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Summary record of the 1183rd meeting

Topic:

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

Extract from the Yearbook of the International Law Commission:-

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breaking into a diplomatic mission or discharging firearms at the premises of the mission, had become so frequent that it seemed necessary to take them into account. The sub-paragraph would not, however, cover minor intrusions, such as the importunings of door-to-door salesmen.

47. Sub-paragraphs (*c*) and (*d*) covered attempts to commit violent attacks, as well as participation in such attacks as an accomplice. The Working Group had decided not to include extortion as a separate offence, since, in its opinion, the element of extortion did not broaden the scope of the crime committed. It had also decided not to include conspiracy as a separate offence, since its definition varied in different legal systems. The common law notion of conspiracy was in fact covered by the definition of "accomplice" in most systems of civil law.

48. Article 2 then went on to say that each State Party should make the acts mentioned in the preceding sub-paragraphs crimes under its internal law, a provision which provided the basis for universal jurisdiction over crime of that character. As a minor drafting change, he suggested that the last part of article 2 might be clearer if the clause "whether the commission of the crime occurs within or outside of its territory" were inserted directly after the words "a crime under its internal law".

49. Article 2 also provided that the offences in question should be "punishable by severe penalties which take into account the aggravated nature of the offence". The Working Group's idea had been that violent attacks upon internationally protected persons who were engaged in carrying out the business of the world community should be more severely punished than similar offences under internal criminal law. The Working Group had also discussed the possibility of defining those penalties more precisely, but had finally decided that that would lead to complications. For example, if mandatory minimum sentences were laid down, it would be necessary to define each individual crime, and that would undoubtedly make it more difficult to secure general acceptance of the draft.

50. Sir Humphrey WALDOCK said he had some doubts about the words "regardless of motive" at the beginning of article 2, since they might raise problems in the criminal law of his own and other countries. For example, would those words apply to a burglar who broke into the premises of an internationally protected person without being aware of the fact that that person enjoyed diplomatic status?

51. The CHAIRMAN, speaking as a member of the Commission, said that those words had been taken from article 2 of the OAS draft convention, where their basic purpose, as he understood it, was to make it clear that the existence of political motives for the commission of the offences in question would not shield the offender from prosecution. In the hypothetical case referred to by Sir Humphrey, the question was whether the burglar would have to run the risk of finding that the house he had broken into belonged to a diplomat, or whether the burden of establishing his motivation would lie with the prosecution. On the whole, the Working Group's position was that the greater burden should be placed on the burglar rather than on the prosecution.

52. Sir Humphrey WALDOCK said that, as Mr. Reuter had pointed out on an earlier occasion, there was always the possibility of a motivation which had no connexion with the diplomatic status of the internationally protected person: a jealous husband might, for instance, attack a diplomat for wholly private reasons.[8]

53. The CHAIRMAN, speaking as a member of the Commission, said that the offender would normally be tried by the courts of the State where the offence had been committed, although there might be exceptional cases in which the offender fled to his own country, and the latter might then find itself obliged to sentence him to a more severe penalty than that provided for by its own legislation. He did not, however, think that the prosecution should be required to determine the motivation for the act.

54. Sir Humphrey WALDOCK said that the words "regardless of motive" might even be represented as barring a plea of self-defence.

55. The CHAIRMAN, speaking as a member of the Commission, said that as he understood it, criminal law generally considered the motive immaterial and held that what really mattered was the intent. Sufficient provocation might always be regarded as a mitigating circumstance. In any case, the words in question had been used because they were found in the OAS draft convention.

56. Mr. SETTE CÂMARA said that he himself had raised the question of motivation when the Working Group had discussed article 2. A crime might contain a political element and a personal element, and it was difficult to decide which should prevail. However, he thought that the question of motivation was one to be considered by the courts, which would undoubtedly give proper weight to a plea of self-defence.

57. Mr. TSURUOKA (Chairman of the Working Group) said that the general feeling in the Group had been that, in the exceptional cases referred to by Sir Humphrey Waldock, it was possible to rely on the wisdom of the authorities in the country concerned, and that there was no need to fear that there would be any abuse in the application of a convention of that kind. That was why the Working Group had taken the view that the use of the words "regardless of motive" presented no difficulty.

The meeting rose at 1 p.m.

[8] See 1151st meeting, para. 48.

1183rd MEETING

Wednesday, 21 June 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor and Mr. Yasseen.

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 to 5, A/CN.4/L.182 and L.186)

[Item 5 of the agenda]

(continued)

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

ARTICLES 1 and 2 *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of articles 1 and 2 of the draft articles submitted by the Working Group (A/CN.4/L.186).

2. Speaking as a member of the Commission, he said that article 1 of the Working Group's draft had been based in part on article 1 of the OAS Convention of 1971,[1] which referred only to "those persons to whom the State has the duty according to international law to give special protection". It had also been based, in part, on article 1 of the Rome draft, which had referred to members of permanent or special diplomatic missions and members of consular posts, civil agents of States on official mission, staff members of international organizations in their official functions, persons whose presence and activity abroad was justified by the accomplishment of a civil task defined by an international agreement for technical co-operation or assistance, and members of the families of the above-mentioned persons (A/CN.4/253/Add.2). Article 1, while partaking of the ideas contained in both of those texts, was intended to give a clearer definition than that contained in the OAS Convention and a broader one than the more limited definition contained in the Rome draft.

3. Mr. CASTAÑEDA said that, as earlier in the session, he would like to state for the record that he was opposed in principle to the procedure which the Commission had adopted for dealing with the present topic, of appointing a working group instead of a special rapporteur.[2]

4. The draft articles submitted by the Working Group did not seem to differ basically from those which had been submitted by the Chairman in his working paper (A/CN.4/L.182), even though the Working Group had eliminated the controversal terms "international crime", "political crime" and "right of territorial asylum". In his opinion, the present draft was still extremely restrictive, since in article 7 it had merely replaced the idea of political crimes by that of extraditable crimes.

5. By making extradition compulsory, the article eliminated the possibility of territorial asylum in the case of crimes which had been traditionally regarded as political offences. That constituted a serious breach of an ancient Latin American tradition. The new draft was, in fact, even more restrictive than the OAS Convention, which had gone to the extreme limit of what the Latin American States had at that time considered tolerable.

6. He was not surprised that France, a country with a great tradition in the matter of the granting of political asylum, had expressed its categorical opposition to the idea (A/CN.4/253/Add.3). He himself wished to make it quite clear that if the present draft articles were put to the vote, he would feel obliged to vote against them.

7. The CHAIRMAN, speaking as a member of the Commission, said that he would like to call Mr. Castañeda's attention to the fact that the Working Group had provided, in article 6, that the State Party in whose territory the alleged offender was found should, if it did not extradite him, "submit without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution". He could see some possibility of compromise with the position taken by Mr. Castañeda if the latter felt that the purpose of asylum was to prevent the return of an alleged offender to a State where he could not expect a fair trial, but not otherwise.

8. Mr. CASTAÑEDA said that it was not his wish that individuals responsible for crimes against internationally protected persons should escape punishment. He did not, however, see the need for a formulation which might have an adverse effect on the traditional principle of territorial asylum, which was already embodied in many regional extradition treaties. It had been due to considerations of that kind that the original draft of the OAS Convention has been amended to provide, in its present article 6, that: "None of the provisions of this convention shall be interpreted so as to impair the right of asylum".

9. Mr. RAMANGASOAVINA said that the text proposed by the Working Group was a compromise in which the authors had carefully avoided controversial expressions such as "international crime", "political offence" or "crime of international significance", but precisely for that reason, it might not have the desired psychological effect.

10. The convention which the Commission was drawing up had the twofold purpose of preventing and punishing the growing number of attacks on the persons of diplomats; but although it fulfilled its punitive function, it failed in its preventive role because it did not have the deterrent character which was desirable. The principle should have been established from the outset that, whenever the person of a diplomat was involved, crimes such as murder, kidnapping, unlawful restraint, holding to ransom and even complicity must be regarded as crimes under the ordinary law and punished accordingly, without the guarantees and privileges accorded to political offenders in many countries. That principle was clearly laid down in article 2 of the draft submitted by Mr. Kearney (A/CN.4/L.182) and in article 1 of the draft submitted by Uruguay (A/C.6/L.822).

11. It was not a question of eliminating the concept of "political offence", but of restricting it to relations between the Government and the citizens of that particular country. As soon as the perpetrators of such a crime attacked a foreign State or its representatives, they

[1] See *International Legal Materials*, vol. X, p. 255.

[2] See 1151st meeting, paras. 10-14.

must be treated as criminals under the ordinary law, wherever they might be.

12. One difficulty was that such a rule had repercussions on the principle of asylum, which for some States was sacrosanct. Another difficulty was that the country in which the crime was committed was placed in a delicate situation, both internally and internationally. Internally, if it gave in to blackmail, it would be breaking its own laws by not respecting the separation of powers and by interfering with the normal operation of institutions; internationally, if it did not give in to blackmail, it risked becoming involved in a dispute with the sending State. It was therefore vital that the crimes covered by the draft articles should be prevented; potential offenders would be deterred as soon as they realized that they would no longer enjoy the protection generally accorded to political offenders.

13. With regard to sub-paragraphs (*a*) and (*b*) of paragraph 1, which defined the categories of protected persons, it might well be asked whether different persons were involved from those already covered by the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions and the draft convention on relations between States and international organizations. If that was not the case, it might be sufficient simply to include a reference to those instruments.

14. Mr. SETTE CÂMARA said that on the whole he agreed with the text of article 1 presented by the Working Group. In some ways, it seemed to go back to the 1856 "*attentat*" clause, which had provided international protection for certain special categories of persons and whose scope had gradually been enlarged until it had culminated in the adoption by the League of Nations on 16 November 1937, of the Convention for the Prevention and Punishment of Terrorism.[3] As the Second World War had begun shortly afterwards, that convention had never been ratified; nevertheless, it served to show that world public opinion at the time had been convinced that the international community should take some action to suppress terrorism.

15. In view of the steady increase in acts of terrorism, which were undoubtedly far more frequent than they had been in 1937, he personally was convinced of the need to adopt stern measures as a deterrent. The draft articles submitted by the Working Group had been inspired by the Convention for the Suppression of Unlawful Seizure of Aircraft,[4] adopted at The Hague in 1970, and by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,[5] adopted at Montreal in 1971. The Working Group had taken an objective approach and had avoided such controversial terms as "international crime", "political crime" and the like.

16. The Working Group's draft dealt with a special category of persons, and in that respect was a substantial improvement on the OAS Convention of 1971. He was prepared to support that draft on the understanding that, as Mr. Tsuruoka had pointed out, it was to be regarded as the first step towards a broader approach to the general problem of crimes of terrorism.

17. In article 1, the Working Group had abandoned the idea of enumerating all the categories of persons covered and had presented a general formula which included a large number of government officials, as well as officials of international organizations. He agreed with Mr. Hambro that the words "of universal character" between square brackets should be deleted and that protection should be extended to the officials of international organizations in general.

18. Mr. TAMMES said that he wished to comment on the important aspect of asylum referred to by Mr. Castañeda in connexion with the articles on extradition.[6]

19. He was not himself an expert on criminal law and was therefore obliged to rely largely on generally accepted texts. He noted that the Working Group had used the term "crime" in both articles 1 and 2, whereas the parallel text in the 1970 ICAO Convention for the Suppression of Unlawful Seizure of Aircraft[7] used the term "offence". The OAS Convention[8] also used the term "crimes", possibly as a result of the translation into English of the Spanish word "*delitos*". However, the word "crime" as a term of modern international law had a very special connotation, being used in the sense of the crimes tried by the Nuremberg International Military Tribunal and later of the crime of genocide.

20. Article 1, paragraph 2, of the Declaration on Territorial Asylum adopted by the General Assembly in resolution 2312 (XXII) stated: "The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.[9]

21. He stressed that point because it had been raised at the 1970 Conference at The Hague at which the Convention for the Suppression of Unlawful Seizure of Aircraft had been adopted, and Governments would undoubtedly wish to know why the Commission had replaced the word "offence" by the word "crime". At The Hague Conference, the United States, the USSR and ICAO had proposed that the unlawful seizure of aircraft should be described as "an international common crime". The Conference, however, had rejected that proposal and had opted for the more usual term "offence". The word "offence" was also used in the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971,[10] and in

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[3] See *International Legal Materials*, vol. VII, p. 862.

[4] *Ibid.*, vol. X, p. 133 (ICAO DOC. 8920).

[5] *Ibid.*, p. 1151 (ICAO DOC. 8966).

[6] See paras. 5 and 6 above and 1151st meeting.

[7] See *International Legal Materials*, vol. X, p. 133 (ICAO DOC. 8920).

[8] *Ibid.*, p. 255.

[9] See *Official Records of the General Assembly, Twenty-second Session, Supplement No. 16*, p. 81.

[10] See *International Legal Materials*, vol. X, p. 1151 (ICAO DOC. 8966).

the Rome draft referred to in the observations of Denmark (A/CN.4/253/Add.2).

22. He was aware that the Working Group's draft did not use the term "crime under international law", though article 2, sub-paragraph (*d*), referred to "a crime under its internal law". In order to prevent any possible confusion, therefore, he suggested that the Commission should either employ the language used in earlier conventions or else explain in its commentary why it had departed from the language of the 1970 ICAO Convention for the Suppression of Unlawful Seizure of Aircraft. On that point, paragraph (6) of the observations of Denmark (A/CN.4/253/Add.2) was very pertinent when it stated: "It would seem, therefore, that if the Hague rules were to be disregarded in the preparation of a new convention, this would tend to create unnecessary difficulties on issues to which a widely acceptable solution has already been found".

23. Mr. BEDJAOUI said that the subject dealt with in the draft articles was a particularly delicate one on account of its obvious and topical political overtones. That was why he had serious misgivings about the text now before the Commission, since the changes which the Working Group had made in Mr. Kearney's text (A/CN.4/L.182) had eliminated controversial terms such as "political offence" or "territorial asylum" without removing the difficulties underlying the draft as a whole.

24. He fully endorsed the observations of the Government of France (A/CN.4/253/Add.3), which had expressed serious doubts about the usefulness of a text on a matter on which international law was relatively clear and precise.

25. Any innovations which the Commission might make in that area of the law in the name of a political and legal philosophy of which he personally approved might have serious repercussions on other principles of legal or political philosophy. Far-reaching changes in those principles in a text which went beyond ordinary law might not be accepted by States, and the convention might suffer the same fate as the 1937 Convention for the Prevention and Punishment of Terrorism,[11] which had not been ratified by a single State. In any case, a text of the type proposed would oblige many States to make substantial, and perhaps politically difficult, changes in their national law. Obviously, what the Commission was drafting was treaty law. It was not elucidating customary rules and therefore had no need to consider whether the rules it drew up were consistent with customary international law. It should, however, take fully into account the need to avoid creating new legal situations which went beyond ordinary law and would deter States from ratifying the convention owing to the resulting problem of having to amend their national law.

26. But there was another and more important question, and it was a question of principle. Of course the principle of the stability of international and internal order must be supported, but it should not be at the expense of other equally important principles, and involve acquiescence in the perpetuation of tyranny or injustice. The great defect of the proposed text was that it took account of only one aspect of the problem, the stability of the international political order, to the exclusion of the other aspect, injustice or tyranny, which was at the root of political terrorism.

27. The flexibility of the solution adopted in article 6, the choice between extradition or prosecution, was only apparent. Without in any way condoning the destructive excesses of an act or its disastrous consequences for human life, the State in which the offender sought refuge might sympathize with the political motives by which the act had been inspired.

28. The solution now proposed irrevocably excluded the principle of asylum, which was laid down in article 8 of the League of Nations Convention of 1937, as well as in the 1971 OAS Convention to Prevent and Punish Acts of Terrorism.[12] It made extradition mandatory for political crimes. Yet it was not possible to treat the partisan inspired by a political ideal in his attempt to breach the defences of an oppressive Power on the same footing as a gangster demanding ransom.

29. The system adopted in the proposed text was based on the principle of the universality of the right to punish, which might be claimed by any State. It would create difficulties for countries whose criminal law was based on the opposite principle of the territoriality of criminal law. What was even more serious, however, was that it accorded the right to punish not only to the State in which the offence was committed and the State in which the offender was found, but to any State concerned; it was not difficult to imagine cases where such a possibility would lead to delicate political situations against which neither the text as a whole nor the choice provided for in article 6 provided complete protection.

30. A State clearly had a duty to ensure the safety of diplomatic agents and assimilated persons, but the protected persons themselves had a duty of neutrality, a duty which was not always respected. A State also had a duty to prevent its territory from being used as a base for an attack on another State and a further duty not to encourage the organization of plots. But the struggle against "subversive" movements did not impose a blind obligation on the State, and the problem of the exchange of information on such matters as plots and conspiracies, which had implications for two other problems, that of liberation movements and the struggle against the propagation of political ideas, needed to be handled with the utmost circumspection.

31. Mr. USHAKOV said that the basic principle underlying the draft was the principle, well established in international law and universally accepted, of the protection by all States of diplomacy, which had been instituted for the purpose of ensuring good relations between States. The draft was designed to strengthen that principle. Neither the right of asylum nor political struggles were involved. As he saw it, the draft was solely intended to consolidate, to the greatest possible extent and on the basis of reciprocity, respect of a well-established principle

[11] See *International Legal Materials*, vol. VII, p. 862.

[12] *Ibid.*, vol. X, p. 255.

of international law. Attacks on diplomatic agents were attacks on friendly and peaceful relations between States.

32. In paragraph 1 (*b*) of article 1 the word "government" should be replaced by the word "State", so that it was not only ministers who were covered. A better French translation should also be found for the English word "official". In the third line, the word "official" was superfluous, since the functions in question were always official. Those were, however, purely drafting points which he would not press. So far as the substance was concerned, he approved of article 1 in its entirety.

33. Mr. BARTOŠ said he would first present his point of view on the draft as a whole and then deal more specifically with articles 1 and 2.

34. The Working Group and the Chairman were to be commended on the draft they had now produced which was almost entirely satisfactory; many of the principles it stated he could endorse without reservation. His views on the Chairman's draft he had already expressed earlier in the session.[13]

35. Recourse to terrorism in political disputes, especially when it affected international relations, must be banned. States must, therefore, take preventive measures to discourage the preparation, attempting or commission of crimes against persons entitled to special protection under international law or against members of their families.

36. It was right that serious crimes should not be treated as political crimes, even when committed for political motives, since they were crimes against humanity and thus endangered international relations. That was not a new concept in international law, as it had already been accepted in regard to war crimes.

37. He also agreed entirely with another principle contained in the draft, namely, that strong measures must be taken against persons committing acts of violence irrespective of their nationality or the nationality of their victims. States were under an obligation to take immediate action against perpetrators of acts of violence against diplomatic agents and to increase the severity of the penalties to which they were liable.

38. With regard to extradition, he endorsed the principle enunciated in article 6. He also believed that, where several States applied for extradition, it was the application of the State of which the victim was a national which should be granted, especially if the victim had died.

39. He endorsed the principle that States were under a special obligation to co-operate in the prevention and punishment of acts of violence. They were also under an obligation to suppress any illegal organization to which the offenders belonged, which they supported or on whose behalf they had committed acts of violence.

40. In his opinion, the rules laid down in the draft did not apply to criminal acts committed on the territory of a State when both the perpetrator and the victim were nationals of that State, since in that case the requirements for an international offence would not be met.

41. He had already expressed earlier in the session [14] the view that diplomats were not always innocent victims. They sometimes violated their obligation of neutrality and interfered directly or indirectly in insurrectionist movements in the territory of the State where they exercised their functions. He was therefore in favour of including in the draft a general obligation of neutrality in any political dispute on the part of persons enjoying special protection. If diplomats and other assimilated persons failed to respect that obligation, they must take the consequences. It was generally accepted that, although diplomatic agents were entitled to special immunities, they nevertheless remained responsible for their actions. An act of terrorism should not therefore be regarded as provocation when it had been provoked by the victim himself.

42. With regard to article 1, he only wished to point out that the concept of an international organization referred to in paragraph 1 (*b*) should be taken to mean any intergovernmental international organization, whether universal or regional.

43. In the same sub-paragraph, the words "or on an official visit" should perhaps be inserted before the words "and who is entitled...", as it was often on such occasions that attacks were made and official visits came under the heading of the performance of official functions.

44. Article 2 was acceptable as it stood.

45. Mr. TABIBI said that, like other members, he was in general agreement with the purpose of the Working Party's draft. It was obvious that some measures needed to be taken to put a stop to attacks on diplomats: the real issue was how to deal with the problem.

46. With regard to the text of the draft, there were a number of points that called for further study. First was the question of the scope of the articles. In his opinion, certain persons who had not been covered were just as important as diplomats or officials of international organizations of universal character. He therefore supported the deletion of the words in square brackets, "of universal character", so as to cover officials of all international organizations, large or small.

47. Secondly, there was the question of government officials, and that disclosed a loophole in the draft. Certain government officials, such as those working for a nuclear energy commission, might hold more important secrets than cabinet ministers; for security reasons, they should receive special protection when travelling abroad, even if travelling unofficially for the purpose of exchanging views with colleagues in other countries. The importance of affording special protection to an official who was on an unofficial visit was demonstrated by the recent case of Mr. Kissinger, adviser to the United States President, who had visited Japan on holiday, but with the admitted purpose of conducting official negotiations.

48. With regard to the form of the proposed instrument, he suggested that it should take the form of an additional protocol to the 1969 Vienna Convention on Diplomatic Relations; its provisions would help to strengthen the system established by that Convention.

[13] See 1152nd meeting, paras. 8-14.

[14] *Ibid.*, para. 10.

49. Next, the tone of some of the articles should be softened. It would make the whole draft more acceptable to States if certain articles were not couched in language which appeared to dictate the manner in which States should manage judicial proceedings in their own territories.

50. He also doubted whether States would find it possible to accept the system of mandatory extradition for offences which were not always simple acts of terrorism but might sometimes be acts connected with political activities. As Mr. Tammes had mentioned, a number of delegations at The Hague Conference of 1970 had raised objections to the draft convention then under discussion precisely because of the provisions it contained on the subject of extradition.

51. His own country had a practical interest in the whole question, in that there were no less than 8 million people in the tribal areas on the borders of Afghanistan. Those who had read Kipling's books knew that raids, involving killings and abductions, used to be carried out frequently from that area during the period of British rule in India. Such raids into neighbouring countries still occurred occasionally even now, whence Afghanistan's concern with the whole problem of acts of violence committed across frontiers.

52. As regards individual articles of the draft, articles 1 and 2 were acceptable, subject to certain adjustments. The opening sentence of article 3 was acceptable but not sub-paragraphs (*a*) and (*b*). It would be proper to recommend to States that they should impose stronger measures to prevent the offences in question and also to recommend the exchange of information, but not to attempt to dictate to them the action they should take, as the present text of those sub-paragraphs appeared to do. If articles 4 to 7 were dropped, the rest of the draft would be acceptable to him.

53. The whole draft should be referred back to the Working Group for re-examination in the light of the discussion, with a view to producing a more acceptable text for submission to the General Assembly.

54. Mr. SETTE CÂMARA said that, in the Working Group, he had been responsible for the suggestion that the term "crime" should be used instead of the term "offence" which had been used in the earlier document (A/CN.4/L.182). In his opinion, the reasons which had led the 1970 Conference at The Hague not to use the term "crime" in the Convention it had adopted [15] did not apply to the present draft. Those reasons had been connected with the fear that the maxim *nullum crimen sine lege* might be invoked with regard to the new offences against aircraft. The acts covered by the present draft had always been labelled as crimes in the domestic law of all countries and there was therefore no reason why they should not be so described in the draft.

55. Mr. QUENTIN-BAXTER said that the Working Group's very lucid draft would be of great assistance to the Commission in crystallizing the problems involved.

56. The success of a convention of the kind proposed depended on two things. The first was whether the policy of the convention could be reconciled with what Mr. Castañeda called the "right" of asylum; the second was whether the requirements of the convention could be conveniently assimilated into the domestic laws of States, which had very strong traditions and clear procedural requirements in matters of extradition and criminal law.

57. In relation to article 1, only the first question arose. As the provisions of extradition laws and treaties clearly demonstrated, the majority of countries believed that the basic principle governing the right of asylum was that transactions between the rulers and the ruled in a particular State should not be passed upon by third States.

58. The typical case which had led to the demand for a convention on the lines of the draft articles now under discussion did not contravene that principle. An ambassador involved in a political situation which concerned the receiving State alone was being treated merely as a pawn in someone else's game. The purpose of those who committed the offence against him might be simply to embarrass the Government of their country, which had a duty to protect diplomats, and which also had to demonstrate its will to be the master in its own house.

59. In that sense there was a true parallel with the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.[16] That Convention was based on the view that the political situation in a country could provide no justification for imperilling the lives of air passengers. Similarly, it could provide no justification for endangering the traditions of diplomatic relations.

60. It should, however, be recognized that, with the definition of internationally protected person given in article 1, it could not properly be said that the draft now under discussion did not impinge at all on the right of asylum. In the typical case of an attack on a diplomat or other protected person in connexion with a political struggle to which the person concerned was alien, there was no conflict with the right of asylum. The draft, however, also covered the case of a politician on a visit to another country who was attacked by one of his fellow countrymen for political reasons. Undoubtedly, the country where the offence had occurred would consider it as an act endangering international relations and as an outrage to its hospitality. That State would have every reason to want to punish the offender and to want him back if he escaped. But it had to be recognized that such a case involved an overlap with the law of asylum because the person attacked was not unconnected with the political situation which had led to the attack. In view of that overlap, some States would hesitate to accept the draft.

61. Like Mr. Hambro, he saw no justification for drawing a distinction according to the place of commission of the offence.[17] If a diplomat stationed at Geneva was the

[15] *Convention for the Suppression of Unlawful Seizure of Aircraft*, ICAO DOC. 8920, see *International Legal Materials*, vol. X, p. 133.

[16] *Ibid.*

[17] See 1182nd meeting, para. 39.

victim of an attack while on a visit to a nearby place in France, the position should be the same as if the attack had occurred in Switzerland. The situation which had given rise to the need for a convention of the type proposed was the use of a diplomat of a foreign country for political purposes with which he was entirely unconnected. From that point of view, the actual place of commission of the offence was immaterial and the Commission would do well to keep its draft within that framework.

62. Mr. BILGE said that at the beginning of the session he had expressed his approval of the set of draft articles prepared by the Chairman,[18] but the text now proposed by the Working Group corresponded even more closely to what he had in mind than had the Chairman's original text.

63. He agreed with Mr. Bedjaoui that no-one could condemn liberation movements fighting for the principle of self-determination. But an exception had to be made when such movements acted blindly and attacked persons who were in no way concerned with such aims. The case was different where the victim was involved in the political dispute but such a case was covered by article 2, which referred to internal law. If the act of violence was committed in self-defence as recognized by internal criminal law, the perpetrator would clearly not be convicted. In general, the proposed articles would not hinder a legitimate struggle, but would discourage blind acts of violence against innocent persons.

64. It would of course have been preferable to broaden the scope of the draft, but the Commission was bound by the terms of General Assembly resolution 2780 (XXVI).

65. Like Mr. Hambro, he thought that the words "of universal character" should be deleted[19] from paragraph 1 (*b*), since officials of regional organizations were particularly exposed to acts of violence as they were less anonymous than those of universal organizations. The verb "accompany" in paragraphs 1 (*a*) and (*b*) was not entirely suitable; it did not, for instance, cover the case where a member of the family of a person entitled to special protection was travelling to join him. It would therefore be better to adopt wording similar to that used in article 40 of the Vienna Convention on Diplomatic Relations.

66. He hoped the Working Group would introduce into article 2 the concept of the threat of violence.

67. Sub-paragraph (*d*) of article 2 referred only to "participation as an accomplice" in acts of violence. It would be desirable to introduce the concept of assistance, especially financial assistance, to a clandestine organization, without actual participation in the act of violence.

The meeting rose at 1.05 p.m.

[18] See 1150th meeting, para. 26.

[19] See 1182nd meeting, para. 40.

1184th MEETING

Thursday, 22 June 1972, at 10.50 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 to 5, A/CN.4/L.182 and L.186)

[Item 5 of the agenda]

(continued)

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

ARTICLES 1 and 2 *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles submitted by the Working Group (A/CN.4/L.186).

2. Mr. TSURUOKA (Chairman of the Working Group) said that many of the misgivings expressed by members concerning the draft articles could be removed if the Commission reached agreement on their exact purpose. In the light of the genesis of the Commission's work, of the debates at the Sixth Committee's last session and of the comments of Governments, it seemed safe to say that their purpose was to protect the existing diplomatic machinery, which was essential to maintain order and facilitate co-operation between States, in other words, to ensure the survival of the international community in its present form. The Working Group's text appeared to meet that dual purpose and, in that respect, to be quite non-controversial.

3. The machinery proposed by the Working Group provided for the more severe punishment of certain offences where they were committed against persons enjoying special protection under international law. In such cases it recognized the exercise of an extra-territorial jurisdiction and instituted closer international co-operation, which should facilitate the application of the articles. Viewed from that standpoint, the text was in no way revolutionary; it merely reinforced existing rules or principles of international law. The smooth functioning of the proposed machinery would in large measure depend on the proper application of the text. If it was conceded that that machinery remained within the limits of the already existing rules, there should be no ground for concern with regard to the operation of the future convention.