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5th meeting of the Committee of the Whole

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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obligation disappeared when, as a result of a succession of States, the treaty in which it was embodied was no longer in force.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*)

ARTICLE 2 (Use of terms)[1] (*resumed from the 3rd meeting*).

1. The CHAIRMAN invited the Committee to continue its consideration of draft article 2 and to make general comments on the draft articles as a whole.[2]

2. Mr. DAMDINDORJ (Mongolia) said that the decision to prepare draft articles on succession of States in respect of treaties had been the result of the process of decolonization and the achievement of independence by States, and that the future convention would help to promote the codification and progressive development of international law.

3. His delegation considered draft article 2, which was based on article 2 of the Vienna Convention on the Law of Treaties, to be of great importance and was in favour of adopting it as it stood. Draft article 5, which was also of vital importance to the future convention, should be given the highest priority and should be adopted without change.

4. Mr. DOH (Ivory Coast) said that his delegation was grateful to the International Law Commission for having struck a balance in the draft articles between the principle of *de jure* continuity and that of the "clean slate". In so doing, the Commission had safeguarded the principle of the sovereign equality of States and the right of States to self-determination, and had made it clear that it did not believe States could be obliged to be bound by treaties without their express consent.

5. Draft article 2 would be entirely acceptable to his delegation if it were not for the wording of paragraph 1, subparagraph (*b*). The word "responsibility", which had a specific meaning in international law, might give rise to conflicting interpretations. If a colonial territory enjoyed internal autonomy, but was not competent to conduct its own foreign affairs, when it achieved independence and national sovereignty such competence would be transferred to it from the predecessor State. His delegation would therefore like the word "responsibility" to be replaced by the word "competence" in paragraph 1, subparagraph (*b*). If the word "responsibility" was retained in that subparagraph, draft article 2 should contain a clear definition of its meaning for the purposes of the convention.

6. Mr. TABIBI (Afghanistan) thanked the delegations for the honour they had done to him and his country by electing him Rapporteur of the Committee of the Whole. He congratulated the International Law Commission and its special rapporteurs on the excellent draft before the Conference and commended the Legal Department of the Secretariat, particularly the Director and Deputy Director of the Codification Division, for publishing so many scientific documents, which would greatly facilitate the Conference's work of codification.

7. He then paid a tribute to the late Mr. Edvard Hambro of Norway, who had served as Chairman of the Drafting Committee in 1974, when the final reading of the draft convention before the Conference had been concluded; he suggested that a special meeting of the Conference should be dedicated to the memory of Mr. Hambro.

8. He would not comment on the substance of the draft article by article at that stage, but would merely make some brief observations on article 2. Although the terms defined in article 2, paragraph 1, were similar to the terms contained in the Vienna Convention on the Law of Treaties, the way in which the Vienna Convention operated was different from the way the draft convention would operate. That difference was due to the fact that the Vienna Convention covered relationships between equal parties having equal interests, whereas in the case of State succession, the treaty régime was spread over two stages and covered relations between the predecessor State, the successor State and another party, in the case of bilateral treaties, or other parties, in the case of multilateral treaties. It was therefore necessary to take account not only of relations between predecessor and successor States, but also of relations with other parties to treaties, since all arrangements between the predecessor State and the successor State were subject to the will of all the parties to the treaty in question. It was not the predecessor State alone which decided on a succession; it was also subject to the will of other parties to the treaty, which had an equal legal claim to the treaty régime. His delegation was therefore of the opinion that in article 2, subparagraphs (*l*) and (*m*) of paragraph 1, defining the parties to a treaty, should be placed after subparagraphs (*c*) and (*d*), because those three elements—the predecessor State, the successor State and other parties to the treaty—were closely related.

9. His delegation fully supported the proposal of the representative of Cuba that the word "validly" should be inserted before the word "concluded" in paragraph 1, subparagraph (*a*),[3] since article 2 dealt only with "valid" treaties, not with colonial or unequal treaties. Although article 6 covered that point, his delegation was concerned with the relationship between article 2 and articles 11 and 12, relating to boundary régimes and other territorial régimes which were recognized by international law and were in keeping with the principles of the United Nations Charter.

10. With regard to the "clean slate" principle, although a newly independent State should have free choice, its freedom was naturally subject to the interests of the world community, and to those of the other

[1] For the amendments submitted to article 2, see 2nd meeting, foot-note 4.

[2] See above, 1st meeting, paras. 9-11.

[3] See above, 2nd meeting, para. 22.

parties to the treaties to which it might succeed. Moreover, a new State should succeed not only to the privileges, but also to the responsibilities arising from treaties.

11. As to article 2, paragraph 2, he did not agree with the representative of Greece[4] that it should be deleted. His opinion was based not on the fact that a similar provision was embodied in the Vienna Convention on the Law of Treaties, but rather on the fact that such a provision would enable many States Members of the United Nations to overcome their constitutional problems.

12. If the Conference ultimately adopted a convention on succession of States in respect of treaties, he thought it would have to include machinery for the settlement of disputes, as had been done in other conventions.

13. His delegation supported the Soviet proposal concerning humanitarian and other types of convention operating on a world-wide scale.

14. Mr. PANCARCI (Turkey), noting that the codification and progressive development of international law had become urgently necessary as a result of changes in the composition of the international community, said that codification of the rules relating to succession of States in respect of treaties would help to promote the development of relations between States.

15. The draft articles were clear and well balanced, though some of the provisions included were superfluous because they had already been embodied in the Vienna Convention on the Law of Treaties. His delegation was of the opinion that the inclusion of such provisions would only weaken the draft convention and give rise to doubts and conflicting interpretations. It understood, however, that caution had prompted the inclusion of those provisions in the draft, which was the result of attempts to reconcile various interests and points of view.

16. His delegation took the view that the draft convention should embody two basic principles, namely, the "clean slate" principle and the principle of *de jure* continuity, though the exceptions to those principles provided for in the draft should be maintained.

17. Article 2, paragraph 1, subparagraph (*f*), dealt with territories which had had a special legal status before independence, and a distinction should be made between territories which separated from an existing State and should therefore not benefit from the "clean slate" principle, and dependent territories which had had the same status as the metropolitan Power before independence and should benefit from the "clean slate" principle.

18. The Committee should also give careful consideration to draft article 30, which related to the uniting of States and provided, in principle, that treaties concluded by a predecessor State continued in force in respect of the successor State. As it now stood, that draft article did not provide a solution to the problem of conflicting treaties concluded by predecessor States and the Committee should therefore study it closely.

19. Mr. KRISHNADASAN (Swaziland) said that the draft articles, which were basically acceptable to his delegation, gave clear expression to the principles of self-determination and sovereign equality cherished by newly independent States. When such States looked at the draft articles, they were aware of the bitterness of former colonial Powers and the personal humiliation experienced by peoples and their leaders. Thus, account had to be taken not only of the legal aspect, but also of the psychological aspect of the principle of self-determination. His delegation welcomed the fact that the International Law Commission had been aware of that psychological element and had adopted a pragmatic approach in order to enable newly independent States to continue treaties concluded by predecessor States.

20. His delegation was somewhat concerned about the question of non-retroactivity dealt with in draft article 7. It hoped that the draft convention would be able to apply to successor States which had already been independent for a number of years when the future convention came into force. Such a possibility seemed to be implied in article 7, by the words "except as may be otherwise agreed", but the final articles should explicitly state that the draft convention applied to such States, especially as the lists of applicable treaties provided by predecessor States were often incomplete.

21. Referring to article 2, which was more or less acceptable to his delegation as it stood, he drew attention to paragraph 1, subparagraph (*b*). His delegation had no difficulty in understanding the use of the word "responsibility", but if that word gave rise to problems in French, it might be necessary to replace it by another term. He suggested that any such problems might be solved by replacing the words "responsibility for" by the words "responsibility with respect to".

22. With regard to article 2, paragraph 2, his delegation supported the view expressed by the representatives of Greece[5] and Romania,[6] namely, that that paragraph need not necessarily be included in the draft articles and that the Committee was not always bound to follow the example of the Vienna Convention, especially as one of its tasks was to promote the progressive development of international law. Some delegations had expressed the view that that para-

[4] See above, 3rd meeting, paras. 65 and 68.

[5] See above, 3rd meeting, para. 68.

[6] See above, 3rd meeting, para. 69.

graph would ensure respect for the sovereignty of States, but the Committee did not need to highlight terms used in internal law. On the contrary, one of the functions it could perform was to encourage uniformity in the use of terms.

23. Mr. SUCHARITKUL (Thailand) said that Thailand was neither a successor nor a predecessor State in any of the categories proposed in the draft articles. However, as a succession of States might be deemed to have occurred in the territories of its immediate neighbours, his country would be interested to know the precise meanings of the various terms used in the articles and wished to be assured about the continuation or termination of treaty rights and obligations relating to neighbouring newly independent States. The progressive development of principles of international law on the subject would be in the interests of certainty in international relations and the draft articles should be adopted, after appropriate revision, subject to the limitations on the scope of their application laid down in articles 3, 4, 7 and others.

24. As a general observation, his delegation considered that the law of treaties should offer guidance regarding the principles governing State succession in respect of treaties, and that particular attention should be paid to the principles of freedom of contract, privity of treaties and the "clean slate". The desirability of the continuance of treaties should not be identified with the maxim *pacta sunt servanda*. Continuance or perpetuity did not necessarily mean stability or certainty; it was not a virtue to be sustained at any cost, including cost to third parties to the succession of States. In all cases, the consent of the parties should be the determining factor. The proposals in the draft articles concerning the classification of principles to be applied to various categories of succession of States appeared to be practical and in harmony with the prevailing views of writers and with State practice.

25. Mrs. DAHLERUP (Denmark) reaffirmed that her Government was satisfied with the scope and structure of the draft articles and that it was in favour of adopting a legally binding convention.

26. The course of the debate had shown the difficulties of finding comprehensive definitions and her delegation considered that the draft should also contain provisions for the settlement of disputes. Since the draft articles were intended to complement the Vienna Convention on the Law of Treaties, it would be appropriate to base the procedure for the settlement of disputes on the corresponding provisions annexed to that Convention. Her delegation was prepared to join other delegations in working out a suitable proposal.

27. Mr. TODOROV (Bulgaria) congratulated the International Law Commission and its Special Rapporteurs on the draft articles, which were acceptable as a basis for discussion. His delegation shared the basic philosophy of the draft, since it was based on the law of treaties, on the general principles of international law and on the Charter of the United Nations.

28. The International Law Commission had succeeded in maintaining a balance between the principle of the "clean slate" and that of *ipso jure* continuity. His delegation supported the "clean slate" principle, because the population of a territory under colonial domination could not be bound by treaties to which it had not consented. But to protect the interests both of the newly independent States themselves and of the international community, some exceptions, such as those provided for in articles 11 and 12, were required. The text of article 7, which had been adopted by a narrow majority, required further study.

29. Two other important matters were participation in multilateral treaties of a universal character after a succession of States and the settlement of disputes. His delegation considered that the "contracting-out" system would strengthen the role of international law in the interests of the international community as a whole.

30. Mr. MUDHO (Kenya) said that the draft articles were broadly acceptable, with the exception of article 7, the utility and desirability of which were doubtful. In view of the fact that the International Law Commission had devoted years of study to the draft articles, which had also been commented on by most of the governments represented at the Conference, he trusted that it would not be necessary to introduce any new principles or to depart from those on which the draft articles were based.

31. He reiterated his Government's support for the "clean slate" principle as being consistent with the Charter of the United Nations and, in particular, with the principle of self-determination. He also urged the retention of the exceptions formulated in articles 11 and 12; he had doubts about the proposals by certain delegations to consider other exceptions, particularly exceptions relating to multilateral treaties of a universal character.

32. His delegation was open minded about the inclusion of provisions for the settlement of disputes.

33. His delegation found the definitions in article 2 acceptable—a view which had remained unaffected by the suggestions for changes in paragraph 1, subparagraphs (*b*) and (*f*). However, it remained open to any proposal to improve any article in the draft, and would study the specific proposals for amendment made by a number of delegations in connexion with the difficulty they held to exist in reconciling article 2, paragraph 1, subparagraph (*f*) with article 33, paragraph 3.

34. Mr. SCOTLAND (Guyana) said that, without dwelling on the manifold ramifications of the draft,

its relationship to the Vienna Convention on the Law of Treaties, its treatment of the principle of self-determination or its concept of succession of States, his delegation would observe by way of general comment that, while in some quarters it might be wished that the draft articles should be in harmony with the 1969 Vienna Convention, care should be taken to avoid the impression that that was the primary consideration. The paucity of State practice on certain aspects covered by the draft articles and its incoherent nature made any rigid formulation of principles from such practice inadvisable. Furthermore, the incorporation by reference in article 19, paragraphs 2 and 3 of articles 19 to 23 of the Vienna Convention, was likely to be a source of difficulty.

35. He had some misgivings about the definition of "succession of States" in article 2, paragraph 1, subparagraph (*b*). In paragraph (3) of the International Law Commission's commentary to that paragraph it is stated that the term referred "exclusively to *the fact of the replacement* of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations" (A/CONF.80/4, p. 17) paragraph (3). In his view, the reality of the incidence of succession might be more accurately described by a reference to a replacement in the exercise of competence for the international relations of the territory concerned. As was acknowledged in articles 10, 15, 16 and 17, the successor State was required to perform some act before it could properly be said to exercise its competence for international relations. The successor State might or might not exercise that responsiblity in respect of particular treaties. It could therefore be seen that on a succession of States, the successor State had competence to discharge the responsibility devolving upon it by virtue of having replaced the predecessor State.

36. He also had some misgivings about article 2, paragraph 1, subparagraph (*f*) for two reasons. First, the definition used the term "dependent territory" which itself required a definition. Secondly, the definition was not exhaustive, since it did not appear to take into account the situation envisaged in article 33, paragraph 3, nor did it cover the reality of United Nations practice as it had developed in relation to international territory. If the Conference accepted the last premise, paragraph 1, subparagraphs (*b*) to (*f*) might require slight amendment. It also appeared that the limitation to multilateral treaties of the definition of "notification of succession" in paragraph 1, subparagraph (*g*) might require examination in view of paragraph (14) of the International Law Commission's commentary to article 10, which referred to formulating the provisions of article 10 "in general terms in order to make them applicable to all cases of succession of States and to all types of treaty" (*ibid.*, p. 37).

37. In article 2, paragraph 1, subparagraph (*m*), he had no difficulty with the term "other State party", which was appropriate. Although he had no reservations about the substance of the definition, he thought it would be clearer if reworded to read:

> "Other State party" means, in relation to a successor State, any party to a treaty in force at the date of the succession of States in respect of territory to which that succession relates, other than the predecessor State.

38. It was claimed that paragraph 2 of article 2 was designed to safeguard rules or usages governing the classification of international agreements under national law. In his view, the Conference had no competence to disturb such matters and a State would be unlikely to regard the definitions in article 2 as applying within its borders unless, as it was at liberty to do, it expressly incorporated them into its national law. His delegation therefore regarded the provision as superfluous, but would not press for its deletion if other delegations, *ex abundanti cautela*, would prefer its retention.

39. Mr. MANZ (Switzerland) said that his country, which had traditionally attached great importance to the primacy of law in international relations had always taken an active part in the work of codification which had been undertaken for many years under the auspices of the United Nations and acknowledged the valuable work done by the International Law Commission and its two Special Rapporteurs in preparing the draft articles which the Conference was considering.

40. The Swiss delegation was in the main satisfied with the draft Convention. Of course, it would comment on specific points in due course.

41. The Swiss Government was in favour of the "clean slate" principle, which was derived not so much from the right of peoples to self-determination but from one of the basic general principles of law, namely, the principle of *res inter alios acta*. In the nature of things, the effects of legal acts could apply only to their authors. Hence, it was surprising that the International Law Commission had seen fit, regarding the application of treaties to successor States, to institute two different legal régimes (articles 15 and 33 of the draft) concerning two situations between which, in strictly legal terms, it would be hard to distinguish. Indeed, the International Law Commission seemed to have seen the difficulty because, in article 33, paragraph 3, the presumption of continuity disappeared when a State separated in circumstances having the same nature as those attending the formation of a newly independent State. In making that observation, his delegation was well aware that a satisfactory solution would be hard to find.

42. The Swiss Government hoped that the proposed convention would give a special place to treaties affecting the common interests of mankind, including the humanitarian conventions proper, which embraced almost the entire international community and occupied a place apart among conventions of a

universal character, in other words, it hoped that a presumption of continuity would be established for those treaties. On the other hand, a proposal to make an exception in favour of any treaty of a universal character would, in the Swiss delegation's view, make too wide a breach in the "clean slate" principle on which the draft articles were centred.

43. The Swiss delegation hoped that the outcome of the International Law Commission's efforts and the Conference's deliberations would not be a mere academic exercise, but that they would lead to the adoption of a useful instrument, in the form of a convention even more widely applicable than was envisaged in draft article 7. The Swiss delegation would also support efforts to include in the convention a procedure for settlement of disputes.

44. Mr. ESTRADA-OYUELA (Argentina) said that his Government greatly appreciated the work of the International Law Commission and the importance of its contribution to the task of codifying international law and thereby strengthening international peace and security.

45. It was already clear that the decision to link consideration of draft article 2 with the making of general comments had been sound. His delegation was among those which hoped that the outcome of the Conference's work would take the form of a convention on succession of States in respect of treaties, as a complement to the Vienna Convention on the Law of Treaties. It believed, too, that the Conference should strive, particularly in the Drafting Committee, to achieve greater precision in a number of the provisions embodied in the draft articles—the Committee of the Whole, of course, remaining responsible for questions of substance.

46. Once the other articles had been discussed, it might be possible further to clarify the definitions in article 2, particularly the new definitions relating to succession of States. Although definitions had been a problem ever since the time of Roman law, there were now further aids, such as formal logic, which would be a great help in many cases where a definition was desirable.

47. The new definitions in article 2 were, in general, of a type capable of covering all possible cases. That was the ideal type of definition, but if it failed to provide the degree of perfection required, the indicative method could be adopted. Improvements could be made continually as the work progressed. In saying that, he was not overlooking the difficulties inherent in the preparation of any legal text.

48. A number of delegations had stressed the need to establish a procedure for the settlement of disputes, which they thought were bound to arise because of imperfections in the texts of the articles. His delegation was of the opinion that the topic should be considered separately from the present deliberations; to talk about the settlement of disputes arising out of imperfect drafting during the drafting work itself was not the best way to carry out codification.

49. Mr. YANGO (Philippines) expressed his delegation's appreciation of the work of the International Law Commission in preparing the draft articles. For the time being, his delegation could express its general satisfaction with draft article 2 and with the way in which the draft articles had been linked to the Vienna Convention on the Law of Treaties.

50. His delegation would express its views later on article 2, which it deemed highly important. It the meantime, it would closely associate itself with the work on the draft articles as a whole, which must be as thorough as possible.

51. Mr. MITCHELL (Papua New Guinea) said that his country, as a new member of the international community, had a particular interest in the work on succession of States in respect of treaties. His delegation thought that the draft articles provided a useful basis for the negotiation of a convention.

52. Since gaining independence, on 16 September 1975, Papua New Guinea had been carefully examining all the previous treaties relating to its territory. After studying the draft articles, the Government had also declared the policy it intended to pursue in regard to treaties; it had adopted a variant of the "clean slate" principle, its aim being to avoid a doctrinaire approach to treaty relations, and had emphasized the need to reach a consensus on the future status of agreements previously in force.

53. He reiterated his Government's support for the draft articles before the Conference.

54. Mr. ROBINSON (Observer for the United Nations Council for Namibia), speaking at the Chairman's invitation, said that despite the constant emergence of newly independent States during the past 20 years, not all peoples had yet achieved self-determination in accordance with the aims of the United Nations Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples. For example, Namibia was still occupied illegally by South Africa, in defiance of those instruments and of international law.

55. The United Nations, pursuant to General Assembly resolutions 2145 (XXI) and 2248 (S-V), had assumed direct responsibility for the territory of Namibia. That country was therefore a *sui generis* case, in that its predecessor within the meaning of article 2, paragraph 1, subparagraph (*f*), would be the United Nations itself. The delegation of the United Nations Council for Namibia therefore hoped that special case of Namibia would be taken into account and that article 2, paragraph 1, subparagraph (*f*) would be amended to cover it.

56. His delegation hoped to have an opportunity of addressing the Committee again during discussion of the articles relevant to the situation in Namibia.

57. Mr. ZAKI (Sudan) said that his Government was satisfied with the draft articles as a whole; his delegation would approach their discussion in a spirit of co-operation, in the hope that the Conference would succeed in completing its task. His delegation agreed entirely with the definitions proposed by the International Law Commission in article 2 and, in view of the importance of the observance by the international community of obligations which formed part of international law, supported the retention of article 5 in its present wording.

58. The CHAIRMAN announced that the Committee had concluded its consideration of article 2 and the hearing of statements of principle.

ARTICLE 5 (Obligations imposed by international law independently of a treaty) (*continued*)[7]

59. Mr. NAKAGAWA (Japan) said his delegation continued to believe that article 5 was useful, if not indispensable, and supported its retention in its present wording. The article clarified the situation with regard to the application of rules of general international law to a new State and was therefore of value in view of the incorporation of the "clean slate" principle in the draft as a whole. It would also make it easier to deal with multilateral treaties of a universal character by clarifying the scope and nature of the issues involved in that question. The article should apply to successor States and to predecessor States and other States parties as well.

60. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation had first considered article 5 to represent a mere transposition of the axiom contained in article 43 of the Vienna Convention on the Law of Treaties; the discussion in the Committee had, however, shown that the problem was in fact more complex. On balance, his delegation believed that article 5 should be retained, since it showed that there was a limit to the application of the "clean slate" principle, which had sometimes been too rigidly stated in other draft articles. Article 5 did not say what obligations international law imposed or what rights it conferred in a particular case, but stated clearly that there were certain provisions of that law which could exist independently of a treaty which had lapsed.

61. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) said his delegation was firmly of the opinion that article 5 should be retained. That article was needed in order to consolidate the provisions of article 43 of the Vienna Convention on the Law of Treaties and because the convention which the present Conference was trying to adopt must state clearly, in the interest of the entire international community, that the termination of a treaty did not release the parties to it from compliance with the obligations incumbent upon them under the rules of contemporary international law. The article would serve as an indication for all States, including newly independent States, that normal relations between States would be impossible without respect for international obligations and principles, and particularly the Principles set forth in the United Nations Charter.

62. For those reasons, and also bearing in mind that article 5 was linked with the following articles in the draft convention, his delegation agreed that it should be retained, in the form proposed by the International Law Commission.

63. Mr. EUSTATHIADES (Greece) stated that, since the discussion in the Committee had shown that article 5 served to do more than merely restate a fundamental principle adopted in the Vienna Convention on the Law of Treaties, which would in any case have remained valid even if not expressly mentioned in the draft convention, his delegation would not object to its retention.

64. Mrs. BOKOR-SZEGÖ (Hungary) considered it essential for the entire international community that article 5 be maintained in its present form. It might be, for example, that a treaty which was terminated had imposed obligations of interest to all countries, and perhaps to newly independent States in particular; the deletion of article 5 would have the effect of releasing all the parties to such a treaty even from obligations as important as those deriving from the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)).

65. Mr. MEISSNER (German Democratic Republic) strongly supported all the speakers who had called for the retention of article 5 in the form in which it had been drafted by the International Law Commission. His delegation was firmly convinced that the article was of paramount importance for the entire draft and understood it to set the convention in the framework of existing international law.

66. Mr. AL-KATIFI (Iraq) observed that the effect of article 5 would be to bind States by a rule which was not a treaty rule, but one of customary international law. As the representative of France had pointed out,[8] that immediately raised the problem of the applicability of such a rule to a newly independent State, which by definition would not have participated in its elaboration. While the traditional view was that the rule would automatically apply to the new State, it was also maintained that the State must explicitly or implicitly consent to be bound by it. His

[7] For the amendment submitted to article 5, see 4th meeting, foot-note 6.

[8] See above, 4th meeting, para. 39.

delegation thought it very desirable to settle the question of the applicability of the rule in the convention and therefore favoured the incorporation of a version of article 5 redrafted so as to fulfil that purpose.

67. Mrs. SLAMOVA (Czechoslovakia) associated her delegation with those which favoured the retention of article 5 as it stood. Many international agreements embodied progressive legal rules, such as those relating to the sovereign equality of States, the right of peoples to self-determination, and the principle of non-interference in internal affairs, which constituted the body of general international law and which every State must uphold even if, following a succession, it was no longer a party to a treaty in which those rules were explicitly stated. Article 5 removed all possibility of uncertainty in that respect.

68. The CHAIRMAN, observing that opinions had been expressed for and against the retention of article 5, asked whether the Committee wished to vote on the article, as would seem to be necessary, at the present meeting.

69. Mr. MIRCEA (Romania) urged that, instead of a vote, an attempt should be made to draft a compromise text acceptable to all delegations.

70. The CHAIRMAN pointed out that the Committee was obliged, by virtue of its rules of procedure (A/CONF.80/8), to vote on proposals which had been contested. The Drafting Committee would naturally take account in its discussion of any article, however adopted, of the range of views expressed in the Committee.

71. Mr. YACOUBA (Niger), speaking as Chairman of the African Group, asked that the decision on article 5 be postponed until the following day to give members of the Group time for consultations.

72. Mr. MIRCEA (Romania) said he thought the rules of procedure had been adopted on the basis of a general understanding that proposals would be put to the vote only as a last resort and that the Committee would, as far as possible, work by consensus. More time was needed, and available, for consultations between delegations with differing views, and for study of the links between individual articles. If the Committee voted too hastily on the proposals before it, the convention would not be acceptable to all, and his delegation would be unable to sign even the Final Act of the Conference.

73. The CHAIRMAN said that he appreciated the concern of the representative of Romania, but that voting on contested proposals was not only authorized by the Committee's own rules of procedure, but also formed a part of the practice of previous codification conferences. He observed, however, that all the decisions which the Committee had taken so far concerning proposals had been adopted by consensus.

74. Mr. MUSEUX (France) and Mr. ARIFF (Malaysia) proposed that, in view of the complexity of the problems to which the content of article 5 had given rise, the decision on the matter should be postponed until the following day.

It was so decided.

The meeting rose at 6.05 p.m.

6th MEETING

Friday, 8 April 1977, at 10.40 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 succesion 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 5 (Obligations imposed by international law independently of a treaty) (*continued*)[1]

1. Mr. SATTAR (Pakistan) endorsed without reservation the principle set forth in article 5, which was based on existing international law and State practice. Article 5, by affirming that every State must fulfil any obligations imposed on it by international law independently of any treaty, helped to restore the necessary balance in the draft convention and should therefore be retained.

2. Mr. FARAHAT (Qatar) also believed that article 5 restored the balance between the "clean slate" principle and the principle of continuity. Accordingly, he could support the article in its present form.

3. Mr. SETTE CÂMARA (Brazil) said that he had at first had the impression that article 5 was completely neutral and merely reflected article 43 in the Vienna Convention on the Law of Treaties, so that it would be immaterial whether it was retained or deleted. However, he had now come round to the view that the article was useful and should be retained. In fact, article 43 in the Vienna Convention was only concerned with "the invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation" and did not deal with the succession of States. But the succession

[1] For the amendment submitted to article 5, see 4th meeting, foot-note 6.