

March 1968

## Conflict Avoidance In International Law - The Sparsely Peopled Areas and the Sino-Indian Dispute

Daniel Wilkes

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [International Law Commons](#), and the [Water Law Commons](#)

---

### Repository Citation

Daniel Wilkes, *Conflict Avoidance In International Law - The Sparsely Peopled Areas and the Sino-Indian Dispute*, 9 Wm. & Mary L. Rev. 716 (1968), <https://scholarship.law.wm.edu/wmlr/vol9/iss3/7>

# CONFLICT AVOIDANCE IN INTERNATIONAL LAW— THE SPARSELY PEOPLED AREAS AND THE SINO-INDIAN DISPUTE

DANIEL WILKES\*

## INTRODUCTION

Thinly populated territory requires special treatment in international law. The conflict in Vietnam since 1959 has demonstrated this, as rule after rule of international law has become inapplicable to the reported facts. For example, it is deemed legitimate in international law to recognize a revolutionary regime as in de facto control of a substantial part of a country if it 1) is in effect administering, as a government, a defined part of the territory plus a defined part of the population, 2) can maintain foreign relations, and 3) is believed to be likely to retain its control.<sup>1</sup>

Although large areas of the countryside in South Vietnam are subject to at least military and tax control of the Viet Cong by night, the specific villages or men and women administered are not necessarily contiguous in space nor continuous in time. Since the same may be said for daytime administration in many places by the government of the Republic of Vietnam, traditional recognition rules are of little avail in deciding, for example, whether Cambodian recognition of the Viet Cong's National Liberation Front,<sup>2</sup> or United States recognition of any of the successive governments centered on Saigon, violated international law. Here, the sparsity of population outside the cities was a key factor in shaping situations in which many of the old rules could not be applied.

At first sight, then, it may seem that new legal rules are needed to provide this special treatment. It is the thrust of this article, however, that what is really needed is a shift in emphasis from reliance on the

---

\*LL.B. Harvard, LL.M. in International Law, New York University, Visiting Associate Professor of International Law, The University of Connecticut School of Law.

1. Cf., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1965).

2. For Cambodian recognition of the NLF and the establishment of an NLF diplomatic mission in Phnom Penh, see R. SHAPLEN *Letter from Cambodia*, NEW YORKER, Jan. 13, 1968, 66 at 69.

development of rules to the nurturing of new mechanisms of cooperation. In this respect the law of sparse terrain is representative of a much more general shift in international law. Thus, this article uses the problem of sparsely peopled areas, and in particular of those on the Sino-Indian border, as a "laboratory" to demonstrate the weaknesses of past rule-centered law insofar as the avoidance of conflict is concerned.

To do this, a three-stage argument is developed, 1) presenting broad general principles for change, 2) demonstrating the inadequacy of existing rules, and 3) in conclusion, making some basic proposals.

In the first stage, the background of the shifts in emphasis taking place in international law is set forth. Here, the major break-through in the law of territory—the Antarctic Treaty—is used to show a shift to new techniques. Here, too, the need to resort to new sources for these cooperative techniques—for example, in the case of border problems, to physical sciences such as hydrology, and to social sciences such as the economics of development or the politics of regional enterprise—is emphasized. Finally, the need to keep "peace" and "cooperation" uppermost as the primary goals for which these techniques are fashioned is presented, exemplified here by changes in the rules of war which armed conflicts over sparse borderlands require.

In the second stage, the traditional rules for resolving disputes over sparse territory are explored, one by one. Sino-Indian border areas serve here as a "laboratory" to demonstrate that agreement on rules themselves may—and often does—fail to avoid conflict but merely shifts it to conflicts over facts. In this section, too, some suggestions are made for handling the problem of minorities living along international boundaries.

Lastly, in the third stage, three major proposals are set out. These in turn are based on the application of the new emphases laid down at the outset and on the conclusions drawn from the inadequacy of traditional rules.

One caveat is in order. It is clear that in many circumstances two border states will still be able to agree to have arbitrators apply the traditional rules to end a dispute between them. It is only because it is equally clear that in many other cases the absence of new mechanisms bars cooperation and invites armed conflict that alternatives to the traditional rules are argued for below.

## THE BACKGROUND SET BY CHANGING INTERNATIONAL LAW EMPHASES

When we survey the new tools that international lawyers apply to the problems of sparsely peopled areas, several themes emerge.

*Theme One: We cannot talk about the development of new rules without talking about the development of new mechanisms for our nation-to-nation dialogues.* In fact, it is precisely because certain rules are inconsistent with pacific means of discourse that new rules are being devised.

The Antarctic affords us a perfect example. If a right to possess ice-covered Antarctic territory were said to stem from "discovery" on the ground that "greater occupation" is not suitable—by following the *Clipperton Island Arbitration* rule<sup>3</sup>—then squabbles over priority or range of discovery could bar new scientific ventures there. On the other hand, if the right to possess internal ice-covered lands were to stem from maintenance of a base along the coast—by following the *Eastern Greenland Case* rule<sup>4</sup>—then squabbles would arise over whose base it is and how far they can claim. This, too, could block the kind of cooperation, for example, that led the United States to turn over its Wilkes base to Australia for use by scientists of both nations in 1959.<sup>5</sup> The alternatives were clear: either give up the cooperation and peace, or develop new rules for Antarctica.

The Antarctic Treaty of December 1, 1959—which placed an express moratorium on the type of game played by these classical rules—provided a start in the more affirmative direction.<sup>6</sup> The key lessons we learned from this treaty were: first, that we can devise new mechanisms which will *avoid conflicts*, predictable under the old rules, before they arise. Second, that the new rules for sparsely peopled areas must be consistent with both, not just one, of our international societal aims: peace *and* cooperation.

This last is the most difficult to translate into an operative principle, rather than mere lip-service. This is especially true where the most

---

3. 2 Int'l Arb. Awards 1107, 26 AM. J. INT'L L. 390 (1932).

4. P.C.I.J., Ser. A/B, No. 53 (1933).

5. MODERN ENCYC. OF AUSTRALIA AND NEW ZEALAND 90 (1964).

6. 12 U.S.T.S. 749. Existing alternatives to a war of all against all in the Antarctic are spelled out in JESSUP AND TAUBENFELD, CONTROLS FOR OUTER SPACE AND ANTARCTIC ANALOGY (1959). The full panoply of the pre-Treaty national polemics on Antarctic claims has been superlatively collected in HAYTON, NATIONAL INTERESTS IN ANTARCTICA, AN ANNOTATED BIBLIOGRAPHY (1959).

dramatic conflicts of the day throw shadows of doubt on the desire of certain states to cooperate at all.

An honest self-appraisal will reveal conduct by many nations that could be interpreted by neighbors as inconsistent with desires to cooperate. In this category belong such acts as seizures of fishing boats where notices to their owners or fines would suffice; closing of consular services as a diplomatic "maneuver"; closing of border roads; "retaliatory" customs discrimination; and strongly worded protest notes where informal exchanges are possible.

An honest appraisal also discloses that world energies directed toward real cooperation increase with each decade no matter how painfully precarious present levels may seem to be. Who would have visualized in 1945, for example, such ventures as the Oceanographic Survey of the Indian Ocean, the International Geophysical Year, the WHO Campaign to Eradicate Malaria, or world-wide coordinations by the Technical Assistance Board?

Finally, the techniques, such as the Indus Waters Treaty, to ensure that measures to avoid shooting will also increase the chances for joint efforts, rather than decrease them, are yet being forged. Greater efforts to develop those techniques, rather than pessimism as to their practicability, has characterised the present stage of transitional international law.

*Theme Two: For this "rethink" of international law, we are drawing increasingly upon materials of other disciplines* such as the physical and social sciences. For example, in the sparsely occupied areas, the traditionalist's "legal" orientation led him to look for a rule based on "rights" rather than "use." Yet the proposition "he who first occupies land holds exclusive right to use it" does not guarantee its use at all. Suppose we have an island that may be usable by several nations together. If we pose, as the only international law problem, the question of who has the exclusive right to use it, we have arbitrarily limited ourselves to use by either state A or state B. To some extent, this reflects post-feudal coupling of the determination of rights with the resolution of conflicts which in itself was a significant advance over the "might makes right" of an earlier day. It may leave us unnecessarily limited in our ability to *avoid conflict*, as contrasted with resolving it.

Other ways of looking at this island become legally relevant only if we are willing to shed the blinkers of the purely "rights-conscious"

approach. For instance, if we consider the technical possibility of its joint use as a factor of legal relevance, we can bring to bear solutions that can go beyond mere exclusive rights to use based on "occupation" or "title." New solutions have in fact been applied in this identical situation to permit joint exploitation of Christmas Island phosphates by Australia and New Zealand.<sup>7</sup> Significantly, this type of "solution-conscious" approach has been proposed to resolve sparsely peopled space conflicts in Vietnam and elsewhere in the Mekong River region through solutions revolving around joint development of the river valley as a whole.

Perhaps, however data from the social sciences will prove the most helpful of all in forging new tools for conflict avoidance. For example, use of data-collection techniques to discover the psychological attitudes of the country-by-country "desk men" in the American State Department revealed that they were basically empathetic toward their assigned country, while men from other departments tended to be antipathetic in order to represent domestic or security interest.<sup>8</sup> The disclosure of this fact—that, in the decision-making process, opinions which did not take into account the feelings of the nations with whom we had friendly relations were numerically weighted against the opinion of the man best suited to understand those feelings—opened the way to corrective adjustments.

*Theme Three: Changes in international law are limited by purposes we have already accepted for world public order.* These purposes are often enough stated—to bring, through peaceful cooperation, the intellectual and physical fruits of civilization to all<sup>9</sup>—but they are just as often subordinated in conflicts over sparsely peopled areas. This occurs most wastefully when military "life-taking" bars all cooperation from taking place.

The fundamental question thus posed for transitional law rules is whether this subordination is in fact required by some other rule of conduct. For example, the existing rule that each state has a right to protect its territorial integrity and to call on others to help it to do so

---

7. Each is an equal partner with the other in mining carried out by a joint Christmas Island Phosphate Commission. See, 2 WHITEMAN, DIGEST OF INT'L LAW 1103 (1963). Cf. 1912 proposals for a joint regime in Spitsbergen but with no national ownership at all, summarized in JESSUP and TAUBENFELD, *supra* note 4.

8. See Pruitt, *An Analysis of Responsiveness between Nations*, 6 J. OF CONF. RES. 5 (1962).

9. See e.g., U.N. CHARTER, preamble.

raises just such a question. Suppose "unrestricted military life-taking" were proposed to fit within the traditional rule of self-defense. Then the proposed rule of "unrestricted action" could be weighed in terms of whether it harmonized with or ran counter to the purposive directions we have already accepted for world public order.

As a very minimum, therefore, the protection of territorial integrity in today's world can remain consistent with these purposes only if:

1. *it uses means rationally calculated to reduce the amount of life-taking activity needed under the rule,*
2. *it uses means which permit the cessation of such activity, and*
3. *it uses means that are not inconsistent with cooperation after military action ends.*

Application of these rules underlay the "peace force" solution produced by Secretary-General Dag Hammarskjöld for the Suez crisis in 1956. They are also implicit in dialogues between foreign offices about the case of protection for South Vietnam. Most differences between them have been expressed in terms of whether given actions, such as the bombing of training and supply depots in North Vietnam, were in fact rationally calculated to reduce the ultimate life-taking required, to permit an end to hostilities, and to permit cooperative development of the Mekong valley.

The very consequences of such differences over whether steps taken meet these minimum requirements of transitional international law suggest, also as a minimum, one final general rule:

4. *in the protection of territorial integrity, techniques for conflict avoidance must assume equal importance with steps toward conflict resolution.*

There has been much energy devoted, during our "rethink" of international law, to this question of whether there are such "general principles" to which other rules may be subject. The "whether" question misses the boat. Statements of "general principles" have become a matter of concern to international lawyers, not because they are any stranger to us,<sup>10</sup> but because of fears that others may use valid ones to justify

---

10. I.C.J. STAT. art 38(d). The necessity of consistency with a Preamble or purposes had already been applied to whether a convention against night work for women applied only to those in manual work. *Interpretation of the 1919 Convention concern-*

actions that are actually inconsistent with the stated principles.<sup>11</sup> The real challenge facing us is whether we can define the ways in which these general principles must be applied if they are not to be used to destroy the stability we gain from predictable rules of world conduct.

The author's own belief is that, especially together with states that entered the partnership of nations after 1945, our first main task is to make explicit (a) exactly why certain results reached under traditional rules are still valid in terms of the recognized common aims of nations,<sup>12</sup> and (b) exactly which uses of general principles lead to valid new rules of world public order and which uses actually run counter to development of world rule of law.

Such an analysis is offered below regarding rules for sparsely peopled areas. The thrust of this analysis will be to ask the question whether traditional rules tend to avoid conflict over sparse places. *Caveat*: The key mistake to be shunned at all costs is to make any unwarranted conclusion about whether traditional rules may still be relied on in international adjudications when parties decide to resolve conflicts by non-military means. Of course, they can be relied on in such a case. Indeed, the fact that they must be relied on has a great deal to do with whether they are adequate to avoid conflicts which become too harmful to fit in with the needs of our age.

#### CHARACTERISTICS OF SPARSELY PEOPLED AREAS

There are so few completely unoccupied lands on our planet that meaningful discussions on old or new titles to territory must start with the fact we now deal either with densely peopled or with sparsely peopled ones. In the denser ones, boundary and national sovereignty disputes can and do still persist, whether over title to Upper Silesia<sup>13</sup> or over Belgian rights to the plots amid Dutch territory involved in the *Case concerning Sovereignty over Certain Frontier Land*.<sup>14</sup> How-

---

*ing Employment of Women during the Night*, P.C.I.J., ser. A/B, No. 50 (Advisory opinion 1932).

11. See, e.g., TRISKA and SLUSSER, *THE THEORY, LAW, AND POLICY OF SOVIET TREATIES* 25-26, 40-41 (Stanford 1962).

12. AMERICAN BRANCH OF THE INT'L LAW ASSN., 1963-64 PROCEEDINGS AND COMMITTEE REPORTS 93 (1964).

13. M. LACHS, *POLISH-GERMAN FRONTIER*, 7-9, 17, 73 (Warsaw 1964). The implication is that Polish title can be derived both from the international agreements discussed therein and from the fact of continuous Polish occupation since 1945.

14. [1959] I.C.J. Rep. 209.



ever, greater density of population leads in itself to greater likelihood that a dispute will not be resolved by military means.

This discloses the more obvious of the two key differences between lightly peopled and heavily peopled spaces. The lightly peopled ones, from a military standpoint, offer a continual invitation to grab them just from the small commitment of troops ordinarily needed to acquire *de facto* control.

The second key difference lies in the greater likelihood that local resources have not yet been developed in the lightly peopled areas. If they are to become fully developed, special requirements arise. For instance, there must be a governing authority that is:

1. committed to its development, and
2. able to "import" into the sparse area the skills, machines and raw materials needed to develop it. This is true whether these skills and materials are made available from denser areas within the same state or from elsewhere.

For instance, Indonesia has projects to bring the Brantas River on Java under control. Unless controlled, this river's free cargo of lava and silt will cause thousands of square miles to become wasteland.<sup>15</sup> Yet lack of funds halted projects to train the river itself, and lack of competent geologist-surveyors prevented an early start for the ambitious multi-purpose dam project on the river at Pohgadjih.<sup>16</sup> In all fairness, the many projects already begun on Java since independence show the effect which a mere change in the governing body's commitment to development can have.<sup>17</sup>

An "obvious" third requirement for development remains:

3. There must be adequate, sustained and trustworthy peace in the area. It is just this obvious an omission from discussion of "rights" to territory which leads foreign offices to those steps that may be the most inconsistent with development goals.

#### METHODOLOGY

We shall try, experimentally, to apply our three themes from above together with the logic of these requirements for development to the

---

15. UNITED NATIONS, MULTIPLE-PURPOSE RIVER BASIN DEVELOPMENT—PART 2C, ST/ ECAFE/Scr. F/14 93 (1959).

16. Cf. PRICE, AMAZING MISSISSIPPI, 136-143, 166-167 (1962).

17. UNITED NATIONS, *supra* note 15, at fig. 31.

"legal" problems raised by sparsely peopled areas. After a brief look at the ways in which polar regions are similar to sparse regions elsewhere, we shall use the situation on the Indian-Chinese border as a laboratory in which to study the adjustments old rules must make to fit transitional ones.

#### ANTARCTIC AND ARCTIC REGIONS AS SPARSELY PEOPLED AREAS

We already have begun to change our international law rules with regard to the sparse polar regions. It is submitted that these spaces represent two special types of sparse areas, not just "freak" cases. Thus they can be looked at as parts of the world in which the ground rules for sparsely peopled areas are most free to adapt to newly-seen world needs.

If they are to be set apart at all, it cannot be on the ground that we cannot occupy them, for the fact is that both areas are now susceptible of "occupation" in the traditional sense. We have only to look at recent stations in the Antarctic,<sup>18</sup> or weather posts on the north polar ice-pack and ice-floes,<sup>19</sup> to see that we are well on the way to "occupying" them in the sense in which Denmark's "occupation" of Greenland's glacial and polar ice-covered lands has already been upheld by the World Court in the *Legal Status of Eastern Greenland* case.<sup>20</sup>

Further, both polar regions possess the two characteristics that set off lightly peopled areas from more densely populated ones:

1. Their sparsity of population creates the same temptations to grab them by use of relatively small military commitments that other sparsely peopled areas have.

2. The polar regions have the same lag in development of local

---

18. BUKYO TSUSHIN KYOKAI, *ANTARCTIC* 44, 47, 77-85, 94, 97, 100, 109, 117, 130, 141, 145, 157, 169, 181-195, 199-206 (1958).

19. The United States has maintained frozen ocean weather watch crews at Station Alpha, Station Charlie, Fletcher's Ice Island, Arlis I and Arlis II. 1 *ENCYC. INT'L* 561 (1964). The Arlis II camp has drifted 5,000 miles and sustained up to 20 men. *N.Y. Times*, Jan. 26, 1965, at 8, col. 3. (For photos of this frontier town see, 127 *Nat. Geographic* 278-281 (1965).) The Soviet Union has maintained at least five ice stations at once. Hayton, R.D. *Polar Problems and International Law*, 52 *AM. J. INT'L L.* 746 (1958); for experiences on early Soviet stations see FYODOROV, *SCIENTIFIC WORK OF OUR POLAR EXPEDITION* (1939) and ARMSTRONG, *RUSSIANS IN THE ARCTIC* (1958) (courses of 1948 and 1957 stations are mapped at p. 71).

Cf. the nuclear-powered American community complete with laundry rooms and ping pong tables that exists in Greenland's ice cap, described in WAGER, *CAMP CENTURY CITY UNDER THE ICE* (1963).

20. STEFANSSON, *GREENLAND* 160-197 (1942).

resources. Again it is necessary to stress that this lag is not due to any inherent impossibility of human exploitation created by the polar cold. Finnish homesteaders have resisted pressures to move from arctic environments for several centuries.<sup>21</sup>

In several ways, foreign offices have accepted the key implications of these characteristics even more rapidly for the polar areas than for others. First, as the unanimous acceptance of the Antarctic Treaty showed,<sup>22</sup> there already has occurred a shift from efforts to resolve conflicting claims to efforts to avoid conflicts about them. Second, the Antarctic Treaty also showed that today's international lawyers look for techniques which maximize both the chances for resource development and the chances for more joint undertakings.

Indeed, today's fundamental differences over the way we should treat the frozen north polar seas are due, in part, to opposite views of the resources involved in the Arctic, rather than to the absence of legal tools to secure their development. If you stress the navigational interests below and above the ice, techniques to maximize use of the Arctic by planes and submarine vehicles are in order; if you stress use of the surface of the ice, *i.e.*, for weather stations, techniques that assign responsibilities on national lines at least become more arguable.

Special polar circumstances, as well as the differences between the two regions, do warrant their treatment elsewhere. There is no *a priori* reason for us to retreat, however, from the principles already accepted for the sparsely peopled Antarctic when we form transitional rules for sparsely peopled areas along boundaries. There is also no *a priori* reason why techniques for conflict avoidance in the Antarctic may not contain analogues for avoiding conflict elsewhere. For instance, there is nothing inherent in the principle of "national sovereignty" which precludes two states, that agree on the area between them in dispute, from declaring a thirty-year moratorium on enforcement of purely national claims, agreeing to local or internationalized administration—as on Christmas Island,<sup>23</sup> and permitting its full development. Indeed, a brief look at the effect traditional legal analyses have in our Sino-Indian laboratory situation may show why there is room for the Antarctic principles in shaping techniques for other sparse areas.

---

21. Address by Prof. D. F. Lynch, in Hanover, New Hampshire, February 23, 1963.

22. *Supra* note 6.

23. *Supra* note 7.

THE INDIAN-CHINESE BORDER DISPUTE AS A "LABORATORY" FOR  
OLD AND NEW RULES

HYPOTHESIS: *Traditional concepts may be inadequate to permit peaceable development of disputed sparsely peopled areas.*

SITUATION: The northern and northeast frontier lands of India lie in the Himalayas and between the river valleys flowing from them. They are peopled by nomadic groups, many of whom have made permanent settlements in some of the valleys.<sup>24</sup> For purposes of our "model," military posts of Indian and Chinese troops since the outbreak of hostilities between them are disregarded. However, prior to these hostilities, the Indian Defense Department had been building up defenses, particularly through road and airstrip expansion, in the North-East Frontier Agency (NEFA) and Ladakh areas.<sup>25</sup>

In 1840, McMahon surveyed a line at the northern edge of the presently disputed areas which essentially followed the natural Himalayan boundary, bearing in mind certain customary delineations. This was perceived by him as a line connecting the highest crests and ridges, following the watershed lines that divided waters flowing into one boundary state from those flowing into the other, and at times by lines connecting natural parts of the boundary with each other or with traditional passes between them.<sup>26</sup> This line was agreed to, for the sake of peace, trade and guarantees of protection, by the Tibetan, British and local Chinese imperial representatives in 1842.<sup>27</sup> Parts along the Ladakh border also coincided with the traditional boundary defined by piles of stone and recognized in the Tibetan Chronicles.<sup>28</sup> Later, trade agree-

---

24. As of 1946, in what is today the Northeast Frontier Agency plus Assam, all but 28 river valleys had some recorded settlement. *National Geographic Society Map of India and Burma* (1946).

25. Brissender, *India, Neutralism and SEATO*, in MODELSKI, "SEATO" 225-28 (1962).

26. Almost any recent non-Chinese map will show the "McMahon Line" in gross where it forms the boundary between China (Sinkiang and Tibet) and India. Where a part of this line is marked "Frontier undefined", it would appear to reflect in most cases the imprecise language used for connecting sections rather than any major territorial realignment. Compare, for instance, the *National Geographic Society Map of India and Burma* (1946) (northeasternmost sector of Northeast boundary marked "Frontier undefined") with the same Society's *Map of China* (1945) (sector not marked as undefined).

27. Krishna, *Sino-Indian Boundary Question and International Law*, 11 INT'L & COMP. L. Q. 381 (1962).

28. *Id.*

ments were made in the presence of Chinese imperial officials, Sun Yat Sen officials, and, in the case of the 1954 agreement, high Chinese People's Republic representatives; they all assumed a boundary between India and Tibet at passes on the McMahon Line.<sup>29</sup> The last treaty expressly to confirm this Line was that of 1914, which further provided for Chinese Sun Yat Sen troops to stay out of one sector whose autonomy would be guaranteed. The Tibetans and the British (for India) signed it. At the formal closing, however, the Sun Yat Sen official refused to sign because of the autonomy provisions, *not* because of the McMahon Line.<sup>30</sup>

In the 112 years prior to the first incursions of Chinese border patrols in 1954, Indian-British administration had been, if not wholly sporadic, at least something less than wholly continuous. Their administrative and jurisdictional activities included: 1) exploratory and survey parties, 2) punitive expeditions against malefactor tribes, 3) occasional court cases, usually conducted outside the more mountainous areas, that involved persons from those areas, 4) inclusion of these areas in linguistic surveys, censuses, maps, legislation, guidebooks or official publications, 5) "use of areas for trading, hunting, grazing and salt collection," 6) maintaining of police checkposts and patrols, 7) revenue settlements, 8) building of roads and airstrips, of NEFA administrative buildings, and, more recently, of schools and hospitals to serve administered areas, and 9) the sending of reconnaissance patrols to visit border checkpoints.<sup>31</sup>

In 1959, the Chinese People's Republic made official claims to areas previously considered Indian territory and, by 1960, Chou En Lai and Nehru agreed to have each country present its claims and documents at a joint meeting. After initial agenda differences—*i.e.*, as to whether the boundaries of Bhutan and Sikkim were to be discussed, and as to whether the Indian-Chinese boundary had ever been delimited—each side presented a description of the boundary line it claimed to be the

---

29. *Id.* at 389.

30. Merani, *India-China Border Dispute*, 13 J. PUB. L. 163 (1964).

31. *Id.* at 171-172, 174-176, 177-180; Krishna, *Title to Territory*, 2 INDIAN J. INT'L L. 204 (1962); GRIERSON, *LINGUISTIC SURVEY OF INDIA AND THE CENSUS OF 1911* 5, 12-15 (1919); LAHIRI, *ANNEXATION OF ASSAM* 14-16; SHIPTON, *ANTIQUÉ LAND* 29 (1950); CHAKRAVORTY, *BRITISH RELATIONS WITH THE HILL TRIBES OF ASSAM SINCE 1858* (1964); FURER-HAIMENDORF, *APA TANIS AND THEIR NEIGHBORS* 154-161 (1962); Report of the Officials of the Governments of India and the Peoples Republic of China on the Boundary Question (Ministry of External Affairs 1961) 298-338, Annex A at 339-340 (hereinafter cited as Report of the Officials).

proper one.<sup>32</sup> The Indian and Chinese positions did not appear to agree as to a single stretch along the over 1700 mile border. In fact, aside from trisection points with third states, only three points are common to both descriptions: the Karakoram Pass, the Mana Pass and the Darma Pass.<sup>33</sup> Before the shooting ended, People's Republic military units secured *de facto* control over several areas on the Indian side of the McMahon Line.<sup>34</sup>

ANALYSIS: Claims to sparsely settled areas have been said to rest on four grounds: 1) location and natural features of the boundary, 2) administrative and jurisdictional acts, 3) traditions and custom, and 4) treaties and agreements.<sup>35</sup> With respect to each of these concepts, we shall pose the same question: to what degree does it by itself ensure the amount of peace and cooperation which development on both sides of the boundary demands?

### *Location and Natural Features of the Boundary*

In a world in which squads of soldiers can be moved by helicopters and complex building equipment can be carried in by air, traditional agreement that "natural" geographic bounds are relevant for fixing political ones ensures neither the narrowing of a boundary quarrel nor its peaceable resolution.

For example, in the Chinese and Indian confrontation of 1960, both sides assumed that the way in which geographical features, such as mountains and watersheds, "divided" their territory was a key to establishing the boundary between them. The Chinese insisted the disputed Ladakh border was part of the general Sinkiang-Kashmir boundary direction

along the Karakoram Mountain range following broadly the watershed between the two big river systems, [the Tarim River in Sinkiang and the Indus River].<sup>36</sup>

---

32. Report of the Officials, at 1-4. The Indian description is also substantially set forth in Merani, *supra* note 30, at 164-166, and the Chinese description quoted in its entirety at 166 n.9.

33. *Id.*

34. The Times (London), Nov. 21, 1962, at 2, col. 1 (cease-fire proposals and map), Nov. 23 at 12, col. 6 (cease-fire) and Nov. 27 at 9 col. 4 (withdrawal line).

35. See, e.g., Report of the Officials, at 7. "Discovery" has been claimed as an additional ground, but is omitted from our list as serving no useful purpose unless connected with one of the named four grounds.

36. *Id.* at 3. Note also Point Three of Chou En Lai's proposed six-point basis for discussion:

"In determining the boundary between the two countries, certain geograph-

The Indian government also relied on natural features and even proposed that this be discussed first at the meeting.<sup>37</sup> While both sides thus accepted the relevance of natural features, their dispute did not appear to have moved one wit nearer to resolution. The arena of contest was merely shifted to "Which watersheds?" and "Which mountain ridges?"

### *The Conflicting Watersheds Problem*

Rivers that cross boundaries raised this problem most acutely. For example, to get from one key mountain pass to another in the Himalayas, the Sino-Indian boundary line had to cut across the Qara Qash River that flows, from its source in Jammu and Kashmir, deep into Sinkiang. (See Figure 1.) The farther north this boundary can be made to cross the river, the more of its watershed India (State B) gets, but the less of this watershed China (State A) must get.

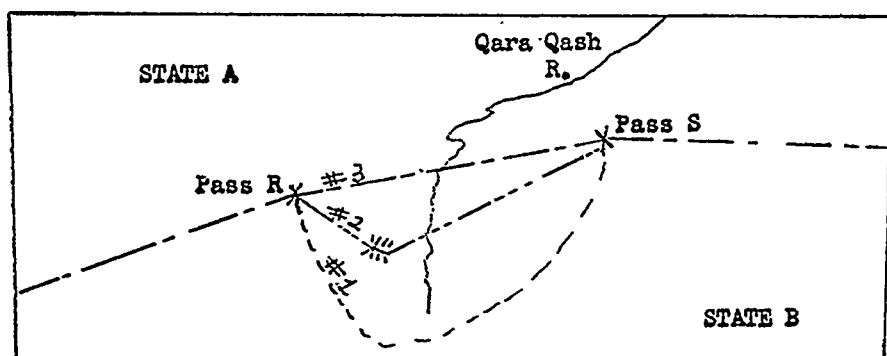


Fig. 1: Schematic diagram of the Qara Qash trans-border river

It is sometimes possible to "gerrymander" the border to keep the entire river basin wholly in the main user's state. (See Line #1, Figure 1.) Often, however, competing "geographical features—such as the key passes R and S in the schematic diagram—require the river to be crossed at some point. The question in dispute then becomes: "Which point?"

Here, existing doctrines provide ways of justifying a given allocation; they do not provide an unequivocal answer. For instance, there

---

ical principles, such as watersheds, river valleys and mountain passes, should be equally applicable to all the sectors of the boundary." *Id.* at 9.

37. *Id.* at 7. As a concession to the Chinese, treaties were in fact discussed before natural features.

is authority for the proposition that the watershed line can be used as the "natural boundary."<sup>38</sup> State A could seek to tack the watershed lines along either side of the river to some natural feature, such as a mountain range, upstream. (Line #2, Figure 1.) On the other hand, the same theme of keeping to the natural boundaries as much as possible can be used by State B to push the boundary crossing further downstream if it can find other mountain ridges or vital passes to connect. (Line #3, Figure 1). Again, uniformity of doctrine is no guarantor against conflict.<sup>39</sup>

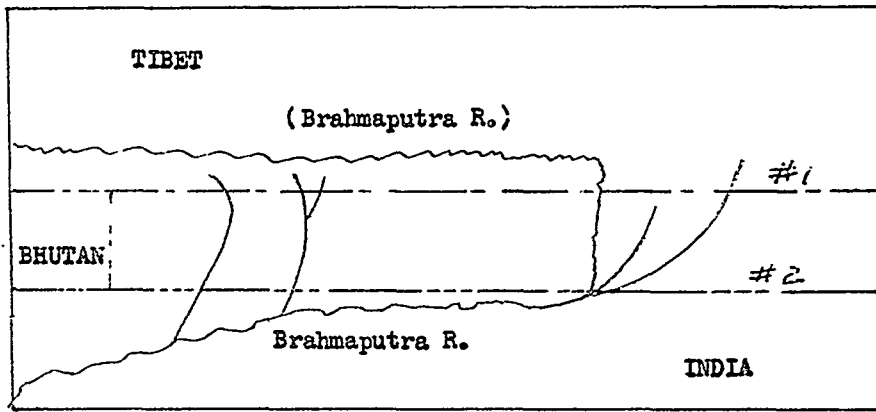


Fig. 2: Schematic diagram of the Brahmaputra trans-border river

A "reverse twist" spin is put on the "legal ball" by Indian and Chinese claims in the Brahmaputra River basins. (Figure 2.) This river rises in Tibet; flows eastward; turns south into the North-East Frontier Agency; and bends southwest through Assam. The McMahon Line relied on by India as both the agreed treaty boundary and the "natural boundary" gave primacy to the crest lines and key passes in the Himalayas. (Line #1, Figure 2.) To do so, however, it had to cross four Indo-Tibetan rivers<sup>40</sup> at points considerably north of those on the Chinese espoused line.<sup>41</sup> (Line #2, Figure 2.)

38. *Island of Timor Arbitration* (Portugal v. Netherlands), Hague Court Reports (Scott) 355, 383 (1916).

39. Cf. the Canadian-United States border at issue in the *St. Croix Arbitration* (United States v. Great Britain), 2 Moore's Int'l Adjudications 367 (1929). There the arbitrators tried to take of the desire of the drafters of the Jay Treaty of 1794 to use natural features to fix the Canadian-American boundary, only to find that the "mountains" and "watershed" referred to did not exist.

40. The Subansiri, the Tsari, the Dihang [sic] and the Luhit.

41. The Chinese claimed a boundary line which runs due east from the southeast



This raises a "which-comes-first-the-chicken-or-the-egg?" type of conundrum. We say the ridge lines are the relevant "natural features" because they put more of the watersheds of these cross-border rivers in India. We say the reason for putting these watersheds in India is that the ridge lines are "the natural boundaries." Vice versa, if the Chinese urge that these watersheds ought "naturally" to belong to the upstream state in which they rose, some other "natural feature" further south would be shot forth into the "natural boundary" battle.<sup>42</sup>

In the particular case of India and China, one way to break out of this type of tautology is to accept the passes connected by the McMahon Line as the "paramount geographical fixtures." Unfortunately, if other "paramount geographical features" can be put forward,<sup>43</sup> the battle is joined once more. For the general purposes of our inquiry into the utility of traditional rules in avoiding conflict, it is unnecessary to approve or disapprove of arguments offered by either side. What is crucial to our discussion is the fact that two competing "natural features"—the mountain ridges between the passes already in use to travel from Tibet to India, and the watersheds of tributaries already flowing from Tibet into a Tibet-born river—can be used under the "natural feature" rubric to advance opposed positions on where "Nature" has placed her boundary line.

### *The "Natural Place for a Boundary" Problem*

Nor are we any nearer a peaceful resolution if we use the idea of a "natural location for a boundary" between sparse areas. Admittedly, if the parties already agree that a given geographic feature is "naturally located" in such a way as to "naturally form" the boundary, this can be used to set up the political line. The difficulty is that, in the case of sparsely peopled areas, this is less likely to be agreed upon today than in the past.

Several new factors make a dispute about the "naturalness" of a geographical boundary less susceptible to peaceable resolution once vocal

---

corner of Bhutan and then northeast along the base of the Himalayas. Report of the Officials, *supra* note 29, at 4.

42. E.g., the Dibang [sic] River headwaters.

43. Such an argument might equate the hill people of NEFA with the hill people of Tibet and thus argue that the paramount geographical feature would be the base of the Himalayan foothills where they meet the plains of the Brahmaputra Valley, as is in fact the position of the Chinese People's Republic. Report of the Officials, *supra* note 29, at 4 and map supplied by China facing page 6; see also an apparently similar map in LAROUSSE ENCYC. WORLD GEOGRAPHY 523 (1964).

conflict has begun. These are: a) the ease of modern transport,<sup>44</sup> b) the rise in ground and airborne military effectiveness, both in numbers and in range,<sup>45</sup> c) the growth in numbers of sparse area colonizers,<sup>46</sup> and d) the rise in our ability to use and develop sparse areas.<sup>47</sup> Awareness of these changes can pull us in either direction—toward new conflicts, or toward new means of conflict avoidance. True, they make a military contest over a sparse area seem both more feasible and more worthwhile. On the other hand, they produce equally excellent reasons why full development cannot take place unless the right to be there free from such a contest is assured.

This is precisely why the traditional "natural boundary" solution reached in the *Island of Timor Arbitration*<sup>48</sup>—where the division between Portuguese and Dutch territory was set at the mountain range that cut Timor in half—becomes increasingly less relevant. The pattern that made such a solution easy to arrive at required several conditions, now practically obsolete, to be present: 1) little knowledge of the resources located there, 2) little awareness of how to exploit many of them, and 3) a location far from the home countries. This pattern is far less likely to recur in the disputes of today. In no small measure due to United Nations assistance, claimants to sparsely peopled areas have gained an increasing awareness of both the resources they possess and the ways they can be exploited.<sup>49</sup> The last condition, too, has been disappearing as sparse areas come under the claim of former colonies in the vicinity, and the possibility of protracted conflict rises.

### *The Rule of the Temple Preah Vihear Case*

The proof that transitional international law has already recognized

44. E.g., trucks now travel over the road, built by the Chinese across India's disputed Aksai Chin territory, connecting Sinkiang and western Tibet. See map, 13 *Keesing's Contemporary Archives* 19124 (1962). Cf. the social and economic changes which similar transport developments by India have led to in NEFA Himalayan frontier districts, described in FÜRER-HAIMENDORF, *supra* note 31, at 154-157.

45. Compare Lord Curzon's criticism of his military officers for using 200 men, needed elsewhere, for an expedition against the Mishmi tribes north of the Brahmaputra, cited in CHAKRAVORTY, *supra* note 31, at 140.

46. E.g., compare the disclosure in May of 1965 that 12,000 to 20,000 Indonesians had settled on sparsely populated Mindanao in the Philippines. N.Y. Times, May 24, 1965, at 11, col. 5.

47. In the Himalayas men have tented without oxygen as high as 19,500 feet above sea level, see HILLARY, *HIGH ADVENTURE* 128 (1955).

48. *Supra* note 38.

49. For examples of such surveys in southeast Asia, see UNITED NATIONS, *supra* note 15.

the need for this shift from "natural feature" rules to less arguable ones lies in the *Temple Preah Vihear* decision by the World Court.<sup>50</sup> There, a line surveyed to mark out boundaries already agreed upon in a 1904 treaty was supposed to follow the "natural" boundary between Thailand—then Siam—and Cambodia—then French. At the point under dispute, the geographical feature was the "watershed line."

The real item under dispute, however, was a Buddhist temple located near the edge of a cliff. To place this temple on Thai soil, Thailand urged the World Court to find that the cliff edge was the "natural" line dividing the waters of the two states. Cambodia, on the other hand, asked the Court to accept an early mapped line later relied upon in negotiations or either of two extra surveys' watershed lines, any of which would put the temple on Cambodian soil. Thus the Court had before it no less than four possible boundaries to choose from. Faced with this relative instability of such "natural" boundaries, the Court held (9-3) that a) the treaty itself evidenced the aim of the parties to achieve final stability as to their boundary, b) this stability could best be achieved by binding both countries to the original mapped lines relied upon by the parties or their predecessors in later negotiations, and c) thus, it was unnecessary [sic] for the Court to consider where the natural feature, the "watershed line," was actually located.<sup>51</sup>

The rule that emerges from the *Temple Preah Vihear* decision is not the narrow one that natural boundaries in treaties must yield to later maps and other conduct of the parties; rather, it is that

*today's crucial need is for adjacent states to get along with each other if both are to develop the resources on their own side of the boundary; thus this need requires us to place a higher priority upon boundary stability than upon the original natural boundaries themselves.* [Emphasis added]<sup>52</sup>

The futility of references, repeated by both sides in the Indian-Chinese border dispute, to the "natural features" on which, *inter alia*, they rely, only further emphasizes the need for this shift to some greater stability if conflict is to be avoided.

50. *Temple of Preah Vihear Case (Cambodia v. Thailand)*, [1962] I.C.J. Rep. 6 (Merits).

51. *Id.* at 33.

52. See Wilkes, D. *New Emphases and Techniques for International Law—The Case of the Boundary Dispute*, 15 *WESTERN RESERVE L. REV.* 632-635 (1964) and the sources cited therein.

*Administrative and Jurisdictional Acts*

Traditionally, continuous administrative acts have been used as evidence to show that a state has "occupied" territory. It is just one step removed, however, to substitute "administration" itself and emerge with a new rubric. Factual continuous administration may be easy to determine in densely populated regions, such as the municipal parcels involved in the *Case concerning sovereignty over Certain Frontier Lands*.<sup>53</sup> However, continuous acts are far less likely to have occurred in sparse regions. The question we must face squarely, therefore, is: can we afford to have title to sparse regions stand or fall on whether there exists a continuous string of administrative acts—by *only one* of the disputing states?

In the Indian-Chinese border confrontation, the Indians offered 82 documents to establish this "continuous" administration of the North-East Frontier Agency territory now claimed by China. These included items such as diplomatic notes in which the government of India acted as the administrator, and a 1935 document to show these very areas were excluded from normal regulations of the central Indian government.<sup>54</sup> Some of these documents are partially self-serving in the sense that they presume the right to administer this Himalayan hill country and yet are offered to establish the fact that India administered it. Other evidence, such as the 1935 order, can cut both ways; it asserts that the area is subject to regulation by the claimant state, but at the same time admits that it is not susceptible to administration in the ordinary sense. A third kind of evidence shows factual governing activities in the hill country, as in India's 1914-15 report on taxation and other administration in the Abor and Mishmi tribal areas. These last can establish some administration; they can even establish repeated administration. What it is hardest for them to do is to establish continuous administration.

A few examples serve to underscore this point:

*Example #1—Surveys.* As evidence of administration of each of the disputed areas, India submitted proof of several surveys carried out for the British or Indian governments. The trouble with this is that the Chinese People's Republic also claims to have surveyed "India's" Aksai Chin area in 1954 and 1955. Their subsequent construction of a road

---

53. *Supra* note 14.

54. Report of the Officials, at 335; the complete roster of documents offered by India is contained on pages 298-338.

through that area buttresses this claim.<sup>55</sup> Again, this is not stated to evaluate the Chinese claim, but rather to show that, for sparsely peopled areas, a 'battle of the surveys' becomes especially possible.

Yet another problem is created by the incomplete survey or census. For instance, a party making a magnetic survey of British Sikkim in 1855 reported it was stopped from continuing because of the hostile Nepalese there.<sup>56</sup> Does this establish an administrative occupation by the government of India or one by Nepal?

Again, a linguistic survey of India in 1919 was able to use 1911 comparative census figures for all of India except Ladakh, for which they had to use census figures from 1901.<sup>57</sup> Does this establish that Ladakh was subject to continued administration by India from 1901 to 1919 by linking the two types of surveys, or does it raise the question of whether India had enough administrative control in Ladakh in 1911 for a thorough census there? The same 1919 survey also noted that its figures for languages spoken by the North Assam tribesmen were small because

except in the case of Miri, nearly all the speakers of these languages live outside settled British territory. Hence the small numbers recorded.<sup>58</sup>

Does this linguistic survey establish the presence or the absence of Indian administration over the Aka, Abor, Dafa and Mishmi tribesmen and the Himalayan areas in which they live?

*Example #2—Exercise of criminal jurisdiction.* As two of the 146 evidences of administration for the disputed middle sector, India submitted records of two criminal cases, one in 1927 and another in 1936.<sup>59</sup>

55. *Id.* at 257; see also, map cited in *supra* note 44. It has been argued that Chou En Lai's disclaimer in 1954 of any knowledge of the building of this road eliminates any possibility of a "prescriptive" right arising, for India did not learn of the road until 1958. Krishna Rao, *supra* note 31, at 206.

56. SCHLAGINTWEIT, H. REPORT ON THE PROGRESS OF THE MAGNETIC SURVEY OF INDIA IN SIKKIM, KHOSIA HILLS AND ASSAM 6 (1856).

57. GRIERSON, *supra* note 31, at 11.

58. *Id.* at 15. Of all the non-Miri speaking tribesmen, the survey covered only 20 Akas, 170 Abors, 990 Daffas and 220 Mishmi in this area north of the Brahmaputra Valley. Except for the Abors, these groups all live on the Indian side of the snow range backbone of the Himalayas. CHAKRAVORTY, *supra* note 31, at 3.

59. Report of the Officials, at 327.

Does this establish the presence of Indian criminal administration in 1927 and 1936 or the absence of it between 1928 and 1935?

It is not unusual for high mountainous regions to be freer from law enforcement than other parts of a country. *I.e.*, in the United States, the illegal production of "moonshine"—alcoholic whiskey usually made from corn or maize—still persists in the Appalachian mountains.<sup>60</sup> However, a special side effect occurs where the sparse hilly grounds are not surrounded by administered areas, as in the sectors disputed between China and India. Here, if the title to the hills were left to turn on the presence or absence of continuous exercises of criminal jurisdiction, probably neither side would end up with "title" for several reasons.

First, you may have as many or more periods when crimes go unpunished as those when they are punished, as was the case with the Mishmi tribesmen of northern Assam between 1861 and 1899.<sup>61</sup>

Second, you may have punishment on the disputed sparse area by troops or police of both sides, as when Chinese troops were sent in to clear the areas well on the Ladakh side of the Karakoram Pass of bandits in 1946.<sup>62</sup>

Third, the presence of armed tribesmen with the advantages of mountainous and sparsely populated terrain can militate in favor of a policy of deliberate non-administration of the area.<sup>63</sup> Such a policy may be motivated by a frank realization that the government that claims control over their territory cannot in fact control them.<sup>64</sup> On the other hand, the price of submission to "control" may be that the "controllers" agree to leave traditional tribal administration alone.<sup>65</sup> In both cases, the fact that such a policy existed for the area shows an assertion of a right to jurisdiction that is in a sense at least partially self-serving. In both cases, it also shows that, if title is to turn on whether criminal or other jurisdiction was in fact exercised continuously, many methods of

60. Compare the presence of slavery in Apa Tani villages in northern Assam in 1945, observed by the anthropologist, FÜRER-HAIMENDORF, *supra* note 31, at 79, 81, 88-89.

61. CHAKRAVORTY, *supra* note 31, at 136-40.

62. Reported first hand by SHIPTON, *supra* note 31, at 29.

63. This was the case in the Assam hills after 1884. CHAKRAVORTY, *supra* note 31, at 170-71. For persistence of this policy by exclusion from regular administrative laws and orders, see, *e.g.*, the 1935 document cited in note 54, *supra*.

64. *E.g.*, it was Mackenzie's report in 1884 as to tribes "over whom we can exercise no control" that led to the Assam hills 'non-administration' policy. CHAKRAVORTY, *supra* note 31, at 166 n.4.

65. Compare the insistence of Sarawak's Dayak tribesmen that Rajah Charles Vyner Brooke's cession of Sarawak to the British government would continue their traditional tribal self-rule. See MACDONALD, BORNEO PEOPLE 26 (1958).

dealing with sparse areas and their peoples would become inconsistent with any state's "title" claim.

In the Chinese-Indian dispute, India did not rest her claim on any single type of administrative and jurisdictional acts, but on the totality of them, as well as on other factors. Nevertheless, the two basic defects just illustrated remain. Some acts will still be ambiguous in establishing "continuous administration," and even acts that are not ambiguous can be used to fan the fires of conflict in the very regions where it is vital to see that conflict is avoided.

### *Traditions and Custom*

This is the real "powder keg" of traditional boundary law. Even in densely populated areas, we have had all too many calls to restore "traditional boundaries" by rejoining "Sudetenlands" with common roots or customs. One would have thought we had separated long ago the arguable question of protecting minority groups from this no-longer-arguable one of whether states can go to war to "regain" lands which are theirs solely by virtue of "tradition." Only by keeping these two questions quite distinct can we keep boundary rules and public order aims consistent.

### *Sparse Areas and Combat by Document*

Where a border separates sparsely peopled areas, however, the "doctrine" is still very much alive, but by no means any the less dangerous. First, the "fact" of traditional occupation of the territory itself becomes more open to "proof" by either side. One side's "tax collector" becomes the other side's "bandit."<sup>66</sup> Second, the sparseness of the area invites even greater likelihood that the "legal" contest will be settled by a modern "trial by combat."

This is the case with respect to the Aksai Chin area on the Indian side of the traditionally mapped border with Sinkiang and western Tibet. India produced 57 documents to prove "customary" occupation; China produced still fewer items.<sup>67</sup> Yet both had heaped on the fire enough coals for a prolonged dispute, so long as the agreed ground rule was that a title claim could be made out on "traditional" ownership.

---

66. E.g., between 1943 and 1945, British military patrols were sent to turn back Tibetan tax collectors or "bandits" in the Dihang [sic] Valley. LAMB, CHINA-INDIA BORDER 166 (1964).

67. Report of the Officials, at 255-266, 298.

India pointed out that Chinese records were sparse;<sup>68</sup> China claimed in a letter to foreign diplomatic offices that she had proved

with a large volume of conclusive data that the traditional boundary line as pointed out by China had a historical and factual basis.<sup>69</sup>

India rejected monastic records of Chinese-Tibetan customary control as irrelevant; China rejected Indian material based on travels of foreigners as "obviously valueless."<sup>70</sup> India pointed out her subjects had used these hills for pastures; China rejoined she had sent an army there unhindered, surveyed it, and built a long motor highway across it without even discovery by India until 1958.<sup>71</sup>

It would be naive to imagine that the major military campaigns launched by China in the three disputed areas could have been averted here if this "Combat by Document" had been avoided. It is equally naive to suppose that cooperation is best attained by traditional doctrines and procedures that make such "Combat" possible.

### *Combat by "Local Custom"*

A brief look at any ethnic maps of Africa or Asia will show that many a healthy border would become an open sore if title to sparse areas could turn on the origins of local peoples or other proofs of their connection with the claimant across the border. Yet title grounded in "customary" control—which, by definition, must be something other than actual administrative control—raises just such a specter. Precisely because this is a rubric for something short of actual control, it can, often in the name of "self-determination," crop up as a recurrent excuse for redetermination, unless some less litigious ground can be found.

For example, the Chinese have introduced evidence that Tibetan Buddhist authorities traditionally considered the monasteries in Ladakh to be under their control. Since many settled lands in Ladakh are traditionally rented from these monasteries, the "customary control" dispute really boils down to a question of who has held those monasteries' loyalty during the periods in dispute.<sup>72</sup> The difficulty is that in sparse

---

68. *Id.* at 257.

69. Letter of Nov. 15, 1962 of Chou En-lai, reprinted in SINO-INDIAN BOUNDARY QUESTION 20-21 (1962).

70. Report of the Officials, at 256; letter of Chou En-lai, *supra* note 69, at 21.

71. Report of the Officials, at 298, 257, SINO-INDIAN BOUNDARY QUESTION, *supra* note 69, map no. 1 following p. 37; *accord*, Krishna Rao, *supra* note 31, at 206.

72. See DOUGLAS, BEYOND THE HIGH HIMALAYAS 190-193 (1953), who traces the Mos-



areas each side may be able to "prove" some kind of loyalty. Take the kind of proof that turns on payment of taxes, for example. If people in Zondereygen pay taxes to Belgium, this becomes a sign of their loyalty and of administrative advantages they receive from "their" government in return.<sup>73</sup> Once we turn to sparsely peopled border areas, however, we often find intermittent payments to several sides. Furthermore, this may be done, not to obtain administrative advantages, but to guarantee freedom from any administration at all. With such loose "ties" involved, can title to Ladakh be made to turn on whether this chain of customary command ran "farmer to lama to Lhasa" or "farmer to lama to rajah to Raj?" If so, title claims become far from secure. For instance, China might claim those *duars* of eastern Assam who once paid tribute to the Durbar of Bhutan, who paid tribute to Lhasa, who paid tribute to the Chinese government.<sup>74</sup>

Another kind of proof turns on "inferred loyalty." This is proof of traditional allegiance by proof of common roots or customs. For example, the Chinese premier builds his "Chinese" Ladakh from the fact that Ladakhis use Tibetan lamaist geographic names, such as *chu* for "river" or *la* for "mountain pass."<sup>75</sup> The facts of Himalayan life reveal, however, that if language is to prove anything at all, it would prove these peoples "belong" to no-one, for

as a rule, each tribe is separated from its neighbours, and languages thus quickly split up into dialects which easily develop into a distinct language. . . . These [mountain dialects] are *mutually unintelligible*.<sup>76</sup>

The nub of this type of argument is the idea that "like should take

---

lem eviction of the Chinese from Ladakh in the 16th century, its annexation for India by the Maharajah of Kashmir in 1646-47, its 'reconquest' for India by the Rajah of Jammu in 1834 when some 25% of the Ladakhi monks fled to Tibet. The four methods for rental from the lamas in the 1950's are described in DOUGLAS, *supra* at 191-192.

73. Case concerning sovereignty over Certain Frontier Lands, *supra* note 14.

74. Political dispatch of Col. Robertson, March 27, 1839, reported in Lahiri, *supra* note 31, at 220-21. Compare present Chinese attempts to reestablish Lhasa's earlier loose overlordship over the Himalayan states, reported by Robertson through creation of a Nepal-Bhutan-Sikkim federation by rebel troops. Observer (London), Feb. 7, 1965, at 13, col. 8.

75. Letter of Chou En-lai, *supra* note 69, at 8; as to Chinese evidence of Tibetan calendars, language and festivals in occupied NEFA towns, see *Joint Report of Journalists*, Peking Review, Jan. 25, 1963, p. 13.

76. GRIERSON, *supra* note 31, at 5; (*emphasis added*).

care of like." The rubric under which it is put is that "common customs evidence a custom of common rule." Admittedly, treaties and arbitrators determining boundaries have tried to avoid dividing local tribes, as in the tribal enclaves created by the 1859 Treaty between Netherlands and Portugal on their Timor border.<sup>77</sup> This may be done in agreed cases. If the same logic were to be available in disputed areas, however, it would be as easy, for instance, for India to show that valleys of Tibet where Abori dialects are spoken are proof these sections of Tibet "belong" to the Abori hills of the North-East Frontier Agency as it would be to prove the opposite.<sup>78</sup>

The "common customs" gimmick almost guarantees a non-cooperative squabble where multiple groups are involved. Here, arguments based on one group's contacts across the border can be met by ones based on another group's contact the other way. Even President Wilson, in fixing a border between Greece and Turkey, confessed his inability to harmonize the desires of four such groups to remain together.<sup>79</sup>

Thus, the solution to the problem of trans-border groups just cannot lie in permitting claims to "rejoin" what are inferred to have once been joined. The solution can lie in two ways in which more stable borders can be attained.

First, *world efforts for protection of minority groups must be increased*. This can be done by:

- (a) Codes for protection of minority frontier groups, such as the one put forth by the Delhi World Rule of Law conference;
- (b) development of the good offices of the High Commissioner for Refugees;
- (c) more regional courts for civil rights protection, such as the European Human Rights tribunal;
- (d) use of more detailed equal protection clauses in treaties to spell out safeguards for minority groups descended from those of foreign origin; and
- (e) more United Nations technical assistance projects intentionally aiding groups along potentially explosive boundaries.

---

77. See 1 HACKWORTH, DIGEST OF INT'L LAW 714-15 (1940).

78. Cf., CHAKRAVORTY, *supra* note 31 at 5.

79. HACKWORTH, *supra* note 77 at 715.

Second, *the differences a boundary makes in daily life can be deliberately reduced by:*

- (a) simplifying regulations for crossing the boundary, such as visa-free travel;
- (b) regional simplifying of boundary functions, such as the Nordic Council's absence of passport requirements for Scandinavians in Norway, Sweden and Denmark; and
- (c) achieving greater freedom of movement by economic and other associations, such as has been achieved by the O.E.C.D. or the I.A.T.A.<sup>80</sup>

Protection of minority groups along a border is by no means a minor problem, but we cannot afford to have it persist as a recurrent "boundary" problem.

### *The Battle of the Maps*

One map speaks volumes; yet maps can have many meanings. A map based on a survey evidences administration of the area surveyed. A map annexed to a treaty evidences agreement. An official map published by one government can evidence its acquiescence in the border line used for the border with its neighbor. A map shown by one side's diplomats in negotiations, and not objected to by the other side, also evidences agreement or acquiescence.<sup>81</sup>

Unofficial maps to establish "traditional" borders in sparse places, however, do not speak with the same unequivocal tongue. Here, the very sparseness breeds unfamiliarity, and the unfamiliarity breeds conflict. In the dispute at hand, for instance, India produced some 44 Indian maps plus 9 Chinese ones,<sup>82</sup> while China produced just enough to "ante up" for the contest. India produced Chinese atlases to "establish" the traditional NEFA area border. Thus, title to the other disputed sectors becomes less stable if some Chinese atlases show them as Chinese. Atlas maps, travel guide maps and other maps are all two-way streets. If 100% of them showed the identical line, the "traditional boundary" doctrine would bring peace and collaboration. Unfortunately, examples

---

80. BOGGS, *INTERNATIONAL BOUNDARIES* 201 (1940).

81. *Preah Vihear Case*, *supra* note 50, *see generally*, Weissberg, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, 57 *AM. J. INT'L L.* 781 (1963).

82. These maps are listed in Report of the Officials, at 339-40.

of such unofficial maps that differ sharply are not hard to find.<sup>83</sup> Thus, such a battle often ends, not with a bang, but with a babble.

If all three arenas—"natural features," "administration" and "tradition"—are used at once, the permutations possible become a college debater's delight. The basic issue remains: can we afford to have thousands of square miles of sparsely peopled border lands "put up" for debate? It does not matter how an impartial judge would rule.<sup>84</sup> If we are to move the necessary rung up on the world order ladder, we must aim at avoiding any such "debate" at all. Certainly, India deserves better security for her sparsely peopled frontier areas than the knowledge she can win a World Court case if only China would submit to one.<sup>85</sup>

Thus the one conclusion we can readily draw from these first three arenas is that there must be some surer ground on which to rest title claims for sparse areas. Do treaties provide that ground?

### *Treaties and Agreements*

Most borders rest quite firmly on the treaties on which they have been built. Along these borders, peaceful transit is a fact of daily life, and security to build without threat of attack "runs with the land." The 3,000-mile unarmed Canadian-American border is such a place. Yet it took no less than 26 treaties, protocols, arbitral disputes and hearings of commissioners from 1782 to 1925 to mark it.<sup>86</sup> Thus, there

---

83. E.g., for an entirely different Ladakh border, see Baron Augel, *Map of the Punjab, Kashmir, Iskardu and Ladakh comprising the Dominions of Ranjeet Singh compiled from the Original Documents* (n.p. 1849) in the British Museum map room; for lines closer to base of the Himalayas in NEFA areas, see Goode, J. P. *Eurasia* (Harrup Physical Wall Map Series, London 1914), Ramsey, *Stanford's Orographical Map of Asia* (1878), Wheeler, J. T. *Short History of India* (1884), map at 472, LAROUSSE ENCYC. WORLD GEOGRAPHY (1964) at 523, and *Mineral Resources of Eurasia based on Soviet Karta Meteorozhdenii Poelznykh Iskopaemykh Mira* Minsk, 1955 (1959).

84. India offered to refer the dispute to the I.C.J. if Chinese troops returned to their Sept. 8, 1962 positions. Speech of Nehru, Dec. 10, 1962 reported in 13 KESING'S CONTEMPORARY ARCHIVES 19142 (1962). Although we will probably never learn what the exact solution of the Court might have been, some of the finest examples of international law argument in the boundary area have been presented by India's Legal Officer, K. Krishna Rao in *Sino-Indian Boundary Question and International Law*, *supra* note 27.

85. On Dec. 20, 1964, Chou En-lai told the National People's Congress that the United States had been informed in ambassadorial talks in Warsaw that China would refuse to enter the United Nations until the representative of Formosa had been excluded. 13 KESING'S CONTEMPORARY ARCHIVES 20776 (1965). A fortiori, submission to the I.C.J. while a Taiwan Chinese judge is on the Court is most improbable.

86. See Boggs, *supra* note 80, at 219-24.

is no magical "permanence" to a treaty border thought by its drafters to have been fully marked. A boundary treaty brings agreement; but it may also bring disputes, changes by force, rancor and disaffirmances as well.

The Indian-Chinese border dispute presents the gamut of treaty problems that may remain. This border was the subject of some 107 treaties.<sup>87</sup> The earliest raised the first type of problem, that of the Indefinite Boundary Description. To cite but one example, early treaties spoke of the "traditional boundaries of Ladakh" to describe part of the Indian border with Tibet.<sup>88</sup>

A second type of problem that arose was that of the Ambiguous Reference. Typically, this is a reference to a natural feature that is not what it is described to be. For instance, one treaty refers to a part of the Kashmir-Sinkiang border as along "a crest line that is the watershed."<sup>89</sup> When the crest and watershed lines turned out to be different, which one marked the border?

A third type of problem which is possible is that of the Treaty with the Wrong Party. For instance, to "annex" Kuriapara and Charduar in the Assam hills, the East India Company paid the Durbar of Bhutan "compensation for loss of revenue." But the hillmen in these sectors in fact paid no tribute to the Durbar, but were under the indirect rule of Lhasa at the time.<sup>90</sup>

Yet a fourth type is the Broken Treaty problem. Does the frustration of some part of the boundary treaty nullify the boundary concessions given as the quid pro quo for it? An interesting development in the Chinese-Indian dispute is the Chinese insistence that "India sent troops north of the McMahon Line" and that, even if the Line were valid before, it became invalid because of this.<sup>91</sup>

Traditionally, we have relied on the tools of "arbitration," "litigation" and "negotiation" to handle these problems of the boundary

---

87. Report of the Officials, at 288-97.

88. For one difficulty here, compare a map of India today with Baron Augel's map in note 83 *supra*.

89. Lord Curzon described this section of the Himalayas as "200 miles of tumbled masses of peaks and gorges" without any "clear crested ridge," and noted that its water divide was often not identical with its highest crest. LORD CURZON, *FRONTIERS* 19 (1907). Cf. a similar dilemma arose after the Chile-Argentina Treaty of 1881 had erroneously referred to the Andes' "highest summits which form the watershed." Broek, J.O.M. *Problem of Natural Frontiers* in *FRONTIERS OF THE FUTURE* 12-13 (1941).

90. LAHIRI, *supra* note 31, at 222-23.

91. Letter of Chou En-lai, *supra* note 69.

treaty. Unless new techniques emerge, however, the result is predictable in each case: cooperation stops while the flames of debate are fanned.

### CONCLUSIONS

CONCLUSION #1: There is a great need for new mechanics of dialogue about boundaries in sparsely peopled areas. As we have seen, traditional concepts from arbitration and tribunal cases can support either side in the type of dialogue in which India and China, for example, exchanged over 378 diplomatic Notes on their border dispute.<sup>92</sup> No disputes are more deep-seated than border ones. Yet in no case is a dispute between two states as backward in terms of modern emphases on multi-state cooperation as one over a border. Consequently, the main goal of new rules for sparsely peopled areas is to *avoid the conflicts predictable under the old rules* before they arise, not merely to aim at resolving them.

PROPOSAL: For many boundaries, there is a close enough *rapprochement* between the states along them so that the boundary can be fixed for all time.<sup>93</sup> Probably most boundaries fit into this category. Yet if some further step is not taken to make these lines permanent, bad times may follow the good and even traditionally recognized zones can become a source of unwonted rancor. The framework for a solution is already at hand in the United Nations' *International Map of the World on the Millionth Scale* (IMW) being prepared by the Economic and Social Council. In the past few years new or revised maps for parts or all of 78 international borders have been deposited with the IMW.<sup>94</sup> Unfortunately, all areas on the map are covered by the following legend:

Boundaries shown on this map are not, in some instances, finally determined and their reproduction does not imply official endorsement or acceptance by the United Nations.<sup>95</sup>

A cartographic conference recommended that when one state is to submit a map for areas which include part of another, an agreement should

---

92. 13 KEESING'S CONTEMPORARY ARCHIVES 19121A (1962).

93. See e.g., the *clause definitive* in German treaties with France (1951, 1956), Belgium (1956) and the Netherlands (1957) cited in LACHS, note 13 *supra*, at 37.

94. See Int'l Map of the World on the Millionth Scale—Report of 1962, ST/ECA/Ser./D8 (1963) at 13-14 and Reports for 1960, 1961 and 1963.

95. *Id.* at 13-14.

be worked out for a single map with information supplied by both countries. Yet despite the amount of agreement obtainable, so long as their map becomes subject to the general legend, a major opportunity is lost.

As a first step in avoiding future conflicts, therefore, those making the IMW should be authorized to record those lines which the border states themselves agree should be their boundaries for all time, subject only to change by agreement or some other authorized means. Thus a system much like our Torrens Land Title Registration in the United States could be created for most of the world's borders.

The initiating General Assembly resolution would set forth:

(a) the clear intent to have boundary maps deposited under this resolution binding upon the parties unless changed by the means specified,

(b) the authority for the IMW to record some maps in this way, while continuing to record other maps as subject to the legend, and

(c) the mechanics of getting authorized changes in fixed boundaries. At the same time, the Assembly should consider the long-range advisability of authorizing deposit of like maps in a 1:25,000 scale or any intermediate scale similarly agreed upon by the border states.

**CONCLUSION #2:** Some boundary disputes have been resolved without force, sometimes by arbitral or judicial decision, sometimes by negotiation. We have seen that there are difficulties with even these peaceful channels, not the least of which is the forestalling of joint ventures during the process of resolving the conflict. Yet another difficulty stems from the recurrent fact that agreement in gross, itself, does not always result in agreement in detail. If the mechanism that establishes the boundary after a potential dispute is recognized is to allow joint development to continue, new tools are required.

**PROPOSAL:** Elsewhere, it has been suggested that boundary surveys could be carried out under internationalized auspices.<sup>96</sup> The advantages of a World Boundary Commission are compelling. First, it can develop a reputation for impartiality and accuracy upon which others can rely, *e.g.*, to reduce agreed boundaries to 1:25,000 scale maps. Second, it can pool those with surveying skills and equipment. This will make available persons with training or tools when they are

---

96. See WILKES, *supra* note 52, at 639.

not to be found on the borders to be marked; it will also lead to additional uniform standards in surveying and map recording. This is not a new proposal. Uniform standards have been a goal of such organizations as the International Hydrographic Bureau, the International Federation of Surveyors, and the Pan-American Institute of Geography and History;<sup>97</sup> they were recommended by Trygvie Lie in 1949 when he first suggested a United Nations Cartographic Office;<sup>98</sup> they are currently under consideration by conferences meeting on the IMW.<sup>99</sup>

Most important of all, it could create for the first time a body whose main concern is the avoiding of boundary conflicts. This alone could (a) lead to a greater awareness of the need to seize on periods of *rapprochement* to avoid future conflicts, (b) provide access to a new kind of forum outside the traditional arenas for national posturing, and (c) serve as a source of fresh proposals for use of sparse areas near boundaries, for surveying and marking of borders, for dealing with changes in border riverbeds, water levels or earth contours, and for new boundary rules.

In concrete terms, it is proposed that this Boundary Commission be established by General Assembly resolution with three branches. A *technical branch* would handle actual surveying; on request, it would supervise, train or advise local and technical assistance survey missions. To some extent, this would build on the existing coordinations by the United Nations Cartographic Office whose work could be raised to the stature that the proposed commitment to a World Boundary Commission involves. An *executive branch* would have responsibility for deposit procedures for the International Maps of the World and for proposals in the border area. Finally, a *panel of Commissioners* would be available for boundary mediation.

If this role is not to suffer from the posturings characteristic of existing channels, it must:

1. aim at non-public dialogues,
2. create and hold to those psychological milieus that increase chances for joint ventures by states with troubled borders, and

---

97. Report of the Secretary General on Coordination of Cartographic Services of Specialized Agencies and International Organizations, ECOSOC, E/1322 (1949) at 88, and Add. 1 at 199.

98. *Id.* at 53.

99. See Int'l Map of the World to the Millionth Scale, Proceedings of the 1962 Conference, vol. 2 (proposed uniform markings) (1965).



3. help to bring aid for trans-border projects into the picture as much as possible.

In this role, a World Boundary Commission may be better situated to accomplish what President Johnson has tried to do with American offers of one billion dollars for Mekong Valley development. WBC proposals would come from an impartial, rather than a partisan source. Its project proposals would be multilateral, and could take advantage of the UN Technical Assistance Board's coordination. It would be committed to look for solutions that averted conflict, and that strove in conflict situations to keep the doors of cooperation, if not open, at least ajar.

**CONCLUSION #3:** Sparse areas provide the open invitation to grab them which dense areas lack. Yet, because of their sparseness, conflict on them often lacks the dramatic events that arouse world concern. We are in danger, therefore, of facing a series of "creeping expansions" near these less populated borders of Africa, Asia and Latin America, unless some step is taken to close that invitation.<sup>100</sup>

**PROPOSAL:** If the problem of boundary disputes is seen as a serious enough one, the following increases in mechanisms available to avoid them are possible:

1. If it is possible for two states to demarcate their border for all time, they should be encouraged to do so. The proposal for a Fixed-Border deposit for the International Map of the World to the Millionth Scale adds to existing treaty demarcation a further means of doing this.

2. If a part of the border is in dispute but is susceptible of arbitration or mediation, some body should be charged with the responsibility for broaching to the parties the possibility of a more cooperative milieu if the matter is settled once and for all. The proposal for a World Boundary Commission adds an alternative forum which explicitly avoids public posturing while such a settlement is being worked out.

3. If a part of a border is in dispute but it does not appear "negotiable," the advantages to both sides of a long-term *moratorium* of all border claims should be considered. Where the right to *use* the disputed area is in dispute, unless some joint development scheme is possible, a

---

100. Boggs counted 180 international borders some 102,000 miles long in all, as of 1940. Of these, 106 were in Africa, Asia or South America. Boggs, *supra* note 80, at 212.

moratorium on claims is not what either party wants. However, there may be cases where the very thing a claimant desires is some mechanism by which he can preserve his claim without having to fight for it. Traditional rules require states to keep pressing their claims or give them up; yet border claims are the most difficult to keep pressing without keeping the border states apart.

De facto moratoria occur all the time. They are the cease-fires without treaties after armed conflict. Yet when armed force is first threatened, some method of avoiding the conflict other than complete backing down may be desired. The crucial thing is to realize that an agreement to keep back the bullets does *not* represent a victory, if the animus over the border remains. Thus, a key part of any moratorium device is a specific, realizable and phased Plan for Development across the border to go with it.

In short, there must be a "carrot" involved, rather than a "sop." This "carrot" must be both able to be seen and able to be believed in. Unfortunately, solid long-range planning that requires a several-year dam construction is neither as visible nor as credible as something that can be done right away.

The more that shooting is likely, moreover, the more difficult will be the diplomat's job of making this "carrot" preferable to the emotional releases of prolonged border conflict. This is not to say we do not need the dam; this is to say the incentives for border ventures must include both short-range as well as long-range projects. And where armed conflict seems inevitable there may have to be escalations of cooperation. The Johnson Proposal to use one billion dollars for the Mekong Valley, instead of the 77 million dollars sought for the existing 1964-1968 development plan, is just such an attempt.<sup>101</sup> If political goals and "jelled" hostilities in Viet Nam are not already a bar to cooperation there, much more must be done to make this proposal a visible and credible thing after rancor and bloodshed has stepped in. The time for border boldness is before the conflict begins.

---

101. Cf., ECAFE, "Summary Records of the 20th Session", E/CN.11/667 255-56 (1964).