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11th meeting of the Committee of the Whole

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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.

a provision of an instrument that had not yet entered into force. Furthermore, when codifying provisions on such a delicate question, account must be taken of all relevant problems, by providing for all possible situations and avoiding the need to refer a decision to another body.

6. Article 7 set forth a residuary rule and hence protected the existence of sources of law other than treaties. The wording could be improved; what he had in mind, in particular, was the United States' amendment (A/CONF.80/C.1/L.16), which seemed to have attracted the attention of the majority of delegations. With regard to the amendment to the title proposed by the United States delegation on the basis of the Convention on the Law of Treaties, he reminded members that in the latter Convention the corresponding title covered provisions that were much wider in scope than those of article 7; he would, therefore, prefer to retain the title proposed by the Commission. Moreover, the role played by the will of the parties was not clear in the United States' amendment, subparagraph (*b*) of which gave the impression that the convention applied in any case "in respect of a succession that occurred before" its entry into force, whereas the Commission's text protected the autonomy of the will of the parties and provided for possible recourse to other sources of international law. In that connexion, he had in mind, too, the working paper submitted by the United Kingdom delegation, which made application of the convention dependent upon a declaration by the new State and on the consent of other States to be bound by the convention. His delegation reserved the right to revert to that document in regard to the option given to new States.

7. In conclusion, he said that he was in favour of retaining the original article 7, which dealt with essential aspects of the problem of non-retroactivity.

8. Mr. YASSEEN (United Arab Emirates) said that the question of "interim" law (*droit intertemporel*) was one of the most delicate problems of law in general. Non-retroactivity of a legal rule was a general principle of law, but, even in domestic law, with some exceptions, it was not a mandatory principle. It was possible for the legislator to waive it. In international law, States could also waive that principle by agreement and provide that a treaty provision would be retroactive. It was not, therefore, a question of *jus cogens,* but of a question left to the judgment of the parties. However, unless otherwise agreed, a rule of treaty law could not be retroactive. That was an undisputed principle in international law, because general customary law provided for the non-retroactivity of rules of international law. It might be thought, therefore, that it was not necessary to include in the draft articles a rule on the scope of the convention in time, and some delegations had proposed the deletion of article 7. Deletion of that article would, however, entail application of the general principle of the non-retroactivity of treaty rules, and it was questionable whether such application was desirable in the case of a convention on the succession of States in respect of treaties. There had been many cases of succession of States in the past 20 years following the process of decolonization. If the general principle of non-retroactivity was accepted, the convention could never be applied to such cases of succession, and there would be very few successions of States in the future. The convention would therefore lose much of its importance if its application were limited to successions which occurred after its entry into force.

9. Moreover, although article 7 was related to article 6, it was nevertheless of general scope and could be regarded as independent. It would, therefore, certainly limit the scope of the convention in time. The only difference between the principle set forth in that article and the principle set forth in article 28 of the Vienna Convention on the Law of Treaties, which reflected customary law, lay in the fact that article 28 of the Convention on the Law of Treaties considered the entry into force of the treaty with regard to the State Party, whereas article 7 considered the entry into force of the Convention *in abstracto,* and not necessarily with regard to the State Party in question.

10. He thought that the solution proposed in article 7 was inadequate and that provision would have to be made for other solutions if newly independent States were to benefit from the experience accumulated in the convention. He appreciated the concern of the United Kingdom, which had submitted a working paper, to enable certain newly independent States to benefit more easily from the convention and he would revert to the proposals in that document when the final clauses were taken up.

11. The United States' amendment went quite far to meet the needs of application of the convention to certain successions of States. Subparagraph (*a*) set forth the general rule of non-retroactivity by stating that the present articles applied "in respect of a succession of States which has occurred after the entry into force of these articles". By stipulating that the present articles applied also "in respect of a succession that occurred before the entry into force of these articles, 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", subparagraph (*b*) did not waive the principle governing application of that general rule, because a situation which had not been resolved before the entry into force of the convention was one which, in due course, could come within the scope of the convention. In that case, there would be no retroactivity, but an immediate application, because the convention would apply only to situations which had not been resolved and which subsisted after its entry into force. Subparagraph (*b*) clearly specified that the convention did not apply when the situation had been resolved before its entry into force, because in that case there would be retroactivity, which would be contrary to the general rule.

12. It was questionable, however, whether a situation that had already been resolved before the convention's entry into force should be excluded from the scope of the convention. As the representative of the United Republic of Tanzania had very rightly pointed out,[4] the treaty situation of the successor State might have been resolved inequitably, particularly in the case of former colonial territories which, at the time of their accession to independence, had not been completely free to manifest their will. Situations already resolved should, therefore, be called in question again, if they had not been resolved equitably in accordance with acceptable principles. The convention could make it possible to review such *bona fide* cases, in the light of the new rules set forth in it. Provision would also have to be made, however, for new solutions to determine the legitimacy of regulations adopted prior to the entry into force of the convention.

13. The Cuban amendment (A/CONF.80/C.1/L.10) proposed a solution by excluding from application of the rule of non-retroactivity, "States which have attained their independence as a result of the decolonization process or the liberation struggle". While appreciating the concern of the Cuban delegation, he considered that the amendment was too general, because it related to article 7 as a whole, whereas it should relate only to the second part of that article which concerned non-retroactivity. That amendment might not, therefore, be in conformity with the interests of newly independent States, as some delegations had pointed out.

14. He concluded by saying that it was not possible to provide as a general rule for the convention to have retroactive effect for all newly independent States, as the Cuban amendment proposed, or to exclude the possibility of reviewing situations already resolved before the entry into force of the convention, as would the United States' amendment. In his opinion, therefore, a middle approach would have to be found, taking accound of the interests of newly independent States by making it possible to rectify unjust settlements adopted before the entry into force of the convention, while preserving the stability of international relations.

15. Mr. HELLNERS (Sweden) said that the principle of non-retroactivity, embodied in article 28 of the Vienna Convention on the Law of Treaties, raised a very serious problem in connexion with the present articles. If that principle were applied to the convention under consideration, newly independent States would never be bound by the convention and, therefore, a large part of the provisions drawn up by the International Law Commission would have no direct effect on the situations they were intended to cover. It would be difficult to maintain that, apart from the convention, rules already existed which were similar to those provided for in the draft articles, inasmuch as many delegations had pointed out that State practice was inconsistent. Furthermore, it was clear that in some cases the convention established new rules of international law and did not confine itself to codifying them. It could therefore be asked whether the degree of retroactivity provided for in article 7 was enough to give the convention real value for newly independent States, as very few States would accede to independence after its entry into force. A provision should perhaps be added to the draft articles enabling a newly independent State to apply the rules of the convention voluntarily in connexion with its own succession. Obviously such a mechanism should also take into account third States affected by the treaties in question.

16. He considered that the Byelorussian SSR amendment (A/CONF.80/C.1/L.1) concerned only the title of the article and simply made minor changes to the content of the Commission's text, which did not go far enough. The Cuban and United States amendments had certain features in common. Both tended to introduce a certain amount of retroactivity into the draft articles in order to make the convention a workable proposition. Nevertheless, it was obviously impossible to introduce rules whereby all old treaties of a certain type could be retroactively denounced.

17. He wondered whether, in that context, the purpose of the Cuban amendment was actually to enable all treaties concluded by a certain type of State from the 1940s onwards to be denounced or renegotiated, or only "unequal" treaties. In the latter case, he felt that the problems posed by such treaties should be solved at the political level and not be used to challenge situations which might be perfectly legitimate.

18. The United States' amendment offered certain drafting advantages and set forth clearly the issues involved. The general rule laid down in subparagraph (*b*), whereby the convention could only be applied retroactively to situations which had not been resolved before it entered into force, would certainly be very useful to States which, for one reason or another, had not yet settled their treaty status.

19. He appreciated the general remarks in the working paper submitted by the United Kingdom, but felt that the amount of retroactivity proposed in the paper was not enough to be really effective. He would therefore have some difficulty in accepting the United Kingdom's proposals, which for practical purposes appeared to be rather complicated.

20. He was opposed to the deletion of article 7, proposed by some delegations: as many other delegations had pointed out, that would entail application of article 28 of the Vienna Convention on the Law of Treaties. Although he did not share the view of the delegations which felt that, without a clause on retroactivity, States would be free to apply the con-

[4] See above, 9th meeting, para. 53.

vention retroactively, he did not understand why those delegations were opposed to having their opinion clearly embodied in the text of the convention and preferred to leave the question unresolved. It was certain that if no express provision were made, the majority of countries would assume, in accordance with international practice, that the convention did not have retroactive effect.

21. Mr. BEDJAOUI (Algeria) said that article 7 did not entirely meet the needs of the international community, particularly newly independent States; however, he did not support the conclusion reached by several delegations that it should therefore be deleted. If the provision were deleted, there would be a reversion to the customary law of the Convention on the Law of Treaties and the disadvantages of a situation deplored by a number of delegations would be exacerbated. Article 7 qualified the principle of non-retroactivity by safeguarding the self-determination of States and providing for the possible application of rules of customary international law to the succession of States. However, the provision needed to be improved. Since many conventions had remained a dead letter from not having entered into force, it would be wise to provide for a certain amount of retroactivity and to apply some instruments in advance. Furthermore, as the draft under consideration characterized a certain stage in the development of law, and as political decolonization would shortly be complete, deferment of the application of the convention's provisions until it had entered into force would deprive it of some of its importance for the international community. However, care must be taken not to pave the way for generalized retroactivity and to avoid making the convention applicable to State succession dating back to the nineteenth century, as that would create the same interpretative difficulties as might arise in connexion with article 6. A sound version of article 6 would facilitate the drafting of article 7 and vice versa.

22. The Algerian delegation believed that the idea expressed in article 7 should be maintained, that the title proposed by the United States should be adopted, after modification to take the time factor into account, and that the basic elements of the Cuban and United States amendments should be incorporated in the Commission's text. It shared the views of the representative of the United Arab Emirates concerning subparagraph (*b*) of the United States amendment. The Drafting Committee might be instructed to recast the article.

23. Mr. HASSAN (Egypt) supported the proposal that a working group on article 7 be set up, and reserved the right to express his views once the Committee had received a new version of the article.

24. Mr. SHAHABUDDEEN (Guyana) recalled that at the 10th meeting his delegation had made preliminary observations on the draft article under consideration;[5] he wished to state the conclusions it had reached. It agreed in principle on the need for a provision along the lines of article 7 in the convention, whether article 6 was maintained or not, as the convention would lose much of its importance if no exception to the principle of non-retroactivity was provided for. The Commission's version of article 7 however did not provide for adequate retroactivity and in any event the language used was not sufficiently clear to achieve the partial retroactivity that was intended. His delegation was aware that the Commission had used the reference to entry into force in the provision as a drafting device to achieve retroactivity, but it was possible to retain that expression and still be within the general rule in article 28 of the Vienna Convention on the Law of Treaties. These was no inevitable irreconcilability between the two provisions and therefore nothing in the draft article which necessarily implied an intention to displace article 28 of the Convention. The latter would therefore apply normally and exclude retroactivity altogether. Whether or not the Convention on the Law of Treaties had entered into force or certain States had signed it did not affect the issue, inasmuch as article 28 of that instrument represented the prevailing relevant international law. For that reason, and those it had adduced at the 10th meeting, his delegation was not entirely satisfied with the Commission's text. The alternatives were the amendments of the United States and the United Kingdom, both of which required some changes. Guyana was in favour of a provision stating, first, that a dependent territory acceding to independence before or after the convention was opened for signature could apply the convention to the effects of its own succession; secondly, that if it became party to the convention before the latter entered into force, it could opt to apply it provisionally to the effects of its succession, with effect from the date on which it exercised that option; thirdly, that in all other cases where such a State became party to the convention, the latter would apply to the effects of its succession, with effect from the date on which the convention entered into force in respect of that State; and, finally, providing for a clearly defined mechanism for that purpose.

25. The United States amendment met those basic requirements, but unfortunately lacked precision and did not provide for the desired mechanism. In particular, the wording of the exception provided for in subparagraph (*b*) should be made clearer. The United Kingdom amendment might appear technically complex, but it made provision for a workable mechanism which was clear and explicit. Its only defect was that it ruled out for States which had acceded to independence before the convention was opened to signature the possibility of applying the latter to the effects of their succession. Consequently, if it were necessary to choose between the United Kingdom's amendment and that of the United States, his delegation would opt for the latter. The United King-

[5] See above, 10th meeting, paras. 5-11.

dom's text could however easily be adopted if paragraph 1 were altered and drafting changes where made elsewhere, as his delegation had already mentioned. Thus modified, the article could be placed among the provisions relating to the entry into force of the convention. If the Committee could not adopt that alternative, the Guyanese delegation would support the United States amendment.

26. Mr. SANYAOLU (Nigeria) said that if all delegations agreed with the principle of non-retroactivity, it should be stipulated in one way or another in the convention. Consequently, his delegation could not agree to the deletion of article 7, which was based on articles 4 and 28 of the Convention on the Law of Treaties. However, it shared the views of several delegations that article 7, as drafted by the Commission, rightly provided for a certain measure of retroactivity so as to allow for the situation of newly independent States, but that did not mean that the title given to the article was incorrect.

27. As for the amendments to the draft article, neither the amendment by the Byelorussian SSR nor the amendment by Malaysia (A/CONF.80/C.1/L.7) introduced any new element and they could thus be referred to the Drafting Committee. The Cuban amendment strengthened the element of retroactivity contained in the draft article. The amendment by the United States, while having the merit of providing for successions occurring before the entry into force of the convention, disregarded the cases in which a certain amount of time elapsed between the date of the succession and the moment at which the successor State became party to the convention.

28. All in all, his delegation had no fundamental objection to article 7 as drafted by the International Law Commission and thought that the articles under consideration should supplement the provisions of the Convention on the Law of Treaties. The Committee should remember that, if it drafted a provision differing from the corresponding article of the Convention on the Law of Treaties, it would be running counter to the very purpose of codification.

29. Furthermore, his delegation shared the idea that article 7 should not cover successions of States which occurred before the entry into force of the convention and thought that the United Kingdom proposal might offer a solution within the framework of the final provisions. It was not yet, however, able to take up a position regarding that proposal and reserved the right to revert to the matter when the final provisions came to be considered.

30. Mr. DOH (Ivory Coast) said that any draft article should be examined from the standpoint of the need to establish a balance between the "clean slate" principle and the principle of legal continuity. Draft article 7 defined the scope of article 6, the effect of which should not be retroactive. The principle of non-retroactivity in the matter of treaties was a principle of general international law which was enshrined in article 28 of the Vienna Convention on the Law of Treaties. That principle was such an important one that it could not be passed over in silence in the future convention and, consequently, article 7 could not be deleted, whatever difficulties it might present for some delegations. Deletion of that provision would undoubtedly render the application of the future convention more difficult and would lead to hopelessly entangled situations.

31. The article under consideration was based on three ideas. It began with a general saving clause concerning retroactive application of the convention by virtue of principles of international law other than those embodied in the instrument itself. Such other principles could stem from regional customs or from the international practice of States, provided that they were not contrary to the general principles of international law. To deny such a fact would be to deprive the future convention of all object and fail to recognize the varied sources of international law. Moreover, in becoming an *ipso facto* member of the international community, a successor State could not regard the "clean slate" principle as being subject to no legitimate exceptions, since that could be contrary to the natural laws of the international community.

32. The second part of article 7 enshrined the principle of the non-retroactivity of the future convention with respect to a succession of States occurring prior to its entry into force. That idea had already been amply developed during the current discussion.

33. The third part of the article under consideration contained another essential saving clause in that it entered a reservation concerning the sovereign will of the successor State and of the other parties to the treaties in question. In his own delegation's view, any arrangment whereby the predecessor State and the other parties to a treaty agreed to apply it to the successor State, without the latter having expressly stated its approval, should be regarded as null and void. No tendentious interpretation of article 7 in that sense was possible.

34. From the point of view of balance between the "clean slate" principle and that of legal continuity, article 7 seemed to give precedence to the principle of continuity. Nevertheless, since there was no rule without an exception, the article proposed by the International Law Commission was, after all, satisfactory.

35. The amendment by the Byelorussian SSR was designed solely to simplify the title of article 7 but, in that specific case, simplification was not synonymous with clarification. The proposed title duplicated the contents of the article and his delegation preferred the title proposed by the International Law Commission.

36. The Malaysian amendment contained the three ideas on which the amendment drafted by the International Law Commission was based and, being a purely formal amendment, should be referred to the Drafting Committee.

37. The Cuban amendment implied a distinction between various categories of succession, according to the historical and political process of accession to independence. By reason of the difficulties that such a distinction would inevitably create in practice, his delegation had some reservations concerning the amendment.

38. The amendment by the United States of America related to both the title and the contents of article 7. As far as the title was concerned, a reference should be made to the principle of non-retroactivity, since that principle was already incorporated in the Vienna Convention on the Law of Treaties. He had no objection to the body of the article, particularly subparagraph (*a*), but feared that the term "situation" in subparagraph (*b*) might be difficult to interpret. He wondered how the situation of a successor State in respect of a treaty to which it would not be a party could be determined. That concept of situation contained an element of subjectivity which could cause serious difficulties. Consequently, he proposed that the United States amendment should be referred to the Drafting Committee.

39. In short, he preferred the text proposed by the International Law Committee, although that provision did not establish a perfect balance between the "clean slate" principle and the principle of legal continuity.

40. The CHAIRMAN suggested that, since the Committee was already lagging behind the work programme it had set itself, representatives who had yet to speak on article 7 should make their statements as brief as possible. He reminded them that they would be able to express their views in greater detail during the informal meetings which would precede the voting on that provision. There were still 10 persons who wished to speak on article 7.

41. Mr. YANGO (Philippines), speaking on a point of order, recalled that a proposal had been made to set up a working party to examine article 7 and that the proposal had been supported by a number of delegations. In the circumstances, and with all due respect to the speakers who had not yet given their views on article 7, he proposed that the debate on the article under consideration should be closed.

42. The CHAIRMAN, having read out rule 24 of the rules of procedure (A/CONF.80/8), asked whether any delegations opposed the closure of the debate.

43. Sir Ian SINCLAIR (United Kingdom) said that, while he understood the concern of the representative of the Philippines, the debate in question was so important that it was too early to close it. Instead, he proposed that the list of speakers be closed.

44. Mr. HELLNERS (Sweden) agreed with the previous speaker and added that it would hardly be fair to prevent 10 delegations from giving their views. He would even be reluctant to limit the length of the statements.

45. The CHAIRMAN read out rule 21 of the rules of procedure, on closing of the list of speakers, and asked the representative of the Philippines if he would agree to the application of that provision.

46. Mr. YANGO (Philippines) said that, in the light of the opinions expressed by the representatives opposed to the closure of the debate and of the wish to take the floor informally expressed by other delegations, he accepted the suggestion.

47. Mr. AMLIE (Norway) said that it was customary, before reading out the list of speakers and declaring it closed, to invite any delegations which so desired to be included in the list.

48. Mr TODOROV (Bulgaria), speaking on a point of order, said that the time had come for the meeting to rise so as to enable the Conference to meet as arranged. To prevent any hasty decision concerning the debate on article 7, he requested the adjournment of the meeting in conformity with rule 25 of the rules of procedure.

49. The CHAIRMAN said that, if there was no objection, he would adjourn the meeting.

It was so decided.

The meeting rose at 12.40 p.m.

12th MEETING

Thursday, 14 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 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. MUPENDA (Zaire) said that his delegation had some difficulty with article 7. It was not appro-

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