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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.

of States, particularly in the context of part III of the draft convention, which dealt with newly independent States, involved the termination of numerous treaty provisions which included rules of international law that could not be regarded as having been abrogated. Thus, article 5 did serve a purpose in so far as it could prevent misinterpretation of the draft convention.

4. Mr. MANGAL (Afghanistan) considered that article 5 was inherently dangerous, because if a State no longer regarded itself as bound by a treaty on the ground that the treaty was unjust it should not be bound by any of the obligations embodied in that treaty unless they were in conformity with the United Nations Charter and other rules of international law, as the Byelorussian representative had aptly pointed out.[2] Therefore, he suggested that the Drafting Committee should modify the text of article 5 slightly so as to specify that a State was not bound to fulfil any obligation embodied in a treaty which was no longer in force in respect of that State except in so far as that obligation was in conformity with the rules of general international law. That change would make it clear that article 5 was not intended implicitly to assure the maintenance in force of a treaty that had become invalid.

5. Sir Francis VALLAT (Expert Consultant) drew the Committee's attention to the connexion between article 5 in the draft convention and article 43 in the Vienna Convention on the Law of Treaties. In his view, the fundamental principle that a State was subject to customary law was not in question. The problem was whether or not that principle should be set out in the draft convention. The need for such a provision became clearer if article 5 was compared with article 43 in the Vienna Convention; for the latter did not cover the case of a treaty being considered as not in force in respect of a State by reason of a succession of States. Consequently, if there was no article 5, it might be concluded that the rule embodied in article 43 of the Vienna Convention did not apply in that particular instance and that consequently States were released from the obligations to which they were subject under customary law.

6. Mr. PANCARCI (Turkey) considered that article 5 did fill a gap and should be retained in the draft convention. That article, like many others, was the result of a compromise between different interests and views and its deletion would affect other articles. If retained, it would be easier to interpret the provisions of the future convention.

7. Mr. KRISHNADASAN (Swaziland) asked in what instances article 5 would apply to a predecessor State.

8. Sir Francis VALLAT (Expert Consultant) replied that it would apply in cases of disagreement concerning treaty relations between a predecessor and a successor State. If a treaty was not considered to be in force between them, the predecessor State's obligations were in question on exactly the same ground as the successor State's obligations, so that article 5 covered the predecessor State as well as the successor State.

9. Mr. SCOTLAND (Guyana) considered that the wording of article 5 should be amended so as to make the meaning clearer. It referred to "a State" when in fact it concerned at least three categories of States: the predecessor State, the successor State and other States parties to the treaty. Thus the general expression "a State" might be misunderstood.

10. Mr. MARESCA (Italy) also considered that the wording of article 5 was far from clear and should be amended by the Drafting Committee.

11. Mr. MIRCEA (Romania) formally proposed that the text of article 5 should be amended to read:

Article 5. Obligations deriving from generally accepted principles and rules of international law independently of a treaty

The fact that a treaty is not considered to be in force by virtue of the application of the present Convention shall not in any way impair the duty of the successor State and other States concerned to fulfil any obligation embodied in that treaty under generally accepted principles and rules of international law independently of the treaty.

12. The CHAIRMAN asked whether members of the Committee were willing to proceed with the examination of the text proposed by the Romanian representative as an oral amendment or whether they would prefer to take it up at the following meeting after it had been circulated in writing.

13. Mr. SNEGIREV (Union of Soviet Socialist Republics) said that he preferred to wait until the amendment had been submitted in writing.

14. Mr. MIRCEA (Romania) said that he would submit his amendment in writing at the following meeting.

15. The CHAIRMAN suggested that, in the circumstances, further examination of article 5 should be postponed until the following meeting and in the meantime the Committee would proceed with article 6.

16. Replying to a question by the Pakistan representative concerning the procedure to be followed for examining amendments, he explained that any delegation could always ask for an amendment to be circulated in writing in its working language but that the Committee could also examine an oral amendment provided no objection was raised. As for suggestions directed to the Drafting Committee, he also reminded the Committee that if a proposal had not been submitted as a formal amendment and had not

[2] See above, 5th meeting, para. 61.

been put to the vote, the Drafting Committee could only consider it from the drafting point of view and could not make any change of substance in the text.

ARTICLE 6 (Cases of succession of States covered by the present articles)[3]

17. Mr. GILCHRIST (Australia) said he understood the arguments in favour of draft article 6 advanced by the International Law Commission in paragraphs (1) and (2) of its commentary (A/CONF.80/4, pp. 22 and 23). Nevertheless, although the rule set out in the draft article was derived from customary law, it was likely to give rise to practical problems. States would apply that rule subjectively, and that would necessitate efficient machinery for the settlement of disputes. His delegation therefore shared the Argentine delegation's view that the Conference should deal with the question of the settlement of disputes independently and not merely to camouflage the shortcomings of the Convention.[4] As now worded, draft article 6 ran the risk of perpetuating differences of opinion arising from the subjective application of international law by States. In the past, States had shown flexibility in their attitude towards the legal status of new governments and States according to the circumstances, but it was not certain that a State which abided by draft article 6 would enjoy such latitude. On the contrary, once a State had subjectively qualified a succession of States as unlawful, the Convention would not be applicable to that case of succession. To ensure respect for international law, the Conference should recognize that article 6 would be applied subjectively and should therefore adopt a provision allowing the opinions of States concerning the status and lawfulness of a new State to develop in accordance with the circumstances. That was why his delegation had submitted the amendment in document A/CONF.80/C.1/L.3.

18. Mr. SUTTERHEIM (Netherlands) said that his delegation was concerned by the provisions of draft article 6, since it was not impossible for a new State created under conditions contrary to international law to invoke that article in claiming that the provisions of articles 11 and 12 on boundary régimes and other territorial régimes did not apply to it. He suggested that article 6 should be placed after articles 11 and 12 and that it should be stipulated that it referred only to articles 13 *et seq.*

19. Mr. AL-KATIFI (Iraq) said that, if article 6 related to the legitimate concern of recognizing in the case of territorial changes only successions occurring in conformity with international law, his delegation would be in favour of retaining the article. He was not sure, however, whether the non-application of rules concerning the succession of States to the unlawful transfer of territories might not prejudice the legitimate rights of innocent States or even of the victims of such a transfer. It was self-evident that, apart from the principle of self-determination of peoples and the principle of the prohibition of the use of force in violation of the United Nations charter, international law did not lay down rules for the creation of States, unlike private law, which comprised detailed regulations for the establishment of associations or limited companies.

20. He therefore did not consider that the Australian amendment met his delegation's concern. Moreover, the draft article prepared by the International Law Commission should be so amended as to provide that a State benefiting by an unlawful succession could not evade the treaty obligations relating to the territory which was the object of the unlawful transfer and to set out the relevant principles of international law, such as the principles of self-determination of peoples, respect for the territorial integrity of States and prohibition of the unlawful use of force in international relations.

21. Mr. YIMER (Ethiopia) said that he was in favour of retaining draft article 6 in the convention but that he preferred the wording proposed by the Australian delegation (A/CONF.80/C.1/L.3). Article 6 was not drafted in the same terms as the corresponding provision—article 52—of the Vienna Convention on the Law of Treaties and, moreover, was imprecise. The International Law Commission could have given examples illustrating the provisions of article 6, as it had done in the case of other articles. He would therefore be grateful to the Expert Consultant if he would give examples of cases where succession of States had not occurred in conformity with international law and, in particular, with the principles embodied in the Charter of the United Nations. He also wished to know what particular situations were to be excluded by article 6 from the area of application of the draft convention.

22. Sir Francis VALLAT (Expert Consultant) said that, owing to the possible political implications, he did not think he could give specific examples of situations in which a succession of States had not occurred in conformity with international law. On the other hand, it did not seem difficult to imagine, especially in the framework of article 14 of the draft, cases of succession resulting from unlawful acts—for instance, where a State wished to dismember another for political reasons.

23. Mr. EUSTATHIADES (Greece) said that, in comparison with the Australian amendment, article 6 dealt with the question of cases of succession of States covered by the draft articles from the theoretical rather than the practical point of view. On the other hand, he wondered whether in practice there was really any difference between the text of the In-

[3] The following amendments were submitted: Australia, A/CONF.80/C.1/L.3; Romania, A/CONF.80/C.1/L.5; Ethiopia, A/CONF.80/C.1/L.6; Union of Soviet Socialist Republics, A/CONF.80/C.1/L.8, and Singapore, A/CONF.80/C.1/L.17.

[4] See above, 5th meeting, para. 48.

ternational Law Commission and the Australian amendment. At first sight, there was the essential difference that draft article 6 condemned and provided sanctions against unlawful acts whereas the Australian amendment gave States the option of applying or not applying the Convention according to the circumstances, but his delegation was not convinced of the need for the realistic provisions proposed by the Australian delegation and preferred the logical, abstract and juridical terms of the text prepared by the International Law Commission.

24. Mr. KEARNEY (United States of America) said he agreed with the preceding speaker that article 6 as proposed by the International Law Commission certainly entailed more clear-cut consequences than did the Australian amendment. Nevertheless, he thought it would be difficult to assess the effects of article 6 accurately in view of the scope of the rule proclaimed in that article. Moreover, any succession of States originating in the use of force was accompanied by violations of law by both the parties concerned. His delegation therefore believed that article 6 would have unduly draconian effects which the Committee could not foresee. To remedy that shortcoming, an attempt could be made to define the situations to which article 6 would apply, but any enumeration involved a certain amount of risk. Alternatively, a list could be made of the principles of international law which were embodied in the Charter of the United Nations and violation of which would prevent the application of the draft articles, but that would be a difficult task. That was why the Australian amendment had the great advantage of assuming a tolerant attitude on the part of States, while retaining respect for the principles set out in article 6. The United States delegation therefore considered that the amendment should be adopted.

25. Mr. MARESCA (Italy) said that he supported the idea of preserving international lawfulness, on which the International Law Commission had based article 6, but wondered whether that legal text took historical and political realities into account. There were indeed very few States which had been formed under ideal conditions, without the use of force or foreign intervention. The independence so greatly prized by States had in fact been attained at the cost of circumstances and events which had not always been in conformity with international law. The International Law Commission had clearly been aware of that problem in drafting article 7, which seemed to be calculated to "wipe away" processes which could be considered as not in conformity with international law and which should therefore be taken into account in considering article 6. There was no doubt that it would be highly desirable to introduce moral principles into legal provisions but that would hardly prevent States from adopting the attitude which suited them and which would be based, not on moral, but on political considerations; now that was the very idea embodied in the Australian amendment, which was realistic and legally sound, but if the Committee wished to retain the article prepared by the International Law Commission it should try to improve the text so that it expressed the idea that a State formed in violation of international law had no acquired rights or powers.

26. Sir Ian SINCLAIR (United Kingdom) recalled that in its observations of 1972 his Government had expressed doubts about retaining article 6 on the ground that it might give rise to uncertainty about the application of the convention in particular cases. Furthermore, though there was a link between articles 6 and 7, that did not help since article 7 also gave rise to problems. His delegation did not dispute the fact that cases of succession could result from an act of aggression or a breach of peace but considered that the consequences of such wrongful acts was a matter for the competent bodies of the United Nations. His delegation was concerned about the possible secondary effects of article 6 in its present form, if it was adopted. It would support the Australian amendment, which sought to attenuate some of those secondary effects, if the Committee judged it really necessary to retain an article on that matter.

27. Mr. SEPÚLVEDA (Mexico) said he had doubts about the Australian amendment because it only amounted to changing the order in the wording of article 6 and was open to misunderstanding. His delegation preferred the more lucid text worked out by the International Law Commission.

28. Mr. MANGAL (Afghanistan) said that obviously the purpose of codifying rules of international law was to apply them only to situations established in conformity with the principles of the United Nations Charter and other rules of international law. Thus the draft articles should be confined to normal situations where treaties had been validly concluded between sovereign and independent States. Article 6 clearly ensured that a predecessor or successor State party to an unjust and unlawful treaty could not benefit from or rely upon the draft articles. For that reason his delegation considered that article 6 was essential to the balance of the whole of the draft articles and that any move that would upset that delicate balance might have serious consequences not only for the discussion of other draft articles but also for the ratification of the convention itself by many States.

29. The main purpose of the codification and progressive development of international law was to make legality prevail in international relations and not to produce recognition of situations or facts that were contrary to the principles of international law. If some delegations had to insist on deleting article 6 or modifying its substance, the Committee might consider elaborating a declaration instead, setting out the principles applicable to the succession of States in respect of treaties. It would be worth exploring that possibility if the articles which his delegation regarded as fundamental to the balance of the draft

had to be deleted. The difficulties that the implementation of a convention on succession of States in respect of treaties might create could induce some States to refrain from ratifying or acceding, so that it would not become universal in character.

30. Referring to the Australian amendment, he said that each delegation was certainly entitled to submit amendments but it also had the duty to seek the best means of codification. The Australian amendment could only be interpreted as seeking to relieve States of their fundamental obligation not to recognize the existence of certain unlawful situations and for that reason his delegation regarded the amendement as unacceptable and declared itself in favour of article 6 as proposed by the International Law Commission, since that text appeared to be quite satisfactory.

31. Mr. KAMIL (Indonesia) considered that the scope of article 6, as now worded, was fairly limited since it implied that the draft convention would not apply when a State came into being in a manner contrary to the principles of international law embodied in the Charter of the United Nations. But it would be difficult to decide who was competent to pronounce on the lawfulness or unlawfulness of any given situation. For that reason his delegation supported the suggestion made by the Asian-African Legal Consultative Committee at its eighteenth session in Baghdad, in 1977, to the effect that the concept of a lawful situation must be defined in the draft. In addition he proposed that the word "only" in the draft article should be replaced by the word "normally".

32. Mr. SCOTLAND (Guyana) observed that various problems had emerged from the debate and his delegation would attempt to identify the issues which confronted the Conference in relation to article 6.

33. Those issues were the following: Firstly, how to exclude from the scope of the draft articles a succession of States achieved in a manner which was not in conformity with international law and in particular the principles of international law embodied in the Charter of the United Nations? If the above premise were accepted, then the successor State, which in that case might be described as the "aggressor State", was free to disregard treaties applying to a territory before its illegal act, even if that territory was not incorporated into the State of the "aggressor State".

34. Secondly, how far, and how, did the Conference give overt recognition to political realities? The latter might be a matter of drafting but the former was a substantive issue.

35. Thirdly, how far would the Conference adopt flexibility in a text to permit the kind of auto-interpretation of obligations which was the basis of the Australian amendment?

36. Should the Conference present, as part of a treaty, an article which suggested support for the replacement of one State by another in circumstances which might not be in conformity with international law and in particular the principles of international law embodied in the Charter of the United Nations?

37. His delegation had many difficulties with the Australian amendment. The absence of certainty in draft article 6 was implicit in the practices of States and previous speakers had already alluded to it. In the Australian draft the uncertainty was explicit and it was a matter for consideration whether the Conference should approach the question in that manner.

38. He wondered whether, in addition to its illegal act, the State acting illegally should find support for its action in a provision of the convention which was being drafted by the Conference. That was a possibility which could arise from adoption of the Australian amendment. His delegation was therefore regrettably unable to support that amendment.

39. Mr ARIFF (Malaysia) questioned whether article 6 in its present form need be included in the draft convention. He noted that the draft did not contain any definition of a succession of States occuring in conformity with international law. Therefore, that expression might lend itself to differing interpretations and give rise to misunderstandings. Without impugning the good intentions of the International Law Commission, he wondered how a distinction could be drawn between events in conformity with international law and those that were not. In view of the definition of the term "succession of States" contained in article 2, paragraph 1, subparagraph (*b*), namely "the replacement of one State by another in the responsibility for the international relations of territory", whatever the circumstances in which that replacement occurred, he was unable to understand why the application of the future convention had to be confined to the effects of succession of States occurring in conformity with international law.

40. Therefore, either the expression "succession of States occurring in conformity with international law" must be defined or the words "international law and, in particular", in draft article 6 must be deleted. In fact the reference to principles of international law embodied in the Charter of the United Nations was quite enough to cover all the situations that the International Law Commission had had in mind.

41. The Australian amendment sought to clarify and simplify article 6, but although the phrase "a succession of States occurring in conformity with international law" had been replaced by a reference to events which had occurred contrary to international law, that amendment was just as ambiguous.

42. Mr. HASSAN (Egypt) considered that the difficulties to which article 6 might give rise did not jus-

tify its deletion. An imperfect draft was preferable to one shorn of so vital a provision.

43. Mr. MUPENDA (Zaire) expressed a preference for article 6 as proposed by the International Law Commission. While that provision sought to condemn the effects of any events contrary to the principles of international law embodied in the Charter of the United Nations, the Australian amendment appeared to sanction the acts of aggressor States. There was a danger that the amendment might prove to be a source of misunderstanding.

44. Mr. HELLNERS (Sweden) said that at the beginning of the discussion he had thought that the principle set out in article 6 would be accepted by all delegations as one which should be fundamental to the Committee's work. It had then seemed to him that the provision could be dropped since it was self-evident and the mere fact of repeating such an axiomatic principle might give the impression that it was in doubt. However, after listening to the discussion and studying the Australian amendment he had concluded that the principle was not as self-evident as he had thought and might be included in the draft convention.

45. The Australian amendment was not altogether clear. It would not suffice, in order to remove difficulties of interpreting the phrase "in conformity with international law" which appeared in the draft article, to replace it as proposed in the Australian amendment. The latter seemed to open the door to accepting a great many types of situation. Certainly States were not bound to accept them but the amendment produced the surprising impression that the future convention could apply to unlawful acts provided the State concerned raised no objection. For that reason his delegation could not accept the amendment.

46. He had the same doubts about the suggestion made by the representative of Indonesia to substitute the word "normally" for the word "only" in draft article 6 as he had about the Australian amendment. Moreover, any other change in the wording proposed by the International Law Commission was liable to produce more confusion rather than clarity.

47. Undoubtedly, article 6 was closely linked with article 7 and the latter would attenuate the purport of the former. On the other hand, the principle set forth in article 6 might also be incorporated in the preamble to the draft convention.

48. Mr. FARAHAT (Qatar) considered that the wording of article 6 as framed by the International Law Commission was free of ambiguity. While he understood the reasons which had prompted the Australian amendment, he thought that there might be a danger that such a formulation might legitimize unlawful situations. As that amendment raised doubts and uncertainties he would support article 6 as it stood, in principle, but would welcome any drafting improvements that might be made.

The meeting rose at 1 p.m.

7th MEETING

Tuesday, 12 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 6 (Cases of succession of States covered by the present articles) (*continued*)[1]

1. Mr. MIRCEA (Romania), introducing his delegation's amendment to article 6 (A/CONF.80/C.1/L.5), said he thought that it would be premature to regulate, in a specialized convention, the highly complex question of the conformity of a succession of States with the principles of international law. If the article in question was to be retained, it would be essential to indicate the basic criteria needed to define the concept of succession of States. Since a number of delegations wished to keep article 6, his delegation had submitted an amendment which departed only slightly from the text proposed by the International Law Commission. The reference to "international law and, in particular, the principles of international law embodied in the Charter of the United Nations" had been replaced by the words "fundamental principles embodied in the Charter of the United Nations, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly resolution 2625 (XXV)) and in other international instruments". It could not be denied that the Declaration contained some provisions of direct concern to the succession of States in respect of treaties and that the application of those provisions, particularly the principle of self-determination, ought to help with the solution of certain problems. Among the "other international instruments" which his delegation had in mind were the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX), of which his country had been one of the first advocates, the

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