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Summary record of the 2459th meeting

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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.

article 57 [4]. The new form of language likewise connected the dispute to the legal consequences of an international crime, something that was only fitting in a set of articles that dealt with precisely that subject. It had been pointed out that the legal consequences of an international crime did not differ significantly from those of other internationally wrongful acts, but because of the serious nature of an international crime, it had been felt that provision should be made for the option of third party settlement mechanisms. The new text did not touch on the *erga omnes* aspect of international crimes—the fact that numerous parties might be affected—since the Commission had not decided to establish a particular category of specially affected States, though it had recognized in its discussions that such a category might well exist. At the dispute settlement stage, it had been felt that the emphasis should be placed on bilateral relations.

4. He commended the texts to the Commission and hoped that any remaining problems would be cleared up during the second reading of the draft articles.

5. Mr. ARANGIO-RUIZ said he was grateful for the efforts made to work out the new formulations and had great sympathy for the idea behind them: anything that involved a third party in the determination of the existence or the consequences of an international crime was a positive contribution. He was puzzled, however, as to how the proponents of the texts envisaged the relationship between the *erga omnes* nature of an international crime and *erga omnes* scope of article 53 with the bilateral nature of both the conciliation and the arbitration procedures. Were third-party States affected, or not affected, by a prima facie finding by the conciliation commission of the existence of a crime or by the determination by the arbitral tribunal? The Commission had rejected the idea that States could accept the compulsory jurisdiction of ICJ, a body which was already in existence, was based on a multilateral treaty and was an organ of the United Nations. Yet, in connection with crimes the proposal interjected a conciliation procedure for a prima facie determination of the existence of a crime, involving certain decisions by the conciliation commission and arbitral tribunal. Were those decisions in any way binding on States that were obliged to comply with article 53, for example?

6. Mr. ROSENSTOCK said the proposal had undergone so many reincarnations that it was difficult to come to grips with the latest of them, which, though more elegant than earlier versions, retained many of the same problems and posed new ones. He would not support its inclusion in the draft for the simple reason that the Commission did not have sufficient time to give it thoroughgoing consideration.

7. In addition to the valid questions raised by Mr. Arangio-Ruiz, he noted that the reasons behind the proposal had still not been clearly explicated, nor had the relationship of the scheme to the mechanisms of the United Nations. The proposal presupposed a prior determination that a crime had been committed. Yet what if a State that had committed an international crime did not accept such a determination? Apparently, the whole scheme outlined in the proposal could not then apply.

8. He agreed with Mr. Bowett's suggestion (2458th meeting) that the whole, complex issue should be raised in the commentary, with a request for Government comments. Incorporating the proposal, even on first reading, would be premature and unproductive.

9. Mr. de SARAM thanked those who had worked out the proposal, but thought that any proposal dealing with State crimes that potentially involved countermeasures in *erga omnes* situations must be viewed with great caution. The Commission had not yet defined in sufficiently precise terms what constituted a State crime. Any system it set up to deal with such crimes might encroach on areas governed by the Charter of the United Nations. Notwithstanding all the criticisms levelled at the Charter of the United Nations, it embodied the best existing guarantee of security and order for small States. He could not condone any system that might in any way undermine the authority of the Charter by establishing an institution for the determination of the existence of crime.

10. The situation touched on by the proposal was extremely complex. A substantial body of opinion held that certain types of relations between a Government and people within its territorial jurisdiction could, under customary international law, constitute a crime. Countermeasures, when taken to preserve the political independence and territorial integrity of one State, could have a substantial impact on another State. An example could be taken from the experience of his own country, Sri Lanka, after the Gulf war. With the imposition by the Security Council of sanctions on Iraq, which furnished nearly all of his country's oil supply, the private sector had greatly feared that the entire Sri Lankan economy would grind to a halt within three months. Such considerations explained his difficulties with the proposal, though he would not stand in the way of including it in the articles to be adopted on first reading, for the purposes of comments by Governments.

11. Mr. BOWETT said he was not convinced of the system's workability, for he did not think the conciliation commission would be dealing so much with the consequences of a crime as with the very existence of a crime. If the system was to be instituted, it was when demands for remedies—restitution or satisfaction—were made by the victim State that it should come into play. In other words, it was only after the conciliation commission had determined that there was prima facie evidence that a crime had been committed that it would be useful to have a mechanism whereby the State alleged to have committed the crime could insist upon arbitration. He did not oppose the proposal altogether—he simply believed it had not been sufficiently thought through.

12. Mr. EIRIKSSON, responding to comments on the proposal, noted that the suggested scheme's interrelations with the Charter of the United Nations and the Security Council were covered in article 39 of part two. Such interrelations were no more triggered by crimes and countermeasures than by anything else in the draft articles. In line with the wording chosen elsewhere in the draft, the proposal referred to a State which had committed an internationally wrongful act—not one that had allegedly committed such an act. Part three, in fact, dealt

not so much with whether such an act had been committed, as with the legal consequences.

13. The problem of countermeasures had been raised, but there was a separate regime for them, and the system under discussion was entirely independent. It had been argued that the compulsory mechanism relating to countermeasures would actually encourage their use, but the proposed system would circumvent the need to adopt a countermeasure in order to have judicial proceedings instituted.

14. As to the *erga omnes* problem, he would point out that the focus of the proposal was the most directly affected State. But the consequences for other States would be dealt with by the general operation of the dispute settlement mechanism as between two parties and involving a third party. That whole issue would have to be taken up in the context of the articles as a whole, and at the stage of the second reading.

15. Mr. BENNOUNA said the new proposal was even more problematic than the previous one. The main problem was the attempt to propose a bilateral mechanism for dealing with multilateral situations. When an international crime was committed, all countries potentially became injured States. The result might well be a series of successive bilateral conflicts to be adjudicated by a string of arbitral tribunals and conciliation commissions. There was an inherent inconsistency, moreover, in invoking prima facie evidence if numerous conciliation commissions were at work.

16. With the proposal before it, the Commission appeared to be trying to square the circle, but that was impossible. The only way out was to envisage a role for ICJ, as had been done by the Vienna Convention on the Law of Treaties. Yet since that approach was ruled out, the Commission's report should outline the attempts made to resolve a difficult issue, incorporate the proposal now before it, explain that further work needed to be done on the proposal, and indicate the Commission's intention to pursue that work on second reading.

17. Mr. ARANGIO-RUIZ said it was his impression that Mr. Eiriksson had not really answered his question of how to reconcile the possibility of one or more bilaterally valid decisions or recommendations of the conciliation commission with the multilateral, even universal *erga omnes* nature of the consequences established by article 53. The idea of incorporating the text with a view to refining it on second reading was unacceptable: the text to be adopted now must be as close to a finished product as possible. He was also worried by the reference to article 39. Unfortunately, it had been adopted, but article 39 did not solve any of the problems involved. If so, the problems were solved in the wrong way, as he had explained on earlier occasions. He likewise took issue with the comments regarding the Charter of the United Nations—it went without saying that nothing must be done to undermine it, but it was not sacrosanct, either. Its procedures might actually be put to good use in the context of State responsibility, with regard either to crimes or to delicts, provided there was a willingness to envisage bold solutions, something on which he would not insist, for he had no wish to preach again in favour of his own proposals.

18. Mr. MIKULKA said that, though he had participated in the discussion leading to the proposal before the Commission, he had to dissociate himself from the proposal itself, on which he had a number of reservations. It did indeed pose many problems, some of them not apparent at first glance, and the Commission must not hastily incorporate it in the articles on first reading without giving very serious consideration to all the possible consequences. The remaining problems did not vitiate the proposal's potential usefulness, but merely revealed that more had to be done to develop a workable system for compulsory jurisdiction. He endorsed the stance taken by Mr. Bowett and Mr. Bennouna in favour of reflecting in the report the whole range of difficulties identified, and perhaps incorporating the proposal itself in a footnote for the information and reaction of States, but of not including the proposal in the articles adopted on first reading.

19. Mr. FOMBA, referring to the form of the proposal, said that as long as the existence of a dispute did not prejudge the legal status of the situation created by the behaviour of a State accused of an internationally wrongful act, the State should be described as "allegedly" having committed that act. On substance, the problems being encountered were clearly linked to the weakness of the current world institutional order. Though he welcomed the efforts made to refine the proposal, further consideration was needed and he agreed with Mr. Mikulka that the entire problem, in all its complexity, should be placed before States for their reaction, to enable the Commission to look into the subject in greater depth during its consideration of the articles on second reading.

20. Mr. HE said he appreciated the efforts behind the revised proposal before the Commission but still experienced many difficulties with it. The term "crime" was used only for consistency with article 19 of part one; hence, an alternative reference, such as to an internationally wrongful act of a serious nature, could be used instead, and there was no need to create a separate regime in part three. However, even if the Commission wished to establish a separate regime for the determination of the existence of a crime, the proposal would not be workable. It was open to question whether the conciliation commission had the competence to judge on the prima facie evidence whether a crime had been committed. If a case was to be referred for arbitration on the basis of such prima facie evidence, arbitration would become compulsory.

21. Mr. VILLAGRÁN KRAMER said that it would be very surprising if, having agreed to make negotiations a preliminary condition for the taking of countermeasures for international crimes, the Commission failed to provide a legal mechanism for that purpose. Members had spoken of squaring the circle, but surely the circle was squared once and for all by Article 33 of the Charter of the United Nations. In his view, the Commission should either adopt the text proposed by the Drafting Committee, revise paragraph 1 of article 58 [5] or adopt Mr. Eiriksson's proposals. For his part, he could support either version.

22. Mr. LUKASHUK said that Mr. Eiriksson's proposal on article 57 [4] was inconsistent with the definition of the task of the conciliation commission provided for in paragraph 1 of that article. To collect all necessary information was one thing and to decide whether there was prima facie evidence that an international crime had been committed was quite another. Such a finding would be a matter entailing legal consequences of the greatest importance and would lie quite outside the competence of the conciliation commission. For that reason, he could not support the proposal.

23. The CHAIRMAN said that Mr. Eiriksson's proposal had met with sympathy on the part of many members of the Commission, but it required further reflection which the Commission was unable to give it at the current juncture owing to pressure of time. He therefore suggested, in accordance with the views expressed by Mr. Bowett, Mr. Bennouna and Mr. Mikulka, that the Commission should draw attention to the problem in its report, appending the text of Mr. Eiriksson's proposal and explaining that it had had no time to discuss it in depth at the current session. The issue would thus remain open for decision at the stage of the second reading.

It was so agreed.

24. Mr. CRAWFORD said he had no objection to that course of action, provided it was made clear that the solution proposed in article 57 [4] was not the only one. There was much to be said for the solution originally proposed by the former Special Rapporteur, namely, that disputes should be referred to ICJ.

25. The CHAIRMAN said it would be made completely clear that the Commission intended to explore all solutions in the light of the reactions of Governments.

26. Mr. EIRIKSSON, pointing out that he had not objected to the course of action suggested by the Chairman, thanked those who would have supported his proposals for insertion in the text of articles 57 [4] and 58 [5]. He would add, parenthetically, that the more unreasonable a proposal was, the more likely it was to be adopted.

27. Mr. YANKOV said that, while he was in favour of any effort to strengthen the system of compulsory third-party settlement, he was greatly concerned to find serious gaps in terms of institutional arrangements and procedural rules for dealing with the legal consequences of breaches of *erga omnes* obligations. He had great sympathy with the former Special Rapporteur's proposal that disputes should be brought before ICJ, but was not sure that the Court had the jurisprudence and practice to deal with *erga omnes* consequences. As for bringing the matter to the attention of the General Assembly or the Security Council, was it conceivable that any permanent member of the Council could ever be accused of having committed a crime? Most disturbingly, it seemed that *erga omnes* obligations were easily accepted, but the world was not ready to deal with breaches of them.

28. Mr. ARANGIO-RUIZ said that, while it might be true that a permanent member of the Security Council could never be accused of a crime, for the very simple reason that the Council would not admit it, it was with that problem in mind that he had included in his text of draft article 19 of part two[5] a provision whereby a preliminary finding of a crime—or, as the Commission had now decided to put it, prima facie evidence that an international crime had been committed—had not been reserved for the Council. He had also mentioned the General Assembly, a body in which no State enjoyed special immunity. That had also been the purpose of his proposal.

29. Mr. YANKOV remarked that General Assembly resolutions did not have legally binding force. The question of an adequate mechanism for dealing with international crimes still remained unsolved. He did not wish to argue with anyone but only to avail himself of what was probably his last opportunity in the Commission to draw attention to what he believed to be a major problem in regard to *erga omnes* obligations.

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

CHAPTER IV (International crimes) (*concluded*)

30. Mr. ARANGIO-RUIZ requested a vote on the whole of chapter IV of part two.

Chapter IV was adopted by 12 votes to 2, with 9 abstentions.

31. Mr. ARANGIO-RUIZ, explaining his abstention, said that although, as must be clear by now, he did not like chapter IV, he was nevertheless glad to see it there because it meant that the concept of international crimes was still alive despite the efforts of those who would have liked to see article 19 of part one eliminated. It meant that the notion of crimes, however called in footnotes to the text, remained. That was definitely a gain. For that reason, he had not voted against the chapter. He had, however, abstained because the chapter was utterly inadequate in meeting the problem, including the one mentioned by Mr. Yankov, namely the problem of the *erga omnes* effect, including the proper use of the existing institutional mechanism, which consisted not only of the Security Council but also of the General Assembly, where all States were equal, and of ICJ, where the law was supposed to be applied equally for every State.

32. Mr. ROSENSTOCK said that the adoption of chapter IV could not be taken to indicate a reaffirmation of article 19 of part one. The rules of the game required that, since that article still existed, members should not question its existence by reopening the debate on that subject. Their readiness to adopt chapter IV was, however, quite without prejudice to their position on the substance of article 19.

33. Mr. EIRIKSSON said that, having been a member of the Drafting Committee at the time of its work on chapter IV, he remained loyal to its decisions.

34. Mr. KABATSI said that he had voted against the chapter for three reasons. First, he did not subscribe to the idea that States, as opposed to individuals, could

[5] See 2436th meeting, footnote 9.

commit crimes. Secondly, with reference to the remarks just made by Mr. Yankov, he thought that to create a problem without devising some means of resolving it was unacceptable. Thirdly, if crimes committed by States did exist—with all the devastating consequences that would entail—then it was unfair that, because of the composition of the Security Council, not all States could be adjudged criminal.

35. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt part two, as amended.

Part two, as amended, was adopted.

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

Article 54 (Negotiation),

Article 55 (Good offices and mediation),

Article 56 (Conciliation),

Article 57 (Task of the Conciliation Commission),

Article 58 (Arbitration),

Article 59 (Terms of reference of the Arbitral Tribunal),

Article 60 (Validity of an arbitral award), and

Annexes I (The Conciliation Commission) and II (The Arbitral Tribunal)

36. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), introducing part three of the draft, said that he could be very brief, for two reasons. The first was that the seven articles and two annexes that constituted part three had been approved only the previous year at the forty-seventh session. The second reason was that the Drafting Committee had not made any substantial changes in the text. In fact, part three remained practically intact. The word "draft" before the "articles" had been deleted throughout in order to keep the language uniform. In article 55 [2] (Good offices and mediation), the order of the initiative of a State party wishing to tender good offices or offer to mediate, on the one hand, and a request of the parties for good offices or mediation, on the other, had been reversed, the latter now being mentioned first. The text adopted at the forty-seventh session had contained one annex with two articles, one on the conciliation commission and the other on the arbitral tribunal. The Drafting Committee currently proposed two annexes, one on the conciliation commission and another on the arbitral tribunal, but the text was exactly the same as the previous year. The Drafting Committee recommended the adoption of the seven articles of part three (arts. 54 [1] to 60 [7]) and its two annexes. With that recommendation, he concluded the second report of the Drafting Committee.

37. Mr. BENNOUNA said that the words "Failing the establishment of the conciliation commission provided for in article 56 or" at the beginning of paragraph 1 of article 58 [5] were unnecessary and should be deleted. The establishment of the conciliation commission was not in doubt, as the provisions set out in annex I governing the appointment of its members confirmed.

38. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, as he understood it, the first part of article 58 [5], paragraph 1, was necessary because the establishment of the conciliation commission depended entirely on the parties to the dispute.

39. Mr. EIRIKSSON said that the necessity for the first part of article 58 [5], paragraph 1, was explained in the commentary. Omitting it would presuppose that a report had been made, which was not always the case.

40. Mr. BENNOUNA said that he was not satisfied by those answers. Article 56 provided that, subject to certain conditions, any party to the dispute could submit it to conciliation. Article 57 [4] spoke of the report of the conciliation commission. Annex I covered every detail of the conciliation commission's establishment, membership, and so on, leaving absolutely no lacunae. From those facts he deduced that the conciliation commission was established automatically at the request of one of the parties. If a State failed to request the establishment of a conciliation commission, that meant it did not intend to resort to conciliation. He failed to see the legal logic of the sentence in question.

41. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he withdrew his previous remarks and accepted Mr. Bennouna's arguments.

42. Mr. VARGAS CARREÑO said that there were many examples of countries deciding to go straight to arbitration without first submitting a dispute to a conciliation commission. The 1984 dispute between Argentina and Chile was a case in point. The current text of article 58 [5], paragraph 1, should be maintained for that reason, an appropriate explanation being included in the commentary.

43. Mr. BOWETT said that Mr. Bennouna was right in saying that the conciliation commission was established as soon as one of the parties requested it. It was clear from article 56 [3], however, that if neither party sought conciliation, no conciliation commission would be established. That possibility had to be provided for. He suggested that Mr. Bennouna's point could be met by replacing the words "Failing the establishment of" at the beginning of article 58 [5], paragraph 1, by the words "Failing a reference to".

44. Mr. BENNOUNA said that there remained the time factor. Before the wording of the article could be finally adopted, the period following which the parties could have recourse to arbitration should be specified. The Commission must be clear about what it was adopting.

45. Mr. BARBOZA said that, if the parties decided not to go to conciliation first but to go straight to arbitration, that was what would happen; if, on the other hand, one party proposed arbitration and the other refused, preferring to go first to conciliation, then that was what would happen. There was no need for any time limit: the mechanism provided would work spontaneously.

46. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), agreeing that the words "Failing the establishment of" could give rise to confusion,

suggested that Mr. Bowett's proposal should be modified by adding the words "of the dispute". The opening words of paragraph 1 would then read "Failing a reference of the dispute to the Conciliation Commission".

47. Mr. GÜNEY proposed that mention of the conciliation commission should be omitted: the opening words of the paragraph would then read "Failing a reference to conciliation".

48. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, although the proposal had merit, the wording of the whole text would have to be changed and an explanation would have to be given of what precisely was meant by conciliation.

49. The CHAIRMAN said that Mr. Güney's proposal could perhaps be reconsidered on the second reading of the draft articles.

50. Mr. LUKASHUK noted that paragraphs 3 and 5 of article 57 [4] referred, respectively, to "final recommendations" and a "final report". Paragraph 4, however, referred to recommendations of a different legal nature, namely, those made in order to get a response. The words "The recommendations", at the beginning of paragraph 4, should therefore be replaced by "Preliminary recommendations" and, in paragraph 5, the word "preliminary" should be inserted before "recommendations", at the beginning of paragraph 5, and the word "final" before "recommendations", at the end of the paragraph. That would more accurately reflect the position and would also have the necessary legal rigour. As a consequential amendment, the words "final recommendations", at the end of paragraph 3, should be replaced by "future recommendations". Again, in paragraph 1 of article 58 [5], the word "final" should be added before "report". Lastly, the word "validity" which appeared in the title for article 60 [7], embraced a very broad notion. Article 60 [7], however, was concerned not so much with validity as with a challenge to validity and he therefore proposed that the title should be reworded to read: "Challenge to the validity of an arbitral award".

51. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, to his mind, the title was satisfactory. As was apparent from paragraph 1, article 60 [7] covered not only a challenge to the validity of an arbitral award but also what would ensue as a result of such a challenge, namely, confirmation or otherwise by ICJ of the validity of the award.

52. So far as Mr. Lukashuk's other points were concerned, he saw no need to modify article 57 [4]. Possibly the best way of clarifying matters would be to add the word "final" before the word "report", in paragraph 1 of article 58 [5], to make what was implicit explicit.

53. Mr. YANKOV, agreeing with the suggestion by the Chairman of the Drafting Committee, said he did not think that paragraph 4 of article 57 [4] would be improved by adding the word "preliminary" before "recommendations", and the other paragraphs of the article were in any event self-explanatory. He had no strong feelings about the matter, however, and would not object if Mr. Lukashuk insisted on his proposal.

54. Mr. BOWETT said that Mr. Lukashuk was right and his point could be met, first, by replacing the words "final recommendations" at the end of paragraph 3 of article 57 [4], by "later recommendations" and, secondly, by replacing the word "The", at the beginning of paragraph 4, by "Preliminary".

55. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said Mr. Bowett's first proposal was very useful but he could not agree to the second, which would only confuse the situation rather than clarify it.

56. Mr. MIKULKA said he supported that view.

57. The CHAIRMAN, appealing to the Commission not to allow itself to be turned into a drafting committee, asked Mr. Lukashuk whether Mr. Bowett's first suggestion was acceptable to him.

58. Mr. LUKASHUK said that, though he had some difficulty with the appearance of the word "recommendations" twice in paragraph 5 of article 57 [4], he would not press his points.

59. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt part three, as a whole, with the understanding that the word "final", in paragraph 3 of article 57 [4], should be replaced by the word "later", and the words "Failing the establishment of the Conciliation Commission", in paragraph 1 of article 58 [5], should be replaced by "Failing a reference of the dispute to the Conciliation Commission".

It was so agreed.

Part three, as amended, was adopted.

Adoption of the draft articles on State responsibility on first reading

60. The CHAIRMAN said that the Commission had completed its consideration on first reading of the draft articles on State responsibility, and invited the Commission to provisionally adopt the draft articles, on first reading, as a whole, as amended.

61. Mr. LUKASHUK, referring to the title of the draft, said that, while "State responsibility" might be all right for the title of an agenda item, it was not suitable for a title of an ambitious draft. It would be preferable to use the title "The law of State responsibility" which would reflect the content of the draft more accurately.

62. Another problem concerned the reference in the articles to international responsibility and international obligations. The nature of such responsibilities and obligations could, however, differ inasmuch as they could be moral, political and so on. Furthermore, the draft spoke of wrongful acts, which, in all languages, could mean not only acts that were illegal but also acts that were immoral. It would therefore be advisable to introduce in article 3, subparagraph (*b*), a reference to a breach of an international "legal" obligation or an obligation "under international law". It was interesting to note in that con-

nection that the Organization on Security and Cooperation in Europe now had a code of political obligations.

63. The CHAIRMAN, noting that the draft before the Commission was the outcome of a compromise, said he trusted that it would be adopted by consensus and that there would be no need to have recourse to a vote.

64. Mr. ROSENSTOCK said that there was a slight difference between adoption by consensus and adoption without a vote. He would prefer the latter, since some members, including himself, had voted against certain parts of the draft. To adopt it by consensus would suggest that the Commission was fully satisfied with the general balance of the draft, while adopting it without a vote would indicate that the Commission was fully satisfied that the draft should go forward.

The draft articles on State responsibility, as a whole, as amended, were adopted on first reading.

Tribute to the Special Rapporteurs

65. The CHAIRMAN said that, in accordance with the Commission's practice and in recognition of the valuable contribution Mr. Arangio-Ruiz and his predecessors as Special Rapporteurs had made to the Commission's work on the draft articles on State responsibility, he would invite the Commission to consider the following draft resolution:

"*The International Law Commission,*

"Having provisionally adopted the draft articles on State responsibility,

"Wishes to express to the three Special Rapporteurs, Mr. Roberto Ago, Mr. Willem Riphagen and Mr. Gaetano Arangio-Ruiz, its deep appreciation for the outstanding contribution that their erudition and vast experience made to work on the topic as a result of which the Commission has completed its consideration on first reading of the draft articles on State responsibility."

The draft resolution was adopted by acclamation.

66. The CHAIRMAN said that he was speaking not only as Chairman but also as a member of the Commission. It was the last year in which Mr. Arangio-Ruiz, like he himself, would be serving on the Commission. He had learned much from Mr. Arangio-Ruiz. To see him, with the same vigour of mind and of body, the same dash and the same alertness as he had displayed in 1985, it was hard to think in terms of age. Mr. Arangio-Ruiz was one of those members who saw the law in its loftiest forms, albeit perhaps tinged with a degree of Utopian idealism—but, as everyone knew, the Utopia of today was often the reality of tomorrow. As a professor himself, he shared that element of Utopian idealism. There were those who were bold, daring and somewhat extreme, though Mr. Arangio-Ruiz's only link with extremism lay perhaps in his courage. While he himself had not always endorsed Mr. Arangio-Ruiz's approach, it was simply because he had not dared to be so bold and because he had made more concessions to realpolitik, to *raison d'État*, for States were omnipresent even if the members of the Commission were not their representatives. From time to time, when the Commission had had difficult problems to tackle, he was inclined to think of the alpinists who made that most terrible of all climbs, the north face of the Eiger. For the members of the Commission, State sovereignty represented the north face of the Eiger and in tackling the difficulties inherent in State sovereignty it was the special rapporteurs who were first on the rope, there to guide and help the Commission. But the Commission must not go too far and break away from States too much, because States would not then follow the Commission. It was necessary for the Commission's membership to include not only the realist but also the person who pushed a little further; and it was the role of members of the Commission, as jurists, to encourage States to go a little further. The kind of debate in which they had engaged was extremely useful even if their fervour would be tempered later, either in discussions in the Commission or in the Sixth Committee of the General Assembly or by States themselves. He thanked Mr. Arangio-Ruiz for having been among those first on the rope and for urging the Commission to go as far as possible, while taking account of international reality.

67. Mr. BARBOZA said that the completion of the first reading of the draft on State responsibility was a historic moment. The exercise had started many years before with the Latin American jurist, Mr. Amador, had continued under Mr. Ago and Mr. Riphagen, and had almost been concluded by Mr. Arangio-Ruiz. "Almost" was, however, an unfortunate word, for the Commission as a whole profoundly regretted that Mr. Arangio-Ruiz had felt compelled to resign as Special Rapporteur. None the less, with the completion of the first reading of the draft articles, the Commission, the academic community, and those United Nations circles engaged in the development and codification of international law would certainly acknowledge the extraordinary contribution to the law of State responsibility made by Mr. Arangio-Ruiz. It was thanks to him that the Commission had made great progress towards clarifying the main problems that arose in a complicated area of customary law. Many aspects of the work that the Commission had done with Mr. Arangio-Ruiz's help would remain for ever. He thanked Mr. Arangio-Ruiz for his efforts and his brilliant contribution and dedication to the cause of the rule of law which all members of the Commission espoused.

68. Mr. THIAM said that the Chairman had given full expression to the sentiments of the Commission with regard to Mr. Arangio-Ruiz, a great jurist and fine person. As a special rapporteur himself, he could well understand the decision made by Mr. Arangio-Ruiz to withdraw from that position. In fact, one could not actually speak of his resignation, because Mr. Arangio-Ruiz had completed his work, having done it with brio and bringing to it his exceptional talents. In his statements to the Commission, Mr. Arangio-Ruiz had always expressed himself with a generosity of spirit, strong force of character and a full sense of his convictions. Indeed, the strength of conviction displayed in elaborating his reports would serve as an example to members in their future work. He had been among those who had been highly sensitive about the use of the term "State

crimes''. While he might have regretted certain of his statements, his beliefs in that regard remained unchanged. In any event, the criticisms made of the reports had been directed at the language rather than the substance, about which the Special Rapporteur had always been correct.

69. Mr. Arangio-Ruiz, as Special Rapporteur, would always hold a special place in the collective memory of the Commission. He was a man of firm beliefs, concerned with the difficulties not just of the powerful States but also the smaller States, and it was true that there could be no international peace and security without a balance between the interests of the great and the small.

State succession and its impact on the nationality of natural and legal persons (*concluded*) (A/CN.4/472/Add.1, sect. B, A/CN.4/474[6])

[Agenda item 6]

Recommendations of the Working Group on State succession and its impact on the nationality of natural and legal persons (*concluded*)*

70. The CHAIRMAN invited the Special Rapporteur to continue his report on the work of the Working Group on State succession and its impact on the nationality of natural and legal persons.

71. Mr. MIKULKA (Special Rapporteur) said he wished first to express his great appreciation and admiration for the contribution made by Mr. Arangio-Ruiz to the codification of the law on State responsibility. Mr. Arangio-Ruiz was one of the members who had helped form the character and substance of the Commission, in which he (Mr. Mikulka) now had the honour to participate. He was certain that posterity would honour his contribution and that the ideas which had not been incorporated in the draft articles would certainly be considered at a later stage.

72. With regard to the work of the Working Group on State succession and its impact on the nationality of natural and legal persons, he had already presented a preliminary report on its work (2451st meeting). It had met once since that time and had continued its analysis of the ideas set forth by the Special Rapporteur, which might serve as a starting-point for a third report on the topic.

73. It was, in his view, time for the Commission to take action on the five recommendations made by the Working Group (ibid.), namely, (*a*) the consideration of the question of the nationality of natural persons should be separated from that of the nationality of legal persons, as they raised issues of a very different order; (*b*) the question of the nationality of natural persons should be addressed as a matter of priority; (*c*) the result of the work on the topic should take the form of a non-binding instrument of a declaratory nature, consisting of articles with commentaries; (*d*) the first reading of those articles should be completed during the Commission's forty-ninth or, at the latest, fiftieth session; and (*e*) upon completion of the work on the nationality of natural persons, the Commission should decide, on the basis of comments by States, whether it would consider the question of the impact of State succession on the nationality of legal persons.

74. He wished to add one further recommendation. In response to comments made during the plenary meeting, the Working Group had considered the question of the title of the topic. In fact, the French and English titles did not correspond and the title in French, *La succession d'Etats et nationalité des personnes physiques et morales,* was the one which had given rise to reservations. The Working Group was therefore recommending that the title of the topic should be modified to read: ''Nationality in relation to State succession'' or, in French, *La nationalité en relation avec la succession d'États.* He thanked the members of the Working Group for their contributions.

75. Mr. GÜNEY said that he fully endorsed the Working Group's recommendations which were based on the discussions held in the Commission and on the reality of State practice. It had been generally agreed in the Commission that the question of the nationality of natural persons should be separated from that of the nationality of legal persons and dealt with first. He supported the recommendation that the Commission should elaborate a non-binding declaration on the topic. The schedule for the completion of the first reading of the draft articles would, of course, depend on the Commission's long-term agenda.

76. Mr. LUKASHUK said that the Special Rapporteur's second report (A/CN.4/474) was of high professional quality and had already been referred to in other international forums as an authoritative source. He fully endorsed the recommendations made by the Working Group.

77. In formulating the draft articles on nationality in relation to State succession, the Commission should bear in mind a number of principles, which would set forth a legal basis for the assignment of nationality: (*a*) every person had the right to a nationality; (*b*) every child had the right to acquire a nationality; (*c*) every person had the right to the nationality of the State on the territory of which he was born or, if he did not have the right to any other nationality, on the territory of which he was living; (*d*) no one should be arbitrarily deprived of his nationality or denied the right to change it; (*e*) no person or group of persons could be deprived of the right to nationality on racial, ethnic, religious or political grounds; and (*f*) women and men were equally entitled to acquire, change or retain their nationality.

78. The draft articles should also make reference to the primacy of international human rights norms, the importance of the rule of law and the principle of non-discrimination, and the need to avoid situations of statelessness. They should include mention of the Convention on the Reduction of Statelessness and should include a

* Resumed from the 2451st meeting.

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

provision according to which the term "State succession" covered all types of transfer of sovereignty. The draft articles should emphasize that even in the case where permanent residents of a State were not granted citizenship, they should, except in some strictly limited cases, enjoy the same fundamental social and economic rights as nationals of the State concerned.

79. Lastly, he fully agreed that the future instrument should take the form of a General Assembly resolution. He hoped that the Commission could complete the first reading of the draft articles at the next session so that it could submit them to the General Assembly for the fiftieth anniversary of the Universal Declaration of Human Rights.[7]

80. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve the recommendations made by the Working Group.

It was so agreed.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT OF THE PLANNING GROUP

81. Mr. ROSENSTOCK (Chairman of the Planning Group), introducing the report of the Planning Group (ILC(XLVIII)/PG/WG/1/Rev.1),[8] said that, in response to General Assembly resolution 50/45, concerning the importance of examining ways and means of improving the effectiveness and efficiency of the United Nations system, the Commission had decided to do a survey of how the Commission had been functioning and what it could do to become more effective and efficient. The survey was contained in the report of the Planning Group, which was intended to be as easy to deal with as possible. It contained an executive summary and a set of specific recommendations at the beginning to facilitate the task of those who might be unable to examine the entire report in detail. The Planning Group had gone over the contents of its report in great detail. The Commission would most likely not need to go over every chapter in detail but might wish to focus on the executive summary and the set of recommendations and then to adopt the report chapter by chapter.

82. After an exchange of views in which Messrs. EIRIKSSON, CALERO RODRIGUES, BENNOUNA, CRAWFORD, MIKULKA, GÜNEY and ROSENSTOCK took part, the CHAIRMAN said that, if he heard no objections, he would take it that the members agreed to consider the report of the Planning Group at the next meeting.

It was so agreed.

The meeting rose at 1.10 p.m.

2460th MEETING

Tuesday, 16 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. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

The law and practice relating to reservations to treaties (A/CN.4/472/Add.1, sect. E, A/CN.4/477 and Add.1 and A/CN.4/478[1])

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur on the topic to introduce his second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PELLET (Special Rapporteur) said that, in his second report, he had adopted a slightly different approach from the one he had announced during the introduction to his first report[2] at the forty-seventh session of the Commission. His original intention had been to deal at the current session with the definition of reservations and the legal regime of interpretative declarations. However, as a result of the new focus given to the problem of reservations by the positions recently adopted by the human rights treaty monitoring bodies, particularly the well-known general comment No. 24 (52),[3] he had

[7] See 2451st meeting, footnote 5.

[8] The report of the Planning Group was not issued as an official document. The report, as amended and adopted by the Commission, is reproduced in *Yearbook ... 1996*, vol. II (Part Two), chap. VII.

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

[2] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470.

[3] General comment on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (A/50/40, annex V).