

Document:-
A/CN.4/SR.1003

Summary record of the 1003rd meeting

Topic:
Succession of States in respect of matters other than treaties

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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

célèbre for over a decade. After the First World War, when parts of Hungary had been ceded to Czechoslovakia, Romania and Yugoslavia, many Hungarians had found that their property was situated in the successor States. Article 250 of the Treaty of Trianon had guaranteed that Hungarian properties would not be subject to retention or liquidation under other provisions of the treaty. The successor States, however, had introduced extensive measures of agrarian reform, in the course of which properties of Hungarians had been expropriated. The amount of the compensation provided for in the laws of the successor States had not been considered adequate in all cases, especially in Romania, where the currency had been devalued. The case had been brought before the League of Nations and had given rise to an immense legal literature. Hungary had based its complaints both on the provision of the Treaty of Trianon and on the principle of the "minimum standard" in the treatment of aliens.

9. He would refer only to an article published in 1928 by Sir John Fischer Williams,¹ who, for the Romanian side, had argued that the maximum that could be claimed for an alien was equality with nationals, and that that did not mean that a State was obliged to accord such treatment to aliens unless the obligation had been embodied in a treaty. In support of his argument, Sir John had cited the following passage from the judgement in a Mexican case: "The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty . . .". "This is not the language", Sir John had then gone on to say, "in which all sober men in civilized communities would at the present time describe any and every measure of expropriation which, though not accompanied by full compensation, was undertaken deliberately by a civilized government and applied impartially to aliens and nationals in pursuit of a policy which that government, rightly or wrongly, acting within the sphere of its own independent authority, conceives to be in the interests of the peace, order and good government of the territory and people committed to its charge".² In his (Mr. Ustor's) opinion, that view was still valid today.

10. When the Hungarian Optants Case had been settled in Paris in 1930, arrangements had been made for setting up funds for compensating landowners whose property had been expropriated. The funds had been made up from various sources. The successor States were obliged to pay into the funds the amount of compensation provided for under their own laws, and under that arrangement the amount to be paid by Romania had been very small. The Great Powers which had financial claims on Hungary had renounced those claims and permitted Hungary to contribute the sums in question to the funds. With the advent of the economic crisis of 1931, however, Hungary had been unable to pay either its debts or its own contribution to the funds, which then became unable to fulfil the

original expectations. That case went to show that equal treatment of nationals and aliens was the maximum which could be asked of any State which nationalized property or carried out agrarian reforms.

11. After the Second World War, he had personally participated in negotiations conducted by Hungary for compensation for property which had been nationalized. In contemporary legal literature, it was often held that the practice of the socialist States of eastern Europe which had negotiated such compensation agreements militated in favour of the idea that there was an international duty to pay compensation, even in cases of general nationalization as part of a programme of social reforms. In his opinion, however, that practice was not enough to establish international custom within the meaning of article 38, paragraph 1. b. of the Statute of the International Court of Justice. The compensation agreements entered into by the socialist States in the 1950s had been concluded not in accordance with what they considered to be international law, but for reasons of political and economic expediency. Those States had considered it desirable to reach a settlement in the interests of peaceful coexistence and international trade relations.

12. The problem of the treatment of aliens in the event of State succession could easily be solved if the Commission accepted the principle that every State had full freedom to change its economic system, even if that involved a change in its property laws. He agreed with the Special Rapporteur that a successor State could not have any less rights than its predecessor.

13. Mr. ROSENNE said that the debate might be more useful if the Special Rapporteur could obtain more precise information on those points on which he wished to have the Commission's views. He suggested, therefore, that the Special Rapporteur be asked to prepare a questionnaire for that purpose.

14. The CHAIRMAN asked the Special Rapporteur whether he would be able to prepare the questionnaire for circulation at the meeting on Friday, 20 June.

15. Mr. BEDJAoui (Special Rapporteur) said he would do so.

The meeting rose at 1 p.m.

1003rd MEETING

Thursday, 19 June 1969, at 10.5 a.m.

Chairman: Mr. Nikolai USHAKOV

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

¹ *British Year Book of International Law*, 1928 — International law and the property of aliens.

² *Op. cit.*, p. 29.

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

(A/CN.4/216/Rev.1)

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

1. The CHAIRMAN invited the Commission to continue consideration of item 2 (b) of the agenda and asked the Special Rapporteur to present the questionnaire he had drawn up at the Commission's request, which read:

1. What legal basis should acquired rights be given?
Is there a "transfer" of obligations by "transfer" of sovereignty?
Does an independent international obligation exist?
Is there a more satisfactory basis than the two indicated above?
Should respect for acquired rights be presumed?
2. How can the maintenance of acquired rights be reconciled with certain principles of international law or with the General Assembly resolutions concerning the right of peoples to self-determination, the inalienable and permanent right of peoples freely to dispose of their natural wealth and resources, the right of peoples freely to adopt the economic system they desire, etc.?
3. How can the denial of acquired rights be reconciled with human rights, and with the duties (where such exist) of the State towards aliens (in so far as there is no doubt that this question belongs to the topic of State succession)?
4. Will any conclusions that the Commission may reach in this debate concern the problem of acquired rights in general, or will they not have to be confined to economic and financial acquired rights, or, even more narrowly, to private economic and financial rights?
5. How, and according to what criteria, are the boundaries to be drawn between the subject under discussion and the international responsibility of States?
6. More generally speaking, is the theory of acquired rights useful for showing the complexity of the problems of State succession, or would it not be preferable, in view of its uncertainties and imprecision, to abandon it and to seek rules in general international law (including rules of responsibility) to determine the behaviour of the successor State, like that of any other State, and to preserve any former situations which deserve to be maintained?
7. Does the Commission wish to instruct the Special Rapporteur to submit, for its next session, and in the light of the present debate, a draft of articles on acquired rights, or would it prefer a draft on a more particular aspect of succession in economic and financial matters?
8. Does the Commission wish the Secretariat to undertake the various tasks and inquiries which the Special Rapporteur has suggested?

2. Mr. BEDJAOUI (Special Rapporteur) said that the question of the legal basis to be given to acquired rights, which he had put at the beginning of his questionnaire, was not purely academic. It was necessary to know the justification of the obligation on the successor State in order to be able to define its nature, scope and limits satisfactorily and to determine possible exceptions. He himself had failed to find any such basis, either in a transfer of obligations, which would mean that the

successor derived its sovereignty from the predecessor State—a theory he rejected—or in the notion of an independent international obligation. Nor did he think that respect for acquired rights could be presumed. The heart of the matter was question 5 of the questionnaire, which was linked to question 6; for it was doubtful whether the concept of acquired rights should be retained if it was too imprecise to be of any use.

3. Mr. TESLENKO (Deputy Secretary to the Commission) said that in question 8 the Special Rapporteur asked whether the Commission wished the Secretariat to undertake the various tasks and inquiries he had suggested. It might therefore be useful for the Secretariat to explain at once what it understood those tasks to be. They would comprise a survey, a bibliography and an analysis of the jurisprudence of international tribunals.

4. The survey would be carried out by means of a questionnaire drawn up by the Special Rapporteur, designed to elucidate the actual practice of States on a number of specific points. It would be sent by the Secretary-General to the Governments of States Members of the United Nations. The Secretariat would assemble the replies received and publish them in an official document.

5. The bibliography would cover all aspects of succession of States and governments. Each title in the bibliography would be accompanied by a brief summary of the contents of the work.

6. The analysis of the jurisprudence of international tribunals would centre on the question: "are the courts' decisions on acquired rights based on general international law or on treaties binding the parties in each particular case?"

7. All that work would inevitably cost money, and in accordance with rule 154 of the rules of procedure of the General Assembly, the Secretariat would submit an estimate of expenditure to the Commission before it took a decision on the matter.

8. The CHAIRMAN said that if the work could be done by the Codification Division without additional expenditure, the decision could be taken at once. If, on the other hand, additional expenditure was involved, the Commission could not take a decision until the amount had been estimated.

9. Mr. ROSENNE said he was obliged to the Special Rapporteur for his quick response to the suggestion he had made at the previous meeting. The question of expenditure was not, however, the only question which arose in regard to the work to be undertaken by the Secretariat; much more fundamental issues were involved and he would deal with them at a later meeting when speaking on the substance.

10. Mr. YASSEEN said that the Commission should take a decision on the content and scope of the information it wished the Secretariat to obtain.

11. Mr. TESLENKO (Deputy Secretary to the Commission) said that the Secretariat had no wish to pre-judge the Commission's decision. His remarks had been prompted by two considerations: first, the Secretariat

would have to prepare an estimate of the expenditure in accordance with rule 154 of the General Assembly's rules of procedure; and secondly, he had wished to explain how he interpreted the Special Rapporteur's request, so that the Commission could say exactly what it wanted the Secretariat to do.

12. Mr. TAMMES said he would deal with the questionnaire later; for the moment he wished to thank the Special Rapporteur and comment on his interesting second report, which provided the Commission with a large amount of material set out in an appropriate form for consideration and discussion. The report contained a good many innovating ideas and he personally had no objection to the Special Rapporteur's presenting his material in the form of a strong plea in favour of the view he held. The opposite view to the Special Rapporteur's was so deeply rooted in history and in established legal thinking that it did not seem out of place to attempt to find a solution to the problems involved by argument and counter-argument.

13. The discussion so far had brought out two important points. The first was that the doctrine of acquired rights was neither sufficiently precise nor sufficiently general to be suitable for acceptance as the hard core of an international legal rule. The second was that, whatever rules might be finally adopted on the matter, the situation of State succession after decolonization was *sui generis*. Because of the immense difference in economic development usually found between the former colonial Power and the newly independent State, the case of decolonization could not be compared with other cases of State succession, such as integration or merger. The Special Rapporteur had drawn attention to that distinction in an interesting passage in paragraph 89 of his report.

14. On the central issue discussed in the report, he thought that, with regard to economic and financial rights, general international law recognized two principles which were not altogether in harmony with each other. The first was that a State could do what it pleased with the property of its own nationals. It was only recently that international law had moderated to some extent its complete lack of interest in the acquired rights of nationals by recognizing, in article 17 of the Universal Declaration of Human Rights, that "Everyone has the right to own property" and that "No one shall be arbitrarily deprived of his property". In that new development, no distinction was made between aliens and nationals. There was, however, no remedy as effective as the traditional channel of diplomatic protection.

15. The second principle, in which international law was highly interested, was the protection of aliens against the State which had power over their private economic rights. International law furnished the means of protecting such private economic rights to the State with which the rights were identified, although in fact they might represent international, or rather multinational, capital. A striking description of the position in that respect was given in a passage written in 1950, quoted by the Special Rapporteur in paragraph 58 of his report. The present position, however, was that no one would maintain that alien property was sacred and

that it was sheltered by international law from any measures that might be taken in the public interest by the State concerned, though compensation must, of course, be paid for expropriation. At the same time, the antithesis between nationals and aliens with regard to acquired rights was no longer absolute. Nor were acquired rights in themselves absolute.

16. It would be running counter to that sound development, and would be contrary to the interests of the new States in particular, if the antithesis between nationals and aliens were maintained in its full rigidity, since the paradoxical result would be that international law disclaimed all interest in acquired rights in one instance, but concerned itself with them in another, merely because sovereignty over a piece of territory had changed hands. As a recent writer on State succession had pointed out, "There is no reason why a successor State should be in any less strong a position in this respect than any other State, or why acquired rights should be invested after a change of sovereignty with a sanctity and permanence greater than they had before".¹

17. Decolonization gave rise to problems of acquired rights on a very large scale. In that particular kind of State succession, an enormous volume of rights became alien overnight, so that the question of the protection of acquired rights was particularly acute.

18. The problem could hardly be approached from the standpoint that the newly independent State had been enriched because it now had in its power all the wealth to which aliens had acquired rights. In other United Nations bodies an attempt was being made to lay down principles of co-operation, on the basis that all peoples were entitled to an equitable share in economic and social progress in accordance with Article 55 of the Charter. The idea was even being put forward of a charter of development which would constitute a solemn preamble for the strategy of development. From that point of view, the enrichment of new States should be welcomed rather than discouraged. In paragraph 109 of his report, the Special Rapporteur had included some comments on that point which took into account important trends of thought in the Economic and Social Council and its subsidiary bodies.

19. The concept of equality had been referred to during the discussion and it was interesting to note that the International Court of Justice, in its Judgement of 20 February 1969 in the *North Sea Continental Shelf* cases, had dealt with the relation between equity and equality. Those cases had been presented as a matter of geography and, in broad outline, the Court had been called upon to decide what principles should be observed by the States concerned in their further negotiations, and in future law-making. The Court had held that equity did not require the reshaping of geography: there was no room in nature for mathematical equality, but there could be room for equitable correction of natural inequality. The following passage from the Judgement was worth quoting:

"Equity does not necessarily imply equality. There

¹ D. P. O'Connell, *State Succession in Municipal Law and International Law*, 1967, vol. I, p. 265.

can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as those that equity could remedy . . . It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result".²

That passage was very pertinent to the situation under discussion, which, though historical rather than geographical, like the situation in the *North Sea Continental Shelf* cases involved a question of distribution of wealth. It was within human power to remedy if not to change such situations.

20. He could not agree that compensation had no place in the international law of the future. Compensation was a necessary safeguard for foreign investments, which still had a part to play in helping to bring a reasonable degree of prosperity to developing countries. Compensation was also necessary to relieve the human suffering which inevitably resulted from social change. It should, moreover, be remembered that compensation had a place in cases of State succession other than those resulting from decolonization.

21. It was not at all contrary to the principle of sovereign equality that compensation should come into play in cases where reliance had been placed on the promises of a State which had concluded a contract or granted a concession. Once the process of decolonization had been completed and normal participation in economic and social progress had been resumed in all continents, the international rules on compensation for loss of property would appear in a normal context. If that were the lesson to be learned from the Special Rapporteur's second report, a solid foundation would have been laid for legal rules to guide the international community in those matters.

22. Mr. REUTER said he was not in a position to reply immediately to all the Special Rapporteur's questions, which he had only just seen; he would reserve the right to add to or modify the views he was about to express on some of them.

23. But first of all he wished to pay a tribute to the Special Rapporteur for the remarkable scientific and intellectual qualities he had shown in drafting his report. It was a fighting document. In form, style and conclusions, it was designed to prove that a successor State was free to reject, as it pleased, any obligations contracted by the predecessor State. The militant character of the report could be summed up in two propositions: either there was sovereignty or there was not; either a legal rule was clear and precise or it was not a rule.

24. Nevertheless, as Mr. Castrén had discreetly but clearly brought out, several doors were still open or at least ajar. He himself was in favour of compromise solutions, for though compromise might not have the logic of reason, it had the logic of life.

25. Ever since the world had begun, *rebus non stantibus*, both the strongest grounds and the most sordid pretexts had been put forward to justify debtors not paying their debts, States plundering their subjects and States defaulting on the most solemn undertakings towards one another. It was not so very long ago that the Christian princes of the Western world used to maintain that, on the death of their predecessor, all obligations contracted by him became null and void. Some means of confirming such obligations had to be found, therefore, before they could be treated as "acquired rights", and such confirmation was not always a disinterested action. Jurists in all ages had devised procedures, concepts and a vocabulary which were not always faultless, but which made it possible to take account of conflicting interests all of which were to some extent legitimate.

26. The term "acquired rights" thus meant, precisely, that the rights acquired were genuine rights and that, if they had not been acquired, there would be no rights at all. The expression "State succession", by analogy with the death of a natural person, recalled the common-sense position that anyone who accepted an inheritance had to accept the liabilities as well as the assets.

27. No legal system could allow itself the luxury of rejecting all transition in the name of an abstract concept, however logical it might be. Problems of inter-temporal law were difficult, but the Commission had already prepared articles on such problems in international law. It was possible that those articles had been accepted because they were not very clear, but in his opinion, it was because transitional rights had to be provided for in every sphere, and even an obscure formula was better than silence, which was mere cowardice.

28. Whatever form the results of the Commission's work ought to take for its discussions to be useful, it was certainly better that they should be focussed on the future rather than on the past.

29. That presupposed the fulfilment of two conditions, distinct in law but largely united in practice. First, it must be clearly stated what cases of change in sovereignty were to be considered. In his view, it could only be those in which there was a lawful change of territorial sovereignty. Unlawful situations, which characterized a great many examples of past changes, involved nullities and sanctions and were completely irrelevant to any rules the Commission might prepare for lawful situations. And for that reason he thought the problems of State succession arising out of decolonization were not of any great importance. Decolonization had now reached a very advanced stage, unless, of course, the term was to be used in a more general sense, particularly from the geographical standpoint, than was given to it in the United Nations. Decolonization problems had been, or would be, solved within a treaty framework. If there were further operations to be undertaken and if they

² *I.C.J. Reports 1969*, pp. 49 and 50, para. 91.

did not proceed peacefully, the problems raised would be considered within the framework of international responsibility, with its full panoply of nullities and sanctions.

30. On those terms, the cases of State succession to be considered were not very numerous. Some imagination was needed, seeing that present-day international law was not very kindly disposed towards territorial changes. However, if the right of self-determination was accepted, which juridically threw open the right of secession in unitary States, there was one case today. If federations were considered, which also admitted the possibility of secession, and if it were recognized that a State could leave a federation, there was, perhaps, another case.

31. But the trend today was in the other direction. Federations were being formed and unions were developing, with their concomitant joint services, undertakings and investments. Those unions granted economic rights to aliens, and all kinds of situations could be imagined in which the problems of State succession in economic matters arose and would arise; some indeed had already arisen. It would be better to deal with some of those problems rather than with the problems raised by decolonization, although the former had also arisen in connexion with decolonization. That was the case where colonial federations had broken up and the unsolved problems now arose in the relations between the States born of the dissolution of the federation, not in the relations between the colonizers and the colonized.

32. To come to the question of principles, it had been suggested that the Commission should examine the human rights aspect of the problem, not only from the individual but also from the collective standpoint, for even in the capitalist countries, patrimonial relations were more relations between groups than relations between individuals. Internationally, however, human rights were not at present considered from that aspect. The Commission should accordingly tackle the major problems of collective economic relationships, and the question of human rights should be approached with caution.

33. On the other hand, unlike the Special Rapporteur, he attached great importance to the principle of unjust enrichment. When the abuses of capitalism were criticized, it was on the ground of unjust enrichment. If that criticism was to be accepted even by capitalists, it must be admitted that there could also be cases when the abolition by law of all existing rights brought an unjust enrichment in the opposite direction. The notion was rather vague, but it could have practical results.

34. There were also a number of lessons to be learned from the study of the concept of good faith, for investments were everywhere covered by some form of agreement, in law or in fact. The acceptance of such investments involved the acceptance of a certain responsibility. The elements and the limits of that responsibility must be studied.

1004th MEETING

Thursday, 19 June 1969, at 11.30 a.m.

Chairman: Mr. Nikolai USHAKOV

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

Co-operation with other Bodies

[Item 5 of the agenda]

(resumed from the 999th meeting)

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN, welcoming His Excellency Mr. Bustamante y Rivero, the President of the International Court of Justice, said that his presence symbolized the bonds which united the Court with the International Law Commission, both as to their membership and in their work. Five judges of the Court were former members of the International Law Commission, as several former judges had been; and in its work the Commission was called upon to ponder the judgments of the Court and draw the necessary conclusions to assist it in its task of codification and progressive development of international law. The Court and the Commission pursued a common aim proclaimed in the preamble to the Charter of the United Nations: "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".

2. An eminent jurist, author of many notable works, philosopher, historian, man of letters, diplomat and statesman, Mr. Bustamante y Rivero symbolized the universal nature of the highest virtues of the great servants of the law. He had successively taught such varied disciplines as archaeology, social geography, philosophy and law. He had been advocate, judge and prosecutor, as well as minister plenipotentiary, ambassador and chairman of the committee on private international law at the second South American Congress of Jurists. Finally, he had filled the highest office in his country, that of President of the Republic. His presence was a source of pride for the Commission.

3. Mr. BUSTAMANTE Y RIVERO (President of the International Court of Justice), after thanking the Chairman for his kind words of welcome, said that the International Court of Justice and the Commission were both working to promote and develop the law, and to perfect it so far as was humanly possible. It was therefore natural that the President and judges of the Court should from time to time have the pleasure of visiting the Commission and exchanging mutual good wishes for the success of their common endeavours.

The meeting rose at 11.15 a.m.