

Document:-  
**A/CN.4/SR.1287**

**Summary record of the 1287th meeting**

Topic:  
**Succession of States with respect to treaties**

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63. An interesting point had been raised in the Sixth Committee by the Egyptian delegation, which had asked how, in legal theory, the rights and obligations of parties under a treaty could be separated from the international instrument which had created those rights and obligations (A/CN.4/278/Add.6, para. 417). He wished to stress that the provisions of articles 29 and 30 did not deal with the question of the existence of a treaty. Nevertheless, rights and obligations could clearly exist only in the context of the treaty from which they derived. If the treaty disappeared, the rights and obligations would also disappear. He believed that it was precisely the merit of articles 29 and 30 that they referred to rights and obligations deriving from treaties, but not to the treaties themselves.

64. A number of other questions had been raised by Governments with which, in his opinion, it would be inappropriate to deal in the present context. One was the suggestion by the delegation of Morocco that provision should be made for arbitration in certain circumstances (*ibid.*, para. 447). Another was the comment by the delegation of Kenya that article 30 should not be placed on the same footing as article 29 (*ibid.*, paras. 450 and 451). For the reasons given in his report (*ibid.*, para. 453), the comments made on the subject of "unequal treaties" likewise did not, in his view, call for any change in articles 29 and 30.

65. As a matter of drafting, it had been suggested that the provisions of article 30 should be simplified by combining sub-paragraphs (a) and (b) in each of the two paragraphs. The Drafting Committee should consider that suggestion and act on it if it was possible to do so without disturbing the meaning or detracting from the clarity of the text.

66. The United States Government had made the more specific comment that it might not be advisable to provide, as was done in paragraph 1 of article 30, that the rights and obligations had to attach to a particular territory in the State obligated and to a particular territory in the State benefited (*ibid.*, para. 418). The language used in the article might be construed as excluding, for example, the case in which transit rights accrued to a landlocked State, for the right in that case was not attached to a particular territory in the landlocked State which benefited from the treaty. The point thus raised was essentially one of drafting and should be given careful consideration.

67. The United Kingdom Government had suggested that the term "territory" should be defined (*ibid.*, paras. 418 and 460). That question had already been discussed by the Commission, which had decided not to adopt a definition.<sup>10</sup> For his part, he did not recommend that the discussion on that point should be reopened.

68. The Netherlands Government had suggested that the system embodied in article 30 should also be adopted for certain treaties which guaranteed fundamental rights and freedoms to the population of the territory to which a succession of States related (*ibid.*,

para. 418). That suggestion was a very interesting one but the Commission had so far refrained from creating special categories of treaties. Moreover, it was difficult to see how the case mentioned by the Netherlands Government could be covered in a section which dealt with rights and obligations arising from boundary and other territorial treaties, that was to say rights and obligations running with the land. Clearly, the matter should be dealt with in the context of other articles of the draft.

69. In conclusion, he recommended that articles 29 and 30 should be retained substantially as they stood and that the greatest care should be taken to make the commentary as full and as accurate as possible.

The meeting rose at 1 p.m.

## 1287th MEETING

Monday, 1 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

*Present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Raman-gasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

### Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.205; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

ARTICLE 30 (Other territorial régimes) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 29 and 30.

2. Mr. SETTE CÂMARA said that, during the Commission's long discussion on those articles in 1972<sup>1</sup> a consensus had emerged that the so-called "dispositive treaties", "treaties of a territorial character", "real treaties" or "localized treaties" could not be considered as governed by either the clean slate rule of article 11 or the moving treaty-frontiers rule of article 10. Since the time when the distinction between "real" and "personal" treaties had been recognized, the former had been regarded as transmissible and the latter as not transmissible. The legal basis for that treatment had been traced by some writers to the old Roman Law

<sup>10</sup> See *Yearbook* ... 1972, vol. I, p. 247, article 22 bis and p. 275, para. 7.

<sup>1</sup> See *Yearbook* ... 1972, vol. I, pp. 247-249, 250-254, 258-266 and 275-276.

maxims *nemo plus juris transferre potest quam ipse habet* and *res transit cum suo onere*. The real rights created by a treaty impressed the territory with a status which was intended to have a certain degree of permanence.

3. The Commission had been right to deal separately with the case of boundary treaties and that of other treaties of a territorial character. There was some difference between the two categories, since boundary treaties were executed instantly, whereas the other treaties entailed repeated acts of continuous execution. There could be little doubt that boundary settlements constituted an exception to the clean slate rule; legal writings and State practice were virtually unanimous in upholding their continuity. During the whole course of the decolonization process, there had been no trace of any claim for invalidation of a boundary treaty on the basis of the clean slate principle. Even Tanzania, one of the strongest defenders of that principle, had proclaimed that boundaries established by a treaty remained in force. In 1964, the Organization of African Unity had adopted a resolution solemnly pledging all its member States to respect "the borders existing on their achievement of national independence".

4. The principle of continuity did not, of course, mean that boundary treaties were sacred and untouchable. They were inherited, together with any related disputes and controversies, and could therefore be challenged, but on grounds other than the clean slate rule.

5. The decision by the Vienna Conference to exclude boundary treaties from the operation of article 62, on fundamental change of circumstances, of the Vienna Convention on the Law of Treaties,<sup>2</sup> showed that those treaties were of an exceptional character and were accorded a special status in the interests of the international community.

6. In 1972, the Commission had made a decisive choice by adopting the solution embodied in articles 29 and 30, namely, that it was not the treaties themselves that constituted a special category, but the situations resulting from their implementation. The Commission had taken that decision in full awareness of the problem that could arise from severance of the dispositive from the non-dispositive provisions of a treaty. Even though it was not the treaty which was inherited but the régime emanating from it, he believed that the problem was still one of succession in respect of treaties and not one of succession in respect of matters other than treaties, as had been suggested by the Egyptian Government in its comments (A/CN.4/278/Add.6, para. 417).

7. The Special Rapporteur's able analysis of government comments (*ibid.*, para. 419 *et seq*) showed that a large majority of States supported articles 29 and 30. The few reservations based on defence of the principle of self-determination were not convincing; if every newly independent State could unilaterally repudiate the boundaries that constituted the material basis of its existence, the world would be plunged into chaos.

8. It was important to remember that no State was bound to accept the inheritance of injustice. It was always free to dispute the legality of boundary provisions by the means established by the United Nations Charter for the settlement of international disputes.

9. Besides boundaries, articles 29 and 30 touched on matters of great international moment, such as rights of transit, the use of international waterways and de-militarized or neutralized territories, on which States were extremely sensitive. The present formulation was cautious and well balanced. He would therefore hesitate to embark on the discussion of any major changes, such as that suggested by the Netherlands Government (A/CN.4/275/Add.1, para. 19).

10. Although he was in general agreement with the present wording of the articles, he would be prepared to consider any specific suggestions for simplification of the wording of article 30.

11. Mr. TABIBI said that the law of State succession in respect of treaties was extremely complex and the régime very pragmatic, so that it was not uncommon for the same State, and even the same international tribunal, to take diametrically opposed positions in different cases. And the most complex area of that law was the law of State succession in respect of boundary régimes or territorial régimes established by a treaty. Sir Gerald Fitzmaurice, a former Special Rapporteur of the Commission on the law of treaties, had written in 1948: "... it is necessary to look very carefully at the convention concerned in order to see whether it is one affecting the international *status* of the ceded territory or of any river, canal, etc., within it, or whether it is merely one creating *personal* obligations for a given country in respect of that territory or things in it".<sup>3</sup> Mr. Castrén, a former member of the Commission, had expressed strong doubts as to how far treaties of territorial nature constituted a true case of succession by operation of law and how far their continued observance by the successor State was a matter of political expediency.<sup>4</sup> M.G. Marcoff, in his well-known work on accession to independence, had stated his belief that the transmissibility of such treaties was governed by the principles of the equality of States and self-determination.<sup>5</sup>

12. It was indeed the people and their right of self-determination which were the most important considerations in contemporary international law. That law would be made workable only by the support of the people everywhere, not by concepts accepted by a small number of continental jurists.

13. Despite the arguments advanced by the Special Rapporteur, he remained unconvinced of the usefulness of articles 29 and 30. The cases mentioned in the commentary (A/8710/Rev.1, chapter II, section C) did not suffice for the establishment of rules. The present draft of the two articles was politically oriented and, for

<sup>2</sup> See *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. 297.

<sup>3</sup> See *Yearbook ... 1972*, vol. II, p. 45, para. 3.

<sup>4</sup> *Académie de droit international, Recueil des cours*, 1951-I, vol. 78, pp. 436-437.

<sup>5</sup> Marco G. Marcoff, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, (Fribourg, 1969), pp. 205 *et seq*.

that reason, had attracted the political support of a number of nations, including the big Powers. In fact, it was undeniable that those articles, like article 62 of the Vienna Convention on the Law of Treaties, did no more than reflect the practice of the United Kingdom as a boundary-maker in the eighteenth and nineteenth centuries.

14. The main precedents mentioned in the 1972 commentary to articles 29 and 30 were the *Case of the Free Zones of Upper Savoy and the District of Gex* (paras. (3) and (4)), which had been decided by the Permanent Court of International Justice, and the *Åland Islands* dispute (para. (5)), which had come before the Council of the League of Nations. Both those cases were of a limited character and the commentary itself drew attention to their weaknesses; they did not constitute sufficient grounds for establishing a general rule in a complex area of law.

15. Much of the commentary to articles 29 and 30 was based on an article written by O'Connell in 1962. That article, however, contained the statement: "Critics of the dispositive category have correctly pointed out that the advocates of servitudes established their case by calling all transmissible territorial treaties 'servitude', while the writers on State succession purportedly delimited the category of transmissible territorial treaties by classifying them as servitudes, so that a *petitio principii* was involved in the argument".<sup>6</sup>

16. On the question of severability of treaties, articles 29 and 30 clearly reflected the well-known United Kingdom practice. In that connexion, however, it should be noted that Lauterpacht had written in 1949: "It is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty once signed and ratified is more than the expression of the intention of the parties".<sup>7</sup> Clearly, therefore, the treaty as a unit should be looked at as a complete whole. O'Connell had suggested caution in utilizing intention as the touchstone of severability, and every boundary or territorial treaty should be examined as a separate case to determine the real intention of the parties.

17. The crux of the commentary was that the articles dealt not with the treaty itself, but with the situation and régime created by the treaty (para. (35)). He did not believe that it would be legitimate to use the two or three cases cited in the commentary to establish rules to cover all the complex political and legal cases of boundary and territorial régimes established by treaty. It would not be acceptable to the newly independent States to abandon the clean slate rule in favour of a situation or régime created by unequal treaties going back to the colonial era of the eighteenth and nineteenth centuries. Those settlements had taken no account of ethnic, linguistic or cultural affinities and should not be preserved in defiance of the principle of self-determination.

<sup>6</sup> D.P. O'Connell, "Independence and succession to treaties", in *The British Yearbook of International Law*, 1962, at p. 150.

<sup>7</sup> H. Lauterpacht, "Restrictive interpretation and the principle of effectiveness in the interpretation of treaties", in *The British Yearbook of International Law*, 1949, at p. 76.

18. The main reason for the inclusion of articles 29 and 30 in the present draft was the existence of paragraph 2 (a) of article 62 of the Vienna Convention on the Law of Treaties. It should be remembered, however, that the international scene had greatly changed since 1969; the cold war had been replaced by *détente*, the rights of the People's Republic of China had been restored and both the Federal Republic of Germany and the German Democratic Republic were now Members of the United Nations. Moreover, article 62, paragraph 2 of the Vienna Convention was qualified by other articles of that Convention, such as article 46 on competence to conclude treaties, article 47 on restrictions on authority to express consent, article 48 on error, article 51 on coercion and, above all, article 53 on *jus cogens*. Thus article 62 of the Vienna Convention could not serve to legalize unequal treaties. In that connexion, the expert consultant at the Vienna Conference had given assurances that the establishment of a boundary by a treaty left untouched any legal grounds that might exist for challenging that boundary, such as the principle of self-determination or invalidity of the treaty.<sup>8</sup> It was subject to those assurances that the exception embodied in paragraph 2 (a) of article 62 had been adopted.

19. It was his considered opinion that the inclusion of articles 29 and 30 would constitute an unwarranted exception to the clean slate rule, which was the cardinal principle of the present draft, and would create doubts as to the application of article 53 of the Vienna Convention on the Law of Treaties.

20. A cursory examination of the examples given in the commentary showed that they failed to support the rules embodied in articles 29 and 30. Thus Tanzania had refused to recognize the lease at a nominal rent granted to Zaire, Rwanda and Burundi under the so-called Belbases Agreements of 1921 and 1951 (paras. (22) and (23)), on the grounds of the limited competence of Belgium as the former administering Power. Similarly, the Nile Waters Agreement of 1929 (para. (26)) had been rejected by the Sudan and Tanganyika with the result that Egypt had made a new arrangement with those countries. Israel, too, had denied, in the Security Council, the validity in law and in fact of the 1923 and 1926 Agreements on water rights over the Jordan river (para. 27). Somalia had rejected colonial arrangements made in the past. The United States had considered the military arrangements relating to the West Indies as of only limited duration (para. (24)).

21. In his view, all those examples of State practice contradicted the rules embodied in articles 29 and 30, which purported to confer permanency on boundary régimes and territorial arrangements. The argument advanced in support of those articles, namely, the maintenance of peace, was unconvincing. Peace would not be achieved by maintaining a boundary illegally established under an unequal or colonial treaty; it had to be sought

<sup>8</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary Records* (United Nations publication, Sales No. E.68.V.7), p. 381, para. 31.

mainly on the basis of the agreement of the country concerned.

22. He was equally unconvinced by the argument derived from article III, paragraph 3, of the Charter of the Organization of African Unity.<sup>9</sup> That provision admittedly upheld respect for the sovereignty and territorial integrity of States, which was also upheld by the Charter of the United Nations. There were, however, many African States, such as Somalia, which were not satisfied with boundary and territorial arrangements that were a legacy from the colonial era. Most modern writers stressed the fact that colonial frontiers had been shaped more by strategic or economic needs than by the sentiments and aspirations of the populations concerned. It was for that reason that many Asian and African boundaries failed to follow clear ethnic or cultural divisions.

23. That being said, he wished to comment on the Treaty of Kabul,<sup>10</sup> mentioned in paragraph (14) of the commentary. That Treaty had not, in fact, been a boundary treaty, but a treaty of friendship concluded in 1921 after the third Anglo-Afghan war. It had been terminated by giving one year's notice under its article 14. There was, moreover, nothing in that Treaty which pointed to permanency of any of its provisions. The United Kingdom had given its own one-sided interpretation of the matter, which conflicted not only with article 14 of the Treaty itself, but even with the provisions of the Indian Independence Act and with various written and unwritten promises made to Afghanistan before the sub-continent had become independent. The frontier to which the United Kingdom note, quoted in paragraph (14) of the commentary, referred, had not been a demarcation line, but a political boundary drawn for the purpose of protecting British India from possible invasion from the North. Both the North-West Frontier Province, with its population of three million at the time, and the Free Tribal Area had been administered separately from India.

24. There were two other documents which should be mentioned in paragraph (14) of the commentary in order to make it more balanced. The first was a letter of 1921 from Sir Henry Dobbs, the head of the British Mission, to the Afghan Minister for Foreign Affairs, which had been attached to the Treaty of Kabul; that letter recognized the interest of Afghanistan in the frontiers of India beyond the Durand Line and the fact that the members of the frontier tribes were not citizens of India. The second was the United Kingdom declaration of 3 June 1947, which dealt with the special case of the North West Frontier Province and the Free Tribal area. Both those documents had been included in the Secretariat publication *Materials on Succession of States*.<sup>11</sup>

25. He disagreed with the Special Rapporteur's conclusion that Governments supported articles 29 and 30: out of over 130 Members of the United Nations, only

23 were mentioned in paragraph 425 of his report (A/CN.4/278/Add.6) as having expressed such support in writing or orally, and in many cases that support was stated to be "by implication". In fact, articles 29 and 30 were favoured only by certain big Powers and a small number of countries which benefited from the boundaries inherited from the colonial era. For political reasons, a great many countries had not expressed their views at all: one example was Japan, which had not submitted any comments, but which was actively negotiating on the subject of territorial treaty provisions. There was also the significant silence of the People's Republic of China.

26. In the circumstances, it was most unrealistic to imagine that burning political issues could be disposed of by treating the provisions of articles 29 and 30 as though they constituted settled rules of international law. The only possible course was to seek, by peaceful and direct negotiation, settlement of those territorial disputes which endangered the peace of the world.

27. He had already commented on the limited reliance which could be placed on the few judicial precedents mentioned in the commentary. He would only add that, as far as the International Court of Justice was concerned, its present composition did not inspire confidence in the majority of the countries of Asia and Africa.

28. In conclusion, he urged that articles 29 and 30 should be deleted from the draft.

29. Mr. TAMMES said that the Special Rapporteur had given convincing answers to the more fundamental objections raised to articles 29 and 30. His report demonstrated that the many inequities of history could not be corrected simply by means of a convention on succession in respect of treaties; but at the same time it stressed that the draft articles would leave untouched any other grounds for claiming the revision or setting aside of boundary settlements (A/CN.4/278/Add.6, para. 440).

30. His own comments would be largely concerned with drafting, although not devoid of substantive implications. It seemed to him that the final phrase of article 29, "régime of a boundary", needed to be clarified, especially as the commentary, paragraph (18) of which explained the matter, would not remain when the draft articles became a convention. That phrase appeared to have been used mainly in order to determine that treaty provisions for the completion of a boundary settlement, by demarcation or otherwise, were inherited by the successor State with the boundary situation already executed. That extension of devolution, however, was one of the most controversial issues that arose with respect to boundary régimes. It had been an issue between the parties in the *Case concerning the Temple of Preah Vihear*,<sup>12</sup> but the International Court of Justice had not decided whether such treaty provisions were transmissible upon succession. The same controversial issue had arisen in connexion with the Treaty of Kabul and in boundary disputes between African States.

<sup>9</sup> United Nations, *Treaty Series*, vol. 479, p. 74.

<sup>10</sup> League of Nations, *Treaty Series*, vol. XIV, p. 67.

<sup>11</sup> ST/LEG/SER.B/14, (United Nations publication, Sales No. E/F.68.V.5), pp. 5 and 6.

<sup>12</sup> *I.C.J. Reports 1962*, p. 6.

31. Since those various controversies had not been settled, the meaning of paragraph (18) of the commentary was not clear in so far as it referred to “ancillary provisions” of a boundary treaty which were “intended to form a continuing part of the boundary régime”. The question arose, for example, whether such provisions would include a clause providing for compulsory jurisdiction of the International Court of Justice.

32. One method of clarifying article 29 would be to introduce a reference to the means of completion of the boundary after succession—demarcation, the holding of a plebiscite, or provision for the exercise of an option by the inhabitants concerned. Another method would be to introduce the language of paragraph (18) of the commentary, where it referred to “ancillary provisions which were intended to form a continuing part of the boundary régime created by the treaty and the termination of which on a succession of States would materially change the boundary settlement established by the treaty”. Yet another solution would be to apply the criterion in paragraph 3 (b) of article 44 (Separability of treaty provisions) of the Vienna Convention on the Law of Treaties. The reference would then be to provisions of a boundary settlement which were an “essential basis of the consent” given by the parties to be bound by the treaty as a whole. It was not possible, however, to rely merely on the expression “boundary régime”, which was insufficient to define the precarious rights and obligations it was intended, according to the commentary, to make transmissible under sub-paragraph (b) of article 29.

33. It had been stressed by the Special Rapporteur at the outset of the general discussion, and subsequently by other speakers, that there was much in the draft articles which affected the well-being of people; it was that human element which was lacking in paragraph 1 of article 30. There were many boundary situations in which the population of the border region was a more important factor than succession to the territory. Paragraph (12) of the commentary referred to the customary grazing rights of Somali nomadic shepherds in territory which had been divided in the nineteenth century. As a matter of international law, the case had remained unsettled: the United Kingdom considered the rights to be unaffected by the succession of States, but Ethiopia considered them automatically invalid.

34. Consequently, without attempting to settle specific disputes, it was necessary to provide a general rule for the future sufficiently comprehensive to cover human situations that were far from rare. To give an example, Norway regarded itself as a successor State bound by the Swedish-Russian treaty of 1826, which regulated the boundary and was the basis of a régime governing Lapp migrations. There were many treaty provisions which guaranteed—beyond all vicissitudes of territorial sovereignty—the free access of people to monuments, religious shrines and wells. It was those simple but important human needs that the Netherlands Government had had in mind in its comments (A/CN.4/275/Add.1), rather than a whole system of human rights and fundamental freedoms.

35. The gap to which he had drawn attention could largely be filled in article 30 by inserting the words “or

its inhabitants” after the phrase “for the benefit of a particular territory” in sub-paragraphs (a) and (b) of paragraph 1. The Commission could also amend the commentary to indicate that the rights referred to in sub-paragraph (b) of article 29 were more extensive than was indicated by the present text of the commentary.

36. Lastly, with regard to paragraph 2 of article 30, he thought it might be necessary to make a distinction between the different kinds of benefits granted to a group of States, in order to determine whether they were transmissible or personal. Any benefits which were one-sidedly military or political should not be transmissible; paragraph 2 (a) of article 30 was not clear on that point and should be amended.

37. Mr. THIAM said he thought the problem raised by articles 29 and 30 was essentially a practical one, namely, what the practical effect of their provisions would be. In the case of Africa, for example, it was a fact that the Charter of the Organization of African Unity had laid down a number of principles, one of which was that established frontiers were no longer open to question. But it was also a fact that since that principle had been laid down, the countries of Africa had been faced with problems relating to territorial claims every year, and not once had they seen fit, on the basis of the principles established by the OAU Charter, to refer such a claim to the Organization’s Commission of Mediation, Conciliation and Arbitration. The only dispute referred to a Commission—that between Algeria and Morocco—had not been referred to the Commission of Mediation, Conciliation and Arbitration provided for in the OAU Charter, but to an *ad hoc* commission whose role had never been precisely defined, and the dispute had finally been settled by direct negotiation.

38. As far as the international community was concerned, assuming that the draft articles were adopted and became a convention providing for reference to the International Court of Justice, he did not think that the States directly concerned would go to the Court. The reason was that articles 29 and 30 directly concerned only two classes of States: those which benefited by a previous treaty and those which considered themselves injured by a previous treaty and wished to call it in question. So, assuming that the articles were adopted by the Commission and the General Assembly, would those States which considered themselves injured consent to be bound by a convention some of whose articles they could not accept? If they did not regard themselves as bound by the convention, what would be the practical effect of the articles in question?

39. He thus shared Mr. Tabibi’s view that, if it was not possible to find a formula satisfactory to the countries concerned, it would be better to drop article 29. In his opinion, the Commission should reconsider the article and see whether, apart from the principle it laid down, it would have any real practical effect and could help to settle territorial disputes.

40. Mr. MARTÍNEZ MORENO said that draft articles 29 and 30 had the merits of prudence and objectivity; he congratulated the Special Rapporteur on having

maintained a careful balance. He himself, like the majority of speakers, was in favour of retaining articles 29 and 30 because he believed that application of the principle of continuity was vitally necessary for the maintenance of world peace and security. For the purposes of the commentary, however, he considered it indispensable that the Commission should avoid endorsing any principle that might imply a partisan approach to some actual boundary dispute then in progress.

41. Mr. Tabibi had pointed out that, during the nineteenth century, a number of metropolitan States had concluded treaties with former colonial territories concerning their boundaries. It was possible, of course, that if a metropolitan State found it could no longer refuse independence to a territory, it might first conclude a treaty that would prejudice that territory's future boundaries. Obviously, what was needed was some principle similar to the principle of Roman law which prevented the property of a widow from passing into the hands of the creditors of her deceased husband.

42. Mr. Thiam had said that the inclusion of articles 29 and 30 was undesirable for practical reasons. He himself, however, thought that it would be equally impractical to insist on maintaining the clean slate principle, in spite of the many cases in which that principle applied. As the Special Rapporteur had made clear in his text and commentary, the clean slate principle should not prevail against any specific treaty concerning boundary régimes.

43. Mention had been made of the Latin American application of the principle of *uti possidetis*, but he did not think that that practice was very consistent in the Latin American countries. Some States had, for example, taken the view that they could retain their colonial titles to land, while others, such as Brazil, had applied the principle of *uti possidetis* as establishing fundamental title. Much care should therefore be exercised in drafting the commentary concerning practice in Latin America.

44. The question had also been raised whether boundary disputes could not be settled peacefully, or, in other words, by arbitration. The Latin American States had always maintained that arbitration was the best possible solution and had in some cases even accepted the idea of compulsory arbitration. There had, however, been some important cases in which arbitration had not been accepted by the parties, such as the case of the boundary dispute between Colombia and Costa Rica which had been supposed to be settled by the decision of the President of France.<sup>13</sup> He therefore believed that articles 29 and 30 should also leave some room for settlement by direct negotiation between the parties, though settlement by other means should also be possible.

45. With regard to the problem of local populations, which had been mentioned by Mr. Tammes and Mr. Sette Câmara, he considered that, as a matter of

human rights and *jus cogens*, it was absolutely necessary to take full account of the situation of minority populations. He was therefore in favour of extending the principle of continuity of treaties to cover problems affecting the populations of border territories.

46. Mr. USHAKOV said that, like the Special Rapporteur, he considered that the arguments for retaining articles 29 and 30 were practically irrefutable but that their form and drafting should be reviewed, together with the commentary, so as to ensure that they were not prejudicial to any State or territorial régime. He did not question the principle laid down in the articles, but wished to make a few remarks with a view to clarifying the commentary.

47. It was unnecessary to stress the relationship between the articles under consideration and the clean slate principle. For the principle stated in articles 29 and 30 was a general principle which applied to all cases of succession of States, not merely to the emergence of newly independent States. No matter whether a State was created by fusion, dissolution or separation, boundaries previously established by treaty were in no way affected. It should therefore be made quite clear in the commentary that the principle stated in articles 29 and 30 applied to all kinds of succession of States and even to transfers of territory. If a transferred territory had a boundary with a third State, that boundary, as established by the predecessor State by treaty, was binding on the successor State.

48. The commentary should also point out that the Commission was not making any innovation in the draft articles. It was merely confirming a principle of customary law which had existed for centuries and was accepted by contemporary international law. International law had long recognized the principle that a boundary established by treaty was not affected by a succession of States, whatever its nature. Early international law had even recognized that a territory of one State might be absorbed by another State by *debellatio* and that such a conquest was effective within the limits of the territory absorbed.

49. For the purposes of the draft articles, the term "succession of States" meant the replacement of one State by another in the responsibility for the international relations of territory, that was to say, in general, the replacement of one State by another in the exercise of responsibility for the territory. That change could not affect boundary régimes as such. No matter whether a new State had emerged from a fusion, a dissolution, a separation or the decolonization process, its emergence could not affect the territorial régimes to which it had been previously subject. There was too often a tendency to visualize the emergence of a newly independent State in the abstract, as if it had no boundaries. If that were so, not only would the newly independent State not be obliged to recognize the boundaries previously established by treaty, but adjacent States would be free not to recognize them and to encroach on its territory. In reality, it was not by the birth of a State that boundaries could be altered, but by other means recognized by international law.

<sup>13</sup> *British and Foreign State Papers*, vol. XCII, p. 1038.

50. When a new State was born with a disputed boundary, it might continue the dispute begun by the predecessor State. That was so because territorial régimes were in no way affected by a succession of States.

51. It did not seem correct to say, as the Special Rapporteur had done, that "By speaking of the boundaries or the obligations and rights established by a treaty, the way is clearly left open to an attack on the validity of the treaty if there should be grounds for it" (A/CN.4/278/Add.6, para. 444). For the validity of a treaty, especially a treaty establishing boundaries, did not in any way derive from a succession of States; its validity could be challenged, not by invoking a succession of States, but by relying, for example, on the Vienna Convention on the Law of Treaties. Furthermore, a treaty establishing boundaries might be lawful, but the boundaries might have been changed by agreement between the States concerned, just as the treaty might be unlawful in the eyes of international law, but lawful boundaries might have been established by agreement.

52. It did not seem possible to state that "articles 29 and 30 in their present form seem to fit well with article 6, which excludes the application of the articles to a so-called succession which may occur unlawfully" (*ibid.*, para. 446), since articles 29 and 30 applied to any case of State succession, whether lawful or not. No succession of States of any kind could affect a territorial régime. For instance, if a State occupied part of the territory of another State by military force, thus creating an unlawful situation, the boundary between that territory and a third State would not be changed in any way. Thus even in unlawful cases the rule in articles 29 and 30 applied, and there was no need to establish any relationship between those provisions and article 6.

53. As to unequal treaties, the possibly unequal character of a treaty had nothing to do with a succession of States. That was a question to be settled by reference to other branches of international law.

54. As to provision for possible arbitration if the rules laid down in articles 29 and 30 conflicted with the principle of self-determination of the populations concerned or were contested by a State declaring itself not bound by a treaty considered to be unequal, the Special Rapporteur had said, in paragraph 448 of his report, that that question might be considered subsequently in connexion with the general question of the settlement of disputes. His own view was that there was no need to provide for arbitration when the draft articles stipulated that successions of States must take place in conformity with contemporary international law and that they did not affect territorial régimes. Arbitration was recommended only in order to reopen old situations; but the rules of contemporary international law could not be applied retroactively. It should be made quite clear in connexion with article 6 that the future convention would apply only to successions of States which occurred in the future. It was quite evident that if the successions of States which had occurred in previous centuries were judged today in the light of modern international law, most of them would be found to be unlawful.

55. He found articles 29 and 30 acceptable, subject to drafting changes, but hoped that they would be further explained in the commentary.

The meeting rose at 6 p.m.

## 1288th MEETING

Tuesday, 2 July 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

*Present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Raman-gasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

### Statement by the Secretary-General of the United Nations

1. The CHAIRMAN welcomed the Secretary-General of the United Nations and the Director-General of the United Nations Office at Geneva. He invited the Secretary-General to address the Commission.
2. The SECRETARY-GENERAL said that, the Commission having recently commemorated the twenty-fifth anniversary of its first session, he was glad to have an opportunity of extending his whole hearted congratulations and best wishes to its distinguished members. During the twenty-five years of its existence, the Commission had made an admirable contribution to the codification and progressive development of international law, and thus to the fostering of friendly relations and co-operation among States and the strengthening of international peace and security.
3. The codification and progressive development of international law was a continuing process whose importance and difficulties were illustrated by the items placed on the agenda for the present session of the Commission in accordance with the recommendations of the General Assembly.
4. One of those items was State responsibility. There was no need to stress the importance of that topic. The Commission had brought out and developed with admirable clarity the rule that every State was responsible for its wrongful acts, which was the governing principle of the whole matter. It had succeeded in finding a basic approach to that very difficult topic by undertaking the codification of general rules governing international responsibility, including rules on the legal consequences of violations of norms on the maintenance of international peace and security.
5. At the same time, the Commission was putting the final touches to the draft articles on succession of States in respect of treaties and was engaged in a study of succession of States in respect of matters other than treaties—in particular, economic and financial matters.