

# **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.12**

## **12th 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)*

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)<sup>1</sup>**

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

<sup>1</sup> For the amendments submitted to article 7, see 9th meeting, foot-note 4.

appropriate to include in the future convention the principle of non-retroactivity, which was a general legal principle already embodied in article 28 of the Vienna Convention on the Law of Treaties. His delegation shared the view expressed by some members of the International Law Commission, in paragraph (2) of the commentary to article 1, that article 7 "might give an erroneous impression that the draft articles were largely irrelevant to the current interests of many States and that the text of the article was unduly wide and vague in its effect" (A/CONF.80/4, p. 23).

2. The Committee should certainly legislate for the future, but at the same time treaties were signed in order to be applied and the main field of application of the future convention would be the situation of newly independent States; cases of separation or annexation of territories were becoming increasingly infrequent and few dependent territories remained. There would be no point in concluding a convention which would be applied by only a few States. In his delegation's view, article 7 was rendered meaningless by the provisions of article 22, which restored retroactivity for newly independent States, and should be deleted unless a formula could be found which provided a certain measure of retroactivity for such States.

3. Among the amendments, his delegation had been particularly interested by those of Cuba (A/CONF.80/C.1/L.10) and the United States of America (A/CONF.80/C.1/L.16). It had considerable sympathy with the idea underlying the Cuban amendment, but as other speakers had said, it maintained the idea of retroactivity and its wording could raise more problems than it would solve for newly independent States. The United States amendment, with some clarification of subparagraph (b), might solve the problem of succession for newly independent States.

4. In conclusion, he said it would be helpful if the Expert Consultant could explain within what time-limit a State was regarded as being newly independent.

5. Sir Francis VALLAT (Expert Consultant) said that the term "newly independent State" had been provisionally defined in article 2, paragraph 1, subparagraph (f). So long as the convention was applicable, retroactively or otherwise, a State which satisfied that definition would be regarded as newly independent.

6. Mr. PANCARCI (Turkey) said that in his view the Committee should primarily codify the principles and rules of customary international law on the succession of States in respect of treaties. Succession was a particular aspect of the law of treaties and for that reason, the International Law Commission had followed the Vienna Convention on the Law of Treaties very closely and had taken over both terms and clauses from that Convention. The principle of non-

retroactivity, a fundamental principle of customary international law, was confirmed in article 28 of the Vienna Convention. His delegation endorsed the view expressed by the International Law Commission and the Expert Consultant that the general provisions of the convention under consideration should also contain a non-retroactivity clause, in order to avoid uncertainty about its temporal scope.

7. He urged the Committee to set aside political considerations and to put the interests of the international community before national interests, in order not to fail in its task. Both the International Law Commission's draft and the discussions on it had been concerned mainly with the needs of newly independent States. But the era of decolonization was drawing to a close and the world was entering upon the era of uniting of nations at the regional level. The Committee should therefore act objectively in the interests of future generations and give attention in the future convention to the uniting of States.

8. With regard to the amendments, the Byelorussian proposal (A/CONF.80/C.1/L.1) was rather long for the title of an article and rather short for the text; the title of the draft article described the substance of the article better and should be retained. The Malaysian proposal (A/CONF.80/C.1/L.7), which was a drafting amendment, was clearer than the text of the draft. The United Kingdom working paper on the subject (A/CONF.80/C.1/L.9) required further study. With regard to the Cuban amendment, Turkey, as the first country which had fought desperately for its independence, unreservedly supported the liberation struggles of dependent peoples; but his delegation saw some difficulty in including a general clause of that nature in a purely legal text. It did not think the amendment would benefit newly independent States. The United States amendment was very widely drawn and profoundly changed the non-retroactivity principle of contemporary international law.

9. His delegation was in favour of draft article 7; its wording might be improved, but the substance should remain unchanged. The provisions of article 7 were in full conformity with the "clean slate" principle.

10. Mr. GILCHRIST (Australia) said that article 7 or something on the same lines was a necessary element in the future convention, for the reasons which had been explained by the Expert Consultant. However, some further machinery, preferably of a simple nature, was required to enable a successor State to become a party to the convention. The United Kingdom working paper should prove useful in that connexion.

11. Sir Ian SINCLAIR (United Kingdom) said he fully agreed with the representative of the United Arab Emirates that the question of the intertemporal law raised delicate problems and that the general rule of non-retroactivity in international law was not in

any sense *jus cogens*.<sup>2</sup> The problem was to avoid upsetting solutions which had been reached in past successions of States, while working out a convention responsive to the current preoccupations of many States and the long-term needs of the international community.

12. Article 7 had three aspects. First, there was the basic rule which was not a rule of non-retroactivity, but rather a rule of limited retroactivity. Secondly, there was the concluding exception, "except as may be otherwise agreed"; he agreed with those who considered that the exception was not relevant to the current preoccupations of many States. Thirdly, there was the opening phrase, "without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles"; he thought the Committee had not given sufficient attention to that phrase.

13. The relevant rules of customary international law were not clear or precise. The International Law Commission had conducted a thorough survey and the draft articles conformed to preponderant recent practice. However, the adoption of the future convention would, in itself, have an impact on the handling of the problem in the future, as was shown by the influence exercised by the Vienna Convention on the Law of Treaties, although it had not yet entered into force. His delegation considered that the retention of article 7 was necessary and that many of the anxieties voiced might be dispelled by the impact of its opening phrase.

14. With regard to the Byelorussian amendment, his delegation agreed that the present title of article 7 was unsuitable and hoped that the Drafting Committee would reach agreement on another title more closely reflecting the wording of the article. The Malaysian proposal was primarily a drafting amendment which should be considered by the Drafting Committee. He would comment on the Cuban amendment when the Cuban representative had introduced it in its revised form. His delegation had doubts about the United States amendment. Since it was not limited with regard to time, there was a risk it might re-open dormant disputes. Subparagraph (b), which was intended to limit that possibility, required tighter wording on the subject of past transactions.

15. Thanking speakers for the interest they had shown in the United Kingdom working paper, he said that the points raised by the representative of Guyana<sup>3</sup> would be taken into consideration. The working paper did not propose an amendment to article 7, but an addition to the final clauses of the future convention, designed to temper some of the rigorous consequences of that article.

<sup>2</sup> See above, 11th meeting, para. 8.

<sup>3</sup> See above, 11th meeting, para. 25. See also 10th meeting, para. 10.

16. Mr. LA (Sudan) said that draft article 7 contained three basic elements. The first was a saving clause which, his delegation thought, could be dispensed with. In an area in which precedents were few and conflicting and consensus non-existent, it would be difficult to identify any rules of international law to which the effects of a succession of States would be subject independently of the present articles. Moreover, since succession of States to treaties was the subject which, more than any other, had engaged the International Law Commission in progressive development rather than codification, consensus could not be hoped for on the basis of existing customary international law.

17. With regard to the second element, namely, the non-retroactivity provision, and the third element, which represented the International Law Commission's attempt to alleviate any harsh consequences of the second, the Expert Consultant had rightly said that something along the lines of the present text was needed in order to save the convention from the effect of article 28 of the Vienna Convention on the Law of Treaties or at least from its most rigorous consequences for newly independent States. The question was whether the draft article did that adequately; in his delegation's view, it did not.

18. In the light of those reservations, his delegation had examined the various draft amendments submitted. The Malaysian amendment was only a drafting change, and as such should be considered by the Drafting Committee. The amendment of the Byelorussian SSR summarized the non-retroactivity principle; and to the extent that the purpose of article 7 was to provide for limited or selective retroactivity of the present articles, the amended title would be as misleading as the present title of draft article 7. His delegation would therefore have difficulty in accepting that amendment. It had some sympathy for the Cuban amendment, which, however, seemed to set no limit to the retroactive application of the present articles. His delegation thought that the drafting could be improved, and since he understood that the Cuban delegation was revising its amendment, he would reserve further comment until later. His delegation had no objection to the United States amendment in principle. In subparagraph (b), however, it would have preferred a more technical term than "resolved", which left the status of the successor State open to various subjective interpretations. He hoped the Drafting Committee would bear that point in mind.

19. Mr. MIRCEA (Romania) said that his delegation took a position of principle with regard to article 7. In its view the International Law Commission, in drafting that article, had taken too strict a view of the Vienna Convention on the Law of Treaties. It was important that the new convention should find a common denominator for the practice of States, both legal and political, and should appropriately apply both to present and to future cases of succession

of States, in order to take due account of the interests of newly independent States—a problem which the International Law Commission had perhaps not overlooked, but had failed to solve in the present draft articles.

20. With regard to the first part of article 7, his delegation thought it was difficult at that stage to say which rules the effects of a succession of States would be subject to under international law independently of the articles; for the moment it stressed that a balance should be sought between the “clean slate” and continuity principles. The second part of article 7 did not apply in certain cases; States would be free to apply whatever rule they saw fit. It was difficult in any case to accept the idea that States could apply the convention before its entry into force.

21. With regard to the proposed amendments, those of the Byelorussian SSR and Malaysia were useful. In principle, his delegation could support the Cuban amendment, but it saw some difficulties, since due account ought to be taken not only of the interests of newly independent States, but also of the rights and duties of other States. The United States amendment was a praiseworthy effort to change the wording, and even the substance, of the text of the draft. The first sentence, however, contradicted the sense of the subsequent text and might lead to the conclusion that States could derogate from the articles after their entry into force—a meaning surely not intended by the United States delegation. Moreover, the Romanian delegation could not accept the last part of subparagraph (b), which could perhaps be re-phrased.

22. His delegation thought the problem raised by article 7 could be solved if the convention contained a clause allowing provisional acceptance without effect on agreements already concluded. Perhaps the General Assembly could adopt a recommendation to the effect that, even before the convention entered into force, States should try to act in accordance with its provisions and to standardize their practice in regard to succession to treaties.

23. Mr. HERNANDEZ ARMAS (Cuba) observed that, as the Kenyan representative had said in the Drafting Committee, the proposed convention was intended to deal, not with static legal situations, as was the Vienna Convention on the Law of Treaties, but with political realities. The General Assembly itself had recommended that the International Law Commission should take special account of the developing countries' views. As the Federal President of the Republic of Austria had said at the opening of the Conference,<sup>4</sup> politics and law could not be divorced without serious consequences.

24. He was grateful to those delegations—especially Brazil and the United Republic of Tanzania—which

had supported the Cuban amendment. That amendment took account of the situation of developing countries which achieved independence as a result of decolonization. The intention was that countries which gained their independence as specified in the Cuban amendment would not require the predecessor State's agreement before acceding to the convention.

25. His delegation had no wish to disregard the tenets of international law, but it wished to affirm that non-retroactivity could not be acceptable in all cases. It was aware of the potential scope of the expression “except as may be otherwise agreed”. As the Algerian representative had pointed out, the independence achieved by some countries might not really be complete. For example, a newly independent State, exhausted by its fight for freedom, might undertake, in exchange for material assistance and cessation of hostilities, to observe certain clauses in present international instruments, believing that the latter would ultimately be adjusted in favour of such States as itself.

26. Although it stressed the legitimacy of the political aspect, his delegation would nevertheless like to see the draft convention concluded on the basis of universality and subsequently ratified by most of the international community—something which the Vienna Convention on the Law of Treaties, with only 35 ratifications since 1969, had not achieved. The Cuban delegation was therefore submitting a revised amendment with a view to obtaining more widespread support.<sup>5</sup>

27. The Cuban amendment was not aimed at regulating the time factor referred to in the United Kingdom working paper. That paper reflected, in its introduction, the Cuban delegation's own view, but limited the application of the convention to successions of States that occurred after the convention had entered into force, whereas it ought also to apply to the many States which had already become independent since the Second World War, and indeed to all newly independent States within the meaning of the definition in article 2, paragraph 1, subparagraph (f) referred to by the Expert Consultant.

28. Mr. SAMADIKUN (Indonesia) said that in his delegation's view the principle of non-retroactivity introduced in article 7 provided an element of clarity and certainty for the other articles. Article 28 of the Vienna Convention on the Law of Treaties did not render draft article 7 superfluous; it provided for non-retroactivity with respect to any act or fact that took place before the entry into force of the treaty with respect to a party, whereas draft article 7 limited non-retroactivity to a succession of States which took place before the entry into force of the articles as a

<sup>4</sup> See above, 1st plenary meeting, para. 11.

<sup>5</sup> A first revised version of the Cuban amendment was subsequently issued as document A/CONF.80/C.1/L.10/Rev.1 and a second version, also sponsored by Somalia, was issued as document A/CONF.80/C.1/L.10/Rev.2 (see below, paras. 56-57).

convention, not with respect to an individual State when it became a party. Such a provision was necessary in order to deal with specific problems that might arise out of a succession of States, and his delegation shared the view that draft article 7 should be retained.

29. The amendments submitted by the Byelorussian SSR and Malaysia should be referred to the Drafting Committee. The United States amendment warranted serious consideration; a few changes might usefully be made to clarify the text. The Cuban amendment too was of great interest. The United Kingdom working paper introduced new elements for consideration in connexion with the final clauses of the draft convention, and his delegation would comment on them later.

30. Mr. USHAKOV (Union of Soviet Socialist Republics) said that the most important of the three parts of article 7, which was an important element of the convention as a whole, was the provision to the effect that "the present articles apply only in respect of a succession of States which has occurred after the entry into force of these articles". The need to include such a provision in the convention arose from the fact that it determined precisely to which cases of succession of States, i.e. the emergence of a new independent State, the uniting or separation of States, the future convention was to apply. If article 7 were to state that "the present articles apply in respect of any succession of States", that would mean that the convention would be applicable even in respect to successions in the most distant past, which was clearly intolerable. Similarly, on that assumption any State which had emerged in a dependent territory at any time in the past would be able to claim that it was a "newly independent State" within the meaning of article 2, paragraph 1, subparagraph (f), since that definition set no time-limit.

31. If article 7 were deleted altogether, application of the convention would be regulated by article 28 of the Vienna Convention on the Law of Treaties, and the convention would be pointless, since the events which gave rise to a succession would inevitably occur before the new State thus formed could become a party to the convention, and article 28 of the Vienna Convention precluded the application of a treaty to any act or fact which took place before the date of the entry into force of that treaty with respect to the specific party concerned.

32. He urged all delegations which had opposed article 7 to reflect on the situations he had mentioned in the light, *inter alia*, of the explanations of the need for the article given by the Expert Consultant. Article 7 was the only provision in the draft which contained temporal limitations on its application, and any change in its substantive content would be inadmissible. His delegation would, however, be willing to consider drafting amendments to the article and supported the amendment to the title proposed by

the Byelorussian SSR which had the merit of stating clearly the exact sense of the provisions of article 7.

33. Mr. BENBOUCHTA (Morocco) said that, during the general debate, his delegation had advocated the deletion of article 7.<sup>6</sup> The present title was inappropriate, for it gave the impression that the article merely stated the general principle of the non-retroactivity of international law, whereas its purpose was to place some limit on the application of that principle. The first part of the text was superfluous, since it added nothing to a principle of international law which had already been stated in other instruments. And while the article had the merit of tempering the application of the principle of non-retroactivity so as to permit application of the future convention to newly independent States, its second part was too vague to show exactly when such application was possible. That could give rise to such wide and conflicting interpretations as to endanger the whole concept of non-retroactivity as a general principle of international law.

34. However, in view of the fact that the majority of the Committee favoured the retention of the ideas expressed in draft article 7, his delegation was prepared to consider carefully any amendments which took account of its objections to the present text. It would reserve its comments on the amendments which had so far been submitted to the article until a fresh text had been proposed by the informal consultations group.

35. Mr. AL-KATIFI (Iraq) said that the fact that the non-retroactivity of treaty rules, which was a well recognized principle of international law, had given rise to such wide differences of opinion on article 7 in the International Law Commission, in the comments of Governments (A/CONF.80/5), and in the Committee, could be explained by serious omissions in the drafting of the article, which could endanger the vital interests of nearly all States which had existed before the entry into force of the convention.

36. The text took insufficient account of one of the main objectives of codification—that of relieving States of the heavy burden of proving the existence of certain rules of customary international law; for once a customary rule had been incorporated in a written treaty, the question whether or not it existed no longer arose. In addition, the article seemed to distinguish between the rules of general international law and the new rules to be incorporated in the convention, and to apply the principle of non-retroactivity only to the latter. That distinction was a possible source of conflict, for one State might claim that a rule was already part of general international law, whereas another might claim that the same rule was new and, under article 7, could not apply retroactively.

<sup>6</sup> See above, 3rd meeting, para. 52.

37. It was possible that the present text of article 7 would give satisfaction to some States in their bilateral relations, but it seemed unwise to sacrifice the objectives of a universal convention to such considerations. His delegation considered that a saving clause of the type included in article 13 should suffice to give States the assurances they sought in regard to bilateral matters.

38. With regard to the amendments submitted to the article, his delegation considered that the United States proposal had the merit of filling the gaps in the original text and that, subject to drafting improvements in the latter part of subparagraph (b), it constituted a suitable basis for efforts to overcome the difficulties to which several speakers had referred.

39. Mr. SATTAR (Pakistan) said that his Government had no objection to the substance of article 7, which generally followed the model of article 4 of the Vienna Convention on the Law of Treaties, and considered that a provision of that nature was required in the convention. If article 7 was deleted, the Committee's task would become purely academic, for the operation of the articles which it was drafting would become subject to the provisions of article 28 of the Vienna Convention on the Law of Treaties.

40. His delegation believed, however, that article 7 should be made more flexible, in order to permit extension of the benefits of the future convention to as many newly independent States as possible, including those which achieved independence before the convention came into force. Such a change was all the more desirable as it would help to avoid the controversies which might otherwise arise as to which rules of international law were applicable to succession of States in respect of treaties.

41. The amendments submitted by the United Kingdom and United States delegations seemed to go some way towards extending the benefits of the articles to a larger number of cases of succession, but the apparent contradiction in the United States amendment with the principle of consent in respect of treaties would have to be eliminated. The revised Cuban amendment (A/CONF.80/C.1/L.10/Rev.1) aimed at bringing within the scope of the convention a category of successor States which had gained independence before the entry into force of the convention, but the logic of that amendment required that the benefits of the convention be available to newly independent States as defined in article 2, paragraph 1, subparagraph (f).

42. His delegation hoped that the informal consultations group would be able to produce a widely acceptable version of article 7, thereby enabling the Conference to complete its work on time.

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

43. Mr. MUSEUX (France) said that, while his remarks were to be considered merely as preliminary comments, his delegation wished to make clear both the importance it attached to article 7, which was the key to the entire convention, and its desire to find a solution to the very difficult problems to which that article gave rise.

44. If such a solution was to be found, the convention must have a certain degree of retroactivity, for as many speakers, and the International Law Commission itself, had said, a mere repetition of the provisions of article 28 of the Vienna Convention on the Law of Treaties would mean that the convention would not apply to any successor State. His Government had already expressed its fears concerning the acceptance of retroactivity, but as the representative of the United Arab Emirates had rightly pointed out the principle of non-retroactivity was not immutable,<sup>7</sup> and there was in fact a legal precedent for its modification in article 28 of the Vienna Convention, in the words "Unless a different intention appears from the treaty or is otherwise established...".<sup>8</sup> The question was how great a degree of retroactivity could or must be permitted and how that could be done.

45. His delegation had not as yet taken any definitive position on article 7 or the amendments thereto, for they provided only partial solutions to its problems. Article 7 was only the "tip of the iceberg", and it was not until complete machinery for the implementation of the convention had been proposed that final judgements could be made on it. His delegation therefore suggested that the informal consultations group should study not only article 7 alone, but also the entire question of the application of the convention to predecessor, successor and third States.

46. In seeking a solution to the problem of article 7, his delegation would be guided by certain specific considerations, the first of which was that there could be no derogation from the principles laid down in section 4 of the Vienna Convention on the Law of Treaties, and particularly in article 34 thereof, which provided that "A treaty does not create either obligations or rights for a third State without its consent".<sup>9</sup> For the purposes of the convention which the Conference was drafting, a "third State" was one which had not completed the formalities for accession to that instrument; his delegation could not accept an article such as article 7 as being binding on any State other than those which had in fact completed such formalities, so that the retroactivity permitted by the article would be accepted, and not imposed.

<sup>7</sup> See above, 11th meeting, para. 8.

<sup>8</sup> *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. 293.

<sup>9</sup> *Ibid.*, p. 294.

47. The question of retroactivity related to the application of the draft convention to acts or facts which had taken place before its entry into force with respect to a given State. Such retroactivity was, of course, not possible unless the convention itself had entered into force. Retroactivity must have a legal basis and that legal basis was the draft convention itself. That point was particularly important in internal constitutional law, because retroactivity could be an exception to the legal provisions adopted by national parliaments. It was therefore the national legislative authority which was competent to decide whether such an exception could be allowed. In that connexion, he stressed that the Committee could not question the validity of acts or facts which had occurred in the past. That seemed to be what the United States delegation had intended to say in subparagraph (b) of its amendment, which could be made clearer by some drafting changes.

48. Referring to the words "except as may be otherwise agreed" at the end of draft article 7, he asked that the Expert Consultant might provide some clarification of the International Law Commission's reason for including those words in the article. He noted that the representatives of Barbados<sup>10</sup> and Cuba had also requested an explanation of the meaning of those words. His delegation did not, however, share the Cuban representative's view that those words would enable a predecessor State and a successor State to conclude an agreement providing that article 7 did not apply to a particular case of succession. Such an exception would, moreover, be contrary to draft article 8 of the future convention. The United States delegation had tried to make the meaning of the words "except as may be otherwise agreed" clearer and more specific by beginning its amendment with a reference to agreement between "the successor State and the party or parties to a treaty", but that wording did not really solve his delegation's problems, because the question at issue was not one of a succession of States to treaties in general, but, rather, one of a succession of States to a particular treaty; and he did not think that draft article 7 covered the case of special agreements reached on particular treaties.

49. His delegation reserved the right to comment on the proposed amendments to draft article 7 during the discussions in the informal consultations group, in which the United States amendment should be given priority.

50. Mr. MARSH (Liberia) said that his delegation was of the opinion that draft article 7 or a provision of a similar kind should be included in the future convention. The present wording of the draft article might, however, be amended to make it less restrictive.

51. The amendment submitted by the Byelorussian SSR was somewhat restrictive, in that it did not refer to cases of State succession which occurred before the entry into force of the draft convention. The same was true of the amendment submitted by Malaysia, and his delegation could not support either of those amendments. The Cuban amendment was attractive, although the exception for which it provided seemed to apply only to cases in which States had attained independence as a result of the decolonization process or a liberation struggle, and not to cases of voluntary cession of territory or of the uniting of two or more States.

52. The working paper submitted by the United Kingdom was of great interest, but his delegation would prefer to discuss it in connexion with the final clauses of the draft convention. The United States amendment seemed to be broad enough in scope to cover cases of State succession occurring before and after the entry into force of the draft convention. It would therefore be acceptable to his delegation, subject to a few drafting improvements.

53. Mr. OSMAN (Somalia) said it was a basic assumption of internal law that, when a law or regulation was formulated, it had no retroactive effect, unless it provided otherwise. The same basic assumption held true in international law. Thus, when a treaty was formulated, it applied to acts which occurred in the future unless it expressly provided otherwise. Article 28 of the Vienna Convention on the Law of Treaties laid down that treaties applied only to the future, not to the past, and the same was true of the rules governing succession of States, which could apply only to successions which occurred after the entry into force of the draft convention. His delegation believed that the Committee could not include provisions in draft article 7 which would be a departure from the model on which it should base its work, namely, the Vienna Convention on the Law of Treaties.

54. He was not implying that no convention could have any retroactive effect at all. Indeed, the provisions of Article 103 of the Charter of the United Nations made it clear that the Charter itself had a retroactive effect and nullified any prior obligations of States under any other treaty which conflicted with it. What the authors of the Charter had had in mind when they had formulated Article 103 was that rules of *jus cogens* and, in particular, the right to self-determination, should be safeguarded and not violated by prior existing treaties. The implications of the principle of non-retroactivity were extremely important for developing countries in Africa, Asia and Latin America. In Africa, for example, so many colonial treaties had been concluded by colonial Powers in defiance of the will and consent of the peoples concerned, that it would be idle for the Committee to take cognizance of such treaties, which had been concluded under the guise of customary law.

<sup>10</sup> See above, 9th meeting, paras. 50-51.



55. Referring to the amendment submitted by the United States of America, he drew attention to subparagraph (b), the last part of which stated that the present articles would apply in respect of a succession that occurred before the entry into force of the 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". In other words, if conflicts arising in connexion with colonial treaties had not been resolved, the future convention would apply. He did not object *a priori* to the contents of that amendment, which was an attempt to promote the progressive development and codification of customary international law, but he thought it would be acceptable only if it were drafted in a much more flexible manner.

56. His delegation fully supported the amendment submitted by Cuba (A/CONF.80/C.1/L.10/Rev.1) because it dealt with the consequences of the decolonization process and the liberation struggle occurring before the entry into force of the future convention and provided that emerging countries had the option of deciding, in the exercise of their sovereign rights, whether treaties concluded against their will and consent by colonial Powers should be maintained, rejected or modified. In order to make that point clear, he formally proposed that, in the Cuban amendment, the words "if they so wish and in the exercise of their sovereign rights" should be added between the word "may" and the word "avail".

57. Mr. ALMODOVAR (Cuba) said that his delegation had no difficulty in accepting the subamendment proposed by the representative of Somalia.

58. Sir Francis VALLAT (Expert Consultant), replying to the question raised by the representative of France concerning the meaning of the words "except as may be otherwise agreed" at the end of draft article 7, said he thought that question had been raised in the context of the relationship between draft articles 7 and 8, which, in his opinion, covered entirely different subject-matters. More specifically, however, he could say that the International Law Commission had decided that there were occasions when it was better to use the wording contained in draft article 7, no matter how vague it might be, than to try to identify the parties concerned, because such an attempt at identification could give rise to serious difficulties. Thus, the words "except as may be otherwise agreed" referred implicitly to the States concerned by, or involved in, a succession of States. A precedent for that wording was to be found in article 11 of the Vienna Convention on the Law of Treaties.

59. Referring in a general way to the discussion which had taken place on draft article 7, he said he thought that it was the kind of discussion the International Law Commission would have liked to hear on that article, which had been expected to give rise to considerable difficulties. He himself was more and

more convinced that, quite apart from the provisions of article 7, the problem of the retroactivity or non-retroactivity of the draft articles needed to be solved by some procedural device to be included in the final clauses. In that connexion, he drew attention to article 24 of the Vienna Convention on the Law of Treaties and, in particular, to paragraph 4 of that article, which stated that "The provisions of a treaty regulating [...] other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text".<sup>11</sup> That article might be of interest and assistance to delegations in their efforts to solve the problems raised by draft article 7.

60. The CHAIRMAN said that the consideration of draft article 7 would be suspended in order to allow for informal consultations between the Vice-Chairman and interested delegations.

*The meeting rose at 6.15 p.m.*

<sup>11</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.), p. 292.*

## 13th MEETING

*Friday, 15 April 1977, at 10.40 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 8 (Agreements for the devolution of treaty obligations or rights from a predecessor State to a successor State)<sup>1</sup>

1. Sir Ian SINCLAIR (United Kingdom), introducing his delegation's amendment to article 8 (A/CONF.80/C.1/L.11), explained that its main purpose was to spell out the intention of the International Law Commission in proposing the article under discussion. Paragraph 1 of the article presented no difficulties for his delegation: it stated in clear terms the effects of devolution agreements. In reading the commentary to the article (A/CONF.80/4, pp. 24-29), he had noted that the International Law Commission emphasized the connexion between article 8 and articles 35 to 37 of the Vienna Convention on the Law of Treaties. In paragraph (22) of its commentary, the International Law Commission had ob-

<sup>1</sup> The following amendments were submitted: United Kingdom of Great Britain and Northern Ireland, A/CONF.80/C.1/L.11; Malaysia, A/CONF.80/C.1/L.15.