Document:-
A/CN.4/SR.1000

Summary record of the 1000th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1969, vol. I

that same meeting, was one on which the Latin American countries had made an important contribution to the development of international law. The Latin American continent had also made original and important contributions to the study of the topic of State responsibility, which was also on the Commission's agenda for the present session. He hoped that co-operation between the Commission and the Committee would continue, not only in respect of those topics on which their views were identical, but also in respect of those on which they started from different viewpoints, as exemplified by the fresh efforts being made in Latin America to develop an appropriate legal system for its economic integration.

78. Mr. KEARNEY thanked Mr. Caicedo Castilla for his very interesting report and said that his country, which was a member of the Inter-American Juridical Committee although not a Latin American State, was participating actively in that Committee's work and regarded it as a great world forum for the development of international law.

79. Mr. TABIBI said that the Asian region also had a deep respect for the work of the Inter-American Juridical Committee. He himself had been particularly impressed by the solidarity of the Latin American countries with the countries of Africa and Asia when they had been among the first signatories of the Vienna Convention on the Law of Treaties.

80. Mr. USTOR and Mr. EL-ERIAN thanked Mr. Caicedo Castilla for his statement.

The meeting rose at 1.5 p.m.

1000th MEETING

Monday, 16 June 1969, at 3.15 p.m.

Chairman: Mr. Nikolai USHAKOV

Present Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen.

Fifth Seminar on International Law

1. The CHAIRMAN welcomed the participants in the fifth Seminar on International Law and invited its Director to address the Commission.

2. Mr. RATON (Director of the Seminar on International Law) said that a determined effort had been made to improve the geographical distribution of participants in the Seminar. Out of 23 participants, 13 were from developing countries, thanks to the generosity of several States and to the co-operation of UNITAR, which had financed the granting of fellowships. He wished to thank those members of the International Law Commission who had agreed to address the participants and without whose collaboration the Seminar could not take place.

3. The CHAIRMAN thanked Mr. Raton on behalf of the Commission and congratulated him on his continued efforts to ensure the success of the Seminar ever since its inception.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216)

[Item 2 (*b*) of the agenda]

4. The CHAIRMAN invited Mr. Bedjaoui, the Special Rapporteur, to introduce his second report on succession of States in respect of matters other than treaties (A/CN.4/216).

5. Mr. BEDJAOUI (Special Rapporteur) said that at its previous session the Commission had decided to begin by examining the economic and financial aspects of the succession of States. He had decided to start with acquired rights, so as to clarify without delay a confused problem which he thought was of capital importance. He did not wish to dwell on the decisive importance of the political considerations which distorted the purely technical and legal aspects of the problem and which were to some extent responsible for the contradictory solutions hitherto adopted for it. Unfortunately, those considerations made the Commission's task an extremely delicate one, but the subject had to be clarified.

6. He had decided to take as his starting point the equality of States, in particular, the equality of the predecessor State and the successor State. In public international law there were no categories of States such as the ordinary State and the successor State and, if there were any differences with regard to the obligations devolving on the successor State, the following points would have to be taken into consideration: first, the fact that in a number of resolutions the General Assembly had invited States to take into account the experience and problems of the newly independent States with a view to strengthening their sovereignty and independence; secondly, the extent to which acquired rights were compatible with the permanent sovereignty of peoples and nations over their wealth and natural resources, which had been recognized in a General Assembly resolution;[1] thirdly, the question of the impact on acquired rights of the principle of the right of peoples to self-determination, which was proclaimed in the Charter—that principle, and the recognition of permanent sovereignty over natural resources, suggested a break rather than continuity in the relations between the predecessor State and the successor State, thus making the problem of acquired rights even more acute; fourthly, the extent to which the Declaration on Rights and Duties of States,[2] an International Law

[1] General Assembly resolution 2158 (XXI).

[2] See *Yearbook of the International Law Commission, 1949*, p. 287.

Commission draft according to which every people was entitled to decide freely its own political, economic and social system and therefore had an inviolable right to modify its existing economic institutions and create new ones, was compatible with the principle of acquired rights; and lastly, the fact that decolonization had given birth to States at different economic levels and had been accompanied by basic structural reforms in the decolonized countries, where the problem of acquired rights consequently arose in its acutest form.

7. In the light of those considerations, the question arose what were the obligations of the successor State and the foundations of acquired rights. As he had shown in his report, he had come to the conclusion that it was hard to find a precise legal basis for acquired rights. One approach adopted was that the transfer of obligations resulted from the transfer of sovereignty. But sovereignty was not transferred: there was no transfer, but a substitution of one sovereignty for another. A State possessed its sovereignty not from the State which preceded it, but by virtue of international law. In a succession of States, one sovereignty ended and another began. Consequently, there could be no transfer of obligations since there were two independent legal orders. Moreover, it was doubtful whether the predecessor State itself was bound to respect acquired rights. Hence it would be more equitable to remove the ambiguity and refrain from claiming the absolute inviolability of acquired rights, and, consequentially, to refrain from imposing on the successor State any more obligations than on the predecessor State which upheld those acquired rights. International law provided no sanction for the violation of acquired rights by the predecessor State. But the successor State was expected to take over the obligations of the predecessor State and be liable to international sanctions in the event of any violation. Thus, on transfer to the successor State, the obligation of the predecessor State would be transformed into an international obligation.

8. It was therefore hard to agree not only that the obligation should be transmitted, but also that it should become more onerous in the process.

9. Again, the two concepts of transfer and transformation seemed a little contradictory. If an obligation was transformed, obviously it was no longer the same as the original obligation.

10. In a second approach, an attempt was made to justify the principle of acquired rights by appealing not to the legal orders of the predecessor State and the successor State, which remained independent and alien to each other, but to a third order, namely, the international legal order. According to that approach, the obligation would be an international obligation, imposed on the successor State, and on it alone, by public international law. That concept was clearer than the first and more in keeping with the fact that the two legal orders to which the predecessor State and the successor State belonged were so different and independent that they offered no inherent reasons for transferring the obligation. The obligation could survive only by recourse to a third order, namely, the international legal order. Consequently, it was not the obligation of the predecessor which survived, but a new international obligation which replaced it and was imposed on the successor State.

11. It must, however, be asked how that view could be reconciled with the great principles of self-determination, sovereignty over natural resources, and equality of States. Such a rule appeared not only unprovable, but absurd, useless and unjust. It was unprovable, and its real existence had not yet been established. It was absurd, since if there were an international obligation, that would mean that the successor State was compelled to accept an obligation of which the predecessor State could divest itself. Except where aliens were concerned, a right accorded by the predecessor State afforded no international protection and could even be violated by the very State which had created it. The predecessor State had only to disappear for the successor to be compelled—to an even greater extent than its predecessor—to respect rights whose creator might violate them without incurring international sanctions. The theory of acquired rights was useless, because it linked the predecessor State to the successor State in respect of rights which had come into existence before the change of sovereignty and were invokable after the change. Assuming the obligation to have an international character, the successor State would be respecting a right not because it had been respected by its predecessor, but because a higher rule of public international law, bearing no relation to the reasons for which the predecessor had respected that right, had been imposed on the successor State and on it alone. If that were the case, there would no longer be any "problem" of succession of States; the entire subject-matter of succession would be governed by that rule of public international law, which would clearly impose respect for acquired rights in all circumstances and in all fields. That would mean taking a definitive stand in favour of continuity, of automatic extension, even to the length of hiding the new sovereignty under a bushel. Reality, with all its complexities and inconsistencies, disavowed that theory only too often. Finally, the rule that respect for acquired rights was an international obligation was unjust because it could benefit only aliens; nationals could not invoke it because they were not, or at least not entirely, governed by public international law and had no access to the necessary machinery or procedure. Acceptance of such a rule would mean perpetuating the privileged treatment of aliens in relation to nationals. On that point, he referred members to paragraphs 61-71 of his report.

12. It might thus be said that acquired rights meant perpetuation and inadequacy. Classical law, in so far as it demonstrably accepted acquired rights as a principle, ought to contain the means for adapting itself to the new circumstances, and it would be a mistake to expect it to state a principle which might cripple it and lead to its breakdown.

13. The criterion of public policy invoked by its supporters in fact upset the theory of acquired rights, since if there was one sphere in which the exclusive jurisdiction of the State was sovereign it was that of the appraisal of public policy. International relations

called for a measure of good faith and the criterion of public policy, which offered a release from the obligation to respect acquired rights, was a standing temptation to States. It was therefore better discarded.

14. Practice, jurisprudence, doctrine and precedent in general were of no decisive help in studying the problem of acquired rights. Precedents abounded, but they contradicted each other. It might be useful to re-examine the precedents so as to put an end to the practice of automatically invoking them. It was debatable whether the 1919 peace treaties or those concluded after the Second World War really confirmed the principle of acquired rights. And even assuming that they did, it might be asked when the allies and their associates of 1919 or the allies of 1945 had respected those rights. Was it when they seized and liquidated all German private assets abroad or when they compelled Germany to pay compensation to those it had expropriated? The doctrine was still obscure, and one writer had stated that respect for acquired rights was a well-established principle of public international law, but that both the scope and the nature of that protection were controversial, which to say the least was going back in the second part of his statement on what he had said in the first.

15. In citing the precedents, such as the *Hungarian Optants*,[3] *Chorzow Factory*[4] and *German Settlers*[5] cases, it was too often forgotten that the issue in the case was not so much the principle of respect for acquired rights as the interpretation of a treaty. And did those treaties which themselves recognized acquired rights thereby confirm an existing principle, or did they merely introduce an exception to the general rule of the rejection of acquired rights?

16. Again, did respect for acquired rights consist in the absolute inviolability of established rights or in the obligation to pay compensation? But inviolability and compensation could not be dissociated without upsetting the theory of acquired rights. The principle of the abolition of acquired rights was based on the exercise of a competence of which the successor State was not deprived by international law. Nationalization, for instance, was an act recognized by public international law as falling within the competence of every State, so how could a perfectly legitimate act give rise to compensation? It was therefore questionable whether the right of nationalization could be restricted according to capacity to pay. That right was one of the attributes of sovereignty, which either existed or did not exist, but did not depend on capacity to pay. The poor countries could not be imprisoned in the vicious circle of poverty, where they could not nationalize because they were poor and remained poor because they could not nationalize.

17. On the problem of compensation legal opinion was hopelessly divided because there was no basis for compensation, as was explained in paragraphs 80-86 of his report. The ethics of compensation should therefore be re-examined. But even assuming that equity permitted and counselled the payment of compensation, the economic and financial structures of the new countries prevented such payment, as was explained in paragraphs 125-127, on structural impediments. Justification of the obligation to pay compensation had also been sought in the theory of unjustified enrichment, but, as he had shown in paragraphs 128-132 of his report, that theory was inadequate. Current practice tended to go beyond compensation and to prefer global settlements and the substitution of co-operation for compensation. By its resolution 1803 (XVII) of 14 December 1962, the General Assembly had excluded the right of compensation in cases of succession by decolonization.

18. Jurists and international law institutes and associations were paying increasing attention to the succession problems facing the newly independent countries born of decolonization. The International Law Association had devoted two sessions, at Helsinki and Buenos Aires, specifically to those problems. The General Assembly also, in a number of well-known resolutions, had requested that the problems of State succession should be settled in the light of the experience of the newly independent States. The Permanent Court of International Justice, in the *Lighthouses* case,[6] had rightly considered that the various cases of annexation, cession, dismemberment and independence could not all be governed by a single rule.

19. In the context of decolonization, therefore, acquired rights took on a new colour. Such problems had occurred and been dealt with daily for a quarter of a century by more than half the members of the United Nations; they affected young States and the great Powers alike. As he had shown in paragraphs 106-108 of his report, acquired rights and decolonization were a contradiction. The "reversing" function of decolonization took precedence over its "renewing" function and decolonization appeared as a process involving the destruction of certain types of economic and financial relationships which had helped to maintain the bonds of subordination. It meant a break. Renewal of acquired rights would in some cases mean a renewal of colonization, and in all cases would mean the prevention of structural reforms.

20. The lessons which could be learnt from his study of economic and financial acquired rights and State succession were, first, that in the absence of any treaty provision to the contrary, the successor State possessed complete rights over its national patrimony, which consisted of State and local authorities' property, whether movable or immovable, corporeal or incorporeal, public or private, employed in public utility services or acquired for gain by the predecessor State; secondly, that the successor State automatically acquired full sovereignty over the wealth and natural resources in its territory—patrimonial and concession rights to those resources granted by the predecessor State did not constitute acquired rights which could be invoked against the successor State; thirdly, that to an as yet unspecified extent, the successor State was responsible for charges

[3] See *Annual Digest of Public International Law Cases, 1927-1928*, Case No. 59.

[4] *P.C.I.J., 1928, Series A*, No. 17, Judgment No. 13.

[5] *P.C.I.J., 1923, Series B*, No. 6.

[6] *P.C.I.J., 1934, Series A/B*, No. 62.

on national assets; fourthly, that rights acquired under the legal order of the predecessor State were binding on the successor State only if the latter had plainly acknowledged them of its own free will or if its competence was restricted by treaty; fifthly, however, that the free determination of the successor State with regard to acquired rights in no way released it from the obligation to observe the rules of conduct that governed every State and whose violation would render it responsible.

21. Perhaps the Secretariat, which had already produced some excellent documentation on State succession, could undertake, first, a general study of the practice of States so as to clarify its meaning and scope, indicating what solution had been finally adopted in each case; then, secondly, conduct a more thorough study of the precedents; thirdly, prepare a breakdown of the precedents showing the extent and form of the maintenance or rejection of acquired rights in the various fields such as concessions, contracts, assets and liabilities; and, finally, compile a bibliography as it had done for the law of treaties, but with a brief commentary on each title.

22. Mr. BARTOŠ, reserving the right to speak again later, congratulated the Special Rapporteur on his masterly analysis; he had made a very full presentation of the subject, couched in measured and well chosen terms.

23. The question of acquired rights was not new, since it had already arisen in acute form after the First World War, but it had taken on a new dimension with decolonization.

24. It was questionable whether acquired rights were solely a problem of equity and balance of legal rights. For several decades, while the gold standard system had been in force, the view had been held that investors were entitled, even after a devaluation, to recover the value of their investments. That was the purpose of the gold clause. In the *Serbian Loans* case and the *Brazilian Loans* case, the Permanent Court of International Justice had ordered the two defendant States to pay the gold franc value of their debts, in accordance with the gold clause.[1] Subsequent to the Court's decisions, however, a compromise had been reached whereby France had renounced a large part of its claim, because it was more concerned over the possibility of recovering something than merely securing judicial recognition of its claim. The cases of compensation mentioned by the Special Rapporteur showed that, even where the principle of compensation had been accepted on the basis of the recognition of acquired rights, the amount of compensation actually paid had been adjusted to the debtor's real capacity to pay.

25. After the Second World War it had been affirmed, both in the General Assembly of the United Nations and at a number of conferences, that the principle of acquired rights was incompatible with decolonization. The new State must be released not only from the sovereignty of the former colonial Power, but also from the economic servitudes established by that Power, which had acted in bad faith both as possessor of the territory and as custodian of the interests of the people. The resolutions of the General Assembly, in particular resolution 1803 (XVII), showed that the recognition of acquired rights in favour of the former colonial Powers was incompatible with the emancipation of the peoples of the new States.

26. The States of the third world, which constituted the majority of the membership of the United Nations, were all opposed to acquired rights, and that, seeing how numerous those States were, had led to a change in the substance of the notion of acquired rights.

27. Of course, compromise settlements had been made in the past and would be made in the future, for the colonial Powers were not prepared purely and simply to renounce their claims; but disputes were settled empirically and actual compensation by compromise. The debtors held out for nearly nothing, whereas the creditors claimed one hundred per cent, and in the end a reasonable settlement was reached.

28. With regard to the principle, the starting point should be that all so-called acquired rights were void. In the first place, they all arose out of concessions granted by the former colonial Power acting as an imperialist Power in a country which did not belong to it. In the second place, settlers failed to allow for the fact that their investments had already been amortized and had yielded the equivalent of several times their value. Lastly, the sovereignty of a new State would be jeopardized if its right to nationalize and exploit its resources itself were called in question.

29. That led up to the very interesting argument put forward by the Special Rapporteur that the question of compensation was not automatically linked to right of the State freely to dispose of its natural resources. In fact, that new approach was not unfamiliar to the most capitalist investor States, for they had instituted a special form of insurance for exported capital to cover the risks involved in foreign investment: by means of a system of credit insurance, the State itself covered up to seventy or even ninety per cent of the investment.

30. International case-law in the matter of security of foreign investments no longer relied so definitely as before on the doctrine of acquired rights. It relied more on the general obligations of the State and on its duty to observe the rules of general international law and municipal law. The sovereignty of the country in which the investments had been made was the prime factor. Even in nationalization cases, the right of the State to expropriate property had been acknowledged; the question of compensation had been treated as secondary.

31. That was a new trend in international law which the Special Rapporteur had brought out in his report, and it was to that trend that he (Mr. Bartoš) had tried to confine his first statement.

32. Mr. TABIBI said that, at that stage, he wished to make only a preliminary comment; he would speak again when he had carefully examined the Special Rapporteur's second report, which constituted a study in depth of a vital question and was full of valuable material and information.

33. At the previous session, the Commission had

[1] *P.C.I.J., Series A*, Nos. 20/21, Judgments Nos. 14 and 15.

decided that it would examine as a priority topic in 1970 the succession of States in respect of matters other than treaties. The Commission was now able to discuss an important aspect of that topic thanks to the commendable effort made by the Special Rapporteur in submitting a second report despite his heavy official commitments.

34. The Special Rapporteur's approach and conclusions were acceptable in the light of the contemporary situation among States, of the decisions and resolutions of the United Nations and of the basic principles of international law.

35. He agreed with the Special Rapporteur that the political aspects of the topic had so far overshadowed its legal aspects and he approved of the Special Rapporteur's view that the theory of acquired rights could only be studied from the starting point of the basic principles of international law. Foremost among those principles was that of the equality of States; since all States were equal in rights and in obligations, a successor State had the same sovereign rights as the predecessor State, including the sovereign right to dispose of its natural resources.

36. The second relevant principle of international law was that of self-determination, which was not a political principle but a legal principle. That principle had been recognized in the International Covenants on Human Rights [8] and constituted a rule of *jus cogens*. At the Vienna Conference on the Law of Treaties, during the discussion of article 49 of the draft, on coercion of a State by the threat or use of force, and of the amendment to that article of which Afghanistan had been one of the sponsors, he had pointed out that political self-determination was meaningless unless supplemented by economic self-determination.[9] It was precisely for that reason that the Group of 77 States were working for economic self-determination in UNCTAD. In the light of those facts, he supported the Special Rapporteur's rebuttal of the theory of acquired rights.

37. There were many decisions and resolutions of the United Nations which were of special relevance and which showed the approach of contemporary international society to the important issue under discussion. The Special Rapporteur had appropriately referred to the historic Declaration on permanent sovereignty over natural resources, adopted by the General Assembly in its resolution 1803 (XVII), but it was important to remember that that declaration was a complement to the famous Declaration on the granting of independence to colonial countries and peoples, contained in General Assembly resolution 1514 (XV). To those decisions must now be added the very recent Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties adopted by the United Nations Conference on the Law of Treaties and annexed to the Final Act of that Conference [10] and the resolution, relating to that same Declaration, whereby the Conference requested "the Secretary-General of the United Nations to bring the Declaration to the attention of all Member States and other States participating in the Conference, and of the principal organs of the United Nations". Those recent decisions were especially relevant because many of the acquired rights claimed by predecessor States had been procured by coercion, and hence by illegal means.

38. Reference had been made to the question of compensation. Undoubtedly, in many cases, developing countries had agreed to grant compensation, but such decisions had been taken of their own free will. There was no rule of international law which limited national sovereignty or curtailed the principle of self-determination in that respect.

39. He supported the Special Rapporteur's request for documentation, but pointed out that the Secretariat would only be required to supplement material which had already been gathered, since in 1961 a circular had been sent to States Members of the United Nations and a considerable quantity of information had been assembled by the Office of Legal Affairs, some of which existed only in mimeographed form. In addition, the Secretariat had prepared a study on the question of permanent sovereignty over natural resources,[11] which contained much valuable material. Apart from supplying additional information of that kind, the Secretariat could also assist by making available to members of the Commission studies prepared by learned societies, such as the International Law Association, which had discussed the question of State succession at its Conference at Buenos Aires in August 1968.

The meeting rose at 5.55 p.m.

[8] See General Assembly resolution 2200 (XXI).

[9] See *United Nations Conference on the Law of Treaties, First Session, 1968, Official Records*, pp. 269 and 270, paras. 21-26.

[10] A/CONF.39/26.

[11] A/AC.97/5/Rev.2, United Nations publication, Sales No.: 62.V.6.

1001st MEETING

Tuesday, 17 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States and Governments: Succession in Respect of Matters other than Treaties

(A/CN.4/216)

[Item 2 (*b*) of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's