

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.8

8th 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)*

43. Mr. PANCARCI (Turkey) said that the Turkish delegation, like many other delegations, was uncertain about the need to maintain article 6; after having heard the Soviet representative, however, it was convinced of the general importance of such a clause. The Soviet amendment clarified the idea expressed by the Commission in article 6 and should be studied closely.

44. The CHAIRMAN pointed out that the representatives of Swaziland and Egypt had suggested that the Soviet oral proposal, instead of replacing article 6, could be used to supplement either article 6 or article 13. In view of the procedural consequences such proposals could have, the Chairman invited the Soviet delegation to express its views on the matter.

45. Mr. USHAKOV (Union of Soviet Socialist Republics) said that the purpose of his proposal was not to supplement article 6 but to replace it, inasmuch as it did not differ from it in substance. Nor could his proposal be used to supplement article 13 as the latter, although dealing with a principle related to that contained in his proposal, referred to a different matter. There could be no question of merging into one article proposals dealing with two distinct situations, particularly as drafting the title of the new article would cause problems. It would also be difficult to know where to insert such an article, whereas articles 6 and 13 fitted smoothly into the draft. The Soviet proposal was intended to improve the wording of article 6 by aligning in with the text of article 13, but without affecting the substantive provisions.

The meeting rose at 12.55 p.m.

8th MEETING

Tuesday, 12 April 1977, at 3.25 p.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 [Item 11 of the agenda] (continued)

ARTICLE 5 (Obligations imposed by international law independently of a treaty)¹ (resumed from the 6th meeting)

¹ For the amendment submitted to article 5, see 4th meeting, foot-note 6; for earlier discussion of article 5, see 4th to 6th meetings.

1. Mr. MIRCEA (Romania), introducing the Romanian amendment to article 5 (A/CONF.80/C.1/L.4), said that although the International Law Commission had based the draft article on article 43 of the Vienna Convention on the Law of Treaties, his delegation believed that the case of States, especially the successor State, involved in a succession was not the same as that of States which sought to terminate a treaty. In the case of succession, a newly independent State could invoke the "clean slate" principle, and, as the comments of other delegations showed, it was a fairly general practice not to refer to the imposition of obligations on States which were entering the international arena for the first time. With that in mind, his delegation had attempted to lighten the text of article 5 of the draft by modifying the second part of the sentence. The amendment did not entail any great change in the substance of the article and its wording could, no doubt, be improved by the Drafting Committee.

2. Mr. SHAHABUDEEN (Guyana) said that article 5, as drafted by the international Law Commission, was useful and should be retained in substance. He had some comments to make on it, however, which also applied to the amendment submitted by Romania.

3. The International Law Commission had modelled article 5 on article 43 of the Vienna Convention on the Law of Treaties, but that provision was addressed to States which were parties to both the Vienna Convention and a treaty which had been terminated, whereas comments made in the Committee showed that draft article 5 was seen as being directed, perhaps chiefly, to newly independent States, which, by definition, could not yet be parties either to the proposed convention or to any treaty concluded by the predecessor State. In view of that difference there was a need to reconsider the formulation of article 5, and especially its legislative aspect in regard to newly independent States.

4. A distinction should be made between the provisions of the convention, considered as a convention, and the principles of international law which those provisions embodied as currently existing, or of which they might ultimately succeed in promoting general acceptance. The provisions of the convention could not apply to States which were not parties to that instrument and it might, therefore, be more appropriate to provide, in article 5, that the question whether or not a treaty was in force for a State would turn not on "the application of the present articles", but on the "application of the principles embodied in the present articles" or words to that effect, as in article 7.

5. The basic principle stated in article 5 would apply to States which were not parties to the convention by virtue of the fact that it was a generally accepted principle of international law. That being so, it might be best to replace the word "shall" by the word

“does”, in order to avoid the impression that the Conference was seeking to establish a new rule and to apply it to such States irrespective of their consent. Precedents for such a change were to be found in the wording of article 8, paragraph 1, and article 9, paragraph 1.

6. Mr. MUSEUX (France) said that the doubts he had earlier expressed concerning the usefulness of article 5 would be entirely dispelled if the Drafting Committee would align the French version of the article with the English text, by replacing the phrase “*il est soumis*” by the words “*il serait soumis*”.

7. Mr. EUSTATHIADES (Greece) asked whether it would not be more appropriate to align the English with the French text. As it stood, the French version of article 5 was the more categorical.

8. Mr. YASSEEN (United Arab Emirates), speaking as Chairman of the Drafting Committee, said that the point raised by the representative of France was not a mere drafting matter and should be settled in the Committee of the Whole.

9. Mr. MUSEUX (France) said he remained convinced that the matter he had raised was one for the Drafting Committee. He observed that there was identity between the French and English versions of article 3, subparagraph (a), in which wording similar to that in article 5 appeared in a similar context.

10. Sir Francis VALLAT (Expert Consultant) explained that, in each language, the text of article 5 had been modelled on that of article 43 of the Vienna Convention on the Law of Treaties. In his view, there was no difference between the meanings of the English and French versions of the article.

11. Mr. MUSEUX (France) reiterated his surprise at the fact that different moods were employed in article 3, subparagraph (a), and article 5. Was that difference due to an error of drafting or some substantive reason?

12. Sir Ian SINCLAIR (United Kingdom), speaking as a former member of the Drafting Committee for the Vienna Convention on the Law of Treaties, said it was possible that the discrepancy noted by the representative of France was due to a lapse by that Committee. In his view, the issue could be settled by the Drafting Committee of the present Conference in the light of the similar expressions used in both articles 3 and 5.

13. Mr. YASSEEN (United Arab Emirates), speaking as Chairman of the Drafting Committee, said he still believed that the difference in question corresponded to a substantive difference between the two articles. But the Committee of the Whole would nevertheless be able to refer the question to the Drafting Committee for its consideration.

14. Mr. SAHRAOUI (Algeria) said that there was not only a difference in the wording between the French and English versions of article 5, but also a difference in substance between article 3, subparagraph (a), and article 5. The use of the conditional in both language versions of article 3, subparagraph (a), implied that a State would have a greater freedom of choice in matters to which that provision referred than it would under article 5. A solution must be found to the problems of both the drafting and the substantive differences.

15. Mr. MARESCA (Italy) stressed that, while it might be acceptable to use the conditional in English, it was essential to employ the indicative mood in French in both article 3 and article 5, because a legal obligation either was or was not in force for a State.

16. Sir Ian SINCLAIR (United Kingdom) reiterated his belief that the problem of the difference between the French and English versions of draft article 5 was essentially linguistic. However, the Drafting Committee might be asked to consider it in all its ramifications, comparing the various language versions of draft article 5 with article 43 of the Vienna Convention on the Law of Treaties and those of draft article 3, subparagraph (a) with the corresponding provision of the Vienna Convention.

17. Mr. MIRCEA (Romania) said that if the Drafting Committee was to be entrusted with the discussion of matters of substance, he also wished it to discuss, as a drafting suggestion, the amendment proposed by his delegation, taking into account the comments made by the representative of Guyana.

18. The CHAIRMAN said that, if there was no objection, he would take it that the Committee provisionally adopted article 5 and agreed to refer it to the Drafting Committee for consideration in the light of the comments made at the present meeting.

*It was so decided.*²

ARTICLE 6 (Cases of succession of States covered by the present articles) (*continued*)³

19. The CHAIRMAN said that the delegation of Australia had withdrawn its amendment to draft article 6 (A/CONF.80/C.1/L.3).

20. Mr. AMLIE (Norway) said it had been stated that the basic assumption for the Committee's work was that the future convention must apply to the effects of a succession of States which was a legal and lawful occurrence and not to the effects of a succession which occurred in violation of international law.

² For resumption of the discussion of article 5, see 31st meeting, paras. 4-5.

³ For the amendments submitted to article 6, see 6th meeting, foot-note 3.

It had also been stated that, as a consequence of that assumption, draft article 6 was redundant and might just as well be deleted.

21. His delegation agreed with the assumption that the future convention must apply only to successions of States which were lawful, but it could not agree with those delegations which had suggested that article 6 could be deleted, because the preparation of the draft convention was not merely a juridical and academic exercise; it had political and emotional overtones which involved national sensitivities. Moreover, draft article 6 should not be relegated to a place in the preamble or in the definitions; it definitely deserved a place in the body of the future convention.

22. It was therefore necessary to decide how to formulate the principle of draft article 6. Several alternatives had been submitted, in the basic text prepared by the international Law Commission and the amendments submitted by Romania (A/CONF.80/C.1/L.5), Ethiopia (A/CONF.80/C.1/L.6) and the Soviet Union (A/CONF.80/C.1/L.8). His delegation could not accept the Romanian amendment, which diluted the substance of the article. There was nothing to be gained by referring to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)), and the reference to "other international instruments" might give rise to conflicting interpretations.

23. The Ethiopian amendment expressed the same idea as the International Law Commission's text, but in stronger terms and embodied an important drafting change. It should therefore be voted on in the Committee and not automatically referred to the Drafting Committee.

24. The amendment submitted by the Soviet Union should definitely have a place in the future convention, but it could not replace article 6. He hoped that the Soviet delegation would be able to agree that its amendment should either be combined with the International Law Commission's text, or be added to the draft as a new article. If the Soviet delegation could not agree to either of those two suggestions, his delegation would propose a subamendment to the Soviet amendment.

25. Mr. MEISSNER (German Democratic Republic) said that his delegation supported the amendment submitted by the Soviet Union and agreed with what the representative of Austria had said,⁴ namely, that State succession was a phenomenon which must be distinguished from the effects following from it. The Soviet amendment was fully in keeping with the definition in article 2, paragraph 1, subparagraph (b), and

there was nothing to prevent the principle of draft article 6 from being included in the preamble of the future convention.

26. Mr. MARESCA (Italy) said that his delegation had serious doubts about accepting draft article 6, because any succession of States resulting from the emergence of a new State was an undeniable historical fact which had legal consequences in international law, and there were no legal rules governing the legitimacy of the emergence of a State or a succession of States.

27. His delegation had given careful consideration to the proposed amendments to draft article 6. The Ethiopian amendment merely expressed in negative form what had been positively expressed in draft article 6. The Romanian amendment had the advantage of avoiding the use of the words "in conformity with international law", but it contained a reference to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which was not, and could not be considered as, a source of international law. Furthermore, the words "in other international instruments", in the Romanian amendment, looked to the future, and a reference to such instruments would only lead to difficulties and conflicting interpretations. His delegation therefore had serious reservations concerning the Romanian amendment.

28. The intellectual approach adopted in the amendment submitted by the Soviet Union was entirely different from that adopted in the International Law Commission's draft article 6, which laid down rather vague and unconvincing legal rules. The wording of the Soviet amendment clearly expressed the idea that the emergence of a new State, whether legitimate or not, was a fact which could not be denied. That principle was closely related to the principle stated in article 13 relating to the validity of treaties. And if it was true that nothing in the present articles should be considered as "prejudicing in any respect any question relating to the validity of a treaty", it was also true that nothing in those articles should be considered as "prejudicing in any respect any question relating to the validity of a succession of States".

29. The purpose of the future convention was not to decide whether a succession of States was valid or not, and the Committee must bear that fact in mind when it decided how draft article 6 was to be worded.

30. Mr. MUPENDA (Zaire) said his delegation was of the opinion that draft article 6 should be adopted as it stood. He could not support the amendment submitted by the Soviet Union, which failed to take account of the need to ensure respect for the rules of international law and the principles of the United Nations Charter and contained the same subjective elements which had prevented his delegation and most other delegations from supporting the amend-

⁴ See above, 7th meeting, para. 42.

ment submitted and subsequently withdrawn by Australia.

31. He noted that the Soviet amendment referred to the question of the validity of a succession of States, which might give rise to problems concerning the legitimacy of a State. His delegation believed that the validity of a treaty was a matter of concern mainly to the States parties to the treaty in question, whereas the validity of a succession of States was closely related to the sovereignty of States, which were free to recognize a succession that occurred in violation of international law and of the basic principles embodied in the Charter of the United Nations.

32. His delegation would therefore support the amendment submitted by Ethiopia, which closely resembled the International Law Commission's text and should be given careful consideration by the Drafting Committee.

33. Mr. NAKAGAWA (Japan) said his delegation shared the concern expressed by a number of other delegations that the inclusion of draft article 6 in the future convention might involve an element of subjective judgment regarding the applicability of the draft articles to particular cases of succession of States, as defined in article 2, paragraph 1, subparagraph (b). It also agreed with the Soviet delegation that the principle to be expressed in article 6 was not that of the lawfulness or unlawfulness of a succession of States, but, rather, that of the effects of a succession. The delegation of Japan nevertheless believed that the idea expressed in article 6 was worth retaining, and it could accept the International Law Commission's text as it stood.

34. The amendment submitted by Ethiopia contained a useful drafting suggestion and should be referred to the Drafting Committee. The Romanian amendment complicated the issue by diluting the reference to the principles of international law and by adding a reference to "other international instruments". With regard to the Soviet amendment, his delegation considered that it changed the purpose of draft article 6, because it referred to the "validity of a succession of States"—a new concept which could give rise to conflicting interpretations and confusion. It would be better to refer to the legality of a succession of States, rather than to its validity. Consequently, his delegation could not agree that the Soviet amendment should replace draft article 6. It might, however, be combined with the International Law Commission's text to provide the basis for a compromise solution which would be acceptable to all delegations.

35. Mr. DOH (Ivory Coast) said that draft article 6 related to successions of States which occurred in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations. Hence it did not apply to situations resulting from the use of force,

such as cases of aggression, the occupation of territories and unilateral declarations contrary to the principles of *jus cogens*.

36. The amendment submitted by the Soviet Union failed to express the idea of the objective legitimacy of a succession of States and to make a distinction between a succession occurring in conformity with international law and a succession occurring in violation of international law. Consequently, his delegation could not support the Soviet amendment, to which it formally proposed the following subamendment:

Nothing in the present articles shall be considered as prejudicing in any respect any questions relating to the validity of a legitimate succession of States occurring in conformity with the principles of international law and the Charter of the United Nations as such.

37. That proposed subamendment would cover the amendments submitted by Romania and Ethiopia, both of which took account of the principles of international law and the principles embodied in the Charter of the United Nations. If the Soviet Union could not agree to refer to those principles in its amendment, his delegation would support the text of draft article 6.

38. Mr. ESTRADA-OYUELA (Argentina) commended the constructive attitude shown by the Australian delegation in withdrawing its amendment.

39. A number of speakers had already expressed the view that the Soviet Union amendment did not deal with the subject-matter of draft article 6. The Soviet representative's explanation that it had been modelled on article 13 tended to substantiate that view and in fact both texts referred to matters it was desired to exclude from the future convention, namely, the validity of treaties and the validity of a succession of States. The Soviet representative had pointed out that article 1 provided that the draft articles applied to the effects of a succession of States; however, his amendment said nothing about the effects of a succession: it merely stated that the future convention should not prejudice any question relating to the validity of a succession.

40. Although it might well be desirable to include such a principle in the draft articles, it was clear that the Soviet Union amendment was not a satisfactory substitute for the International Law Commission's draft of article 6, which was intended to limit the application of the future convention to the effects of a succession of States occurring in conformity with international law and to preclude its application to any succession violating that law. The argument that the Conference was engaged in drafting provisions concerning lawful successions did not obviate the need for such an article, since it was generally held that acts violating international law required provisions to deal with their effects. Article 6 constituted a sanction in the form of the non-application of the future

convention. He did not think the Conference should be prevented, on procedural grounds, from ascertaining whether there was support for the suggestion that the Soviet text should be considered as an addition to the draft articles rather than an amendment of article 6.

41. With regard to the other proposals, he did not consider that the subamendment proposed by the Ivory Coast was a useful addition to the present draft of article 6 and since the Romanian amendment said nothing about a succession of States occurring in violation of international law, it did not solve the problem. The Ethiopian amendment, which was close to the original International Law Commission's draft, had some advantages of style which should be considered by the Drafting Committee.

42. Mr. SHAHABUDEEN (Guyana) said that the Romanian amendment had the disadvantage that the phrase "other international instruments" introduced uncertain criteria for determining the validity of a succession of States.

43. The approach adopted in the Soviet Union amendment left open the question whether the future convention would be applicable in the case of an invalid succession of States—a matter which was dealt with in draft article 6. It might be inferred by a process of deduction from other provisions that the intention was that the future convention should not apply to cases of invalid succession, but any reference to the question of validity made it necessary to include an explicit ruling in the text. He did not consider that the parallel with article 13 sufficed to outweigh the disadvantages of the Soviet Union proposal, to which he preferred the International Law Commission's.

44. Although the Ethiopian amendment was essentially a variant of the text of the draft, it had the merit, by virtue of its negative formulation, of laying stress on the exclusion from the application of the future convention of successions of States occurring in violation of international law. That amendment should be referred to the Drafting Committee.

45. Mr. JELIĆ (Yugoslavia) said that he had already spoken in favour of draft article 6. He could support the Soviet Union amendment, if, as had been suggested, it appeared as a complement to article 6 or article 13 or as a new independent article; but he could not accept it as a replacement of the present article 6, since it did not deal with the same subject-matter.

46. Mr. HELLNERS (Sweden) said that the discussion had confirmed him in the view that the text of draft article 6 was to be preferred; the amendments did not offer any more clear-cut formula.

47. The Ethiopian amendment had the doubtful advantage of transposing the formulation into the negative; the phrase "in violation of international law",

however, still retained the imprecision which had been criticized in the phrase "in conformity with international law", used in the draft. He would not object to the Ethiopian text being referred to the Drafting Committee.

48. The Romanian amendment had merit in so far as it followed the layout of the original International Law Commission draft, but it added further imprecision.

49. It had already been pointed out that the Soviet Union amendment did not deal with the same subject-matter as draft article 6, although it had some bearing on it. Like other speakers, he could accept both the draft article and the Soviet Union amendment, but he could not support the latter as a replacement for draft article 6.

50. Mr. HASSAN (Egypt) said that the Soviet Union amendment contained two proposals: first, to replace the present draft article 6, which meant the deletion of that article, and second, to introduce a new principle regarding the validity of a succession of States, which was not related to the subject-matter of draft article 6. In his view, a vote should be taken on the proposal to delete the present draft article 6 and the proposal concerning the validity of a succession of States should be considered in conjunction with article 13.

51. He agreed with other speakers that the Romanian amendment weakened the principle stated in draft article 6 and that the Ethiopian amendment, which did not markedly differ from the International Law Commission's text, should be referred to the Drafting Committee.

52. The CHAIRMAN observed that the Soviet Union amendment had not been submitted as a complement to article 6 or to article 13: it proposed a text to replace draft article 6, which must necessarily entail its deletion. Hence a vote could not be taken on the issue of deleting article 6 unless a subamendment was proposed to the Soviet Union amendment.

53. Mr. ARIFF (Malaysia) said that, as his delegation saw it, the intention in article 6 was to confine the future convention to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles embodied in the Charter. His delegation fully supported that intention, but it considered that the effects referred to in the present text should either be defined—in article 2, for example—or not mentioned at all.

54. The Romanian amendment was an attempt to clarify the reference to international law. The Ethiopian amendment, which used the words "in violation of" instead of "in conformity with", also aimed at greater clarity. In his view, however, neither text would solve the problem of deciding whether an

event had violated or conformed with international law.

55. The Soviet Union amendment introduced a new element. If that text replaced draft article 6, the article as reworded could no longer be applied to questions of validity once a succession of States had become a *fait accompli*; for whereas draft article 6 referred to the application of the present articles, the Soviet amendment spoke of a succession of States as such. The Malaysian delegation thought that the Soviet text could indeed form part of article 6, the present text of which could perhaps be extended by wording to the effect that the present articles did not prejudice in any respect any question relating to the validity of a succession of States as such. However, his delegation could not agree to the adoption of the Soviet amendment as a replacement for draft article 6.

56. Mr. MANGAL (Afghanistan) said his delegation had thought that the draft of article 6 as it stood was deemed acceptable by consensus. However, several amendments had now been proposed, and his delegation felt bound to express its views on them.

57. His delegation fully supported the text of the Soviet Union amendment, since it could add to draft article 6 by incorporating in it a meaning not adequately conveyed by the present text. But since that amendment dealt with subject-matter different from that of draft article 6, his delegation shared the view that great care was needed in considering the proposed place for the amendment.

58. His delegation would welcome a provision making the future convention applicable only to successions of States which had occurred in conformity with international law. The basis of article 6 should remain as it was, but the text of the Soviet amendment might well appear elsewhere in the draft convention.

59. The Romanian amendment would detract from the clarity of draft article 6, and, if adopted, could lead to difficulties in interpreting and applying the future convention. His delegation agreed with previous speakers that the principles of the United Nations Charter could not be categorized as fundamental and non-fundamental, as was done in the Romanian draft amendment. It also considered that the reference to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States would add nothing useful to the reference to the Charter. Moreover, the Declaration mentioned might not constitute a source of law applicable to situations of the sort seemingly envisaged in the Romanian amendment. The wording "and in other international instruments" could lead to ambiguities which would not arise out of the text of draft article 6 as it stood.

60. The amendment proposed by the Ethiopian

delegation seemed to be of a drafting nature. His delegation would have no objection if it was referred to the Drafting Committee, but still believed that the text of article 6 was clear enough as it stood.

61. Mr. SATTAR (Pakistan) said that his delegation would hope that the Soviet delegation could reconsider its amendment in the light of the comments and suggestions made by many speakers, particularly the constructive and creative suggestion that the Soviet amendment should add to rather than replace article 6. His own delegation saw no contradiction between draft article 6 as it stood and the Soviet amendment; but it could not agree to the replacement of the present text of article 6.

62. His remarks were intended not only as an appeal to the Soviet delegation, but also as an explanation of his vote if the Committee decided to take a decision by voting.

63. Mr. YACOUBA (Niger) said that his delegation supported the proposal that the Soviet draft amendment should be incorporated in the existing text of article 6 rather than replace it, since it was necessary that any unlawful succession of States should be declared null and void.

64. Mr. KEARNEY (United States of America) said that the Committee could either reject the Soviet amendment or adopt it to replace draft article 6, but could not have both texts together. The Soviet amendment was not complementary, but contradictory to article 6 as it stood. Even if it was desired to maintain a quasi-criminal sanction, as implied in the present text—and there was no definition of illegality—it would be illogical to append the wording contained in the Soviet amendment—in which the word "prejudicing" in the English version should perhaps have been "prejudging"—since the first part of the resultant text would still imply that certain acts contrary to international law could not be covered.

65. With regard to the Romanian draft amendment, his delegation considered that the text up to and including the words "in the Charter of the United Nations" was more useful than the text of draft article 6 as it stood, since the former avoided the implicit need to decide whether a particular event had been in violation of international law. The remainder of the text, however, particularly the words "and in other international instruments", was vague, and his delegation could not support its adoption.

66. The negative form of wording used in the Ethiopian amendment had the advantage of illustrating the punitive element in the present text of article 6. He reiterated his delegation's view that the text of that amendment would be better than the present text of article 6 if the wording after "in violation of" were simply "the principles of international law embodied in the Charter of the United Nations".

The meeting rose at 6 p.m.