

Document:-
A/CN.4/SR.2417

Summary record of the 2417th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1995, vol. I

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

during the debate, would be included in the Commission's report for consideration when the report was adopted. The composition of the Drafting Committee for each topic would be decided, as was the practice, at the beginning of the session.

It was so decided.

The meeting rose at 1.10 p.m.

2417th MEETING

Friday, 14 July 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*)* (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,¹ A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce part three of the draft articles on State responsibility proposed by the Drafting Committee (A/CN.4/L.513), the titles and text of which read:

Part three

SETTLEMENT OF DISPUTES

Article 1. Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

* Resumed from the 2406th meeting.

¹ Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

Article 2. Good offices and mediation

Any other State Party to the present articles, not being a party to the dispute, may, upon its own initiative or at the request of any party to the dispute, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 3. Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in the Annex to the present articles.

Article 4. Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 5. Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 3 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken counter-measures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

Article 6. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the Annex to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 7. Judicial settlement

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the award the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. The issues in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration in conformity with article 6.

ANNEX

Article 1. The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 3 of part three by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

- (i) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (ii) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The 4 conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The 4 conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Article 2. The Arbitral Tribunal

1. The Arbitral Tribunal referred to in article 5 of part three shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of, a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

2. Mr. YANKOV (Chairman of the Drafting Committee) said that, of the 35 meetings held by the Drafting Committee between 29 May and 10 July 1995, 13 had been devoted to the topic of State responsibility. He wished to express his appreciation to all the members of the Committee for their diligence and to the Special Rapporteur, Mr. Arangio-Ruiz, who had provided the Drafting Committee with valuable guidance. The assistance of the secretariat had also been highly valued.

3. The Drafting Committee had had before it articles 1 to 6 of part three (Settlement of Disputes) and the annex thereto proposed by the Special Rapporteur in his fifth report² and referred to the Drafting Committee by the Commission at its forty-fifth session, in 1993.³ The Drafting Committee had also considered article 7 proposed by the Special Rapporteur in his seventh report (A/CN.4/469 and Add.1 and 2), which was included in document A/CN.4/L.513.

4. The dispute settlement system proposed by the Special Rapporteur in his fifth report had been very rigorous but of limited scope because it was concerned exclusively with disputes arising subsequent to the taking of countermeasures and did not deal with the settlement of disputes arising out of the interpretation and application of the future convention in general. The Special Rapporteur's system essentially aimed at correcting the negative

² See 2391st meeting, footnote 13.

³ See *Yearbook... 1993*, vol. II (Part Two), p. 35, document A/48/10, para. 205.

aspects of the presently unilateral reaction system. The Special Rapporteur's proposed system, while limited in scope, was also somewhat rigid in that it led, through successive compulsory stages, to the unilateral submission to ICJ of the specific category of disputes concerned.

5. The Drafting Committee, having due regard to the views expressed in plenary, had broadened the scope of part three to cover any dispute arising out of the interpretation and application of the future convention. It had also proposed two different dispute settlement systems, a more demanding one for disputes arising subsequent to the taking of countermeasures, and a less rigorous one for disputes arising out of the interpretation or application of the future convention.

6. The Drafting Committee was aware that its proposed approach was innovative and might be considered as overambitious given the present general attitude of States towards dispute settlement and bearing in mind that State responsibility covered the entire spectrum of international law. The Committee had, none the less, felt that the Commission must not overlook its responsibilities in the progressive development of international law under Article 13 of the Charter of the United Nations and article 1 of its statute. A relatively bold approach was in order, since nothing prevented the Commission from taking, on second reading, a more modest line if the reaction of States so demanded. In all fairness to the Drafting Committee, it should be made clear that some members had expressed scepticism about the viability and general acceptability of the articles currently before the Commission and one member had suggested that the Drafting Committee should elaborate alternative formulas to be submitted to the General Assembly for its consideration. Despite those differences, all the members had faithfully collaborated in the effort to elaborate a balanced and technically sound dispute settlement system.

7. As a general rule, the system proposed by the Drafting Committee provided for compulsory conciliation, that is to say conciliation by unilateral request, followed by arbitration by agreement. However, in relation to disputes following the adoption of countermeasures, a different regime was proposed in favour of the State against which countermeasures had been taken: that State could, at any time, initiate arbitration by unilateral request.

8. The proposed rules were residual in the sense that States parties to any dispute arising out of the interpretation or application of the future convention, including disputes arising subsequent to the adoption of countermeasures, could at any time, by agreement, resort to any dispute settlement procedure and any dispute settlement mechanism of their choice.

9. Article 1 dealt with negotiation, the first choice and the most commonly used method in settling disputes. Under article 1, if a dispute regarding the interpretation or application of the future convention arose between two or more States parties to the convention, they should, upon request by any one of them, seek to resolve it amicably by negotiation. It should be stressed that each party could unilaterally initiate the negotiation process. Since no third party was involved, it was for the

parties to conduct the process in the way they considered most appropriate from the initial to the concluding stages and article 1 left their freedom of action unimpaired.

10. The phrase "dispute regarding the interpretation or application of the present articles" was all-embracing and encompassed disputes which had arisen following the adoption of countermeasures. The word "amicably" highlighted the desirability of scaling down hostilities and tensions and reaching a solution in a spirit of understanding and goodwill.

11. Article 2 dealt with good offices and mediation which were the mildest form of third party involvement. Any State party to the convention, not being party to the dispute, could tender its good offices or offer to mediate with a view to facilitating an amicable resolution of the dispute.

12. Resort to good offices and mediation was, of course, conditional upon acceptance by the parties to the dispute. While the State acting as the third party could not impose its will on the parties, it could foster a peaceful approach to the dispute by providing a channel of communication, facilitating dialogue and making proposals for an amicable solution of the dispute. The use of the word "amicable" in article 2 was intended to characterize the spirit that should govern the good offices or mediation effort.

13. Article 3 concerned conciliation. Unlike the corresponding article proposed by the Special Rapporteur in his fifth report, which concerned exclusively disputes that arose following the adoption of countermeasures, the present article also covered disputes arising from the interpretation or application of the convention.

14. The Drafting Committee, drawing on a number of recent conventions, had provided for resort to conciliation as a useful intermediate stage between negotiation (with or without the help of a third party) and arbitration.

15. As a procedure leading to a non-binding outcome, conciliation enabled each party to arrive at a better understanding of the other's point of view and to obtain an objective evaluation of the case without committing itself to particular terms of settlement. Indeed, in accordance with the traditional notion of conciliation, the outcome of the procedure under article 3 would take the form of recommendations. The process was none the less compulsory in the sense that, subject to the conditions enunciated in the first part of the article, each party could initiate it by unilateral request.

16. Two conditions had to be met to initiate the procedure by unilateral request. The first condition, namely the requirement that three months should have elapsed from the date of the first request for negotiations, performed a dual function: first, it provided a check against refusal to negotiate and dilatory practices at the negotiation stage; secondly, it gave negotiations a reasonable chance of achieving their purpose and prevented the premature involvement of a third party against the will of one of the parties. In that connection, he wished to stress that it was important, and in the interest of reaching an amicable settlement, not to put undue pressure on the parties. The parties could of course, by agreement, resort

to conciliation at any time and without having to comply with the three-month requirement. The second condition was that no mode of binding third-party settlement should have been instituted. That clause took care of cases in which the parties might be under an obligation, by virtue of another instrument, for instance a declaration of acceptance of the jurisdiction of ICJ, to resort to a binding third-party settlement. In such a case, the less rigorous procedure envisaged in article 3 would not apply.

17. The text of article 4, on the task of the Conciliation Commission, was based on the proposal made in his fifth report by the Special Rapporteur for article 2 of part three. In drafting article 4, the Drafting Committee had been guided by three considerations. First, the Conciliation Commission should be given access to all the information it might need to formulate its recommendations. Secondly, the work of the Conciliation Commission should be completed within a reasonable period of time, so that if the conciliation effort failed, resort could be had to other procedures without the overall dispute settlement process being unduly protracted. Thirdly, since the goal of conciliation was to find a solution acceptable to the parties, the Conciliation Commission should be given an opportunity to make preliminary proposals, to test the degree of acceptability of its recommendations.

18. Paragraph 1 of the article, which drew on paragraph 1 of article 15 of the Revised General Act for the Pacific Settlement of International Disputes, set out the framework within which the Conciliation Commission was expected to work. Under paragraph 1, the task of the Conciliation Commission was to elucidate the questions in dispute, to collect, with that object in mind, all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to settlement. As it was to gather information by "inquiry or otherwise", the Conciliation Commission had considerable freedom in selecting the method it considered most appropriate to that task. The wording "to endeavour to bring the parties to the dispute to settlement" also gave the Conciliation Commission a wide measure of discretion in the fulfilment of its task.

19. Paragraph 2 addressed three issues. First, it required the parties to provide the Conciliation Commission with a statement of their position regarding the dispute and the facts upon which that position was based. Secondly, it required them to provide the Conciliation Commission with any additional information or evidence as it requested. Thirdly, it required the parties to assist the Conciliation Commission in any fact-finding it might wish to undertake. The nature of fact-finding could vary, depending upon the nature of the dispute, and might involve the examination of witnesses, site visits, or assessment of the extent of injury. Fact-finding could take place in the territory of any of the parties, unless exceptional reasons made that impractical. In such a case, an explanation of those exceptional reasons had to be provided to the Conciliation Commission.

20. The underlying concern of paragraph 3 was to enable the Conciliation Commission to proceed step by step towards the formulation of final recommendations

in order to enhance the chances of those recommendations being acceptable to both parties. The preliminary proposals, which could be addressed to any or all of the parties, were without prejudice to the final recommendations. As indicated by the words "at its discretion", it was entirely up to the Conciliation Commission to determine whether the presentation of preliminary proposals served a useful purpose.

21. Paragraphs 4 and 5 dealt with the final stages of the conciliation procedure. Under paragraph 4, the Conciliation Commission had to submit the report containing its recommendations to the parties not later than three months from the formal constitution of the Conciliation Commission and it could specify the period within which the parties were to respond to those recommendations. The word "recommendations" highlighted the non-binding character of the conclusions of the conciliation procedure. The rest of the paragraph was intended to provide a reasonable time-frame for the conclusion of the procedure. The Drafting Committee had felt that a period of three months was sufficient for the completion of the report, and that the parties should be encouraged to react in a timely fashion to the recommendations. The latter part of the paragraph therefore specified that the Conciliation Commission could stipulate a time within which the parties to the dispute were to respond to its recommendations. There too, the Conciliation Commission enjoyed full discretion.

22. Paragraph 5 dealt with the last stage in the conciliation process. If the response to the Conciliation Commission's recommendations did not lead to settlement of the dispute, the Commission might submit to the parties a final report containing its own evaluation of the dispute and its recommendations for settlement. Such an action was entirely up to the discretion of the Conciliation Commission. Paragraph 5 included cases where the Conciliation Commission might be convinced that its recommendations, with some further adjustments, could provide the basis for an agreed settlement. The intention was to facilitate settlement of the dispute rather than to invite the Conciliation Commission to pass judgement on the reaction of the parties.

23. Article 5, on arbitration, reflected the basic distinction between disputes which had arisen following the taking of countermeasures and disputes arising out of the application and interpretation of the future convention. Paragraph 1 laid down the general rule and paragraph 2 set out the exceptional regime to which a State against which countermeasures had been taken might resort. Under paragraph 1, resort to arbitration was conditional upon the agreement of the parties. The parties could submit their dispute to an arbitration tribunal constituted in accordance with the procedure established in the annex to part three. Parties could also agree to establish any other type of arbitration tribunal they deemed appropriate. Since resort to arbitration was conditional upon the agreement of all parties, they could initiate the procedure at any time.

24. Under paragraph 2, the State against which countermeasures had been taken was entitled, unilaterally, to submit the dispute to arbitration. Arbitration under paragraph 2 was thus compulsory for the State

alleged to have taken countermeasures and the arbitration tribunal would be established on a mandatory basis, in accordance with the procedure set out in article 2 of the annex to part three.

25. The exact context of the term "dispute" in the first line of paragraph 2 had given rise to a divergence of opinion in the Drafting Committee. Some members maintained that the competence of the arbitral tribunal should be limited to the issue of countermeasures. Others contended that the competence of the tribunal would necessarily extend to the underlying dispute. According to the latter view, it would be impossible for the arbitral tribunal to determine the legality of a countermeasure without determining whether there had been a wrongful act. Furthermore, limiting the competence of the arbitral tribunal to a determination of the lawfulness of the countermeasures would not provide an effective means for settling the dispute between the parties as a result of the remaining unresolved issue. The latter view had prevailed in the Drafting Committee.

26. Article 6 laid down the general terms of reference for an arbitral tribunal referred to in article 5 in two situations, namely, (a) where the parties had voluntarily agreed to submit their dispute to arbitration under paragraph 1 of article 5 and had not agreed to terms of reference other than those provided for in article 6; or (b) where the allegedly wrongdoing State which was the object of countermeasures had unilaterally initiated the compulsory arbitration provided for in paragraph 2 of article 5.

27. Paragraph 1 of article 6 provided that the arbitral tribunal should decide "any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles". The first of those two criteria recognized that the dispute referred to the arbitral tribunal was determined by the issues of fact or law that were identified by the parties to the dispute as the subject of their disagreement; the second criterion was standard language used in the dispute settlement provisions of most international agreements. The Drafting Committee had recognized that, in the context of the draft articles on State responsibility, that criterion required a substantial degree of flexibility. An arbitral tribunal entrusted with the resolution of a dispute relating to the interpretation or, more especially, the application of the articles would necessarily need to determine factual and legal issues relating to the violation of international law allegedly committed by the wrongdoing State to the detriment of the injured State. The legitimacy of countermeasures taken by an injured State, for example, depended, *inter alia*, on the wrongfulness of the conduct of the State against which the countermeasures were directed. The word "any" was intended to cover all issues of fact or law that had to be decided by the arbitral tribunal in relation to the particular dispute between the parties.

28. Paragraph 1 indicated that the arbitral tribunal was to decide any such issues "with binding effect". It followed that an arbitral tribunal also had the inherent power to issue such binding interim or protective measures as might be necessary to ensure the effective performance of the task with which it had been entrusted,

namely, the resolution of the dispute between the parties. That would include the capacity to issue binding orders requiring the cessation of the wrongful act and the suspension of countermeasures pending the final decision of the arbitral tribunal and the resolution of the dispute. Given the general understanding on the subject of arbitral procedure, the Drafting Committee had not considered it necessary or appropriate to include detailed provisions in the draft articles on State responsibility with respect to the powers or the procedures of an arbitral tribunal. That point would be duly noted in the commentary.

29. As further indicated in paragraph 1, the procedures to be followed by the arbitral tribunal were addressed in the annex. Article 6 merely provided that the arbitral tribunal had to submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions. The Drafting Committee had considered that it was useful to provide a time-limit for the completion of the arbitral tribunal's work and that six months from the date of the final submissions of the parties was a reasonable period for doing so.

30. Paragraph 2 recognized the importance of an arbitral tribunal being able, when necessary, to resort to fact-finding for a proper determination of the facts at issue between the parties. In some cases, the arbitral tribunal might wish to undertake fact-finding in the territory of one or more of the parties to the dispute. Under paragraph 2 of the article it was entitled to do so. Although the parties were not, by virtue of the paragraph, placed under an obligation to permit such fact-finding, the Drafting Committee had felt that they should do so in order to facilitate the work of the arbitral tribunal and the resolution of the dispute. Furthermore, the arbitral tribunal should be permitted to draw appropriate inferences from a party's refusal to permit such fact-finding. That was consistent with the relevant jurisprudence, including the decision of ICJ in the *Corfu Channel* case.⁴ The issue would be discussed in the commentary to article 6.

31. In article 7, the words "in conformity with article 6", at the end of paragraph 2, should be replaced by "in conformity with the Annex to the present articles". Consequent on that correction, a reference to article 7, paragraph 2, should be added to the reference to article 5 appearing in article 2, paragraph 1, of the annex. Article 7 was intended to deal with the problem that might arise following an arbitral proceeding when one of the parties to the dispute challenged the validity of the resulting arbitral award. Different views had been expressed as to whether the problem should be addressed in part three. While some members of the Drafting Committee had stressed the importance of addressing a situation in which a party asserted spurious claims of invalidity to avoid compliance with an unfavourable arbitral award, other members had expressed concern about adding an additional layer to the dispute settlement process by introducing a role for ICJ in relation to arbitral proceedings. The former view had prevailed in the Drafting Committee. The present wording was similar to that of

⁴ See 2381st meeting, footnote 8.

articles 36 and 37 of the Model Rules on Arbitral Procedure.⁵

32. Paragraph 1 was intended to ensure the availability of an effective mechanism for resolving questions relating to the validity of an arbitral award. It provided that any party to the dispute might, by making a timely request, unilaterally refer the question of the validity of an arbitral award that had been challenged to ICJ if the parties had not agreed to refer the question to another tribunal within three months of the date of the award. The Drafting Committee had noted that the timely nature of a request for the determination of the validity of an award might depend upon the grounds on which the award was challenged, as was recognized in the Model Rules on Arbitration. That would be indicated in the commentary to article 7.

33. The competence of ICJ in the judicial proceedings envisaged in paragraph 1 would be limited—and he wished to emphasize that point—to either confirming the validity of the arbitral award or declaring its total or partial nullity if there were grounds for doing so. The Court would not be competent to review the award or to rule on its merits. In the absence of a declaration of nullity, the arbitral award would remain final and binding on the parties to the dispute. The Drafting Committee had felt that it was not necessary to elaborate the possible grounds for the invalidity of an arbitral award in paragraph 1 of article 7, as the Commission had already dealt with that question in the Model Rules on Arbitration. That would be duly noted in the commentary.

34. Paragraph 2 addressed a situation in which the arbitral proceeding had failed to resolve the dispute between the parties as a consequence of the invalidity of all or part of the arbitral award. It provided that any party could unilaterally submit the unresolved issues to a new arbitration in conformity with the annex to the present articles. The Drafting Committee had thought such a provision necessary to ensure the availability of an effective procedure for resolving the continuing dispute between the parties.

35. With reference to the annex to part three of the draft articles, he said that, since the substantive articles of part three envisaged conciliation and arbitration for the settlement of disputes arising out of the interpretation and application of the future convention, the annex dealt in two separate articles with, respectively, the conciliation mechanism and the arbitration mechanism.

36. Like the rest of part three, the annex laid down residual rules in the sense that the parties were free to agree on modes of settlement other than conciliation or arbitration or on mechanisms different from those envisaged in the annex. However, in the absence of agreement, in other words, if the third-party dispute settlement proceedings were initiated by a unilateral request, the machinery provided for in the annex was binding on both parties. So far as the annex was concerned, and in the context of compulsory proceedings, that meant three things. First, in the case of compulsory conciliation, the Conciliation Commission would mandatorily be consti-

tuted in accordance with the provisions of article 1 of the annex. Secondly, the arbitration procedure which might be initiated by a unilateral request under article 5, paragraph 2, of part three would mandatorily be conducted by an arbitral tribunal constituted in accordance with article 2 of the annex. Thirdly, once compulsory proceedings were instituted in accordance with article 1 or article 2 of the annex, they could be interrupted only with the agreement of both parties.

37. Again in drafting the annex, the Drafting Committee had been specially attentive to ensuring that it was fully consistent with the general approach reflected in part three, which, as he had indicated, distinguished between, on the one hand, disputes arising after one of the parties had taken countermeasures and, on the other hand, all other disputes arising from the interpretation or application of the convention, and which provided, in the case of the first category of disputes, for compulsory conciliation and/or arbitration, and, in the case of the second category of disputes, for compulsory conciliation and arbitration by agreement.

38. Article 1 of the annex, which concerned the Conciliation Commission, was based on the annex to the Vienna Convention on the Law of Treaties and on annex V to the United Nations Convention on the Law of the Sea. The text of paragraph 1 was identical with that of paragraph 1 of the annex to the Vienna Convention on the Law of Treaties.

39. In paragraph 2, the opening words of the *chapeau* paragraph gave expression to the concept of compulsory conciliation as embodied in article 3 of part three inasmuch as they enabled each party to initiate the conciliation proceedings unilaterally by a request to the Secretary-General. Subparagraphs (a) to (d), which contained standard arrangements and were self-explanatory, were modelled almost word for word on the annex to the Vienna Convention on the Law of Treaties. Subparagraph (e) was also closely modelled on the corresponding provision of the annex to the Convention, subject, however, to the elimination of the reference to the members of the Commission, which the Drafting Committee had found unnecessary. Accordingly, the text before the Commission only provided for the selection of conciliators from the list to be established under paragraph 1 of the article.

40. Paragraph 3 reflected the concept of compulsory conciliation and reproduced the terms of article 12 of annex V to the United Nations Convention on the Law of the Sea.

41. Paragraph 4, which laid down a standard rule governing most third-party dispute settlement organs, was modelled on article 13 of the same annex of the United Nations Convention on the Law of the Sea.

42. Paragraph 5 was a simplified version of paragraph 3 of the annex to the Vienna Convention on the Law of Treaties. Since the first sentence gave the Conciliation Commission almost complete discretion in determining its procedure, the Drafting Committee had not deemed it necessary expressly to provide for the various steps which the Conciliation Commission might take in discharging its functions, such as inviting the parties or

⁵ See 2412th meeting, footnote 6.

international organizations with expertise in the area concerned to submit their views or drawing their attention to measures which might facilitate the settlement of the dispute. Nor did paragraph 5 deal with details relating to the Conciliation Commission's report. It did, however, specify the conditions under which the Conciliation Commission adopted its decisions. In view of the non-binding nature of the outcome of conciliation, the word "decisions" should be interpreted as referring to the Conciliation Commission's decision-making process, which, of course, extended to the formulation of recommendations. The relevant sentence reflected current practice and was closely modelled on existing precedents. Lastly, paragraph 6 was borrowed from article 3 (*h*) of annex V to the United Nations Convention on the Law of the Sea.

43. As to article 2 of the annex, dealing with the Arbitral Tribunal, he recalled that annex VII to the United Nations Convention on the Law of the Sea provided for a list of arbitrators, to be drawn up by the Secretary-General of the United Nations, from which members of the Arbitral Tribunal should preferably be chosen. The Drafting Committee had felt that as much leeway as was compatible with the requirements of impartiality should be left to all concerned in selecting the members of the Arbitral Tribunal, and had therefore omitted the requirement for a list of arbitrators.

44. In formulating article 2 of the annex, the Drafting Committee had drawn on article 3 of annex VII to the United Nations Convention on the Law of the Sea. It had, however, tried to simplify the extremely detailed provisions of that article. The reference in the first sentence of paragraph 1 to article 5 and article 7, paragraph 2, of part three covered, of course, the two hypotheses envisaged in article 5, namely, arbitration following a unilateral request as envisaged in paragraph 2 of article 5 and arbitration by agreement as provided in paragraph 1 of the same article. If the parties agreed to resort to a different type of arbitral tribunal, they remained entirely free to do so. If, however, arbitration was initiated by a unilateral request as provided in paragraph 2 of article 5, the Arbitral Tribunal would mandatorily be constituted in accordance with the provisions of article 2 of the annex.

45. Paragraph 2 of article 2 of the annex was based on subparagraphs (*d*) and (*e*) of article 3 of annex VII to the United Nations Convention on the Law of the Sea. The authority that would take the place of the parties in the event of difficulties in completing the composition of the Arbitral Tribunal was the President of ICJ, or its Vice-President, or the most senior member of the Court who was not a national of either party. The rationale behind those alternatives was to exclude the possibility of appointments being made by a national of one of the parties, with the attendant risk of casting doubt on the objectivity and impartiality of the Arbitral Tribunal. The same concern underlay the requirement in the last sentence of paragraph 2 that the members appointed by a third party should be of different nationalities. The corresponding provision of annex VII to the United Nations Convention on the Law of the Sea further prohibited the appointment of individuals who were in the service of, ordinarily resident in the territory of, or nationals of any

of the parties to the dispute. The Drafting Committee had considered that the prohibition should not extend to the case of appointments made as a result of the failure of one party to appoint its members. Since, under paragraph 1, that party had the possibility of appointing one of its nationals as a member of the Arbitral Tribunal, there was no reason to rule out that possibility when the appointment was made by a third party. Paragraph 3 of article 2 was taken from article 3 (*f*) of annex VII to the United Nations Convention on the Law of the Sea and differed from the corresponding provision of article 1 of the annex in only one respect, namely, the inclusion of the words "within the shortest possible time", which were intended to avoid unnecessary delays.

46. Paragraphs 4 and 5 had no equivalent in article 1 of the annex. The Drafting Committee had felt that, in view of the binding nature of the outcome of arbitration proceedings, it was essential that the subject-matter of the dispute, and therefore the terms of reference of the Arbitral Tribunal, should be clearly defined (either jointly by the parties or, failing agreement, by the Tribunal itself) at that start of the proceedings at the latest. Paragraphs 4 and 5 were equally applicable to arbitration proceedings instituted by unilateral requests under article 5, paragraph 2, of part three and to those instituted by agreement under article 5, paragraph 1. They were based on article 8 of the Model Rules on Arbitral Procedure.

47. Paragraph 6 paralleled paragraph 3 of article 1 of the annex. The Drafting Committee had borne in mind the difference between conciliation proceedings under article 3 of part three, which were always compulsory, and arbitration proceedings under article 5, paragraph 2, of part three, which were compulsory only if counter-measures had been taken. It had not, however, found it necessary to alter the language of paragraph 3 of article 1 of the annex to take account of that difference. In the case of arbitration under paragraph 1 of article 5, paragraph 6 postulated that the parties had previously agreed to resort to the Arbitral Tribunal provided for in article 2 of the annex, in which case they could not stop the process by failing to participate in the proceedings.

48. The Drafting Committee had not found it necessary to include in article 2 provisions along the lines of paragraphs 4 and 6 of article 1 of the annex, bearing in mind that the rules on arbitral procedure were well-established and did not need to be reiterated in the present context. One member of the Drafting Committee had thought, however, that there should be greater symmetry between articles 1 and 2 and had objected, in particular, to the non-inclusion of a paragraph providing that the Arbitral Tribunal was the judge of its own competence. That point would be elaborated in the commentary.

49. Paragraph 7 paralleled paragraph 5 of article 1 of the annex. Because of the binding nature of the outcome of the proceedings, the Drafting Committee had felt it appropriate expressly to reserve the possibility for the parties themselves to determine by agreement the procedure to be followed by the Arbitral Tribunal. As he had already indicated in introducing article 6, it was implicit in the nature of arbitration proceedings that the Arbitral Tribunal had the inherent power to issue such binding interim or protective measures as might be nec-

essary to ensure the effective performance of the task with which it had been entrusted.

50. Expressing the hope that the Commission would find it possible to adopt the recommended articles by consensus, he said that, since the report he had just introduced was the final report of the Drafting Committee at the present session, he wished to add a few remarks by way of general summing-up. The Drafting Committee had held a total of 35 meetings, of which 17 had been devoted to the Draft Code of Crimes against the Peace and Security of Mankind, 13 to State responsibility and 5 to international liability arising out of acts not prohibited by international law. It had adopted a total of 26 articles and an annex containing 2 further articles. It was, of course, for the Commission to assess the productivity of the Drafting Committee's work, but he wished to take the opportunity to express to all members of the Drafting Committee and to the three Special Rapporteurs his appreciation of their commendable efforts to arrive, as far as possible, at general agreement while respecting the views of all members. The Drafting Committee had made every effort to work as a team in an atmosphere of mutual respect and friendly cooperation, and that, he thought, had been its greatest asset.

51. Mr. ARANGIO-RUIZ (Special Rapporteur) said that part three of the draft would have to be completed when something was done about crimes at the next session. He had proposed an article on dispute settlement in the case of international crimes to become article 7 of part three of the draft. He referred the members of the Commission to the text of that draft article as proposed in his seventh report.

52. Contrary to the impression that the Chairman of the Drafting Committee might have given in his introduction, the articles adopted by the Drafting Committee for part three did not go beyond his proposals, in terms of innovation. What he had proposed for part three was a very tight set of procedures, regarded by some members as even revolutionary, which could be set in motion unilaterally and would lead to a settlement of any dispute following any countermeasure. To his mind, part three was preceded by article 12 of part two as he proposed in his sixth report, and specifically paragraph 1 (a), which provided a barrier against abuse of countermeasures.⁶ That article had also been considered revolutionary and specified that an injured State could not take countermeasures unless it had exhausted the means of settlement available to it under international law.

53. There was nothing to that effect in the present part three as proposed by the Drafting Committee and the conciliation envisaged in that part did not, therefore, prevent the taking of countermeasures prior to bona fide attempts at an amicable settlement. Obviously, the Drafting Committee had been influenced by a minority of members who had challenged his proposals by stating that they were revolutionary, and one member had even affirmed that the provisions on dispute settlement were unnecessary in a convention on State responsibility, which was supposed to codify and progressively develop the substantive, but not the procedural, law in that area.

It should not, in his view, be suggested too strongly to States that major innovations were being proposed in the area either of settlement of disputes or of State responsibility. On the contrary, it seemed to him that States were being provided by the Commission with much less valuable advice than was needed if progressive development of the law in those areas was to be achieved.

54. Mr. PELLET said that, despite the hope voiced by the Chairman of the Drafting Committee, there could be no consensus since, for that to be achieved, everyone had to join in. He for one was not ready, no matter what happened, to join in a consensus on a very important draft, a draft that was totally unacceptable to him. The mechanism devised by the Drafting Committee further to the Special Rapporteur's proposals could be described as an absolutely remarkable system which constituted an unheard of advance in international law, a break with current methods that no member of the Commission could object to in the abstract. The draft called into question what were the most firmly established principles of positive international law, in particular the free choice of means for the settlement of disputes, the principle that there was no obligation on States to submit disputes to arbitration and, a fortiori, to judicial procedures. Article 3, for instance, introduced a mechanism of compulsory conciliation, which was contrary to the principle of free choice of means for the settlement of disputes. But the Drafting Committee had not stopped there: in article 5 it had also introduced compulsory arbitration. He appreciated that paragraph 2 of that article applied solely to disputes that arose in connection with countermeasures and that paragraph 1 provided for optional arbitration. That was only the outward appearance, however. In reality, what the Drafting Committee had conceived was a generalized system of compulsory arbitration, since all it would take to impose such arbitration was for one State, which perhaps had never yet thought of doing so, to adopt countermeasures in order to force another State to go to arbitration. To that extent, the proposed system, regardless of any considerations of realism and desirability, was harmful and dangerous. It would encourage recourse to countermeasures, which must be used as little as possible in international relations. Again, by definition, it would be primarily of benefit to powerful States. For example, France or the United States of America could force Chad or Belize to go to arbitration by having recourse to countermeasures: the contrary was not the case. In short, while compulsory arbitration might seem to represent progress, it had the perverse effect of encouraging recourse to the countermeasures that were reserved for the powerful.

55. Moreover, if the proposed system were adopted, it would be tantamount to imposing recognition on States of the competence of ICJ to hear any international dispute since, in the final analysis, any dispute could be reduced to a dispute involving responsibility. Indeed, the Chairman of the Drafting Committee had himself stated that responsibility encompassed the whole of international law. A generalized system of compulsory arbitration would be imposed on States, in any event on weaker States, and the principle of the optional settlement of disputes under international law would be brought to an end. It might be regarded as an advance, but the problem

⁶ See 2393rd meeting, footnote 3.

posed by encouraging recourse to countermeasures still remained.

56. The Drafting Committee, in its keenness, had even reintroduced article 7, against which he had earlier voted and which provided for recourse to ICJ if the validity of an arbitral award was challenged. Contrary to all practice, however, that article failed to list the possible grounds for such a challenge. Even the forward-looking Model Rules on Arbitral Procedure contained a list of the grounds on which an application to nullify an arbitral award must be based. Under article 7, therefore, there would be no limitation on the grounds on which a State, dissatisfied with an award, could challenge the validity of that award before the Court. That was tantamount to introducing a procedure for appealing against arbitral awards which, though perhaps desirable in theory, was entirely alien to all the best practices of international law.

57. He was the first to recognize that the draft—apart from article 5, which was totally unacceptable, given the inequality it would create among States—probably pointed in the right direction, but he firmly believed that, on the whole, it was better to leave well enough alone. Much had been said of realism, but it was most unlikely that the draft would be enthusiastically received by States. Also, he was not unsympathetic to the argument that the Commission, as a body of independent experts, could, if it took the view that a particular system was good, propose that system to the General Assembly, at least on first reading. The system in question was, however, good only in part. It was also unrealistic. Above all, in proposing it, the Commission would be exceeding its mandate, which was to codify and progressively develop international law, not turn it upside down. In abandoning the principle of the free choice of means for the settlement of disputes, imposing compulsory arbitration for the settlement of any dispute, and introducing machinery for appeal to ICJ without the necessary safeguards, the Drafting Committee was certainly not codifying international law. Nor was it engaging in “progressive” development, however generous one might be in using the word “progressive”. Further, if the Commission did adopt the proposed articles, it would be revolutionizing the whole of international law, which was not what it was required to do by its statute. Such a course would also pose a great threat to the rest of the draft and in particular the acceptability to States of part one, to which he was still very much attached. The Commission would have threatened, purely for some abstract intellectual pleasure, probably the most important draft ever to have been placed before it.

58. On such an important matter, it seemed to him that a formal vote was essential, either on the text as a whole or on the two provisions that were totally unacceptable: article 5, paragraph 2, and article 7. A consensus would only distort the position of certain members, including his own: that position could be altered only if part three of the draft were declared to be optional, which was not the case.

59. Mr. JACOVIDES said that, over the years, he had consistently favoured the principle of compulsory third-party dispute settlement. Although for the time being

that could be no more than a desirable objective, it should none the less be the ultimate aim. In the particular case of State responsibility, there were even more reasons why such a principle should be applied, although its acceptability to the Commission and indeed to States as a whole was clearly limited. He would therefore go along with the draft proposed by the Drafting Committee, on the understanding that some slightly more elaborate arrangements could be arrived at, possibly at the Commission's next session, after the Sixth Committee had made known its reaction to the articles.

60. Mr. BENNOUNA said that it was difficult to speak calmly after Mr. Pellet had injected such passion into the debate. Naturally, Mr. Pellet's voice was but 1 among 35 and a consensus did not, of course, mean unanimity, particularly in the United Nations; rather, it signified an agreement in which the minority joined. Otherwise, the minority would have a right of veto, as it were. It was also unwise to threaten a vote which was in any event provided for in the rules.

61. What had surprised him most was that Mr. Pellet, in invoking the principle of the free choice of means for the settlement of disputes, had apparently forgotten the basic rules of international law. The Commission was not making a law but drawing up a draft convention to which a State could, or could not, accede, and in acceding to a convention, it expressed its consent to that convention. Mr. Pellet, who had taken part in the preparation of a major multilateral treaty, should know that there were hundreds of agreements which imposed the compulsory settlement of a dispute on the States in question; the draft convention with which the Commission was now concerned was just one more. The arguments Mr. Pellet had adduced, therefore, were quite unacceptable at the level of a body of experts in international law.

62. The other suggestion with which he would take issue was that small countries would be crushed by the major Powers if the parties to a dispute were required to have recourse to arbitration. That was putting a highly complex gloss on the matter, and he did not see it in that way at all. Indeed, such an argument—the small versus the powerful—should not even be raised. The fact was that there was a disparity in the balance of power throughout the world, and the law should seek to correct, not legalize, that disparity. In the specific case of responsibility, the law must take precedence over the use of force, and that was the principle laid down in article 12 of part two, which would have to be adopted sooner or later.

63. It was certainly not a question of a revolution but simply of continuity in the procedures for the settlement of disputes under international law. The only new factor was how to deal with article 12 of part two, and specifically, how to resolve the question whether or not the procedures for the settlement of disputes had to be exhausted before recourse could be had to countermeasures. In that connection he would remind members that his agreement on the articles as a whole was subject to the solution finally adopted for that article. It was interesting to note that, under the Understanding on rules and procedures governing the settlement of

disputes, priority was given to settlement of disputes over countermeasures.⁷

64. Again, the contention that there would be an unlimited right of referral to ICJ did not hold water since it was the validity, not the substance, of the award that would be at issue, as Mr. Pellet, who had pleaded before the Court on a number of occasions, should know. An award could be challenged, for instance, on the ground that its terms had not been respected, that it had not been delivered by the necessary majority, or that there had been a fundamental mistake of law. The case of the *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal) was one such case.⁸ It was important, therefore, not to read into a text something that it did not say.

65. The articles before the Commission were well drafted. To make it quite clear that the validity of the award could not be challenged after one year, however, he would propose that, in paragraph 1 of article 7, the words "made within a period of one year from the date of the award" should be added after the words "any party". Subject to that amendment and to a final decision on article 12 of part two, he was in favour of the adoption of the text before the Commission.

66. Mr. BOWETT said that he had been very disturbed to hear Mr. Pellet comment on the draft in such terms. He shared Mr. Pellet's concern about the risk that the system of compulsory arbitration provided for in article 5 of part three might act as an encouragement to States to take countermeasures as a means of forcing arbitration upon the other party. None the less, in the Drafting Committee, Mr. Pellet and he had been in a minority. It seemed only proper, therefore, to allow the view of the majority to prevail on first reading and to await the reaction of States in the General Assembly to the minority view. He saw no reason, however, for allowing that view to deprive the Commission of a consensus.

67. He agreed that the title of article 7 was somewhat misleading and that it did not really convey the function of the reference to ICJ. A better title might perhaps be "Challenges to the validity of an arbitral award", which would more accurately convey what was meant.

68. Mr. Pellet was concerned that article 7 did not list, in the body of the text, the grounds on which a challenge to the validity of an arbitral award might be made. In the Drafting Committee it had been agreed that the commentary to the article would simply refer to and possibly restate the grounds already described in the Model Rules on Arbitral Procedure. There was not much dispute about those grounds and hence there seemed to be no need to clutter up the article simply by listing grounds on which nullity might be alleged.

69. As to the main thrust of the article, which was to allow ICJ to resolve disputes about nullity, Mr. Pellet had suggested that the motivation behind it had been an abstract pleasure for its proponents. That was nonsense. It was a matter of practical necessity, because the real

situation was that if one of the parties was dissatisfied with an arbitral award, it was all too easy for it to dismiss the award. All it needed to say was that the award was not sufficiently reasoned or that the tribunal had made a fundamental procedural error. There were grounds for nullity that could be trumped up and could be argued even when they had very little basis in fact. But as matters stood, once grounds were advanced by a State, the State was, as it were, freed from the obligation to abide by the award. That was an unacceptable situation, and it was therefore a matter of practical necessity, not abstract pleasure, to provide a mechanism to prevent that situation from arising. The solution would simply be to allow a referral to the Court when there was a ground of nullity alleged by one of the parties to the award. It was not a very novel process. As Mr. Bennouna had pointed out, the Court had functioned in exactly that way recently in the case of the *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal). Without the article, the gap was so serious that the whole system became worthless.

70. Mr. ARANGIO-RUIZ (Special Rapporteur) said that everything he had wanted to say had already been said by Mr. Bennouna and Mr. Bowett, except with regard to Mr. Pellet's remark that one of the adopted provisions would encourage resort to countermeasures. In particular, he agreed with the idea of provisional adoption, subject to a final decision on article 12, with which part three was closely linked.

71. With regard to Mr. Pellet's remark that article 5, paragraph 2, would encourage the taking of countermeasures, it was difficult to see how a State would resort to countermeasures merely to bring another party before an arbitral tribunal. Clearly, it all depended on how strong a State felt its case was. Why would a State waste countermeasures, which were costly, simply to bring another State before a tribunal which would obviously also be called upon to pronounce itself on the legality of the countermeasures?

72. He failed to understand the distinction between large and small States drawn by Mr. Pellet, who had argued that it was easier for France or the United States to resort to countermeasures than for Belize or Chad. Obviously, the countermeasures to which a large State resorted would not be on the same scale as those of small States, but even in the case of small States, article 5, paragraph 2, would be applicable. Mr. Pellet's argument just did not hold water. It was another way of misleading small States.

73. Mr. MAHIOU noted that Mr. Pellet had criticized the Drafting Committee for being abstract, but had himself committed the same mistake, notwithstanding the examples he had cited. In any event, if no provision was made for resorting to arbitration, large States were free to resort to countermeasures without any control. If they did not win a dispute with a small State, they would in any case take countermeasures. With the procedure set out in article 5, paragraph 2, the countermeasures would at least be subject to judicial review. The arbitral tribunal would judge the small State that had committed the error, but it would also judge the countermeasure taken by the large State. Therefore, it did not disturb him that, by

⁷ GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (Sales No. GATT/1994-4), annex 2, p. 404.

⁸ *Judgment, I.C.J. Reports 1991*, p. 53.

resorting to countermeasures, a large State could force a small one to accept arbitration. There were circumstances in which liberty oppressed and the law liberated. In the case at hand, the convention was one that would protect a small State and also compel it to respect the law. He therefore failed to see the difficulties raised by Mr. Pellet in connection with safeguarding the freedom of action of small States.

74. Mr. EIRIKSSON said that he disagreed with Mr. Pellet and endorsed the comments of Mr. Bowett. Mr. Mahiou's remarks on the abstract nature of the point being raised were also well taken. He would ask the Commission to imagine a situation in which article 5, paragraph 2, did not exist and a State was prepared to agree to arbitration and then took countermeasures or otherwise exacerbated the debate in such a fashion that the other State then agreed to go to arbitration. Article 5, paragraph 1, would have the same effect. Therefore, it was not article 5, paragraph 2, that would give rise to that abstract possibility. It would simply be the fact that the debate had been exacerbated to such an extent that a State was prepared to take the matter to arbitration or to defend itself in some way.

75. As to a point made by Mr. Bennouna, it was his recollection that the Drafting Committee had agreed to a new title for article 7 reading: "Validity of an arbitral award which complies with the draft model rules". If the Commission agreed with Mr. Bennouna on the need to be more specific about timing in article 5, paragraph 1, he was prepared to suggest an appropriate wording.

76. On a procedural point, the Commission could perhaps move on to the adoption stage at the present time, because it was necessary to be able to prepare the work of the following week on adoption of the commentary, which would be submitted along with the commentaries to articles 11, 13 and 14 as part of the "package".

77. Mr. LUKASHUK said that, after listening to so much firm support, his own endorsement was almost superfluous. Mr. Jacovides was correct in saying that at the present stage, the debate should not focus on details, which had been very carefully discussed and reflected in a text which, to his mind, represented the best possible formulation. Notwithstanding Mr. Pellet's brilliant, albeit emotional, criticism, no one could deny the high calibre of the draft. The fundamental objections to the draft had been of a purely practical nature. Whether or not States agreed was not the point: the draft should be referred to the General Assembly, and its excellent quality was a credit to the Commission.

78. Mr. IDRIS suggested that the word "other" in article 2 should be deleted, because it was redundant. The words "or otherwise" in article 4, paragraph 1, should be removed, because they were not clear, or else the phrase "all necessary information by means of inquiry or otherwise" should be recast to read "all necessary information". In other words, no restriction would be placed on the latitude of the Commission to resort to inquiry or otherwise. The words "In addition" in article 4, paragraph 2, should be deleted and the sentence rephrased to read "They shall further". Finally, he agreed with Mr. Bowett about the title of article 7, although he preferred the word "objection" to "challenge".

79. Mr. de SARAM said that, although he endorsed the articles, he had a reservation about article 4, paragraph 2, which contained a particular reference to fact-finding within the territory of any party to the dispute. It was unwise to seek to legislate for particular cases in general articles. No such provision was found in article 6. He hoped that his reservation would be recorded in the commentary.

80. As to article 5, paragraph 2, for those who opposed countermeasures, the solution lay in article 30 of part one of the draft. Personally, he failed to see how article 5, paragraph 2, could encourage countermeasures. If a State, in the exercise of a unilateral right, had recourse to a countermeasure, it seemed only fair that the State against which a countermeasure was taken should have the unilateral right to go to binding arbitration. It was not apparent to him what else a State against which a countermeasure had been taken could do.

81. Mr. ROSENSTOCK, referring to article 5, said that implicit in the statement of the Chairman of the Drafting Committee was that the phrase "Failing the establishment of the Conciliation Commission" in no way restricted the freedom of action of States. That should be made perfectly clear in the commentary.

82. He had some sympathy for Mr. Pellet's hesitation to leap into part three and about the extent to which the Commission had gone in establishing binding dispute-settlement mechanisms. As to the effect on countermeasures, he none the less suspected that what the Commission was seeing was an objection to countermeasures and to anything that made countermeasures more rationally conceivable, rather than an actual objection to the mechanism itself. It seemed to him that a mechanism that forced States into a third-party dispute settlement safeguarded the equality of States at all levels of the dispute. That was why many members had stressed that, by promoting arbitration, greater equality of treatment, not inequality, was being fostered.

83. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the general introduction to the commentary to part three contained a basic flaw: the whole description was closely dependent upon article 12. In his view, the Commission should adopt the articles provisionally, subject to finalization and the commentaries, as soon as it had completed its final version of article 12, which had not yet been adopted.

84. Mr. ROSENSTOCK said that the Commission should not be held hostage to a particular view on article 12. The article had been adopted by the Drafting Committee and then sent back to it at the request of the Special Rapporteur. In effect, the Drafting Committee had adopted the article twice. If the Special Rapporteur, the Drafting Committee and the Commission as a whole could not make progress on article 12, an effort could be made to find a compromise solution. But it was unacceptable to say that the Commission could not move forward on part three or on articles 11, 13 and 14 because it had not reached agreement on article 12—an approach that would deny the Commission the benefit of receiving the response of the General Assembly and would make the Commission look very foolish.

85. Mr. ARANGIO-RUIZ (Special Rapporteur) said everyone recognized that the interrelationship between article 12 and part three posed a problem. If some members were anxious to submit some articles with commentaries to the General Assembly, the Commission might send the commentaries to articles 11, 13 and 14. He did not think that it would look foolish. With regard to the previous speaker's remark about being held hostage, the real question was: who was being held hostage by whom?

86. Mr. ROSENSTOCK thanked the Special Rapporteur for his assurances that at least articles 11, 13 and 14 could be referred to the General Assembly, because that would be a step forward and would respond to what the Commission had been asked to do. In his view, it should also be possible to submit part three.

87. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was one thing to send the text of part three to the General Assembly with the small changes that had been suggested in the course of the current meeting, and quite another to send the commentary, which inevitably went beyond the individual articles and concerned the whole system and thus again tied in with article 12. As he saw it, the problem would not be resolved before the end of the current session.

88. Mr. EIRIKSSON said that, as a member of the Drafting Committee, he had never seen any such relationship with article 12. He had worked purely on part three. Much of the commentary to part three was purely functional. If the Special Rapporteur agreed, there could be a whole section of the commentary to article 12, in which he could reproduce his views.

89. Mr. PELLET said he wished it to be placed on record that he contested Mr. Rosenstock's interpretation of the adoption of article 12.

The meeting rose at 1.10 p.m.

2418th MEETING

Monday, 17 July 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

Draft report of the Commission on the work of its forty-seventh session

1. The CHAIRMAN suggested that the Commission should consider its draft report to the General Assembly paragraph by paragraph, beginning with chapter II. He invited the members of the Commission to inform the secretariat directly of minor changes that were purely of a drafting nature and to bring up in plenary only those changes that involved substantive issues. The objective was that the Commission should submit the best possible report to its parent body.

CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.509 and Corr.1)

A. Introduction

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

2. Mr. IDRIS said that he considered the words "several Governments" at the end of the paragraph to be an exaggeration, especially as, later on, in paragraph 18, the Commission stated that "the reductions ... relied too heavily on the views expressed by a limited number of Governments".

3. Mr. THIAM (Special Rapporteur), supported by Mr. MAHIOU, proposed that the word "several" should be replaced by "certain".

Paragraph 12, as amended, was adopted.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

5. Mr. RAZAFINDRALAMBO proposed that, in the third sentence, the word "perhaps" should be replaced by the words "at least".

Paragraph 15, as amended, was adopted.

Paragraphs 16 to 25

Paragraphs 16 to 25 were adopted.