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the rule of limited retroactivity was as such acceptable to the States participating in the Conference. The drafting of article 7 was another matter, which would to some extent depend on the final clauses.

49. His delegation agreed with the delegation of the Byelorussian SSR that the title of article 7 should be altered, but it did not consider the formula proposed by the Byelorussian delegation to be satisfactory. His delegation supported the suggestion made by the United Kingdom in its working paper and felt that they should be used as a basis for further work. It would also be willing to seek a solution along the lines indicated in the United States amendment, which pursued, by more radical means, the same objective as the United Kingdom by endeavouring to make the rule set forth in article 7 more flexible. The Cuban amendment was also designed to introduce greater flexibility into that article, but the solution which it envisaged to achieve that end would be difficult to apply in practice. The Malaysia amendment was of a purely drafting nature and did not seem essential.

50. Mr. WALKER (Barbados) said that he had difficulty in accepting article 7 as currently worded, since it did not appear to be relevant to States which had already attained independence. He was not happy with the words "except as may be otherwise agreed" at the end of the article, in that they did not specify by whom. He then raised the question whether it was intended that an agreement concluded outside the scope of the convention could activate a provision in the convention.

51. Concerning the amendments he said he could not support the amendment submitted by the Byelorussion SSR, as it appeared to have no relevance to States which had already attained independence, nor the Malaysian amendment, which he did not consider to be one of substance but rather of a drafting nature which did not alter the meaning of draft article 7. While understanding the concern which had prompted the Cuban amendment, he did not consider its form to be satisfactory. In contrast, he found merit in the United States amendment, the proposed title of which was satisfactory. He thought the amendment sought to clarify the expression "except as may be otherwise agreed". The amendment incorporated both instances of succession, namely succession after entry into force of the convention and succession prior to the entry into force of the convention. But he was not happy with the words, at the end of the amendment, "except when the status of the successor State in relation to the treaty has been resolved prior to the entry into force of these articles". It was his view that in those circumstances the question of succession would not arise at that point in time, as it would have already been settled.

52. Mr KATEKA (United Republic of Tanzania) agreed with the representative of India that article 7 should be deleted. He was, however, sympathetic towards the amendment submitted by Cuba, which enabled States that had attained their independence as a result of the decolonization process or the liberation struggle before the entry into force of the convention to utilize its provisions. He thought it fair to make an exception to the principle of non-retroactivity for such States, which had often found themselves in an unequal position vis-à-vis the colonial Power at the time of the succession of States and must therefore be given the opportunity to avail themselves of the provisions of the convention in order to correct the injustice to which they had been subject and to free themselves from colonial status.

53. He endorsed the title proposed in the United States amendment, but felt that that amendment made an unfair distinction by referring solely to the successor State. The successor State might have accepted an unjust situation, under pressure from the predecessor State, because of its eagerness to achieve its independence.

54. He would state his position on the working paper submitted by the United Kingdom during the consideration of the final clauses; however, he could already say that he had doubt concerning the usefulness of the proposals contained in that document. At the time of acceding to independence, most new States reserved their position with regard to a treaty by requesting a respite enabling them to accede to that treaty subsequently without any interruption occurring.

55. In conclusion, he said that he would prefer article 7 to be deleted; if, however, that article were to be retained, he would like the text to be amended along the lines of the Cuban amendment.

The meeting rose at 1.05 p.m.

10th MEETING

Wednesday, 13 April 1977, at 3.40 p.m.

Chairman: Mr. Riad (Egypt)

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

ARTICLE 7 (Non-retroactivity of the present articles) (*continued*)[1]

1. Mr. MANGAL (Afghanistan) said that his delegation supported the provisions of draft article 7. Al-

[1] For the amendments submitted to article 7, see 9th meeting, footnote 4.

though non-retroactivity was a general principle of treaty law it should nevertheless be included in the present articles for a number of reasons, such as the recognized differences between the rules of the law of treaties and the principles of international law governing succession of States in respect of treaties, which were of a crucial and controversial nature.

2. Non-retroactivity should not, however, be so interpreted as to prejudice a State's position regarding the validity of the effects of a succession of States which occurred before the convention had entered into force; that applied particularly to colonial treaties, including those which established boundaries, and to successions of States involving the right to self-determination of peoples under colonial domination.

3. His delegation had no objection to the reference to agreements at the end of article 7, but it feared that the unlimited scope allowed for the application of that clause might cause difficulty and confusion, and possibly lead to the suppression of basic questions relating to the validity of the effects of a succession itself, when it occurred before the convention had entered into force. He considered that article 7 should guarantee the avoidance of such consequences.

4. His delegation was satisfied with the position of the article on non-retroactivity in the draft; its subject-matter logically followed that of draft article 6.

5. Mr. SHAHABUDDEEN (Guyana) said that the biggest theoretical and practical problem in drafting the future convention was that although it was intended to apply to the effects of a succession of States from the date of the succession, it might be difficult to apply where the successor State was a new State, which could, *ex hypothesi* only accede to the convention after the date of the succession. For under article 28 of the Vienna Convention on the Law of Treaties, the future convention would not ordinarily apply to facts occurring before the date of the new State's accession to it. The provision in article 22 of the draft for certain treaties to apply to a newly independent State from the date of independence probably did not extend to the future convention itself, and attempts to fill the gap by means of article 7 seemed to him circuitous and unsafe.

6. It seemed, from paragraph (3) of the International Law Commission's commentary (A/CONF.80/4, pp. 23-24), that the intention was to reverse the situation in the case of States achieving independence after the general entry into force of the convention, so that it would apply to successions which occurred when States became independent, even though they would be acceding to the convention after the succession had occurred. To that extent, therefore, the intention in draft article 7 was to displace the ordinary operation of article 28 of the Vienna Convention and permit partial retroactivity. Since, under the said article 28, the new convention would ordinarily operate only prospectively, draft article 7 would in effect provide, not for non-retroactivity, but for retroactivity in certain cases; hence, as the United Kingdom representative had observed,[2] the title of the article was a misnomer.

7. The simple reference to a succession of States occurring after entry into force of the articles seemed to imply displacement of the operation of the general rule in article 28 of the 1969 Vienna Convention, in regard to any succession of States occurring after the new convention entered into force, even if the succession took place before the successor State acceded to the convention. As presently worded, however, the draft articles could consistently apply, in the case of a newly independent State, to any succession in which it might become involved after the convention had entered into force and after it had become independent and acceded to the convention; for instance to subsequent acquisitions or transfers of territory to or from another State. It was thus possible to fulfil the reference in the draft to a succession of States occurring "after the entry into force of these articles" and otherwise give reasonable effect to draft article 7 without having to curtail the application of article 28 of the Vienna Convention. The implications in the draft might thus be insufficient to restrain the seemingly fundamental provisions of the latter article from preventing the new convention from reaching a succession of States occurring upon independence and before the new State acceded to the convention.

8. The words "as may be otherwise agreed" were presumably intended to allow the convention to apply either from a date prior to that on which it would ordinarily enter into force, or, in the case of a new State emerging after the convention's entry into force, from a date other than that of its emergence. However, since a new State was faced with a multitude of treaties, perhaps a safer method of providing for agreement on the date of application of a multilateral convention would be to deal specifically with the matter, probably in the articles on entry into force of the convention. It could be stated explicitly that where a State achieved independence after the convention entered into force, when it became a party the convention would apply from the date of independence; where independence was achieved before the convention entered into force an option to apply the convention from the date of independence might be given, such option to be exercised at the time of becoming a party to the convention. The problem was to decide whether States achieving independence before the convention was opened for signature must necessarily be excluded.

9. With regard to the amendments submitted, that of the Byelorussian SSR (A/CONF.80/C.1/L.1) seemed to be a shortened version of the text of article 7 of the draft; it did not settle the question of

[2] See above, 9th meeting, para. 21.

partial retroactivity by implication. It deleted the concluding words of the text of the draft article, which his delegation agreed were inadequate, but substituted nothing to help newly independent States. The Malaysian amendment (A/CONF.80/C.1/L.7) was a verbal variation of the text of the draft, and his delegation's comments on that text were again applicable. His delegation appreciated the Cuban amendment (A/CONF.80/C.1/L.10) and the role it assigned to the decolonization process and the struggle for liberation. He wondered, however, whether what was being excepted from the text of the draft was the provision for partial retroactivity or the exclusion of the application of the convention to any succession of States occurring before the convention entered into force.

10. The United Kingdom working paper (A/CONF.80/C.1/L.9) contained much of interest to his delegation. Paragraph 1 of the annex seemed intended to apply to new States emerging after the date on which the convention was opened for signature, but the reference to "a succession of States" seemed to include previously existing States which thereafter acquired territory from another State; he was not sure whether that was the intention in the draft. Not every succession of States involved the emergence of a new State, and not every successor State was a new State. The reference in paragraph 2 to "its own succession" required definition. A newly independent State might, in the course of time, become a party to several successions of States, as the term was defined, other than that involved in its achievement of independence. He believed, too, that paragraph 5 of the United Kingdom draft might need a stipulation concerning the time with effect from which a provisional application of the convention would commence; it would presumably be the date of the declaration of provisional application, but the time ought to be specified.

11. His delegation saw much value in the United States amendment (A/CONF.80/C.1/L.16), but thought that certain clarifications were necessary. Subparagraph (*a*) failed to deal with the problem of partial retroactivity by implication, and he was not sure whether subparagraph (*b*) could apply to a succession occurring before the convention was opened for signature, as in the case of ex-colonial countries which had achieved independence in recent decades.

12. The CHAIRMAN said that since the Byelorussian SSR's amendment dealt only with the title of article 7 and did not affect the text itself, he would suggest that the Expert Consultant be invited to speak on the International Law Commission's drafting of that article.

13. Sir Francis VALLAT (Expert Consultant) said he thought he reflected the majority view of the International Law Commission in believing a text on the lines of the present draft article 7 to be a necessary part of the future convention, whatever form the provision might take, if the effect of the rule of non-retroactivity contained in article 28 of the Vienna Convention on the Law of Treaties was to be avoided.

14. Referring to the work of the International Law Commission, he drew attention to the comments of the then Chairman of the Drafting Committee,[3] to the effect that the last phrase of article 28 of the Vienna Convention referred not to the entry into force of a treaty as such, but to its entry into force with respect to each party, and that if the international instrument resulting from the draft articles contained no provisions on retroactivity, the said article 28 would apply to it, so that the whole of part II, concerning newly independent States, would be completely inoperative. Although his own original view had been that the text of article 7 (article 6*bis* at that time) was unnecessary, he now believed, for the reasons set out in paragraphs 42 to 45 of the same summary record, that such an article would be necessary and that consideration would also have to be given to the introduction of some machinery for accession by new States to the instrument that would result from the draft articles.

15. His remarks were, of course, confined to the legal connotations, which it was essential that the Conference should grasp, although he was well aware that there were political aspects which many delegations rightly had in mind.

16. Mr. MARESCA (Italy) observed that, as in internal law, there was a need in the codification of international law not only for rules which legislated *pro futuro,* but also for transitional provisions dealing with circumstances arising shortly before those rules came into force. Article 7 as proposed by the International Law Commission took account of that need by stating, first, that the articles would apply only in respect of a succession of States which occurred after their entry into force and, secondly, that they would so apply "except as may be otherwise agreed". While he was sure everyone would agree that the convention should not legislate solely for the future, he wondered whether the provision made in article 7 for situations arising *medio tempore* would prove sufficient in practice, and whether it might not deprive the whole convention of all meaning. For those reasons, he considered that the text of article 7 should be changed.

17. Of the amendments submitted to the article, he found the Byelorussian SSR's proposal too straightforward to provide the flexibility which was required. The proposal submitted by Malaysia was essentially a drafting amendment and might well be taken into account by the Drafting Committee. The Cuban amendment had the merit of stating clearly that there was at least one category of States to which the

[3] *Yearbook of the International Law Commission, 1974,* vol. I, p. 193, 1285th meeting, paras. 20-21.

principle of non-retroactivity would not apply. The interests of newly independent States had, however, been provided for at other points in the draft, and the language of the amendment was such as to create a danger of political disputes.

18. It was the United States amendment which his delegation found the most attractive, for it recognized that there were situations which arose *medio tempore* and provided a clear rule to deal with them. His delegation considered the second most appropriate amendment to be that contained in the working paper submitted by the United Kingdom, which was entirely compatible with the principle of non-retroactivity and sought to place transitional rules in their natural position in the final clauses of the convention.

19. Mr. SETTE CÂMARA (Brazil) observed that the International Law Commission had originally intended the present article 7 as a follow-up to the provisions of article 6; and that article 7, which the Commission had adopted only by a small majority, embodied elements of articles 4 and 28 of the Vienna Convention on the Law of Treaties. Some members of the Commission had considered the inclusion of article 7 undesirable, because non-retroactivity was a general principle of the law relating to treaties and was duly reflected in article 28 of the Vienna Convention, while others had been of the opinion that its inclusion would cause newly independent States to view the entire draft with some scepticism, since it did not conform to their current interests.

20. Article 7 departed substantially from article 28 of the Vienna Convention on the Law of Treaties by providing that the draft articles would apply only in respect of a succession of States which occurred after their own entry into force; whereas article 28 of the Vienna Convention provided that there would be non-retroactivity with regard to situations which no longer obtained on the entry into force of a treaty with respect to a particular party. That difference was very important, since a newly independent State might ratify an instrument after it had already been in force for some time, and in such a case article 7 could entail retroactivity of the instrument for that State for the entire period which the agreement had already been in force for other States.

21. The answers to the questions whether that was the result the International Law Commission had been seeking and whether it would be in the interests of third States or of newly independent States, would vary from case to case, and it was for that reason that his delegation was uncertain of the wisdom of the provision proposed. There was, however, a need for some degree of retroactivity of the convention in some respects, for it had to be admitted that its entry into force might take so long that the entire process of decolonization would be completed without the newly independent States having been able to take advantage of the help offered to them in part III. His delegation had no misgivings about the general principle of the non-retroactivity of treaties as laid down in the Vienna Convention, but it shared the general opposition to article 7 in its present form.

22. The amendment submitted by the Byelorussian SSR was very clear, but caused his delegation some concern because it related only to the title of the article, though it sounded very much like a substantive provision. Perhaps that problem could be solved by the Drafting Committee. The amendment submitted by Malaysia, which was most ingenious, mainly affected the drafting of the article and could be sent to the Drafting Committee. The proposal put forward by Cuba was very clear, but it perhaps provided for too rigid an exception, which might not always be in the interests of the newly independent States it sought to help.

23. The Working Paper submitted by the United Kingdom was a very elaborate and important document, but, as its authors had said, it was intended for careful study in connexion with the final clauses of the convention. With regard to article X, proposed in the annex to the working paper, his delegation feared that the authorization, in paragraph 1, of the expression of consent solely by signature would raise problems in States where the ratification of international agreements was required by the Constitution. It also had misgivings concerning the declarations mentioned in paragraph 2 of the proposed article, which it seemed would be similar to the non-binding unilateral declarations mentioned in article 9 of the convention.

24. While it had some reservations concerning the actual wording of the United States amendment, his delegation considered that the proposal had many positive elements and constituted a possible key to the solution of the problem of ensuring an appropriate degree of retroactivity of the convention.

25. Mr. SEPÚLVEDA (Mexico) observed that his delegation had already declared itself in favour of the deletion of article 7, because of the difficulties it raised. But in the event of such deletion it would not be sufficient merely to apply the provisions of article 28 of the Vienna Convention on the Law of Treaties, since that would not provide the help to newly independent States which was the main object of the convention. It was necessary to find ways of making the convention operational before the requisite number of ratifications had been received, for that might well take many years and it would not be right to apply to States which came into being during that period a régime less favourable than that which would apply thereafter.

26. He suggested that the Committee might consider a few cases which illustrated the need to establish such a transitional régime. One was the case of a newly independent State which did not yet benefit from the treaties concluded by the predecessor State,

perhaps because it did not know of the existence of such treaties; another was the case of States which achieved independence between the time when the draft convention was signed and the time when it entered into force; yet another was the case in which a State attained independence after the draft convention had entered into force, but the predecessor State was not a party to it or to the Vienna Convention on the Law of Treaties. Those were three important cases to which the future convention would not apply because of the lack of a transitional régime. The Committee should try to fill that gap by seeking exceptions to the traditional principle of non-retroactivity.

27. In view of the number of amendments which had been submitted, it was clear that draft article 7 was not fully satisfactory and that it gave rise to objections and reservations. The amendment submitted by the Byelorussian SSR expressed, in a rather brutal and rigid form, the principle of the non-retroactivity of treaties and was therefore unacceptable to his delegation. The Malaysian amendment also failed to provide a solution to the problem of exceptions to that principle. The Cuban amendment retained the International Law Commission's text of article 7 and proposed the addition of a new paragraph which did not take account of the need for the future convention to apply to newly independent States. The United States amendment was a very positive contribution which represented an improvement on the International Law Commission's text of article 7, but it did not meet all his delegation's concern about the need for a transitional régime. Lastly, the United Kingdom working paper was also a positive contribution, but it was out of place in the present discussion.

28. His delegation was not at all satisfied with draft article 7 or with the amendments proposed. It therefore urged that that draft article should be deleted.

29. Mr. KRISHNADASAN (Swaziland) said his delegation agreed with the Expert Consultant that it was necessary for the draft convention to contain some provision relating to the retroactivity or non-retroactivity of the draft articles. As he had said earlier,[4] his delegation was particularly concerned about draft article 7 because, if it was adopted as it stood, most of the future convention would not be applicable to States which were now independent, but which could well qualify as newly independent States, since they had achieved independence only in the last few years. He was therefore of the opinion that draft article 7 should either be deleted or changed entirely so as to be applicable not only to a succession of States occurring after the entry into force of the future convention, but also to a succession occurring before the entry into force of the convention.

30. He noted that although the words "except as may be otherwise agreed" provided some flexibility, they were not adequate and not sufficiently clear in the present context. Moreover, the words "after the entry into force of these articles", which provided for a selective measure of retroactivity, seemed to go against the general principle of non-retroactivity.

31. From what he had just stated, it was clear that the amendment submitted by the Byelorussian Soviet Socialist Republic was unacceptable to his delegation. It also found the Malaysian amendment unacceptable, even though it merely proposed drafting changes. His delegation could accept the substance of the Cuban amendment, but thought it should be worded in a different way, especially as the last part of the proposed new paragraph might not provide alternate solutions to any problems of State succession that might arise.

32. He would make a more detailed statement on the working paper submitted by the United Kingdom during the discussion on the final clauses of the draft; but at present he was of the opinion that the approach adopted was not sufficiently far-reaching and that the words "on or after the date on which the present convention is opened for signature", in paragraph 1 of article X, proposed in the working paper, would prevent the future convention from applying to a succession which occurred before the date on which the convention was opened for signature.

33. The amendment submitted by the United States of America appeared to meet most of his delegation's wishes in regard to draft article 7. It particularly appreciated the fact that that amendment began with the words "Except as may be otherwise agreed", thus reversing the normal approach to an article of that kind. It had no quarrel with subparagraph (*a*), but it agreed with the representative of Brazil that the word "status" and the words "successor State" in subparagraph (*b*) might give rise to some difficulties.

34. He hoped that the United States delegation would explain why it had confined the exception to the successor State, when in fact it should also apply to the other parties to the treaty in question. He also hoped that the United States delegation would explain the use of the words "has been resolved prior to the entry into force of these articles", in subparagraph (*b*), and indicate whether the exception provided for could be subsumed under the opening words "Except as may be otherwise agreed". Despite those difficulties, however, he shared the view of the representative of Brazil that the United States amendment seemed to be the key to a satisfactory solution to the problems raised by draft article 7.

35. Mr. MUDHO (Kenya) said that his delegation's position with regard to draft article 7 remained the same as the position it had described at the 1493rd meeting of the Sixth Committee during the

[4] See above, 5th meeting, para. 20.

twenty-ninth session of the General Assembly (see A/CONF.80/5, p. 124).

36. Thus, his delegation continued to be of the opinion that draft article 7 was unnecessary in view of the provisions of article 28 of the Vienna Convention on the Law of Treaties. It had, however, listened carefully to the arguments advanced by delegations which wished draft article 7 to be retained and which considered that article 28 of the Vienna Convention would not adequately cover the situations envisaged in draft article 7 because parties to the future convention might not necessarily also be parties to the Vienna Convention and because, even if both conventions were in force for the parties to a dispute or potential problem relating to a succession of States in respect of treaties, the future convention would not be available for most newly independent States, which would have come into being before the entry into force of the future convention. The advocates of draft article 7 had also argued that newly independent States might well wish to take advantage of the future convention in order to avoid the undesirable consequences of unequal treaties and that the draft articles should therefore provide for a certain amount of flexibility in retroactive application.

37. His delegation had tried to determine to what extent the text of article 7 prepared by the International Law Commission met those needs, and had come to the conclusion that it did not fulfil its purported purpose; first, because the effect of the saving clause referring to rules of international law to which a State would be subject independently of the draft convention was far from certain, since the practice of States with respect to succession was by no means uniform and, secondly, because the words "except as may be otherwise agreed" did not seem to lead anywhere at all. What remained of the article was already covered by article 28 of the Vienna Convention of the Law of Treaties.

38. His delegation had then tried to determine which of the proposed amendments would enable draft article 7 to fulfil its purpose. The amendment submitted by the Byelorussian SSR was unacceptable as it did not introduce any new elements. The Malaysian amendment really introduced only darfting changes and was therefore also unacceptable. His delegation had a great deal of sympathy for the Cuban amendment but regretted that it had the defects of retaining the text prepared by the International Law Commission and adding a new paragraph 2 which would probably create more problems than it solved. The amendment submitted by the United States of America had many merits and his delegation would have no difficulty in accepting the proposed title. As to the substance of that amendment, it would, however, welcome further clarifications concerning subparagraph (*b*). In particular, it wondered why the United States had decided to refer only to the "successor State" in that subparagraph. It also thought that the use of the word "resolved" might be ambiguous.

39. His delegation had not had time to give sufficient consideration to the working paper submitted by the United Kingdom. At first glance, however, it could see that the paper contained some useful elements and it would therefore reserve the right to comment on it later in the discussions.

40. Mr. DAMDINDORJ (Mongolia) said his delegation considered that draft article 7 was an extremely important part of the future convention, because it emphasized the sovereign right of newly independent States to determine their own status with regard to treaties which had entered into force before the entry into force of the future convention. Moreover, article 7, which was based on the "clean slate" principle, particularly with respect to international treaties and contractual obligations, was closely related to articles 5 and 6. Taken together, those three draft articles constituted a general clause of the future convention. His delegation therefore shared the view of the Expert Consultant and many other delegations that the arguments in favour of deleting draft article 7 were not convincing.

41. With regard to the amendments, his delegation supported the amendment submitted by the Byelorussion SSR, which proposed a new title for draft article 7. Although the Cuban amendment did not really affect the substance of article 7, it stressed the non-applicability of that article to States which had attained their independence as a result of the decolonization process or a liberation struggle before the entry into force of the future convention, and was therefore very useful.

42. His delegation would speak on the other amendments to draft article 7 later, if necessary.

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

43. Mr. ESTRADA-OYUELA (Argentina) said that there was no change in the position of his delegation in regard to article 7, which had already been explained in other fora by Argentina representatives. He was disposed to support the Mexican proposal that the article should be deleted.

44. One obstacle to the acceptance of article 7 was its present position: the International Law Commission had worked out a series of draft articles rather than a draft convention, and article 7 was not in its proper place. Another difficulty was that the draft article and all the amendments thereto referred to "entry into force" without making it clear whether they meant the general entry into force of the future convention or its entry into force for a particular State which became a party to it; the latter meaning would have immediate legal consequences. Another difficulty was the existence of article 28 of the Vienna Convention on the Law of Treaties.

45. The remarks of the Expert Consultant had clearly illustrated the problem of a principle which seemed to be both valid in general terms and difficult to apply in specific cases. The main point to consider was whether the provisions would work in practice and to what particular circumstances retroactivity or non-retroactivity would apply. The arguments about the definition of the term "date of succession of States" in article 2, paragraph 1, subparagraph (*e*) were relevant to draft article 7. It might, however, be useful to approach the question of retroactivity from another angle.

46. Article 28 of the Vienna Convention on the Law of Treaties laid down that the provisions of a treaty did not bind a party "in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty".[5] It might therefore be held that it was the continuation of the situation and not the date of succession which should be the determining factor, since it was generally recognized that some time must elapse before a newly independent State could sort out the treaty obligations it had inherited from the predecessor State. In that case, by using the concept of "situation" contained in article 28 of the Vienna Convention, it might be possible to reach a consensus on the application of the draft articles to an existing situation, irrespective of its date.

47. Mr. NAKAGAWA (Japan) said that article 7 was an important article dealing with a far from simple issue.

48. His delegation believed it essential to incorporate the principle of non-retroactivity in the convention in some form, so that the rules adopted would not call in question the effects of a State succession which had occurred in the past. The Conference was not engaged in a mere codification of existing law: although several articles, such as articles 11 and 12, largely reflected State practice and customary international law, in other cases the rules proposed differed from the practice of many States. If, therefore, the articles were applied retroactively, they might have the effect of destabilizing existing treaty relations which had been established on the basis of a concept of State succession different from that envisaged in the future convention.

49. The next question was how to formulate the principle of non-retroactivity in the draft articles. As had been pointed out in paragraph (3) of the International Law Commission's commentary to article 7, article 28 of the Vienna Convention on the Law of Treaties "would, if read literally, prevent the application of the articles to any successor State on the basis of its participation in the convention" (A/CONF.80/4, pp. 23-24), since such participation would inevitably come after its independence. In its draft of article 7, the International Law Commission had proposed the solution of partial retroactivity, namely, retroactivity to the date of entry into force of the articles.

50. His delegation appreciated the effort made by the International Law Commission to strike a balance between the need not to put in issue the effects of a past State succession and the need to enable a newly independent successor State to apply the future convention. However, it had some difficulty in accepting article 7 in its present form. For example, if a State which came into existence one month after the entry into force of the convention became a signatory to it 10 years later, it would theoretically be in a position to claim the right to apply a particular treaty retroactively on the basis of article 30 or article 33. Article 7 might, therefore, become a source of hindrance to the smooth application of the convention in cases where the principle of continuity was adopted in the draft. His delegation shared the hope expressed by the representative of the Federal Republic of Germany[6] that suitable provisions would be made in the final clauses to rectify that shortcoming of draft article 7.

51. With regard to the amendments, he considered that those submitted by the Byelorussian SSR and Malaysia should be referred to the Drafting Committee, as they were mainly drafting changes. The United States amendment opened the door too wide and would adversely affect the present balance of article 7. The same applied to the Cuban amendment. The working paper submitted by the United Kingdom was interesting, but he would defer his comments, since it related to the final clauses of the convention.

52. Mrs. BOKOR-SZEGÖ (Hungary) said that she was in favour of the present title of article 7 which corresponded to that of article 28 of the Vienna Convention on the Law of Treaties. However, she approved of the proposed Byelorussian amendment to the title, which should be referred to the Drafting Committee after the text had been harmonized in the different languages. In French, the present text did not read like a title.

53. She understood the desire of newly independent States that certain provisions of the future convention should apply to events which had occurred before its entry into force, since most successions of States had taken place during the process of decolonization. She hoped that they would find satisfaction in the fact that article 7, by referring to "international law independently of these articles", maintained all the customary law which had developed over the recent decades of decolonization, and which the future convention would serve to crystallize.

[5] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publications, Sales No. E.70.V.5), p. 293.

[6] See above, 9th meeting, para. 45.

54. Mr. LANG (Austria) said that he shared the desire expressed by the Expert Consultant that the work of the Conference should have immediate application to concrete cases, in order to serve the needs of the peoples the participants represented. Deletion of article 7 would only be a last resort.

55. The Byelorussian SSR's amendment, after the question of its form had been settled, should be referred to the Drafting Committee, together with the Malaysian amendment, which contained useful textual improvements. The Cuban amendment had the merit of focusing attention on the political implications of the article; he asked the Cuban representative whether the amendment applied also to the first part of draft article 7. The wording of the United States amendment reflected the thinking of the Conference as regards the title of article 7 but some imprecision in the last two lines of subparagraph (*b*) might cause difficulty. The proposals put forward by the United Kingdom in its working paper might provide a way out of the difficulties, which could probably be resolved only in the context of the final clauses of future convention.

56. The CHAIRMAN announced that the President of the Conference had requested him to set up an informal consultations group, open to all delegations, to find solutions to the problems raised by particular articles.

The meeting rose at 5.55 p.m.

11th MEETING

Thursday, 14 April 1977, at 11 a.m.

Chairman: Mr. RIAD (Egypt)

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 7 (Non-retroactivity of the present articles) (*continued*)[1]

1. Mr. NATHAN (Israel) said that he favoured retention of article 7. By stipulating that the convention under consideration applied only in respect of a succession of States which occurred after its entry into force, "*except as may be otherwise agreed*", the article excluded applicability to the convention of article 28 of the Vienna Convention on the Law of Treaties, which otherwise rendered it completely inoperative.

2. Since article 7 provided for the possibility of applying the convention retroactively, he proposed that the title "Non-retroactivity of the present articles" be replaced by another title more consistent with the contents of the article, such as "Applicability of the Convention". He considered that the Conference should avoid excessively rigid application of the rule of non-retroactivity, which would exclude many States from the scope of the convention.

3. The United Kingdom's proposal (A/CONF.80/C.1/L.9) should be examined very carefully and should be considered when the final clauses were taken up.

4. The relationship between article 7 and those provisions of the convention which governed the continuity of treaty relations, such as those in articles 10, 23, 28 and 30, should be made clear. He supported the suggestion of the representative of the Federal Republic of Germany[2] that a reasonable time limit should be established for accession to the convention after its entry into force so as to avoid problems that might be caused by tardy accessions occurring long after the date of the succession of States.

5. Mr. MEDEIROS (Bolivia) observed that, in the light of precedents, particularly articles 4 and 28 of the Vienna Convention on the Law of Treaties, the International Law Commission had deemed it appropriate to recall the principle of non-retroactivity in the draft convention under consideration. There were two aspects to the question: first, the principle of non-retroactivity applied only if the parties had not otherwise decided; and, secondly, it was important to find a solution that would be applicable during the interim period between the formation of a new State and the entry into force of the proposed convention. Although all delegations shared that point of view, they were not unanimous in thinking that a provision along those lines should be included in the convention; according to some, a reference to the general rule set forth in article 28 of the Vienna Convention on the Law of Treaties would suffice. His delegation considered that the importance of the principle of non-retroactivity and certain practical reasons justified a reference to it in the convention. Although connected to the Vienna Convention on the Law of Treaties, the convention on succession of States in respect of treaties should none the less be autonomous, particularly since it would be difficult to refer purely and simply to article 28 of the Convention on the Law of Treaties when article 73 of that Convention stipulated that the provisions of that Convention were not to prejudge "any question that may arise in regard to a treaty from a succession of States",[3] and the absence of a rule on non-retroactivity would be aggravated by the fact that it was impossible to apply

[1] For the amendments submitted to article 7, see 9th meeting, foot-note 4.

[2] See above, 9th meeting, para. 45.

[3] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.