the desirability of dropping the term "revision", which had certain political connotations and which harked back to the period between the two world wars when there had been so much discussion on the application of article 19 of the League of Nations Covenant and the whole question of peaceful change.

66. In formulating the draft articles on the amendment of treaties, the Commission should be careful to remain within the field of law and to lay down clear procedural rules that would facilitate amendment without leading to anarchy. At the same time, it should avoid prejudicing the rule in article 65, which dealt with the problem of conflicting treaty provisions in terms not of nullity, but of priority and State responsibility. The essential principles in the matter of amendment were those of unanimity and *inter se* agreements; where a new treaty was concluded, the matter was covered by article 65.

67. With regard to terminology, it was essential to bring the language of paragraph 2 of article 68 into line with that of paragraph 3 (*b*) of article 42, on the termination of a treaty as a consequence of its breach. That paragraph referred to the "violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty". Since the situa-

tion envisaged in paragraph 2 of article 68 was similar, the same terms should be used. It was also necessary to bear in mind the language used in paragraph 2 of article 46, on the separability of treaty provisions. In paragraph 2 of article 69, the terminology used throughout Part I of the draft article [19] should be followed.

68. When speaking earlier, he had opposed the inclusion in article 67 of the obligation to consult the party concerned, but in the case of article 68, paragraph 1, he was prepared to accept the right of consultation of the other parties to the treaty. There was no contradiction between those two positions. The parties to a treaty were not obliged to enter into consultations with any party making a proposal to amend the treaty. But should a proposal for revision be made, all the parties were entitled to be notified of the proposal and, if any negotiations actually took place, all the parties were entitled to be consulted and to participate in them.

69. It had also been asked whether other States concerned in the treaty should not also be invited to take part in the negotiations for its amendment. In principle, there was much to be said for inviting them, especially in view of the contemporary trend towards universality in international law; but he feared it might open the way for unduly wide participation in the amendment of treaties. The wisest course would be to adopt a well-defined criterion, by providing that all States which had taken part in drawing up the original treaty could participate in the negotiations for its amendment.

70. In article 69, the provisions of paragraph 3 (*b*) seemed premature, in that they anticipated a violation where none might take place. As he had pointed out during the discussion of article 65, the text of a treaty could be apparently incompatible with that of another treaty without any actual conflict arising. The second treaty could remain a dead letter or be applied in such a way as not to give rise to any conflict in the application of the two treaties. The Special Rapporteur had forestalled that objection by beginning paragraph 3 (*b*) with the word "If", but its provisions should be clarified.

71. He could not support the opening proviso of article 67. A treaty could contain an absolute prohibition of all amendments. There were treaties which specifically stated that they were laying down the law for all time; one example was the Peace of Westphalia of 1648. But clearly, even if a treaty contained such a clause, it was still open to amendment.

72. A treaty could also contain a clause which laid down a time limit, or specified the procedure, for its amendment. Provisions of that type were permissible, since they did not constitute an obstacle in perpetuity to the adaptation of the treaty to changing circumstances. Nevertheless, even where such provisions existed, there could be no doubt that, with the unanimous agreement of all the parties to the treaty, it was possible to override the time limit and any other procedural conditions that might be laid down in it.

[19] *Yearbook of the International Law Commission*, Vol. II, pp. 161 *et seq.*

73. He would speak later on the distinction between the conclusion of a new treaty and the revision of an existing one.

The meeting rose at 6 p.m.

746th MEETING

Tuesday, 16 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) *(continued)*,

ARTICLE 68 (Right of a party to be consulted in regard to the amendment or revision of a treaty) *(continued)* and

ARTICLE 69 (Effect of an amending or revising instrument on the rights and obligations of the parties) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 67 to 69 in the Special Rapporteur's third report (A/CN.4/167/Add.1).

2. Mr. PAL said it was vitally important to provide for the revision of treaties, in recognition of the inevitable evolution in relations between States. Treaties were significant devices of States in their mutual relations; they were instruments of stability as well as of change in international community relations. They were catalysts and moderators of political forces in the international arena. Treaties had gained special significance because they called for conscious and voluntary action founded on explicit consent and free will, binding States solely through the manifestation of their consensus based on complete and unabridged sovereignty.

3. The world was already witnessing a loosening of the former rigidity in international community conduct. Barring unforeseen disturbances, that trend could be expected to continue in its essentials, which would mean considerable variations and developments in treaty relations. Existing treaty relations would certainly need re-adjustment and extension; an example was provided by regional arrangements, which would require readjustment in many respects to provide for their extension to much wider regions, of which no area could be excluded except by its own choice. Any regional arrangement which had not hitherto included