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Summary record of the 747th meeting

Topic:
Law of Treaties

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deal with that case in the context of the draft articles under consideration, for the purpose of such agreements was in fact to amend the original treaty or replace it.

52. Mr. TUNKIN noted that some members had spoken in favour of dealing with *inter se* agreements. In that connexion, he wished to stress that, in his statement at the previous meeting, he had not opposed that idea. He had emphasized that *inter se* treaties, which could be perfectly valid within the framework of the original treaty, should be treated as distinct from revision. The expression "*inter se* revision", could create considerable confusion.

53. In fact, an *inter se* agreement was not a agreement revising the earlier treaty, but constituted a separate treaty. Admittedly, the practical results could occasionally be similar, but it was essential to make a distinction between two separate legal institutions. So long as that distinction was made and the provisions on each institution were kept separate, he could agree, in general, to the substance of article 68, paragraph 2, provided that its provisions were suitably completed.

54. The basic rule for amendment of a treaty was that the provisions of the treaty itself should apply; the primacy of the treaty provisions was in keeping with the *pacta sunt servanda* rule. Where the treaty did not contain any provisions on amendment, the problem of procedure arose. He had not advocated the need for a conference in every case, but the agreement of all the parties to the treaty was necessary to convene a conference. The parties could, of course, agree on a simpler procedure if they wished; for example, the proposed amendment could be circulated to all of them by the depositary and, if approved, could be ratified. On the other had, a proposal could be made to convene a conference, and the suggestion made by Mr. Reuter concerning the procedure to be followed in those circumstances was extremely valuable.

55. The question of the legal effects of amendments could be settled by the texts of the amendments themselves. The conference which adopted the amendments could decide on the number of ratifications required for their entry into force and also on their consequences for States which did not ratify them. The draft articles should specify that the matter could be decided by the conference, and lay down a residual rule along the lines of article 69, paragraph 1, for application failing such decision.

56. He would not object if some provisions on *inter se* agreements were included in the draft articles, but a clear distinction should be made between such agreements and the revision of treaties.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the differences of opinion which had arisen during the discussion were perhaps not as great as they might appear at first sight; it was true that there was substantial disagreement on one point, but he hoped it would still be possible for the Commission to produce acceptable draft articles on amendment and revision. While he would be prepared to accept a greater separation between the provisions on *inter se* agreements and those on revision, which also might result in *inter se* amendment of a treaty, he would strongly oppose the exclusion of the former subject. The *inter se* procedure constituted the crux of the whole problem of the amendment of multilateral treaties and without a reference to that procedure, articles 67 and 69 would become meaningless.

The meeting rose at 12.50 p.m.

747th MEETING

Wednesday, 17 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167 and Add.1 and 2)
(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. El-Erian said that, as he had dealt only with article 67 in his previous statement, he now wished to make some general comments on articles 68 and 69. The debate had shown that a distinction should be made between the partial alteration of the provisions of a treaty and its total replacement by a new treaty. Total replacement was already covered by article 41 (Termination implied from entering into a subsequent treaty).[1] It was therefore his understanding that articles 68 and 69 dealt with the partial alteration of a treaty.

3. Mr. Tunkin and Mr. Lachs had stressed that an *inter se* agreement did not involve a material revision of the body of the treaty; but since it introduced a new element into the general regime of the treaty, certain safeguards should be provided to ensure that it did not affect the enjoyment by the other parties of their

[1] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 16.

rights under the original treaty or prevent the effective achievement of the objects and purposes of that treaty as a whole. He accordingly supported the idea of treating an *inter se* agreement as a *cas d'espèce* in a separate article, with the necessary safeguards.

4. He agreed with Mr. Yasseen that it would be desirable to keep both of the terms "amendment" and "revision"; but a distinction should be drawn between the process and the results. An alteration which resulted in partial changes in the treaty was an amendment, whereas one which resulted in its complete replacement constituted a new treaty. In Chapter XVIII of the Charter entitled "Amendments", the terms "amendment" and "review" were used. However, when the parties to a treaty reviewed its provisions, they could decide on any of three courses: they could either take no action at all, or make partial changes (i.e. amend the treaty) or else replace the whole of the treaty as indicated in article 41 of the draft. He therefore agreed that the word "amendment" should be used in the draft articles under consideration — a solution which would avoid doctrinal difficulties.

5. Mr. AMADO said he agreed with McNair and some other writers in considering the revision of treaties as essentially a political matter. That view was based on practice. The term "revision" had indeed proved unfortunate in use.

6. The Commission was engaged in work which might be described as "bourgeois". The problem was to preserve the old treaties. If the Commission wished to follow the Special Rapporteur and lay the foundations of a technique for treaty revision, why go beyond the rules already stated in the earlier articles?

7. There was one obvious result of amendment *inter se*; if it did not affect the basis of a treaty, the treaty remained intact and that was what mattered. The Commission should adhere to the principle of stability and the *pacta sunt servanda* rule, which represented honour in international law.

8. Mr. TSURUOKA said he recognized that, in order to preserve justice and facilitate international co-operation, it was sometimes useful and even necessary to adapt the law to the new demands of real life. It must not be forgotten, however, that for the achievement of that purpose the stability of the legal order was equally important, necessary and fundamental. A clear distinction should be drawn between adapting the law to the demands of society and subordinating it to the claims of certain countries or groups of countries. It could hardly be maintained that the law should give way to certain claims, even if they emanated from very great Powers.

9. Customary rules gradually formed around matters governed by treaties. That process was calculated to temper the rigidity of conventional rules, so that the need to adapt the law to reality diminished as customary rules evolved. No member of the Commission had yet referred to that idea, which was no doubt self-evident, but to which the Commission should nevertheless give weight.

10. He agreed with Mr. Amado that history provided distressing examples of abuse. The Commission should concentrate on the need to prevent abuses.

11. The articles on the amendment and revision of treaties proposed by the Special Rapporteur were very wise and very moderate. They dealt mainly with the situation that arose when a treaty was followed by another treaty dealing with the same subject-matter in a different way. The problems which then arose were quite easy to solve if the terms of the first treaty allowed the conclusion of the second and if the parties to both treaties were the same; for that case, the solution was already provided in article 41, adopted at the fifteenth session, and article 65. Nor were there any insurmountable difficulties if the first treaty had been concluded within an international organization which had customs or conventional rules on the subject. The problem was more difficult if the parties to the second treaty did not include all the parties to the first and if the first treaty did not contain a clause permitting the conclusion of the second. It might then be asked why some of the parties to the first treaty should be entitled to conclude a second treaty conflicting with the first. The criteria were very vague and were open to abuses. Thus it would be better not to formulate rules on the amendment of treaties, since most of the situations that might arise were already covered by other articles, in particular articles 40 and 41, adopted at the fifteenth session, and article 65.

12. He was not opposed to the Commission's formulating a technique for the amendment of treaties, provided that that technique was consistent with the unanimity principle, or with its corrollary that the consent of all the parties to the original treaty was required before some of the parties could conclude a new treaty amending it.

13. Mr. de LUNA said that since the unanimous agreement of the parties to a treaty was necessary for its amendment, the question whether it should be revised or not depended on the success of the negotiations undertaken to that end. If the negotiations failed and a second treaty conflicting with the first was concluded, the situation contemplated in article 65 would arise. The problem, however, was that when a party to a treaty proposed its revision, it could not foresee the reaction of the other parties or know whether the negotiations would be successful or not. Moreover, as Mr. Yasseen had pointed out, there were cases in which an amendment adopted by some of the parties *inter se* did not bring the situation within the terms of article 65, because it was in fact a revision of the treaty; thus the decisive criterion in every case was the intention of the parties.

14. So long as the outcome of the proposal for revision was not known, the only significant element was the intention of the parties. If their intention at that time was to enter into a treaty having the same purpose as the previous treaty and constituting a revised version of it, the process would be one of amendment. That would be so even if, for instance, a hundred States took part in the revision conference, but only ninety ratified the amendments it adopted. In such cases the new treaty

concluded at the conference was a revised treaty and not a second treaty different from the first.

15. The *inter se* procedure provided for in articles 68 and 69 was the most usual method of revising treaties. However, the approach adopted in paragraph 2 of article 68 amounted to treating the amending instrument as a second treaty conflicting with the first. In the first place, that paragraph did not stipulate the obligation to notify all the other parties of the proposal for amendment; since it was stipulated that paragraph 1 of article 68 did not apply to the case referred to in paragraph 2, that case was not treated as one of revision. In fact, article 68 offered a solution similar to that provided by article 65 for conflicting treaties.

16. He reiterated the need to use the same terminology in article 68, as the Commission had adopted in the earlier articles on reservations and on termination. The object, in all cases, was to prevent any action which might affect the other parties' enjoyment of their rights (or fulfilment of their obligations) under the treaty or might hinder the effective execution of any of the objects or purposes of the treaty.

17. Before the text of articles 67 to 69 had been before the Commission, he had given an example of an exception to the rule in article 65, paragraph 4 (*a*) — a case in which the later treaty prevailed over the earlier one, even though it did not include all the parties to the earlier treaty. It was the case of a new treaty having localized effects, namely, the treaty revising the regime of Trieste.[2]

18. He agreed that it would be better to avoid the term " revision ", which had political connotations. The whole problem of " peaceful change " was really a legislative one. It was the problem of introducing new norms of international law through progressive development, sometimes of a revolutionary character. A good example was provided by decolonization in United Nations practice, on which a *jus cogens* rule was emerging.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that it had not been his intention to lay down a code of techniques for treaty revision in the general sense of the word. A number of techniques had been developed in practice and the use of them was largely a political question, which he had endeavoured to avoid. His purpose had been rather to analyse existing practice with regard to the amendment of treaty provisions, in order to ascertain whether there were any elements which deserved or needed formalization in the draft articles on the law of treaties. One example of such an element was the very important point embodied in article 68, paragraph 1: the right of all the parties to a treaty to be consulted concerning any agreement intended to modify its provisions. Cases could be mentioned, some of them quite recent, in which certain of the parties to a treaty had negotiated its revision without consulting the others.

20. He did not believe that the Commission should attempt to control techniques of revision as expressed in the clauses commonly included in treaties to govern their future revision. States clearly wished to retain great freedom of action in the matter. Moreover, clauses of that type differed very widely and hence did not provide an adequate basis for the formulation of a general rule.

21. Reference had been made to the distinction between bilateral and multilateral treaties for purposes of drafting provisions on amendment. In fact, only the provisions of article 67 and of article 68, paragraph 3, were capable of application to bilateral treaties, and those were not the more important provisions in the articles under discussion.

22. For his part, he would resist any suggestion to introduce the question of the termination of treaties or that of the *rebus sic stantibus* rule into the discussion of the revision of bilateral treaties. Circumstances arose in which, without having any legal basis for demanding the revision of a treaty, a State nevertheless desired its amendment: that was the type of case envisaged in articles 67 to 69. In the case of bilateral treaties, that type of situation tended to find its own solution, being simply a matter for negotiation between the two States; the real difficulty arose in connexion with multilateral treaties.

23. He did not believe that the sharp distinction between the amendment of a treaty and the conclusion of a new treaty, on which some members insisted, could in fact be made. The technique used for revision was, precisely, the conclusion of a new treaty. Even a short protocol additional to an earlier treaty might have the effect of transforming it into a completely new treaty for the States which were parties to the protocol. International treaty-making practice showed a definite tendency to maintain old treaties in being as far as possible, so as not to lose the benefit of the ratifications slowly accumulated over the years. As a result, a complex situation arose when only some of the parties to an earlier treaty ratified a new or revised version: the old treaty alone applied to those of the original parties which had not ratified the new one, while both the old and the new treaty applied to the others. Sometimes also, where a matter was regulated by a series of treaties that did not all have the same contracting parties, a new treaty was concluded which consolidated the provisions of all the earlier ones. That process was commendable, but unfortunately it also had its dangers, since it might lead to a situation in which some of the original parties to the older treaties remained subject to them, because they had not ratified the consolidating instrument. That complication was inevitable because of the basic rule that a treaty was not binding upon a State which was not a party to it, and the frequent failure of States to ratify treaties which they had signed. In the circumstances, it seemed somewhat unrealistic to try to draw a sharp distinction between an amending treaty and a new treaty creating an *inter se* arrangement between some of the parties only.

24. The purpose of article 68, paragraph 2, was to deal with the case in which, because of the localized interest involved or for some other reason, some of the parties decided to supplement or vary the pro-

[2] See 743rd meeting, para. 25.

visions of the treaty in a manner that concerned them alone. He stressed the importance of the words " as between themselves alone ", in the opening sentence of that paragraph. As far as the parties to the *inter se* agreement were concerned, however, that agreement constituted a revision of the earlier treaty. The relationship to which it gave rise was in no way different from that which resulted for States ratifying an amendment left unratified by some of the other States that had participated in the negotiations for revision.

25. The provisions of article 68, paragraph 2, were not concerned merely with the technique of revision. Their purpose was to lay down, by implication, certain limitations upon the power to conclude *inter se* agreements without the consent of the other parties. Agreements of that type constituted a common means of modifying the obligations of a treaty. In some cases, the agreement would be legitimate, but in others it might constitute a violation of the rights of the other parties to the original treaty; the purpose of paragraph 2 was to distinguish between those two possibilities. He agreed, however, that the provision was perhaps not very well placed, since it concerned not so much the right to be notified provided for in article 68, paragraph 1, as the subject-matter of article 69.

26. There appeared to be some measure of agreement in the Commission on a number of points which could be included in the draft articles for submission to governments. However, he did not think that the Commission should try to formulate an elaborate code of rules for the revision of treaties; for the problem of reconciling the need for stability with the need for change was one with regard to which States tended to assert considerable freedom in making their own decisions.

27. Article 67 was intended to be introductory. The opening proviso was important because it took into account the fact that many modern treaties imposed certain restrictions not only on revision, but even on the making of proposals for revision. For example, a periodical review process was often prescribed. Of course, if all the parties so agreed they could ignore such conventional limitations, but in view of the need to uphold the *pacta sunt servanda* rule the Commission should not lightly disregard them. The initial proviso of article 67 was especially relevant to the obligation, stipulated in sub-paragraph (*b*), to consider in good faith a proposal for revision. If the proposal was made at the end of a specific period laid down in the treaty itself, the obligation of good faith applied; but if the proposal was made before the expiry of the specified period, no such obligation could be said to exist.

28. He could be prepared to drop sub-paragraph (*a*) of article 67, but some members appeared to think that the provisions of sub-paragraph (*b*) should be retained in some form. Perhaps they could be introduced into article 68 in a manner that would prove generally acceptable.

29. The question arose what action was to be taken in consequence of the proposal for revision. A conference might be convened or, if the number of States concerned was small, the diplomatic channel could be used for revising the treaty. Some members had advocated the unanimity rule, which would give every State party to the original treaty a right of veto over the calling of a conference for its amendment. He did not think the Commission should go beyond a statement of the right to be consulted; in particular, it should not lay down any rules regarding the choice between a conference and the diplomatic channel. He was opposed to the suggestion that the draft articles should make provision for a right of veto over the convening of a conference. Any provision having that effect would conflict with modern practice and would have the most unfortunate results, particularly for law-making treaties.

30. One possibility might be to try to set out in the draft the rules to be followed in convening a conference. Mr. Reuter had suggested that the Commission should be guided by the clause of the treaty governing its entry into force. That idea might not provide a workable rule, however, for some treaties specified that they would enter into force on being ratified by a small number of States. Moreover, there was no essential relationship between the number of ratifications required for a treaty's entry into force and the proportion of the States parties whose consent was necessary for the convening of a conference to revise the treaty. Another possibility would be for the Commission to take as a basis the revision clauses included in many multilateral treaties. Unfortunately, those clauses varied very widely and it was difficult to find in them an adequate basis for general rules. In the circumstances, the Commission should confine itself to a clear statement of the right of all the parties to a treaty to be notified of any proposals for revision and to be consulted with regard to the conclusion of any amending instrument, leaving other questions to be decided by the interested States.

31. The actual conclusion of the amending instrument should, as stated in article 68, paragraph 3, be governed by the provisions of Part I of the draft. The reference was to all the provisions of Part I, including in particular article 6 on the adoption of the text of a treaty,[3] which contained a substantial safeguard for the unanimity rule. Sub-paragraph (*a*) of that article specified that in the case of a treaty drawn up at an international conference, the adoption of the text would take place by the vote of two-thirds of the participating States, unless the Conference adopted another voting rule by the same majority. Sub-paragraph (*b*) specified that, in the case of a treaty drawn up within an organization, the voting rule applicable would be that of the competent organ of the organization in question. In all other cases, however, " the mutual agreement of the States participating in the negotiations " was required, as specified in sub-paragraph (*c*). That requirement safeguarded the position where a treaty was concluded by a small group of States — a type of treaty which had already given rise to serious problems in connexion with other articles of the draft.

32. With regard to the amending treaty, the basic rule was that, like all treaties, it was not binding on

[3] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 166.

a State that was not a party to it. Exceptions to that rule were very rare. One exception was the case in which the treaty itself provided that a minority of the parties could be overruled by the majority, so that an amendment adopted by a majority vote would become binding upon all the parties. Another exception was the case in which a majority rule was laid down in the constitution of an international organization for treaties concluded within the organization. The purpose of article 69, paragraph 1, was to set out the rule and exceptions in question. However, the opening sentence of that paragraph formulated a rule containing an *inter se* element, because the revision instrument, like all treaties, was binding on by upon the parties, and would therefore often result in an *inter se* situation, even if that result had not been intended.

33. Paragraph 2 of article 69 dealt with a situation which needed to be covered : the frequent case in which the revising instrument was in force in respect of only some of the original parties, while the unamended treaty continued to apply with respect to the other parties. In that case, a State which had been duly invited to the negotiations for revision and had not raised any objections should not, merely because it had not ratified the revising instrument, be able to complain that that instrument constituted a violation of its rights under the original treaty.

34. In conclusion, he suggested that, in view of the suggestions made for the rearrangement of the provisions of articles 67 to 69, he should himself prepare a revised version of those articles in the light of the discussion. The new draft articles would be submitted to the Commission for consideration before being referred to the Drafting Committee.

35. The CHAIRMAN, speaking as a member of the Commission, pressed for the deletion of sub-paragraph (*b*) of article 67. It would not be fair to impose an obligation of good faith on the parties receiving a proposal for amendment if the party making the proposal was not likewise required to act in good faith.

36. Moreover, although he usually preferred the Commission to reserve anything touching on State responsibility, he thought it would be dangerous only to say, as in article 69, paragraph 3 (*b*), that on the entry into force of an amendment or revision of a treaty *inter se* which constituted a violation of the treaty *vis-à-vis* the other parties, those parties had the right to terminate the earlier treaty. The Commission should also provide for the possibility of those parties invoking the responsibility of the States which had made amendment *inter se*.

37. Mr. BRIGGS, referring to article 69, asked why, if it was stated in paragraph 1 that an amending instrument did not affect the rights of any party to the treaty which did not become a party to that instrument, it should be necessary to state in paragraph 2 that the bringing into force of the amending instrument could not be considered by any such party as a violation of its rights under the treaty.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the word "affect" was perhaps not very satisfactory. What the provision in question meant was that the amending instrument did not derogate from rights under the treaty. The bringing into force of an amending instrument *inter se* might violate the right of a party to the original treaty which had declined to participate in the revision, but a party which had participated in the revision could not afterwards maintain that its rights had been violated or that the original treaty applied as between itself and the parties to the new agreement. In other words, he had introduced a rule based on estoppel, which reflected what seemed to happen in actual practice, as States did not challenge the bringing into force of an amending treaty that they had failed to ratify. In practice such a situation was not very likely to arise.

39. Mr. BRIGGS, observing that article 69, paragraph 3 (*b*), referred to article 42, asked whether the Special Rapporteur had intended to equate revision with material breach. He would hardly have thought that revision came within the definition of "breach", which was the unfounded repudiation of a treaty or the violation of a provision essential to the effective execution of any of its objects. He also questioned whether revision would allow of the termination of a treaty by the unilateral withdrawal of one of the parties.

40. Sir Humphrey WALDOCK, Special Rapporteur, explained that if the bringing into force of an amendment or a revision amounted to a material breach, termination or suspension could only be brought about if all the conditions laid down in article 42 were fulfilled.

41. It was not easy to see what rule could be devised to cover withdrawal. Some treaties, in particular the constituent instruments of some international organizations, provided a right of withdrawal for a party which had voted against an amendment, but in the ordinary case of a revision resulting in *inter se* agreements two sets of interests came into existence : those of the parties which had accepted the amendment and those of the parties which had not accepted it. He did not think that any automatic right of withdrawal could be conferred on the parties which did not ratify the amendment.

42. Mr. LIU said that article 67 fulfilled a useful purpose and should be retained as a separate article. It was particularly important to lay down the principle it contained because in the past many inequitable treaties had been concluded under duress. The need to reconcile respect for treaties with evolution and change had been recognized in Article 19 of the Covenant of the League of Nations, which provided for the reconsideration of treaties that had become inapplicable, and a similar idea might be said to have been incorporated in Article 14 of the United Nations Charter.

43. He was not altogether convinced that it was desirable to retain article 68, paragraph 2, as he was inclined to regard *inter se* agreements as separate treaties. At all events, if that paragraph was retained it would need considerable modification, as would article 69, paragraph 2.

44. The CHAIRMAN, speaking as a member of the Commission, said, with regard to Mr. Briggs's first question, that he recognized that there were certain reasons for treating participation in a conference for the amendment or revision of a treaty as amounting to a kind of estoppel. But the Commission should carefully consider the danger of such a provision; for a State might agree to participate, and then become aware, during or even after the Conference, that the proposed instrument would be prejudicial to its rights and obligations. Article 69, paragraph 2 (*a*), was ambiguous and might deter States from taking part in a revision Conference for fear that the mere fact of having done so would subsequently debar them from claiming that their rights had been violated.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that article 69, paragraph 2 (*a*), was intended to refer to the process of voting the text of the amendment. Once a party had, by an affirmative vote, given its approval to the amending instrument the adoption of which would put the final clauses into operation, it seemed reasonable to stipulate that that party could not claim that the instrument violated the original treaty.

46. Mr. YASSEEN thought that paragraph 2 (*a*) should be understood to mean that the State concerned had taken a positive attitude when the instrument had been adopted. Abstention could not be regarded as a positive attitude. If a State "took part in the adoption of the ... instrument" in that sense, the normal inference would be that it could not thereafter claim that that instrument violated its rights.

47. The CHAIRMAN, speaking as a member of the Commission, said that the adoption of the final act of a conference — which simply affirmed that the text in question was the result of the conference's proceedings — in no way constituted an undertaking to approve that text as a contractual instrument.

48. Mr. TSURUOKA said that the meticulous jurists of Japan, for example, might take part in a conference in order to observe the proceedings, but would probably abstain from voting on the adoption of the instrument in order to reserve the right to reject it on further consideration.

49. The CHAIRMAN suggested that the Commission should accept the Special Rapporteur's offer to redraft articles 67 to 69.

It was so decided.

ARTICLE 65 A (The effect of breach of diplomatic relations on the application of treaties)

50. The CHAIRMAN invited the Commission to consider article 65 A in the Special Rapporteur's third report (A/CN.4/167/Add.2).

51. Sir Humphrey WALDOCK, Special Rapporteur, said that after the discussion at the fifteenth session on the effects of a breach of diplomatic relations,[4] he had prepared the article now before the Commission. In accordance with the Commission's policy, he had left aside the question of the effect of hostilities on treaties and also the consequences of non-recognition, which belonged to the topic of State succession. Thus the proposed article dealt with the effect of the severance of diplomatic relations and with the withdrawal of diplomatic missions simply as such. The cardinal rule was that the legal relations established by the treaty would not be affected, which was also true of relations established by customary rules of international law.

52. On the other hand, the absence of diplomatic relations might result in difficulties in executing certain types of treaty. He had discussed in the commentary the possibility of a treaty providing for its execution through the diplomatic channel, in which event it might be possible to proceed with the performance of the treaty though the intermediary of a representing third State; but it was not certain how far such a third State could act, and impossibility of performance might ensue which could result in suspension of the operation of certain clauses. It was for that reason that he had inserted a reference in the article to the provisions of article 43. The Commission might think it unnecessary also to refer to the obligation under article 55.

53. The CHAIRMAN, speaking as a member of the Commission, said that generally speaking he shared the Special Rapporteur's views. In the case of certain types of treaty the severance of diplomatic relations made it materially impossible to apply the treaty provisions. He wondered what, for example, would be the consequences of the severance of diplomatic relations between two States which were bound by a treaty — say a treaty for the pacific settlement of disputes — stipulating that diplomatic remedies must have been exhausted before recourse could be had to the procedure provided for in the treaty itself.

54. Sir Humphrey WALDOCK, Special Rapporteur, replying to the Chairman, said that such a rule had been invoked as a basis for preliminary objections in cases brought before the International Court, but never successfully. He would have thought that something might depend on the circumstances and on which State was responsible for breaking off diplomatic relations. In any event, if a State broke off diplomatic relations it would not be able to plead that diplomatic processes had not been exhausted by the other party to the dispute.

55. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the rule enunciated in article 65 A, but not with its presentation, because the reference to article 43 might cause confusion and wrongly imply that a breach of diplomatic relations could lead to the termination of a treaty, whereas in fact it could only result in the suspension of its operation in certain cases. He therefore considered that the article should be redrafted to read:

> "The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty. However, if

[4] *Yearbook of the International Law Commission, 1963*, Vol. I, 697th meeting, paras. 54 *et seq.*

the application of the treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties thereto, and it is not possible to execute the treaty through a representing State, or such a representation has not been established, then the application of the treaty is suspended as between any parties upon the severance of their diplomatic relations."

56. Sir Humphrey WALDOCK, Special Rapporteur, asked whether Mr. Jiménez de Aréchaga wished it to be understood that on the severance of diplomatic relations there was an obligation to appoint a representing State.

57. Mr. JIMÉNEZ de ARÉCHAGA replied in the negative. It was to cover that point that he had inserted the phrase " or such a representation has not been established ".

58. Mr. BARTOŠ said that he fully supported the wording proposed by the Special Rapporteur. An example of what could occur was to be found in the relations between the Federal Republic of Germany and Yugoslavia: the unilateral severance of diplomatic relations had not prevented the Federal Republic of Germany from fulfilling certain obligations to Yugoslavia. It was obvious that if diplomatic relations between two States were severed because of political differences, there could be no genuine co-operation between them: that was a case of impossibility of performance which it would be better not to mention expressly. The Special Rapporteur had adopted that course and the Commission should adhere to it.

59. Mr. VERDROSS thought it would be going too far to say that the severance of diplomatic relations did not affect the relations established between States by a treaty. It would be more realistic to say that " the obligations arising out of a treaty are not affected insofar as they are not incompatible with the situation created by the severance of diplomatic relations ".

60. Mr. ROSENNE, thanking the Special Rapporteur for complying with his suggestion at the fifteenth session,[5] said that article 65 A was acceptable to him. He partly agreed with Mr. Jiménez de Aréchaga, however, that to make the operation of the article subject to the whole of article 43 might introduce unforeseen complications. The article could be redrafted to state the general principle at the beginning and make such reference to article 43 as was necessary at the end.

61. Referring to a point made by the Chairman, he said that where a treaty stipulated that diplomatic remedies must be exhausted before recourse to other proceedings, once diplomatic relations had been severed it would be impossible to comply with that stipulation any longer.

62. It was important to include in the draft an article stating the rule of international law on the effect of the severance of diplomatic relations on treaties, because in the event of severance a municipal tribunal might have to apply rules of international law.

63. Mr. de LUNA considered that the Special Rapporteur had adopted the right approach. No State could divest itself of treaty obligations by breaking off diplomatic relations. In fact, the result of a breach of diplomatic relations was only a temporary impossibility of performance, so that not all the elements in article 43 would be applicable.

64. Mr. TUNKIN said that although article 65 A was likely to be generally acceptable, the Drafting Committee would doubtless need some guidance on certain points, in particular the relevance of article 43.

The meeting rose at 12.50 p.m.

748th MEETING

Thursday, 18 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167/Add.2)
(continued)

[Item 3 of the agenda]

ARTICLE 65 A (The effect of breach of diplomatic relations on the application of treaties) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 65 A in the Special Rapporteur's third report (A/CN.4/167/Add.2).

2. Mr. YASSEEN said it seemed certain that the severance of diplomatic relations did not affect the validity of treaties and did not terminate them. Nevertheless, it resulted in the absence of diplomatic representatives and reflected an abnormal state of relations between two States. The latter point should be stressed as much as the former.

3. There were treaties whose application required action by diplomatic organs. If those organs ceased to exist, it was no longer possible to implement the treaty. That applied, for example, to treaties on extradition, trade, navigation and judicial assistance. It was true that there was an institution of international law under which a State's interests could be protected by the representatives of another State during the period of breach of diplomatic relations. But it was doubtful whether all questions could be settled through the representatives of a third State, and whether there might not be treaties whose execution required some

[5] *Ibid.*, 696th meeting, para. 21.