

Document:-  
**A/CN.4/SR.2463**

**Summary record of the 2463rd meeting**

Topic:  
**Other topics**

Extract from the Yearbook of the International Law Commission:-  
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80. The CHAIRMAN said he took it that the Special Rapporteur was prepared to amend paragraph (17) in the light of the comments by Mr. Calero Rodrigues and Mr. Rosenstock. He said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (17) on that understanding.

*Paragraph (17) was adopted on that understanding.*

Paragraph (18)

*Paragraph (18) was adopted.*

*The meeting rose at 1 p.m.*

## 2463rd MEETING

*Wednesday, 17 July 1996, at 3.05 p.m.*

*Chairman: Mr. Ahmed MAHIOU*

*Present: Mr. Al-Baharna, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer.*

### 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 (continued)* (A/CN.4/L.527/Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 and Corr.1 and Add.11)

1. The CHAIRMAN invited the Commission to resume its consideration of the commentaries to the draft articles.

*Commentary to article 3 (Punishment)* (A/CN.4/L.527/Add.2)

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.*

Paragraph (7)

2. Mr. ROSENSTOCK said that the last three sentences of the paragraph were unnecessary and undermined what the Commission had accomplished. He therefore proposed that they should be deleted.

*Paragraph (7), as amended, was adopted.*

New paragraph (8)

3. Mr. ROSENSTOCK proposed that a new paragraph (8) should be added, reading:

“(8) It is, in any event not necessary for an individual to know in advance the precise punishment so long as he knows that the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nürnberg Judgment<sup>1</sup> and in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

<sup>1</sup> *Nazi Conspiracy and Aggression: Opinion and Judgment* (Washington, United States Government Printing Office, 1947), pp. 49-51.”

4. Mr. THIAM (Special Rapporteur) said the disturbing thing about Mr. Rosenstock's proposal was that it meant the perpetrator of a crime would not have to know the penalty in advance. What then was the purpose of the maxim *nulla poena sine lege*?

5. Mr. ROSENSTOCK said that what the perpetrator of a crime did not need to know was the precise length of the sentence. Indeed, it was for that reason that his proposal was couched in rather precise terms. Given the severity of the acts involved, there would be no doubt in the mind of those who committed them that the penalty would be severe punishment.

6. Mr. BOWETT said that, on the whole, the proposed paragraph was good. It was the word “precise” that was all important. The *nulla poena sine lege* maxim operated where the individual did not know that his acts were punishable, but very few systems of law laid down precise punishments. So long as an individual knew that his acts were punishable by law, the fact that he did not know the precise punishment was irrelevant.

7. Mr. CALERO RODRIGUES said that he was in favour of Mr. Rosenstock's proposal, which was a very good attempt at justifying the wording of article 3, an article that did not lay down any penalties but merely stipulated that the punishment must be commensurate with the character and gravity of the crime. If the Commission did not at least try to explain the reason for the wording of article 3, the whole article would be called into question.

8. Mr. LUKASHUK said that he had nothing against the idea behind Mr. Rosenstock's proposal but the words “so long as he knows” caused him some concern.

9. Mr. THIAM (Special Rapporteur) said that he had included the wording in question because the Drafting Committee had decided, after much discussion, that it was unnecessary for the Commission to specify penalties.

10. Mr. MIKULKA said that it was important not to confuse two different issues: the principle of legality, or *nullum crimen, nulla poena sine lege*, and ignorance of the law, in which regard he would remind the Commis-

sion of another maxim, *ignorantia juris neminem excusat*. The two issues must not be confused.

11. Mr. ROSENSTOCK said that he would have no difficulty in deleting the words “he knows that” from his proposal, to meet Mr. Lukashuk’s point, but he did attach considerable importance to a paragraph along the lines he was proposing.

12. Mr. VARGAS CARREÑO said that he fully shared Mr. Lukashuk’s concern and was therefore pleased that Mr. Rosenstock had agreed to delete the words in question.

13. Mr. FOMBA, agreeing with Mr. Mikulka, said the main point was that the accused was bound to know that an accusation of a crime against the peace and security of mankind was an extremely grave matter and consequently must know that he would be punished accordingly if he committed such a crime.

14. The CHAIRMAN suggested, in the light of the discussion, that the Commission should adopt Mr. Rosenstock’s proposal for a new paragraph (8), with the deletion of the words “he knows that”.

*It was so agreed.*

*New paragraph (8), as amended, was adopted.*

*The commentary to article 3, as amended, was adopted.*

*Commentary to article 4 (Responsibility of States)*

Paragraph (1)

15. Mr. CALERO RODRIGUES proposed that, in the penultimate phrase, the words “with a State” should be added after “de facto relationship”.

16. Mr. de SARAM said that he would prefer to delete the whole phrase, with or without the words proposed by Mr. Calero Rodrigues. It touched upon the question of State responsibility and it was going too far to suggest that any form of de facto relationship with a State would engage State responsibility.

17. Mr. THIAM (Special Rapporteur) said there were indeed instances in which a simple de facto relationship could engage the responsibility of a State. If the Commission wished to delete the phrase, so be it, but it was merely a statement of fact which appeared in the commentary.

18. Mr. FOMBA said that the Special Rapporteur was right, but if it was decided to omit the phrase, that should not affect the balance of the paragraph too much.

19. Mr. de SARAM said that, even if the statement appeared only in the commentary, it none the less represented the Commission’s opinion. He did not doubt that an individual might commit a crime while in a de facto relationship with a State, but that could be regarded as involving State responsibility. For that reason, he would prefer to delete the phrase.

20. Mr. CALERO RODRIGUES said that the question of de facto relationships had been dealt with in the draft

articles on State responsibility in article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State). The commentary to that article<sup>1</sup> explained the circumstances under which a de facto relationship might exist. Article 8, subparagraph (b), referred to the case where a person or group of persons was exercising elements of the governmental authority in the absence of the official authorities. There, the Commission was focusing on circumstances in which, for one reason or another, the regular administrative authorities had disappeared. For example, during the Second World War, local authorities had sometimes fled from an invading or liberation army and persons acting on their own initiative had provisionally taken over the management of certain public concerns or had exercised elements of the governmental authority. It was also possible for private persons acting on their own initiative to assume functions of a military nature.

21. The Commission had decided that in such situations the responsibility of the State might be engaged. The inclusion in paragraph (1) of the commentary to article 4 of the draft Code of a reference to a simple de facto relationship was based on the same reasoning as that underlying article 8 of the draft on State responsibility.

22. Mr. ROSENSTOCK proposed that the word “simple” should be deleted because it indicated a degree of casualness which might give rise to concern.

23. Mr. THIAM (Special Rapporteur) said that he had no objection to deleting the word “simple”. He would also point out that the concept of persons acting on behalf of the State was recognized in domestic law, in particular in administrative law.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

24. Mr. LUKASHUK proposed that the last sentence, which was somewhat naive in the context, should be deleted.

*Paragraph (2), as amended, was adopted.*

*The commentary to article 4, as amended, was adopted.*

*Commentary to article 2 (Individual responsibility) (concluded)*

25. The CHAIRMAN invited the Commission to revert to its consideration of paragraphs (5), (6) and (7) of the commentary to article 2, which had been left in abeyance at the previous meeting.

Paragraph (5) (concluded)

26. The CHAIRMAN reminded the Commission that Mr. Calero Rodrigues had submitted a proposal at the previous meeting, the English text of which had now been finalized and read:

“(5) Article 2, paragraph 2, deals with individual responsibility for the crime of aggression. In relation to the other crimes included in the Code, paragraph 3

<sup>1</sup> See *Yearbook . . . 1974*, vol. II (Part One), pp. 283 et seq.

indicates the various manners in which the role of the individual in the commission of a crime gives rise to responsibility: he shall be responsible if he committed the act which constitutes the crime; if he attempted to commit that act; if he failed to prevent the commission of the act; if he incited the commission; if he participated in the planning of the act; if he was an accomplice to its commission. In relation to the crime of aggression, it was not necessary to indicate these different forms of participation which entail the responsibility of the individual, because the definition of the crime of aggression in article 16 already provides all the elements necessary to establish the responsibility. According to that article, an individual is responsible for the crime of aggression when, as a leader or organizer, he orders or actively participates in the planning, preparation, initiation or waging of aggression committed by a State. All the situations listed in paragraph 3 which would have application in relation to the crime of aggression are already found in the definition of that crime contained in article 16. Hence the reason to have a separate paragraph for the crime of aggression in article 2.”

27. Mr. ROSENSTOCK said that he could accept the replacement of the first sentence of paragraph (5) by the new sentence proposed. However, the second sentence, and the fourth and fifth sentences, which referred to the distinguishing features of the crime of aggression, should not be deleted from the original paragraph (5).

28. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph (5) as proposed by Mr. Calero Rodrigues, provided the sentences indicated by Mr. Rosenstock were re-incorporated into the text.

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

Paragraph (6) (concluded)

29. Mr. CALERO RODRIGUES proposed that the first sentence of paragraph (6) should remain and that the rest of the paragraph should be replaced by the following:

“Participation only entails responsibility when the crime is actually committed or at least attempted. In some cases it was found useful to mention this requirement in the corresponding subparagraph in order to dispel possible doubts. It is of course understood that the requirement only extends to the application of the present Code and does not pretend to be the assertion of a general principle in the characterization of participation as a source of criminal responsibility.”

The purpose of the proposed commentary was to explain why the Commission had decided to make express reference in article 2 to crimes which were actually committed or at least attempted.

30. Mr. ROSENSTOCK said that in the last sentence of the proposed amendment, the words “does not pretend” should be replaced by “does not purport”.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

31. The CHAIRMAN drew the attention of the Commission to the amended version of paragraph (7). At the end of the second sentence, following “for this conduct”, the words “under the present subparagraph” had been deleted. The third and seventh sentences in paragraph (7) had been deleted in their entirety.

32. Mr. ROSENSTOCK said that he would prefer to retain the seventh sentence.

33. Mr. VILLAGRÁN KRAMER said he too wished to maintain the seventh sentence of paragraph (7). Furthermore, he did not understand why the third sentence, which referred to the Nürnberg Tribunal, should be eliminated.

34. The CHAIRMAN said that if members did not insist on the proposed deletions, he would take it that the Commission wished to adopt paragraph (7) as it stood.

*Paragraph (7) was adopted.*

*The commentary to article 2, as amended, was adopted.*

*Commentary to article 1 (Scope and application of the present Code) (concluded)*

35. The CHAIRMAN drew the attention of the Commission to paragraph (3 bis), proposed by Mr. Pellet, which read:

“(3 bis). After lengthy debate, the Commission decided not to provide a general definition of crimes against the peace and security of mankind. It considered that State practice should determine the precise boundaries of the notion, which is a result of merging in a single concept the crimes against peace, war crimes and crimes against humanity distinguished in article 6 of the Charter of the Nürnberg Tribunal.”

36. Mr. BENNOUNA said that it was not accurate, in legal terms, to assert that the notion of crimes against the peace and security of mankind had arisen from merging the three types of crimes in a single concept. Moreover, the use of the words “notion” and “concept” in referring to the same idea gave rise to confusion. He proposed that in the last sentence the words “to determine the precise boundaries of the notion, which is a result of merging in a single concept” should be replaced by “to determine the precise boundaries of the concept, which encompasses crimes against peace, war crimes and crimes against humanity”.

37. Mr. ROSENSTOCK said that the words “After lengthy debate” should be deleted because they were not relevant. The rest of the paragraph was difficult to understand and he was not convinced that it accurately reflected the Commission’s views. Nevertheless, if the majority wished to adopt the paragraph, he would join the consensus.

38. Mr. THIAM (Special Rapporteur) said it was true that there had been lengthy debate on whether to provide a general definition of crimes against the peace and security of mankind. In response to Mr. Bennouna’s objec-

tion, he pointed out that, in his first report,<sup>2</sup> the three types of crimes had been placed in separate categories and the Commission had decided that they should be merged into one category. Moreover, all the literature and the experts on international criminal law were in agreement that the crimes in question should now be considered as a single concept.

39. Mr. VILLAGRÁN KRAMER said that according to the general theory of law, laws could not be merged. Rather, one law presupposed incorporation in another. The reference in the proposed text to the merging of three categories in a single concept did not correspond to the philosophy of law. He suggested, therefore, that the last part of the paragraph: “which is a result of . . .” should be deleted, although a reference to article 6 of the Charter of the Nürnberg Tribunal could be retained.

40. Mr. BOWETT said he wondered why the Commission needed a general definition of crimes against the peace and security of mankind when the individual crimes had already been defined.

41. The CHAIRMAN said that many requests for a general definition had been made, both in the Commission and in the Sixth Committee. It was therefore advisable for the Commission to explain that it had discussed the question at great length and had finally decided not to provide such a definition.

42. Mr. de SARAM said the statement that crimes against the peace and security of mankind derived from categories distinguished in article 6 of the Charter of the Nürnberg Tribunal imposed a limit on the concept of crimes against the peace and security of mankind, a concept that was much broader than what the Commission had established in the Code. With regard to the first sentence of the proposed text, the Commission had decided at the previous meeting that it should not refer in the commentary to the nature of the discussions it had held.

43. Mr. THIAM (Special Rapporteur) said that the reference to the lengthy debate did reflect what had actually taken place.

44. Mr. LUKASHUK said that the proposed commentary did not clarify the article and only gave rise to more debate.

45. Mr. CALERO RODRIGUES said that it was time for the Commission to stop discussing details. He was willing to accept paragraph (3 bis) as proposed, as long as the Commission moved ahead in its work.

46. Mr. PELLET said that he could accept the idea of deleting the first sentence and changing the wording in the way proposed by Mr. Bennouna. The result would, however, be minimalist and would fail to clarify how the Commission had arrived at the concept of crimes against the peace and security of mankind.

47. The CHAIRMAN read out the amended text of paragraph (3 bis):

“(3 bis). The Commission decided not to provide a general definition of crimes against the peace and security of mankind. It considered that State practice should determine the precise boundaries of the notion, which encompasses the crimes against peace, war crimes and crimes against humanity distinguished in article 6 of the Charter of the Nürnberg Tribunal.”

48. Mr. BENNOUNA said that the word “notion” should be replaced by “concept”.

*Paragraph (3 bis), as amended, was adopted.*

*The commentary to article 1, as amended, was adopted.*

*Commentary to article 5 (Order of a Government or a superior) (A/CN.4/L.527/Add.3)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

49. Mr. ROSENSTOCK suggested that the words “the defence most frequently raised”, in the first sentence, should be replaced by “most frequently claimed as a defence”.

*It was so agreed.*

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

*The commentary to article 5, as amended, was adopted.*

*Commentary to article 6 (Responsibility of the superior)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

50. Mr. CALERO RODRIGUES suggested that the words “of Additional Protocol I” should be inserted after “article 86”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

*The commentary to article 6, as amended, was adopted.*

*Commentary to article 7 (Official position and responsibility)*

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted, subject to an editing change in the French version of paragraph (2).*

<sup>2</sup> Yearbook . . . 1983, vol. II (Part One), p. 137, document A/CN.4/364.

Paragraph (7)

51. Mr. BENNOUNA suggested that the last sentence should be placed at the beginning of the paragraph.

*Paragraph (7), as amended, was adopted.*

*The commentary to article 7, as amended, was adopted.*

*Commentary to article 8 (Establishment of jurisdiction) (A/CN.4/L.527/Add.4)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

52. Mr. CALERO RODRIGUES noted that, as the Commission had agreed at the previous meeting, the use of the word "instance" should be avoided. He would therefore suggest that the first sentence of paragraph (2) should read:

"Article 8 establishes two separate jurisdictional regimes: one for the crimes set out in articles 17 to 20 and another for the crime set out in article 16."

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

53. The CHAIRMAN suggested that consideration be given to whether the phrase "crimes against United Nations and associated personnel" should be retained in the list of the most serious crimes set out in the first sentence.

*Paragraph (3) was adopted, on that understanding.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

54. Mr. ROSENSTOCK recalled that, in accordance with the understanding reached at the previous meeting, the last sentence of paragraph (5) should be deleted.

*It was so agreed.*

55. Mr. BENNOUNA, supported by Mr. PELLET, noted that the French version of the paragraph was defective and suggested that it should be reviewed for editorial consistency.

*Paragraph (5), as amended, was adopted, on that understanding.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

56. Mr. CALERO RODRIGUES pointed out that the phrases "in the first instance" and "in the second instance", in the first sentence of paragraph (7), should be deleted, in line with the understanding he had already mentioned in connection with paragraph (2).

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) to (11)

*Paragraphs (8) to (11) were adopted.*

Paragraph (12)

57. Mr. BOWETT suggested that the phrase "rather than by a limited number of States acting on their own behalf", in the fourth sentence, should be deleted, as it appeared to cast aspersions on the work of the Nürnberg Tribunal.

58. Mr. ROSENSTOCK said he had no objection to the proposal, but it should be clearly pointed out that that part of the commentary was intended to preclude the possibility of two States setting up a bilateral institution and proclaiming it a court for the purposes of asserting jurisdiction over international crimes.

*It was so agreed.*

59. Mr. de SARAM suggested that the sixth sentence should be deleted. It set out modalities for establishing an international criminal court, but thus contradicted the seventh sentence, which stated that article 8 was not intended to indicate the method for establishing such a court.

*Paragraph (12), as amended, was adopted.*

Paragraph (13)

60. Mr. CALERO RODRIGUES queried the wording of the last part of the second sentence: "jurisdiction of the State which has committed aggression". The phrase implied a judgement as to the criminal act of a State. Rather, the reference should be to the jurisdiction of a State over its nationals.

61. Mr. ROSENSTOCK said that the phrase did sound peculiar, but it was correct and necessary. The reference was to aggression, a crime which, under the Code, could only be tried by an international court. The Code also provided that aggression was an act committed by a State, although an individual could be involved in planning it, for example. A State party was not precluded from trying its nationals for aggression—namely, nationals of the State that committed the aggression.

62. Mr. CALERO RODRIGUES said he still preferred a reference to the jurisdiction of a State over its nationals. While an individual might contribute to aggression committed by his or her own State, he or she could equally well contribute to aggression committed by another State. In some cases, a national of a given State could easily be involved in the politics or actions of a neighbouring State.

63. Mr. ROSENSTOCK said that, unfortunately, the faulty drafting of article 8 itself allowed for the interpretation given by Mr. Calero Rodrigues. It might be necessary to revise the formulation of the article. The intention was to permit a State that had formerly been under a rogue regime, and had committed aggression under that regime, to try its own nationals, including the leaders of the regime, for the crime of aggression. If there were no such provision, the basic message of article 8, which was that aggression should be adjudicated only by an international tribunal, would be undone. Only very limited

exceptions from that rule were to be allowed: to permit Uganda to try Idi Amin Dada, for example, or to prevent Iraq from claiming jurisdiction over Kuwaiti citizens involved in the Gulf war.

64. The CHAIRMAN suggested that the words “over its own nationals” should be inserted before “of the State” in the second sentence of the paragraph, in order to take account of the concerns expressed by Mr. Rosenstock.

65. Mr. ROSENSTOCK endorsed that suggestion.

66. Mr. THIAM (Special Rapporteur) said that he, too, could go along with the suggestion, particularly as it reflected the form of language used in article 8 itself.

67. Mr. MIKULKA said that, since all members of the Commission were in agreement on the commentary, which was intended to rectify a shortcoming in the drafting of article 8, perhaps it would be worthwhile to go back to the source of the problem and correct the wording of article 8 to make the meaning clearer.

68. The CHAIRMAN said he did not agree that article 8 needed to be revised.

69. Mr. MIKULKA said that such a revision was not absolutely necessary, but the need for extensive commentary to preclude the possibility of misinterpretation of article 8 would be obviated if article 8 was better worded. Now, it could be construed as meaning that a State that had not committed the crime of aggression could punish for that crime an individual who was a national of that State. Yet the Commission’s intention, about which everyone agreed, was to enable a State that had itself committed the crime of aggression to punish its own citizens, including former leaders, at a later stage.

70. Mr. CALERO RODRIGUES said he questioned whether all members of the Commission were in fact agreed on that single interpretation of article 8. He had understood the article to allow any State party to try its own nationals for the crime of aggression. He requested clarification on whether, when article 8 had been adopted, it had been decided that the interpretation given by Mr. Mikulka and Mr. Rosenstock was the proper one.

71. Mr. THIAM (Special Rapporteur) said that, to his recollection, the provision in question had been adopted in plenary following a proposal by Mr. Kabatsi supported by Mr. Lukashuk and Mr. Pellet.

72. Mr. BENNOUNA said that the commentary did not explain clearly enough the precise meaning of the second sentence of article 8. He could envisage a situation in which a State party trying its own nationals might be precluded by that provision from trying a national of another State who had acted as an accomplice to the crime. The difficulty appeared to be more than a simple matter of drafting and he therefore suggested that a small group including the Special Rapporteur and, possibly, Mr. Rosenstock and Mr. Lukashuk should be appointed to consider paragraph (13).

73. The CHAIRMAN said that the suggestion was a useful one and invited a small group consisting of the Special Rapporteur, Mr. Rosenstock, Mr. Calero Rodrigues and Mr. Mikulka to meet to consider possible amendments to the commentary relating to the second sentence of article 8. Paragraph (13) would in the meantime remain in abeyance.

*It was so agreed.*

74. Mr. MIKULKA said that he agreed to join the small working group, but would point out that the second sentence of article 8 had been adopted rather hurriedly with no thought given to problems such as dual nationality. In his earlier remarks, he had had no intention whatever of challenging Mr. Calero Rodrigues’ interpretation, but as he recalled, everyone at the time had understood the sentence to mean what Mr. Rosenstock had said it meant. The Commission should not be too rigid about the possibility of amending the text of article 8 in the interests of avoiding misunderstanding.

75. Mr. CALERO RODRIGUES requested the Chairman to invite the secretariat to provide the small working group with information about the precise history of the adoption of the provision in question.

76. The CHAIRMAN assured the members of the small working group that all necessary information would be placed before them.

77. Mr. THIAM (Special Rapporteur) said that he could recollect no previous case of an article being amended in plenary at the stage of adoption of the commentary. However, he did recognize that there was a problem in the present instance.

Paragraph (14)

*Paragraph (14) was adopted.*

Paragraph (15)

78. Mr. CALERO RODRIGUES suggested that the paragraph should be left in abeyance pending the proposals of the small working group set up in connection with paragraph (13).

*It was so agreed.*

*Commentary to article 9 (Obligation to extradite or prosecute)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

79. Mr. BENNOUNA, referring to the fourth sentence, suggested that the words “and trial” should be inserted between the words “the prosecution” and “of such an individual”.

80. The CHAIRMAN, pointing out that the article itself referred to extradition or prosecution but not to trial, remarked that prosecution did not necessarily lead to trial. It would be best to leave paragraph (3) of the com-

mentary as it stood or in any case to request the Special Rapporteur to verify whether Mr. Bennouna's proposal is acceptable under criminal law.

81. Mr. ROSENSTOCK and Mr. THIAM (Special Rapporteur) concurred.

82. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (3), on the understanding that the words "and trial" would be inserted in the fourth sentence.

*Paragraph (3) was adopted on that understanding.*

Paragraphs (4) to (9)

*Paragraphs (4) to (9) were adopted.*

*The commentary to article 9, as amended, was adopted.*

*Commentary to article 10 (Extradition of alleged offenders)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

83. Mr. CALERO RODRIGUES suggested that, in the interests of greater clarity, the words "for extradition" should be inserted between the words "a request" and "and thereby fulfil" in the fourth sentence.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) and (4)

*Paragraphs (3) and (4) were adopted.*

*The commentary to article 10, as amended, was adopted.*

*Commentary to article 11 (Judicial guarantees) (A/CN.4/L.527/Add.5)*

Paragraphs (1) to (15)

*Paragraphs (1) to (15) were adopted.*

Paragraph (16)

84. Mr. BOWETT suggested that the words "to defend against the charges", in the first sentence, should be replaced by "to defend himself against the charges" or "to offer defence against the charges".

*Paragraph (16), as amended, was adopted.*

Paragraphs (17) to (21)

*Paragraphs (17) to (21) were adopted.*

*The commentary to article 11, as amended, was adopted.*

*Commentary to article 12 (Non bis in idem)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

85. Mr. ROSENSTOCK proposed that the word "committed", in the first sentence, should be replaced by "been accused of", that the words "by a given State" should be inserted before "for the same crime" in the second sentence, that the word "lightly" should be inserted between the words "not" and "be required" in the third sentence. Lastly, the phrase "and would violate the general principle of proportionality" at the end of the paragraph should be deleted.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

86. Mr. ROSENSTOCK proposed that the words "As a compromise," at the beginning of the paragraph should be deleted and that the words "has attempted to strike", in the third sentence, should be replaced by "has struck". In line with the observations he had made at the previous meeting, he also proposed the words "Some members of", at the beginning of the second sentence should be omitted.

87. The CHAIRMAN suggested that the Special Rapporteur should be requested to review the wording of the second sentence.

*Paragraph (4) was adopted on that understanding.*

Paragraphs (5) to (13)

*Paragraphs (5) to (13) were adopted.*

*The commentary to article 12, as amended, was adopted.*

*The meeting rose at 6 p.m.*

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## 2464th MEETING

*Thursday, 18 July 1996, at 10.05 a.m.*

*Chairman: Mr. Ahmed MAHIU*

*Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer.*

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