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**Summary record of the 1004th meeting**

Topic:  
**Cooperation with other bodies**

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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.

4. Reiterating the feelings expressed in previous years by other members of the Court who had had the honour of addressing the Commission, he called for continued efforts by both bodies to further the progress of international law, which was so important for human justice.

5. An examination of the specific tasks of the Commission and the Court, however, revealed points of difference between them. The Commission was called upon to examine the whole field of international law objectively and impartially, as it were from above the living realities of relations between peoples. After carefully sifting the theory of the law, the doctrine of writers and court decisions, it formulated and refined legal principles which it stated in codifications that later served—until multilateral treaties were concluded by States—as a guide to judges adjudicating in specific cases.

6. The Commission, though it remained aloof from current legal disputes and concrete cases, never lost sight of their complexity when taking decisions that were not purely theoretical, but took the realities of the contemporary world into account. The great merit of the Commission's work was that it most aptly associated pure legal theory—as found in the writings of eminent jurists and in the decisions of the International Court of Justice, arbitral tribunals and other judicial bodies—with the concrete rules of law which could be discerned by constant observation of everyday life and the conflicts and vicissitudes of the modern world.

7. As to the judges, their aims were similar, but their position was rather different. Unlike the members of the Commission, they could not adopt a purely general and speculative approach to the technical problems of international law. They had to face the obstacles and the circumstances of the particular dispute between the parties to a case. They must laboriously seek means of adapting to the specific problems of a particular dispute the principles and rules formulated by the Commission, which would subsequently be adjusted and adopted by a diplomatic codification conference.

8. In that difficult task, the members of the Court appreciated the help and encouragement of their friends in the Commission. The Chairman had very rightly pointed out that five former members of the Commission were at present judges of the International Court of Justice. Leading international lawyers who had served on the Commission had thus come with their knowledge and wisdom to strengthen the Court in the performance of its task of rendering justice and applying the law to specific cases.

9. That explained the very pleasant comradeship between the judges of the Court and the members of the Commission. They all belonged to the same unique family. In the common task of developing the law, the Commission dealt with the theoretical aspects without disregarding practical matters; the Court dealt with practical cases without disregarding legal theory. They both worked for the same purpose.

10. It was therefore particularly gratifying for him to be with the Commission on that occasion and to bring to it the greetings of all the judges of the International Court. He associated himself with the common wish of

all the judges of the Court that the Commission might continue to be successful in its work of formulating the new rules which were constantly emerging and developing, while still remaining part of that great body of law which must prevail throughout the world if the so much needed conditions of peace were to be established.

11. Mr. CASTAÑEDA said that, as a Latin American member of the Commission, he wished to be among the first to welcome the President of the International Court of Justice. President Bustamante y Rivero united in his person some of the highest intellectual, academic and political values of the present time, so that all Latin Americans could feel justly proud of his appearance before the Commission. While the Commission had been entrusted by the General Assembly with the important task of codifying international law, which was work of a general and abstract character, the International Court of Justice was the principal international body responsible for the interpretation and application of legal rules and principles. The Commission was therefore particularly gratified by the visits of the President and other judges of the Court, inasmuch as they provided a most valuable link between legal theory and practice. He was sure that the members of the Commission regarded the Court as the surest safeguard against some of the most serious perils threatening humanity today.

12. Mr. ROSENNE said that the visit of the President of the International Court of Justice to the Commission was remarkable for at least three reasons. First, it was the first time that the Commission had been honoured by the visit of a President of the Court during his term of office. Secondly, it was the first time that the Court had been represented at one of the Commission's meetings by a distinguished jurist who had not been a member of the Commission. Thirdly, it was the first time that a whole meeting of the Commission had been devoted to an address by the President of the Court.

13. He wished to thank the President for his thought-provoking address, and in particular for his very pertinent comments on the points of difference between the work of the Court and that of the Commission. He had been reminded of a sentence in an opinion delivered by the President in 1962, which read: "Since the law is a living phenomenon which reflects the collective demands and needs of each stage of history, and the application of which is designed to achieve a social purpose, it is clear that the social developments of the period constitute one of the outstanding sources for the interpretation of law, alongside examination of the preparatory work of the technicians and research into judicial precedents. The law is not just a mental abstraction, nor the result of repeated application of judicial decisions, but is first and foremost a rule of conduct which has its roots in the deepest layers of society".<sup>1</sup> He was convinced that that opinion of the President was shared by many international lawyers, even if it seemed from time to time that the august body over which he now presided had not fully learned all its lessons.

14. In his statement at the International Labour Con-

<sup>1</sup> *I.C.J. Reports, 1962, South West Africa cases*, p. 351.

ference on 18 June 1969, the President had said: "... the vocation of a judge is neither convenient submission to prevailing social habits, nor rigid abstract theorising, but the lofty exercise of a flexible and human faculty of judgment, an unflagging determination to redress reality in the service of perfection, equity and peace". He had gone on to say that the body he represented—the organ of international justice—was perhaps the one to which was assigned the last and hence the most difficult task of all: "that of preventing, through the bonds of law, a break-up of this unity of mankind, the unity of the species that will assure in time the destiny of man". And later he had added: "It is juridical life which proclaims the rule of law over and above vested interests; which establishes equality of rights and opportunities; which accords to each what in pure justice is his due; which safeguards national and human dignity; which receives into legislation the principles of the new law and makes way for the reform of outmoded institutions". That last sentence, in particular, expressed the idea which had guided the General Assembly in establishing the International Law Commission and which had since guided the Commission in its work.

15. He noted with satisfaction that during the President's term of office a thorough re-examination of the standing of the Court, its relationship to other international organs and its methods of work had been initiated. At the same time, however, he could not avoid expressing his concern lest, through an excess of publicity—which at present seemed characteristic of United Nations diplomacy—the Court might be drawn into the storm-centre of political controversy. At the last session of the General Assembly, more than one representative had tried to provoke a public debate on the report which the Court had submitted to the United Nations in 1968 and which had implied a somewhat unexpected reinterpretation of United Nations practices.

16. Mr. REUTER said the Commission was bound to feel respect and pride at the great honour of being able to welcome the President of the International Court of Justice. Since he himself was at present discharging the duties of counsel to the Court, he had to be discreet and could not say everything he wished, but he would say that the personal charm, courtesy and friendliness of the President made him forget the distance by which their functions separated the counsel and judges of the International Court of Justice. The presence of Mr. Bustamante y Rivero in the Commission was a reminder that the Court was an organ of the United Nations, but it must be borne in mind that any application of the law was a creative and original effort requiring the calm, independence and solitude in which he exercised his heavy responsibilities with such distinction and authority.

17. Mr. YASSEEN said that the great honour done to the Commission by the visit of the President of the International Court of Justice, was due both to his personal qualities and the office he held. After paying a tribute to Mr. Bustamante y Rivero's eminence, he emphasized the interdependence of the work of the International Court of Justice and that of the International Law Commission: the former had to ensure respect for the international legal order, while the latter

had to codify and progressively develop its rules. The codification of international law could help to promote general acceptance of the compulsory jurisdiction of the International Court of Justice by making the rules of international law clearer, more precise and less controversial. For instance, some countries which had not accepted the Court's compulsory jurisdiction had not hesitated, after the adoption of the Vienna Convention on Diplomatic Relations, to ratify the optional protocol on compulsory jurisdiction. What was more, the Commission's work had made it possible to widen the scope of compulsory jurisdiction, which, since the adoption of the Vienna Convention on the Law of Treaties, could henceforth extend to the question of incompatibility of treaties and rules of *jus cogens*. For all those reasons, the visit of the President of the International Court of Justice was of exceptional importance for the Commission.

18. Mr. TABIBI said he wished to welcome Mr. Bustamante y Rivero as the President of the principal United Nations organ concerned with the ending of injustice throughout the world. Since President Bustamante had assumed office, there had been a great change in the International Court of Justice, particularly in the direction of closer contacts between the Court and other United Nations bodies, such as the General Assembly and the International Law Commission. As the President had mentioned in his address, many former members of the Commission had become judges of the Court; it was not surprising that their visits should be particularly welcome to the Commission, which at its 1967 session had received no less than three of them.

19. The President had rightly pointed out the need for stronger links between the Commission and the Court, inasmuch as both served the same ultimate objective under the United Nations Charter, the one as a quasi-legislative and the other as a judicial organ.

20. He also welcomed the President as a representative of the Latin American region, which had such a rich tradition of law and justice. He himself, as an Asian jurist, could say that the people of his region were looking forward to the day when the Court would really assume the role expected of it in the preservation of law and justice throughout the world, and he hoped that in its future work, the Court would take into consideration the new force which the emerging nations represented in the development of international law.

21. Mr. BEDJAOUI said that the Commission felt proud and honoured by the visit of the President of the International Court of Justice. Mr. Bustamante y Rivero was not only an eminent jurist and statesman, but a man with a richly endowed personality such as was rarely encountered; he was a servant of the international community working for the renovation of law who, by reason of the constant and distinguished services he had rendered to the cause of law in the International Court of Justice, must be held in high esteem by all jurists and all men.

22. Mr. TAMMES said he had always followed the decisions and opinions of the International Court of Justice with the greatest interest and had therefore been gratified by the President's reference, in his address, to

the converging activities of the Commission and the Court. He wished to join other speakers in expressing the hope that relations between the Court and the Commission would be even closer in the future.

23. The people of his country were proud to have the International Court of Justice in their midst as the continuation of a tradition dating from the early days of the present century, when statesmen from all over the world had found The Hague an ideal meeting-place for international conferences.

24. Mr. USTOR said he wished to greet the President of the International Court of Justice not only as a distinguished jurist and scholar, but also as a son of heroic Peru and a representative of the great Latin American legal tradition. He was continuing that tradition not only in his work in the Court but also in his books, among which could be found a treatise on sociology; that showed that his thinking went to the very roots of law and to its role in the development of society.

25. He welcomed the closer contacts which the Court was establishing with the United Nations General Assembly, through reports submitted to that body, and with the International Law Commission. The Commission was an important law-creating agency of the United Nations, because its work of codification inevitably also involved an attempt to improve, supplement and generally reformulate legal rules in the light of contemporary conditions. How far the application of international law—which was the main task of the Court—was connected with its creation, or with interpreting and thereby moulding it in the light of contemporary conditions, had been the great problem facing the Court in 1966 in the *South West Africa* cases. The views of seven of the judges had proved unsatisfactory to the greater part of the world, which had found their position too rigid when they had said that law could serve a social need “only through and within the limits of its own discipline”,<sup>2</sup> and that the duty of the Court was “to apply the law as it finds it, not to make it”.<sup>3</sup> The greater part of the world community had approved the stand taken by the dissenting judges, one of whom had said: “The historical development of law demonstrates the continual process of the cultural enrichment of the legal order by taking into consideration values or interests which had previously been excluded from the sphere of law”.<sup>4</sup>

26. In the of dissenting opinions of that kind, the Court was faced with no small difficulty in serving the needs of the world community as a whole; he hoped that in future it would give an even more prominent place to the realization of social justice.

27. Sir Humphrey WALDOCK said he wished to join with his colleagues in expressing his sense of privilege and pleasure at the presence of the President of the International Court of Justice. As Special Rapporteur for the law of treaties, he had always been impressed by the very real importance of the Court as the interna-

tional organ concerned with completing the work of codification on which the Commission was engaged. He had noted in the past that, in dealing with the general principles of codification, the Commission had often found itself confronted with questions involving a mixture of facts and law and that it then became very difficult to push codification of general rules further without encountering sharp divergences of opinion. It was at that point that the work of the Court in interpretation and application became an essential complement to the work of the Commission. As a member of another Court, he could also assure the President that all international courts attached the greatest importance to the decisions and opinions of the International Court of Justice, and that he personally would look forward with the liveliest interest to its future activities.

28. Mr. RUDA said that, as a Latin American member of the Commission, it was a great pleasure for him to welcome the President of the International Court of Justice. The President had already been justly praised as an eminent jurist, statesman and man of letters, but he (Mr. Ruda) recalled that in his student days Mr. Bustamante y Rivero had also been universally looked up to by the youth of Latin America as an outstanding example of what was finest in that continent. He was glad to note that the Court and the Commission, as the President had pointed out, were engaged in a joint task in which the rule of law was placed above any political ideology.

29. Mr. BARTOŠ, after paying a tribute to the President of the International Court of Justice, emphasized the importance of the compulsory jurisdiction of the Court—the only guarantee that the law would be applied—which the Charter had unfortunately not made into a rule. He regretted that the powers of the Court were limited, since that was a ground adduced to justify the optional character of its jurisdiction. The Court should be given the widest possible competence in order to ensure respect for international law and the rule of law generally in relations between nations. It would be wrong to think that to recognize the jurisdiction of the Court was a slight on the honour of States.

30. He hoped that by their future work the International Court of Justice and the International Law Commission would develop a better international order and fight side by side, independently of all political considerations, against injustice and disorder in the world.

31. Mr. IGNACIO-PINTO associated himself with the tributes paid to the President of the International Court of Justice. A visit by the representative of a body which sought to ensure respect for the primacy of law in the world was an encouragement to the Commission which, far from engaging in “legal pedantry” as it had been accused of doing, was helping to establish the reign of peace through justice in the world.

32. The CHAIRMAN thanked the President of the International Court of Justice for his kind words about the Commission and its members and asked him to convey the Commission's respects to the judges of the

<sup>2</sup> *I.C.J. Reports*, 1966, p. 34.

<sup>3</sup> *Ibid.*, p. 48.

<sup>4</sup> *Ibid.*, p. 252.

International Court and to tell them how much the Commission appreciated the work they were doing, which was of such importance for international law.

The meeting rose at 1.5 p.m.

### 1005th MEETING

Friday, 20 June 1969, at 10.15 a.m.

Chairman: Mr. Nikolai USHAKOV

*Present:* Mr. Bartoš, Mr. Bedjaoui, 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.

#### 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]

(resumed from the 1003rd meeting)

1. The CHAIRMAN invited the Commission to resume consideration of the Special Rapporteur's second report (A/CN.4/216/Rev.1).

2. Mr. REUTER said that in his previous remarks<sup>1</sup> he had suggested that the form in which the question had been presented to the Commission required that it should first decide what were the specific cases it wished to study under the heading of succession of States and then consider what principles it should follow in their detailed examination. His personal opinion was that principles which could lead to constructive compromise solutions should be chosen, depending, of course, on the sphere which the Commission assigned to succession of States.

3. Many of the problems taken up, either by the Special Rapporteur in his report or by those members of the Commission who had already spoken, did in fact arise very often in cases of State succession, but not necessarily in that connexion only; they often arose quite apart from State succession. For example, members of the Commission had naturally mentioned the question of the consequences, in international law, of changes in the structure or economic policy of a State, whether it was a new State or not. Such changes, which raised the problems of respect for private property and the treatment of aliens, could occur without any succession, as had happened in France in 1944-1946. In the example given by Mr. Ustor, problems of succession had arisen when the Austro-Hungarian empire had been split

up into several States; and then later, in 1946, fresh problems of war damage and change of régime had been superimposed. Again, problems of succession would arise for a decolonized State which recovered its full independence and opted for a relatively liberal economic régime, but it would also have problems of the same kind to settle if it subsequently decided to change its economic structure. Those examples showed that the Commission's task could be envisaged more or less broadly. The question was whether the problems raised by succession of States and governments and the similar problems which arose apart from succession should be studied together or separately.

4. He was not opposed to the idea that the Commission should examine, under State succession, the problems arising out of changes in the structure or economic policy of an independent State, whether it was a new State or not, which were outside the limits of succession as such. If the Commission so decided, it would inevitably have to widen the scope of its study considerably and introduce new principles. For example, it would have to study the important consequences for a whole series of contracts—concessions, investment agreements, and so on—of changes made by a State in its economic policy or structures. That was a case for application of the *rebus sic stantibus* clause, a legitimate case for the modification of certain contractual balances. In private law and in collective property relationships, amendments to contracts were common, and examples could also be found in public international law. In the modern world, the distinction between private collective property and public collective property was artificial. The contracts concluded every day between the socialist planned-economy countries and private enterprise contained revision clauses or provided for amendment procedure.

5. The modern world, therefore, was one of creative change, and it was in that direction that the Commission should orient its studies if it wished to deal with succession in the broadest sense. Such an attitude might perhaps be regarded as revolutionary, but he had no objection to that. The Commission had already decided that the product of its study should be draft articles for a convention, not just a model draft. If it decided to deal with succession of States in the manner he had indicated, the Commission would not have to prepare draft articles; it would have to think about proposing more flexible texts, directives, recommendations or simply commentaries on model solutions. It might also submit, in the form of a report, a critical analysis of a new kind of treaty relations to which Mr. Bedjaoui had referred in his study. On the other hand, if it took State succession in the strict sense of the term, it would have to leave aside problems which were linked to State succession in fact if not in law.

6. As to the research requested of it, the Secretariat should be given precise instructions regarding the most important points on which it was to concentrate.

7. Sir Humphrey WALDOCK said he admired the lucidity and elegance of the Special Rapporteur's report, but found it rather difficult to comment on, because the Special Rapporteur had made the subject acquired rights and the Commission had been expecting to receive a

<sup>1</sup> See 1003rd meeting, paras. 22 *et seq.*