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Summary record of the 2472nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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the Protocols Additional thereto'' should be added at the end of the first sentence.

It was so agreed.

83. Mr. TOMUSCHAT proposed the words *inter alia* should be inserted between ''provided for'' and the words ''by the'', in the first sentence.

84. Mr. ROSENSTOCK said that the words ''general characteristics'', used in the second sentence of paragraph (4) and again in paragraph (5), were inappropriate and should be replaced by the word ''criteria''.

85. Mr. THIAM (Special Rapporteur) said that he accepted the suggestion by Mr. Tomuschat, but would not be in favour of using the word ''criteria'' in the context of paragraphs (4) and (5). The characteristics in question were specified in the *chapeau* of the article and were that the crimes in question had to have been committed in a systematic manner or on a large scale.

86. Mr. PELLET recalled that the precise English rendering of the French word *caractère* had given rise to a good deal of discussion in connection with the consideration of article 3 of the draft Code.

87. Mr. ROSENSTOCK said that he was prepared to leave it to the secretariat to ensure that the language of paragraphs (4) and (5) was in line with that used elsewhere in the commentary in connection with the concept of crimes committed in a systematic manner or on a large scale.

88. Mr. CALERO RODRIGUES suggested that the secretariat should also see whether the word ''listed'', in the second sentence, should not be replaced by the word ''indicated'', inasmuch as the characteristics or, as the case might be, criteria in question were only two in number.

It was so agreed.

Paragraph (4), as amended, was adopted on that understanding.

The meeting rose at 1.05 p.m.

2472nd MEETING

Thursday, 25 July 1996, at 3.15 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Güney, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

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

CHAPTER II. ***Draft Code of Crimes against the Peace and Security of Mankind*** **(continued) (A/CN.4/L.527 and Add.1 and Add.1/Corr.1, Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 and Corr.1 and Add.11)**

D. Articles of the draft Code of Crimes against the Peace and Security of Mankind (*concluded*) (A/CN.4/L.527/Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 and Corr.1 and Add.11)

Commentary to article 20 (War crimes) (*concluded*) (A/CN.4/L.527/Add.11)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the commentary to article 20 of the draft Code of Crimes against the Peace and Security of Mankind, starting with paragraph (5).

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

2. Mr. ROSENSTOCK proposed that the last part of the second sentence starting with the words ''causing extensive casualties'' should be deleted because that statement did not apply in the case of attempt.

3. Mr. THIAM (Special Rapporteur) said that he supported that proposal.

It was so agreed.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

4. Mr. de SARAM said that the words ''has not been made up out of nothing'' were a bit colloquial.

5. Mr. PELLET proposed that those words should be replaced by the words ''has not been drawn up *ex nihilo*''.

It was so agreed.

6. Mr. LUKASHUK, referring to the second sentence, said that the acts in question were primarily punishable by international humanitarian law and that the sentence should be amended to read: ''Most of the acts listed are recognized by international humanitarian law and included in different instruments''.

It was so agreed.

Paragraph (9), as amended, was adopted.

Paragraph (10)

7. Mr. LUKASHUK said that, like paragraph (9) and for the same reason, the beginning of paragraph (10) needed to be amended. He therefore proposed that, in the first sentence, the words "grave breaches" should be followed by the words "of international humanitarian law as contained in the Geneva Conventions of 12 August 1949".

8. Mr. PELLET said that he fully supported that proposal because the breaches in question were punishable under customary international law even if those who committed them were not nationals of States parties to the Geneva Conventions of 12 August 1949.

9. Mr. ROSENSTOCK said that he supported Mr. Lukashuk's proposal, but pointed out that the same solution could not be adopted in the case of the Protocols Additional to the Geneva Conventions.

10. Mr. THIAM (Special Rapporteur) said that he also supported Mr. Lukashuk's proposal.

11. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph (10) as amended by Mr. Lukashuk.

Paragraph (10), as amended, was adopted.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

12. Mr. PELLET proposed that, since the comment he had made on the Geneva Conventions of 12 August 1949 was also applicable in the present case, the end of the first sentence should be amended to read: ". . . serious violations of the laws and customs of war on land, as referred to in the 1907 Hague Convention (IV) and the regulations annexed thereto".

It was so agreed.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

13. Mr. TOMUSCHAT proposed that, as in the first sentence of paragraph (13), the first sentence of paragraph (15) should be amended to read: ". . . namely, war crimes which have their basis in articles 35 and 55 of Additional Protocol I".

It was so agreed.

Paragraph (15), as amended, was adopted.

The commentary to article 20, as amended, was adopted.

Section D, as amended, was adopted.

B. Recommendation of the Commission

14. The CHAIRMAN said that, having adopted the commentaries to the articles, the Commission had to decide what recommendation it intended to make to the General Assembly on the form the draft Code of Crimes against the Peace and Security of Mankind should take.

15. Mr. PELLET said that it was better to let the General Assembly decide.

16. Mr. CALERO RODRIGUES said that a trend in favour of that solution had appeared to be taking shape during the discussion which had already taken place on the question.

17. Mr. THIAM (Special Rapporteur) said he did not think that it was wise to leave it to the General Assembly to decide because the draft Code might then have the same fate as the one submitted in 1954.[1]

18. Mr. BENNOUNA said that, in its recommendation to the General Assembly, the Commission should indicate at least that it wanted the provisions of the Code to be binding and that it would like the Code to be acceded to by as many States as possible, leaving it to the General Assembly to decide on the most suitable way of complying with those two requests.

19. Mr. BARBOZA pointed out that, in any event, the General Assembly could decide which solution it thought best and that a recommendation leaving it to the Assembly to decide was therefore meaningless. The Commission had to assume its responsibilities and express its preference or, at least, give the General Assembly some indications.

20. Mr. ROSENSTOCK said that, if the Commission recommended a convention, he was afraid that it might be ratified only by a small number of States. If it was left up to the General Assembly to decide, it might be able to take account of the results of the meeting that was to be held in late August on the draft statute for an international criminal court and the course to be followed with regard to the draft Code might then be clearer. It would be too early to make a recommendation on the draft Code without knowing what was to happen to the draft statute of an international criminal court. For the sake of the work it had done, the Commission should therefore simply give the General Assembly some indication of the various possible options.

21. Mr. PELLET said that, unlike Mr. Bennouna, he did not want the provisions of the Code to be binding, for reasons relating to the draft Code itself and the fact that the statute of an international criminal court was in the process of being drawn up. There could thus be no consensus on that point. A consensus must nevertheless be sought and he proposed that the Commission's recommendation should be worded along the following lines:

> "The Commission discussed the question of the action that the General Assembly might take on the draft Code of Crimes against the Peace and Security

[1] See 2445th meeting, footnote 5.

of Mankind. There were several possibilities, including the adoption of a convention, the inclusion of the Code in the statute of an international criminal court and a declaration (or any other idea that might be put forward).

"Following an exchange of views, the Commission recommends that the draft Code should be given the widest possible acceptance and considers that the General Assembly should decide on the most appropriate way of achieving this goal."

22. Mr. AL-BAHARNA said that the Commission would be failing in its duty if it did not recommend a specific solution to the General Assembly. In his view, it should recommend that the General Assembly should adopt the draft Code, which was the result of many years of work and contained basic rules of international law, in the form of a convention. If the draft Code was adopted in the form of a declaration, the future international criminal court, whose statute referred to conventions in force, would not be able to apply its provisions.

23. Mr. RAZAFINDRALAMBO pointed out that the draft Code was a text of fundamental importance to the international community, as shown by events which had recently taken place in various parts of the world. It should therefore be adopted in the form of a binding convention which could be implemented by an international criminal court. It was, moreover, quite certain that the General Assembly would like to receive specific indications in that regard. He could therefore not accept Mr. Pellet's proposal unless the Commission let the General Assembly know what the majority opinion of its members was on that question.

24. Mr. LUKASHUK said that a convention would be the best solution in legal terms. However, if the Commission wanted its draft Code to take the form of an official instrument, it would probably be more realistic for the time being to propose only a declaration, which could later become a convention. A declaration would simply state rules of customary law and an international criminal court would therefore be able to apply it.

25. Mr. BARBOZA said that it would not be good for the Commission to present a divided front to the General Assembly. A consensus could probably be reached on Mr. Pellet's proposal.

26. Mr. PELLET said that, in his view, a convention might create a group of virtuous States because only States which regarded themselves as above reproach would ratify the text.

27. Mr. MIKULKA said that preference should be given to a declaration, not because a convention would not be appropriate, but for tactical reasons. It would be illusory to hope that a convention would be signed shortly. However, if the Commission opted for a declaration, it must be understood that the General Assembly would adopt the Code as proposed, without further consideration of matters on which the Commission had already decided. The Code was acceptable as a declaration only as a reflection of customary international law. If it was amended and its nature was thus changed, it would no longer have any authority.

28. Mr. SZEKELY said that he would very much like the draft Code to become a convention having at least as much authority as the Additional Protocols to the Geneva Conventions of 12 August 1949. They had such moral force that it was difficult for a State not to accede to them. He therefore regretted the lack of consensus, which would deprive the Code of its binding legal force.

29. The CHAIRMAN, speaking as a member of the Commission, said that he was also in favour of the solution of a convention. In his view, the Commission had engaged in codification by ruling out certain crimes and keeping only offences already dealt with by the conventions in force and customary international law.

30. Mr. AL-BAHARNA proposed that the beginning of the text proposed by Mr. Pellet should be amended so that it would be clearly stated that the Commission had not been able to agree on the form the draft Code should take and so that there would be a reference to the work of the Preparatory Committee on the Establishment of an International Criminal Court.

31. Mr. ROSENSTOCK said he thought that the text proposed by Mr. Pellet could be amended to take account of the concerns expressed by Mr. Al-Baharna.

32. Mr. PELLET said that the purpose of his proposal had been to avoid saying that the members of the Commission had not been able to agree on a specific proposal or suggesting that there was a minority or a majority in favour of a particular solution. He would like the text to be as discreet as possible on that point.

33. Mr. THIAM (Special Rapporteur) said that it was not possible to tell the General Assembly that it must find a solution itself because the Commission had been unable to agree. He recalled that the draft Code was the outcome of 15 years' work, which had involved restricting as much as possible a basis *ratione materiae* that had originally been very broad.

34. Mr. SZEKELY urged the Commission to reach a consensus. What was important, in his view, was that it had in fact agreed on the draft Code it had adopted. That was what it had to show, and not the fact that the members had not been able to agree on the recommendation to the General Assembly.

35. Mr. AL-BAHARNA said that he withdrew his proposal.

36. The CHAIRMAN suggested that, during the meeting, the secretariat should submit a text of a draft recommendation to the General Assembly based on the proposal by Mr. Pellet.

It was so agreed.

37. The CHAIRMAN said that the draft recommendation to the General Assembly which the secretariat had prepared on the basis of Mr. Pellet's proposal read as follows:

"The Commission considered various forms which the draft Code of Crimes against the Peace and Security of Mankind could take, including an international convention adopted by a plenipotentiary conference

or by the General Assembly itself, incorporating the Code in the statute of an international criminal court, or a declaration by the General Assembly."

"Following an exchange of views, the Commission decided that the draft Code should be given the widest possible acceptance and recommended that the General Assembly should select the most appropriate form to achieve this goal."

38. Replying to comments made by Mr. AL-BAHARNA, Mr. YANKOV and Mr. LUKASHUK on the list contained in the first paragraph of the draft recommendation, the CHAIRMAN, supported by Mr. CALERO RODRIGUES, said that the proposed text was the result of a compromise and that, by agreeing to the principle, the members of the Commission had also agreed not to reopen the substantive debate. Moreover, the list reflected the opinions expressed by the members of the Commission on the forms that the draft Code might take and nothing could therefore be added to it or taken away.

39. Mr. BOWETT said that, in the second paragraph, it was not accurate to say that "the Commission decided that the draft Code should be given the widest possible acceptance" because that was a decision to be taken by Governments. He therefore proposed that the paragraph should be amended to read: "the Commission expressed the hope that the draft Code would gain the widest possible acceptance".

40. Mr. YANKOV said that he supported that proposal.

41. Mr. LUKASHUK said that Mr. Bowett's proposal was satisfactory. He also suggested that the words "Following an exchange of views" should be deleted because there was nothing exceptional in the fact that the Commission had taken a decision following an exchange of views.

42. Mr. THIAM (Special Rapporteur) said that he supported Mr. Lukashuk's proposal because it was obvious that the Commission could not decide anything, particularly in view of the number of members it had, without holding an exchange of views. The sentence would be more readable if it were shortened in that way.

43. Mr. ROSENSTOCK said that he supported Mr. Bowett's proposal and the amendments suggested by Mr. Lukashuk.

44. Mr. MIKULKA said that it was important to convey the idea that, as far as the Commission was concerned, the main objective was the broadest possible participation, the choice of form being secondary. He therefore proposed that the second paragraph should be amended to read: "The Commission recommends that the General Assembly should choose the most appropriate form to guarantee the broadest possible acceptance of the Code by States".

45. Mr. CALERO RODRIGUES said that he found that proposal very attractive because it did not change the substance of the paragraph and made the Commission's intention very clear.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the draft recommendation as amended by Mr. Mikulka.

The draft recommendation, as amended, was adopted.

Section B, as amended, was adopted.

47. The CHAIRMAN said that the Commission would take up consideration of chapter II, section A, of its draft report on the draft Code of Crimes against the Peace and Security of Mankind at a later time.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*)* (A/CN.4/472/Add.1, sect. D, A/CN.4/475 and Add.1,[2] A/CN.4/L.533 and Add.1)

[Agenda item 4]

REPORT OF THE WORKING GROUP ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (*concluded*)*

48. The CHAIRMAN invited the members of the Commission who wished to do so to comment on the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.533 and Add.1), which could be annexed to the Commission's report. The report contained the full text of the articles and commentaries thereto proposed by the Working Group.

49. Mr. BOWETT said that the Commission could not transmit a text to the General Assembly containing absurdities such as that in article 1, subparagraph (*b*), which stated that "activities which do not involve a risk" of causing significant transboundary harm "nonetheless cause such harm". Reference should be made to "activities which were originally believed not to involve a risk of causing significant transboundary harm".

50. Mr. PELLET said that the report would not be sent to the General Assembly under the Commission's signature and contained only the conclusions of a working group. He regretted, moreover, that the Commission could not officially submit to the General Assembly chapter II (Prevention), a carefully thought out text that the Member States could now adopt. Chapters I (General provisions) and III (Compensation or other relief) were, however, very much open to criticism and he maintained the reservations he had already expressed about them.

51. Mr. ROSENSTOCK said that the wording proposed by Mr. Bowett for article 1, subparagraph (*b*), was not entirely appropriate because an activity might originally not involve a risk of transboundary harm, but begin to reveal one as it was carried out. It would therefore be better to refer to "activities not prohibited by interna-

* Resumed from the 2465th meeting.

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

tional law which do not involve a perceivable risk referred to in subparagraph (*a*)''.

52. In reply to Mr. Pellet, he said that it would not be appropriate to let the General Assembly know about differences of opinion among the members of the Commission, particularly as the Commission had no decision to take at present.

53. The study of the topic so far had been particularly useful because it enabled the General Assembly to have before it a complete text that was very broad in scope and dealt with all of the questions that the subject matter covered. Member States would thus be able to express their views on a number of problems that they would have an opportunity to focus on for the first time. The Special Rapporteur, the Rapporteur of the Commission and the secretariat should try to draw up a list of the points on which it would be helpful for the Commission to receive guidance from the General Assembly. For example, were Member States prepared to endorse a system of strict liability and to consider the case of ultrahazardous activities and substances? Did they want obligations of prevention to be particularly strict? Would they be prepared to accept other obligations and, if so, which ones? Those were problems that Governments should have begun to study as early as 1972, following the adoption of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), in particular, principle 21.[3]

54. Mr. SZEKELY said that he also regarded the report under consideration as the result of work that would be extremely beneficial to the international community. States which had common borders would certainly be happy to be able to use the guidelines provided by the proposed articles to solve their transboundary problems, which could arise on a daily basis.

55. The main merit of the draft articles was that they would enable Member States to have an idea of the scope of a convention that would govern the subject matter and thus give the Commission useful indications for the follow-up to its work.

56. The draft articles proposed a very clear-cut definition of transboundary harm caused by one State to another State. At present, the Commission had not yet dealt with the problem of international liability for harm to the global commons. That was a very interesting topic and one that the Commission had already included among the topics it might consider in future.

57. Mr. BENNOUNA said that, while he agreed with the comments by Mr. Bowett and Mr. Pellet, he did not think that it was possible to improve on the wording of article 1, subparagraph (*b*), because, if that provision was taken literally, its scope would include any activity carried out anywhere in the world. In fact, the entire approach of the draft articles was open to criticism. For the sake of consistency, only problems of risk and prevention should have been dealt with.

58. The introduction to the question of responsibility in chapter III was not clear. Did it refer to responsibility in the usual sense of the term or to ''liability'' in the English sense of the term?

59. He would not object if the report of the Working Group was referred to the Sixth Committee, but, when the topic came up on the Commission's agenda in future, he would like it to focus only on the questions of prevention and risk that lay at the heart of the problem.

60. Mr. de SARAM said that, as the Commission had already reached its decision at an earlier meeting on the procedural question of the submission of the report of the Working Group to the General Assembly before its consideration by the Commission in plenary, he would not be commenting on that aspect of the matter. He wished, moreover, to pay tribute to the quality of the report and to the work of the Special Rapporteur. However, he hoped that, whenever the report of the Working Group returned to the Commission for its consideration, the Commission would have the opportunity to determine whether the report of the Working Group and the draft articles it contained provided adequately for the type of transboundary damage with which he was most concerned that the Commission should deal, namely, the causing in one State of damage which was of considerable magnitude and might be catastrophic because of an activity in another State not prohibited by international law.

61. He was not at all certain that the report of the Working Group and its draft articles could now be regarded as providing adequately for damage of that nature and for the prompt and adequate reparation or compensation required. There were one or two provisions in the report and in the draft articles which appeared to set out the proper fundamental beginning and with which he could wholeheartedly concur: article 3, which seemed to reflect the correct perspective that the freedom of States to carry on or permit activities in their territory was not unlimited and was subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm; and the sentence in paragraph (3) of the commentary to article 21 which referred to the fundamental notion of humanity that individuals who had suffered harm or injury due to the activities of others should be granted relief, which found deep resonance in the modern principles of human rights. Yet, the many qualifications incorporated in the report and draft articles seemed to deprive those essential principles of their essence and objective.

62. As to the general approach or perspective adopted in the report of the Working Group and its draft articles, it seemed to him that there had been excessive reliance on procedures of consultation and private law remedies. While it was true that, in certain regions of the world, sophisticated consultation procedures and judicial and administrative infrastructures were already in place for the handling of transboundary damage of great or catastrophic proportions, that was certainly not globally true.

63. In the current quinquennium, the Commission had certainly never considered the fundamental legal questions to which the topic of liability for the injurious consequences of acts not prohibited by international law

[3] See 2450th meeting, footnote 8.

gave rise. As he saw it, the questions were whether, as between States at the public international law level, a State in whose territory an activity not prohibited by international law was conducted (the State of origin) was: (*a*) under public international law legally obliged through the secondary rules of State responsibility to provide reparation to an injured State from resulting transboundary harm; and (*b*) whether the State of origin was under a primary legal obligation to provide the affected State with necessary compensation and relief. There had been occasions in present-day public international law, where a legal obligation to compensate had been found in cases of injurious consequences resulting from lawful activities, even where no treaty had governed.

64. Everyone did, of course, know about the rule of "due diligence", but the Commission had to consider whether there were not limits to that rule, as seemed to be the case in the internal law of many countries. The rule was, moreover, certainly not the only rule of international law that was applicable. He emphasized that he was not concerned with such low-level damage occurring in one State because of activities in neighbouring States that, in terms of good neighbourly relations between States, should be resolved through consultations. He was concerned, rather, with occurrences of transboundary damage of substantial and possibly catastrophic proportions.

65. The commentary to article 8 (Relationship to other rules of international law) reflected a legitimate concern with the operation and content of the prevailing obligations of States under public international law. Yet it seemed to him that paragraph (2) of the commentary was not entirely clear and that its second sentence stating that the reference in article 8 to any other rule of international law is intended to cover both treaty rules and rules of customary international law was troubling because of its omission of the general principles of law, which were, of course, a direct source of international law under Article 38 of the Statute of ICJ.

66. He hoped that the question of the current status of the law on the topic under consideration would be one of the first in the list of specific questions which Mr. Rosenstock wanted to ask the Governments of Member States.

67. Mr. VILLAGRÁN KRAMER said that the advantage of the report of the Working Group was that it gave Governments an overall view of a complex topic with which the Sixth Committee had been dealing for a long time. The idea of consulting Governments through the report was a good one. The study of the topic of liability for injurious consequences arising out of acts not prohibited by international law required good knowledge both of the Roman law and the common law systems, particularly the "law of torts", and the opinion of Governments on the principles of extra contractual liability according to those two types of system was bound to be helpful. The amendment by Mr. Rosenstock to Mr. Bowett's proposal on article 1, subparagraph (*b*) was very much to the point because the potential for risk and the element of foreseeability were very important aspects in that regard.

68. Mr. BARBOZA (Special Rapporteur) said that the coherent set of articles contained in the report of the Working Group would at least enable the General Assembly to improve its understanding of the topic. The text was probably not perfect, but all members of the Commission had had an opportunity to state their point of view in the Working Group.

69. He agreed with Mr. Bowett's comments: the provision he had criticized reflected the opinion of only some members of the Working Group and should have been placed in square brackets, but it was now too late to include alternatives in the text, which had to be referred to the General Assembly as it stood.

70. Mr. MIKULKA recalled that the report of the Working Group had never been discussed in detail in plenary, even if the Special Rapporteur seemed to be attributing responsibility for it to the Commission as a whole. He was therefore not sure whether the Commission had been right to decide to annex the report of the Working Group to its own report. The impression should not be given that Member States were being called on to formulate comments on what was still only a draft to which the Commission would necessarily have to give further consideration at a later stage.

71. Mr. BARBOZA (Special Rapporteur) said that his comments had been misinterpreted and Mr. Mikulka's reaction was based on a misunderstanding.

72. The CHAIRMAN said that that point could be cleared up during the consideration of paragraph 12 of chapter V of the Commission's draft report on that question (A/CN.4/L.529) and that the exchange of views on the report of the Working Group had been completed.

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

CHAPTER V. ***International liability for injurious consequences arising out of acts not prohibited by international law*** **(A/CN.4/L.529)**

73. He invited the members of the Commission to consider chapter V of the draft report paragraph by paragraph.

A. Introduction

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 8 to 11

Paragraphs 8 to 11 were adopted.

Paragraph 12

74. Mr. PELLET proposed that the following phrase should be added at the end of the paragraph: ", which it intended to take up again, if necessary, in accordance with its usual procedures".

75. Mr. BARBOZA (Special Rapporteur) said that the Commission was sovereign and that, when it took up the consideration of the articles again, it would do so on the basis of its own sovereignty.

76. Mr. CALERO RODRIGUES said that the words "as necessary" were inappropriate because they suggested that the Commission might conclude that it did not have to take up the consideration of the articles again. He therefore proposed that those words should be deleted.

77. Mr. LUKASHUK said that that was an internal matter of no interest to the General Assembly.

78. Mr. YANKOV said that he would like the text of paragraph 12 to be retained as it stood, but could also go along with the proposal by Mr. Calero Rodrigues.

79. Mr. SZEKELY said that he supported the view expressed by Mr. Calero Rodrigues and Mr. Yankov.

80. Mr. PELLET said that he was prepared to agree to the deletion of the words "as necessary", which reflected a personal position that the Commission did not have to go along with. He withdrew that part of his proposal. He would, however, find it very difficult to agree to the text of paragraph 12 if he did not have the guarantee, which he had, moreover, believed he had received from the Special Rapporteur during the earlier discussion, that, in any event, the Commission would follow the usual procedure when it took up the consideration of the topic again.

81. Mr. YANKOV said that he appreciated Mr. Pellet's spirit of compromise. He was of the opinion that the original wording of the last sentence expressed the same idea as the revised proposal by Mr. Pellet, but he would nevertheless support that proposal.

82. Mr. CALERO RODRIGUES proposed that, in the last sentence, the word "necessary" should be deleted because it might give the impression that, without the comments of the General Assembly and Governments, the Commission could not continue its work on the topic. He therefore proposed that the beginning of the sentence should read: "These comments will provide useful guidance . . .".

83. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the last sentence of paragraph 12, as amended by Mr. Pellet and Mr. Calero Rodrigues.

It was so agreed.

84. Mr. MIKULKA said that the first sentence of paragraph 12 was unacceptable. What the Commission was asking was that the General Assembly should make comments on the questions referred to in the commentary to article 1, on the approach to the issue of compensation or other relief as set out in chapter III and on the draft articles as a whole. There were, however, no draft articles for the time being. There were only the articles contained in the report of the Working Group, which had never been discussed by the Commission in plenary.

85. Mr. PELLET said he was also disturbed by the approach the Commission had taken in the present case. In order to remove the ambiguity of the text, he proposed that the words "the draft articles as a whole" at the end of the first sentence should be replaced by the words "the report of the Working Group as a whole".

86. Mr. VILLAGRÁN KRAMER drew attention to the fact that the Working Group had simply put into shape articles that had been adopted by the Commission and submitted to the General Assembly two years previously as well as the year before.

87. The CHAIRMAN said he recognized that the articles in question in paragraph 12 were not draft articles in the usual sense which had been considered and discussed by the Commission on first reading before being submitted to the General Assembly. In order to remove the ambiguity at the end of the first sentence, he suggested that the wording that was being criticized should be replaced by the words "the articles and commentaries proposed by the Working Group", which were more in line with the title of the report of the Working Group.

88. Mr. MIKULKA said that he preferred the wording suggested by Mr. Pellet because, in the light of the statute of the Commission, the wording suggested by the Chairman might create confusion between commentaries by the Working Group and commentaries by the Commission. However, if the other members of the Commission were not bothered by that confusion, he would go along with the Chairman's proposal.

89. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to replace the words "the draft articles as a whole" at the end of the first sentence by the words "the articles and commentaries proposed by the Working Group".

Paragraph 12, as amended, was adopted.

90. Mr. CALERO RODRIGUES proposed that the following paragraph should be added to chapter V of the draft report of the Commission:

> "Since Mr. Julio Barboza is leaving the Commission, not being a candidate for re-election, the Commission felt that it should express its deep appreciation for the zeal and competence which he demonstrated for 12 years as Special Rapporteur for this important and complex work."

The proposal was adopted by acclamation.

New paragraph 13 was adopted.

91. The CHAIRMAN, speaking on his own behalf and that of all members of the Commission, said that he also wished to thank Mr. Barboza for the work he had done on a complex topic in circumstances that had been complicated by time constraints and the priority given to other topics. Although the result achieved was not exactly what the Commission had originally wished, it would serve as a useful basis for the work of the new members of the Commission.

Chapter V, as amended, was adopted.

The meeting rose at 6.10 p.m.