Document:-
A/CN.4/SR.1902

Summary record of the 1902nd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

33. Replying to Mr. Huang, who had pointed out (1893rd meeting) that not all sources of rights and obligations were covered in article 5, he said that other sources could be mentioned if the Drafting Committee thought it necessary, but drew attention to the difficulty of referring to such sources as a unilateral declaration. The suggestion by Mr. Francis (1894th meeting) concerning a reference to the object and purpose of multilateral treaties could be considered by the Drafting Committee. Mr. Balanda (*ibid.*) had, in addition to questioning the reference to new legal relationships and making suggestions concerning the French text of subparagraphs (*b*) and (*c*), asked whether the "individual persons" referred to in subparagraph (*d*) (iv) could be considered to include legal persons such as multilateral corporations. Without going into the primary rule involved, he wished to assure the Commission that, in drafting subparagraph (*d*) (iv), he had intended to refer only to natural persons. In reply to Mr. Balanda's point that subparagraph (*d*) (iv) went too far and that, in the case of the infringement of individual rights, not all the States parties to the treaty concerned were injured States, he noted that, under the European Convention on Human Rights,[11] every State party was entitled to bring a claim against any other State party.

The meeting rose at 1.05 p.m.

[11] See 1894th meeting, footnote 10.

1902nd MEETING

Thursday, 13 June 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* (continued) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (concluded)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*concluded*)

1. Mr. RIPHAGEN (Special Rapporteur), continuing his summing-up of the discussion, noted that Mr. Ushakov (1895th meeting) had expressed some doubts about the value of draft article 5. Most speakers had considered that article essential, however, and he was sure that any drafting problems could be dealt with in the Drafting Committee. He would revert to article 5 later, but would like first to make a general remark concerning draft article 6.

2. Many members had found article 6 too detailed, especially in its first paragraph. The reason for including the details was connected with what Mr. Arangio-Ruiz (1900th meeting) had called the "preliminaries", the intermediate phase of a situation arising from an alleged wrongful act. Article 6 tried to set out what the injured State could require the author State to do. It had been held that the article was not strong enough and that it should be based on the obligation of the alleged author State, an approach he had adopted in his earlier drafts. But as Mr. Ushakov had rightly remarked, there was no obligation unless the injured State demanded that something should be done. Hence he believed that the drafting of article 6 was, in principle, correct.

3. The second reason for including the details in paragraph 1 of article 6 was connected with draft article 7. Article 6 dealt with *restitutio in integrum stricto sensu*—what Mr. Reuter had once called the perfect undoing of the internationally wrongful act, the belated performance of the primary obligation. But since that concept might give rise to difficulty in a situation involving the private right of a private individual, he had thought it useful to separate it from the other obligations of the author State. Of course, if one did not accept article 7, that reason was eliminated. In that connection, he noted that some international lawyers seemed to regard international law as being completely separate from internal law—an attitude with which he most emphatically disagreed. Of course, the state of internal law could not excuse non-performance of an obligation, although when looking at article 33 of part 1 of the draft, on a state of necessity, one could have doubts. In any event, the author State should at least apply the possibilities it had *proprio motu* to redress the wrongful act. The main reasons for including the details in article 6, then, were to underscore the preliminary stage, which occurred before the more dramatic stage of reciprocity or reprisals.

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

4. Article 7 dealt only with *restitutio in integrum stricto sensu*—the method dealt with in article 6, paragraph 1 (*c*)—which meant the re-establishment of private rights affected by an internationally wrongful act. Though there was no absolute uniformity in the opinions and decisions of arbitrators, in modern international law *restitutio in integrum stricto sensu* was not required, but a substitute performance was required as compensation. The rule in article 7, which concerned the treatment of aliens, could be compared with a rule existing in many internal legal systems concerning the legal position of servants of the State, or with the rules applicable to United Nations officials. If it was established that an official had been dismissed in contravention of the applicable rules, the public authority, or the Secretary-General of the United Nations, had a choice between reinstatement of the official, which was *restitutio in integrum stricto sensu,* or a pecuniary indemnity. Article 7 could not prejudge the existence of primary rules. Perhaps there were no rules of customary law, but a situation might arise in which there had been an internationally wrongful act in breach of an obligation concerning the treatment of aliens, whether conventional or customary.

5. Replying in order to the comments made by members of the Commission, he noted that Mr. Sucharitkul (1890th meeting) had expressed the view that the provision in article 6, paragraph 2, would not be easy to apply. He was well aware of that fact; the quantum of damages was a difficult point in any arbitral decision. The Chairman, speaking as a member of the Commission, had said that developing that point would mean opening a very long and difficult debate.

6. Mr. Sucharitkul and several other speakers had referred to the dividing line between so-called reciprocity and so-called reprisals. He thought the discussion on that point had been somewhat confused, since the word retortion had also been used. To the best of his knowledge, that word was most commonly applied to measures not contrary to international obligations, and he therefore believed that retortion was outside the scope of the Commission's discussion.

7. With regard to draft article 12, subparagraph (*a*), relating to diplomatic immunity, references had been made to the ICJ in connection with the case concerning *United States Diplomatic and Consular Staff in Tehran*.[5] He believed there was some misunderstanding as to the link between that case and article 12, subparagraph (*a*). The ICJ had not been dealing with reciprocity or reprisals; it had simply said that violation of diplomatic immunity could not be a response to alleged intervention of the embassy in internal affairs. That was a rather different context, since the Court had not been dealing with reciprocity in the diplomatic field. In paragraph (7) of the commentary to article 8, it was simply stated that a breach of diplomatic immunity could not be a permissible response to an unlawful act; cases of so-called reciprocal application of a rule between two States were not dealt with. He therefore believed that, apart from drafting questions, article 12, subparagraph (*a*), belonged in the draft, although it should perhaps appear as a separate article. The reason why article 12 referred only to immunities and not to privileges was that privileges were subject to a restrictive interpretation on both sides, as the Chairman (1901st meeting) had pointed out.

8. In regard to draft articles 14 and 15, he had already dealt, in his general introduction (1890th meeting), with the desirability of setting out the additional legal consequences of international crimes, as mentioned by Mr. Sucharitkul and others, as well as with the proposal by the Chairman (1901st meeting, paras. 15-16), which could be referred to the Drafting Committee. The Chairman's proposal did not set out the legal consequences either; perhaps a reference could be added to the criminal responsibility of individuals as such, which might be considered as falling outside the scope of the Commission's draft, but which could nevertheless be useful. As far as the criminal responsibility of States was concerned, the Chairman's proposal also referred to what the international community as a whole might decide on that matter.

9. Mr. Sucharitkul (1890th meeting) and others had questioned whether article 15 was really useful. He himself believed that it differed from article 4, which dealt with situations in which, under the normal rules of State responsibility, a State could take measures under articles 8 or 9. But those measures would have the effect of endangering international peace and security. Article 4 was rather negative, whereas article 15 was positive in that it referred to particular rights and obligations arising from aggression and to the Charter of the United Nations, Article 51 of which dealt with self-defence. Whether self-defence should be mentioned in the article or in the commentary was a matter for the Drafting Committee. He agreed with several other speakers that article 15 was a useful and necessary reminder of instruments other than the articles on State responsibility.

10. Mr. Sucharitkul and, indeed, nearly all speakers except Mr. Ushakov (1895th meeting) had agreed that part 3 of the draft was necessary and that work should be continued on preparing articles in that part. References had been made to the ICJ and to a possible international criminal court within the framework of the draft Code of Offences against the Peace and Security of Mankind, all of which he would take into account when drafting the articles. Some speakers, while agreeing that part 3 would be useful, had doubted its acceptability to States. That was a realistic point, but in any event the Commission's responsibility was to make proposals. Some States would consider parts 1 and 2 unacceptable without part 3.

11. Mr. Reuter (1891st meeting) had expressed reservations on draft article 6, particularly in connection with article 22 of part 1. While he understood those reservations, he thought that, for the time being, the Commission should deal with part 2 within the framework of the articles already adopted as part 1. As to Mr. Reuter's reservations concerning *jus cogens*, everyone knew that that concept raised many difficulties and had been the subject of discussion in

[5] Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

many other bodies and at the United Nations Conference on the Law of Treaties in 1968 and 1969. Like Mr. Arangio-Ruiz (1900th meeting) however, he was inclined to believe that *jus cogens* could not be ignored.

12. He had already replied to Mr. Reuter's comments on articles 8 and 9, which had been referred to the Drafting Committee for a clear distinction to be made between reciprocity and reprisals. He himself did not agree that, in the case of an unequal treaty, the performance of one party was less important than that of the other; that was also a matter to be clarified by the Drafting Committee.

13. Mr. Reuter had also referred to the absence from the draft of any reference to the punishment of a State. Punishment had not been specifically mentioned, but a reference had been made in article 14 to the source of the rules—the international community as a whole—and he had given reasons why he believed it was difficult to be more specific at the present time. Another question raised by Mr. Reuter concerned the relationship between the 1969 Vienna Convention on the Law of Treaties and part 2 of the draft, and whether draft article 13, which in Mr. Reuter's view changed the rules of the Vienna Convention, was acceptable. He believed that different levels were involved: validity in the larger sense of the law of treaties, on the one hand, and measures taken by States, on the other. Wherever he had departed from the terms of the Vienna Convention, he had done so deliberately. Article 13 had to have a narrower scope than any material breach: for not every material breach destroyed the purpose of a treaty. In his opinion, therefore, it was not necessary for article 13 to use the same terminology as the Vienna Convention, and it was not a modification of that Convention.

14. Mr. Reuter's observations concerning the phrase "the international community as a whole", which had first been used in article 19 of part 1 of the draft, left many questions open. Perhaps the Commission could improve on that phrase, which was an essential one; but in any case it was justified in using the same expression in part 2 as it had in part 1.

15. Some of the points made by Mr. McCaffrey (1892nd meeting) were clearly matters for the Drafting Committee. As to the use of the word "suspend" in draft article 9, paragraph 1, he did not think that term was too weak. Perhaps Mr. McCaffrey had been referring to the distinction between suspension and termination. Other speakers had suggested that the word "suspension" in article 11, paragraph 2, should be qualified by the word "temporary". That was a matter for the Drafting Committee, but to his mind suspension was always temporary; if it was not temporary, it became termination. Another question that might arise was how long the suspension should last.

16. Mr. McCaffrey had also raised a point concerning draft article 10. That article referred to third-party settlement procedures, not to negotiations, which were available only if the other party wished to negotiate in good faith. If a third-party settlement procedure did result in a binding decision, there was always the possibility that the injured State would not enforce the decision, but a new legal relationship between the parties to the dispute did in fact arise.

17. As to who would judge the applicability of draft article 11 regarding the limitation of countermeasures, the answer would be given in part 3 of the draft: if the decision was not accepted, no procedure was provided for and it would be necessary to rely on the good faith of the States involved. The same applied to the question whether article 11, paragraph 2, went too far in its reference to a "procedure of collective decisions".

18. As to the question whether article 14, paragraph 2, was also applicable to international delicts, Mr. Tomuschat (1896th meeting) had answered that question when he had said that, in the event of a breach of a bilateral treaty, a third State normally had nothing to do with that situation.

19. Referring to the comments made by Mr. Calero Rodrigues (1892nd meeting), he cautioned against using the term "*inter alia*" in article 6. If an exhaustive list of what the injured State might require from the author State was not to be provided, it would be better to say nothing at all. Perhaps that was a matter of drafting, or it could be explained in the commentary. Reparation in kind was possible and was mentioned in the commentary. Perhaps the word "compensation", suggested by, among others, the Chairman (1901st meeting), could be adopted. The doubts expressed by Mr. Calero Rodrigues concerning article 11, paragraph 1 (*c*), could perhaps be dispelled in the Drafting Committee.

20. Many of the points raised by Mr. Flitan (1892nd and 1893rd meetings) could be referred to the Drafting Committee, such as the distinction between reciprocity and reprisal and the possibility of dividing article 12 to make a separate article on *jus cogens*. He did not think that article 10 was unbalanced in favour of the alleged author State, as Mr. Flitan had suggested.

21. Most of the remarks made by Mr. Thiam (1893rd meeting) had concerned the relationship between the draft Code of Offences against the Peace and Security of Mankind, with which Mr. Thiam was dealing, and the topic under consideration. In drafting the articles, he had assumed that Mr. Thiam's topic would cover personal criminal responsibility only. The need to include the criminal responsibility of States in the draft code had arisen subsequently, during the discussion.

22. He believed he had already replied to most of the comments made by Mr. Huang (1893rd and 1894th meetings), with the exception of a few points which could be referred to the Drafting Committee.

23. Mr. Francis (1894th meeting) had been very strongly in favour of retaining article 7 as it stood and, in his own opinion, had correctly interpreted the meaning of that article.

24. Referring to Mr. Balanda's comments (*ibid.*) concerning "new legal obligations", he pointed out that that approach had been followed by the Commission since long before he had become a member,

and that was why he had followed it. Mr. Balanda had been against retaining article 7 and had spoken of capitulation régimes, which, in his own opinion, were in no way comparable with article 7. The remarks made by Mr. Francis, Mr. Njenga (1896th meeting) and the Chairman (1901st meeting) might be helpful in clarifying that point.

25. He believed he had already replied to most of the comments made (1895th meeting) by Sir Ian Sinclair, who believed that it was not possible at present to add specific legal consequences within the framework of article 14. As to the wish expressed by Sir Ian and Mr. Malek (1900th meeting) to see articles in part 3 drafted as soon as possible, he hoped to have completed that part in his next report to the Commission.

26. Mr. Ushakov had read out (1895th meeting, para. 24) and later submitted to him a draft of an article, which would probably be article 8, and which enumerated some, but not all, of the possible countermeasures. Such an incomplete list, like the use of the expression "*inter alia*", was inappropriate: the Commission's task was to indicate which countermeasures were possible and which were not. Mr. Ushakov had been right in saying that countermeasures ceased immediately if the new obligations of the author State were fulfilled; whether it was necessary to say so in the draft articles was a matter for the Drafting Committee to decide.

27. He appreciated Mr. Ogiso's observation (1895th meeting) that the Commission was trying to determine the position of alleged author States and alleged injured States. As to the view that article 9, paragraph 2, on proportionality, was perhaps rather weak, he could not see the point of reprisals if absolutely strict proportionality was to be invoked. The observation that the draft did not take full account of *jus cogens* outside the area of crimes was quite true; that would be corrected in the drafting of part 3. Mr. Ogiso had also agreed with Mr. Ushakov that articles 8 and 9 gave the impression that the injured State could suspend the performance of any or all of its obligations; but the limitations in articles 10, 11 and 12 could not, of course, be provided beforehand. Moreover, article 9 did not propose that the injured State should stop performing all its obligations at once, but that it should do so selectively. A real distinction could only be made, however, in the case of armed reprisals, which was a separate point. In earlier reports, he had pointed out that the principle of *jus cogens* was involved, and that limitation of reprisals under article 12, subparagraph (*b*) was relevant.

28. Most of the comments made by Mr. Njenga (1896th meeting) had already been discussed in other contexts. He noted that Mr. Njenga was in favour of article 7 and that his explanation, like that of Mr. Francis, was exactly what he himself had had in mind in drafting the article.

29. Mr. Tomuschat (*ibid.*) had stressed the need to refer to sources in article 5. He himself had already explained why the references in that article were not exhaustive; he believed that the source, whether a treaty or customary law, did make a difference in the determination of the injured State. A new question raised by Mr. Tomuschat concerned the result of a breach of the obligation to consult, which in his own opinion must be answered within the framework of the particular consultation provision. Agreements in the field of a related topic, that of international liability for injurious consequences arising out of acts not prohibited by international law, stipulated the obligation to consult, but non-fulfilment did not in itself create a responsibility. In any case, that matter concerned primary rules, and he doubted that the Commission's articles could clarify primary rules in that respect. Mr. Tomuschat had also observed that article 9 seemed to refer only to the passive conduct of the injured State; but in his own opinion both the passive and the active aspects of the situation were covered.

30. Mr. Mahiou's comment (1897th meeting) on draft article 16, subparagraph (*c*), suggested that the reference to belligerent reprisals had caused some misunderstanding. The reprisals referred to were those taken in response to a breach of an obligation of *jus in bello*—a difficult problem which had been dealt with at many ICRC conferences. That limited field of belligerent reprisals should not be developed in the draft, but left to organizations which had much more experience of it.

31. Replying to Mr. Barboza's remarks (*ibid.*) on the non-exhaustiveness of article 5, he pointed out that, if reference were made to a unilateral declaration, it would still not be known whether that declaration had been addressed to one State, a group of States, or all States. As to the question, relating to article 6, paragraph 1 (*b*), whether an author State could invoke the non-existence of remedies under its internal law, the point was that, if the author State did have such remedies available, it should apply them. He agreed with Mr. Barboza that it was difficult at the current stage to be precise about the additional legal consequences of crimes.

32. In regard to Mr. Díaz González's criticism (1897th meeting) of the use of the terms "reciprocity" and "reprisals", he himself would have no objection to deleting those terms; the measures in question could then be referred to as "measures under article 8" or "measures under article 9". But that was purely a drafting matter.

33. Mr. Razafindralambo (1898th meeting) had questioned whether the expression "interim measures of protection", in article 10, paragraph (2) (*a*), was correct; that could be left to the Drafting Committee. On the question of State immunity, he believed that article 10 was without prejudice to the applicable rules; but he doubted whether State immunity was so sacrosanct that it fell outside the scope of countermeasures. That, however, was a matter of primary, not secondary rules.

34. He agreed with Chief Akinjide (*ibid.*) that realism was desirable, but he also believed that, as international lawyers, the members of the Commission should aim for Utopia. On the question whether the international community as a whole, referred to in article 14, paragraph 1, was developing rules on international crimes *in abstracto* or *in concreto*, he

observed that he himself, when drafting the rules, had had a legislative function in mind.

35. Mr. Roukounas (*ibid.*) had commented on the lack of elements of injury in article 5, but, as Special Rapporteur, he himself had felt bound by part 1 of the draft articles, which completely disregarded that question. Material damage could easily be determined, but he believed that to raise the idea of moral damage would amount to begging the question. Perhaps that point could be clarified in the Drafting Committee.

36. He was glad to note that Mr. Al-Qaysi (1899th meeting) approved, in general, of most of the draft articles and also considered part 3 of the draft to be essential. He was unable to answer the question what would happen if the system established under the Charter of the United Nations failed to function. Draft article 13 dealt with the case of the complete breakdown of systems other than the United Nations system. In his opinion, the Commission should leave it to the Organization itself to see how it could improve the United Nations system.

37. Mr. Lacleta Muñoz (*ibid.*) had made a number of useful suggestions which could be discussed in the Drafting Committee. He had also drawn attention to some difficulties that might arise in specifying the additional legal consequences of an international crime. He was pleased to note that Mr. Lacleta Muñoz, too, was in favour of part 3 of the draft and approved of the outline suggested in the sixth report (A/CN.4/389, section II).

38. Mr. Yankov (1899th meeting) had rightly said that not everything that had been, as it were, promised by the Commission in its earlier reports had been fulfilled. He had made some points which could be dealt with in the Drafting Committee. It should be noted that part 3 would not relate to part 2 only. It would provide a special system, which would come into effect when measures were taken under part 2, but it must necessarily be based on part 1 as well. He was glad to see that Mr. Yankov also thought that the articles of part 3 should be prepared, and he would do so as soon as possible. He had noted Mr. Yankov's statement that, in drafting those articles, account should be taken of certain difficulties relating to third-party dispute settlement.

39. Mr. Arangio-Ruiz (1900th meeting) had suggested that an injured State should be defined as one whose rights had been infringed and had referred to the concept of injury mentioned by Mr. Roukounas (1899th meeting). That definition would be acceptable if part 1 of the draft was changed accordingly. But some obligations were really the mirror image of rights. Most of the rules in customary international law were based on the sovereign equality of States, and certain obligations flowed from that principle. In his opinion, it was not easy simply to say that an injured State was one whose right had been infringed and to use the concept of injury, particularly since Mr. Arangio-Ruiz rejected the distinction between subjective law and legitimate interests. He himself agreed that the distinction was particularly relevant in internal legal systems, but did not think that it could be transposed to the field of international law. In any event, that was a matter for discussion in the Drafting Committee.

40. With regard to the doubts expressed by Mr. Arangio-Ruiz concerning articles 6 and 7, he had already explained that article 7 referred only to the particular form of reparation called *restitutio in integrum stricto sensu*. There was a difference between a material impossibility, dealt with in article 6, paragraph 2, and the difficulty of re-establishing the right of an individual which had been taken away.

41. The idea of mutual assistance, mentioned in draft article 14, paragraph 2 (*c*), had been taken from the Charter of the United Nations. It was an expression of solidarity, which was to be welcomed. No one had referred to the position of neutral States, such as Switzerland; he agreed that, in regard to international crimes, there should be no neutrality in the strict sense. Hence article 14, paragraph 2, provided a minimum obligation for any State not to recognize as legal the situation created by an international crime and not to render aid to a State which had committed such a crime. An example of mutual assistance would be if a State broke off economic relations with a State which had committed an international crime, and a third State then established economic relations with the former State. He was glad to note that Mr. Arangio-Ruiz accepted the idea of part 3 in principle.

42. Mr. El Rasheed Mohamed Ahmed (1900th meeting) had supported article 7, although he had feared that it might implicitly favour the tendency of some writers and specialists to withdraw concessions from the application of internal law and place them under international law. That, however, was a question of primary rules and depended on the particular situation. Mr. El Rasheed Mohamed Ahmed had also referred to the psychological elements involved, particularly in connection with article 10, paragraph 2; but several other speakers had maintained that article 10 was not too much of a limitation for the injured State. A balance would have to be struck between the views expressed. Mr. El Rasheed Mohamed Ahmed had also said that he was in favour of part 3, which he considered to be an integral part of the structure of the draft.

43. Mr. Koroma (*ibid.*) considered that part 3 was essential and approved of the role assigned to the ICJ.

44. The remarks made by the Chairman, speaking as a member of the Commission (1901st meeting), had been mostly favourable, at least in regard to articles 6 to 13. The Chairman had even proposed a text for article 14, paragraph 1 (*ibid.*, para. 15), which was a useful suggestion and could be taken up in the Drafting Committee. He was glad to note that the Chairman was in agreement with the outline of part 3.

45. With regard to future action, he suggested that the Commission should refer articles 7 to 16 to the Drafting Committee, which would produce revised texts as a basis for discussion at the following session. The Drafting Committee would bear in mind all the points made during the debate.

46. Mr. FRANCIS said that, in principle, he had no objection to referring articles 14 and 15 to the Drafting Committee, on the understanding that the Committee would take no action on them for the time being. He was convinced that, if the situation had not been as it was, the Special Rapporteur would have gone further in articles 14 and 15. The Special Rapporteur had said that, although the international community had recognized the concept of international crime, there was no general consensus on the consequences of such crimes. He had been right not to go further in articles 14 and 15, because article 19 of part 1 of the draft already attributed criminal responsibility to States and the General Assembly had been asked to determine whether a State could be a subject of law under the draft Code of Offences against the Peace and Security of Mankind. If the Commission went further, it might prejudge the decision to be taken by the General Assembly. The Drafting Committee should therefore be requested to refrain from taking up articles 14 and 15.

47. Mr. USHAKOV supported the Special Rapporteur's suggestion that articles 7 to 16 should be referred to the Drafting Committee.

48. The CHAIRMAN said that the Commission had had a comprehensive discussion on State responsibility. Some concrete suggestions had been made and there had been broad agreement on draft articles 1 to 13. He agreed with the Special Rapporteur that, since articles 5 and 6 had already been referred to the Drafting Committee, articles 7 to 16 should also be referred to it. A wide exchange of views had been held on articles 14 and 15 and the Drafting Committee would have ample material for reflection. He thought that the Committee could be requested to consider articles 14 and 15 in the light of the comments made in the Commission. If it made concrete proposals on those articles, they would be useful to the Commission and the Sixth Committee of the General Assembly, and could be used by the Special Rapporteur in preparing his next report. He therefore suggested that the Commission should refer articles 7 to 16 to the Drafting Committee, on the understanding that the results of its work on articles 14 and 15 would be used by the Special Rapporteur, who might submit appropriate formulations in his next report.

49. Mr. RIPHAGEN (Special Rapporteur) said that the Chairman's suggestion was a workable one. It did not seem likely that the Drafting Committee would be able to discuss articles 14 and 15 during the current session. It should be informed that those articles involved special difficulties, but that it would be useful if it could make concrete proposals. He therefore supported the Chairman's suggestion.

50. The CHAIRMAN said that the mere fact of referring the articles to the Drafting Committee implied that they would not be discussed by the Commission at its next session until the Committee had made its recommendations. Members would then be free to discuss the articles and express their views on them. Articles 14 and 15 would be considered by the Drafting Committee if it had time. The Special Rapporteur would participate in the work of the Committee and take account of its discussions in his next report. The Commission should not still be in doubt about the need to harmonize its work on State responsibility with that on the draft Code of Offences against the Peace and Security of Mankind. It was with an awareness of that need that articles 14 and 15 were being referred to the Drafting Committee.

51. If there was no objection, he would take it that the Commission agreed to refer articles 7 to 16 to the Drafting Committee.

It was so agreed.

The meeting rose at 5.55 p.m.

1903rd MEETING

Friday, 14 June 1985, at 10.35 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
ARTICLES 23* AND 36 TO 43**

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* Resumed from the 1864th meeting (*Yearbook ... 1984*, vol. I, pp. 298-300, paras. 1-22).

** Concerning articles 36 to 42, resumed from the 1847th meeting (*ibid.*, pp. 191 *et seq.*).

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two) pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.