Document:-

A/CN.4/SR.2468

Summary record of the 2468th meeting

Topic:

Other topics

Extract from the Yearbook of the International Law Commission:-

1996, vol. I

2468th MEETING

Tuesday, 23 July 1996, at 3.10 p.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. 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)

Commentary to article 47 (Countermeasures by an injured State) (*concluded*) (A/CN.4/L.528/Add.3 and Corr.1)

Paragraph (10)

1. Mr. ARANGIO-RUIZ suggested that the words "or maintaining" should be added before the word "countermeasures" in the fifth sentence.

2. Mr. BENNOUNA said that the addition of those words would give rise to problems in French and was not necessary.

3. Mr. ROSENSTOCK said that the words "to compel both cessation and reparation" at the end of the second sentence complicated matters unnecessarily and might create confusion. He therefore proposed that they should be deleted.

4. The CHAIRMAN said that, in that case, it would also be necessary to delete footnote 7, which referred to those words.

It was so agreed.

Paragraph (10), as amended, was adopted.

5. Mr. VILLAGRÁN KRAMER said that, before going on to the consideration of paragraph (11), he was of the opinion that the content of paragraph (10) of the commentary which had just been adopted was not applicable to crimes. He requested that that opinion should be reflected in the summary record.

Paragraphs (11) and (012)

Paragraphs (11) and (12) were adopted.

6. The CHAIRMAN reminded the Commission, before it went on to the consideration of the commentary to article 48, that paragraphs (1) and (2) of the commentary to article 47, that would form a general introduction to chapter III of part two, had been left pending until Mr. Eiriksson had drafted his proposed amendment in writing.

The commentary to article 47, as amended, was adopted on that understanding.

Commentary to article 48 (Conditions relating to resort to countermeasures)

Paragraph (1)

7. Mr. VILLAGRÁN KRAMER said that paragraph (1) suggested that conditions relating to resort to countermeasures were applicable in all cases, including the case of one of the crimes listed in article 19 of part one, such as the crime of genocide. It must, however, be noted that, in such a case, the obligation to negotiate or to suspend countermeasures as soon as the internationally wrongful act had ceased, as usually required of the injured State under article 48, was meaningless. In the case of aggression, moreover, it was not possible that the State which had been attacked should have to start negotiations before it reacted. When the Security Council authorized a State to take countermeasures, it did not ask it to negotiate first. By stating those new rules, the Commission was moving far away from United Nations practice and general international law. Before paragraph (1) was adopted, it should therefore give more thought to the question whether the conditions relating to resort to countermeasures which it stated should apply in the case of crimes.

8. Mr. ROSENSTOCK said that Mr. Villagrán Kramer's comment was relevant. Paragraph (1) said nothing about the specific consequences of crimes. It would probably be rather complicated to redraft it completely at the current stage, but, by way of an indication for the reader, a sentence could perhaps be added explaining, for example, that a State facing an emergency situation was not required to negotiate. He was thinking of the case of self-defence. Explanations to take care of Mr. Villagrán Kramer's concerns might also be included in the section on crimes.

9. The CHAIRMAN said that the case of self-defence was covered in article 34. He nevertheless suggested that Mr. Villagrán Kramer should submit a written proposed amendment to paragraph (1). Pending the distribution of that proposal to the members, he said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (1).

Paragraph (1) was adopted on that understanding.

Paragraph (2)

10. Mr. BENNOUNA suggested that, in the sixth sentence, the words "including negotiations", which added nothing to the commentary, should be deleted. To bring the French text into line with the English text, the word *interêts* should be replaced by the word *droits* at the end of the last sentence.

It was so agreed.

11. Mr. ROSENSTOCK said that he supported Mr. Bennouna's proposals. He also suggested that, at the end of the second sentence, the words "whether these other remedies should be exhausted" should be replaced by the words "whether this needed to be". He also proposed that the words "any form of" before the word "countermeasures" in the sixth sentence should be deleted because they were unnecessary.

It was so agreed.

Paragraph (2), as amended, was adopted.

Paragraph (3)

12. Mr. BENNOUNA, commenting on the form of paragraph (3), said that the words *droits juridiques* at the end of the second sentence were not a good translation of the words "legal rights". It was enough to refer to "rights". In the last sentence, the words "its legal position" should be replaced by the words "its rights".

13. As to substance, paragraph (3) referred to the obligation to negotiate without ever explaining why that obligation had been introduced and what the point of it was. That gap could be filled if the words "by negotiation" in the penultimate sentence were followed by an explanatory sentence, which might read:

> "This obligation, which has been clearly explained by international legal decisions, has the advantage of crystallizing the dispute by enabling each State to explain its legal position and to settle the dispute in good faith by fulfilling their international obligations."

The sentence might, of course, be worded differently, but he thought that such an explanation was necessary.

14. Mr. ROSENSTOCK said that the obligation to negotiate, as provided for in article 48, paragraph 1, had not been unanimously agreed on by the members of the Commission and that that paragraph had even had to be voted on. The possibility of interim measures of protection had been provided for in order to solve the problem created by the introduction of that obligation. Paragraph (3) of the commentary, which was designed to reflect that compromise, was acceptable as it stood. However, if explanations on the grounds for the obligation to negotiate were to be added, the arguments of those who had been opposed to it would also have to be reflected.

15. He therefore proposed that paragraph (3) should be retained as it stood, except that, in the fourth sentence, the word "strikes" should be replaced by the words "tries to strike" and, in the fifth sentence, the word "amicably", which added nothing and could give rise to confusion, should be deleted.

16. The CHAIRMAN asked Mr. Bennouna whether, in the light of the arguments put forward by Mr. Rosenstock, he maintained his proposal.

17. Mr. BENNOUNA said he regretted that the Commission was adopting that position. His only intention had been to explain, by means of a neutral reference, what the obligation to negotiate meant. If the Commission preferred not to give any explanation and to bury its head in the sand, it could even delete paragraph (3) as a whole because article 48 stood on its own. The interested persons simply had to refer to the text books and other writings on law. He would not press for his suggestion, but, as a trade-off, he would like Mr. Rosenstock to withdraw his proposal for the amendment of the beginning of the fourth sentence.

18. Mr. VILLAGRÁN KRAMER said that, in that particular area, the Commission had to have very clear ideas. At present, there was no obligation to negotiate in the event of reprisals and Mr. Bennouna would be unable to cite a single case of reprisals where an obligation to negotiate had been established or regarded as valid. The obligation to negotiate that the Commission thought should be introduced in the system it was proposing should, in his view, be substantially restricted if the Commission wanted to obtain the approval of the text by States which had been or continued to be in favour of the practice of countermeasures. They would agree to restrict their own right to resort to countermeasures only if they had a specific idea of the regime that would be applicable in the framework of the articles. It would therefore be better if the Commission left things as they were, while taking note of the statements that had been made.

19. The CHAIRMAN, replying to a comment by Mr. Lukashuk on the words "the Commission eventually concluded" in the third sentence, said that those words had to be retained because there had been a discussion and a vote had even been taken.

20. Since Mr. Rosenstock did not insist on his first proposal, he said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (3), deleting only the word "amicably" in the penultimate sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

21. Mr. BOWETT proposed that the word "analogous" in the first sentence should be deleted because it would be dangerous to suggest that the Commission was drawing an analogy with other procedures.

22. Mr. ARANGIO-RUIZ said that he supported that proposal and suggested that the beginning of the sentence should be simplified to read: "The term 'interim measures of protection' is drawn from procedures of international courts."

23. Mr. BENNOUNA said that the words "drawn from" should be replaced by the words "based on", but that was only a drafting problem. He had two other proposed amendments to submit to the Commission. In the third sentence, the words in brackets should be deleted because it was not necessary to explain that assets could be removed from the jurisdiction within a very short time. His second proposal was that the following new penultimate sentence should be added:

> "Such measures would be designed to enable the injured State to prevent any deterioration of its position in its relations with the State which committed the wrongful act."

The purpose of that proposal was to explain interim measures of protection, but, if some members considered it too ideologically oriented, he would withdraw it.

24. Mr. ARANGIO-RUIZ said that he could agree to Mr. Bennouna's first proposal, but, with regard to the second, he thought that the injured State had to protect its rights, and not only its position in its relations with the wrongdoing State.

25. The CHAIRMAN pointed out that Mr. Bennouna was prepared to withdraw his second proposal. It was true that, since interim measures of protection had to be taken by the competent bodies, they should be allowed to decide what the purpose of such measures was.

26. Mr. BOWETT said that he objected to the deletion of the words in brackets in the third sentence of paragraph (4) because the commentary was designed to explain the purpose served by interim measures of protection and it was precisely because of the speed with which assets could be removed from a jurisdiction that the Commission had provided for the possibility of interim measures of protection.

27. Mr. AL-BAHARNA said that he was in favour of the retention of the words in brackets and suggested that, in order to make the text clearer, the brackets should be removed.

28. The CHAIRMAN said that, in a spirit of compromise, the Commission should leave that part of the sentence as it stood. In reply to a comment by Mr. VILLAGRÁN KRAMER, he said that there should be a provision to protect the rights of third States. He said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (4) with the amendments to the first sentence proposed by Mr. Bowett and Mr. Arangio-Ruiz.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

29. Mr. BENNOUNA said that the words "are unlikely to succeed" were too subjective and should be replaced by the words "are deadlocked".

30. Mr. ARANGIO-RUIZ said that, although both wordings involved some degree of subjectivity, the degree was not so great when determining whether or not a deadlock existed. That was a relatively more objective criterion that would be easier to evaluate.

31. Mr. ROSENSTOCK said it was precisely the appearance of objectivity that created a problem. Such wording would suggest that there were objective criteria for determining whether the countermeasures to which the injured State resorted at its own risk were lawful or wrongful. The evaluation by the injured State was always of a subjective nature and implying that it could be made more objective was misleading.

32. Mr. KABATSI, supported by Mr. THIAM, proposed that, as a compromise solution, the Commission might add the words "are deadlocked and" before the words "are unlikely to succeed".

33. Mr. AL-BAHARNA proposed that, in the first sentence, the words "which go beyond" should be replaced by the words "which might go beyond".

34. Mr. ROSENSTOCK said that the problem could be solved if the word "and" after the words "are at a standstill" were replaced by the word "or".

35. Mr. BENNOUNA said that only the word "and" would indicate clearly that negotiations were unlikely to succeed. Replacing it by the word "or" would be the same as leaving the text as it stood. He was, moreover, prepared, in a spirit of compromise, to agree to the original text, even though he regretted that the Commission could not be more flexible.

36. The CHAIRMAN said that, if he heard no objections, he would take it that the the Commission wished to adopt paragraph (6) as it stood.

Paragraph (6) was adopted.

37. Mr. VILLAGRÁN KRAMER said he wanted it to be placed on record that he could agree to the adoption of paragraph (6) only if it was understood that negotiations were regarded as "unlikely to succeed" if the wrongdoing State: (*a*) refused to cease its wrongful conduct; and (*b*) refused to recognize its duty of reparation.

Paragraph (7)

38. Mr. ROSENSTOCK said that the end of paragraph (7) as from the words "the allegedly wrongdoing State" in the second sentence suggested that there was a conventional regime such as the one the Commission was proposing. Such an affirmation was not correct from the point of view of general international law and the Commission would have to be more specific, for example, by adding the words "in the context of the regime defined by the Commission" after the words "where a State takes countermeasures" in the penultimate sentence.

39. Mr. BOWETT, replying to the comment by Mr. Rosenstock, proposed that the words "pursuant to article 48" should be added after the words "where a State takes countermeasures".

It was so agreed.

Paragraph (7), as amended, was adopted.

Paragraph (8)

40. Mr. ROSENSTOCK, referring to the third sentence, proposed that the words "will also have power" should be replaced by the words "must also have power". It was that power that gave rise to the obligation to suspend countermeasures; that obligation did not flow automatically from the institution of dispute settlement proceedings.

41. Mr. TOMUSCHAT said that paragraph (8) gave rise to a substantive problem in view of the doctrinal dispute on whether the interim measures of protection indi-

cated by ICJ under Article 41 of its Statute were binding or not on the parties to the dispute.

42. Mr. BOWETT said that ICJ could issue orders binding on the parties, provided that such orders were worded along those lines. Thus, if it so wished, it could indicate interim measures of protection having the effect of suspending a countermeasure.

43. Mr. ARANGIO-RUIZ said that, unlike paragraph (8) of the commentary, which referred to "power to order or indicate interim measures of protection", Article 41 of the Statute of ICJ used only the word "indicate". By using the words "issue orders binding on the parties", article 48, paragraph 3, laid down a condition for the suspension of countermeasures and the words "or indicate" in the last sentence of paragraph (8) should therefore be deleted.

44. Mr. TOMUSCHAT said that, if those words were deleted, ICJ would no longer be a "tribunal" within the meaning of article 48. However, even if the indication of interim measures of protection by ICJ was not legally binding, it carried such political weight that it should be covered by article 48, paragraph 3. The text of that provision should therefore be amended and the necessary explanations given in the commentary.

45. Mr. ROSENSTOCK said that paragraph (8) did not rule out the possibility that ICJ might play a role. The solution might be to use the words in quotation marks in the first sentence in the third sentence. As the text of article 48, paragraph 3, now stood, if a tribunal was not authorized to issue orders binding on the parties, it could still settle the dispute, but having the dispute submitted to it did not make it an obligation for the State which had taken countermeasures to suspend them because ICJ did not have power to issue binding orders and could therefore not protect that State. He thought that the words "or indicate" should be deleted.

46. Mr. PELLET said that the text of article 48, paragraph 3, was not at all ambiguous because it stated that the tribunal must be able to issue "orders binding on the parties". It was very rash to try, in a commentary on a draft article on State responsibility, to settle a dispute that had existed since the establishment of ICJ concerning the nature of the interim measures of protection it indicated. If the words "or indicate" were kept in the commentary, the text of article 48, paragraph 3, itself would have to be amended, as Mr. Tomuschat had proposed. He himself was opposed to such an amendment and to the entire system proposed. Moreover, the last sentence of paragraph (8) seemed to give the tribunal a power not given to it either by part three of the draft articles or by the annex. It should therefore be deleted.

47. Mr. FOMBA said it was clear that, as the text stood, action by the Court would not have a suspensive effect. He agreed with Mr. Pellet that the last sentence of paragraph (8) should be deleted.

48. The CHAIRMAN suggested that only the end of the third sentence of paragraph (8) should be deleted, as from the words "which may have the effect". The Commission would thus not be taking a stand on the effect of interim measures of protection taken by a particular body.

49. Mr. PELLET said that the last sentence suggested that the tribunal set up in part three of the draft articles had the power in question, but that was not stated anywhere in part three. He therefore proposed that the last sentence should begin with the words "The tribunal to which the dispute is submitted will also have power".

50. Mr. ROSENSTOCK said that he could agree to Mr. Pellet's proposal, but he preferred the one made by the Chairman. An analysis of article 48, paragraph 3, showed that the obligation to suspend countermeasures which it imposed on the injured State depended on the power of the tribunal to issue binding orders. The reason was that the State which had to suspend its countermeasures could benefit from the protection of a tribunal which had that power. If the tribunal to which the dispute had been submitted did not have that power to protect it, it was doubtful whether the injured State was required to lay itself wide open by lifting the countermeasures. The effect of interim measures of protection must therefore not be limited to the modification or suspension of the countermeasure taken, but must be to do away with the need for the injured State to maintain that countermeasure in order to protect itself.

51. Mr. PELLET said that his concern was to avoid appearing, in the commentary to article 48, to give powers to the tribunal referred to in part three of the draft articles. The solution might be to combine his proposal with that of the Chairman, so that the last sentence would read: "The tribunal to which the dispute is submitted must have power to order interim measures of protection."

It was so agreed.

Paragraph (8), as amended, was adopted.

Paragraph (9)

52. Mr. ROSENSTOCK said that paragraph (9) belonged within the commentaries to part three of the draft articles.

53. Mr. BOWETT said that the last sentence was important because it related to countermeasures.

54. Mr. ARANGIO-RUIZ said it should be ensured that the questions dealt with at the beginning of paragraph (9), particularly that of the scope of the jurisdiction of the arbitral tribunal referred to in article 58, paragraph 2, were in fact covered in the commentaries to part three of the draft articles.

55. Mr. PELLET said that that question was considered in paragraphs (4) and (5) of the commentary to the former article 5 of part three.[1] In that connection, he pointed out that paragraph (5) of former article 5 said nearly the same thing as the footnote to the second sentence of paragraph (9) under consideration, but much more clearly.

[1] See *Yearbook ... 1995*, vol. II (Part Two), chap. IV, sect. C.

56. The CHAIRMAN said that he took it that the Commission wished to request the secretariat to make the necessary comparisons and propose a new, shorter wording for paragraph (9).

It was so agreed.

Paragraph (10)

57. Mr. ROSENSTOCK said that the words "is suspended" in the third sentence should be replaced by the words "may be suspended" because the right of the injured State to continue to take countermeasures would not be suspended in all cases.

58. Mr. ARANGIO-RUIZ said that paragraph (10) could not be amended without affecting the interpretation of article 48, paragraph 3. It should therefore be left as it stood.

Paragraph (10) was adopted.

Paragraph (11)

59. Mr. ROSENSTOCK proposed that paragraph (11), which he thought was unnecessary, should be deleted.

60. Mr. TOMUSCHAT and Mr. CALERO RODRIGUES said they agreed that paragraph (11) was not absolutely necessary, but thought that it should be retained because it was very clear and explained a complex situation in few words.

Paragraph (11) was adopted.

Paragraph (12)

61. Mr. BOWETT said that paragraph (12) was too wordy and that he would have liked to retain only the part dealing specifically with article 48.

62. Mr. LUKASHUK and Mr. ROSENSTOCK said that the word "technically" in the fourth sentence should be deleted.

63. Mr. PELLET proposed that the words "technically non-binding" should be replaced by the words "legally binding".

It was so agreed.

Paragraph (12) was adopted.

Paragraph (13)

64. Mr. ROSENSTOCK said that the last part of the last sentence, which referred to *lex talionis* and "the law of the jungle", was quite out of place in a commentary and should be deleted.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

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

65. Mr. ARANGIO-RUIZ, referring to the commentary to chapter IV, said that he could not accept most of the paragraphs under consideration and, in particular, paragraphs (3), (5), (7), (8) and (10), because they tended to solve explicitly in favour of the competence of the Security Council the problem raised by the implications of the very ambiguous provision contained in article 39, which had been adopted just barely, by 11 votes to 11, with 4 abstentions (2452nd meeting). A number of members of the Commission considered that that article did not make the law of State responsibility subject to the practice of collective security and that it was designed simply to protect the system of collective security from the effects of the articles on State responsibility relating to the consequences of internationally wrongful acts. In his view, however, article 39 did make the law of State responsibility subject to decisions by the Security Council. He had already explained that, he trusted, with sufficient clarity.

66. The paragraphs of the commentary to which he had referred would inevitably be read as an explicit interpretation of article 39 as subordinating the law of State responsibility to Security Council action. In other words, they would confirm the fears expressed by more than one half of the members of the Commission, who had voted against article 39.

67. Moreover, the paragraphs in question did not make adequate room for the decisive role that ICJ could play in the determination of the existence of a crime and its attribution to a State. They also ignored the role of the General Assembly, which was the most representative organ in the system and was referred to in Article 35 of the Charter of the United Nations as an organ not less competent than the Security Council for the purpose of that Article. Everyone knew that at least three categories of the crimes covered by article 19 of part one of the draft articles related to areas within the competence of the Assembly.

68. On the whole, the emphasis that the proposed commentary placed on the functions of the Security Council conveyed the idea that the Charter of the United Nations and, in particular, the "provisions and procedures" referred to in article 39 of the draft articles, dealt with State responsibility, and that was unacceptable. The Charter had nothing to do with the general law of State responsibility.

69. Lastly, he did not agree with the term "innovative" which was used in paragraphs (3) and (11) of the commentary to describe some of the proposals the Commission had studied. The solution adopted by the Commission in articles 39, 51, 52 and 53 was the most innovative because, for the first time, a body as specialized as the Commission was subordinating the law of State responsibility to the action of a political body which was not competent to decide issues of State responsibility.

70. He could also not share the view stated in the footnote to article 39 (A/CN.4/L.528/Add.2), according to which article 39 did not seek to resolve "one way or the other" the question of the scope of the Security Council's powers. Quite the contrary, the commentary under consideration appeared precisely, however different its authors' intention might have been, to seek to resolve the question of the Security Council's powers by implicitly or explicitly extending those powers to the area of State responsibility.

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.