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A/CN.4/SR.1074

Summary record of the 1074th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1970, vol. I

Article 65

Credentials of representatives

1. The credentials of a representative to an organ shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed by the practice followed in the Organization, and shall be transmitted to the Organization.

2. The credentials of a representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed in relation to the conference in question, and shall be transmitted to the conference.

100. Mr. ROSENNE said he had certain objections to the personification of the "conference" which seemed to have taken place in a number of articles. He suggested that article 65 be adopted and sent to the Special Rapporteur, but that the Commission reflect further on the problem of the word "conference".

101. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee would appreciate any suggestions concerning that problem.

Article 65 was adopted.

ARTICLE 61-B (Derogation from the present Part)[13] *(resumed)*

102. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Drafting Committee now proposed that article 61-B be split into two articles, for which it proposed the following texts:

Article 61-B

Derogation from the present Part

Nothing in the present part shall preclude the conclusion of other international agreements having different provisions concerning delegations to an organ or a conference.

Article 61-C

Conference rules of procedure

The provisions contained in articles ... shall apply to the extent that the rules of procedure of a conference do not provide otherwise.

103. Mr. USHAKOV said he could accept that wording.

104. The CHAIRMAN suggested that article 61-B be adopted and that article 61-C be adopted provisionally, pending insertion in the blank space in the first line of the numbers of the articles to be referred to.

It was so agreed.

The meeting rose at 1 p.m.

[13] For previous discussion, see paras. 2-29 above.

1074th MEETING

Monday, 22 June 1970, at 3.30 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Commission to consider the Special Rapporteur's second report on State responsibility (A/CN.4/233). A questionnaire prepared by the Special Rapporteur in connexion with his report had just been issued, which read:

I. *Section I of chapter I:*

(*a*) Does the Commission agree that, in defining the basic rule on responsibility, a composite formula should be adopted that would not prejudge the content of responsibility?

(*b*) Does the Commission agree that the formula adopted should allow for the existence both of responsibility for non-illicit acts and of responsibility arising from the acts of others?

(*c*) Does the Commission find the Special Rapporteur's terminology acceptable?

II. *Section II of chapter I:*

(*a*) Does the Commission agree that the international illicit act contains a subjective element and an objective element?

(*b*) Does the Commission agree that the subjective element may consist of an act or an omission imputable to the State?

(*c*) Does the Commission agree that imputation is a legal operation and that it is international law which imputes to the State—an international legal person—an internationally illicit act?

(*d*) Does the Commission agree that the objective element in an international illicit act consists of failure to fulfil an international legal obligation?

(*e*) Does the Commission agree that there is no need to pay special attention to the notion of abuse of rights?

(*f*) Does the Commission agree that a distinction should be made between illicit conduct and illicit events?

(*g*) Does the Commission agree that there is no need to consider a third constituent element of the international illicit act, namely, injury?

III. *Section III of chapter I:*

(*a*) Does the Commission accept the idea of capacity to commit international illicit acts?

(*b*) Does the Commission agree that it is desirable to refer to the possibility of there being limits to the international delictual capacity of States?

IV. *In general*

Does the Commission accept the broad outline of the plan suggested by the Special Rapporteur and the method he has followed?

2. He invited the Special Rapporteur to introduce his report.

3. Mr. AGO (Special Rapporteur) said that at its twenty-first session the Commission had considered his first report on State responsibility,[1] the purpose of which had been to review previous work on that branch of international law in order to derive the maximum benefit from it for the purposes of the codification being undertaken, and at the same time to avoid committing once again the mistakes which, in the past, had prevented codification of the topic. At the end of the discussion on the first report, the Commission had decided to confine its study of international responsibility for the time being to questions relating to the responsibility of States without, however, excluding the responsibility of subjects of law other than States—a question which, for reasons of clarity, it proposed to study later.

4. He had followed those instructions, but wished to point out that the Commission might sometimes be led to take account of the possible effects of the acts of subjects of international law other than States—in particular international organizations—on the international responsibility of States. The Commission had also decided to start by considering only the responsibility of States for international illicit acts and to defer consideration of responsibility arising out of the performance of certain lawful activities—the so-called responsibility for risk. Certain members of the Commission had observed that the latter form of responsibility involved obligations established by primary rules of international law, whereas the obligations involved in the responsibility of States for international illicit acts arose, precisely, from the violation of obligations established by primary rules. It was to avoid any confusion between those two fields that the Commission had decided to confine its study to the responsibility of States for international illicit acts.

5. The Commission had also decided not to yield to the temptation to combine its codification of the consequences of the violation of obligations established by a primary rule with the definition of those international obligations themselves, in particular those belonging to the law of aliens. It had recognized, however, that the primary rules might have to be considered when it came to define the content of the responsibility and tried to grade the various categories of illicit act according to the importance to the international community of the obligations violated.

6. The study of State responsibility should bear mainly on the origin or source of international responsibility, namely, the illicit act; then on the content of the responsibility, in other words on the consequences attached by international law to an internationally illicit act in different cases; and lastly on certain problems concerning what had been termed the "implementation" of the international responsibility of States.

7. He had concentrated on examining the subjective and objective conditions for the existence of an internationally illicit act. The second report, now before the Commission, only contained some basic general rules. First and foremost it stated the fundamental rule that every international illicit act was a source of international responsibility. There followed a concrete examination of the two elements of the conditions for the existence of the international illicit act: the subjective element, consisting of conduct attributable to a State as a subject of international law, and the objective element, consisting of the fact that the conduct imputed to the State constituted a failure to fulfil an international legal obligation.

8. Members of the Commission should not be surprised to find that the report contained some very lengthy expositions followed by a few articles, which might appear laconic. That was because the topic of responsibility rested on principles which, though relatively few in number, could not be defined until a whole series of problems had been solved, on which there was an abundance of practice, international jurisprudence and doctrine. He had therefore adopted the method of first outlining the problems and then, after examining them, proposing what seemed to him to be the best formulation, taking into account, in particular, the need to avoid prejudging in any way the questions that the Commission would have to settle later.

9. The abundance of works on international responsibility, and the wealth of practice and judicial decisions, explained why the report was loaded with numerous, but indispensable notes.

10. With regard to the problems he had discussed in the report, which dealt only with general rules, the jurisprudence, practice and writers all recognized that any internationally illicit conduct gave rise to State responsibility and that internationally illicit acts by States created new international legal relations. But unfortunately that was where agreement ended; there were three different main views on the consequences of illicit acts and, hence, on the content of responsibility.

11. According to the first view, which might be considered the classical one, an obligatory bilateral relationship was established between the State which had committed the illicit act and the injured State, in which the obligation of the former State to make reparation was set against the subjective right of the latter to claim reparation. Members would find applications of that view, taken mainly from judicial decisions and practice, in the footnotes to paragraphs 15 and 16 of the report.

[1] See *Yearbook of the International Law Commission, 1969*, vol. I, pp. 104-117.

12. The second, opposite, view, of which the most distinguished advocates were Kelsen and Guggenheim, started from the idea that the legal order was a coercive order, and saw an act of coercion as the only direct legal consequence of the illicit act. The obligation to make reparation was considered to be only a secondary duty interposed between the illicit act and the application of the measure of coercion, possibly by agreement between the guilty State and the injured State. It was not specified in that theory, however, whether the "sanction" referred to meant a real sanction having, as such, a repressive character, or a coercive measure intended to secure fulfilment of the obligation violated, and thus corresponding, in a way, to enforcement in municipal law.

13. Lastly, there was a third view, to which he himself adhered, which held that it was absurd to try to limit the direct consequences of an international illicit act solely to the sanction and the obligation to make reparation. An illicit act in international law, as in any other system of law, could give rise to a dual form of legal relations by virtue of which the injured party might, according to the case, acquire either the right to claim reparation or the faculty to impose a sanction on the author of the illicit act. Moreover, that faculty might be acquired by a subject other than the injured party. It was not easy to divide up illicit acts into clearly defined categories giving rise either to reparation only, or to reparation and sanction. All that could be said was that there was normally an order of priority between the two possible consequences, in that by offering adequate reparation the guilty State should be able to avoid the sanction. But that conclusion too was open to doubt in cases where the illicit act was of such gravity that it should be regarded as an international "crime". It might also be asked to what extent modern international law recognized the possibility of a sanction being imposed by subjects of international law other than the injured State, for example, by an international organization, and whether cases did not exist in which it might be said that an international illicit act affected all members of the international community, so that its author was responsible to all States. Those problems were of particular interest in as much as they revealed a trend towards incipient personification of the international community, and as an element making it possible to define a concept of "crime" in international law.

14. The Commission was not called upon to solve those problems at once. It would have to do so later, when it came to consider the content of international responsibility. The reason why he had thought it necessary to refer to them was that the Commission should be aware of those problems and bear them in mind, in order to formulate the basic rule on responsibility for internationally illicit acts without prejudging in any way the answers to questions it would have to settle when it came to define the content of responsibility.

15. He had also raised a question of terminology. In paragraph 26 of his report, he had referred to the many terms used in different languages to denote the act generating responsibility. In the interests of simplicity, he proposed that in French the expression "*fait illicite*" should be adhered to, as the word *délit* suggested too many comparisons with municipal law. One might hesitate between the word *fait* and the word *acte*. But in the Latin languages, the term "*acte*" or "*acte juridique*" was used to designate an entirely lawful manifestation of the will, to which the law attached a legal result corresponding to the will manifested. It was clear, however, that the legal consequences of the illicit act or omission were not a result desired by its author: hence the term "*acte*" was inappropriate. Moreover, in international law, illicit conduct often took the form of an omission rather than an act, and the word *fait* could be better applied to both.

16. It might perhaps be more difficult to find an English equivalent of the term *fait illicite*. On that point, he relied heavily on the assistance of Sir Humphrey Waldock, Mr. Rosenne and all the other English-speaking members of the Commission. He would, however, point out that the word "act" should be translated into French by the word "*action*", rather than "*acte*", which had a strong legal connotation. Perhaps the expression "illicit act" could be retained in English, but he was waiting to hear the opinion of the English-speaking jurists.

17. Although the Commission had decided at its last session to leave aside, for the time being, the problem of responsibility for lawful acts or risk, it was necessary to avoid a formulation of the general rule which would, in effect, exclude that type of responsibility. The formula used, for example, in the *Dickson Car Wheel Company* Case, referred to in footnote 41 to paragraph 28 of his report, was just the type of formula to avoid, since it seemed to stipulate the existence of an "unlawful international act" as a prerequisite for international responsibility.

18. Imputation of the illicit act and imputation of responsibility were not synonymous. Even though the most usual case was that in which an illicit act generated international responsibility attaching to the State which had in fact committed it, the definition to be drafted should also allow for the case where responsibility was imputed to a State or subject other than the author of the illicit act.

19. It was in an attempt to satisfy all those requirements that he had drafted the brief article I which he was submitting to the Commission. He asked members of the Commission to be so good as to give their views on the three questions concerning the first section of chapter I.

20. The next question was when an illicit act could be said to exist in international law. That was the problem of the conditions for the existence of an international illicit act, which was discussed in paragraphs 31-55 of his report. Doctrine and jurisprudence were almost unanimous in distinguishing, for that purpose, a subjective element consisting of conduct—act or omission—imputable to a State, and an objective element, namely, the fact that the conduct in question constituted failure to fulfil an international obligation incumbent on that State. As could be seen from the writings and decisions quoted, that distinction was accepted by writers belonging to all the great legal systems of the world. But there again, unanimity did not go much beyond recognition

of the distinction. In his next report, he would deal extensively with the various problems posed more particularly by the question of imputability, such as the definition of organs of the State, the imputation to a State of acts committed by organs of the State in violation of its internal law, acts committed by public institutions which, under internal law, did not form part of the State, and the problem of acts of individuals.

21. A relevant general point was that the conduct to be imputed to the State might just as well be an omission as an act. That point was widely accepted in both doctrine and jurisprudence. He would refer members, in particular, to the judgement of the International Court of Justice in the *Corfu Channel* Case[2] and the quotations in footnote 53 to paragraph 36 of his report. However, the consequences of illicit acts and omissions were not necessarily identical, and it might therefore be necessary to take account of the possible differences in certain cases.

22. It must also be stressed that although the State was a legal person, it was an entity physically unable to act by itself. It always acted through the intermediary of natural persons who were its organs. To impute an illicit act to a State was to impute an act or omission physically committed by one person to another person. That was a juridical operation, and he did not think the concept of natural causality was applicable. In the same context, he stressed that the State to which an illicit act was said to be imputed was the State as a subject of law, not the State in the sense of a legal order. Moreover, the State was in that case regarded as a person under international law, not as a person under internal law, since the imputation of the international illicit act to the State was a juridical operation originating in international law. The difficulties which were sometimes raised on that point were due to a confusion between imputation and definition of the organs of the State, but it was the international order that attributed to the State, as a subject of international law, an act or omission by its organs as an internationally illicit act.

23. The definition of the objective element of the international illicit act as failure to fulfil an international obligation emphasized the subsidiary character of the rules of international responsibility in relation to the rules imposing on the State the obligations whose violation generated responsibility.

24. The concept of violation of an international obligation was well established in doctrine and jurisprudence. On that point reference might be made to paragraphs 42-44 of his report. As was explained in paragraph 45, the expression "breach of an international obligation" should be used in preference to "breach of a rule", since the subject of law failed to comply, not with a rule of objective law, but with the subjective obligation imposed upon it by that rule. Moreover, any obligation could be breached, no matter what its source, and in addition to the obligations imposed on States by "rules" of international law, there were obligations deriving from unilateral acts, judicial or arbitral decisions or particular conventions. Referring to a last problem of terminology, he pointed out that since every obligation had its counterpart in a subjective right of another subject of law the expression "impairment of a subjective right" was fully synonymous with "violation of an obligation".

25. As to the problem of abuse of rights, that was a matter on which judicial decisions had always been extremely guarded. It had even been possible to assert that they avoided referring expressly to that concept where they applied it in practice. In his view, there was no need for the Commission to become involved in the controversy on that subject. For either the concept was not known to international law, in which case there was obviously no need to deal with it in a study of responsibility; or it was known to international law, which would mean that States were under an international obligation not to exercise their rights beyond a certain limit. Since the objective element of the international illicit act was failure to fulfil an international obligation, abuse of rights would be nothing else but failure to comply with a positive rule of international law thus enunciated.

26. On the other hand, it was necessary to bear in mind the distinction between cases in which the illicit act consisted in conduct which in itself violated an international obligation and cases in which the illicit act was committed when the conduct was combined with some external event. Paragraph 50 of his report contained examples of the first type of case and paragraph 51 of the second. The example of an attack by private individuals on the premises of an embassy clearly illustrated the fact that an external element was sometimes necessary. For although the host State had an obligation to take the necessary measures to protect the embassy, the mere fact that it had not taken those measures was not a violation of that obligation; the external event of the attack was also necessary.

27. Lastly, the question had been considered whether, in addition to the conduct attributed to the State and the failure to fulfil an international obligation which that conduct constituted, a third element, namely injury, was necessary. That concept had sometimes been confused with the external event to which he had just referred. Sometimes, the injury caused by States to individuals had been considered, but that was confusing substantive rules with rules relating to responsibility. International obligations relating to the status of aliens were, indeed, obligations not to cause such injury to aliens. Hence, injury was part of the actual content of the rule. It was not a further element added to the violation of the obligation. On the other hand, the existence and extent of a material injury caused to another State was not, in his opinion, a condition that must be added to the fact that an international subjective right of that State had been infringed. Those were the principles on which the Special Rapporteur had based the article II he was submitting to the Commission. He would be grateful if members of the Commission would reply, in their statements, to his questions on section II of chapter I.

[2] *I.C.J. Reports*, 1949, p. 4.

Co-operation with other bodies

(A/CN.4/234)

[Item 6 of the agenda]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

28. The CHAIRMAN welcomed Mr. Adade, the Attorney-General and Minister of Justice of Ghana, who was also Chairman of the Asian-African Legal Consultative Committee, and invited him to address the Commission.

29. Mr. ADADE (Observer for the Asian-African Legal Consultative Committee) said that the Committee was glad to transmit to the International Law Commission its sincere greetings and good wishes, as well as those of its member countries. At its eleventh session, held in Accra in January 1970, the Committee had been privileged to act as host to Mr. Ushakov, the then Chairman of the Commission, whose presence at its deliberations had been a great source of inspiration and had contributed in no small measure to enhancing the Committee's prestige and standing in the eyes of the general public.

30. In anticipation of the Commission's discussions on the topic of State succession, the Committee had placed that topic on the agenda for preliminary discussion at its eleventh session, with a view to giving member countries an opportunity of defining their positions on it. Unfortunately, time had not permitted the Committee to deal with that item, although, for obvious reasons, it was of special interest to the new States; he assured the Commission, however, that the Committee would continue to follow its discussion of the topic with the keenest interest.

31. At its eleventh session, the Committee had discussed three main items, namely, the rights of refugees, the law of international rivers and the international sale of goods, though it had been unable, owing to lack of time, to discuss the topic of international shipping law.

32. An admirable report of the Committee's discussions on the above subjects had already been circulated by Mr. Ushakov in document A/CN.4/234. He wished to associate himself with Mr. Ushakov's remarks and would only add that every effort was being made to increase the number of the Committee's member States. Nigeria and Korea had already been formally admitted at the eleventh session. The Committee was particularly anxious to attract as many of the French-speaking African States as possible, as it did not yet have a single one of them among its members. That might be due, in part, to the fact that English was so far the only official language used at the Committee's meetings. However, as soon as it had a sufficient number of French-speaking States, the Committee intended to adopt French as an alternative language. Efforts were also being made to persuade some of the East African countries to join the Committee.

33. Although he had so far attended only one of the Commission's meetings, he had not failed to observe the meticulous care with which its affairs were conducted; it was not surprising, therefore, that its proposals invariably commanded world-wide respect and acceptance. He assured the Commission that his Committee attached great value to the Commission's contribution to the development and codification of international law and would do everything possible to assist its endeavours for the good of the whole world.

34. Mr. NAGENDRA SINGH said he had been present as a member of the Asian-African Legal Consultative Committee at its eleventh session in Accra and wished to extend a cordial welcome to the distinguished Minister of Justice of Ghana, who had been Chairman. It was kind of him to find time to come to the Commission and thus show his spirit of co-operation with it. His statement had been illuminating. He (Mr. Nagendra Singh) also wished to express particular appreciation of Mr. Ushakov's excellent report and to thank Mr. Adade for the skill he had displayed as Chairman of the Committee in bringing its eleventh session to a successful conclusion. He hoped that the Commission would send an observer to all future sessions of the Asian-African Legal Consultative Committee; that was the least it could do to show its willingness to co-operate.

35. Mr. YASSEEN, after welcoming the observer for the Asian-African Legal Consultative Committee, pointed out that, under the Committee's statute, any question on the agenda of the International Law Commission was also on the Committee's agenda, a fact which created a very special link between the two bodies. The main task of the Commission was to prepare conventions acceptable to the international community as a whole. The efforts made by regional or intercontinental organizations could only facilitate the task of the Commission, which found their studies extremely useful.

36. He very much hoped that the Committee would, in particular, express specific and detailed views on the topics of State succession and State responsibility. It would be extremely useful to the Commission to have precise knowledge of the views of the many Asian and African States forming the Committee's membership.

37. It was true that not all African and Asian countries belonged to the Committee, but the number of member countries was sufficient to be representative of the different political trends and legal systems. In order to increase the number of members, however, it was necessary to admit the use of languages other than English and he personally had already had occasion to propose, in an article published in 1964,[3] that the Committee should also admit Arabic and French as official languages.

38. In conclusion, he wished the Committee every success in its efforts to further the codification and progressive development of international law.

39. Mr. USHAKOV thanked Mr. Adade and congratulated him of his excellent statement. He also expressed his warm thanks to the Government of Ghana for the exceptional hospitality, so characteristic of that

[3] See *Annuaire français de droit international, 1964*, vol. X, p. 669.

country, which had been accorded to him as observer for the International Law Commission.

40. At the opening meeting of the Committee's eleventh session, a message had been read out from the Chairman of the Presidential Commission of Ghana, emphasizing that the Asian and African countries had many problems in common and that the Committee could help to harmonize their views on important legal issues. Mr. Adade, who had been head of the Ghanaian delegation, had been elected Chairman of the Committee.

41. It was particularly gratifying to note that, as was evident from the whole course of its work at the eleventh session, the Asian-African Legal Consultative Committee attached very great importance to the maintenance and development of mutually advantageous relations with the International Law Commission. He had followed the work of the Committee with great interest. The African and Asian countries had many problems of their own and the Committee was preparing drafts that would be very useful for the development of mutual relations between those countries.

42. The Committee did not, however, restrict itself to problems peculiar to the African and Asian countries. It also concerned itself with problems which affected the world as a whole and, in particular, with the topics on the Commission's agenda. Members of the Commission had more than once had occasion to stress the decisive part played by members of the Committee in the success of the Conference on the Law of Treaties. Only lack of time had prevented the Committee from considering the topic of State succession at its eleventh session and it had been decided that that topic would be discussed at its next session.

43. In the report he had prepared on the eleventh session of the Committee, he had indicated the various decisions which had been taken by the Committee and had emphasized the importance they presented for the International Law Commission.

44. Mr. TABIBI said that he wished to join the preceding speakers in extending a warm welcome to the Chairman of the Asian-African Legal Consultative Committee and in congratulating him on his very interesting statement. It was unnecessary to stress the importance of the part played by the Asian and African countries in shaping contemporary international law; their work in that sphere, as exemplified by the Committee, was of benefit not only to the peoples of Asia and Africa, but also to the community of nations as a whole.

45. Mr. THIAM said that he, too, wished to welcome the observer for the Asian-African Legal Consultative Committee. He particularly appreciated the fact that useful relations had been established between the Committee and the Commission. That co-operation, which could only be beneficial, should be continued.

46. While the new African and Asian States were admittedly in need of rules of their own, they could also bring to the international community new ideas that would enrich international law. It would be particularly useful for the Commission to know the Committee's views on the topic of State succession. Similarly, with regard to refugees, it would be useful for the African and Asian States to study the specific problems resulting from decolonization, while taking care not to depart too far from the general principles of law.

47. There was no doubt, moreover, that if the French-speaking States were allowed to use the language they knew best, that would open the way for their entry into the Committee. There was no other reason for their absence. The French-speaking African States did not constitute a monolithic bloc; there were neighbourly relations between the French-speaking and English-speaking States. It would be useful if the Committee could concern itself with the problems raised by those relations. He hoped that at the next session the observer for the Committee would be able to inform the Commission that a large number of French-speaking States had become members.

48. Mr. ROSENNE said that the work of the Asian-African Legal Consultative Committee had been of particular value to the Commission in connexion with its own work on the law of treaties and that he now looked forward to hearing the Committee's views on the law of State succession. Since he attached great importance to the maintenance of close liaison between the Commission and intergovernmental organs working in the same field, he hoped that the Chairman of the Commission would be able to attend the Committee's next session or else arrange to be represented by a member who could submit a full report on the Committee's activities. Lastly, he thanked Mr. Ushakov for his very interesting report on the Committee's eleventh session and suggested that the Commission should formally take note of that document in its own report.

49. Mr. BARTOŠ said that every year the work undertaken by the Asian-African Legal Consultative Committee was becoming wider in scope. The Committee had successfully overcome the difficulties it had encountered, in particular certain differences between African and Asian countries. It would soon settle the question of working languages which separated the States using English, French and Arabic as the usual languages for African jurists.

50. The Committee had two very different groups of tasks before it. First, it was called upon to strengthen, through the consultations brought about by its meetings, the role of the principles of international law recognized by the United Nations in relations between African and Asian countries, taking account of their specific situation, of which decolonization was one significant feature. Secondly, the Committee continued to make a close study of the work of the International Law Commission. It was to be regretted that the Commission did not make greater use of the results of the studies on topics on its agenda undertaken by the Committee. In his view, not only should the officers of the Commission seek practical means of improving the exchange of information, but the Commission and its Special Rapporteurs should take the opinions and advice of the Committee into consideration. He was convinced that the Committee wished to be heard not only during, but before, the General

Assembly, and not only through the comments of governments, but also through consultations initiated by the Commission. The reciprocal visits of the Chairman of the Committee and the Chairman of the Commission provided an opportunity for studying possible ways of extending the co-operation which had been established.

51. The CHAIRMAN, speaking on behalf of the Commission as a whole, thanked the observer for the Asian-African Legal Consultative Committee for his interesting statement. He himself had found the Committee's work on the subject of the international sale of goods particularly interesting. He shared the hope expressed by other speakers that the Commission would be represented at future sessions of the Committee.

The meeting rose at 6.10 p.m.

1075th MEETING

Tuesday, 23 June 1970, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited Mr. Ago to resume the introduction of his second report on State responsibility (A/CN.4/233).

2. Mr. AGO (Special Rapporteur) said that the third section of his report dealt with the capacity to commit international illicit acts, a concept particularly dear to German jurists.

3. First of all, the word "capacity" must not be understood in the sense of a faculty or power conferred by law: that had been the mistake made by certain German writers, who had regarded delictual capacity as a particular aspect of the broader concept of the capacity to act. It was, indeed, absurd to suppose that the law could confer the power to violate the rules which it laid down. The terms used—whether "delictual capacity" or "capacity to commit illicit acts"—could therefore be no more than a convenient way of expressing the idea that a State which was materially able to exercise an activity in a given sector was also materially able to commit a breach of its international obligations in the exercise of that activity. It was practically certain that every State had that ability. The Commission, which for the time being was considering only the responsibility of States, need not concern itself with the question whether other subjects of law also had that ability. Moreover, the Commission should not allow itself to be drawn into formulating a rule on that point corresponding to article 6 of the Vienna Convention on the Law of Treaties,[1] which dealt with the capacity to conclude treaties, since the concept was entirely different. What was called "delictual capacity" really had nothing to do with the capacity to act or with any kind of legal power.

4. That being so, the only problem which might arise was that of possible limits to the capacity to commit international illicit acts. In that connexion, certain problems known under the name of vicarious responsibility or responsibility for the act of another must be left aside at once. There might be cases in which, because of a special situation, one State exercised control over the activities of another State and was answerable in its place for any international illicit act the other State might commit. In such cases, there were no limits to the capacity to commit international illicit acts; it was the responsibility which the law attached to such acts that was imputed to a subject other than the author of the delinquency.

5. Similarly, there appeared to be no need to refer to the situation of States members of a federal union, first, because it was evident that any State of that kind which had retained even limited capacity to make agreements with States outside the federation was usually *ipso facto* capable of keeping or violating the undertakings it had thus entered into, and, secondly, because federal States were generally opposed to any reference to a separate international personality of the States members of the federation.

6. The real limits to the capacity to commit international illicit acts must therefore be sought elsewhere. There was a whole series of situations in which the activity of one State might be superimposed on that of another State in its own territory. That happened in the case of protectorates, for example, which had not entirely disappeared; in the case of military occupation, not necessarily in time of war, but also following a state of war which had ceased to exist, or even in time of peace; and when the subject exercising the activity in place of the State was not another State, but an international organization. The occupier might replace certain administrative or judicial organs of the occupied State by elements of its own administration, and if the latter committed a breach of an international obligation of the occupied State it was obvious that the delinquency must be imputed to them. That was not a case of vicarious responsibility, but of original responsibility of the State

[1] *United Nations Conference on the Law of Treaties, Official Records*, Documents of the Conference, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).