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Summary record of the 2469th meeting

Topic:
Other topics

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71. He would submit amendments in writing when the Commission discussed paragraphs (11) and (12) of the general commentary.

Paragraph (1)

72. Mr. ROSENSTOCK said that he would have liked a sentence expressing the idea that some members of the Commission continued to have doubts about the validity of the concept of an international crime of the State to be included at the end of paragraph (1).

73. Mr. PELLET, supported by Mr. ROSENSTOCK, proposed that the words "other international delicts" at the end of paragraph (1) should be replaced by the words "other internationally wrongful acts".

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

74. Mr. LUKASHUK and Mr. TOMUSCHAT said that the last two sentences of paragraph (2) should be deleted.

75. The CHAIRMAN suggested that only the first two sentences of paragraph (2) should be retained and that they should be combined with paragraph (3), with the subsequent paragraphs to be renumbered accordingly.

It was so decided.

76. Mr. VILLAGRÁN KRAMER, referring to paragraph (3), said that it was inaccurate to say that the Commission should propose "a solution within the existing system of the Charter of the United Nations". That phrase should be replaced by the following: "a solution compatible with the existing system of the Charter of the United Nations".

77. Mr. ARANGIO-RUIZ said that he did not agree with the reference to the "existing system of the Charter of the United Nations", which implied that the Charter dealt with questions of State responsibility.

78. The CHAIRMAN invited the Commission to take a decision on paragraph (3) at the following meeting.

The meeting rose at 6.10 p.m.

2469th MEETING

Wednesday, 24 July 1996, at 10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer.

Draft report of the Commission on the work of its forty-eighth session (*continued*)

CHAPTER III. *State responsibility* (continued) (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)

D. Draft articles on State responsibility (*continued*) (A/CN.4/L.528/Add.2 and 3 and Add.3/Corr.1)

1. The CHAIRMAN invited the Commission to continue its consideration of chapter III, and in particular the commentaries to articles 51 to 53, including the general commentary to chapter IV of part two of the draft articles (A/CN.4/L.528/Add.3 and Corr.1).

General commentary to chapter IV (International crimes) *of part two* (continued)

2. At the previous meeting there had been some objections to the drafting of paragraph (3), namely, the phrase "within the existing system of the Charter of the United Nations". He proposed that it should be replaced by "which takes into account the existing system of the Charter of the United Nations".

3. Mr. ARANGIO-RUIZ said that, despite the fact he had proposed amendments to it, he was not satisfied with the general commentary which preceded draft articles 51 to 53 and their accompanying commentaries. Draft articles 51 to 53 dealt exclusively with the consequences of crimes. They made no reference whatsoever to procedures for determining the existence of a crime or for determining the consequences of a crime. Indeed, with the exception of article 39 (Relationship to the Charter of the United Nations), the Commission had come to no conclusion about the problem of the characterization of a crime. There was no reason, then, for the solutions proposed by various members of the Commission to be presented in the general commentary to chapter IV. The paragraphs in the general commentary bore no relation to the issues discussed in the draft articles that followed, and it made no sense to present alternative solutions in the commentary when no final solution was provided in the corresponding draft articles. If it chose to retain the general commentary, the Commission should place it in part three, on the settlement of disputes.

4. The CHAIRMAN said that it was true, logically speaking, that the procedure for determining the existence of a crime was dealt with in part three. At the same time, the question of who decided whether a wrongful act was a crime had also been discussed at length during the debate on the draft articles of part two. Since the Commission had already adopted the commentary to part three, it would be more practical to let the general commentary to chapter IV remain where it was. A comment might be added explaining that the general commentary was related to both part two and part three and that a decision could be taken on second reading as to the best place for those paragraphs.

5. Mr. BENNOUNA said that he agreed with the views expressed by Mr. Arangio-Ruiz. It was unwise for the Commission to give any impression of disorder, because that could jeopardize the entire draft.

6. The general commentary to chapter IV dealt exclusively with the question of the settlement of disputes, which fell under part three of the draft articles. Indeed, paragraphs (11) and the following of the general commentary referred specifically to the proposal made by Mr. Pellet and Mr. Eiriksson (2457th meeting) for a two-step procedural mechanism for determining whether a crime had been committed, and it had been designed to fill a gap in the articles on settlement of disputes. In the commentary to article 51, the first sentence stated that the article was essentially a *chapeau* to chapter IV and he failed to see the logic in placing the general commentary before that article. He proposed that the general commentary should be reviewed by a small working group with a view to incorporating it in part three of the draft.

7. Mr. LUKASHUK said that the Commission should provide commentaries which were as brief and succinct as possible. It was not appropriate to present a lengthy introductory discussion to chapter IV, for it was doubtful whether it would be read in full by the Sixth Committee.

8. Mr. PELLET said that the former Special Rapporteur, who was now proposing that the general commentary should be placed in part three, had earlier maintained that it was essential to provide in part two for a procedure for the characterization of a wrongful act as a crime. The general commentary might more appropriately be placed in part three, but he did not see why it could not remain where it was. He would, however, delete paragraphs (7) to (9).

9. Mr. ROSENSTOCK said that he had no objection to deleting the entire general commentary, which contained unnecessary solutions to an unnecessary and artificially created problem. At the same time, there was no compelling reason to deprive the Sixth Committee of the general commentary, which provided an explanation of how the Commission had arrived at its conclusions.

10. Mr. PAMBOU-TCHIVOUNDA said that the general commentary simply did not belong in part two.

11. Mr. VILLAGRÁN KRAMER recalled that most of the literature on the subject of international crimes referred to a 1948 decision which dated back some time and according to which every State was considered to be competent to judge whether harm had been done to it. The general commentary to chapter IV was an attempt to resolve the problems raised in both part two and part three of the draft articles. Deleting that commentary would leave the Commission in the position of proposing draft articles without commenting on them.

12. Mr. ARANGIO-RUIZ said that he saw no contradiction between the proposals he had made in his reports and his current proposal to transpose the general commentary. The general commentary was not relevant to the issues dealt with in articles 51, 52 and 53. If anything, it was related to article 39 (Relationship to the Charter of the United Nations). Yet, even in that article, the Commission had wished to leave unprejudiced the question of the relationship between the law of State responsibility and the law of collective security.

13. Mr. CALERO RODRIGUES said that the general commentary was useful, especially on first reading. It belonged equally well in part two or part three. There was no reason not to present a general review of the problem as an introduction to the chapter on international crimes even if the corresponding draft articles did not present any solutions. He would maintain the general commentary where it stood and, in addition, would incorporate in it the amendments proposed at the previous meeting by Mr. Arangio-Ruiz.

14. Mr. BOWETT said that the general commentary was an appropriate introduction to chapter IV. It served the essential purpose of explaining to the General Assembly the various alternatives the Commission had considered in its effort to resolve the problem of how to distinguish a crime from a delict.

15. Mr. ARANGIO-RUIZ said that, unfortunately, the general commentary to chapter IV did not just provide explanations. It implied that a solution to the problem of characterizing an act as a crime had been found and that that solution was recourse to the Security Council. In actual fact, the Commission had not adopted any particular solution. Furthermore, in a footnote to article 39 (see A/CN.4/L.528/Add.2), it had stated that article 39 did not seek to resolve the question of the relationship between the draft articles and the Charter of the United Nations.

16. Mr. TOMUSCHAT said that he agreed with Mr. Arangio-Ruiz. The general commentary to chapter IV, which provided a useful overview of the Commission's thinking about the issue of distinguishing between crimes and delicts, actually belonged in part three of the draft. Perhaps the substantive consequences of a crime could be discussed in the introduction to chapter IV.

17. Mr. BOWETT drew attention to paragraphs (2) and (10) of the general commentary. Paragraph (2) stated the problem: the Commission had had to decide how to make the distinction between crimes and other international delicts. Paragraph (10) provided the answer: the Commission had concluded that the problem could be handled within part three and by reference to the Charter of the United Nations. Those paragraphs helped to elucidate the draft articles which followed the general commentary.

18. Mr. BENNOUNA said that he was willing to let the secretariat decide about the proper placement of the general commentary. Nevertheless, he agreed with Mr. Arangio-Ruiz that some paragraphs in that commentary implied that the Commission had decided on a particular solution, namely reference to the Charter of the United Nations, something that did not accurately reflect the Commission's conclusions. For that reason, he endorsed the proposal by Mr. Pellet to delete paragraphs (7) to (9) from the general commentary.

19. Mr. PAMBOU-TCHIVOUNDA said the general commentary was not an appropriate introduction to chapter IV and the first sentence of paragraph (2) was

inaccurate: the Commission had never decided anything about how the distinction was to be drawn between crimes and delicts. Even if the Commission had reached some conclusion on that point, the account thereof should be in the commentary to article 19 of part one, not in the introduction to chapter IV.

20. Mr. VILLAGRÁN KRAMER said a few points should be made to clarify the debate. The general commentary furnished an answer to the question of what an international crime was by referring back to article 19. In response to the question of who decides that an act is an international crime, the general commentary outlined a number of alternatives, including the United Nations system. The text under consideration was a description: it pointed to various options, but did not come out in favour of any one of them. He was surprised to hear Mr. Arangio-Ruiz assert that the Commission had not resolved any problems, and his objection to any reference to the United Nations system was frankly preposterous. What could be the harm in such a reference? Lastly, if some members of the Commission wished to do away with the distinction between crimes and delicts, they were entirely free to do so—but he would not participate in the exercise.

21. Mr. ARANGIO-RUIZ said the proposal to delete paragraphs (7) to (9) was not entirely satisfactory. Paragraph (10) would have to be amended as a consequence of such a deletion, because it, too, referred to the Charter of the United Nations, and paragraphs (11) and the following would have to be deleted as well, for they covered other proposals regarding who should decide whether a wrongful act was a crime. Just as he believed it inaccurate to refer to a solution adopted by the Commission—for it had done no such thing—he could not condone the mention of a single solution, to the exclusion of others. Those solutions could all be outlined in the report to the General Assembly, but they had no place in the commentary.

22. The CHAIRMAN said there were clearly a number of problems with the general commentary to chapter IV: it might be advisable to transpose some of the material in it as an introduction to part three. Perhaps a small working group should look into the matter.

23. Mr. ROSENSTOCK said that using the material as an introduction to part three would create the impression that part three dealt only with crimes, which was not the case, and would distort the history of the Commission's discussions. On the other hand, he would have no objection to transposing the text to the end of chapter IV, so that it would serve as a bridge to part three.

24. As to paragraphs (7) to (9) and the discussion of dispute settlement machinery, the proposal by Mr. Arangio-Ruiz had been rejected, as had the one by Mr. Pellet and Mr. Eiriksson, so that the Commission was left with what was outlined in the general commentary. Either the whole text should be rejected, leaving readers uninformed about the Commission's efforts and reasoning, or the truth should be told. The truth was that the Commission had wrestled with whether an international crime could be distinguished from any other internationally wrongful act, and if so, who should so distinguish. During that exercise, the Commission had noticed that in certain circumstances in which a determination must be made, the United Nations system had the necessary capacity to make that determination. Whether one approved of that capacity or not was irrelevant.

25. Mr. ARANGIO-RUIZ said it might be most appropriate to avoid having a general commentary altogether and to mention, in the commentary to article 51, on the consequences of an international crime, that a problem remained unresolved—that no solution had been envisaged by the Commission with regard to the question of who determined the existence of a crime. That would accurately reflect what had happened in the Commission and in the Drafting Committee. Certainly, United Nations organs would operate for the purposes for which they had been created under the Charter of the United Nations—but they had not been created to implement the law of State responsibility.

26. Mr. ROSENSTOCK said he had no objection to placing the text in the commentary to article 51, but did not want it suggested that the Commission had failed to come up with any ideas on how to solve the problem. The various proposals made had been rejected because of the reasoning set out in paragraphs (7) to (9), and also because of their internal inconsistencies and unworkability.

27. Mr. PELLET said he fully supported Mr. Arangio-Ruiz's proposal that the general commentary should be incorporated in the commentary to article 51. A logical sequence would thus be established: the Commission had struggled to define the consequences of the notion of crime, and part of that struggle had included trying to decide whether a special mechanism should be established to determine that an act was a crime. The Commission had not so far taken a position on that point.

28. He likewise endorsed Mr. Arangio-Ruiz's proposed changes to his own earlier proposals concerning paragraphs (11), (11) *bis* and (12), but did not concur with his view that a large portion of text at the end of the general commentary should be deleted. As for Mr. Rosenstock's position that paragraphs (7) to (9) should be retained, it seemed incompatible with the very substance of article 39.

29. Mr. PAMBOU-TCHIVOUNDA said he endorsed Mr. Arangio-Ruiz's proposal to transpose the text to the commentary to article 51 and welcomed Mr. Pellet's elucidation of the situation.

30. Mr. VILLAGRÁN KRAMER said he had no difficulty with the proposed deletion of paragraphs (7) to (9), and could go along with any decision the Commission wished to make on where the whole text of the general commentary would be inserted—to his way of thinking, it made very little difference. What did matter, however, was Mr. Arangio-Ruiz's contention that there was no link whatsoever between the law of State responsibility and the law on collective security. A number of Security Council resolutions disproved that thesis, including those on payment of compensation by Israel to Argentina for a wrongful act committed in Argentine territory; reparation of damage inflicted by Israel through its bombardment of Iraqi nuclear power plants; and Iraq's obligation to allocate 30 per cent of its income for compen-

sation to Kuwait. All of those resolutions went far beyond what would be decided by a court of justice.

31. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to incorporate the general commentary to chapter IV of part two in the commentary to article 51.

It was so agreed.

32. The CHAIRMAN invited the Commission to continue its consideration of the paragraphs in the general commentary with the understanding that they would be incorporated in the commentary to article 51. He reminded the Commission that paragraph (1) had been adopted at the preceding meeting.

Paragraphs (2) and (3) (*continued*)

33. The CHAIRMAN recalled his earlier suggestion that, in the French version of paragraph (3), the words *dans le cadre du* should be replaced by *compte tenu du*.

It was so agreed.

34. Mr. ARANGIO-RUIZ suggested inserting the following at the end of the first sentence of paragraph (2): "and by whom. The Commission considered a variety of possibilities, but did not embody any one of them in the articles it has adopted".

35. In response to a query by Mr. TOMUSCHAT, the CHAIRMAN read out a proposal he had made earlier to merge paragraphs (2) and (3). The first two sentences of paragraph (2) would be combined, with the words "In short" being replaced by "and". The third and fourth sentences of that paragraph would be deleted, and the whole of paragraph (3) appended.

36. Mr. BENNOUNA queried the phrase "it should propose a solution" in paragraph (3). As far as he was aware, the Commission was not proposing any solution at all.

37. Mr. CALERO RODRIGUES pointed out that the "solution" was set out in paragraphs (4) to (10), but agreed that the phrase mentioned by Mr. Bennouna might be better drafted.

38. Mr. LUKASHUK said he endorsed the Chairman's suggestion, but feared that the final sentence amounted to an admission of the Commission's poor standing.

39. Mr. ARANGIO-RUIZ said he welcomed Mr. Bennouna's remarks, which bore out his own contention that a solution had never been proposed. The last part of paragraph (3), beginning with the phrase flagged by Mr. Bennouna, should be replaced by something such as

> "it could only refer to the procedures which generally States use for determining the existence of an internationally wrongful act, namely the unilateral decisions of one or more States plus all the means of negotiation and third-party settlement provided for in part three."

40. Mr. ROSENSTOCK said that not agreeing with a solution did not mean there was no solution. He entirely agreed with Mr. Calero Rodrigues and thought the phrase "it should propose a solution within" could usefully be replaced by "it should resolve the matter within".

41. Mr. PELLET commented that the Commission could hardly be said to be proposing a solution; rather, the paragraph should indicate that the Commission had finally decided to confine itself to the mechanisms for dispute settlement in part three. As for the reference to the Charter of the United Nations which some members, and especially Mr. Rosenstock, appeared to have so much at heart, he would have no objection to the inclusion of a reference to the provisions of article 39 of the draft, but would be resolutely opposed to any attempt to push the Commission in the direction of the Charter.

42. Mr. ARANGIO-RUIZ said that he was happy to hear Mr. Pellet declare himself to be hostile to express acceptance of Charter provisions and procedures for purposes of the determination of State crimes.

43. He said that he was in the habit of addressing himself to fellow members by mentioning their names, and he said he had noted that he himself had recently been referred to as "an individual". He was very glad and proud to be an individual, in other words a human being under the protection of the rules on which Mr. Tomuschat was one of the best experts.

44. The Commission was at that moment engaged in drafting the commentary to article 51, and it was his impression that it was again being pushed by Mr. Rosenstock to admit expressly that, for the purposes of crimes, it had to rely on the decisions of the Security Council, because, according to Mr. Rosenstock, that was enough. If that was the exercise in which he was invited to participate, he wished to declare that he was opposed to any idea of that kind. He did not believe that the Charter of the United Nations governed State responsibility. It did govern many things, and did so pretty well, but it did not govern State responsibility, whether for delicts or for crimes. That was something that could not be endlessly maintained. At the previous session, the Commission had heard arguments to that effect advanced over and over again and had taken votes on the issue. He might have been prepared to accept the reference to part three, but would oppose paragraph (3) inasmuch as it referred in any way to the Charter, and wished his position to be reflected with complete clarity in the summary record of the meeting.

45. Mr. TOMUSCHAT said that he was very sorry to disagree with what had just been said. Of course, the Security Council did not have exclusive competence, but it was a fact of life that whenever an international crime was committed, there was some overlapping of two systems, that of the Charter of the United Nations—in other words, of the jurisdiction of the Council—and that of State responsibility. That was the crux of the matter. It could not be denied and it had to be mentioned. Failure to discuss the problem would rob the whole commentary of its value. The fact that the Council could intervene in such matters and had done so in the past could not be ignored. Council resolution 687 (1991) of 3 April 1991 on Iraq, referred to by Mr. Villagrán Kramer, was only one out of many possible examples. He was prepared to accept the compromise solution suggested by Mr. Pellet

with regard to paragraph (3), but would insist on maintaining paragraphs (7), (8) and (9) because, like it or not, they reflected the fundamental truth about the way in which positive international law was framed nowadays.

46. The CHAIRMAN read out the following revised version combining paragraphs (2) and (3), incorporating the changes suggested by Mr. Pellet:

> "(2) An initial problem facing the Commission was to decide how this distinction should be made and by whom. The Commission considered a variety of innovative proposals to overcome this difficulty, but finally decided to confine itself to the mechanisms for dispute settlement in part three and to the provision of article 39, 'Relationship to the Charter of the United Nations'."

He said that, if he heard no objections, he would take it that the Commission agreed to adopt the revised text.

Paragraphs (2) and (3), as amended, were adopted.

47. Mr. ARANGIO-RUIZ said that he had nothing to say about the reference to part three but had strong reservations with regard to the reference to article 39 because he had been one of the 11 members of the Commission who had voted against that article.

48. Mr. BENNOUNA said that he, too, wanted to express reservations with regard to the reference to article 39. It would be remembered that the Commission had been very divided on that score and he had voted against the article in its present wording.

Paragraphs (4) and (5)

49. Mr. ROSENSTOCK said that the tenuous possibility of the text just adopted by the Commission having any meaning depended on acceptance of paragraphs (4) to (10).

50. Mr. ARANGIO-RUIZ said that paragraph (4) and the following paragraphs did not belong to article 51 or, indeed, to any other article, and should be deleted. The reference to part three and, for those who wanted it, to the Charter of the United Nations in the preceding paragraph were all that was needed to make the general commentary complete.

51. Mr. BOWETT said that, if the purpose of the commentary was to give the Sixth Committee the minimum of information on what the Commission was doing, Mr. Arangio-Ruiz was right.

52. Mr. ROSENSTOCK remarked that those whose views had not prevailed were apparently unwilling to have an adequate reflection of the views that had prevailed. When somebody objected to the presence of a particular paragraph, that paragraph should be put to the vote; otherwise, the Commission would find itself endlessly going round the same circle for the same rather unattractive reasons.

53. Mr. PELLET said that, if Mr. Arangio-Ruiz were an opposition member in a national parliament, he might be said to be filibustering.

54. The CHAIRMAN said that any member could propose the deletion of a paragraph; if the motion was not seconded, the paragraph would be adopted.

55. Mr. FOMBA questioned the use of the word "ordinary" in the second sentence of paragraph (4).

56. Mr. TOMUSCHAT said that the word "criminal" in the last sentence of the paragraph was awkward, because it suggested an act punishable under criminal law.

57. Mr. PELLET commented that, if the objection related to the use of the adjectival form, the word "criminal" could be replaced by the words "constituted a crime".

58. The CHAIRMAN said that he noted that the suggestion just made appeared to be acceptable to all members. The reference to article 16 in the second sentence of paragraph (4) should be changed to "article 52" and the reference to article 17 in the first sentence of paragraph (5), to "article 53".

Paragraphs (4) and (5), as amended, were adopted.

59. The CHAIRMAN said that the views expressed by Mr. Arangio-Ruiz on paragraphs (4) and (5) would be duly reflected in the summary record of the meeting.

Paragraph (6)

60. Mr. VILLAGRÁN KRAMER said the commentary should make it clear that certain crimes, such as genocide, were not susceptible to the option of negotiations. He was not sure whether that point should be made in paragraph (6), paragraph (10) or elsewhere, but would be glad to submit a proposal in writing for insertion in the appropriate place.

61. Mr. PAMBOU-TCHIVOUNDA proposed that paragraph (6) should end with the words "disputes in part three", in the second sentence. The remainder of the paragraph and all subsequent paragraphs of the general commentary to chapter IV, up to and including paragraph (15), should be deleted. If the Commission decided to proceed with the consideration of paragraphs (7) to (15), he would refrain from taking part.

62. Mr. ROSENSTOCK said he agreed with Mr. Villagrán Kramer's view that crimes such as genocide or aggression were not susceptible to negotiations and he looked forward to concrete suggestions for insertion in the commentary. The third sentence of paragraph (6) tended to suggest that, in the event of a crime being committed, the options of negotiations, conciliation or arbitration were necessarily available to States, whereas in reality arbitration was available only under certain circumstances. Accordingly, he wondered if there might not be some merit in deleting the sentence, as Mr. Pambou-Tchivounda had suggested, rather than trying to improve it, for example by inserting words such as "in certain specified circumstances" before the word "arbitration".

63. Mr. FOMBA said that the drafting of the first sentence in the French version was faulty and should be revised. As to the last sentence, he failed to see any problem. The point being made was that the State accused of

the crime would have freedom of choice in respect of the means of settling the dispute.

64. Mr. CALERO RODRIGUES said that he agreed with Mr. Pambou-Tchivounda's proposal for the deletion of the last sentence of paragraph (6). That would also meet the point raised by Mr. Villagrán Kramer.

65. Mr. BENNOUNA said that, like Mr. Fomba, he failed to see the objection to the sentence in question, which merely repeated the gist of what the Commission had decided to adopt. Would deletion of the sentence mean that the State accused of the crime was to be denied freedom of choice between the options listed?

66. Mr. GÜNEY said that he was in favour of maintaining the last sentence of paragraph (6) with the exception of the word "existing", which was redundant.

67. Mr. CALERO RODRIGUES, responding to the comments by Mr. Bennouna, said that the reference to part three, in the second sentence, covered the contents of the third sentence and, therefore, nothing would be lost as a result of deleting the third sentence. As already stated, he was in favour of deleting it, in view of the doubts expressed by Mr. Villagrán Kramer.

68. Mr. ROSENSTOCK said the problem with the sentence in question was that it suggested that States had, as of right, the ability to opt for negotiations, conciliation, arbitration or reference to ICJ. States certainly had the right to prefer any one of those options, but they had no automatic right to arbitration, as opposed to negotiations and conciliation, which were obligatory. In the sentence as it stood, that distinction was blurred. If the Commission decided to maintain it, some modifier indicating the different status of arbitration would have to be added.

69. Mr. VILLAGRÁN KRAMER suggested that the last sentence should be deleted and replaced by something to the effect that negotiations, conciliation and arbitration were not mandatory in the case of certain crimes.

70. The CHAIRMAN pointed out that such a statement would not be in keeping with the contents of article 52.

71. Mr. VILLAGRÁN KRAMER said that he wondered whether article 52 ought not to be reviewed. In the particular case of the crime of genocide, he recalled the efforts made by Mr. Arangio-Ruiz in 1992 to stress the importance of the element of cessation. At the time, he had been greatly struck by the arguments advanced. Cessation of the crime of genocide could not be negotiated. Who was the injured State? Surely, the whole international community had to consider itself harmed by such a crime. Who represented the sector of the population that was being exterminated? Yet, according to the rule adopted by the Commission, prior negotiation was necessary in order to obtain cessation of genocide. In the criminal law of some countries, and particularly in the law of the United States of America, there was a practice known as "plea bargaining", but it related solely to reduction of the punishment, not to perpetration of the act. Bargaining could not enter into the matter in the case of major crimes and, specifically, of genocide. He was not sure whether the Commission should try to clarify the issue in the commentary or whether, as a possible solution to the problem, it should review an article or articles already approved.

72. Mr. ARANGIO-RUIZ said that the concern about the little time available could perhaps be met if the Commission accepted the proposal, made in many quarters, that the last sentence of the paragraph should be deleted.

73. Mr. ROSENSTOCK said that Mr. Villagrán Kramer had drawn attention to a rather serious mistake which could, exceptionally, be corrected by making a small amendment to one or other of the articles. Failing that, it would be necessary to flag the point clearly by adding at some point wording along the following lines:

> "However, some members pointed out that it seemed inappropriate in the case of a crime such as . . . to regard negotiation and conciliation as a mandatory prior step."

74. Mr. BENNOUNA expressed his agreement with Mr. Villagrán Kramer's point and with Mr. Rosenstock's proposed form of wording.

75. Mr. VARGAS CARREÑO proposed that Mr. Villagrán Kramer's point should be met by inserting the words "where appropriate", after the words "via the procedures" in the second sentence of paragraph (6), and adding at the end of the paragraph "except that, in the case of crimes such as genocide, the options of negotiation and conciliation would not be mandatory".

76. Mr. PELLET said that he had very serious reservations about Mr. Villagrán Kramer's proposal, all the more so as there was not enough time to enter into a detailed discussion of the matter. In particular, he was not at all sure that the distinctions Mr. Villagrán Kramer wanted to introduce should be made in the case of State responsibility. All the Commission could do at that stage was perhaps to accept Mr. Rosenstock's proposed form of wording, but prefaced by the words "Certain members considered . . .".

77. The CHAIRMAN suggested that Mr. Villagrán Kramer and Mr. Rosenstock should be asked to prepare a suitable form of wording to cover Mr. Villagrán Kramer's point, for the Commission's consideration later.

It was so agreed.

Paragraph (6) was adopted on that understanding.

Paragraphs (7) to (9)

78. Mr. BENNOUNA proposed that paragraphs (7) to (9) should be replaced by one sentence reading:

> "The Commission recognizes that the State so accused might seek a speedier resolution of its dispute than the procedures in part three would allow, in particular within the framework of the relevant provisions of the Charter of the United Nations."

Paragraphs (7) to (9), as amended, were adopted.

Paragraph (10)

79. Mr. PELLET proposed that the paragraph, which was redundant having regard to the redrafted version of paragraph (2), should be deleted.

80. Mr. BENNOUNA and Mr. CALERO RODRIGUES supported that proposal.

Paragraph (10) was deleted.

Paragraph (11)

81. The CHAIRMAN said he wished to draw attention to a written proposal by Mr. Arangio-Ruiz to replace the paragraph by the following:

"Nevertheless, it should be pointed out that a considerable number of members of the Commission favoured different proposals. The Commission believes Member States should be aware of these proposals, and should be asked to comment on them specifically. In the event that either proposal received wide support, the Commission could return to it during the second reading."

82. Mr. ROSENSTOCK said that he preferred paragraph (11) as originally drafted, but Mr. Arangio-Ruiz's proposal would be acceptable provided, first, that the words "a considerable number of", in the first sentence, were replaced by the word "some" and, secondly, the words "should be asked to comment on them specifically", in the second sentence, were replaced by "and comment on them specifically should States so wish". That would more accurately reflect the level of support the various proposals had received in the Commission. In particular, States should be allowed freedom of choice and should not be pushed into commenting on proposals that had not been supported in significant numbers in the Commission.

83. Mr. ARANGIO-RUIZ said that his recollection of what had occurred at the forty-seventh session was very clear, but he would not press the point. He had no objection to Mr. Rosenstock's second proposal but would suggest that the words "a considerable number of members" should be replaced by "a number of members".

84. Mr. ROSENSTOCK said he did not think that more than a tiny percentage of the Commission had supported either the old Arangio-Ruiz proposal or that of Mr. Pellet and Mr. Eiriksson. His main concern was to ensure that States were not misled, which they would be if any term stronger than "some" was used.

85. Mr. ARANGIO-RUIZ suggested that each member of the Commission should be invited to state his preference for the word or words proposed.

86. Mr. THIAM proposed that the words "a considerable number of" should be replaced by the word "certain".

87. Mr. PELLET, agreeing to Mr. Thiam's proposal, said that Mr. Rosenstock's second proposal seemed to go beyond a matter of mere drafting.

88. The CHAIRMAN said he wished to assure Mr. Pellet that no change of substance was involved. He said that, if he heard no objections, he would take it that the Commission wished to adopt the new version of paragraph (11) as proposed by Mr. Arangio-Ruiz, as further amended by Mr. Rosenstock.

Paragraph (11), as amended, was adopted.

Paragraph (11) *bis*

89. Mr. LEE (Secretary to the Commission) read out the following new paragraph which was proposed by Mr. Arangio-Ruiz:

"One such proposal was that contained in the draft articles submitted by the Special Rapporteur in his seventh report and referred by the Commission to the Drafting Committee following the debate on that report."

Paragraph (11) bis *was adopted.*

Paragraph (12)

90. Mr. LEE (Secretary to the Commission) read out the following text which Mr. Arangio-Ruiz proposed should replace the existing text:

"Another proposal, put before the Commission at the present session, envisaged two stages. In the first stage, 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. That would require an addition to article 57."

91. Mr. ARANGIO-RUIZ pointed out that he had proposed only the first sentence of that text. The other two sentences were the same as those in the original version.

92. Mr. ROSENSTOCK suggested that the original and proposed new versions could be married by amending the opening words to read "Another such proposal envisaged".

It was so agreed.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

93. Mr. BENNOUNA, referring to the last sentence, said that he was troubled by the word "uncertainty". First, coming as it did after the reference to crimes, it did not make for sound legal policy. Secondly, it was not for the Commission to say that the concept of *jus cogens* was surrounded by uncertainty. The sentence should therefore be deleted.

It was so agreed.

94. Mr. TOMUSCHAT proposed that in the first sentence, the word "acts", should be replaced by the words "would act", and that the word "bears", should be replaced by the words "would bear".

It was so agreed.

Paragraph (14), as amended, was adopted.

Paragraph (15)

95. Mr. ARANGIO-RUIZ said that the purpose of his amendment was to make it clear that the proposal he had submitted as Special Rapporteur in his seventh report,[1] in 1995, had also envisaged a two-step procedural mechanism—and a far better one, in his view—for determining whether and by whom a crime had been committed, those two steps being, respectively, a political step before the General Assembly and Security Council and a judicial one before ICJ.

96. Mr. ROSENSTOCK said that Mr. Arangio-Ruiz and Mr. Pellet might perhaps wish to redraft the first sentence of the paragraph to refer to both proposals. He would, however, also propose that, in the second sentence, the words "in the view of those who supported those proposals" should be added after the words "it is therefore necessary", to reflect the fact that certain members did not think that either of the proposals was very helpful. Further, if the reference to *jus cogens* were retained, he would propose that a sentence should be added at the end of the paragraph reading "Others considered the analogy to *jus cogens* misleading and unconvincing".

97. Mr. ARANGIO-RUIZ suggested that, since paragraphs (12), (13) and (14) all dealt with the same subject, they should be combined in a single paragraph. Paragraph (15) could then start by referring to the proposals mentioned in the two preceding paragraphs, namely, the proposal he had submitted as Special Rapporteur and the proposal by Mr. Pellet and Mr. Eiriksson (2457th meeting).

98. Mr. PELLET said that he was somewhat sceptical about the benefits of such a forced marriage between his and Mr. Arangio-Ruiz' proposals. He was willing for them both to be treated on an equal footing, but the idea of a merger between the two struck him as a little strange.

99. The CHAIRMAN invited Mr. Pellet to draft a suitable form of wording, taking account of the views expressed, for the Commission's consideration at the next meeting.

The meeting rose at 1.10 p.m.

[1] See 2434th meeting, footnote 5.

2470th MEETING

Wednesday, 24 July 1996, at 3.15 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer.

Draft report of the Commission on the work of its forty-eighth session (*continued*)

CHAPTER III. *State responsibility* (continued) (A/CN.4/L.528 and Corr.1, and Add.1-3 and Add.3/Corr.1)

D. Draft articles on State responsibility (*continued*) (A/CN.4/L.528/Add.2 and 3 and Add.3/Corr.1)

Commentary to article 51 (Consequences of an international crime) (A/CN.4/L.528/Add.3 and Add.3/Corr.1)

Paragraph (1)

1. The CHAIRMAN pointed out that, at the previous meeting, the Commission had decided to place the 15 paragraphs of the general commentary on international crimes in the commentary to article 51. They would be inserted after the first sentence of paragraph (1) and slight changes in form would be required to make that change easier. The paragraphs would, of course, be renumbered accordingly.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to article 51, as amended, was adopted.

Commentary to article 52 (Specific consequences)

Paragraph (1)

2. The CHAIRMAN and Mr. BOWETT proposed that the word "specific", in the first sentence should be deleted.

It was so agreed.

3. In response to a comment by Mr. CALERO RODRIGUES, who asked for clarification regarding the term "serious consequences", used in the English version, Mr. BOWETT and Mr. ROSENSTOCK explained that the Drafting Committee had wanted to avoid the term "substantial", used in another context. It had, how-