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Summary record of the 2458th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1996, vol. I

of the Charter, and that a new article on the matter was unnecessary.

73. Finally, draft article 7 of part three had provided for a particular system for the settlement of disputes related to international crimes, a system the Drafting Committee found unnecessary, since the provisions of part three could aptly cover disputes concerning both delicts and crimes.

74. Mr. BOWETT said the Chairman of the Drafting Committee had just described four of the draft articles as too complicated, but he would say, rather, that they were misconceived. The entire scheme had hinged on the acceptance of the compulsory jurisdiction of ICJ over crimes. The view generally taken had been that there was no way States would accept such compulsory jurisdiction, and that in that case, they would either reject chapter IV as a whole, thereby excluding crimes *in toto*, or refuse to sign the convention itself. The consequences of the scheme were very serious, and it was right and proper to avoid them.

PART THREE (Settlement of disputes)

75. Mr. EIRIKSSON introduced the memorandum in support of the proposals by Mr. Pellet and himself which related to part three of the draft (ILC(XLVIII)/CRD.4/Add.1).[15] In addition to the supporters listed in that memorandum (Messrs. Bennouna, de Saram, Idris, Kabatsi, Robinson, Szekely, Villagrán Kramer, Yamada and Yankov), other members had decided to endorse it, namely, Messrs. Barboza, Crawford, Fomba, Jacovides, Lukashuk, Thiam and Vargas Carreño. He referred the Commission to the memorandum, which contained detailed explanations for the reasons behind the proposal, and drew attention to some editorial corrections.

76. In essence, the proposal envisaged two stages. In the first, either party could require the Conciliation Commission to state in its final report whether there was prima facie evidence that a crime had been committed. An affirmative view by the Conciliation Commission would trigger the second stage, allowing either party unilaterally to initiate arbitration. The first stage acted like a filter, preventing abuse, and the second stage, involving compulsory arbitration, had been thought to be analogous to the requirement of compulsory jurisdiction for ICJ over disputes arising from pleas of *jus cogens* under articles 53 or 64 of the Vienna Convention on the Law of Treaties. The basis of the analogy had been seen in the relative uncertainty surrounding both the concept of crime and the concept of *jus cogens*.

The meeting rose at 1 p.m.

2458th MEETING

Thursday, 11 July 1996, at 3.15 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,[1] A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE[2] PROPOSED BY THE DRAFTING COMMITTEE[3] (*continued*)

PART TWO (Content, forms and degrees of international responsibility) (*continued*)

CHAPTER III (Countermeasures) (*concluded*)

ARTICLE 48 (Conditions relating to resort to countermeasures) (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of part two, chapter III, of the draft articles and recalled that a working group on article 48 [12] had been set up (2457th meeting). He requested

[15] It was proposed that a paragraph 6 should be added to article 57 [4] (Task of the Conciliation Commission) to read as follows:

"6. At the request of either party, the Commission shall indicate in its final report whether there is prima facie evidence that an international crime may have been committed."

It was also suggested that the text of article 58 [5] (Arbitration), paragraph 2, should be amended as follows:

"2. A dispute may, however, at any time be submitted unilaterally to an arbitral tribunal to be constituted in conformity with the Annex to the present articles in the following cases:

"(*a*) Where one of the parties to the dispute has taken countermeasures, by the State against which they are taken;

"(*b*) By either party to the dispute, in cases where the Conciliation Commission has indicated in accordance with paragraph 6 of article 4 that there is prima facie evidence that an international crime may have been committed."

[1] Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

[2] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

[3] For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

Mr. Crawford, coordinator of the working group, to introduce the working group's proposal.

2. Mr. CRAWFORD said that the working group had been able to agree on a strategy for a solution to the problems that had arisen because, at the stage reached in the Commission's discussions, that could be done by means of a drafting exercise. The Commission would nevertheless have to reconsider all of those problems on second reading.

3. The basic idea had been to combine the amendments proposed by Mr. Bennouna (2456th meeting) and by himself (2457th meeting) in a single paragraph, which was thus balanced. At the same time, his own amendment had been shortened, some terms having been regarded as unnecessary and even, in one case, undesirable. That exercise had led to paragraph 1 of the text of article 48 [12] dated 11 July 1996, which had been distributed.[4]

4. The first sentence was identical to the amendment which the Commission had adopted on Mr. Bennouna's proposal. However, the second sentence differed in two ways from the amendment the Commission had adopted on his own proposal. First of all, the word "rights" had been regarded as less ambiguous and more objective than the term "legal position". Secondly, the words "and which otherwise comply with the requirements of this chapter", which might not have been strictly essential, had nevertheless been regarded as useful for bringing out the idea that measures of protection were themselves countermeasures, even if they were provisional. They should be in conformity with the regime instituted by chapter III.

5. The working group recommended that the Commission should adopt article 48 [12], since the principle underlying the two sentences of the new paragraph 1 had already been approved and the working group had merely done a *toilettage* which had been made necessary when the two amendments had been combined.

6. The CHAIRMAN thanked Mr. Crawford and the working group for having tidied up what the Commission had already adopted and for arriving at a clearer, simpler and more coherent wording. He submitted article 48 [12] to the members of the Commission for their approval. He said that, if he heard no objection, he would take it that the Commission wished to adopt article 48 [12] as proposed by the working group.

7. Mr. LUKASHUK said that, for the sake of consensus, he was prepared to support the new proposal, even though it was not really satisfactory because it was unilateral and based only on the interest of the State which had committed the internationally wrongful act.

8. Mr. ARANGIO-RUIZ said that he maintained his reservation with regard to article 48 [12].

Article 48, as amended, was adopted.

9. Mr. EIRIKSSON said that he had doubts about the scope of the consensus the Commission had reached on the wording of article 48. Since he would no longer be a member of the Commission when it came to consider that text on second reading, he wished to stress that article 48 as it now stood did not clearly show the link between the general provision contained in paragraph 2, the specific provision embodied in paragraph 1 and the conditions laid down in paragraph 3, particularly with regard to the possibility that a tribunal might suspend interim measures of protection. In his opinion, it would have been better to combine paragraphs 1 and 2, starting with the sentence that constituted the wording of paragraph 2 and following it with the wording of paragraph 1 compressed into the following single sentence:

> "Prior to taking countermeasures, an injured State shall in any event fulfil its obligation to negotiate as provided for in article 54, without prejudice to the taking by that State of the interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter."

The restructured article would thus be clearer and bring out more clearly the links between the various provisions.

10. Mr. ROSENSTOCK said that, if article 48 had been put to the vote, he would have voted against the wording resulting from the various amendments, as opposed to that agreed on by the Drafting Committee. He had, however, not wanted to stand in the way of a consensus, considering as he did that the Commission should be able to transmit a text to the General Assembly and to Governments on which they could comment for the purpose of the second reading.

11. Mr. VILLAGRÁN KRAMER said that he had also not wanted to stand in the way of the consensus. However, he pointed out that, before deciding to resort to countermeasures, the injured State must, of course, make some attempt at negotiation, which the French called *la sommation*, and then, if the wrongdoing State did not comply with its request for cessation and reparation, it could exercise its right. He believed that article 48 as it

[4] The text proposed by the working group read as follows:

"Article 48 [12]. Conditions relating to resort to countermeasures

"1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter.

"2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

"3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

"4. The obligation to suspend countermeasures end in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure."

stood could never apply to international crimes because that would be illogical and counterproductive.

12. Mr. YAMADA said that, if article 48 had been put to the vote, he would have voted against the proposed text.

13. Mr. BENNOUNA said that he would have voted in favour of article 48.

14. The CHAIRMAN proposed that the members of the Commission should take a decision on chapter III as a whole. If he heard no objection, he would take it that the Commission wished to adopt chapter III as a whole.

Chapter III, as a whole, as amended, was adopted.

CHAPTER IV (International crimes) (*continued*)

ARTICLE 51 (Consequences of an international crime)

15. The CHAIRMAN invited the Commission to continue its consideration of chapter IV, of which the introduction and article 51 had been submitted by the Chairman of the Drafting Committee at the preceding meeting.

16. Mr. VILLAGRÁN KRAMER, explaining why he partially supported chapter IV, said that, when the Commission had adopted article 19 of part one of the draft, the dichotomy it had established had made it possible to state the characteristics of delicts and crimes and to distinguish between them. It had also made it possible to understand the basic difference between the organized international community as a whole and the institutional community in the context of the United Nations. Two regimes thus existed side by side, the first being that of general international law, which was applied to crimes, and the second, the one which existed under the Charter of the United Nations. The provisions which the Commission had adopted so far clearly showed that the chapter relating to crimes had no application within the United Nations, and vice versa, since the scope of the United Nations system was limited by Article 1 of the Charter.

17. In view of the lack of precision of the legal writings on the question, it should also be stressed that crimes were an extremely serious violation of rules essential for the international community as a whole. The legal and international consequences of such crimes should not therefore be mitigated, but, rather, aggravated. In the Drafting Committee, he had not managed to convince the other members of the validity of his point of view, so that the Drafting Committee had adopted a very "soft" and "tolerant" regime, which had no effect on the Charter of the United Nations. No member State of the Security Council or the Council itself would be bound to apply the rules formulated by the Commission in the event of an international crime and the Council would not find a satisfactory legal regime. If account was taken, for example, of the resolutions which had been adopted at the time of the conflict between Iraq and Kuwait, it would be seen that they were much harsher than what was provided for in chapter IV of the draft.

18. In conclusion, he hoped that, on second reading, the Commission would be able to bring out more clearly what he regarded as the fundamental difference between international crimes and international delicts.

19. Mr. ROSENSTOCK said that, even if he subsequently refrained from requesting a vote, he now dissociated himself from any action the Commission might take on chapter IV because he was of the opinion that the concept of international crimes did not exist and did not need to be created and that no State practice justified the creation of such a concept, which could not give rise to far-reaching consequences.

20. With regard to the comments on action by the Security Council, he pointed out that the Council had not found that a crime had been committed and had done no more than to determine that a State had engaged its international responsibility by committing a wrongful act. In his opinion, the idea of an international crime committed by a State was more the result of media influence on certain lawyers than of a cogent analysis.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 51.

Article 51 was adopted.

ARTICLE 52 (Specific consequences)

22. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 52 dealt with reparation in the event of an international crime. After the Drafting Committee had reviewed the four forms of reparation set out in articles 42 to 46, namely, restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, it had taken the view that all those remedies should be available to the injured State as a result of an international crime without three of the limitations established in the case of a delict. With regard to the condition laid down in article 43, subparagraph (*c*), namely, that restitution in kind did not impose a burden out of all proportion to the benefit that the injured State would receive in obtaining restitution in kind rather than compensation, the Drafting Committee believed that, since the basic purpose of restitution was to restore the situation as it had existed prior to the wrongful act, the wrongdoing State should not be able to keep the proceeds of conduct that was so serious as to be characterized as a crime. The Drafting Committee also considered that the condition laid down in article 43, subparagraph (*d*), namely, that restitution did not seriously jeopardize the political independence or economic stability of the wrongdoing State, was not justified in the case of a crime. It had taken the view that, since the wrongdoing State had forfeited its dignity, the limitation set in article 45, paragraph 3, with regard to impairment of dignity was also not applicable.

23. The Drafting Committee had not considered it necessary to make other changes in the consequences provided for in the case of an internationally wrongful act. The obligation of cessation of the wrongful conduct and the obligation to make full reparation obviously applied both to crimes and to delicts.

24. Some members of the Drafting Committee had wanted article 52 to provide for the possibility of punitive damages, but the majority had taken the view that that was unnecessary, particularly as article 45, paragraph 2 (*c*), already provided that, in cases of gross infringement of the rights of the injured State, the wrongdoing State should pay damages reflecting the gravity of the infringement. The Drafting Committee recommended that the Commission should adopt article 52.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 52.

Article 52 was adopted.

ARTICLE 53 (Obligations for all States)

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that an international crime, which, as stated in article 19, paragraph 2, of part one involved the breach of an international obligation "essential for the protection of fundamental interests of the international community", called for a collective response by that community. When confronted with the commission by a State of an international crime, the members of the international community, which, as stated in article 40, paragraph 3, were all "injured States", had a duty to take certain actions in order to safeguard those fundamental interests. The purpose of article 53 was to set out the obligations that the commission by a State of an international crime entailed for all other States. In preparing the text being submitted to the Commission, the Drafting Committee had considered the proposals which had been made by the two former Special Rapporteurs, namely, draft article 14 proposed by Mr. Riphagen[5] and draft article 18 proposed by Mr. Arangio-Ruiz.[6]

27. The obligations under the first two subparagraphs were negative. Subparagraph (*a*) embodied the obligation of States not to recognize as lawful the situation created by the crime. Subparagraph (*b*) stated the rule that assistance to a State which had committed an act affecting the fundamental interests of the international community in order to maintain a situation which all States had the duty to consider unlawful under subparagraph (*a*) was in itself an unlawful act.

28. Subparagraphs (*c*) and (*d*) dealt with two positive obligations. The duty to cooperate embodied in subparagraph (*c*) was an expression of the solidarity of the international community in the face of a crime and it strengthened the effectiveness of the individual obligations of States. Some members had considered that subparagraph (*c*) was unnecessary as the obligation it contained was already covered by subparagraph (*d*), which related to the obligation of States to cooperate in the application of measures designed to eliminate the consequences of the crime. The Drafting Committee had considered that, even if a State had not participated in the decision to adopt such measures, it must, as a member of the international community whose fundamental interests had been affected, join in efforts to eliminate the unlawful situation created by the crime. Some members nevertheless expressed reservations on the grounds that the provision in subparagraph (*d*) did not reflect *lex lata*.

29. Article 53 did not deal with the question of sending fact-finding operations or observer missions to the territory of a State which had committed a crime, as referred to in article 18, paragraph 2, as proposed by the former Special Rapporteur, Mr. Arangio-Ruiz, because that type of fact-finding mechanism was provided for in part three of the draft and, specifically, in article 57 [4], paragraph 2, and article 59, paragraph 2. The Drafting Committee recommended that the Commission should adopt article 53.

30. Mr. LUKASHUK said that, in his opinion, article 53 and chapter IV as a whole were the result of the excellent work done by the Drafting Committee and an example of what the Commission could do best. It had in fact reached a new stage in the development of international law in the sense that an international crime stopped being simply the problem of a State and became a matter of concern to the entire international community, and that was an important step towards the formulation of rules of *jus cogens* and the obligation *erga omnes*.

31. He also stressed that article 53 left no doubt about the non-applicability in that case of article 48, paragraph 1, and that, without any condition, it required every State party immediately to adopt the rules which it stated. In particular, that article showed that the right to resort to countermeasures belonged directly to the injured States.

32. In conclusion, he considered that article 53 was based on positive international law, took account of progressive trends in its development and fully met the requirements of the Charter of the United Nations. He also endorsed what Mr. Villagrán Kramer had said in that regard.

33. Mr. YANKOV said that he supported the article under consideration, which combined elements of *lex lata* and elements of *lex ferenda*. First, it stated an obligation *erga omnes* to take account of the gravity of crimes. Secondly, subparagraphs (*a*) and (*b*) stated the consequences of the *erga omnes* nature of the obligation in question and, thirdly, subparagraphs (*c*) and (*d*) stated the principle of cooperation enunciated in more general terms in the Declaration of Principles of International Law on Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[7] and in other instruments and it was to be hoped that it would one day become a generally recognized principle of international law.

34. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 53.

Article 53 was adopted.

35. Mr. ARANGIO-RUIZ said he did not think that his proposal that States should accept the compulsory juris-

[5] See 2436th meeting, footnote 17.

[6] See 2457th meeting, footnote 11.

[7] General Assembly resolution 2625 (XXV), annex.

diction of ICJ for such a serious issue as the existence/attribution of an international crime had been "misconceived", to use Mr. Bowett's term. The misconception was rather, especially on the part of lawyers, to leave such an issue in the exclusive discretion of a restricted political body like the Security Council: which is precisely what the "mouse", produced by the Drafting Committee, actually did. By not attributing any role to the Court, the Commission would be missing an opportunity to do something positive and would inevitably achieve a negative result.

36. The Commission was missing an opportunity to develop the law and prepare for the future because, in the first place, it would probably be several decades before a convention on State responsibility could be adopted and States would thus have plenty of time to think about a proposal *de lege ferenda* which the Commission would submit to them on the role of ICJ in relation to crimes. Secondly, the Vienna Convention on the Law of Treaties and, in particular, its articles 64 and 66 provided for the compulsory jurisdiction of the Court in one respect, namely, *jus cogens*, which was fairly close to the subject-matter of chapter IV. Thirdly, Mr. Bowett himself had admitted that a judicial decision was necessary as far as crimes were concerned, merely suggesting, however, that in view of the slowness of the Court's proceedings, the task of determining the existence/attribution of a crime should be entrusted to an ad hoc body. However, there was no sign of that compromise in the text proposed by the Drafting Committee. Fourthly, the role which would be assigned to the Court would not cover the entire subject-matter of crimes and the Court would thus not be requested to deal with all the issues to which a crime gave rise. What he had been proposing, in his capacity as Special Rapporteur, was that the Court should make a finding of the existence/attribution of a crime after the General Assembly or the Security Council had made a preliminary political finding of *fumus criminis*. The aim was thus not to establish the compulsory jurisdiction of the Court in respect of any issues whatsoever relating to State crimes. The Court would only pronounce itself, if seized by either side, on existence/attribution. The rest would remain in the hands of States.

37. Consideration must also be given, as Mr. Bowett had not seemed to do, of the other side of the coin, namely, the negative result the Commission was achieving because, by not giving the Court any role, it was leaving the matter of crimes entirely in the hands of political bodies, primarily those of the Security Council, whose action was being looked at with growing concern by Governments and scholars throughout the world. In fact, the opposition to any role for the Court showed that there was a basic difference of opinion about the Commission's role in the progressive development of international law. His belief was that, by not assigning the Court any role in chapter IV of part two of the draft articles, the Commission was taking a step backwards and endorsing a regression in the development of the law of State responsibility and the law of collective security. Mr. Rosenstock's comments very clearly showed how justified his concerns were about the consequences of the choice the Commission would be making by adopting chapter IV as proposed by the Drafting Committee.

PART THREE (Settlement of disputes) (*continued*)

38. The CHAIRMAN, referring to the proposal which Mr. Eiriksson and Mr. Pellet had submitted at the preceding meeting in connection with part three of the draft articles (ILC(XLVIII)/CRD.4/Add.1),[8] recalled that, in view of the close link between that proposal and chapter IV of part two, it had been decided that the proposal should be considered before chapter IV as a whole was adopted.

39. Mr. BOWETT said that, although the proposal submitted by Mr. Eiriksson and Mr. Pellet was not without merit as to substance, it would be tactically wiser not to adopt it at the current stage because, in the articles it had already adopted, the Commission had provided for compulsory arbitration in respect of countermeasures and it was not known whether States would accept that initiative. He was almost certain that, in also providing for compulsory arbitration in respect of crimes, the very idea of compulsory arbitration might be rejected by States, in respect both of crimes and of countermeasures. He was therefore of the opinion that the proposal should be referred to in the commentary and that States should be expressly requested to make their views on it known. If they supported it, the Commission could come back to it on second reading.

40. It would, moreover, not be so serious not to provide for compulsory arbitration in respect of crimes. Under the proposed amendment to paragraph 1 contained in the proposal by Mr. Eiriksson and Mr. Pellet, the conciliation commission would indicate in its final report whether there was prima facie evidence that a crime might have been committed. The provisions already adopted implicitly had the same effect: either of the parties to the conciliation procedure before the conciliation commission, whose action was in any event already provided for as the draft now stood, might request it to rule on that point and it would be hard to imagine it refusing to do so.

41. Some members had been of the opinion that there had to be some monitoring of the implementation of the specific consequences of the attribution of a crime. He also considered that monitoring was necessary, but thought that it already existed in the draft as it stood. The specific consequences referred to in article 52, namely, the differences in restitution in kind and in satisfaction in the event of an international crime, would be taken into account as part of a procedure involving a third party, which would thus carry out monitoring. The obligations stated in article 53 involved a collective reaction that would usually take place under United Nations auspices and there too would be monitoring.

42. Mr. ROSENSTOCK said that the proposal by Mr. Eiriksson and Mr. Pellet would be interesting if the problem it was designed to solve actually existed, but that was not the case. It was euphemistic to say, as the authors of the proposal did, that the concept of crime was still controversial and uncertain. Moreover, no provision of chapter IV attributed such radical consequences to the existence of a crime as those which the Vienna

[8] See 2457th meeting, footnote 15.

Convention on the Law of Treaties attributed to the emergence of a new norm of *jus cogens*. If countermeasures had been taken, moreover, the text already provided for a dispute settlement obligation. Mr. Bowett's comment on the obligation not to recognize as lawful the situation created by a crime was, of course, judicious, but that obligation was not limited to crimes, whatever meaning was given to that term. Many other violations of obligations *erga omnes* had the same consequence and, by placing the emphasis on crimes, as the authors of the proposal wanted to do, those other cases in which non-recognition was essential and for which no one had proposed any compulsory settlement procedure were being put on the back burner.

43. Far from being necessary, the proposed amendments would be harmful. In the first place, as Mr. Bowett had said, adopting them would further reduce the chances that States might accept part three of the draft articles. There might also be doubts about whether it was wise to request a conciliation body to rule on the existence of a crime because that might jeopardize chances of conciliation. Conciliation was a dispute settlement procedure which, by its very nature, ruled out any judgement. A conciliator was not asked the same thing as a judge. A conciliation procedure was supposed to lead to the settlement of the dispute, not to a compulsory ruling or judgement. For all those reasons, he considered that the proposal by Mr. Eiriksson and Mr. Pellet was neither necessary nor wise and that that was why the Drafting Committee had rejected it and why the Commission should do the same. If the proposal was to be maintained, he would request that it should be put to a vote and would vote against it.

44. Mr. EIRIKSSON, referring to the comments by Mr. Bowett, said he believed that Governments could consider and agree to a compulsory arbitration procedure in respect of crimes independently of the position they would adopt on compulsory arbitration in respect of countermeasures.

45. Mr. ARANGIO-RUIZ said that he agreed with the idea behind the proposal by Mr. Eiriksson and Mr. Pellet. With regard to the concern Mr. Bowett had expressed about conciliation, there was indeed a problem that would have to be solved, anyway. The problem was obviously for the Commission to envisage how, as a matter of law, a procedure involving an ad hoc body set up by only two States could bring about a finding whose effects would involve all the States participating in the convention on State responsibility. Subject to the solution of that problem, he did not think that, by adopting that proposal, the Commission would be lessening the chances that States would accept the compulsory arbitration procedure referred to in article 58 [5], paragraph 2. States must be credited with some legal intelligence. The proposal under consideration offered the advantage of involving a quasi-judicial body and, although he would have preferred that some role should have been assigned to the Court, he considered that, short of that, the Commission should at least provide for a compulsory arbitration procedure.

46. Mr. CRAWFORD said that it was necessary to propose a specific dispute settlement procedure for allegations of crime, whose consequences, especially those provided for in article 53, were serious. However, he would have preferred a closer analogy between the system proposed for crimes and the system adopted for countermeasures. In the latter case, arbitration was a corollary of countermeasures, but that was not true of crimes. Mere allegations of crime should not have consequences with regard to dispute settlement or, in other words, should not be enough to impose compulsory arbitration any more than the mere allegation of wrongful conduct not accompanied by actual countermeasures. The event giving rise to an obligation of compulsory arbitration should be the adoption by States of measures in specific response to conduct characterized as criminal.

47. Mr. Rosenstock had been right to say that the obligations stated in article 53 were not peculiar to crimes; that might call into question the need for further analysis of the concept of crime—and that was, of course, exactly what Mr. Rosenstock had wanted to demonstrate. All the provisions relating to crime, including article 19 of part one, should therefore be analysed in very great detail on second reading. On first reading, however, the Commission should adopt the proposal under consideration, if only to attract the attention of States and provoke a debate on the question.

48. Mr. VILLAGRÁN KRAMER said that the proposal was particularly interesting for small States. When a small State, or even a medium-sized State, was the victim of an international crime, it had two options: it could either bring the case before the Security Council, in the hope that a permanent member would take its side and there would be no veto, or it could follow the course that the Commission was now mapping out in the draft articles. In the event of aggression, for example, a small country's fate was in the hands of the Council. If the Council took action, as in the case of Kuwait, the country concerned could hope for a result, but, if the Council did not take action, the country would find itself at a dead end. The advantage of the proposal under consideration was that it was designed to institutionalize a system that would enable States to obtain a finding of a crime through conciliation. It made available to small States a body to which they could apply and, from that point of view, arbitration was better than relying on ICJ. Apart from being extremely slow, proceedings before the Court were a heavy financial burden for small countries. Arbitration had the advantage of being both faster and less costly.

49. Mr. YANKOV noting that the topic under consideration was a new step in the direction of the development of international law, said that the position of the members who were not sure that the results of the approach being followed would be acceptable was quite understandable. He nevertheless recalled that the Commission was only at the first reading stage and that there were good reasons for giving States some idea, in the articles under consideration and the commentaries thereto, of the innovations on which they would have to take a decision. His own position was based on three considerations.

50. First of all, the evidence which would, according to the amendment by Mr. Pellet and Mr. Eiriksson, be sub-

mitted to the conciliation commission for it to decide whether, prima facie, a crime had been committed would obviously be provided by the States concerned, but would be evaluated by a third party, namely, the conciliation commission chosen by agreement among the parties to the dispute. The conciliation commission would presumably include an analysis in its final report of the probative value of the evidence that was designed to determine whether the crime had been committed. That must be clearly stated in the commentary.

51. Secondly, from the point of view of method, the Commission had to choose between submitting the draft articles under consideration or stating its opinion in the commentary. As it was still on the first reading, the first solution was better because it would show, in the draft articles themselves, that there was a trend in the Commission in favour of compulsory settlement by a third party. That trend was, moreover, being confirmed in real life. For example, his own country had withdrawn the reservations on that point which it had formulated to major international conventions. That phenomenon must be taken into account and meant that the Commission had to be bolder. The proposed amendment by Mr. Pellet and Mr. Eiriksson should be adopted for that reason alone.

52. Thirdly, the situation went beyond the problem of countermeasures. At the forty-seventh session, the Drafting Committee had not encountered any serious problems in preparing part three of the draft articles. There was nothing to prevent the Commission from broadening the scope of that part and moving international law one more step ahead. For those reasons, he endorsed the proposed amendment to article 57 [4] and, in advance, the amendment relating to article 58 [5].

53. Mr. LUKASHUK said that he bowed to the logic of Mr. Bowett's arguments. Although the amendment proposed by Mr. Pellet and Mr. Eiriksson probably had the advantage of facilitating the implementation of the provisions on dispute settlement and, despite the desire to go as far as possible in the direction that that amendment indicated, he was of the opinion that the adoption of article 48, paragraph 1, which made it an obligation for the injured State taking countermeasures to fulfil the obligations on dispute settlement deriving from part three, had totally changed the situation. He could therefore no longer support that amendment.

54. Mr. GÜNEY said he regretted that he also could no longer support the amendment submitted by Mr. Pellet and Mr. Eiriksson. First of all, the international community's reticence, if not apprehension, about any idea of giving a third party compulsory jurisdiction was well known. Ignoring that fact and introducing the idea of a conciliation commission that would have decision-making power, that is to say the power to find in its report that a crime might have been committed, would be going too far.

55. Secondly, such power to make a finding would not relate only to crimes. There would also be obligations *erga omnes*, those which were binding on the parties. Moreover, according to the wording as it now stood, the jurisdiction of the conciliation commission would not be limited to crimes. The proposal under consideration would therefore reduce the chances of acceptance of the whole of the draft, which was an important and complex instrument.

56. Mr. HE said that the mechanism proposed in the amendment by Mr. Eiriksson and Mr. Pellet would be superfluous. He referred to the footnote to article 40, which established a kind of equivalence between the term "crime" and the term "an internationally wrongful act of a serious nature". In the context of the specific consequences of a crime as compared to those of an internationally wrongful act, the characterization of an offence as a crime or as a serious act might be done by the mechanisms already provided for in the draft articles.

57. The crux of the problem was whether the conduct in question was an international crime. The injured State was the first to decide, its decision being reflected in the request for compensation it made in accordance with article 52, since it could base itself on subparagraph (*b*) in order not to apply paragraph 3 of article 45. Other States also decided in accordance with article 53, since each one must choose whether or not to comply with the obligations provided for in subparagraphs (*a*) to (*d*) of that article and to assume their responsibilities accordingly. It was also possible that, at the same time, the Security Council would not recognize the existence of a crime in a binding resolution, in the event that the case had been submitted to it.

58. If the wrongdoing State contested the characterization of crime thus made by the other States, the dispute existed. The dispute could, however, be settled by the current provisions of part three, whether it involved a crime or a serious internationally wrongful act. According to Article 33 of the Charter of the United Nations, moreover, every State had the right to apply to the Security Council if the continued existence of the dispute was likely to threaten the maintenance of international peace and security. Whatever provisions the Commission would ultimately adopt, they would in no way affect that right.

59. He therefore considered that the problem raised by the distinction between crimes and delicts could be settled by the provisions already contained in part three of the draft articles and in the Charter of the United Nations. He was opposed to the amendment proposed by Mr. Eiriksson and Mr. Pellet.

60. Mr. de SARAM recalled that he had already expressed the reservations he had about the inclusion of the concept of "crime" in the draft articles. With regard to the footnote to article 40, it seemed to him in any case that what was meant was an internationally wrongful act of very broad scope. Immediately after the adoption of article 40, moreover, he had made a statement in which he had explained that he understood that that article referred to any "breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community", as clearly stated in article 19, paragraph 2, of part one.

61. In his view, it only confused matters to bring up questions about the opposition between small and large and weak and strong States and even to refer to the Security Council. What was being done was to include crimes

in the area of State responsibility, whose main purpose was cessation and reparation. The concept of crime was, however, defined in treaties only to a very limited extent and, in article 19, entirely provisionally, on the basis of a non-exhaustive list which left much to be desired, as had already been pointed out. In the absence of a conventional definition of "State crime", the conclusion that a State had committed a particular crime could be derived from customary general international law.

62. The Commission was, moreover, dealing primarily with the problem of countermeasures. As was known and as the amendment proposed by Mr. Eiriksson and Mr. Pellet clearly showed, States would have the possibility of taking countermeasures against a State in situations *erga omnes* before the existence of the crime had been found out. Article 50 and, in particular its subparagraphs (*a*) and (*b*) obviously prohibited certain countermeasures, but that did not prevent a State from being seriously affected by reprisals even before the finding by a third party that a "crime" had been committed.

63. The proposal by Mr. Eiriksson and Mr. Pellet was relatively modest. Alongside the right to countermeasures, it established a system which made recourse to arbitration by a third party available not only to the accusing State, but also to the accused State. That possibility was offered after the conciliation phase (arts. 56 [3] and 57 [4]), a reasonable link-up point, although it would have been better for the finding of the crime and its compulsory effects to occur before countermeasures. It was in that way that the proposed amendment was not so bold: it was designed only to enable the State accused of a crime to resort to conciliation and, if necessary, to compulsory arbitration.

64. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, said that, at first glance, he had found the proposed amendment by Mr. Eiriksson and Mr. Pellet attractive, but, after some thought, he was not sure that it really served any purpose. It had a number of drawbacks resulting from the fact that article 53 established obligations for all States whenever an international crime had been committed. From that point of view, the finding that a crime had actually been committed was thus of particular importance for the entire international community. In the new paragraph 6 that was to be added to article 57 [4], a role in that regard was now entrusted to the conciliation commission, which must say "whether there is prima facie evidence that an international crime may have been committed". However, conciliation was a relatively lengthy process and that could be a problem for States which needed to know as of when they were bound by the obligations deriving from article 53.

65. If conciliation had failed, article 58 [5] provided for arbitration, but, from the point of view of article 53, could the decision of an arbitral tribunal chosen by the parties to the dispute have effects for all States? In fact, only the solution which had been advocated by the former Special Rapporteur, Mr. Arangio-Ruiz, and which was to rely on ICJ for a finding of a crime was genuinely satisfactory, but it had been rejected for various reasons.

66. However imperfect it might be, the amendment under consideration could nevertheless be regarded as a first stage and he would therefore not stand in the way of consensus if the Commission decided to adopt it.

67. Mr. FOMBA said that he fully supported the proposed amendment by Mr. Eiriksson and Mr. Pellet, which was logical, modest and quite well balanced, and he thanked Mr. Villagrán Kramer for his arguments in favour of weaker countries.

68. Mr. ARANGIO-RUIZ, speaking on a point of clarification, said that, when he had considered the question of the "finding" that an international crime had been committed in connection with article 19 of part one, he had never proposed that States should be entitled to apply directly to ICJ. In his view, the Court should be seized by the parties only to confirm (or reject) a prior finding by the General Assembly or the Security Council that there was prima facie evidence of the commission of a crime. The solution he was advocating had the advantage of striking a balance between the respective roles of the political bodies and the judicial body of the United Nations. The proposal by Mr. Eiriksson and Mr. Pellet led in a way to a replacement of the two political bodies, the Assembly and the Council, by a conciliation commission, the next stage being an arbitral tribunal. He would at least like the idea of compulsory arbitration to be kept, thereby making available the services of the "group of jurists" to which Mr. Bowett had suggested an application should be made when he had said that the proceedings of ICJ were too slow. However, as he had already pointed out, the question of the extent to which the decisions of such a tribunal might have effects for all the contracting States still had to be answered.

69. In any case, he did not see why the Commission was so hesitant to entrust the Court with what was after all a very limited role, namely, deciding that a crime had been or was being committed. Following such a decision, it would be for States to draw the consequences under the relevant provisions of the State responsibility convention.

70. Mr. MIKULKA said that he agreed with Mr. Calero Rodrigues' comments on the proposed amendment by Mr. Eiriksson and Mr. Pellet. Although a provision on the compulsory settlement of disputes by a third party could be included in a convention dealing with specific crimes, that would be very utopian in such a general instrument as the convention on State responsibility that the Commission was trying to draft.

71. Several references had been made to the analogy with the provision of article 66, subparagraph (*a*), of the Vienna Convention on the Law of Treaties, which related to the application and interpretation of articles 53 and 64 on *jus cogens*. In that Convention, however, it was not to make a finding of the existence of a norm of *jus cogens*, but to draw some conclusions therefrom, that the parties had to submit to the compulsory jurisdiction of ICJ.

72. In the draft articles under consideration, the situation was very different. If there was prima facie evidence that a crime might have been committed, States should

undertake to submit to the compulsory jurisdiction of the arbitral tribunal. It was not very realistic to impose such a restriction on them. In the light of those comments, he was not sure whether the proposed amendment should be retained and invited its sponsors to decide whether it was really necessary.

73. Mr. CRAWFORD said that he agreed with Mr. Mikulka's reservations. He also pointed out that the proposed amendment by Mr. Eiriksson and Mr. Pellet might lead to an absurd situation. Supposing that, during a dispute between two States, State A accused State B of having committed a crime and the allegation was confirmed by the prima facie findings of the conciliation commission, State B would then be entitled to bring the case before an arbitral tribunal, which might well consider that what had been committed was not a crime, but simply an "internationally wrongful act", and that, consequently, it did not have jurisdiction. The proposed solution went, as it were, half way towards compulsory arbitration.

74. Mr. BENNOUNA said that, like many of the speakers who have preceded him, he was not sure about the need for the proposed amendment by Mr. Eiriksson and Mr. Pellet. In principle, the compulsory jurisdiction of ICJ would be better than that of an arbitral tribunal because it would have the advantage of offering consistent and continuing jurisprudence. He nevertheless regretted that he had not had time to give further thought to the proposal, which definitely deserved more detailed consideration. He would particularly like the Commission to take the time to analyse all its consequences. He therefore proposed that any decision on that proposal should be postponed until the following meeting.

75. Mr. GÜNEY said that he endorsed the comments by Mr. Mikulka and Mr. Bennouna and supported Mr. Bennouna's suggestion that the adoption of a decision on the proposed amendment should be postponed until the following meeting.

76. The CHAIRMAN suggested that, in order to speed up the work, Mr. Eiriksson, Mr. Mikulka and Mr. Crawford should meet to try to find a common position for the next meeting.

The meeting rose at 6.05 p.m.

2459th MEETING

Friday, 12 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*concluded*) (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,[1] A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE[2] PROPOSED BY THE DRAFTING COMMITTEE[3] (*concluded*)

PART THREE (Settlement of disputes) (*continued*)

1. Mr. EIRIKSSON said that, at the Chairman's request, he had met with a small group of members to study, in the light of the discussion at the preceding meeting, the proposals on articles 57 [4] and 58 [5] already submitted by Mr. Pellet and himself (ILC(XLVIII)/CRD.4/Add.1).[4] The result of that meeting was a new proposal for the incorporation of a paragraph 6 in article 57 [4], one that would read:

> "6. If the dispute in question arises between a State which has committed an international crime and an injured State as to the legal consequences of that crime under these articles, the Commission shall, at the request of either party, indicate in its final report whether there is prima facie evidence that an international crime has been committed."

2. Again, the proposal for article 58 [5], paragraph 2 (*b*), would be revised to read:

> "(*b*) In the case of a dispute to which paragraph 6 of article 57 applies and in which the Conciliation Commission has indicated that there is prima facie evidence that an international crime has been committed, by either party to the dispute."

3. The intended effect of the new formulation was to refer explicitly to a dispute, thereby tightening the link to the whole subject of the settlement of disputes that was the focus of part three, and making it clear that spurious allegations that had not reached the level of a dispute would not be the subject of judicial proceedings under

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[1] Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

[2] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

[3] For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

[4] See 2457th meeting, footnote 15.