

Document:-  
**A/CN.4/SR.754**

**Summary record of the 754th meeting**

Topic:  
**Law of Treaties**

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

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" 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.

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## 754th MEETING

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

Chairman: Mr. Roberto AGO

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### 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 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 obligations 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.

"Article 69

"Agreements to modify multilateral treaties between certain of the parties only

"1. Two or more of the parties to a multilateral treaty may enter into an agreement to modify the application of the treaty as between themselves alone if

"(a) such agreements are expressly contemplated by the treaty; or

"(b) the modification in question

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

"(ii) 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

"(iii) is not expressly or impliedly prohibited by the treaty.

"2. Any proposal to conclude such an instrument must be notified to all the parties to the treaty."

2. Mr. VERDROSS thanked the Special Rapporteur for his redraft of paragraphs 1 and 4 of article 68, which stated some important rules that had not been very clear before. He thought, however, that paragraph 1 could be simplified by deleting sub-paragraph (a), which was implicit in sub-paragraph (b), since a party could not take part in the conclusion of the instrument in question unless it had been notified in advance. It would also be better to speak of the obligation of the State requesting the amendment, rather than the right of the other States. Paragraph 1 would then read: "A State which requests the amendment of a multilateral treaty is obliged to invite all the other parties to take part in the conclusion of any instrument drawn up for the purpose of amending the treaty."

3. Paragraph 4 was logical. If a State authorized its representative to sign a treaty containing a provision under which the treaty would come into force after it had been ratified even by a small number of States, that State could not be heard to complain afterwards.

4. Mr. BRIGGS said that there seemed to be general agreement on the pattern to be followed in article 68:

it should deal with the procedure for the amendment of multilateral treaties and with the legal consequences of the amending instrument. So far as drafting was concerned, however, he believed that paragraph 1 could be simplified to read: "Every party to a multilateral treaty has the right, subject to the provisions of the treaty, to be notified of any proposal to amend it and to participate in any action which may be taken with a view to the amendment of the treaty". Such a provision would have the effect of opening any amendment—even one originally proposed as an *inter se* agreement—to participation by any party to the multilateral treaty.

5. Paragraph 2 laid down a fundamental and acceptable principle, namely, that an amending instrument did not bind any non-party to it.

6. Paragraph 3 dealt with the legal consequences of conflicting instruments and referred to article 41 (termination implied from entering into a subsequent treaty),<sup>1</sup> and to the new article 65 (application of incompatible treaty provisions)<sup>2</sup> paragraph 4 (b) and (c) of which covered *inter se* amendments. The relationship between articles 68 and 69 had not yet been worked out satisfactorily. They were really two kinds of *inter se* agreement: those resulting automatically from the fact that not all the parties to a treaty became bound by the amending instrument and those intended at the outset to apply *inter se*. In article 69, paragraph 1, the latter type of instrument was hedged about with additional safeguards beyond the rights of notification and participation stipulated in article 68, paragraph 1. But the limitations set out in article 69, paragraph 1, did not appear to be applicable to amendments not originally designed to be *inter se*, and it was doubtful whether the Commission would consider it desirable to apply them to all proposals to amend a multilateral treaty. However, since under the new article 68, paragraph 1, even proposed *inter se* amendments were open to participation by all parties to the treaty, it became difficult to devise a distinguishing criterion between an *inter se* amendment and any other amendment. Perhaps a way out would be to insert certain elements taken from article 69 in article 68, paragraph 4, which might then provide that the application of an *inter se* amendment could not be considered a breach of the treaty by any party to the treaty if it was not bound by the amending instrument and if that instrument did not violate certain of the conditions set out in article 69.

7. The reference to article 42 in article 68, paragraph 5, was inappropriate to the amending process. On the other hand, reference should be made to article 51 if the possibility of termination on grounds of a material breach was to be mentioned.

8. Sir Humphrey WALDOCK, Special Rapporteur, said that although he agreed that articles 68 and 69 did not make a sufficiently clear distinction between the two kinds of *inter se* agreement, Mr. Briggs's idea of introducing into the former the conditions laid down

<sup>1</sup> Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 16.

<sup>2</sup> See next following meeting, para. 1.

in the latter would entirely destroy the purpose of article 68, paragraph 4, which was to impose a complete estoppel in the case of *inter se* agreements that were not intended as such, but came into being as a result of some parties staying out of the amending process.

9. He had inserted the provision contained in article 69, paragraph 2, because it appeared to be the general view that all the parties should be notified of an *inter se* agreement deliberately intended as such from the beginning, in case there might be grounds for questioning it, but of course other parties would not be able to insist on participating in the *inter se* instrument.

10. The CHAIRMAN, speaking as a member of the Commission, drew attention to the difference between articles 68 and 69. In the case covered by article 68, the initial intention was to amend the whole treaty, whereas in the case covered by article 69 the intention was only to conclude a collateral agreement. It would be advisable to make that difference still clearer by deleting paragraph 2 of article 69.

11. Mr. CASTRÉN thought that, in order to stress the difference between the case of a general amendment dealt within article 68 and that of an *inter se* agreement to modify a treaty dealt within article 69, it would be appropriate to add, after the words "proposal to amend it" in article 68, paragraph 1 (a), some such phrase as "as between all the parties" or "having a general effect". Paragraph 3 of article 68, which might be interpreted literally, also needed clarification: as it stood, it gave the impression that the effect of the instrument amending the treaty would be governed by articles 41 and 65 for all the parties to the original treaty. To avoid such an interpretation, the words "to that instrument and" should be inserted after the words "the parties". It would then be clear that the effect of the instrument was confined to the parties which had accepted the amendment and that the legal situation of the other parties was not affected by the amendment, as was very correctly stated in the preceding paragraph.

12. The French text of paragraphs 4 and 5 of article 68 did not exactly correspond to the English original, since it contained the words "*manquement*" and "*manquement réel*" instead of the words "*violation*" and "*violation substantielle*" used in article 42, to which those paragraphs related and which was referred to in paragraph 5.

13. Mr. ROSENNE said that in general he could accept the underlying purpose of articles 67 to 69 particularly in the light of the Special Rapporteur's explanation of the relationship between articles 68 and 69.

14. However, he would like to hear from the Special Rapporteur why special recognition, for a limited period, should not be given to States which had taken part in drawing up the treaty, on the lines of the recognition given to such States in articles 9<sup>3</sup> and 40.

15. He was not certain that the relationship between paragraphs 2 and 3 of article 68 had been properly brought out, and suggested that the two provisions might be combined.

16. Paragraph 4 should be made subject to the terms of the treaty, because in a number of treaties—for example, the United Nations Charter—consent to amendment was given as it were *a priori*.

17. Mr. RUDA asked what was the use of the notification referred to in article 69, paragraph 2, if the parties concerned could not make their views known and take part in the conclusion of the instrument amending the original treaty. He thought it would be more logical to delete that paragraph.

18. Mr. YASSEEN pointed out that he had already drawn attention to the difference between *inter se* agreements of general effect and *inter se* agreements of special effect or collateral agreements. The difference was a material one, but to what extent should it cause a difference in the rights of the other parties? In his opinion, even an *inter se* agreement of limited effect should be notified to the original parties, for it might directly or indirectly affect the original treaty, the parties to which should be given an opportunity of expressing their views. The implied prohibition referred to in paragraph 1 (b) (iii) of article 69 might be disputed. It was understandable that the States which had to be notified should have no voice in the decision of the parties between which it was proposed to modify the treaty, but such notification was necessary nevertheless.

19. Mr. TUNKIN said that the right of all parties to be notified of a proposal to amend the treaty should be stipulated in article 69 as well as in article 68.

20. The provisions contained in article 68, paragraph 1 (a) and (b), should be retained, possibly with some drafting changes, so as to make the procedure clear. Paragraph 4 was too categorical, however: a State might conceivably vote in favour of an amendment and later conclude that the amendment violated its rights or those of other parties. Its first action should not be regarded as finally binding.

21. Mr. LACHS subscribed to the general views expressed by Mr. Verdross and Mr. Briggs concerning the structure of article 68. He agreed with Mr. Verdross that the article should refer to the obligations of parties proposing amendments.

22. Mr. Briggs' criticism had been very much to the point; it was important to distinguish clearly between the two kinds of *inter se* agreement. The distinction was blurred in articles 68 and 69.

23. He agreed with Mr. Tunkin's comment on article 68, paragraph 4: signature or consent to the adoption of the text could not create any obligation for the State concerned or any rights for the other parties. The position was, of course, entirely different once the amending instrument had been ratified.

24. There was no need to deal separately with the question of *a priori* consent, which was already covered

<sup>3</sup> *Yearbook of the International Law Commission, 1962, Vol. II, p. 168.*

in paragraph 2, and the particular example of the Charter could be left aside: a vote in the General Assembly constituted an inchoate title which could only create rights and obligations in special circumstances.

25. The duty to notify any proposal to amend should be extended even to agreements intended from the beginning to be restricted to a group of the parties.

26. Mr. de LUNA said that one difference between articles 68 and 69 lay in the subject-matter amended by the instrument; the difference between the two articles should accordingly be brought out more clearly. The only condition for amendment laid down in article 68 was notification, whereas article 69 reproduced the conditions laid down in article 46.

27. More attention should also be given to the effects of the amending instrument. He did not approve of the text of article 68, paragraph 5, as it stood. If the States concerned wished to make an *inter se* agreement, but did not comply with the conditions laid down in paragraph 1 (a) and (b), that would be a case of the incompatibility of a later treaty with an earlier one contemplated in article 65, the terms of which were cautious enough and would normally be sufficient.

28. In article 69, it would be meaningless to stipulate the conditions in paragraph 1 (a) and (b) if the other parties had no means of knowing what had happened. Hence notification was necessary, as followed from paragraph 1 and as was stated in paragraph 2.

29. Mr. AMADO said he was opposed to the idea of introducing into an article passages which required interpretation; that applied to the words "or otherwise" in article 68, paragraph 4. He was convinced that the Drafting Committee would smooth out the differences, which did not go very deep, and that the words "*violation substantielle*" should be used in the French text instead of "*manquement réel*".

30. The CHAIRMAN, speaking as a member of the Commission, suggested that the wording of article 68, paragraph 1, should be slightly amended so as to mention the specific case in which the parties wished to amend the treaty as between all of them. It would be for the Drafting Committee to decide whether to use the passive form and speak of the right of the other parties to be notified or to use the active form and refer to the obligation of the amending parties to notify them.

31. It would be better to use the word "*violation*" than the word "*manquement*" in paragraph 4 of the French text.

32. He doubted whether the fact of having taken part in the adoption of the instrument debarred a State from claiming that the conclusion of the new treaty was in itself a breach of the original treaty. Either the new treaty really constituted a breach of the earlier one, in which case a party could not lose its right to invoke that fact, even if it had not noticed it beforehand; or else there was no breach and no right, so that no right was lost. Consequently, the grounds for estoppel were rather dubious, and it would be better not to include them.

33. In paragraph 5, he thought that some such words as "without prejudice to the international responsibility which may arise as a consequence" should be added, so that the reader should not infer that where the conclusion of a new treaty was really a breach of the original treaty, the only possible consequence would be that the injured State could terminate the treaty, whereas other possibilities were open to it.

34. Paragraph 2 of article 69 should be deleted.

35. Mr. TUNKIN suggested that paragraph 5 of article 68 might be dropped, as it was essentially covered by article 42, paragraph 1.

36. Mr. JIMÉNEZ de ARÉCHAGA said he would be prepared to agree to the deletion of paragraph 5 of article 68, but certainly not to that of paragraph 4, for in view of the terms of article 47,<sup>4</sup> to drop that provision would be entirely illogical.

37. Article 69, paragraph 2, should also be retained, as it embodied an important provision concerning the procedure for satisfying the conditions laid down in paragraph 1.

38. The CHAIRMAN, speaking as a member of the Commission, observed that the case contemplated in article 47 was very different from that dealt with in article 68, paragraph 4; that paragraph related to a breach, and if there was a breach, a party could not lose the right to invoke it.

39. Sir Humphrey WALDOCK, Special Rapporteur, said that there was an even more cogent reason for retaining paragraph 4 than that given by Mr. Jiménez de Aréchaga. The paragraph provided for the situation in which a State had been notified of a proposal to amend a treaty, had participated in drafting the amending instrument and had adopted the text, thus giving validity to the final clauses and setting in motion the whole machinery for entry into force. It would be entirely unreasonable to allow such a State afterwards to claim that the instrument violated its rights.

40. Mr. YASSEEN said that the matter dealt with in paragraph 4 was not of very great importance, since the provision was only intended to prevent a State from claiming that the new treaty infringed its rights. But a State which had agreed to negotiate, had taken part in a conference, and had even signed the instrument or consented to its adoption, had already committed itself too far to be able to claim that the treaty definitely impaired its right; to recognize its claim would be to cast doubt on the seriousness with which a State was presumed to behave when concluding a treaty. The only controversial point was the phrase "or otherwise". Probably it would be enough to say "if it signed the instrument or consented to the adoption...".

41. The CHAIRMAN, speaking as a member of the Commission, asked what was the exact meaning of the words "or otherwise consented to".

<sup>4</sup> *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9, p. 24.*

42. Sir Humphrey WALDOCK, Special Rapporteur, said it had not been easy to find appropriate wording for paragraph 4, because some treaties were simply adopted by a resolution of a conference and were not signed at all; the phrase "or otherwise consented to" was meant to denote an affirmative vote in favour of a text. He had carefully worded paragraph 4 so as not to admit of any possible implication that a State not a party to an amending instrument could suffer any loss of rights enjoyed under an earlier treaty.

43. Mr. AMADO said he was still not convinced of the need for the words "or otherwise". The idea of consent should at least come before the reference to signature.

44. Mr. LACHS associated himself with Mr. Amado's remark. The Commission should be careful not to minimize the importance of the institution of ratification; an affirmative vote at a conference might not be ratified by parliament, even though the agent had negotiated in good faith.

45. He asked what would be the position, where a treaty contained a clause prohibiting *inter se* agreements, if the parliament of one of the parties refused to ratify an amending instrument.

46. Mr. BARTOŠ said that although he approved in theory of the principle that any manifestation of a State's will was a source of obligation, even after hearing the Special Rapporteur's explanations he doubted that the words used made it quite certain that there was a will to be taken into consideration. He reminded the Commission how votes were generally taken at meetings of international organizations; roll-call votes were exceptional and, as a general rule, it was not known who had voted for or against a text unless it was expressly mentioned in the record.

47. Mr. TUNKIN said he would have preferred paragraph 4 of article 68 to be omitted altogether, because it dealt with a matter of very little importance. It was most unlikely that any State, having signed an amending instrument, would afterwards allege that the instrument violated its rights. If the paragraph were retained, however, at least the words "or otherwise consented to the adoption of" should be deleted.

48. Sir Humphrey WALDOCK, Special Rapporteur, emphasized that paragraph 4 reflected existing practice. Although it was unlikely that a State which had signed an amending instrument and set in motion the whole process of entry into force would then complain that the instrument violated its rights, it would nevertheless be unsafe for the other States concerned to ratify the amending instrument if there was no such rule as that laid down in paragraph 4.

49. He agreed that a State which had not participated in the negotiation of an amending instrument might object to it; but it seemed hardly likely that a State which had done so would object to the instrument.

50. Mr. REUTER said that, although he was prepared to support the majority view on article 68, paragraph 4,

he shared the Special Rapporteur's opinion on that paragraph—the drafting of which might perhaps be improved—and was convinced that there was a misunderstanding between him and his opponents. The Special Rapporteur held that if a State clearly made known through its diplomatic representatives, who were fully competent for that purpose, that it had no legal objection to the conclusion of a treaty, it was bound by that statement. It might be argued that the attitude of the State could be interpreted in two senses: the positive sense of committing itself, which had not been adopted by the Special Rapporteur, and the negative sense of making no legal objection to the treaty. But no parliament had ever been competent to say whether or not one treaty was compatible with another; that was a task for the diplomatic organs. The misunderstanding might be due to the fact that the Special Rapporteur had referred to positive forms of acceptance, such as signature and consent, as expressing a negative opinion.

51. With regard to article 69, paragraph 2, on the other hand, he was inclined to agree with the Chairman. That paragraph should be deleted or at least redrafted. Article 69, paragraph 1, provided for two different situations. The first was that in which an *inter se* agreement was expressly contemplated by the treaty; it would be logical that in that case, at least, there should be no obligation to notify. In the other situation provided for, to require notification would amount to establishing preventive supervision, which would be going too far. Besides, such supervision could not be carried out in practice, because the text would not be settled until after the notification had been made. In any event, the other parties to the original treaty would be informed through the publication of the *inter se* agreement.

52. Mr. YASSEEN, referring to article 68, paragraph 4, said that in his view it was sufficient for a State to say in a diplomatic note that it had no objection to the conclusion of the new treaty. He understood Mr. Bartoš' concern: the voting system was such that it was not known who had voted for or against a text, so that it was impossible to say that a particular State had consented. Paragraph 4 should make it possible to know whether there had been positive acceptance—whether a state had really consented to the adoption of the text of the instrument.

53. Mr. JIMÉNEZ de ARÉCHAGA considered that the Special Rapporteur was entirely justified in pressing for the retention of paragraph 4, which would in no way detract from the importance of the process of ratification. The paragraph meant that a State which had signed an amending instrument and had failed to ratify it, was estopped from alleging that the amendment violated the earlier treaty. Such a State would therefore continue to be bound by the original treaty in the unamended form in which it had ratified it.

54. Mr. AMADO observed that some members of the Commission had given very subtle interpretations of the Special Rapporteur's text; he urged that the

Commission should express itself definitely, clearly and concisely.

55. The CHAIRMAN, speaking as a member of the Commission, stressed that the idea expressed in article 68, paragraph 4, was not of great importance; the provision concerned the exceptional case in which the conclusion of the amending instrument constituted a breach of the treaty. If the Commission wished to retain the idea, it would have to be expressed in a rather different form, perhaps something like the rule stated in article 47. A State might, indeed, have made its position very clear by some means other than signing or adopting the instrument.

56. Sir Humphrey WALDOCK, Special Rapporteur, said he was surprised to learn that there was no way of discovering which States had voted for the adoption of the text of an instrument. He had originally thought of drafting a provision imposing estoppel on a State which signified that it had no interest in an amendment, but some members had been unwilling to go so far and he had accordingly redrafted the provision in its present form.

57. Mr. BARTOŠ said he did not agree that paragraph 4, related to an exceptional case. On the contrary, he thought the problem might often arise and was of general interest.

58. From the practical point of view he agreed with Mr. Amado's comment: the text should be clear and not liable to be misunderstood.

59. From the theoretical point of view, he agreed with Mr. Reuter. It was necessary to establish the will of the State concerned; when that will had been expressed in the normal way the State was bound. Leaving aside the question of evidence of acceptance, the Special Rapporteur's text was satisfactory. But in practice the provision would be impossible to apply if the Commission did not clearly specify the acts by which a State committed itself.

60. M. TUNKIN said that it would make no substantial difference if paragraph 4 were dropped altogether, but if it was retained at least its meaning should be made clearer.

61. Sir Humphrey WALDOCK, Special Rapporteur, said he acknowledged that the drafting of paragraph 4 might be improved, but he still thought its content was important and should be retained.

62. Mr. TSURUOKA said that from the practical point of view it did not matter much whether paragraph 4 was retained or deleted. If it was retained, governments would tend to abstain from voting on the instrument amending a treaty or to vote against it; the general consequence would be that the revision of treaties would become more difficult, which was not the object of the article. In order to promote the stability and security of inter-governmental transactions, it might perhaps be better only to say "if it signed the instrument" and delete the remaining words. Thus amended, the provision would approximate to current practice.

63. Mr. ELIAS said that while there was much force in the Special Rapporteur's arguments in favour of retaining the substance of paragraph 4, he did not believe that the omission of that provision would be any great loss; it would then be for the International Court of Justice, or some other adjudicating body, to apply the rule of estoppel.

64. In his view, there were two possibilities open to the Commission. The first was to replace paragraph 4 by a brief cross-reference to article 47, thus adopting the same approach as in paragraph 3. The second, which he would prefer, was to drop paragraph 4 altogether and leave it to the competent court to apply the rule embodied in article 47 or some amended version of it.

65. Mr. CASTRÉN said he was in favour of retaining paragraph 4, but if possible in a clearer, and certainly in a positive, form. There would be no advantage in referring to article 47, since the rule laid down in that article was too vague for the situation referred to in article 68, paragraph 4.

66. Mr. ROSENNE said he had the impression that the many difficulties which had arisen, in a matter admittedly of some delicacy, were largely questions of drafting.

67. It had been suggested that a reference to article 47 should be added; but in fact it was necessary to co-ordinate article 68 not only with article 47, but also with the articles in Part I dealing with the process of adoption of the text of a treaty and its legal effects.

68. He did not believe that a reference to signature in article 68, paragraph 4, would be sufficient, because many revising instruments were not signed, but adopted in another manner.

69. With regard to his objection that paragraph 4 ought to be made subject to the terms of the treaty, and Mr. Lachs' reply that the difficulty was overcome by the provisions of paragraph 2, he maintained that it was possible to give a different interpretation to those provisions: hence it was necessary to clarify their drafting.

70. Mr. de LUNA said that all the members of the Commission were agreed that the rule of estoppel applied to the amendment of treaties. The problem was therefore only one of drafting, and it was essential that the language adopted should reflect progress.

71. He agreed with Mr. Bartoš that article 68, paragraph 4 was very important. Not only in legal writings, but also in State practice, there had been cases of silence being construed as tacit consent to the amendment of a treaty. There were other cases in which silence had been given conflicting interpretations by legal writers. For example, the Treaty of Versailles contained provisions embodying the consent of the parties to the declaration by Belgium on the termination of its status of neutrality;<sup>5</sup> Russia and the Netherlands, which had been parties to the treaty of London establishing the neutrality of Belgium,<sup>6</sup> had not been parties

<sup>5</sup> Article 31.

<sup>6</sup> *British and Foreign State Papers*, Vol. XXVII, p. 990.

to the Treaty of Versailles and had remained silent. It was becoming increasingly common for treaties to include a clause to the effect that silence was to be interpreted as consent.

72. He did not think it would be sufficient for paragraph 4 to contain no more than a cross-reference to article 47. Such a solution would not make for greater clarity and would not simplify the application of article 68 in practice.

73. Mr. BRIGGS noted with satisfaction that it was intended to delete article 68, paragraph 5. As to paragraph 4, the main objection to its wording had not yet been stated: unfortunately it seemed to imply that if a State did not sign an amending instrument and did not otherwise consent to the adoption of its text, it would be fully entitled to regard any amendment as a breach of the original treaty.

74. Referring to article 69, he said that the deletion of paragraph 2 of that article would not have the intended effect, because article 68, paragraph 1, as it stood covered both *inter se* agreements and other agreements. He therefore agreed with Mr. Yasseen that it would be advisable to retain paragraph 2 of article 69.

75. Sir Humphrey WALDOCK, Special Rapporteur, said he fully agreed that article 68, paragraph 4 needed redrafting. The provision should not be omitted, however, because it stated a principle of some importance. In that connexion, he drew attention to article 17, paragraph 1<sup>7</sup> which obliged a State that took part in the negotiation, drawing up or adoption of a treaty or had signed a treaty "to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force". In the light of that provision the text of article 68, as now proposed, did not even go far enough — unless, of course, a proviso were included in the draft articles to the effect that article 17 did not apply to amending instruments.

76. He suggested that article 68 should be referred to the Drafting Committee without any commitment on the part of members as to their future positions. He believed it would be possible for the Drafting Committee to prepare a generally acceptable text.

77. With regard to article 69, which, he suggested, should also be referred to the Drafting Committee for reconsideration in the light of the discussion, he thought that many of the objections to paragraph 2 would probably disappear after article 68 and paragraph 1 of article 69 had been redrafted.

78. The CHAIRMAN said that so far as article 68 was concerned the Drafting Committee should take account of the following points, on which the members of the Commission were in general agreement. Paragraph 1 should make it clearer that the article related to amendments which, at least when they were proposed, were intended to be adopted by all the parties to a treaty. It seemed to be the general opinion that paragraph 4 should be deleted; if it was retained,

however, the condition should be redrafted so as to place on the same level as the signature of the instrument, the other equally important manifestations of will. The Commission seemed to be in general agreement that paragraph 5 should be deleted.

79. Mr. CASTRÉN said he had some comments to make on the drafting of article 69, the substance of which he found satisfactory.

80. In paragraph 1, sub-paragraph (a), which had not appeared in the text originally submitted (A/CN/4/167/Add.1), could be deleted, as it merely confirmed an obvious idea which was implicit in sub-paragraph (b) (iii).

81. Sub-paragraph (b) (ii) was not necessary either. A modification which did not fulfil the conditions laid down in that sub-paragraph would not fulfil the conditions in sub-paragraph (b) (i) either; it would certainly be prohibited by the treaty, at least implicitly, and would therefore also be excluded under sub-paragraph (iii).

82. Paragraph 2 was important in that it safeguarded the interests of the other parties to the treaty. That provision went far enough and there was no need to settle the problems which might arise if the other parties objected.

83. Mr. BARTOŠ, referring to article 69, observed that in addition to the conditions stated in paragraph 1 (b), there was also the condition of the general interest of the States parties to the treaty: it might be to their advantage to maintain the *status quo*.

84. With regard to paragraph 2 he agreed with Mr. Reuter. There was no need to require that all the parties should be notified of the proposal in advance if *inter se* agreements were expressly provided for in the treaty. In that case the other parties need only be informed of the existence of the instrument after it had been concluded. In the contrary case, where the treaty did not expressly provide for *inter se* agreements, but — like the Vienna Conventions on Diplomatic Relations and Consular Relations — provided only for the conclusion of more detailed bilateral conventions not conflicting with the general rules of the treaty, the provision in paragraph 2 should be retained. For in that case all the parties must be informed of the proposal to modify the treaty; otherwise, they could complain that they were the victims of discriminatory measures.

85. The CHAIRMAN, speaking as a member of the Commission, suggested, as an example, that the members of the Organization of American States might wish to conclude among themselves a special convention derogating from a treaty which did not provide for *inter se* agreements. Would they have to notify their intention to all the other parties to the treaty? He did not think so. Such notification would be pointless: it would be neither a request for authorization — since the proposed modification would be in no way unlawful — nor an invitation — since the American States had decided to conclude the new instrument among

<sup>7</sup> Yearbook of the International Law Commission, 1962, Vol. II, p. 175.

themselves. He agreed that when it has been concluded the instrument would have to be published, but he doubted whether all the parties need be notified of the proposal.

86. Mr. BARTOS said that the answer to the Chairman's question would depend on the terms of the treaty itself. There were treaties, such as the copyright conventions and the conventions for the protection of industrial property, which attempted to standardize a rule of international law and thus to exclude special rules. By virtue of the most-favoured-nation clause, the amendment of one provision might entail modification of a whole system. In that case, the States concerned must be able to judge whether their rights were jeopardized by the proposed modification: they must be notified of all proposed modifications, even *inter se* modifications, because the whole system of legal relations established by the treaty might be effected. He therefore supported the Special Rapporteur's proposal.

87. The CHAIRMAN, speaking as a member of the Commission, suggested that article 69, paragraph 1 (a), should be amended to read: "the possibility of concluding such an agreement is expressly contemplated by the treaty".

88. Speaking as Chairman, he suggested that articles 68 and 69 be referred to the Drafting Committee.

*It was so agreed.*

#### ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

##### ARTICLE 64 (Rules in a treaty becoming binding through international custom)

89. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following title and text and for article 64:

*"Rules in a treaty becoming binding through international custom"*

"Nothing in articles 61 to 62 A precludes rules set forth in a treaty from becoming binding upon States not parties to that treaty in consequence of the formation of customary rules of international law."

90. It would be remembered that during the Commission's previous discussion of his original draft of article 64 (A/CN.4/167),<sup>8</sup> some members had expressed the opinion that the article should embody more comprehensive provisions on the whole relationship between treaty and custom. The general feeling in the Drafting Committee, however, had been that the contents of article 64 should be confined to the case in which rules set forth in a treaty developed into customary rules of international law.

91. The wish had also been expressed that article 64 should be formulated in positive rather than in negative terms, but the Drafting Committee had preferred to retain the negative formulation because the provisions

of article 64 constituted a reservation to those of articles 61 to 62 A, concerning the effect of treaties on States not parties to them.

92. The CHAIRMAN noted that the Drafting Committee's text referred only to the case in which the rules set forth in a treaty were not yet customary rules, but became customary rules later. It did not refer to the case in which a treaty stated in writing a rule which already existed as a customary rule.

93. Sir Humphrey WALDOCK, Special Rapporteur, said that that point had been discussed in the Drafting Committee, but it had been agreed that it should be dealt with elsewhere in the draft articles and that article 64 should be confined to the case envisaged in the text submitted.

94. The CHAIRMAN, speaking as a member of the Commission, suggested that the word "subsequent" be inserted before the word "formation".

95. Sir Humphrey WALDOCK, Special Rapporteur, said that that idea was conveyed in the English text by the use of the word "becoming".

96. Mr. VERDROSS proposed that the words "in consequence of the formation of customary rules" should be replaced by the words "if they have become customary rules".

97. The CHAIRMAN, speaking as a member of the Commission, stressed that it was not the treaty itself which became binding; what really created the obligation was the formation of a customary rule with the same content as the treaty. In order to avoid the repetition of the word "become", if the last phrase was amended as proposed by Mr. Verdross, the words "being binding" should be substituted for "becoming binding".

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the English text he had introduced contained the idea embodied in the proposal made by Mr. Verdross and amended by the Chairman. Amended in accordance with the language of that proposal it would read:

"Nothing in articles 61 to 62 A precludes rules set forth in a treaty from being binding upon States not parties to that treaty if they have become customary rules of international law."

99. Mr. ROSENNE said that that text would cover both a treaty which was declaratory of an existing rule of customary international law and a treaty which itself generated the development of rules of customary international law.

*Article 64, thus amended, was adopted unanimously.*

The meeting rose at 6 p.m.

<sup>8</sup> 740th and 741st meetings.