United Nations Conference on Succession of States in Respect of Treaties

Vienna, Austria
First session
4 April – 6 May 1977

Document:-
A/CONF.80/C.1/SR.4

4th meeting of the Committee of the Whole

Extract from Volume I of the *Official Records of the United Nations Conference on Succession of States in Respect of Treaties (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

68. Mr. EUSTATHIADES (Greece) said he realized that the Expert Consultant and the representative of the United Arab Emirates attached considerable importance to article 2, paragraph 2, but he did not see why the draft articles under consideration had to embody the same mistake as had been made in the Vienna Convention on the Law of Treaties. He did not think that the deletion of paragraph 2 would give rise to confusion, because the terms used in the draft articles were very specific and had a particular meaning.

69. Mr. MIRCEA (Romania) said he fully supported the view expressed by the representative of Greece concerning article 2, paragraph 2. He did not think the Committee was obliged to use the exact wording of the 1969 Convention on the Law of Treaties; it was free to decide what provisions should be included in the draft articles, provided that it could agree on the meaning of the terms used.

70. Mr. ARIFF (Malaysia) said that, since the terms used in the draft articles might have different meanings in internal law and in international law, it was necessary to include article 2, paragraph 2, in the draft articles. Moreover, he believed that that provision ensured respect for the sovereignty of all States.

The meeting rose at 5.50 p.m.

4th MEETING

Thursday, 7 April 1977, at 10.30 a.m.

Chairman: Mr. RIAD (Egypt)

In the absence of the Chairman, Mr. Ritter (Switzerland), Vice-Chairman, took the Chair.

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976
[Agenda item 11] (*continued*)

ARTICLE 3 (Cases not within the scope of the present articles)[1]

1. Mr. KOECK (Holy See) said that his delegation was ready to do everything in its power to ensure the successful outcome of the Conference and to lend its support to other delegations, in keeping with the Holy See's particular mission in the world and its intention to keep aloof from political quarrels. His delegation attached the highest importance not only to draft article 3 as such but also to the principle embodied therein, particularly since the international community would be inclined to consider the provisions of the convention as applicable in practice, regardless of whether or not the convention was in force. Evidence of that could be seen in the fact that the International Court of Justice had already adopted a similar position concerning the Vienna Convention on the Law of Treaties, for the very reason that, although it was not in force, the Convention reflected to a large extent the traditional law in that field. One might even be tempted to take the view that the adoption of codification conventions was more important than their ratification.

2. The Holy See not only concluded agreements that were in the nature of treaties between States when it acted on behalf of the Vatican City State—it also entered into such agreements as the supreme organ of the Catholic world. Consequently, his delegation attached particular importance to draft article 3, for it considered that subparagraph (*a*) took into account cases in which the Holy See, not as a State but in its capacity as representative of the Catholic world, concluded concordats with States, i.e. treaties concerned mainly with religious matters. However, the reference in that provision to general international law might raise difficulties in practice, because the draft did not specify whether particular provisions constituted new rules of law or merely reflected existing customary international law. For that reason, the Holy See would have to examine separately each case of State succession in respect of concordats, having regard to the particular circumstances of every case. It was his understanding that that position was in keeping with the international practice that had developed over the centuries, i.e. that concordats were international treaties of a special character.

3. Mr. MIRCEA (Romania), explaining why his delegation had submitted amendments to articles 1, 3 and 4 (A/CONF.80/C.1/L.2), said that it had sought to include in the scope of the convention the case of treaties concluded between States and other subjects of international law. While it was true that some bodies studied the law of treaties concluded with international organizations, they did not, however, cover the problem of succession to such treaties. As to draft article 3, his delegation had preferred to delete subparagraphs (*a*) and (*b*); firstly, because it would be difficult to draw a distinction between the provisions which were obligatory and the provisions which reflected the progressive development of international law; secondly, because the provision contained in subparagraph (*b*) appeared to be restrictive and it would be advantageous to the international community if subjects of international law other than States could avail themselves of the provisions of the convention.

4. It was his understanding that adoption of draft article 3 by the Committee would in no way prejudge the fate of his delegation's amendment.

[1] The following amendment was submitted: Romania, A/CONF.80/C.1/L.2.

5. Mr. HELLNERS (Sweden) suggested that the Committee should instruct the Drafting Committee to alter the title of draft article 3, which did not appear to be fully in keeping with the content of the provisions of the draft.

6. Mr. MARESCA (Italy) considered that draft article 3 simply reiterated rules already set forth in the Vienna Convention on the Law of Treaties and he wondered about the advisability of pointing out that cases not within the scope of the convention were still subject to the international law in force. Moreover, it was difficult to draw a distinction between the relationships between States and the relationships between States and other subjects of international law. Consequently, he wondered whether subparagraph (*b*) of the draft article was really indispensable. His delegation reserved the right to return to that draft article when the Committee came to consider the Romanian amendment.

7. Mr. USHAKOV (Union of Soviet Socialist Republics) took the view that the amendment proposed by the Romanian delegation was of a drafting nature. He therefore proposed that it should be referred to the Drafting Committee.

8. The CHAIRMAN felt that the Romanian amendment did not relate solely to drafting matters and that it deserved to be considered and put to the vote.

9. Mr. MIRCEA (Romania) said that the Committee could not adopt draft article 3 without first considering both draft article 4 and the amendment thereto.

10. Mrs. BOKOR-SZEGÖ (Hungary) said that she appreciated the concern of the Romanian delegation to simplify the text of the draft article, but drew its attention to the fact that paragraph 3 of the article proposed by Romania was more limited in scope than subparagraph (*a*) of article 3 of the draft articles, since it eliminated the rules of customary law.

11. The CHAIRMAN proposed that the Committee should close the debate on draft article 3 and, after considering draft article 4, should proceed to the vote on the Romanian amendment and on draft articles 3 and 4.

It was so decided.

ARTICLE 4 (Treaties constituting international organizations and treaties adopted within an international organization)[2]

12. Mr. MIRCEA (Romania) said that, by combining the provisions of the draft articles dealing with the scope of the convention, his delegation had sought to propose a text that was closer to reality and easier to understand. For example, it had referred to "treaties concluded between States in written form" and had preferred to omit from its draft definitions that were already contained in the Vienna Convention on the Law of Treaties. It had also felt that treaties constituting international organizations were no different from other treaties but that, in such cases, the rules of the international organizations should be taken into account. Again, his delegation had, in the provision corresponding to subparagraph (*b*) of draft article 4, replaced the words "without prejudice to" by "jointly with"; there was no contradiction between the rules resulting from the progressive development of international law and the rules of international organizations, since the former took account of the latter. In addition, paragraph 3 of the Romanian draft article resolved the difficulties raised by subparagraph (*a*) of the International Law Commission's draft article 3, for it was questionable that the Conference could specify that a particular provision was a rule of customary law and was applicable regardless of whether or not a State was a party to the convention. He also pointed out that, so far as his delegation was concerned, the use of the words "as between States" in subparagraph (*b*) of draft article 3 limited the possibilities of application of the convention.

13. In reply to the comment by the representative of Hungary, he said that paragraph 3 of the Romanian draft article was in fact wider in scope than subparagraph (*a*) of the International Law Commission's draft article 3, for it was not possible to assert from the outset that some provisions of the convention constituted peremptory norms of international law.

14. Lastly, his delegation would prefer a consensus on its amendment and would not press for a vote. It none the less hoped that the Drafting Committee would, as far as possible, take it into account.

15. Mr. YASSEEN (United Arab Emirates) considered that the Romanian amendment raised not only questions of drafting but also questions of substance, since it touched on the problem of the sources of law and on the law of international organizations. Codification involved the enunciation of rules that were already obligatory under various sources of international law. The text prepared by the International Law Commission reflected rules that were already in existence, reconciled rules from different sources and also prepared new rules. In his view, compared with the International Law Commission's text, paragraph 3 of the Romanian draft article lacked precision.

16. As to the question of the law of international organizations, by specifying that the convention would apply jointly with the relevant rules of each organization, the Romanian delegation was placing those rules on an equal footing with the convention, whereas the rules of the organizations should prevail. Consequently, he wondered how any conflicts be-

[2] The following amendment was submitted: Romania, A/CONF.80/C.1/L.2.

tween those rules and the convention would be resolved.

17. For those reasons, his delegation would not be able to support the Romanian amendment.

18. Mr. USHAKOV (Union of Soviet Socialist Republics) was in favour of maintaining articles 3 and 4 as they stood. Those two provisions were closely interrelated and served to elucidate the definition of the term "treaty" which appeared in article 2, paragraph 1, subparagraph (*a*). It might be thought from that definition that the convention would not apply either to treaties concluded between States and other subjects of international law or to treaties not in written form. Doubts might also arise as to whether agreements concluded between States in order to constitute an international organization or adopted within an international organization formed a special category of treaties outside the scope of the proposed convention. Articles 3 and 4 provided answers to those questions.

19. Article 4, subparagraph (*a*) stipulated that the future convention would apply to any treaty which was the constituent instrument of an international organization but without prejudice to any relevant rules of the organization. In fact, it was vitally important that the law of international organizations should take precedence over the rules laid down in the draft convention. If it was decided that those two classes of provision applied "jointly" as proposed in the Romanian amendment that would derogate unduly from the law of international organizations.

20. Article 4, subparagraph (*b*) was quite clear on the subject of treaties adopted within an international organization: in the event of conflict, the law governing the international organization would take precedence. However, the Romanian amendment did not refer to that category of treaties despite their great importance.

21. Turning to article 3, which dealt with the application of the draft convention to treaties concluded between States and other subjects of international law and treaties not in written form, clearly an international organization could not be bound, without its consent, by the provisions of the future convention. The convention would only be binding on subjects of international law which were parties to the convention, and for the time being opening of the convention to signature by international organizations was not being contemplated. However, there were certain rules of international law concerning succession which could be applicable to international organizations independently of the convention. Article 3 also made it clear that, for agreements not in written form, the rules of the future convention deriving from general international law would apply.

22. Thus, articles 3 and 4 adequately covered the questions to which the definition contained in article 2, paragraph 1, subparagraph (*a*) might give rise and their form should not be altered since they were modelled on the corresponding provisions in the 1969 Vienna Convention. The slightest drafting change could create problems of interpretation both of the Vienna Convention and of the future convention.

23. Mrs. THAKORE (India) noted that paragraph 1 of the Romanian amendment, which was based on draft Article 1, did not refer to the effects of a succession of States and she wondered why. Paragraph 2 of the amendment, which was based on article 4, did not touch upon the rules concerning acquisition of membership of an international organization. But those rules were so important that they ought to be mentioned. Furthermore, the word "jointly" in paragraph 2 of the amendment might create difficulties where the provisions of the future convention conflicted with the relevant rules of an international organization. It must be made clear that in such instances the relevant rules of the organization would prevail.

24. Paragraph 3 of the Romanian amendment, which derived from article 3, lacked the safeguard whereby all the rules set forth in the convention to which States would be subject under international law independently of that convention would be applicable. Her delegation thought that that clause should be maintained for the reasons given by the International Law Commission in paragraph (2) of its commentary on article 3 (A/CONF.80/4, p. 18). It also believed that article 3, subparagraph (*b*) was necessary and should not be deleted.

25. In conclusion, she stated that the Romanian amendment was imprecise and that articles 1, 3 and 4 should be retained, as they stood.

26. Mr. PASZKOWSKI (Poland) emphasized that the purpose of the Conference was to continue the work of codifying international law which had begun with the elaboration of the 1969 Vienna Convention on the Law of Treaties. Although not yet in force, that instrument occupied an important and authoritative position in international life. It was already having a direct influence on State practice. That demonstrated the great value of the efforts made by the United Nations in regard to codification. As to the question whether it was too late to codify the law of State succession in respect of treaties, he endorsed the reply given by the President of the Conference in the statement he had made after being elected.[3]

27. He himself believed that the future convention should stand on its own. Consequently, he saw no objection to adopting the first four articles proposed by the International Law Commission, subject to possible amendments to article 2 consequential on modifications which might be made in other draft articles. The amendments submitted so far did not

[3] See above, 1st plenary meeting, para. 18.

seem to provide any improvement in articles 1, 3 and 4.

28. Mr. MIRCEA (Romania) said that it would be desirable to ask the Expert Consultant to give examples of mandatory rules of existing international law that were applicable to States without their consent. He might also cite examples of treaties adopted within international organizations and indicate what were the special characteristics which would place them outside the scope of the future convention.

29. He was astonished that certain delegations, in the desire to incorporate the idea of a multilateral treaty of a universal character in the convention, should assert that the constituent instruments of international organizations, which by definition constituted such treaties, should be subject to a special régime. Such an approach might form an obstacle to new States joining international organizations.

30. Sir Francis VALLAT (Expert Consultant), replying to the Romanian representative's first question, explained that the International Law Commission had as a regular practice refrained from clearly demarcating the dividing line between codification and the progressive development of law when a specific rule of law was formulated. Indeed, since customary international law was in a constant process of development, what was conventional law one day could become customary law the next. He therefore preferred to follow the International Law Commission's practice and not try to give specific examples of rules which were rules of customary international law at present. However, he was bound to add that the provisions of the draft relating to newly independent States were essentially based on State practice and although such rules might not be rules of customary international law at present they might become such soon.

31. Turning to the type of treaties provided for in article 4, subparagraphs (*a*) and (*b*), he mentioned as examples the United Nations Charter, the Convention of the World Health Organization or that of other specialized agencies on the one hand and the conventions elaborated by the International Labour Organisation and the agreements drawn up by the International Civil Aviation Organization on the other.

32. Mr. MIRCEA (Romania) said that his amendment need not be put to the vote: his delegation would be satisfied if it was taken into consideration by the Drafting Committee.

33. The CHAIRMAN pointed out that if the Romanian amendment was not put to the vote it could only be transmitted to the Drafting Committee as a mere suggestion that would in no way be binding, so that it would only be examined from the point of view of form and not of substance.

On that understanding, the Romanian amendment (A/CONF.80/C.1/L.2) was referred to the Drafting Committee.

34. The CHAIRMAN stated that in the absence of any request for a vote on article 3, he assumed that the Committee had approved the article and had decided to refer it to the Drafting Committee.

It was so decided.[4]

35. The CHAIRMAN stated that in the absence of any request for a vote on article 4, he assumed that the Committee had approved the article and had decided to refer it to the Drafting Committee.

It was so decided.[5]

ARTICLE 5 (Obligations imposed by international law independently of a treaty)[6]

36. Mr. MIRCEA (Romania), referring to the title of the article under discussion, stressed that a rule of international law might be applicable by virtue of a treaty or custom. The expression "obligations imposed" seemed to go too far and it would be better to model the title of article 5 on the 1969 Vienna Convention to read: "Rules in a treaty applicable by virtue of international custom".

37. Turning to the article itself, he suggested that the words "the duty of that State" should be replaced by the words "the duty of the successor State or of the other party or parties" to apply the rules set forth in the treaty which derive from international custom.

38. Mr. EUSTATHIADES (Greece) said that he hesitated to propose the deletion of article 5 since his proposal, made the previous day, to delete another article had received scant support, but in fact article 5 merely reproduced an article in the 1969 Vienna Convention and had no place in the future convention. Its inclusion would only be justified if it was drafted not as a general principle but as one applicable in the matter of succession.

39. Mr. MUSEUX (France) said that, on the contrary, article 5 had the virtue of dealing with one of the cases when a treaty would cease to be in force for the successor State by reason of the application of the proposed convention. The difficulty already pointed out by the French representative would then arise: the provision in article 5 would only come into effect legally if the successor State was released from its obligations under the treaty to which it was a party. The problem of what machinery would produce

[4] For resumption of the discussion of article 3, see 31st meeting, paras. 4-5.

[5] For resumption of the discussion of article 4, see 31st meeting, paras. 6-7.

[6] The following amendment was submitted: Romania, A/CONF.80/C.1/L.4.

that result would arise in respect of other provisions in the draft.

40. Mr. HELLNERS (Sweden) agreed with the Greek representative and observed that it was apparent from paragraph (1) of the commentary on article 5 (A/CONF.80/4, p. 22) that the International Law Commission had only been able to justify that provision on the ground that it was axiomatic. As it was self-evident, it could be dropped.

41. Mr. MARESCA (Italy) said that article 5 was not very clear. It was for the 1969 Vienna Convention to determine when treaties entered into force, and repetition of a provision on that point in a convention dealing with the succession of States would only cause confusion.

42. Mr. KRISHNADASAN (Swaziland) agreed with the Swedish representative that the content of article 5 was self-evident. But it also addressed a warning to newly independent States by reminding them of their obligations to be fulfilled under international law. Thus it was less innocuous than it appeared, and he believed that it should be deleted.

43. Mr. USHAKOV (Union of Soviet Socialist Republics) pointed out that article 5 of the draft convention reproduced verbatim the second part of article 43 of the Vienna Convention on the Law of Treaties, which stated that "the invalidity, termination or denounciation of a treaty, the withdrawal of a party from it, or the suspension of its operation [...] shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty".[7] The article of the Vienna Convention did not apply to the succession of States. Article 5 thus filled in a gap by stating that the fact that a treaty was no longer in force in respect of a State owing to a succession of States in no way exempted that State from fulfilling the obligations imposed on it by general international law. It was consequently a necessary article, as it completed article 43 of the Vienna Convention on the Law of Treaties.

44. Mr. MANGAL (Afghanistan) said he shared the doubts expressed by other delegations concerning article 5, which he felt was both ambiguous and superfluous. The article would impose obligations on a State derived from a treaty which was no longer in force for that State; it also took no account of every State's basic right to decide whether it should continue to consider itself bound by a treaty which was no longer in force in respect of it. He felt that no principle of international law should impose any obligation on a State which, acting as a sovereign body, had decided it was no longer bound by the provisions of a treaty which had become invalid. He consequently favoured deletion of article 5.

45. Mr YASSEEN (United Arab Emirates) said he agreed with the representative of Greece that article 5 stated an obvious rule, which it was not necessary to demonstrate, in that it affirmed that a State could not be released from obligations imposed on it by international law. That did not mean, however, that the article was superfluous, as special circumstances argued in favour of its being maintained in the draft convention. As the representative of the Union of Soviet Socialist Republics had noted, the wording of article 43 of the Vienna Convention, "the invalidity, termination or denunciation of a treaty [...] shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty",[8] did not cover the succession of States. It therefore did not apply to the situation referred to in article 5 of the draft, whereby a treaty was "not considered to be in force in respect of a State by virtue of the application" of the future convention. The conclusion could thus be drawn that when a treaty did not apply to a new State, owing to a succession of States, that State was released from the obligations to which it would be subject under international law. It would therefore be very wise to maintain article 5 in order to avoid confusion and any resultant quibbling.

46. Mr. USHAKOV (Union of Soviet Socialist Republics) said that article 5 did not refer to obligations imposed by any particular treaty, but to obligations imposed by general international law, independently of any treaty. Under article 43 of the Vienna Convention, a treaty might lapse, but any obligations under international law which it incorporated would remain valid for all States, whether the treaty existed or not. Thus, if a treaty was no longer in force in respect of a State, that State was no longer bound by the specific obligations contained in the treaty, but it did remain bound by any general obligations which the treaty contained, as those obligations were imposed on it by general international law independently of the treaty. Article 5 therefore did not impose any illegal obligation on any State whatever.

47. Mr. ARIFF (Malaysia) said he fully endorsed the principles set forth in article 5 but proposed in the interests of clarity that the words "the fact that" should be deleted and "which" inserted between "treaty" and "is not"; the beginning of the article then would read: "a treaty which is not considered...".

48. Sir Ian SINCLAIR (United Kingdom) said that he understood the doubts expressed by some delegations regarding the usefulness of article 5, but he had reached the conclusion that the article should be maintained. The process of codification and progressive development of international law which would

[7] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 295.

[8] *Ibid.*

lead to the adoption of the convention on the succession of States in respect of treaties must be viewed in the context of general international law, which was based not only on the rules of the law of treaties but also on rules of customary law existing independently of treaties. It was important therefore to preserve the operation and the universally binding nature of the rules of customary international law.

49. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that he considered that article 5 completed and clarified article 43 of the Vienna convention on the Law of Treaties by affirming that when a State ceased to be bound by a treaty following a succession of States it remained bound by any obligation embodied in the treaty to which it was bound by international law. Such a provision would be very useful as part of the future convention, as it would contribute to a stable international order.

50. Mr. MUSEUX (France) said that he felt the question arising in connexion with article 5 was more complex than it had appeared to be at first, as the article did not simply transpose the corresponding article in the Vienna Convention on the Law of Treaties to the succession of States. As the representatives of Swaziland and Afghanistan had pointed out, there was a basic difference between the situation referred to in article 43 of the Vienna Convention and that covered by article 5 of the draft under consideration. The Vienna Convention was concerned with States which had long been in existence and were therefore already bound by a number of rules of customary law, accepted as rules of general international law. For those States the rules of international law derived not only from treaties, but also from customary law. They continued to exist, therefore, once their contractual basis had disappeared—e.g. owing to the termination of a treaty.

51. The draft under consideration, on the other hand, was concerned with newly independent States, which had not had time to become bound by rules of customary law. For such States, the rules of international law did not have their source in customary law, but solely in treaty law. The treaty law basis of an international obligation disappeared when, as a result of a succession of States, the treaty in which it was embodied was no longer in force. Thus for the States referred to in article 5, the international obligation was no longer based on a treaty, nor was it derived from common law as they were newly independent States. The idea of a rule of international law was consequently not at all the same in that draft article as in the Vienna Convention on the Law of Treaties.

52. The rule set forth in article 5 obviously posed no problem with regard to the predecessor State. With regard to the successor State, however, two alternatives might be considered. A successor State might decline to accept responsibility for a treaty some of whose provisions it found inacceptable, while at the same time it might accept some other provisions which would then become obligations for it. It might also be held that in accordance with article 53 of the Vienna Convention on the Law of Treaties, there were peremptory norms of general international law which were norms accepted and recognized by the international community of States as a whole as norms from which no derogation was permitted and which were binding on all States without exception. The second interpretation posed a tricky problem. In that connexion he recalled that at the Vienna Conference on the Law of Treaties, the French delegation had expressed doubts about the concept of *jus cogens* and had consequently voted against the Vienna Convention on the Law of Treaties. However, without denying that some norms of international law might be obligatory, it felt that it was risky to affirm that principle in a general way without qualifying it.

53. It was consequently clear that article 5 was not a simple transposition of article 53 of the Vienna Convention as it might have appeared to be. He would therefore prefer to see it deleted, as its ambiguity could give rise to confusion.

54. Mr. MARESCA (Italy) said that the lack of clarity of article 5 could be eliminated and the article prevented from encroaching on the Vienna Convention on the Law of Treaties if the word "successor" was placed before the word "State". Specifying that it applied solely to the succession of States would restore the article to its proper context.

55. The representative of France had rightly observed that newly independent States had not yet had access to the rules of general international law with which article 5 was concerned. But a new State was the direct and mandatory recipient of the rules of general international law. Those rules applied to it directly and automatically. There was no way for it to free itself from the obligations deriving from them, as it was a natural subject of international law.

The meeting rose at 1 p.m.

5th MEETING

Thursday, 7 April 1977, at 3.30 p.m.

Chairman: Mr. RIAD (Egypt)

In the absence of the Chairman, Mr. Ritter (Switzerland), Vice-president, took the Chair.

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December and 24 November 1976
[Agenda item 11] (*continued*)