

Document:-  
**A/CN.4/SR.2465**

**Summary record of the 2465th meeting**

Topic:  
**<multiple topics>**

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refer to “imprisonment”, but, since the Commission wanted to emphasize the arbitrary nature of imprisonment, it could, as a departure from its usual practice of using the wording of existing instruments, refer to “arbitrary detention”.

64. Mr. HE and Mr. FOMBA said that they fully supported Mr. Bennouna’s proposal.

65. Mr. PELLET said that the Commission should use the term “imprisonment”, which was contained in the texts in force. Otherwise, it would have to indicate in the commentary why it had substituted the word “detention” for the usual term “imprisonment”. He pointed out that the inclusion of the term “arbitrary detention” at the beginning of subparagraph (g) would create a problem, since the words “detention of population” did not mean anything.

66. Mr. VILLAGRÁN KRAMER, supported by Mr. VARGAS CARREÑO, said that the time element was essential if imprisonment was to constitute a crime against humanity. Even when carried out on a systematic basis and a large scale, imprisonment was not a crime against humanity if it lasted a short time. In order to achieve a consensus, the Commission would have to consider the possibility of referring to “extended and arbitrary” detention.

67. Mr. ROSENSTOCK said that he objected to the idea of referring expressly to the extended nature of detention because such a qualification had not been and must not be used for the other crimes, the only qualification being that contained in the introductory clause. The idea of duration could, however, be conveyed by replacing the word “detention” by the word “imprisonment”.

68. Mr. THIAM (Special Rapporteur) said that the word “extended” did not mean much and that, if the Commission chose the word “imprisonment”, the only justification would be conformity with existing instruments. The time element might be referred to in the commentary.

69. Mr. VILLAGRÁN KRAMER said that such wording did not make imprisonment a crime against humanity.

70. Mr. MIKULKA, supported by Mr. ROSENSTOCK, referring to a comment by Mr. CALERO RODRIGUES, said that the Commission would be able to avoid many drafting and translation problems if it referred to “arbitrary imprisonment” in a new subparagraph, particularly as no substantive argument justified the inclusion of that crime in subparagraph (g).

71. The CHAIRMAN suggested that, in the light of the discussions, the members of the Commission should consider the possibility of adding a new subparagraph, provisionally designated as “(g) bis”, to article 18, and reading: “Arbitrary imprisonment”. He said that, if he heard no objections, he would take it that the Commission decided to add such a subparagraph to article 18.

*It was so decided.*

72. Mr. ROSENSTOCK pointed out that, in subparagraph (f), the terms “fundamental human rights and free-

doms” should be replaced by the usual term “human rights and fundamental freedoms”.

73. Mr. VILLAGRÁN KRAMER said it was essential that the word “fundamental” should also modify the words “human rights”.

74. The CHAIRMAN said that the problem did not seem to arise in French. The commentary to article 18 would be considered at the following meeting.

*The meeting rose at 1.10 p.m.*

## 2465th MEETING

*Friday, 19 July 1996, at 10.10 a.m.*

*Chairman:* Mr. Robert ROSENSTOCK

*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. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Robinson, Mr. Szekely, Mr. Thiam, 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 (*continued*)** (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 8* (Establishment of jurisdiction) (*concluded*)\* (A/CN.4/L.527/Add.4)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, in the course of considering the commentaries to the articles, the Commission had (2463rd meeting) examined the question of the possible interpretation of the last sentence of article 8\*\* and established a small working group to redraft the sentence so as to leave no doubt about its precise meaning. The small working group had met on 18 July 1996 and

\* Resumed from the 2463rd meeting.

\*\* Article 8 was adopted as article 7 by the Commission at its 2454th meeting.

had concluded that the interpretation given in plenary by Mr. Mikulka had indeed been the correct one, namely, that only the State which had committed the aggression could exercise jurisdiction over its nationals for that crime. Accordingly, it was now proposed that the last sentence of article 8 should read:

“However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.”

2. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the new wording of the last sentence of article 8.

*Article 8, as amended, was adopted.*

3. Mr. VILLAGRÁN KRAMER said that he wished to place on record his inability to join the consensus on the provision in question. It was his considered opinion that no State should be precluded from trying its nationals for any of the extremely serious crimes covered by the Code.

4. Mr. de SARAM said that he understood the reference to “article 16” in the sentence just approved by the Commission to refer to article 16 of the Code.

Paragraph (13) (concluded)\*

*Paragraph (13), as amended, was adopted.*

Paragraph (15) (concluded)\*

*Paragraph (15) was adopted.*

*Commentary to article 18 (Crimes against humanity) (concluded)*

New paragraph (13) bis

5. The CHAIRMAN, recalling that the Commission had adopted a new subparagraph (g) bis to article 18 (2464th meeting) and had agreed that a commentary should be prepared, read out the proposed text of the commentary:

“(13) bis. The eighth prohibited act is ‘arbitrary imprisonment’ under subparagraph (g) bis. The term ‘imprisonment’ encompasses deprivation of liberty of the individual and the term ‘arbitrary’ establishes the requirement that the deprivation be without due process of law. This conduct is contrary to the human rights of individuals recognized in the Universal Declaration of Human Rights (article 9) and in the International Covenant on Civil and Political Rights (article 9). The latter instrument specifically provides that ‘No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ Subparagraph (g) bis would cover systematic or large-scale instances of arbitrary imprisonment such as concentration camps, detention camps or other forms of long-term detention. ‘Imprisonment’ is included as a crime against humanity in Control Council Law No. 10 (article II, paragraph (c)) as well as the statutes of the International Tribunal for the Former Yugoslavia (article 5) and the International Tribunal for Rwanda (article 3).”

Unfortunately, translations into the other languages were not yet available. If he heard no objection, he would take it that the Commission wished, in principle, to adopt the proposed new paragraph.

*New paragraph (13) bis was adopted.*

6. Mr. VARGAS CARREÑO said that he had no objection to the paragraph just adopted by the Commission but had a few comments to make in the light of his remarks at the previous meeting. First, he wished to thank the Chairman for his efforts to achieve the broadest possible consensus on the issue of arbitrary imprisonment. While convinced that arbitrary imprisonment was a serious violation of human rights and an offence on the part of the individual who ordered it to be committed, he did not think it necessarily and in all cases constituted a crime against the peace and security of mankind. The elements listed in the new paragraph, important as they were, were in his view incomplete. Circumstances could exist where arbitrary imprisonment might constitute a human rights violation but not a crime against the peace and security of mankind. For example, that might be the case with arbitrary imprisonment for a short period. While appreciating the efforts made to meet the point he had raised, he thought the Commission ought to abide by the principle of including only the most heinous crimes in the Code.

7. The CHAIRMAN invited the Commission to consider the rest of the commentary to article 18.

Paragraphs (1) to (3)

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

Paragraph (4)

8. Mr. LUKASHUK proposed that the phrase “such as the use of a weapon of mass destruction against members of a particular racial or ethnic group in violation of subparagraph (e)”, at the end of the sixth sentence, should be deleted. The use of a weapon of mass destruction was not a good example of persecution.

9. Mr. BOWETT said he supported that proposal.

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

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

10. Mr. LUKASHUK proposed the deletion of the second sentence, beginning with the words “In contrast, the Nürnberg Charter . . .”. The commentary already contained several references to the Nürnberg Charter and it was unnecessary to quote the same passage yet again.

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

Paragraphs (7) and (8)

*Paragraphs (7) and (8) were adopted.*

Paragraph (9)

11. Mr. de SARAM, noting that the paragraph seemed to imply that the definition of torture provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was the only possible one. Was that interpretation correct?

12. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the question of the need to provide a definition of torture in the draft Code had been considered by the Drafting Committee at the previous session at the suggestion of the Special Rapporteur. The Drafting Committee had come to the conclusion that, in view of the standard character of the definition already provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Commission should not embark upon the lengthy exercise of redefining what was already a widely accepted concept.

13. Mr. CRAWFORD said that the point raised by Mr. de Saram also caused him some concern. While the definition in article 1, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adequate in so far as the character of the act of torture was concerned, that was not, perhaps, the case with regard to the question of who might commit the act of torture. Under the Convention, the act had to be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, whereas the *chapeau* of article 18 spoke of acts “instigated or directed by a Government or by any organization or group”, which undoubtedly could include an opposition group. If it was not too late to do so, he would suggest that paragraph (9) should be amended to indicate that the definition in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was relevant so far as the character of the crime was concerned, but that, in accordance with the *chapeau* of article 18, torture as a crime against humanity could be committed not only by a government official but also by someone acting on behalf of any organization or group.

14. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph (9) as amended by Mr. Crawford.

*Paragraph (9), as amended, was adopted.*

Paragraphs (10) to (12)

*Paragraphs (10) to (12) were adopted.*

Paragraph (13)

15. Mr. LUKASHUK, referring to the third sentence, commented that the whole field of public health or safety was governed not only by international law but also by the national laws of each country. It would therefore be preferable to replace the words “in accordance with international law” by “not contrary to international law”.

16. Mr. BENNOUNA said he agreed. The definition of arbitrary deportation or forcible transfer of population under subparagraph (g) required the utmost accuracy and

care. The reference to safety, or *sécurité* in French, was also open to criticism. Whose safety, precisely, was meant? The sentence as a whole should be reviewed.

17. After a brief discussion in which Mr. LUKASHUK, Mr. THIAM and Mr. BENNOUNA took part, the CHAIRMAN suggested that the second part of the sentence should read: “. . . such as public health or well-being, in a manner consistent with international law”.

*It was so agreed.*

18. Mr. ROBINSON wondered whether it was necessary to maintain the reference to “legitimate reasons” in the first part of the sentence as well as the reference to international law in the second part.

19. Mr. LUKASHUK, Mr. de SARAM, Mr. ALBAHARNA and Mr. FOMBA said that they were in favour of maintaining both those references.

*Paragraph (13), as amended, was adopted.*

20. The CHAIRMAN noted that the new paragraph (13) *bis* had already been adopted earlier in the meeting.

Paragraph (14)

21. Mr. VARGAS CARREÑO proposed that the words “because of its extreme cruelty and gravity” should be added at the end of the last sentence.

*Paragraph (14), as amended, was adopted.*

Paragraph (15)

22. Mr. ROBINSON proposed the insertion of a footnote to the fourth sentence citing the document in which the conclusion of the National Commission for Truth and Justice referred to in that sentence had been published.

*Paragraph (15), as amended, was adopted.*

Paragraph (16)

*Paragraph (16) was adopted.*

*The commentary to article 18, as amended, was adopted.*

*Commentary to article 19 (Crimes against United Nations and associated personnel) (A/CN.4/L.527/Add.10 and Corr.1)*

Paragraph (1)

23. Mr. LUKASHUK proposed that the first sentence, which was purely narrative in character, should be deleted, together with the word “Thus,” at the beginning of the second sentence. Again, the whole of the third sentence and the words “In this regard,” at the beginning of the following sentence, should be omitted.

24. Mr. THIAM (Special Rapporteur) said that, although he was not the author of the commentaries under consideration, he felt bound to point out that when a commentary was short it tended to be criticized for being too short and when it was long, it was said to be too

long. The passages in question were a matter of history and he failed to see why they should give rise to any objection.

25. Mr. YANKOV suggested that it should be left to the secretariat to condense the paragraph.

26. Mr. HE said that some of the key terms in article 19 had still not been precisely explained in the commentary. The term "United Nations operation", in particular, required clarification. Yet the commentary still used the definition laid down in the Convention on the Safety of United Nations and Associated Personnel, which would cover not only peace-keeping activities but also election monitoring and other activities. Also, the term "associated personnel", as defined in that Convention, covered a wide range of persons engaged in such activities, but no clear explanation appeared in the commentary. In some cases, very complex political factors were involved, with the international community and the United Nations divided as to the best way of dealing with the situation. To group all such situations together under the same article without further clarification of such key terms would only add to the difficulties of applying the article.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he agreed with Mr. Lukashuk but not with Mr. Yankov. In the first place, the already very busy secretariat should not be overloaded with work. Mr. Lukashuk's proposal merely involved the deletion of two unnecessary sentences and the commentaries were in any event too long and should be reduced for the sake of clarity.

28. Mr. AL-BAHARNA said that, despite the admitted length of the commentaries, the Commission should adopt them as drafted. It would be imprudent, given the time factor, to become involved in deleting certain sentences. The articles were what mattered most, not the commentaries.

29. Mr. YANKOV said that the purpose of his proposal was precisely to save time. Mr. Lukashuk's proposals should be accepted but the order of the paragraph should also be rearranged to refer first to the position of the General Assembly and then to quote excerpts from the report of the Secretary-General.

30. The CHAIRMAN, speaking as a member of the Commission, said that he would be very sorry to see the quotation from the report of the Secretary-General go. In the historical flow of things, there was something to be said for a reminder that, "working under the banner of the United Nations has provided its personnel with safe passage and an unwritten guarantee of protection". A restatement of that goal was worth a few extra lines in a commentary.

31. Speaking as Chairman, he asked whether the Commission would agree to accept Mr. Lukashuk's proposed deletions, without the further deletions proposed by Mr. Yankov, while recognizing that the paragraph could be rearranged as suggested.

32. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), agreeing with the Chairman, said

that the sentence which referred to the report of the Secretary-General was in the nature of an introduction to the next sentence starting with the words "The seriousness and magnitude". If the reference to the Secretary-General were omitted, much rewriting would be needed.

33. The CHAIRMAN, noting that Mr. Yankov did not insist on his proposal, suggested that the Commission should adopt paragraph (1) of the commentary as amended by Mr. Lukashuk.

*It was so agreed.*

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

Paragraphs (2) to (4)

*Paragraphs (2) to (4) were adopted.*

Paragraph (5)

34. Mr. BENNOUNA said that the paragraph was poorly drafted and did not reflect the discussion in plenary on the adoption of the article at all well. It should therefore be reviewed. During the Commission's debate, a distinction had been drawn between general intention, which was explained at far too much length in the first part of the paragraph, and deliberate intention, which was dealt with in the second part of the paragraph. Regrettably, at no point did the commentary bring out the distinction between crimes against the peace and security of mankind and the crimes covered by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Also, a compromise had been reached in a working group whereby it had been agreed that, for a crime against the United Nations to rank as a crime against the peace and security of mankind, it must involve action designed to prevent the United Nations from fulfilling its mission. It had further been agreed that a distinction must be drawn between such action and minor incidents; indeed, the Chairman himself, who had been a member of the working group, had recognized the need for such a distinction. He was therefore quite unable to accept the paragraph as drafted, since it in no way corresponded to the *travaux préparatoires*.

35. Mr. CRAWFORD said that he agreed with Mr. Bennouna. It was, however, a question of emphasis: too much was said about general intention in the first part of the article and not enough in the second part dealing with specific requirement. At the same time it was made perfectly clear, at the end of the paragraph, that a different test was involved from that imposed by the Convention on the Safety of United Nations and Associated Personnel. As he had had some responsibility for the compromise reached in the working group, he would be happy to redraft paragraph (5) in the light of those remarks.

36. The CHAIRMAN, speaking as a member of the Commission, said that, while he would have no objection to any drafting changes, he could not agree that the commentary was other than a reflection of what had been agreed, as he understood the position. Nonetheless, a redraft of the paragraph, as suggested by Mr. Crawford, would be welcome.

37. Mr. THIAM (Special Rapporteur) said that he agreed with Mr. Bennouna. When a substantive matter had not been properly treated, it must be amended and, since Mr. Crawford had been responsible for the commentary to the article, he should draft that amendment.

38. Mr. BENNOUNA said that, in his view, the commentary should have been referred back for review by the working group at which the compromise agreement had been reached.

39. The CHAIRMAN suggested that further discussion on paragraph (5) should be deferred until the paragraph had been redrafted for the Commission's consideration.

*It was so agreed.*

Paragraph (6)

40. Mr. VILLAGRÁN KRAMER said that his point also pertained to paragraph (5) to some extent. Some unlawful acts which affected the international community as a whole gave rise to State responsibility. Others, which were described as crimes, could affect the institutionalized international community, in other words, the United Nations. For the first time, the Commission was dealing with such a crime and he would therefore ask Mr. Crawford if he could mark that distinction in the re-draft he was to prepare of the commentary to paragraph (5). A crime against the United Nations must be clearly differentiated from other international crimes on account of its nature, importance and gravity.

*Paragraph (6) was adopted.*

Paragraphs (7) and (8)

*Paragraphs (7) and (8) were adopted.*

41. Mr. PELLET said that the commentary to article 19 had still not convinced him that crimes against United Nations and associated personnel amounted to crimes against the peace and security of mankind. Had he been present during the debate in plenary, he would have voted against the article and would even have requested a vote on the Code as a whole. The adoption of the article would have prevented him from voting in favour of the Code.

42. Mr. FOMBA said he endorsed those remarks.

43. Mr. YANKOV said that he was not opposed to improved protection for United Nations personnel but he was not convinced by the text the Commission had adopted. His reservation should be placed on record, but he would not stand in the way of the adoption of the commentary as a whole.

44. Mr. LUKASHUK suggested that the term "law of international armed conflict", which appeared in paragraph 2 of article 19, should be replaced, throughout the draft, by the term "international humanitarian law". Also, it might be useful to refer to the latest decision of ICJ and its reference to the fact that the laws and customs of war had later come to be termed international humanitarian law.

45. The CHAIRMAN said he believed that the use of the term "international armed conflict" was deliberate and based on action taken by the General Assembly. Did Mr. Lukashuk insist on his suggestion?

46. Mr. LUKASHUK said that he would not insist, but would suggest as an alternative that some explanation of the point should be added to the draft in a separate paragraph.

47. The CHAIRMAN suggested that Mr. Lukashuk should be asked to draft an explanation for possible incorporation in a footnote, that the term "international armed conflict" meant the relevant portions of "international humanitarian law".

*It was so agreed.*

**Programme, procedures and working methods  
of the Commission, and its documentation  
(continued)\* (A/CN.4/472/Add.1, sect. F)**

[Agenda item 7]

REPORT ON THE LONG-TERM PROGRAMME OF WORK

48. The CHAIRMAN drew the attention of the Commission to the report of the Working Group on the long-term programme of work (ILC(XLVIII)/WG/LTPW/2/Rev.1).<sup>1</sup>

49. Mr. LUKASHUK said that, among the possible future topics listed in section I (Sources of international law) of the general scheme, he wished to draw particular attention to the law of unilateral acts and customary international law, which dealt with very important issues. The last topic on the list—"non-binding instruments"—should read "legally non-binding instruments".

50. Among the possible future topics listed in section IV (State jurisdiction/immunity from jurisdiction), extraterritorial jurisdiction should be a priority. In the list of future topics in section VI (Position of the individual in international law), he would delete the suggested topic of "The individual as a subject of international law". In reference to section VII (International criminal law), he pointed out that the Commission had done enough work on international criminal law and could postpone further work on that matter. The possible future topics listed in section VIII (Law of international spaces) were already being dealt with, and rightly so, by specialized international bodies. He pointed out in that connection that the future topics of ownership and protection of maritime wrecks should not be considered as a priority. Among the future topics in section IX (Law of international relations/responsibility), diplomatic protection was of great importance. The topics listed in section X (Law of the environment and of economic relations)

\* Resumed from the 2461st meeting.

<sup>1</sup> The report was not issued as an official document. The report on the long-term programme of work, as amended and adopted by the Commission, is reproduced in *Yearbook . . . 1996*, vol. II (Part Two), annex II.

were already being dealt with by other organizations which were better suited than the Commission to handle those matters. Among the future topics in section XII (Settlement of disputes), pacific settlement of international disputes was appropriate for the Commission's agenda.

51. By and large, the general scheme proposed by the Working Group was a useful tool for the Commission.

52. The CHAIRMAN said that the Commission would continue its discussion of the report of the Working Group at its next plenary meeting.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)\*\* (A/CN.4/472/Add.1, sect. D, A/CN.4/475 and Add.1,<sup>2</sup> 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**

53. Mr. BARBOZA (Special Rapporteur), introducing 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), said that the Commission had established a working group (2450th meeting) to consolidate work already done on the topic and to see if provisional solutions to some unresolved questions could be reached, with a view to examining all aspects of the topic and making a recommendation to the Commission. It was hoped that the Commission would then be able at the forty-ninth session to make informed decisions with regard to the handling of the topic during the next quinquennium.

54. The Working Group had held six meetings and had operated strictly within the framework of the topic. It had discussed three pressing issues: the activities to which the topic applied; the issue of prevention; and the question of compensation or other relief. The report of the Working Group contained a complete set of draft articles accompanied by commentaries.

55. He wished to express his gratitude to the members of the Working Group for their hard work and cooperation and, in particular, to Mr. Crawford and Mr. Eiriksson, who had carried a substantial burden of the drafting.

56. The draft articles proposed by the Working Group were limited in scope and residual in character. To the extent that existing or future rules of international law, whether conventional or customary in origin, prohibited certain conduct or consequences, they would operate within the field of State responsibility and would by definition fall outside the scope of the present draft articles (article 8). At the same time, the field of State

responsibility for wrongful acts was neatly separated from the scope of the present articles by granting permission to the State of origin to pursue the activity "at its own risk", as set forth in article 11 *in fine* and article 17, provisionally adopted by the Commission as articles 13 and 18, respectively.<sup>3</sup>

57. The topic of international liability for injurious consequences arising out of acts not prohibited by international law covered two basic aspects. The first was the prevention of transboundary harm arising from acts not prohibited by international law, in other words, prevention of certain harmful consequences outside the field of State responsibility. Prevention was dealt with in a broad sense, including notification of risks of harm, whether those risks were inherent in the operation of the activity or arose, or were considered as arising, at some later stage. The second aspect was the eventual distribution of losses arising from transboundary harm occurring in the course of performance of such acts or activities. That aspect was based on the principle that States were not precluded from carrying out activities not prohibited by international law, notwithstanding the fact that there might be a risk of transboundary harm arising from those activities, and the fact that their freedom of action in that regard was not unlimited and in particular might give rise to liability for compensation or other relief, notwithstanding the continued characterization of the acts in question as lawful. Of particular significance was the principle that the victim of transboundary harm should not be left to bear the entire loss.

58. The draft articles were divided into three chapters: chapter I (General provisions), chapter II (Prevention) and chapter III (Compensation or other relief). Most of the provisions of chapters I and II had already been adopted by the Commission. Of particular interest in chapter I was the scope of activities to which the topic applied. Article 1 distinguished between two categories of activities not prohibited by international law: those which involved a risk of causing significant transboundary harm (subparagraph (a)) and those which did not involve such a risk but which did cause such harm (subparagraph (b)). Subparagraph (b) had been placed in square brackets because not all the members of the Working Group had agreed on it. In paragraph 26 of the commentary to article 1, the attention of Governments was drawn to that question and their views on it were welcomed.

59. The articles in chapter II had already been adopted by the Commission. Chapter III was new. In the opinion of the Working Group, the articles on the topic did not follow the principle of "strict" or "absolute" liability as commonly understood: while the concepts were familiar and developed in domestic law in many States and in relation to certain activities in international law, they had not yet been fully developed in international law in relation to a large group of activities, such as those covered under article 1. As in domestic law, it followed from the principle of justice and fairness and from social policy that those who had suffered harm because of the activ-

\*\* Resumed from the 2450th meeting.

<sup>2</sup> Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

<sup>3</sup> See 2450th meeting, footnote 3.

ities of others should be compensated. Chapter III thus provided for two procedures whereby injured parties could seek remedies: pursuing claims in the courts of the State of origin, or through negotiations between the State of origin and the affected State or States. The existence of two different ways of obtaining redress had some resemblance to the solutions proposed in his sixth report.<sup>4</sup> Those two procedures were, of course, without prejudice to any other arrangements to which the parties might have agreed, or to due exercise of the jurisdiction of the courts of the States where the injury occurred. The present articles would not affect the latter jurisdiction if it existed in accordance with the applicable principles of private international law.

60. Chapter III contained three articles: article 20 dealt with non-discrimination in access to the national court of the State causing transboundary harm; article 21 dealt with negotiations with respect to compensation; and article 22 dealt with factors to be considered during such negotiations.

61. In view of the Commission's commitment to completing the draft articles on other topics at the current session, the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law had not been reviewed by the Drafting Committee and would not be debated in detail in plenary. At the same time, in its resolution 50/45, the General Assembly had urged the Commission to resume work on the topic "in order to complete the first reading of the draft articles relating to activities that risk causing transboundary harm".

62. The Working Group had considered that, under the circumstances, it would be appropriate for the Commission to annex to its report to the General Assembly the report of the Working Group and to transmit it to Governments for comment as a basis for the future work of the Commission on the topic. In so doing, the Commission would not be committing itself to any specific decision with regard to the direction of the topic or to any particular formulations, although much of the substance of chapter I and the whole of chapter II had been approved by the Commission at earlier sessions.

63. In making its recommendation, the Working Group had borne in mind the analogous procedure adopted by the Commission at its forty-fifth session in relation to the report of the Working Group on a draft statute for an international criminal court, which, without the benefit of a complete first reading in plenary, had been annexed to the report of the Commission<sup>5</sup> and been transmitted to the General Assembly and to Governments for comment. It was on the basis of that procedure that the Commission had been able to deal expeditiously with the draft statute for an international criminal court at its forty-sixth session.

64. That arrangement would make available for comment a complete text of draft articles on international liability for injurious consequences arising out of acts

not prohibited by international law which could form the basis for future work on the topic and help the Commission, at the next session, make a fully informed decision on how to proceed.

65. The CHAIRMAN suggested that members should first direct their comments to the recommendation of the Working Group that its report should be annexed to the report of the Commission and be transmitted to Governments for comment. Members would then have a chance to comment on the topic in general.

66. Mr. CRAWFORD said that, as a member of the Working Group, he naturally supported its conclusions. The Working Group's primary aim had not been to get the Commission to take a position on what was generally acknowledged to be a controversial and difficult problem but to produce a rationalized version of the work completed so far. The Commission, in its current composition, would thus be leaving a historical record for the next quinquennium without committing future compositions to any particular orientation. The Commission, in its next composition, would then be fully informed and free to decide how to proceed.

67. Mr. VILLAGRÁN KRAMER said that the Commission had made considerable progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law in the past few years. It should be kept in mind that the topic was a matter of great interest to both the industrialized and the developing countries. The former viewed with apprehension certain aspects of the topic, notably the proposed regulatory models. The latter were becoming aware of the risks which might arise from the activities of foreign enterprises operating on their territories. Because the topic was of such great importance, he endorsed the recommendation of the Working Group to transmit its report to Governments. He wished, however, to express one caveat: the Commission must not let the topic fall into oblivion because of reservations on the part of States and should continue to discuss it once Governments had made their views known.

68. Mr. PELLET said that it was difficult to decide how to deal with the Working Group's report without having had the time to read it, since the French text was not yet available. He therefore reserved the right to present his final views at a later time.

69. He was not entirely satisfied with the Working Group's recommendation. The Special Rapporteur had emphasized the precedent set by the Commission when it had decided to annex to its report to the General Assembly the report of the Working Group on a draft statute for an international criminal court. However, the circumstances had been different: the General Assembly had been urgently requesting the draft articles on that topic, something that was not the case with regard to the articles on international liability for injurious consequences arising out of acts not prohibited by international law. Thus, he was not certain whether such a departure from the Commission's usual procedures was justified.

70. It was not appropriate, moreover, to request the views of States on such a varied collection of articles.

<sup>4</sup> *Ibid.*, footnote 7.

<sup>5</sup> *Yearbook . . . 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

Articles 9 to 19 of chapter II (Prevention) had been provisionally adopted by the Commission and thus had proper status. They should be separated from the rest. They were well designed, went as far as was possible in terms of codification and progressive development of the law, and could be transmitted to the General Assembly as a separate and complete set, following the usual procedure of the Commission.

71. The Commission might indeed wish to annex the full report of the Working Group to its own final report. However, requesting the views of States on that report would effectively be adding a third step to an already complex procedure: the Commission would be asking States to react to a report which had not been debated in plenary. It was a precedent that the Commission should not set.

72. Mr. de SARAM said that the Commission could handle the report of the Working Group in three ways. First, it might decide simply to take note of the report and state that it had not had time to discuss the articles on international liability for injurious consequences arising out of acts not prohibited by international law. Secondly, it might transmit the report to the General Assembly with the observation that what was contained in the articles represented only one of the possible ways in which the issues might be resolved from a legal perspective. Thirdly, it could recommend to the General Assembly that the report should be forwarded to Governments for comment.

73. While he was willing to endorse the first or second solution, he had reservations about the third. On receiving the Working Group's report, Governments might well wonder whether it presented definitive solutions to the problems raised, when that was, to his mind, not the case. Furthermore, there had been no decision to transmit other reports of working groups to Governments.

74. Mr. CALERO RODRIGUES said that he fully endorsed the recommendation made by the Working Group. It would be extremely useful to know whether Governments thought that the Commission's work so far on international liability for injurious consequences arising out of acts not prohibited by international law was heading in the right direction, especially as a new special rapporteur would be taking over at the next session. Most of the work already accomplished was on prevention: the core of the topic—liability—had barely been touched upon. In most instances, the Commission transmitted to the General Assembly articles that it had approved on first reading. That meant it could not take the Assembly's opinions into account in the initial stage of its work. The advantage in the instance would be that it was sending something that was not a finished product, so the Assembly could provide guidance for future work.

75. Mr. VARGAS CARREÑO said he wished to express his appreciation for the Working Group's efforts and to pay special tribute to the Special Rapporteur who, over a period of many years, had made significant contributions to the development of a new and complex topic of international law. The recommendation was entirely acceptable. It would enable States to make known their views on international liability for injurious consequences arising out of acts not prohibited by interna-

tional law, something they had had virtually no opportunity to do before, and it would provide impetus for the Commission to move forward in its work.

76. Mr. YANKOV expressed his appreciation to the Special Rapporteur and the Working Group for the enormous amount of work done at the current session. As to the recommendation, flexibility was needed with regard to the Commission's methods of work: approaches taken in the past need not always be adhered to. He saw no difficulty in making it clear that the Commission had neither discussed nor adopted the report, and that it wished to place before the General Assembly the end result of its work on the topic in the past quinquennium. He agreed that the report should be transmitted to the General Assembly for comment, but did not think it should be sent direct to Governments.

77. The CHAIRMAN recalled that Mr. de Saram had proposed that the report be transmitted to the General Assembly, but not to Governments directly. That proposal might form a viable and acceptable compromise.

78. Mr. LUKASHUK said he could go along with that proposal in the interests of consensus. The Working Group—of which he had been a member—had none the less drafted its report and recommendation as a collective endeavour, and the results aptly reflected the various views heard during its discussion. He agreed with other speakers that one of the main obstacles to progress was that the Commission was in the dark about the opinions of States on the topic.

79. Mr. PAMBOU-TCHIVOUNDA said the Commission should not simply take note of the Working Group's report and annex it to its own report to the General Assembly. It must make every effort to find time, before the end of the current session, to consider it in depth, particularly as that report had been prepared in response to the Commission's own request. Perhaps a discussion could be scheduled once the report was available in working languages other than English.

80. Mr. GÜNEY said he had no objection to the Commission's taking note of the report and stating that it had not been able to consider it in depth for lack of time. He had great difficulty, however, with the recommendation that the views and observations of Member States should be elicited: an additional stage should not be incorporated in what was already a highly burdensome procedure.

81. Mr. BENNOUNA suggested that the report to be sent to the General Assembly should suggest a change in the title of the topic, given that very little material in the draft articles dealt with liability or responsibility—it was mostly on prevention. He had no objection to asking for the views of States through their representatives in the Assembly, and could accept the compromise proposal put forward by Mr. de Saram along those lines. The report should be presented as the end result of the work done for so many years by the Special Rapporteur, to whom special tribute was due.

82. Mr. SZEKELY said that, as a member of the Working Group, he wholly supported its recommendation. A very conscious effort had been made, when draft-

ing the recommendation, to achieve clarity and precision and to avoid prejudging the Commission's future work on the topic. The very form of language used had been chosen precisely to take account of the concerns raised at the current meeting. It would be truly unfortunate if a rigid approach to working methods were to preclude the possibility of hearing the reactions of States. As Mr. Calero Rodrigues had pointed out, since there would be a new special rapporteur in the next quinquennium, such reactions were of special importance. He therefore did not think the "compromise proposal" was really a compromise at all: it merely allowed the views of some members to predominate over those of others. He appealed to members to rally to the wording of the Working Group's carefully crafted recommendation.

83. Mr. CALERO RODRIGUES, referring to the possibility of sending the report to the General Assembly, said that, in practical terms, the Assembly would have very few opportunities to consider the report, since it was also to receive draft articles on a number of other topics from the Commission. Perhaps the proposal by Mr. de Saram could be supplemented to make it clear that the report was being transmitted to the General Assembly for comment, but that any observations from Governments in writing would be greatly appreciated as well.

84. Mr. THIAM said it was not only appropriate, but indispensable, for the Commission to report to the General Assembly on what it had done on the topic during the quinquennium. To transmit the report direct to Governments, however, would be to break with the long-established tradition of requesting comments by Governments only at the stage of first reading. He did not believe the Commission should alter that practice.

85. Mr. FOMBA said that, as a member of the Working Group, he fully supported the outcome of its work. He could, however, accept the compromise proposal, as amended by Mr. Calero Rodrigues, as a way out of the current impasse.

86. Mr. KABATSI said he fully supported the course of action proposed by the Special Rapporteur and did not feel comfortable with the alternative suggested by Mr. de Saram, which would deprive the Commission of the benefit of guidance from States on its future work on the topic. On the other hand, he could go along with Mr. de Saram's proposal as amended by Mr. Calero Rodrigues, because the Commission would then be able to hear the comments of States.

87. Mr. EIRIKSSON, joined by Mr. SZEKELY, Mr. HE and Mr. AL-BAHARNA, said they endorsed the proposal made by Mr. de Saram, as amended by Mr. Calero Rodrigues.

88. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt that proposal, together with the amendment thereto.

*It was so decided.*

89. The CHAIRMAN inquired whether, having taken that decision, the Commission wished to consider its dis-

ussion of the topic concluded, or would prefer to take it up again in order to record views on the substance of the matter, at a meeting in the final week of its session.

90. Mr. BOWETT, Mr. PAMBOU-TCHIVOUNDA and Mr. BENNOUNA spoke in favour of devoting an additional meeting to the topic.

91. Mr. AL-BAHARNA said he, too, was in favour of such a course, on the understanding that nothing that would be said would call into question in any way the procedural decision just taken.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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## 2466th MEETING

*Monday, 22 July 1996, at 3.10 p.m.*

*Chairman: Mr. Ahmed MAHIOU*

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

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### Visit by a former member of the International Law Commission

1. The CHAIRMAN said he welcomed Mr. Graefrath, who had been a member of the Commission from 1987 to 1991 and the Chairman of its forty-first session in 1989.

### Programme, procedures and working methods of the Commission, and its documentation (continued) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

#### REPORT ON THE LONG-TERM PROGRAMME OF WORK (continued)

2. The CHAIRMAN invited Mr. Bowett, coordinator of the Working Group on the long-term programme of