

Document:-
A/CN.4/SR.2250

Summary record of the 2250th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
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Paragraphs 41 to 58

Paragraphs 41 to 58 were adopted.

Paragraph 59

83. Mr. TOMUSCHAT proposed that, in the first sentence, the words "under their jurisdiction" should be added after the word "individuals" and that, in the second sentence, the words "or under their close control" should be added after "carried out by States".

84. Mr. MAHIOU, supporting that proposal, said that it would suffice to say "under their control" rather than "under their close control".

85. Mr. AL-KHASAWNEH said that, once again, the paragraph did not reflect the views he had expressed on the matter, when he had stressed that compensation did not have to be pecuniary. To save time, however, he would simply request the secretariat to ensure that his point was covered.

86. Mr. ARANGIO-RUIZ said that he too found no reflection of the remarks he had made during the discussion. In particular, he had pointed out, with reference to article 2050 of the Italian Civil Code, which was similar to many provisions contained in other legal systems, that in the case of dangerous activities a rule of international law should either be recognized as already existing or should be created. Again, nothing reflected his remarks at the 2227th meeting with respect to nuclear activities and the responsibility of States. It was not his intention at that stage to embark upon a drafting exercise but he would like his point to be recorded.

87. Mr. TOMUSCHAT said that, in his view, any member wishing to have a particular point reflected in the report should submit a drafting proposal.

88. Mr. BARBOZA (Special Rapporteur) said that he had not thus far opposed any request by a member for his views to be included in the report. That did not mean, however, that each and every opinion had to be reflected. There were certain criteria by which the Commission's Rapporteur had to abide. It was not his task to reflect all the opinions expressed, particularly since they were in any event to be found in the summary records.

89. The CHAIRMAN said that, at the beginning of the next quinquennium, the Commission should perhaps draw up guidelines for the preparation of its reports.

90. Mr. CALERO RODRIGUES, agreeing with the Chairman, said that it was not for the Commission to try and improve on what had been said by members but only to ensure that the report was clear. If a member had expressed a certain opinion it should be reflected as such, irrespective of whether or not other members considered that the opinion was correct.

91. He fully agreed with the Special Rapporteur that it would be impossible to set out all the views of all the members, for that would merely be to repeat the content of the summary records. If a member wanted his views to receive special mention, however, then he should make a request to that effect.

92. Mr. BARSEGOV said that the views reflected in paragraph 59 were his. In that connection, he noted that the second and third sentences referred respectively to "primary liability" and "strict liability". He had, however, spoken of "absolute liability", which was the term used in the Convention on International Liability for Damage Caused by Space Objects.

93. Mr. BEESLEY said that he would try to formulate a sentence to reflect a comment he had made repeatedly, namely, that the purpose of many of the conventions cited was to limit the liability of operators. The point was so fundamental that it was essential to convey it in the report.

94. The CHAIRMAN said that due note had been taken of Mr. Barsegov's comment and, if he heard no objection, he would take it that the Commission also agreed to adopt the proposal made by Mr. Tomuschat, as amended by Mr. Mahiou.

Paragraph 59, as thus amended, was adopted.

The meeting rose at 1.15 p.m.

2250th MEETING

Thursday, 18 July 1991, at 3 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law (concluded)* (A/CN.4/L.465)

B. Consideration of the topic at the present session (*concluded*)

Paragraphs 60 to 72

Paragraphs 60 to 72 were adopted.

Paragraph 73

1. Mr. PAWLAK proposed that the word “many”, in the first sentence, should be replaced by “most”, so as to reflect the discussion more accurately.

Paragraph 73, as amended, was adopted.

Paragraphs 74 to 79

Paragraphs 74 to 79 were adopted.

Section B, as amended, was adopted.

Chapter V of the draft report, as amended, was adopted.

2. Mr. PAWLAK said that the Commission should, in some way or other, draw attention to the question of the “global commons”, one which could be considered not only under liability for injurious consequences arising out of acts not prohibited by international law but also in other contexts.

3. Mr. BEESLEY said he fully shared Mr. Pawlak’s view: it was essential that some aspects of the problem of harm to the “global commons” should be dealt with in the context of the topic of liability for injurious consequences arising out of acts not prohibited by international law. Aspects of the matter which did not fall under that topic should at least be identified for the purposes of future work, either inside or outside the Commission.

4. The CHAIRMAN invited the Commission to consider chapter I of its draft report.

CHAPTER I. Organization of the session (A/CN.4/L.461)

A. Membership

B. Officers

C. Drafting Committee

D. Secretariat and

E. Agenda

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Sections A to E were adopted.

F. General description of the work of the Commission at its forty-third session

Paragraphs 9 to 15

5. Mr. CALERO RODRIGUES, supported by Mr. PAWLAK, said that, when the Commission had decided to include “a general description of the work” of the session in its report to the General Assembly, the idea had been to submit a summary of the report’s content that could be read to assess the results of the session and highlight the most notable progress achieved in considering the various topics. It was, therefore, regrettable that section F did not at all meet that expectation. It was a bureaucratic description consisting chiefly of an enu-

meration of the documents examined, with the relevant symbols, and of the draft articles adopted; it gave absolutely no idea of what had been achieved in the course of the session, which had none the less been fruitful, since three series of draft articles had been adopted. That, to say the very least, ought to have been indicated at the beginning of paragraph 9. He hoped that the Rapporteur would be able to recast section F thoroughly.

6. The CHAIRMAN proposed that, in the light of Mr. Calero Rodrigues’ remarks, the consideration of document chapter I should be suspended to allow the Rapporteur, in consultation with Mr. Calero Rodrigues and Mr. Pawlak and other members of the Commission who so wished, to recast section F and to bring out the progress achieved in the course of the session.

It was so agreed.

7. The CHAIRMAN invited the Commission to consider chapter VIII of its draft report.

CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.468 and Corr.1)

8. The CHAIRMAN said that, in the French version, the second sentence of paragraph 7 should form the start of paragraph 8 and the other paragraphs should be renumbered accordingly.

A. Programme, procedures and working methods of the Commission, and its documentation

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

9. Mr. PELLET said it was surprising that the corrigendum to the document under consideration had been circulated so prematurely. The Commission had never considered the Planning Group’s report in plenary. Perhaps it was the customary procedure, but it was unusual to prejudice, as did the corrigendum, the position the Commission would adopt on that report.

10. The CHAIRMAN said it was the Commission’s established practice for the Planning Group to report to the Enlarged Bureau and for the Bureau to adopt the Group’s report on behalf of the Commission.

Paragraph 6 was adopted.

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

11. Mr. TOMUSCHAT said it was regrettable that the paragraph gave the impression that it was the General Assembly that included a topic in the Commission’s long-term programme of work; it was the Commission that did so, not the Assembly. The Assembly could make recommendations, but the decision lay with the Commission. He therefore proposed that the introductory phrase in paragraph 8 should read: “On the basis of the report,

the Commission submits to the General Assembly for its consideration the following list of topics which the Commission may wish to include in its long-term programme of work."

12. Mr. McCaffrey said he shared Mr. Tomuschat's view. Since its inception, it was the Commission itself that established its long-term programme of work, even though it had always consulted the General Assembly and received recommendations from the Assembly concerning its agenda. As a specialized body, the Commission itself chose the topics—generally on the basis of a secretariat study—which, in its opinion, lent themselves to codification and progressive development. Accordingly, he proposed that the introductory part of paragraph 8 should read: "On the basis of the report, the Commission decided to include the following list of topics in its long-term programme of work." Needless to say, the list was being submitted to the General Assembly for its consideration, as was the whole of the Commission's report.

13. Mr. Beesley (Chairman of the Planning Group) said that the wording of the new introductory part of paragraph 8 had been carefully worked out and it should be noted that the list of topics was submitted to the General Assembly for its consideration, not for a decision. Nevertheless, to meet Mr. McCaffrey's concern, perhaps the end of the introductory part could be reworded: "... for inclusion by the Commission in its long-term programme of work." One thing was certain: the present members of the Commission could not impose a programme of work on their successors for the next quinquennium.

14. Mr. Shi said that he supported Mr. McCaffrey's proposal, which was wholly in keeping with the Commission's function and mandate. The Commission could choose any topic for inclusion in its long-term programme of work and had no need of a mandate from the General Assembly. Admittedly, the General Assembly could recommend any topic for inclusion in the Commission's agenda, but that was not the point.

15. Again, that did not mean, as Mr. Beesley feared, that the present members would impose a programme of work on their successors in the Commission. Since it had been established the Commission had included very many topics in its programme of work, and some had never been taken up.

16. Mr. Pellet said it might be more logical in that regard to reproduce the terms of the Statute, even though article 18 of the Statute appeared to confer powers of initiative on the Commission only in the codification of international law. Actually, even in that field, such powers did not seem to be unconditional, for paragraph 2 of article 18 said that, when it considered that the codification of a particular topic was necessary or desirable, the Commission

... shall submit its recommendations to the General Assembly.

In any event, it would seem that, on the juridical level, the Commission should look to article 18 of its Statute. As far as he was concerned, the paragraph under consideration posed no particular difficulty, but to meet the concern that had been voiced, perhaps it could be re-

worded to read: "On the basis of the report, the Commission recommends to the General Assembly the following list of topics which it considers desirable for inclusion in its long-term programme of work." The proposal none the less implied that everyone recognized that that step came under article 18 of the Statute.

17. Mr. Tomuschat said that, in his opinion, the real situation was that the Commission submitted a list of topics to the General Assembly, awaited the Assembly's comments on the proposals made, and, the following year, in the light of those comments, the Commission decided to include some of the topics in its long-term programme of work. He therefore proposed that the last phrase of the initial text of the introductory part of paragraph 8 should be recast to read: "which the Commission intends to include in its long-term programme of work"; it was the Commission that took the final decision, in the light of the Assembly's comments.

18. Mr. Calero Rodrigues said that, in the present instance, the Statute was of no help to the Commission, for the notions of long-term programme of work and agenda were rooted in practice. Members seemed unanimous in the view that the list of topics was submitted to the General Assembly not for approval but simply for consideration. Accordingly, Mr. Tomuschat's proposal should, for the reasons Mr. Tomuschat had given, be acceptable to all.

19. Mr. Díaz González said he endorsed Mr. Tomuschat's proposal.

20. Mr. McCaffrey said that he supported it, too, for the advantage of the proposal was that it did not commit the future members of the Commission. It was not for the General Assembly to play the Commission's role, which was that of an expert body capable of determining the legal topics that called for codification or progressive development.

21. Mr. Pellet, referring to the topics for inclusion in the long-term programme of work, suggested that a footnote should indicate that the list did not follow any particular order.

It was so agreed.

22. Mr. McCaffrey, referring to the second topic in paragraph 8, said that the title "Extraterritorial application of national legislation" was not appropriate. It might be better to say "Conflicts of jurisdiction in the extraterritorial application of national legislation".

23. Mr. Graefrath and Mr. Pellet said they were opposed to a change in the title, which was quite explicit.

24. Mr. Bennouna, referring to the third topic in paragraph 8, said that the details in the explanatory note, which was intended to help the reader, were inadequate. The note simply mentioned the 1951 Convention relating to the Status of Refugees, when there were many other treaties, concluded more particularly under the auspices of the Office of the United Nations High Commissioner for Refugees. Another difficulty of the topic was that the issues not yet covered by a convention were political issues, as in the case of that of "ways and means

sued to avert new flows of refugees” mentioned in the explanatory note.

25. Mr. EIRIKSSON said that, instead of consideration of the Commission’s final report, a discussion was starting on matters of substance. It was the first time that members had had an opportunity to put forward their ideas on the long-term programme. In his opinion, there was no reason to be hasty in establishing the programme. The Commission’s agenda was a heavy one and should not be made still heavier.

26. As to the proposed topic of “the law concerning international migrations”, the title or the explanatory note should emphasize the legal aspects of the problem and expressly leave aside the political aspects, which were very delicate. In any event, great caution was needed in defining exactly what the title covered.

27. Mr. McCAFFREY said that migrations and the environment would be the two major issues over the next two decades. The topic of international migrations was one that cried out for progressive development of the law. At the present time, refugee law was rudimentary.

28. The word “migration” was a difficult one to use. It conveyed the idea of persons who moved and, once they had arrived at their destination, settled in. In many cases, however, as was indeed pointed out in the explanatory note, in the world of today the phenomenon was one of populations moving but not settling anywhere. For that reason, it would be advisable to replace the term “migrations” by, for example, “movement of populations”, thereby avoiding the term “refugees”, found in the explanatory note.

29. In the Planning Group, he had maintained that, in his opinion, the topic should be extended to cover internal migrations, or more exactly “internally displaced peoples or populations”, for that too was a major problem.

30. Mr. BARSEGOV, speaking on a point of order, called for a halt to a discussion which would lead nowhere. The Planning Group had had the opportunity to realize that any topic it proposed was much debated and that any one of them could lead to controversy. That was exactly what was happening in plenary. He therefore proposed that the question should be settled either by referring it to the Planning Group or by stating very clearly that the proposed list was entirely provisional and that it committed nobody.

31. Mr. CALERO RODRIGUES said that, like Mr. Barsegov, he thought the discussion could well go on indefinitely. Moreover, one of the major problems lay in the fact that the topics were spread out over two paragraphs; in addition, including them in the Commission’s long-term programme of work did not mean that they would automatically figure on the agenda. Again, since the Commission could not, without discrediting itself, fall short of the General Assembly’s expectations, the solution was to place all of the topics in one list from which it could choose the ones it intended to include in its long-term programme of work.

32. Mr. THIAM said that such a solution was satisfactory, especially since paragraph 8 of the annex to the present document stated that no specific priority was intended by the order in which the headings, or the topics under each heading, were presented.

33. Mr. PELLET pointed out that paragraph 8 grouped the topics on which the Planning Group had been agreed, and paragraph 9 the topics which had involved reservations, or even objections. Moreover, it was unacceptable for the discussion, which was of crucial importance to the future activity of the Commission, to be side-stepped in plenary. Mr. Calero Rodrigues’ proposal was not realistic, for it would be difficult to reach an agreement when the number of topics proposed was so large.

34. Mr. BARBOZA said he recognized, as did Mr. Pellet, that there could be no question of accepting everything without discussion, yet it was simply a list from which to choose topics. He endorsed Mr. Calero Rodrigues’ proposal, which seemed to be the most practical.

35. Mr. MAHIU said he did not believe it was too early to draw up a possible list of topics that the Commission, in the course of the next quinquennium, could use for the purposes of codification of the law. The process that had to be followed was long and complex. At the present late stage, he thought that the solution suggested by Mr. Calero Rodrigues was a wise one, although he appreciated the frustration experienced by some members.

36. Mr. BENNOUNA said that he supported the proposal by Mr. Calero Rodrigues.

37. Mr. DÍAZ GONZÁLEZ said that the number of topics was really of little importance. The point was to prepare a long-term programme of work, and it would be for the Commission, at its next session or at some later stage, to select the topics which could usefully be pursued in the immediate future.

38. Mr. BEESLEY (Chairman of the Planning Group) agreed that there were topics on the Commission’s programme of work which regularly failed to find a place on its agenda, one such example was the topic of recognition of States and Governments.

39. He would not at the present stage object to paragraphs 8 and 9 being merged, but would none the less point out that they were the outcome of a delicate compromise in the Planning Group. Paragraph 8 concerned topics to which no objection had been raised, whereas paragraph 9 covered topics which had been the subject of strong reservations. Perhaps it would be enough, in order to bring the discussion to an end, to state at the beginning that the list was indicative. The main thing was not to fall short of the expectations of the General Assembly.

40. Mr. GRAEFRATH proposed that paragraphs 8 and 9 should be merged by deleting the introduction to paragraph 9. Paragraph 10, which would then be pointless, would be eliminated.

41. Mr. EIRIKSSON said he would like to make sure that, during the next quinquennium, the Commission

would not be obliged from the very beginning of its mandate to assign a week or two each year to considering a topic which had not been sufficiently thought out beforehand. It might be better to start such consideration only after three or four years, in the meanwhile appointing a special rapporteur to look into the topic in depth and prepare a full set of draft articles. Only after that task was completed would the Commission actively discuss the question.

42. The CHAIRMAN, noting that the proposal by Mr. Calero Rodrigues to merge paragraphs 8 and 9 commanded broad support, proposed that paragraph 8 should begin with the words "On the basis of the report, the Commission drew up the following list of topics from which it intends to select topics for inclusion in its long-term programme of work." It would be followed by a list of all the topics mentioned in paragraphs 8 and 9 and the introductory and last sentences of paragraph 8 would be deleted. Paragraph 10 would also be deleted.

43. Mr. PELLET said he supported the proposal by the Chairman. However, it was not normal for members of the Commission to be unable to decide about the list of topics themselves and to have their opinions reflected in the summary record, when it was the only occasion open to them. They were being called upon to consider not the report of the Planning Group but the report of the Commission, when they had not in fact had the opportunity to speak about the proposed topics.

44. The CHAIRMAN thanked Mr. Pellet for his understanding. He said it was not his intention to deprive any member of the Commission of his right to state his views, but it had to be recognized that time was running short. He, too, would have had a great deal to say, for example, about the topic of the law concerning international migrations, and he shared Mr. McCaffrey's opinion in that regard.

The Chairman's proposal was adopted.

Paragraph 8, as amended, was adopted.

Paragraphs 11 to 17

Paragraphs 11 to 17 were adopted.

Paragraph 18

45. Mr. MAHIU said the Planning Group had considered the possibility of splitting the Commission's session into two parts, but had not lingered over the matter, so that the next Commission would be free to make its own decisions. He had none the less told the Planning Group of his intention to raise the question in plenary, where no opportunity had ever arisen to discuss it. Some members of the Commission held the view that the session was indeed very long and, for all kinds of reasons—efficiency, professional or personal considerations, and so on—it should be held in two parts. The Commission's report should include a paragraph indicating that it would be worth assessing the financial, practical, administrative and other advantages and disadvantages of splitting the session. The Commission could engage in a brief exchange of views on the question or consider a text along the lines he had just indicated.

46. Mr. DÍAZ GONZÁLEZ said that the Commission had discussed the question for a number of years. If the report was to include a text like the one envisaged by Mr. Mahiou, the Commission should engage in an exchange of views, for the majority of members did not share his view. Moreover, since the mandate of the present members of the Commission was drawing to a close it was not the right time to raise the matter. The next Commission should be left to discuss the issue, if it so wished, and it could then request the secretariat to examine the financial implications of such a proposal. The secretariat had already informed the Commission of the disadvantages, if only financial, of splitting the session into two parts. Personally, he had no objection to making a number of journeys each year, but he was not unaware of the cost.

47. Mr. MAHIU proposed that, in order to save having a discussion, a paragraph should be included in the report requesting the secretariat to evaluate the advantages and disadvantages of a split session. In that way, the next Commission would be able to take up the question on the basis of the secretariat's note.

48. Mr. DÍAZ GONZÁLEZ said that, if such a paragraph was to be included in the report, the Commission should first engage in an exchange of views to determine whether the majority of the members approved of it in principle.

49. Mr. McCAFFREY said he had always been an advocate of splitting the session in two and he endorsed Mr. Mahiou's proposal. It would be useful to have the text of such a paragraph.

50. Mr. PELLET said that he fully supported Mr. Mahiou's proposal. Together with Mr. Mahiou and Mr. Solari Tudela, before the latter had left, he had drafted a text on which he had asked the views of a number of members. The text read:

"1. A measure which, in the opinion of the Commission, would help to improve the efficiency and quality of its work would be to divide the present single 12-week session into two separate sessions.

"2. This suggestion is based on a number of considerations:

"(a) It is difficult for the secretariat to prepare the Commission's report and the commentaries to articles, and, moreover, service meetings that continue to be held in the normal fashion;

"(b) Consequently, draft reports and commentaries are often circulated late to members of the Commission, who cannot always devote sufficient time to studying them;

"(c) Consideration of them, towards the end of the session, must sometimes be done with some haste;

"(d) In addition, some members of the Commission—and it should be remembered that they also have professional activities—would experience less difficulty in attending two sessions than in taking part in the whole of a 12-week session.

"3. The Commission is aware that implementation of such a proposal involves new administrative arrangements and could have financial implications. It

requests the secretariat to prepare for the next session a feasibility study on such a measure and the additional costs or any savings as a result of various possibilities concerning the duration of the sessions, the place or places at which they would be held and the possibility of allocating the end of the first session or the beginning of the second to the work of the Drafting Committee.”

51. On the basis of the very informal consultations he had had with all members, the text had received the support of Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Graefrath, Mr. McCaffrey, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela and Mr. Tomuschat. Other members agreed with the principle, but not the wording, of the proposal.

52. It was to be inferred, from the support enlisted by the text, that more than half the members of the Commission approved of the idea. He would emphasize that there was no question of asking the Commission to take a decision on the subject, or even make a formal recommendation to the General Assembly. The important thing was that the next Commission should have the benefit of a study; otherwise, it would not be in a position to take a decision. It was usual for the Commission whose term was expiring to make a suggestion of that kind, on the understanding that the recommendation would be a matter for the Commission during its next term.

53. Mr. THIAM said it was regrettable that such an important issue should be raised without warning in plenary, when there was a Planning Group whose task it was to study a question of that kind. Procedures should be respected. A proposal on the periodicity of the Commission's sessions could not be considered in a hurry. The proposed text spoke of difficulties of the secretariat—it was for the secretariat itself to lay the matter before the Commission. Mention was made of members with professional activities—he knew of no one on the Commission who had no professional activities elsewhere. The problem was that splitting the session into two parts would doubtless be more helpful to some professions than to others. Since the proposal did not command unanimous support, it would be better to give up the idea, especially since a question of such importance could not be decided on the basis of informal consultations.

54. Prince AJIBOLA said that Mr. Pellet's proposal should be regarded as out of order, for it had nothing to do with the question of the duration of the next session, which was the subject of the paragraph under consideration. He was surprised at such an unorthodox approach and said it was the first time that he saw a text being supported by proxy. It was for the Planning Group to consider the question.

55. Mr. GRAEFRATH said he supported the proposal to ask the secretariat to carry out a study on the implications of dividing the session into two parts, so as to help the Commission arrive at a decision.

56. Mr. SHI said he shared Mr. Thiam's point of view. The text Mr. Pellet had read out was a blitzkrieg for which many members had been unprepared. He was shocked by such a course of action. The Commission

had discussed the question for years and had never reached agreement. The report ought simply to suggest that, at its next session, the Commission should take up the question of dividing the session into two parts and consider it in detail, from all angles.

57. Mr. DÍAZ GONZÁLEZ said that to use such an approach was not only unusual but also inadmissible. Every member of the Commission was entitled to make proposals, but not subversively.

58. Mr. PELLET said that there had been a misunderstanding. The proposal, which he endorsed, was by Mr. Mahiou and consisted simply in indicating in the report that the Commission requested the secretariat to carry out a study on the feasibility and the cost of a split session. The Planning Group, to which he did not belong, had made no proposal in that regard, yet the problem had existed for a very long time and the Commission should deal with it one day. The members whose names he had mentioned agreed with the text and endorsed the underlying idea for the reasons set out in the proposal. There was no question of asking for the text as a whole to be included in the report or of conveying the impression that the Commission had already taken a decision or that it was unanimous on that point. Quite simply, the report should mention the request made by the Commission to the secretariat, so that the Commission could then take a proper decision. It was considered that the text would obviate the need for a large number of members to repeat their reasons for suggesting a split session.

59. Mr. EIRIKSSON said that the Commission did not have the necessary information for a fruitful exchange of views. In his opinion, the proposals by Mr. Shi and Mr. Pellet were akin, since they sought to indicate in the report that the Commission should later examine the question on the basis of information to be supplied to members of the Commission during its next term.

60. Prince AJIBOLA said that, if the Commission wished to make a recommendation, it was late to do so, on the eve of the last day of the session and, what was more, of the quinquennium. The Commission was wasting time in discussing the matter. It was for the Planning Group to examine it at future sessions.

61. Mr. MAHIOU, referring to paragraph 546 of the Commission's report on the work of its forty-second session,¹ said the Commission was not discussing the question for the first time. It had been raised in the Planning Group, but not at such length as he would have wished, and what was more, he had agreed not to include a special paragraph in the Planning Group's report only by reserving his right to raise the matter in plenary. He had drawn the attention of the Chairman of the Planning Group to the fact that it might well lead to a wide-ranging debate in plenary. It would have been better to engage in a more thorough exchange of views in the Planning Group. Again, he failed to see how one could speak of lack of time in order to side-step a real problem. If the problem could not be settled, at least it should be raised. In fact, it had been raised in the report on the previous session. Had the time not come to draw conclu-

¹ *Yearbook* . . . 1990, vol. II (Part Two), chap. VIII.

sions, to ask the secretariat how a split session would complicate or facilitate the Commission's task? It was on the basis of such information that the Commission could take a decision during its next term.

62. Mr. THIAM said a proposal to the General Assembly to change the way the Commission operated was a question of the utmost importance and one to be taken very seriously. If Mr. Mahiou had wanted the question to be considered in the Commission, he should have asked the Planning Group to report on it. In that way, the Commission would not have been taken by surprise. At the present stage, it could only take note of the statements by Mr. Mahiou and Mr. Pellet. At the next session, the Commission would be able to look into the problem, if it wanted to. There should be no decision to request the secretariat to carry out a study.

63. Mr. BENNOUNA said that some members were more fervent about a secondary issue, procedure, than about problems of substance, such as the codification of international law. Apparently, the outgoing Commission was not entitled to take decisions for the incoming Commission, but it had just adopted a list of topics to be considered in the years ahead. The time had not come to raise the problem, but there was nothing to prevent members of the Commission from discussing it in plenary, for it was not out of order. The Commission was the only United Nations body to meet for 12 consecutive weeks. Consultations behind the scenes had nothing subversive about them and were simply part of normal work. A study of the question was essential if the Commission was to have the necessary information to come to a decision. Mr. Mahiou had made a deliberately moderate proposal: the study being requested committed nobody. The Commission must definitely come to a decision, whether by consensus or by some other means.

64. Mr. NJENGA said that the Commission could indeed request the secretariat to carry out the study, but in doing so it would be shirking the problem. The best course would be first to obtain the views of members of the Planning Group in the course of a thorough discussion, so that the Group could gain an accurate idea. If it turned out that one particular aspect of the problem called for a study, then the Commission could give the secretariat a specific mandate in due and proper form. There was no point in wondering about the financial implications of splitting the session in two—it was already known what they were.

65. Mr. DÍAZ GONZÁLEZ said he shared Mr. Thiam's and Prince Ajibola's view. Admittedly, members were entitled to submit proposals, but not at the last minute. Moreover, since the secretariat was at the service of the Commission, it was not for the secretariat to shape the Commission's decisions. The study envisaged could not precede a discussion by the Commission. Mr. Njenga was right to urge the partisans of that last-minute proposal not to press it but to wait until the next session.

66. Mr. PAWLAK said that, a number of times in the past, he had proposed a split session but had never obtained the support expected. In the light of the discussion, the Commission could simply make do with a summary of the exchange of views in the summary record or

draw the necessary conclusions, along the lines of what was stated in paragraph 546 of the previous report. Personally, he found the session a long one and thought that the Commission's work would be more effective if it met twice a year. However, in taking a decision the Commission should know about the financial implications of such a change and hence it stood in need of a secretariat study. If there was no agreement in that regard, the Commission could also reiterate the conclusions set out in its previous report and postpone consideration of the matter to the next session.

67. Mr. ARANGIO-RUIZ said he wished to remain neutral in the debate, but was concerned about two issues. First of all, with regard to the duration of the session, which some members regarded as too long, to insist on that side of the matter might well give the General Assembly the impression that it could shorten the sessions by a week or even more. Again, he had heard it said that, in the event of a split session, one part would be held in New York. If that was the case, he would give up any neutral position for, apart from climatic factors, he would point out that the library at Headquarters was in no way comparable to the library at the Palais des Nations. In New York, members of the Commission would have to consult a university library.

68. The CHAIRMAN, speaking as a member of the Commission, advised members against a trend to form clans and to plot, which appeared to have emerged in the Commission and could well divide it. As a jurist, he would emphasize that for one party in court proceedings, for example, it was unethical to catch another party unawares by submitting a last-minute proposal without warning him in advance. It was also going too far to compromise the secretariat: to his knowledge, the secretariat had made no complaints about lack of time to prepare the draft report. The matter should have been examined in the Planning Group. The financial implications of the proposal were not the only implications involved: members were now free to attend meetings on one agenda item rather than another, something that could not be done if the session was split into two parts. Lastly, it was not customary for the Commission to work on the basis of majority opinions. It had always held to the policy of endeavouring to arrive at a consensus.

69. Mr. CALERO RODRIGUES said that he had the strongest reservations and objections to such terms as "plot", "unethical" and "unawares".

70. Prince AJIBOLA formally proposed that the proposal submitted to the Commission should be declared inadmissible, for it had nothing to do with paragraph 18, the paragraph under consideration. A proposal of that kind should obviously come from the Planning Group and, in the event, it had been made only at the end of the session and hence the Commission should proceed no further in examining it.

71. Mr. NJENGA proposed that the report should include a text, drafted in neutral terms, reading:

"The Commission considered the issue raised in paragraph 546 of the report on its forty-second session on the possibility of splitting the session of the Commission into two parts. However, since this pro-

posal had not been considered in detail in the Planning Group, it was agreed that during the next session of the Commission the issue would be discussed and, if necessary, a study would be requested from the secretariat on all the implications of such a decision.”

72. Mr. PELLET said that, first of all, there was no reason to be surprised that the problem was being raised at the end of the session: no other opportunity had arisen to discuss the issue in plenary. What was more, he had listed the members who agreed to the principle of a split session simply because Mr. Díaz González had given the impression that he would support the majority view—there was not the slightest conspiracy or attack on the authority of the Chairman. Moreover, consensus, conservatism’s weapon *par excellence*, should not be abused, since a small number of members objecting was enough to put a stop to any proposal for change. To his mind, Mr. Njenga’s proposal was very reasonable. Personally, he would none the less prefer the Commission at least to request the secretariat to be ready to answer requests for information the members of the Commission might wish to make in 1992 about the financial implications and administrative possibilities of a split session. Lastly, he asked for Mr. Njenga’s proposal to be submitted to the Commission in writing, so that it could be adopted at the following meeting.

73. Mr. MAHIU said that he was ready to endorse Mr. Njenga’s compromise proposal.

74. Mr. THIAM said that he had no objections to Mr. Njenga’s proposal, but he would insist that procedures should be observed in the future.

75. Mr. AL-BAHARNA (Rapporteur) said it was regrettable that the Commission was faced at the end of the quinquennium with a proposal that had not been submitted in accordance with the rules and which was aimed at changing its rules of procedure. As a compromise, he could agree to Mr. Njenga’s proposal and hoped that the Commission would take a decision without further delay.

76. Mr. DÍAZ GONZÁLEZ said he supported the motion by Prince Ajibola to declare Mr. Pellet’s proposal inadmissible. It was wrong to contend that the Commission had not had time to discuss the issue, since there had been occasions when a meeting had risen for lack of speakers. If the majority of members deemed Mr. Njenga’s proposal acceptable, he would not oppose it. Nevertheless, the usual procedure for considering such a proposal should have been followed.

77. Prince AJIBOLA said that, in a spirit of cooperation and consensus, he formally withdrew his motion, but emphasized that the normal procedure should have been followed, even though, personally, he would prefer the Commission’s sessions to be held in two parts. Lastly, he supported Mr. Njenga’s proposal.

78. Mr. THIAM said it might be better for Mr. Njenga’s proposal to refer to the “financial and administrative implications of such a decision”, not “all the implications”, since family or professional considerations, for instance, could not be taken into account by the secretariat.

79. Mr. PAWLAK said that the study which might be requested should indeed be confined to the financial and administrative implications, so as not to impose too heavy a burden on the secretariat.

80. The CHAIRMAN said that the Commission would have Mr. Njenga’s proposal before it in writing at the next meeting.

The meeting rose at 6.30 p.m.

2251st MEETING

Friday, 19 July 1991, at 10.15 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

CHAPTER IV. Draft Code of Crimes against the Peace and Security of Mankind (concluded)* (A/CN.4/L.464 and Add. 1-4)

A. Introduction (A/CN.4/L.464)

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.464 and Add.1-3)

CONSIDERATION OF THE NINTH REPORT OF THE SPECIAL RAPporteur (concluded) (A/CN.4/L.464 and Add.1-3)

Paragraphs 8 to 20

Paragraphs 8 to 20 were adopted.

Section B was adopted.

* Resumed from the 2243rd meeting.