Document:-
A/CN.4/SR.753

Summary record of the 753rd meeting

Topic:
<multiple topics>

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

79. As to the idea of "another instrument", he was inclined to agree with the Special Rapporteur rather than the Chairman. The Commission, when discussing Part I of the draft articles, and prompted by the regulations on the registration of treaties, had decided to disregard oral treaties entirely [7] and not to take sides in the argument on whether, since the entry into force of the United Nations Charter, oral treaties were still recognized in international law. The word "instrument" should therefore be retained, but with the proviso that it was the treaty itself that entered into force; the "instrument" might sometimes be merely evidence of the treaty's existence.

80. Paragraph 2 also raised a question of doctrine, namely, whether a treaty containing provisions that differed from the rule laid down in paragraph 1 could debar the parties from resorting to another method of amending an earlier treaty by a later one: should the new instrument be based on the rules concerning amendment laid down in the previous treaty? It might also be asked whether "the established rules of an international organization" were of such overriding force that States could not make any other arrangement. In the case of a treaty concluded within such an organization, naturally discipline required that the members should observe its rules. But if only two States members of an international organization were concerned, and the organization proposed, recommended or laid down a procedure governing relations among its members, the point was open to doubt.

81. Lastly, article 67, which was linked with articles 68 and 69, raised the question of the meaning of the term "multilateral treaties". The Commission had defined a "general multilateral treaty", but it had not given a general definition of a "multilateral treaty". Did articles 68 and 69 constitute exceptions to article 67 with regard to all multilateral treaties, including not only those that where not really of "general interest", but also all the others that were only tripartite or had very limited effects between certain States?

The meeting rose at 1 p.m.

753rd MEETING

Friday, 26 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Later: Mr. Herbert W. BRIGGS

Yearbooks and Summary Records of the Commission

1. Mr. PAREDES said that the essential part of the considerable amount of work done by the Commission was not so much the formulation of definitive rules of law, which governments might or might not accept, as the high-level exchange of views on legal questions and the trend to be followed in dealing with them. He therefore wished to thank the Secretariat, which had begun to distribute the *Yearbooks* containing the records of the debates, and hoped that the Spanish text of the summary records for 1963 would be issued shortly. If governments were expected to state their views, they must be given all the necessary material on which to base them.

2. The Commission's provisional summary records, however, were drafted in such a way that the speaker did not recognize his own statements; either the text made him say the opposite of what he had really said, or it stressed subsidiary points at the expense of essentials. That might be because the summary records were drafted in English and French and then translated into Spanish, or because the précis writers did not have the thorough knowledge of law required. In any event, it was essential that the Chairman should assert the speaker's right to correct the summary record, so as to ensure that it reproduced the thoughts he had expressed.

3. The CHAIRMAN said that the précis writer's work was not easy. Summarizing was a most difficult task, and the subjects dealt with by the Commission were highly technical. Besides, the members of the Commission represented different legal systems and different schools of thought, and not everyone could be expected to be familiar with all of them. Furthermore, although the speakers themselves knew what they considered important or secondary in their statements, their listeners might well gain quite a different impression. Members of the Commission usually spoke extempore, which was as it should be, but as a result, their mode of expression might not be so clear as their thinking, so that it was necessary to restrict the right to correct the summary records to some extent. If members entirely rewrote the summary of their own statements, some of the subsequent statements by other speakers might lose their point.

4. He himself had noted a very considerable improvement in the summary records. But members of the Commission should nevertheless have the broadest possible right of correction, and the Secretariat had never had any idea of contesting it.

5. Mr. ROSENNE pointed out that volume I of the English text of the Commission's *Yearbooks* for 1962 and 1963 had been distributed only the previous day; he hoped that the delay in publication would be further reduced in the future. It was essential for governments to have the *Yearbooks* as early as possible.

6. Associating himself with the Chairman's remarks about the summary records, he said that as far as the English text was concerned they reported, in a generally accurate manner, difficult debates on what were sometimes esoteric subjects.

7. Mr. BRIGGS said he was glad that volume I of the *Yearboks* for 1962 and 1963 had appeared. It was important that those publications should be issued as early as possible so that they could be consulted by governments in preparing their comments on the Commission's drafts.

[7] *Ibid.*, p. 163, para. (10).

8. He agreed with the Chairman that there had been an improvement in the summary records at the present session.

9. Mr. LACHS also expressed his satisfaction at the publication of the *Yearbooks*.

Law of Treaties
(continued)

[Item 3 of the agenda]

ARTICLE 67 (Procedure for amending treaties) *(continued)*

10. The CHAIRMAN invited the Commission to continue consideration of the redraft submitted by the Special Rapporteur for article 67.[1]

11. Mr. PAREDES thought that paragraph 1 gave the impression that any amendment of a treaty involved the conclusion of a new treaty replacing the earlier one. That was certainly not the meaning the text should bear or the meaning the Special Rapporteur had intended to convey. Amendments differed in scope and might affect essential or subsidiary points, so that it might not be necessary to conclude a new treaty. The parties might simply agree to extend their rights and obligations. Amendment was merely a new application of the same rule of law, not the replacement of one rule of law by another.

12. The term "modification", which it had sometimes been suggested should be replaced by "amendment", had given rise to some interesting discussion. In his own view, neither term was appropriate. The idea of amending included, up to a point, that of correcting an error, while the term "modification" was also restricted in scope — by no means so broad as "revision", which meant a fresh study of the essential elements of the text. Revision did not mean a complete change: it might affect only part of a treaty, but it would still relate to its bases or fundamentals. On the other hand, there was no denying that governments used the term "revision" very frequently, and it was Commission's duty to give a precise meaning to terms that were in current use in international life; in that particular case it must ensure that "revision" was not understood in the sense in which certain governments used it, i.e. to mean any change whatever in the system provided for by a treaty, regardless of whether the treaty was void or voided or whether some derogation from, or termination of, the treaty had been proposed. For those reasons he still advocated the use of the term "revision".

13. Sir Humphrey WALDOCK, Special Rapporteur, said that in the light of the criticism made by some members at the previous meeting that his redraft of article 67 was too stringent and did not allow for more informal methods of amending a treaty, he proposed that it should be further revised to read:

"A treaty may be amended by agreement between the parties. Except in so far as the treaty or the established rules of an international organization may otherwise provide, such agreement may be embodied

"(*a*) in an instrument drawn up in accordance with Part I in such form as the parties shall decide; or

"(*b*) in communications made by the parties to the depositary or to each other."

If it was acceptable to the majority, that text would satisfy him. Although it would by implication cover the case of amendment by subsequent practice, that particular point might need to be dealt with more explicitly in some other part of the draft.

Mr. Briggs, First Vice-Chairman, took the Chair.

14. Mr. VERDROSS supported the Special Rapporteur's new proposal, which was a great improvement because it spoke of agreement "between the parties", whereas the earlier text had not made it clear by whom the instrument was concluded.

15. Mr. ROSENNE said that the new text proposed by the Special Rapporteur was acceptable. He had no strong views about the term to be used in the title of section II as he did not believe that from the strictly legal standpoint there was any substantial difference between amendment, revision and modification. There might be some advantage, however, in following the language of Chapter XVIII of the Charter and explaining the matter in the commentary, even if a slight discordance between the texts in the different languages would result.

16. He regretted that the Special Rapporteur had not made the whole of his new article 67 subject to the terms of the treaty or to the established rules of an international organization, but if the majority thought the proposed formulation satisfactory he would not press the point.

17. The Commission need not concern itself with the amendment of bilateral treaties. Obviously they could not be amended unilaterally, and the situation was to some extent analogous to that of reservations to bilateral treaties, which the Commission had described in 1962 as presenting no problem.[2]

18. The word "instrument" was the correct term to describe the document incorporating an amendment formally adopted. As in the case of an agreement to terminate a treaty, it was implicit that the theory of the so-called "equal act" would not apply to such an instrument, and that point should be mentioned in the commentary in order to preserve the degree of flexibility desired by some members of the Commission.

19. Some care would have to be taken to make it plain that the expression "established rules of an international organization" meant the rules applicable to the treaty and not those applicable to the parties in their capacity as members of the organization. Unless that drafting point were dealt with, the text might be open to some unforeseen interpretation.

[1] See previous meeting, para. 56.

[2] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 176, para. (1).

20. Mr. AMADO said he found the Special Rapporteur's new text satisfactory.

21. Mr. ELIAS said he approved of the new text, which was similar to one he had intended to propose himself. It might perhaps be shortened in the course of review by the Drafting Committee.

22. Mr. YASSEEN said that the procedure contemplated in the article was logical: what had been done by *mutuus consensus* could be changed by *mutuus dissensus*. Nevertheless, he foresaw some difficulties in the application of the article.

23. In the first place, must the amendment take exactly the same form as the treaty, in accordance with the theory of the "contrary act"? Some writers had maintained that it must, but there was nevertheless some practice in the matter showing more flexible methods: the parties were sometimes satisfied with an exchange of notes or concordant declarations. The text should accordingly be based on that practice. The amendment need not necessarily take the same form as the treaty; the essential point was that the parties should really consent to it. Thus the new wording proposed by the Special Rapporteur was satisfactory, as it did not depart from the accepted general principles.

24. Consequently, it might perhaps be better not to refer in the article to other forms of implicit amendment, such as amendment consequent upon mere conduct in the application of a treaty. The greatest caution should be observed in that respect, for conduct in itself might not be evidence of the will to amend the provisions of a treaty. In practice, an attitude implying amendment might be regarded as a continuous violation of the treaty by one party. The other party might refrain from protesting vigorously out of resignation or courtesy, or because there was little at stake, but that did not prove that it had consented to the amendment.

25. Mr. JIMÉNEZ de ARÉCHAGA, commenting on the new draft submitted by the Special Rapporteur, said that it attempted to be symmetrical with article 40 on termination.[3] However, some questions were raised which might create unnecessary difficulties, such as the question whether unanimous consent was needed to amend a treaty. There was not an exact parallel in that respect, because while termination required unanimous agreement, the "*inter se*" technique of amendment allowed that requirement to be dispensed with in certain cases. It would therefore be wiser not to go into that question, especially as the two following articles correctly solved the substantive problems. Article 69 covered the special case of *inter se* agreements, an example of which was the practice of the five permanent members of the Security Council not to regard abstentions from voting as an exercise of the veto. That practice was an instance of "*inter se*" *de facto* amendment not touching upon the rights of other States Members of the United Nations and therefore not requiring their consent.

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

26. It would also be preferable not to mention the methods by which amendment could be effected. The methods mentioned in the new text did not by any means constitute an exhaustive list: among others, they did not include record of agreement by parallel statements before an international organ, as in the case of the Security Council practice regarding abstention, or subsequent practice, to which Mr. Tunkin had called attention. It would not be appropriate to deal with amendment by subsequent practice as a matter of interpretation.

27. He therefore considered that article 67 should be restricted to the subject-matter of the original article 68, paragraph 3 (A/CN.4/167/Add.1) and should only provide that, except in so far as the treaty or the established rules of an international organization stipulated otherwise, the rules laid down in Part I applied to the conclusion and entry into force of any instrument designed to amend a treaty.

28. Mr. TABIBI said he could have accepted the first redraft of article 67 with the deletion of the words "modifying its provisions" in paragraph 1. The new text proposed would cover not only amendment in the strict sense of the term, but also any amplification of the original treaty.

29. One point would need to be determined: what would be the position of a party not a member of an international organization, which was opposed to amendment of a treaty that was to be amended in conformity with the rules of that organization?

30. Mr. TUNKIN said that in practice nearly all modern treaties contained provisions concerning their amendment and revision, so that difficulties about the procedure to be followed for their amendment rarely arose. The problem not covered in either of the redrafts of article 67 was whether a treaty could be modified by the development of custom accepted as law by the parties. He appreciated the danger, mentioned by Mr. Yasseen, of recognizing such a possibility.

31. The first part of the new text proposed by the Special Rapporteur was acceptable, but the latter part of sub-paragraph (*b*) was too vague where it spoke of an agreement being embodied in communications between the parties.

32. He was inclined to doubt whether there was much need for such an article, particularly as it would be virtually impossible to devise rules which could adequately meet the requirements of States and which would not in some way be a hindrance in a sphere in which practice was extremely flexible.

Mr. Ago resumed the Chair.

33. Mr. LACHS said that the new text proposed by the Special Rapporteur was an improvement on the previous one, but he would suggest that, by analogy with article 40, the amendment of a treaty required the agreement of all the parties. The document in which the amendment was embodied could take various forms, and as it stood the provision was not exhaustive; that point would require further consideration.

34. A clear distinction should be drawn between interpretation, which gave life to a text, and a formal amendment, which changed an existing instrument. For example, by a process of interpretation chapters XI to XIII of the Charter had acquired a new meaning without having been formally amended.

35. If the rules of an international organization were to be mentioned, the reference should be to those laid down in its constituent instrument.

36. Mr. LIU said he hoped the principle of peaceful change which had been enunciated in the Covenant of the League of Nations would receive adequate mention in the commentary. There seemed to have been some shift of opinion in the Commission, for whereas initially it had been inclined to be cautious, it was now discussing various ways of effecting revision. In view of some uncertainties in the new text prepared by the Special Rapporteur, he would prefer a formula on the lines suggested by Mr. Jiménez de Aréchaga.

37. Mr. EL-ERIAN said it might prove extremely difficult to draft a satisfactory provision because a number of the issues involved were controversial. The Commission had moved a long way from Lord McNair's assertion that treaty revision was a matter for politics and diplomacy ; [4] it seemed to be contemplating a fairly strict provision.

38. The opening proviso in the Special Rapporteur's original text of article 67 (A/CN.4/167/Add.1) had been reintroduced in the latest redraft in the words " except in so far as the treaty or the established rules of an international organization may otherwise provide ". Such a clause would only be acceptable if it referred to the procedure for amendment, for in his opinion the principle of the amendment of a treaty could not be barred altogether by the actual terms of the treaty.

39. Sir Humphrey WALDOCK, Special Rapporteur, explained that an important point of substance was involved in the fact that article 67 did not refer to the agreement of " all the parties " as did article 40, which dealt with termination.

40. There had been general recognition of the need, in dealing with the amendment of multilateral treaties, to strike a balance between stagnation and flexibility. In his first draft of the articles on the amendment of treaties (A/CN.4/167/Add.1) he had attempted to strike that balance by means of the provisions of article 68, paragraph 3, which specified that the rules laid down in Part I applied to the amending instrument. For the adoption of the text of that instrument, the rules embodied in article 6 [5] would therefore apply. Provision was thus made for the adoption of the text by a two-thirds majority at an international conference and, where appropriate, for the application of the voting rule of an international organization, while the requirement of unanimity remained the residuary rule.

41. Where multilateral treaties were concerned, there was a strong case for drawing a distinction between amendment and termination. When a treaty was terminated, the rights of the parties ceased to exist ; when it was amended, the parties which did not wish to accept the amendment remained bound by the original treaty, except or those rare cases in which the treaty itself, or the applicable rules of an international organization such as WHO, laid down that an amendment adopted by a specified majority was binding upon all the parties, including the minority which had opposed the amendment.

42. It was with those thoughts in mind that he had prepared the new draft of article 67.

43. The CHAIRMAN, speaking as a member of the Commission, said he was surprised that the Special Rapporteur's text should give rise to so many difficulties, some of which were surely rather imaginary. It would be paradoxical and regrettable if, owing to disagreement, the Commission had to drop the article, which formed the counterpart to article 40 on the termination of treaties. In that connexion he would like to know whether the Special Rapporteur meant to make a distinction between the two articles by saying " agreement of all the parties " in article 40 and " agreement between the parties " in article 67.

44. Reference had been made to the amendment of treaties by State practice. In his view, interpretation could ultimately lead to a kind of modification of a treaty, even though the parties, unlike jurists, believed that only interpretation was involved. In some cases, however, he thought that the emergence of a particular practice actually resulted in amendment in the true sense of the term. For instance, as a result of technical developments, certain clauses of the treaties relating to the laws of war had become obsolete, which in fact amounted to an amendment. But he did not think that point should be taken up at present. The same problem arose in connexion with article 40, and the Commission had not taken it up when considering that article. The question should probably be considered as a whole, perhaps when the Commission came to deal with interpretation. For the time being he was satisfied with the text proposed by the Special Rapporteur.

45. Mr. TUNKIN said he had taken " agreement between the parties " to mean " agreement of all the parties ".

46. Sir Humphrey WALDOCK, Special Rapporteur, said he had deliberately not used the word " all ", in order to introduce a distinction between the termination and the amendment of a treaty.

47. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur whether the clause beginning with the words " Except in so far as " did not constitute a sufficient safeguard. It was hard to think of other cases in which a treaty could be amended without the consent of all the parties.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that the great majority of modern amendments to

[4] *The Law of Treaties, 1961*, p. 534.

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

multilteral treaties had been made without the consent of all the parties to the original instrument and in the absence of any provision in the original treaty explicitly providing for such a procedure.

49. Mr. YASSEEN observed that the Special Rapporteur's new draft also covered the case of amendment of a treaty by *inter se* agreement among some of the parties.

50. He asked Mr. Tunkin whether, when speaking of international custom, he had been referring to custom in the sense of usage, or to customary rules of international law.

51. Mr. TUNKIN replied that the terms "usage" and "custom" had given rise to considerable confusion. Strictly speaking, "custom" meant a customary rule of international law. The term "usage" applied to a practice which was not accepted as law. In view of the tendency in some quarters to use the term "custom" rather loosely in the sense of "usage", he preferred to avoid that term and to employ the expression "customary norm or rule of international law" — an expression that could give rise to no misunderstanding, because it made clear that the reference was to a rule of law and not to a mere practice. In that connexion, he drew attention to Article 38, paragraph 1 (*b*) of the Statute of International Court of Justice which referred to "international custom as evidence of a general practice accepted as law." That provision of the Statute made it clear that, contrary to the assertion of Kelsen,[6] practice by itself did not constitute international law.

52. He suggested that article 67 should be formulated in such a way as to confine its provisions within the framework of the law of treaties, but not to exclude some other ways of modifying treaties, such as the operation of a rule of customary international law.

53. The Drafting Committee should be invited to amend the article so as to cover that point, though the task would not be an easy one.

54. Mr. YASSEEN said that, in referring to international custom considered as a set of rules of law, Mr. Tunkin had raised a very important matter, to which he (Mr. Yasseen) had referred during the discussion of article 64.[7] Mr. Tunkin had given the Commission yet another reason why it should study the whole question of the relationship between conventional and customary rules. There was no denying that the provisions of a treaty could become obsolete — a phenomenon that had been analysed as the effect of a supervening customary rule which put an end to the treaty or modified some of its provisions. In such a case, the amendment of the treaty was not brought about by the mutual agreement of the parties, which only came into play if, and in so far as, it could be considered as a factor contributing to the formation of the custom. The Commission should consider the possibility of studying, in the context of its draft, the problem of conflict between conventional rules and rules of law derived from other sources.

55. Mr. de LUNA congratulated the Special Rapporteur on his new draft of article 67. The basic idea of the article had been to facilitate the development of international law and to prevent clashes between law and politics from leading to dangerous international conflicts.

56. The new article 67 appropriately emphasized the need for agreement between the parties. But that agreement need not necessarily be of a formal kind; international law was very flexible in that respect, since it permitted the conclusion of an international agreement even by means of signals; for example, the use of the white flag for concluding a truce.

57. The interpretation of a treaty could serve to clarify its provisions or to fill any gaps in them. It could not serve to replace an old rule by a new one or settle the case in which a rule became obsolete because it had ceased to be effective.

58. The parallel between articles 40 and 67 was not complete. In the case of termination under article 40, the treaty was extinguished for all the parties. In the case of amendment of a multilateral treaty, if the *inter se* process was accepted, the amendment could be made without the agreement of all original parties.

59. He was prepared to accept the new formulation of article 67, but he urged that the Commission should consider how to deal with the points raised by Mr. Tunkin and Mr. Lachs. In doing so it should take care not to prejudice any member's doctrinal position with regard to customary international law. For his part, he could not agree that the rules of customary international law had their source in the tacit agreement of States.

60. Mr. ROSENNE stressed that article 67 did not stand alone; it should be read in conjunction with articles 68 and 69.[8] Article 68 specified the rights of all the parties to a multilateral treaty in regard to proposals for amendment. If article 67 were considered together with article 68, it was likely that the problem which had arisen would become largely one of drafting. It would therefore be advisable to refer both articles together to the Drafting Committee.

61. He agreed with Mr. Tunkin that section II, on the modification of treaties, dealt with the law of treaties and not with other branches of international law.

62. Mr. BARTOŠ said that, for the reasons given by Mr. El-Erian and Mr. Yasseen, he had the same objections to the new draft or article 67 proposed by the Special Rapporteur as he had put forward at the previous meeting with regard to the former version.[9]

63. Mr. BRIGGS said that there was obviously more than one way of amending a treaty, but articles 67 to 69

[6] Kelsen, H., *Principles of International Law*, New York, 1932, pp. 307 *et seq.*

[7] 740th meeting, paras. 44-45.

[8] See previous meeting, para. 56.

[9] *Ibid.*, paras. 78-81.

dealt with a particular type of amending instrument. For that reason, he favoured the former redraft of article 67, stating that "The amendment of a treaty is effected by the conclusion and entry into force of another instrument modifying its provisions", with the addition of a proviso such as "or by agreement between the parties". The actual wording could be left to the Drafting Committee, but he thought it important that the Commission's draft should contain a provision on the lines of article 67.

64. He agreed with Mr. Lachs that a distinction should be made between the amendment of a treaty and the process whereby a new meaning was given to its provisions by interpretation.

65. Mr. RUDA said he thought article 67 should be retained in the draft. He was also in favour of retaining the main idea expressed in the first sentence of the Special Rapporteur's new draft, namely, that a treaty could only be amended by agreement between the parties or with their consent. With regard to the subsidiary idea — the manner in which a treaty could be amended — on the whole he approved of the formula suggested in the new draft, but he thought the Commission should take into consideration the comments made by Mr. Tunkin and Mr. Lachs.

66. In order to leave greater latitude to the will of the parties, it should be added that they could amend a treaty by any procedure they considered appropriate.

67. Mr. CASTRÉN said he agreed with Mr. Jiménez de Aréchaga. Perhaps the best solution might be to reintroduce the original text of article 68, paragraph 1 (A/CN.4/167/Add.1), which had only referred to amendment of a treaty by an instrument, without mentioning any other possibility.

68. Sir Humphrey WALDOCK, Special Rapporteur, said he thought article 67 could now be referred to the Drafting Committee, which should be able to produce a generally acceptable text.

69. He was not in favour of introducing a reference to customary international law. To do so would result in an imbalance, since no reference to customary international law had been made in other articles of the draft. Moreover, it would introduce an element of confusion into the provisions of article 67, the purpose of which was to clarify the rules applicable to the more formal kind of revision of treaties.

70. As to the problem of the effect on treaties of changes in the rules of general international law, and of the emergence of new rules of customary international law, he would have to consider that matter when reformulating article 56 on the inter-temporal law.

71. Mr. AMADO said he thought that interpretation should not be mentioned in connexion with the amendment of a treaty. In fact, interpretation very often had the opposite effect and restored the original meaning of a treaty after it had been distorted.

72. He was opposed to tendency to go into unnecessary details when speaking of custom: to speak of "custom" in international law was to speak of international law itself, from which custom could not be expected.

73. The Drafting Committee should base its text of the article on the Special Rapporteur's latest draft, amended as suggested by Mr. Ruda.

74. As to the choice between the words "the parties" and "all the parties", he did not see how the second expression could be regarded as saying any more than the first. A reference to "the parties" in connexion with a treaty certainly meant all the parties.

75. The CHAIRMAN, speaking as a member of the Commission, said that in his view the word "all" before "the parties" in article 40 was redundant.

76. He would like to make two recommendations to the Drafting Committee. First, as Mr. Amado had just pointed out, interpretation should not be confused with amendment: it would be dangerous to include under the term "interpretation" matters that were entirely different. Secondly, reference had been made to the amendment of treaties by the formation of customary rules. In practice, such cases were very rare. It happened much more frequently that a treaty was amended by tacit agreement or by the conclusion of another treaty, which, by implication, involved the amendment of the first treaty.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that whatever views mights be held on the matter, it had to be admitted that a very real difficulty arose in practice. Even where the intention in a multilateral treaty was that any amendment required the consent of all the parties, an amending instrument had been known to enter into force without being ratified or accepted by all the parties to the original treaty.

Article 67 was referred to the Drafting Committee for consideration in the light of the discussion.

ARTICLE 68 (Amendment of multilateral treaties) (redrafted by the Special Rapporteur)

78. Sir Humphrey WALDOCK, Special Rapporteur, said that, as Mr. Rosenne had pointed out, article 68 constituted an essential complement to article 67, particularly on the question of the unanimity of the parties. His redraft of article 68 read:

"*Amendment of multilateral treaties*

"1. Every party to a multilateral treaty has the right, subject to the provisions of the treaty,

"(*a*) to be notified of any proposal to amend it and to a voice in the decision of the parties as to the action, if any, to be taken in regard to the proposal;

"(*b*) to take part in the conclusion of any instrument drawn up for the purpose of amending the treaty.

"2. An instrument amending a treaty does not bind any party to a treaty which does not become a party to that instrument, unless it is otherwise provided by the treaty or by the established rules of an international organization.

"3. The effect of an amending instrument on the obligation and rights of the parties to the treaty is governed by articles 41 and 65.

" 4. The application of an amending instrument as between the parties thereto may not be considered as a breach of the treaty by any party to the treaty not bound by such instrument if it signed, or otherwise consented to, the adoption of the text of the instrument.

" 5. If the bringing into force or application of an amending instrument between some only of the parties to the treaty constitutes a material breach of the treaty vis-à-vis the other parties, the latter may terminate or suspend the operation of the treaty under the conditions laid down in article 42."

79. The provisions of the redraft were based on the original text of articles 68 and 69 (A/CN.4/167/Add.1) and on the discussion in the Commission. Paragraph 1 set forth the right of every party to a multilateral treaty to be notified of any proposal for its amendment and to participate in the negotiations. At that point he had introduced a reference to the right to a voice in the decision of the parties as to any action that might be taken; the purpose of that change was to take into account the view expressed by some members that the article should specify the right of every party not only to be consulted and to participate in the negotiations, but also to have a voice in the decision taken. That right, however, was subject to the proviso in the opening passage of paragraph 1. Many treaties concluded under the auspices of the United Nations laid down that any proposal for amendment must be referred to the General Assembly or another United Nations organ; in those cases, it could not be said that every party had a voice in deciding the procedure to be followed.

80. Some of the provisions of the new article 68 were taken from the text of his original draft of article 69. For example, paragraph 4 concerned a case of estoppel previously dealt with in article 69, paragraph 2. The case contemplated was that of a multilateral treaty amended by an international conference; a State which had attended the conference and had consented to the adoption of the text of the amending instrument, but which did not ultimately accept to be bound by it, would not be entitled to accuse the other parties of committing a breach of the original treaty merely because those parties had decided to apply the amending instrument as between themselves. The former text had referred to participation in the adoption of the amending instrument; that language had been replaced by a reference to the circumstance that the party concerned had " signed, or otherwise consented to the adoption of the text " of the amending instrument. The purpose of the words " or otherwise consented to " was to cover the case in which the party concerned had voted in favour of the text at the conference.

81. Paragraph 5 of the redraft reproduced the substance of the original article 69, paragraph 3 (*b*), but the words " a violation of the treaty " had been replaced by " a material breach of the treaty " to bring the language into line with that of article 42. In that case common agreement was necessary; where a number of the original parties had not consented to the amendment and regarded its entry into force between some of the other parties to the treaty as a material departure from the original treaty, they would have the right to withdraw subject to their being unanimous among themselves.

82. The provisions of the redraft of article 68 were in substance similar to those embodied in the previous texts, but he had endeavoured to take into account the objections to the drafting put forward during the discussion.

83. Mr. RUDA said he had the impression that the new text of article 68 dealt with two completely different subjects. Some of its provisions stated rules on the amendment of multilateral treaties generally, whereas paragraphs 2, 4 and 5 dealt with the amendment of multilateral treaties between some of the parties only and therefore seemed to belong to the subject-matter of article 69.

84. Sir Humphrey WALDOCK, Special Rapporteur, explained that articles 68 and 69 as redrafted dealt with two totally different situations. The agreements covered by article 69 were those in which two or more of the parties to a multilateral treaty decided to modify its application as between themselves alone; they deliberately set out to make an *inter se* agreement and did not contemplate that the other parties to the original treaty would agree to the amendment. Paragraphs 2, 4 and 5 of article 68 dealt with a different situation, which arose quite frequently: the parties set out to modify the treaty for all of them, but some of them did not ratify or accept the new treaty or amending instrument.

The meeting rose at 1 p.m.

754th MEETING

Monday, 29 June 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(continued)

[Item 3 of the agenda]

ARTICLE 68 (Amendment of multilateral treaties) *(continued)* and

ARTICLE 69 (Agreements to modify multilateral treaties between certain of the parties only)

1. The CHAIRMAN invited the Commission to continue consideration of article 68, taking up article 69 in conjunction with it. The two articles as redrafted by the Special Rapporteur read:

" *Article 68*

" *Amendment of mutilateral treaties*

" 1. Every party to a multilateral treaty has the right, subject to the provisions of the treaty,