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Summary record of the 1288th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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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. Ramangasoavina, 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.

Succession of States had always been one of the most difficult topics of international law and had acquired special importance during the process of decolonization. It was therefore very fortunate that in the course of the present month the Commission would adopt a final draft on succession of States in respect of treaties, which he was sure would be of great value to statesmen and lawyers alike. He was fully aware that, in preparing that draft, the Commission had constantly had in mind the principles of self-determination and the sovereign equality of States embodied in the Charter of the United Nations, as well as the need to preserve stability in international treaty relations.

6. The importance which economic and trade matters had acquired at the present time, especially in the relations between countries with different systems or levels of development, both in the social and in the economic sphere added a special interest to the Commission's codification and progressive development of the rules governing the most-favoured-nation clause. There again, the Commission was faced with a mass of conflicting precedents and practices, from which it would have to derive a coherent and logical body of legal rules of universal validity, which would foster the development of economic and trade relations on a non-discriminatory basis.

7. The Commission was also dealing with the question of treaties concluded by international organizations, which was of particular interest to the United Nations, its specialized agencies and other intergovernmental organizations. The articles it was now preparing would be of practical value to the international organizations concerned in carrying out activities which required the conclusion of agreements.

8. The Commission's work on all those topics, and on the items on its programme of future work, would be a substantial contribution towards strengthening the legal basis of world-wide co-operation, which was especially important at a time when the trend towards international *détente* was dominant in international relations.

9. The CHAIRMAN, after thanking the Secretary-General for his statement, observed that it was the second occasion on which he had found time to address the Commission during his relatively short time in office. That in itself was a sign of his appreciation, but after hearing his statement the Commission had no need of indirect evidence of his interest in its work.

10. The Commission was, indeed, highly gratified by the Secretary-General's praise. Although Latin was not an official language of the United Nations, it was sometimes used in the Commission, and on the present occasion he would like to quote the old Latin adage *Principibus placuisse viris non ultima laus est*, which, translated into plain English, meant "It is pleasant to be liked by eminent men"; and the chief administrative officer of the United Nations was certainly an eminent man. He hoped that the Secretary-General, for his part, would find a certain satisfaction in the high esteem in which he was held by the members of the Commission—many of whom were also *principes viri* in the field of law—because of his achievements before taking his present office and his success in discharging his new responsibilities. The Commission was proud that it was a trained jurist who now held the high office of Secretary-General of the United Nations.

11. The Commission had listened with great interest to the Secretary-General's statement and was glad that he shared its views on the importance of the codification and progressive development of international law, and the close connexion of that work with the maintenance of peace, co-operation and justice in a world which was so much in need of them.

12. The Commission considered itself fortunate that in the person of the Secretary-General it had a friend on whose comprehension and help it could count when the problems confronting it were dealt with by him or by bodies in which he played a decisive part. By way of example, he referred to paragraph 176 of the Commission's report for 1973, in which it had informed the General Assembly that in view of the increased demands of its work, it needed more assistance for research projects and studies, which could hardly be achieved without increasing the staff of the Codification Division of the Office of Legal Affairs, as the Commission had already recommended in 1968.

13. In conclusion, speaking on behalf of the Commission, he thanked the Secretary-General for his visit and assured him that in his absence he was always most ably represented by the Commission's Secretary and his efficient staff.

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]

(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

ARTICLE 30 (Other territorial régimes) (*continued*)

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

15. Mr. AGO said that, in his view, the articles under discussion were essential and the arguments in favour of their retention irrefutable. If those articles were deleted, it might be asked whether other provisions, in particular article 11, were necessary.

16. The Special Rapporteur's report and his oral introduction of the two articles both gave the impression that he was not entirely satisfied with their wording. In their present form, the articles seemed to go further than would be desirable in regard to the maintenance of the *status quo*. That was why the Special Rapporteur had stated in paragraphs 439 and 440 of his report (A/CN.4/278/Add.6) that their form and drafting might require further consideration and that special care should be taken with the commentary. The real purpose of article 29 was to stipulate that a boundary did not cease to be a boundary simply because of a succession

of States relating to a particular territory. The wording "A succession of States shall not as such affect a boundary established by a treaty", with which article 29 began, might be misinterpreted because it was rather too categorical.

17. The articles under discussion quite clearly covered all cases of succession of States, not only those resulting in the creation of newly independent States, though they excluded successions of governments. The various cases differed widely.

18. In Latin America, most of the States which had attained independence about the middle of the nineteenth century had previously been part of the Spanish Empire. The Spanish administration, which had had no reason to mark the boundaries of its Latin American provinces in one way more than another, had adopted mountain ranges and rivers as lines of demarcation. Although those boundaries had not always been very precise, they had never been arbitrary, and the new States of Latin America, following the principle of *uti possidetis juris*, had wisely decided to maintain the boundaries established by the Spanish monarchy. But in spite of that, the period following their independence had been characterized by boundary disputes.

19. Moreover, not all the boundaries of those new States had formerly delimited provinces of the Spanish Empire; some of them had separated a province from the territory of another colonial empire. Where a boundary had delimited the territories of two colonial empires, one of the colonial Powers concerned might have taken advantage of the conclusion of a treaty to expand its territory at the expense of the other. When a territory thus detached attained independence, assuming, of course, that the treaty was valid, the question would arise whether the succession of States affected or did not affect the boundary established by the treaty. Although the principle of international law according to which the boundary existed at the time of the succession of States was indisputable, it should be borne in mind that the two colonial Powers had had no reason to contest the boundary, whereas the new State had very specific reasons for wishing to change it.

20. History provided a more recent example of colonies which had attained independence after belonging to a single empire—the French colonial empire. Since, at one time, France had hoped to retain some territories more than others, it might have tried to extend unduly the boundaries of the possessions it wished to retain, to the detriment of the countries which were to attain independence earlier.

21. Generally speaking, it should be noted that in Africa, the boundaries separating territories belonging to different colonial empires had often been established arbitrarily. Some populations had been divided or united arbitrarily. To avoid chaos, the newly independent States of Africa had preferred to adhere to the established boundaries for the time being, though some of them had suffered more than others from the dissemination of their population among different States. It was conceivable that a colonial Power, knowing that a territory under its adminsitration would soon become independent and wishing to develop its relations with another already independent State bordering on that territory, might transfer to that State sovereignty over part of the territory which was about to become independent. The validity of such an agreement between a colonial Power and an independent State was undeniable, but what of the State which would then attain independence after being improperly stripped of part of its territory? In those circumstances one would hesitate to say that the succession of States could not affect the boundary thus established. Article 29 should be worded in such a way that it could not be construed in a manner prejudicial to the interests of certain countries.

22. Consequently, while he was in favour of retaining articles 29 and 30 and reaffirming the fundamental principle of international law on which they were based, he hoped that they would not be open to a political interpretation of which the Commission would surely not approve.

23. Mr. HAMBRO said that many of the oral and written arguments which had been advanced concerning articles 29 and 30 had given him the impression of being special pleading directed at special cases. In the practice of States, of course, all cases were special, but it was important that the Commission should not deal with special cases, but should rather lay down general rules for the future. After all, the Commission did not function as a tribunal, nor did it attempt to decide controversial cases of State succession which had already taken place.

24. It should also be made clear that article 29 did not state or imply that boundary treaties were sacrosanct and would last forever; it simply stated that succession of States as such would not affect those treaties. If a treaty was invalid or grossly inequitable before succession, it would continue to be equally invalid or inequitable thereafter. It should also be made clear that the Commission was not remotely interested in abolishing any instruments for the peaceful settlement of disputes, which should certainly always be available to a successor State if it found that a boundary treaty was inequitable.

25. Some speakers had suggested that article 29 might conflict with the principle of self-determination, but he could not share that view. The principle of self-determination could not and should not be invoked for the purpose of destroying all stability in international relations.

26. It had also been said that the Commission should take into consideration not only the territory affected by a treaty, but also the human beings whose lives might be affected by it. It was undoubtedly true that more importance was now attached to individuals than in the past, but it must be borne in mind that treaties were concluded between States and not between persons. In fact, the importance of State sovereignty was so often emphasized today that it would be absurd to denounce a treaty because it did not attach sufficient importance to individuals.

27. It had also been asked what would happen if article 29 was not included in the draft. In his opinion, probably no great harm would be done, since its provi-

sions were an expression of customary international law. But that was no reason for omitting them, since to do so would attack the very concept of codification. It had been argued that it might be better to omit the article, because it could conceivably lead to controversy. But that argument was also invalid, since it would mean the abandonment of all attempts at codification. After all, States would always be able to ratify the future convention subject to certain reservations.

28. He also favoured the adoption of article 29 because it might prove to be particularly important in relation to article 11, which had already been adopted by the Commission.

29. Lastly, with regard to article 30, he considered it to be a correct expression of customary law, though he was not as convinced of its usefulness as he was of that of article 29.

30. Mr. BEDJAOUI commended the Special Rapporteur for the part of his report dealing with the concluding articles of the draft. Articles 29 and 30 applied to all kinds of treaties, both general and restricted multilateral treaties and bilateral treaties, and to all types of succession of States, not merely those connected with the creation of a newly independent State.

31. As Special Rapporteur for the topic of succession of States in respect of matters other than treaties, he was in a difficult position. While basically in agreement with the rule laid down in articles 29 and 30, he was rather unhappy, if not about their inclusion in the draft articles, at least about their present wording and titles. The Commission had decided to consider succession of States in respect of treaties separately from succession of States in respect of matters other than treaties because it had wished to deal with treaties as subject-matter of succession, not as intruments of succession. In the case of articles 29 and 30, however, a subtle distinction had been drawn between the treaty itself, which would be "consummated" and, having produced all its effects, become merely an evidential instrument serving as a title of validity, and the territorial or boundary régime established by the treaty and valid *erga omnes*. That represented a shift from succession of States in respect of treaties towards succession of States in respect of matters other than treaties, so that articles 29 and 30 should not normally be included in the draft under consideration. Moreover, territorial régimes could derive from sources other than treaties, such as custom; they were then rightly regarded as subject-matter of succession independent of the treaties or custom which had established them.

32. The fact that the matter had been dealt with by the Special Rapporteurs for succession of States in respect of treaties would not dispense him from studying it as part of the topic for which he was Special Rapporteur. He would, however, deal with boundary and territorial régimes independently of the instrument which had established them, whereas in the present case only régimes established by treaty were considered. For the purposes of the draft articles under discussion the emphasis must be on the treaty, not on the régime it established, otherwise the articles might go beyond the bounds of succession in respect of treaties.

33. The United Nations Conference on the Law of Treaties had been more skilful. Article 62, paragraph 2(*a*), of the Vienna Convention[1] was formulated simply in terms of objective rights, which, being a matter of status rather than of treaty law, did not come under that Convention. The articles under discussion, on the other hand not only indicated that boundary and territorial régimes were outside the scope of the draft, they stated a substantive rule—albeit an indisputable one—which took the Commission outside the subject it was considering. If the Commission wished to lay down a substantive rule of positive law, it must refer to treaties, both in the titles and in the text of the articles. It must not refer to boundary régimes or territorial régimes, but to the fate of the treaties establishing such régimes. The attachment of the subject of boundary and territorial régimes to that of treaties was thus quite artificial. To avoid such an artifice, either the Commission must deal with the fate of the treaties, or articles 29 and 30 must be transferred to the topic for which he was responsible.

34. Most frontiers on the African continent had been established by European Powers without regard to the pertinent technical, linguistic or other considerations. A document distributed to the Commission showed that the Somali people had been divided between British Somaliland, the former Italian Somaliland, the French Somali Coast, the northern part of Kenya and certain Ethiopian territories (A/CN.4/L.205). The African States had accepted the principle that boundaries, whether established by treaty or by custom, were inviolate. That position had been confirmed by several provisions of the Charter of the Organization of African Unity.[2] It might be said that the African States, in the interests of peace, had agreed to ratify anew the General Act of the Berlin Conference of 1885,[3] which had divided Africa into zones of colonization or influence. That position had been reiterated at several summit meetings of the non-aligned countries. As to the dispute between Algeria and Morocco referred to by Mr. Thiam, it had been settled in June 1972, on the basis of the inviolability of frontiers, by two treaties between Algeria and Morocco, solemnly signed in the presence of African Heads of State at a summit meeting at Rabat.

35. As he, personally, interpreted articles 29 and 30, the fact that they dealt only with boundary and territorial régimes established by treaty did not mean that régimes established in other ways did not enjoy continuity or that they were precarious or had lapsed. That was one of the drawbacks of dealing with those régimes solely within the framework of treaties; the only remedy would be an appropriate commentary.

36. Régimes imposed by force or in circumstances of inequality, and régimes incompatible with *jus cogens*, were void. Nothing in the text of the articles or in the

[1] 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.

[2] United Nations, *Treaty Series*, vol. 479, p. 70.

[3] *British and Foreign State Papers*, vol. LXXVI, p. 4.

commentary should leave any doubt that the right of self-determination was to be respected. The process of succession of States could not, in itself, either consolidate or validate situations that were contrary to the principles of contemporary international law. Thus territorial régimes of a political nature, such as those of military bases, could not be guaranteed continuity. The same was true of agreements concluded by a colonial Power at the expense of a territory it had administered.

37. The present versions of articles 29 and 30 dealt much more satisfactorily with those various points than the corresponding articles discussed in 1972.[4]

38. Mr. ELIAS said that articles 29 and 30 represented a very important stage in the Commission's efforts at codification. He congratulated the Special Rapporteur on his incisive analysis and on his moderation and sense of balance. In his opinion, the arguments in favour of maintaining the two articles were overwhelming, though he was not entirely satisfied with their wording.

39. He agreed with Mr. Hambro that if article 11 was included in the draft, articles 29 and 30 should be included as well, since they underlined the customary rule that territorial treaties constituted an exception to the clean slate principle.

40. Articles 29 and 30 were also important because of the implications of the Charter of the Organization of African Unity; article XIX of that Charter provided for the establishment of a Commission of Mediation, Conciliation and Arbitration, the sole purpose of which would be to deal with boundary disputes. Since almost all newly independent States were likely to find themselves involved in boundary disputes of one kind or another, it was essential to have some rule in the Commission's draft which would cover the matter, though in that respect the present wording of article 29 was not entirely satisfactory.

41. Moreover, the principles laid down in articles 29 and 30 were in line with the very careful formulation of article 62, paragraph 2 of the Vienna Convention, which stated that "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (*a*) if the treaty establishes a boundary". In drafting articles on succession of States in respect of treaties, the Commission could not logically take a position opposite to that which it had taken in regard to the law of treaties.

42. He agreed with Mr. Ushakov that article 29 was not confined in its scope and effect to newly independent States, but could also apply to long-established States and frontiers. He had, however, found it difficult to accept the idea that an unlawful treaty could establish a valid boundary. In its anxiety to limit the application of the present articles to existing and future problems, the Commission should not give the impression that it believed that boundary régimes should always be considered valid once they had been established. It would be very dangerous to recognize purely *de facto* situations, since that might mean a recognition of territories which had been occupied by military force.

43. He subscribed to the view expressed by the Special Rapporteur in paragraph 440 of his report (A/CN.4/278/Add.6) that the fact of succession as such should not affect boundaries, but should leave open the question of the validity or invalidity of the boundary treaty itself. The Special Rapporteur had, in fact, stressed two things in that paragraph: first that the Commission should do its best to avoid giving the appearance of making decisions which might be regarded as influencing the settlement of a particular dispute, and secondly, that special care should be taken to ensure accuracy in the final version of the commentary. Those were points to which the Drafting Committee should give particular attention in its final formulation, for if legal experts like Mr. Ushakov and the Special Rapporteur could hold such different views on the meaning of articles 29 and 30, the need for stating the rules they laid down as carefully and clearly as possible could not be over-emphasized.

44. There seemed to be general agreement that rules stated in articles 29 and 30 should not be interpreted as in any way discouraging negotiations or arbitration for the peaceful settlement of disputes. The possibility of such a misinterpretation might be avoided by prefacing the articles with some such opening phrase as "Without prejudice to the rights of either party to invoke the validity of the treaty...".

45. Mr. RAMANGASOAVINA said that he endorsed the principle stated in articles 29 and 30. A succession of States should not serve as a pretext for challenging an established situation or for unilaterally denouncing a territorial treaty: such a possibility would militate against the maintenance of peace and international security. The Commission's purpose was not, however, to maintain the stability and continuity of boundary régimes at all costs. It must also avoid the maintenance of a measure of discontent or unrest caused by the stability it was seeking to maintain. It should therefore give the most careful consideration to the principle it was trying to preserve concerning the continuity of boundary treaties and present that principle with numerous precautions, so as to avoid wounding certain susceptibilities. In stating the principle, it should not close the door to all possibility of friendly settlements between neighbouring States, and it must therefore make it quite clear that the rule laid down could not be invoked as a ground for the rejection of any territorial claim based on legitimate rights, such as the right to self-determination. It should not exclude all possibility of arbitration, for arbitration was always desirable with a view to establishing a more equitable situation that was more in keeping with the real territorial, ethnic or sociological facts of the area concerned.

46. Articles 29 and 30 applied to all successions of States—not only to successions resulting from the union or separation of former States, but also to successions involving newly independent States. But very few of the cases cited by the Special Rapporteur in his commentary (A/8710/Rev.1, chapter II, section C), which were drawn both from international practice and from international jurisprudence, related to newly independent States. Most of them related to former European States

[4] See *Yearbook ... 1972*, vol. I, p. 247.

and to treaties negotiated by independent States enjoying full sovereignty. For instance, in the *Case of the Free Zones of Upper Savoy and the District of Gex*, France had succeeded to a treaty between the Kingdom of Sardinia and Switzerland, and in the *Case concerning the Temple of Preah Vihear* it had not been Cambodia, as successor of France, which had disputed the boundary treaty, but Thailand, an independent State, which had been a party to the treaty.

47. He himself came from a State that had no boundary problems, but was situated in a geographical area in which boundary disputes were very acute and many territorial problems remained to be solved. The United Nations had certainly done well to organize a plebiscite in Togo and Cameroon, but there were other problems in Africa which had not yet been settled. For example, it could not be said that the situation in Tanzania, Zaire, Rwanda and Burundi was now stabilized and that those States—Tanzania in particular—had accepted the situation they had inherited from the predecessor States, that was to say the colonial Powers. The situation could only be described as one of tolerance which depended on the understanding between those States, and to which Tanzania might put an end at any time by denying transit through its territory to the nationals of the neighbouring States.

48. He therefore believed that the present wording of articles 29 and 30 might give rise to a misunderstanding that would be hard to dispel. Of course, some Governments accepted those articles, because they had every interest in the stabilization of a situation which was to their advantage. Other Governments, on the other hand, saw the articles as consolidating a situation they considered unjust or unlawful. The present boundaries in Africa, for instance, were the result of administrative decisions imposed by the colonial Powers in the nineteenth century under such instruments as the General Act of the Berlin Conference of 1885. Such boundaries had often been imposed without regard to the interest of the population of the territories concerned. Somalia, for instance, had been divided into several parts, some of which had been attached to neighbouring States. It would take a long time to reach a final settlement of those problems, and it was to be hoped that an acceptable solution could be found by arbitration.

49. While recognizing the need to maintain the principles embodied in articles 29 and 30, he thought their wording should be carefully reconsidered. As Mr. Bedjaoui had said, article 29 seemed to place the main emphasis on boundaries. Important though that question was, the Commission should not forget that it was dealing with succession of States in respect of treaties. It would therefore be better for article 29 to say that a succession of States "shall not as such affect a treaty establishing a boundary" rather than "a boundary established by a treaty".

50. With regard to article 30, Mr. Tammes had made a very wise suggestion in introducing human considerations into the draft articles. The Commission should not concern itself solely with territories, but should place greater emphasis on the interests of the inhabitants of those territories, who were often split up between several neighbouring States, as in the case of the Somali pastoral nomads who had been deprived of their grazing grounds.

51. As Mr. Elias had said, the introduction to article 29 should stress that the principle that a succession of States did not as such affect a treaty establishing a boundary, left untouched any dispute that might exist regarding a particular territorial treaty; for in the case of many newly independent States, the treaties in question had been concluded by colonial Powers without consulting the populations concerned. It should therefore be emphasized that the possibility of arbitration remained open whenever a treaty was seriously contested and whenever the principle laid down in articles 29 and 30 conflicted with the principle of self-determination.

52. Thus, although the principles embodied in articles 29 and 30 could be accepted as a whole, their presentation would have to be completely recast in order to allay any possible fears about their application. The Special Rapporteur had said that the great majority of governments were in favour of the two articles; but in view of the importance of the future convention, he thought every effort should be made to obtain a consensus, for as long as any doubt remained about the application of the articles, some States would not ratify the convention and that would seriously restrict its scope and effectiveness.

53. Mr. TSURUOKA said he believed, like most of the speakers before him, that a succession of States as such was a separate matter and did not affect a boundary established by a treaty or rights and obligations established by a treaty and relating to the boundary régime. The principle stated in article 29 was therefore justified in the interests of stability of frontiers—which often gave rise to international disputes—and consequently in the interests of the maintenance of peace.

54. Nevertheless, he also shared the concern of some members of the Commission because, as Mr. Bedjaoui had observed, articles 29 and 30 applied to all forms of succession of States, including successions resulting in newly independent countries. He therefore agreed with most members of the Commission that the principle stated in the two articles was a good one, but that the drafting needed improvement. Successions of States which brought independent countries into being enabled such new countries to aspire to more legitimate boundaries better suited to their interests. In recasting articles 29 and 30, care should therefore be taken not to exclude all possibility of recourse to peaceful means of settling boundary questions, such as negotiation and judicial procedure. Every recourse to peaceful means of settlement should be permitted, not only to newly independent countries, but to other countries as well. He was sure that the Drafting Committee would find more satisfactory wording to cover that point.

55. He also had some doubts about the interpretation and application of the two articles. He was not sure exactly what was meant by the terms "boundaries" and "boundary régime". Did they refer only to the line of demarcation, or to the limit within which a State exercised its sovereignty? If the latter interpretation were

adopted, the scope of the two articles would be much too wide. For instance, in the case of the law of the sea, those terms would embrace not only land boundaries, but also the limits of territorial waters and the contiguous zone. That point would have to be clarified in the article or, failing that, in the commentary. He himself understood a boundary to mean the boundary line, not the limit of the area within which the sovereignty of a State was exercised, for he thought the latter interpretation would go beyond what the Commission intended. He would, however, be glad if the Special Rapporteur would explain that point.

56. He hoped that the Drafting Committee would find better wording, which would make the meaning of the terms "boundary" and "boundary régimes" clear and allay the anxiety of newly independent countries which feared they would no longer be able to challenge boundaries imposed by an unjust treaty, in the negotiation of which they had taken little part.

57. Mr. ŠAHOVIĆ said that, in his commentary and oral introduction, the Special Rapporteur had succeeded in answering most of the arguments advanced against articles 29 and 30. In drawing up rules on succession of States in respect of treaties the Commission could not have left aside the question of boundary régimes and other territorial régimes, and in dealing with that question it had been right to adhere to the traditional rules of international law. Those rules were indisputable and their validity had not been contested even by those who had expressed doubts about the advisability of including articles 29 and 30 in the draft.

58. Nevertheless, the discussion and the present state of international law showed that there were a number of problems relating to those traditional rules which made it necessary to reconsider them from a new standpoint and to try to adapt them to international law at its present stage of development. In doing so it could be seen that the real problems arose mainly in connexion with successions resulting from the decolonization process. In view of the fundamental principles of contemporary international law upon which that process was based, it had been found necessary to pose the problem of the relationship between the traditional rule of the continuity of treaties, confirmed by the Commission, and the principle of self-determination.

59. In his opinion, the rules involved should be more thoroughly examined in regard to their merits and actual content, with a view to delimiting their field of application. In doing so, special importance should be attached to the present practice of States established during the process of decolonization. On the whole, those States had shown that they were prepared, in their own interest, to observe the traditional rule of the stability of boundaries. The African countries, for instance, had decided to respect the boundaries imposed on them by the colonial Powers, even though they were conscious of the injustice done to them in the past by the imperialist countries. Thus, if international law was viewed as a whole, it must be concluded that the principle of self-determination and the principle of the inviolability of the territorial integrity of States were not conflicting, but interdependent principles, which should both be equally respected, having regard to all the means available to States under contemporary international law for the settlement of their boundary problems. The traditional rule of the continuity of treaties must therefore be respected in regard to boundary régimes and other territorial régimes, but without denying States the possibility of settling boundary questions by applying the other lawful procedures open to them under international law.

60. He agreed that the wording of articles 29 and 30 should be reconsidered. The principles stated in those articles should not be omitted, but be better adapted to the subject-matter of the draft.

61. In his opinion, moreover, the statement that unequal treaties always remained unequal treaties should be qualified. For treaties such as the Act of Berlin, under which Africa had been partitioned by the imperialist Powers, were not unequal treaties from the standpoint of the States which had concluded them, but from that of the African nations which had been under colonial oppression when those treaties had been concluded. And those African nations were now independent States which had decided to respect the boundaries imposed on them by the treaties. Hence it was dangerous to maintain in categorical terms that unequal treaties would always remain unequal treaties.

62. He considered that articles 29 and 30 should be retained, but that their wording should be reconsidered in the light of all the suggestions made, particularly those by Mr. Tammes concerning article 30.[5]

63. Mr. KEARNEY said that he was essentially in agreement with those who considered that articles 29 and 30 were necessary in the draft. He believed, however, that those articles involved problems of presentation.

64. It was not possible to adjust the language so as to allay all the misgivings that had been expressed. That was particularly true of the concern of Mr. Bedjaoui, as Special Rapporteur for the topic of succession of States in respect of matters other than treaties. It was extremely difficult to draw the dividing line between Mr. Bedjaoui's part of the topic of State succession and the part relating to treaties, and it was possible that the Commission might have slightly overstepped that line in articles 29 and 30. At the present stage, however, the Commission could not very well draw back from the position it had taken in 1972.

65. On the question of presentation, Mr. Elias had made an excellent proposal, namely, that it should be made clear that the provisions of articles 29 and 30 did not affect differences regarding the validity of the treaties to which those articles referred. One possibility would be to introduce a separate article which would apply that principle to articles 29 and 30. The new article, which would become either the first or the last in part V, might be worded on the following lines: "Nothing in article 29 or in article 30 shall be considered as prejudicing in any respect a question relating to the validity of a treaty." Although that point had already been made quite clear in the commentary, it

[5] See previous meeting, paras. 33-36.

would be psychologically more effective if it was included in the text of the draft.

66. The Commission could not, of course, rectify boundary situations which, in the opinion of some, were not fair. That was certainly not the purpose of the draft articles. The Commission was not at present engaged in writing frontier law, but only succession law. It could not go beyond the formulation of provisions on succession of States.

67. That being said, he wished to deal with some drafting points. The first related to the phrase "régime of a boundary" in sub-paragraph (*b*) of article 29. That formula had been criticized as being too vague, but it would be very difficult to make it any more precise without going into excessive detail. In fact, the formula was in fairly common use and was usually taken to mean a set of attributes which accompanied a boundary. One example was that of means established for the delimitation and determination of the actual boundary line; a set of agreed technical rules for the purpose of determining the exact site of the boundary would constitute part of the régime of the boundary.

68. The United States Government, in its comments, had suggested the elimination from paragraph 1 of article 30 of the requirement that rights and obligations had to attach to a particular territory in the State concerned (A/CN.4/275). As he saw it, the purpose of that suggestion was to reduce possible argument on the question whether the rights related to a particular territory or to the State as a whole. If one took the example of a land-locked State which had certain rights of transit or the right to use a seaport in another State, those rights clearly benefited the entire land-locked State. Cases of that kind should be covered by the draft articles.

69. He accordingly urged that the Drafting Committee should give careful consideration to that suggestion which, if accepted, would make the application of article 30 clearer, simpler and less productive of disputes.

The meeting rose at 1.05 p.m.

1289th MEETING

Wednesday, 3 July 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Ramangasoavina, 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. EL-ERIAN said that the Commission had decided in 1972 to include articles 29 and 30 in the draft in order to cover certain categories of treaties, or rather certain situations which had their origin in treaties of a "territorial" character, known also as "dispositive" or "localized" treaties. The Commission had taken that decision in full awareness of the complexity of the undertaking; it had recognized in paragraph (1) of the commentary (A/8710/Rev.1, chapter II, section C) that the question of territorial treaties was "at once important, complex and controversial".

3. It had been asked whether the subject-matter of articles 29 and 30 really belonged to succession of States in respect of treaties or to the other part of the topic of State succession, for which Mr. Bedjaoui was Special Rapporteur. That question had been raised in the Sixth Committee by the Egyptian delegation, whose comments were summarized in the Special Rapporteur's report (A/CN.4/278/Add.6, para. 417). During the present discussion, the majority of members had seemed to consider it desirable to include the two articles in the draft. If the Commission decided to retain them, it would be necessary to find a formulation that would allay the misgivings and prevent the misinterpretations to which the present text of the articles had given rise.

4. For those reasons, it was essential to make it abundantly clear what the articles were intended to cover, what their provisions actually meant and, particularly, what they did not mean. In the latter connexion, he drew attention to the statement in the Special Rapporteur's report that "the draft articles should deal only with matters relating to the effects of a succession of States and should not attempt to reiterate rules such as those relating to the validity of treaties". The Special Rapporteur had then gone on to stress the need to make it "absolutely clear that article 30 does not prejudice any grounds that there may be fore invalidating or terminating a treaty" (A/CN.4/278/Add.6, para. 453). There was general agreement that the Commission did not intend articles 29 and 30 to prejudice the question of the validity of the treaties concerned. Article 6 of the draft was particularly relevant to that matter, since it stipulated that the present articles applied only to "the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations", and the provisions of articles 29 and 30 were obviously subordinated to those of article 6.

5. He accordingly supported the suggestion made by Mr. Elias and Mr. Kearney that the position should be made absolutely clear in that respect,[1] primarily for

[1] See previous meeting, paras. 44 and 65.