Book Review. Expropriation in Public International Law by B. A. Wortley

A A. Fatouros

Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Comparative and Foreign Law Commons, International Law Commons, and the Property Law and Real Estate Commons

Recommended Citation

https://www.repository.law.indiana.edu/facpub/1868

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.

L'auteur passe rapidement en revue les antécédents de la C.I.J., avant d'entrer dans l'étude de son sujet proprement dit.

Le pouvoir judiciaire de la Cour, la nature de la juridiction des tribunaux internationaux en général, le droit applicable, ainsi que les diverses attributions de la C.I.J. (judiciaires, consultatives etc) font l'objet d'une étude complète et approfondie.

On sait que seuls les Etats peuvent se présenter comme parties devant la C.I.J. Les particuliers en sont exclus. Il en est de même des organisations publiques internationales; elles tombent aussi sous la règle prohibitive, ce que l'auteur, d'accord avec la doctrine prédominante, trouve injustifié. D'une manière générale, la règle selon laquelle les particuliers, ainsi que les personnes morales de toute espèce, autres que les Etats, n'ont pas accès à la Cour, suivant l'art. 34 par. 1 de ses Statuts, est due à des considérations d'opportunité politique, alors qu'aucun obstacle théorique ou pratique n'existe, selon l'auteur, pour admettre le contraire. Il convient cependant de signaler que des affaires touchant des intérêts particuliers peuvent faire l'objet d'un recours devant la C.I.J. si elles sont prises en main par un Etat. Les exemples sont nombreux dans la pratique. Ce point fait l'objet d'un examen détaillé au chap. III par. 21 à 24 de l'ouvrage.

Si, cependant, les Etats seuls sont justiciables devant la C.I.J., il ne s'ensuit pas nécessairement que tous les Etats y ont accès. Des distinctions s'imposent, suivant que l'Etat intéressé est membre de l'O.N.U., ou partie aux Statuts de la C.I.J., ou ne réunit aucune de ces qualités. Cette question est longuement traitée dans la Partie II de l'ouvrage.

Etude complète, méthodique et riche en documentation, l'ouvrage de Monsieur Crispis apporte une précieuse contribution à l'examen d'un sujet relativement nouveau et d'un très grand intérêt théorique et pratique.

P. MAMOPOULOS
Collaborateur de l'Institut

B.A. WORTLEY, Exploitation in Public International Law. Cambridge University Press, 1959

Professor Wortley's interest in the international law of expropriation is well known and his numerous studies on the subject are sufficient evidence of it. The book under review, volume VI of the Cambridge Studies in International and Comparative Law, is his latest contribution to this highly interesting topic. The author deals here with public international law only, reserving a future special study to the related problems of private international law.

The study opens with a chapter on the «Nature of Expropriation», in which certain general problems of definition and theory are discussed. The author rightly insists on a sufficiently broad meaning of «property», not limited to physical «things» only. He attacks bitterly the Austrian conception of the state as owner of its nationals' property, but he limits himself to a rather short, though repeated (cf.pp. 12-15, 25, 73, 143), assertion of the error in such a view, without really entering into a more theoretical elaboration of the question, such as one would expect from a professor of jurisprudence of his eminence. The second chapter, is both clear and orderly, being chiefly devoted to a most competent study of French and British practice with respect to expropriation and requisition, with particular emphasis on the procedures followed and the states' compliance with the requirement of adequate compensation. A subsection on the international law of the matter consists in fact of a series of citations of relevant studies, while a final section on nationalization does no more than broach this vast topic and state some of the related problems which are dealt with more in detail in later parts of the book.
The third chapter (pp. 38-57) is one of the most original and interesting of the whole book. Professor Wortley examines various forms of internationally lawful confiscation of property. He finds that confiscation as a penalty for criminal offenses or by way of taxation or of exchange and currency control is generally lawful, except when the confiscating state is guilty of an abuse of right. The same rule is applicable in the case of losses caused indirectly by general restrictions on the use of property, though the related problems are much more complicated then and it is often very difficult to draw the line between lawful restrictions and excessive ones. In a later chapter (p. 102 et seq.) the author returns to this subject and examines the possible instances of abuse of rights on the part of the confiscating state. His views on the matter are highly interesting, though one finds a curious contradiction between his statement that «the abuse of a right cannot...be presumed» and his assertion that it is the expropriating state, and not the one complaining of an abuse of right, that has to prove the absence of any abuse (see especially p. 103). Apart from that, his treatment of the question is very valuable and constitutes one of the rare detailed studies of the matter. There follows a short but complete historical survey of diplomatic claims arising out of seizures of property. One notes that before 1914 such seizures were rather infrequent and, when occuring, they were in the main individual in their character and application. General expropriations and nationalizations became more common in the period between the two wars and reached their zenith in the years following the Second World War.

The next chapter (p. 72 et seq.) begins by an interesting discussion of the function of diplomatic protest in connection with actual or imminent expropriations. The bulk of it, however (pp. 76-92), is devoted to an effort to prove that restitution of property, not monetary compensation, is the main form of reparation for claims arising out of expropriations. Unfortunately, Professor Wortley offers but slender evidence in support of his views and his arguments are not very convincing. Almost all the examples he cites are taken from Peace Treaties and refer to unlawful takings of property during wars. These are obviously exceptional instances, which could at most be extended to cover all cases of unlawful expropriation but not those of lawful takings in peacetime, as well. The author cites a single case of restitution in peacetime, but it is a singularly non-illuminating one, since the award gives no details as to either the facts of the case or the court’s reasoning (see citation p. 79, notes 7-8). Indeed, the author is forced to recognize that only exceptionally would a state be able to claim restitution; he nevertheless insists that it has «in principle» the right to do so (pp. 93-95, 100-102). His argument is founded on the necessity for maximum protection of property and he dismisses on these grounds the English Common Law’s (and classical Roman law’s) acceptance of pecuniary compensation as the primary mode of reparation. It may be argued, however, that this latter view is more appropriate to international law, because it is better applicable under present conditions as well as more in accord with the actual judicial and diplomatic practice.

In his subsequent discussion of claims based on alleged misuse of the power to expropriate, the author, in addition to his treatment of possible cases of abuse of rights, deals with the application of the principle of unjustified enrichment. He seems to found on it the obligation of states to compensate aliens for the seizure of their property. He does not make clear, however, his exact conception of the character and effects of this obligation. Acceptance of such a basis for it may entail the adoption of the view expounded by Professors Gihl, Rolin, and others that lack of adequate compensation does not by itself render unlawful an otherwise lawful expropriation. According to this view, a state is in such a case responsible for failing to grant compensation but not for the expropriation itself. Professor Wortley does not deal with this particular view in any detail, but there is ample evidence of his rejection of it (pp. 17, 113, 121). What he does accept is less evident. He sometimes seems to hold that, except for the cases of penal confiscation or taxation, all expropriations entail «in principle» the obligation to restore the exact status quo ante, principally through restitution of the property taken (e.g., pp. 100–101). This is equivalent to a denial of the right of states to expropriate the property of aliens in the public interest and against full compensation. But he also accepts that no claim can be raised when prompt and adequate compensation has been offered (e.g. p. 23).

The author goes on to examine the meaning and extent of an expropriating sta
te's duty to make adequate compensation, reviewing both the theory and the practice in the matter. He holds that partial compensation is in no way sufficient to render an expropriation or nationalization internationally lawful. This view may be valid in strict international law but it fails to take into account any considerations of equity or of concrete conditions. The author then deals with certain special and procedural matters of great interest and importance. In his brief study of the much discussed requirement of exhaustion of local remedies (pp. 140–143), he deals most competently with the relevant questions, while his studies of global settlements and of modern attempts for a multilateral treaty-code of property protection give an illustration of the author's ability and erudition with respect to matters which have yet to receive a thorough legal treatment.

In a final chapter, Professor Wortley sums up his observations and states his conclusions. His is the classical conception of public international law with respect to the protection of the property of aliens. In the not too distant past, there were but few doubts as to the validity of the rules he accepts, but the law of the matter is not as well settled any more. Professor Wortley is too good a jurist not to know that his position is not supported by the actual practice of states in our days. He therefore dismisses it as not constituting an conclusive argument as to legal rights in international law (p. 153). He does refer to it, however, when it supports his position and he makes abundant use of diplomatic notes, protests and claims; Sir John Fischer Williams' masterful statement on the limitations of such texts (in his 1928 article in the British Yearbook of International Law) comes inevitably to mind in this connection. Furthermore, Professor Wortley relies, in an important part of his argument, on the possibility open to claimant states to have recourse to measures of retorsion or reprisals. He states, accordingly, that there is nothing to prevent a State from maintaining a claim for specific restitution and backing that claim by appropriate and legitimate measures of retorsion or reprisals (p. 99, see also p. 112).

Such a statement can easily be reversed; it does not state a positive rule of law but merely makes manifest the existence of a margin of freedom as to state action in such matters.

The book under review is equipped with an excellent index and a useful table of cases. It might have been advisable to include a bibliography, as well, especially since the footnotes give few indications on the works cited. Furthermore, these notes show a certain carelessness, or perhaps haste. Citations are sometimes incomplete and, in a few cases, incorrect (e.g., note 4, p. 112; cf. note 1, p. 120 with note 3, p. 121; and cf. note 2, p. 65 with note 1, p. 144). Otherwise, the book is impeccable in form and general appearance.

It is hoped that the value as well as the limitations of Professor Wortley's book have been made apparent. This is a study to recommend to all jurists interested in the contemporary problems of international law. It is the most complete and up-to-date statement of the traditional view on the international law of expropriation, valuable not only because of the wealth of material it contains, but also as a balance to other books and articles which, by applying in a different manner the traditional tools of international law, reach the opposite conclusions. In this reviewer's submission, however, it is highly doubtful whether the invocation or application of principles and rules which were held as valid in the past, under totally different political, economic and social conditions, will enable us to solve our present day problems. More freedom in our handling of the available legal tools as well as more respect for and understanding of the political and economic facts of contemporary life in the international society would be very helpful in this connection.

A. A. Fatouros
Collaborateur de l'Institut