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Summary record of the 1153rd meeting

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

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1153rd MEETING

Monday, 8 May 1972, at 3.5 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoek, 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 and 2; A/CN.4/L.182)

[Item 5 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of item 5 of the agenda.
2. Sir Humphrey WALDOCK said he largely agreed with Mr. Ago that there was a practical justification for dealing with the protection of diplomats as opposed to other persons who might be the victims of terrorism, because diplomats were acting in the general interests of international relations and were in a special position in which they were unable to defend themselves.
3. The question, therefore, was not merely one of the protection of human rights in general, but rather of diplomatic law; what the Commission had to decide was whether it was really possible to do anything practical and useful by way of a convention for the protection of diplomatic agents. It was clear that such a convention would be useless unless it was accepted by a large number of States and could pass the scrutiny of their Ministers of Justice and other civil authorities who dealt with criminal matters.
4. With regard to the persons to be covered by the convention, the Chairman's draft (A/CN.4/L.182) contemplated a wide range, including Heads of State and public officials of cabinet rank. The inclusion of such persons had been criticized, but he himself considered it logical, since today Heads of State and foreign ministers frequently travelled about the world and did much of the work which had formerly been done by diplomats. The Working Group would, however, have to consider whether and to what extent the convention should include members of special missions and representatives to international organizations.
5. With regard to the criminal acts which the convention should cover and their definition, Mr. Reuter had drawn attention to certain hypothetical cases which the Commission might not wish to cover, but which seemed to fall within the provisions of the Chairman's draft, such as the kidnapping of a diplomat's child from motives of pure financial gain, or the murder of a diplomat by a jealous husband. The Chairman's draft was, indeed, sufficiently broad to cover almost any criminal offence which might be committed against the person of a diplomat, even including manslaughter as a result of gross negligence when driving a car. The Working Group would also have to consider the question of *mens rea* and whether it would be necessary to prove that the offender was aware that his victim possessed diplomatic status.
6. He agreed that it would be undesirable to use the term "international crime", since States might well hesitate to accept such a general idea, the full implications of which it was impossible to foresee. He would prefer, therefore, some such expression as "crime of international concern", or even the word "crime by itself, followed by a list of the acts to which it referred.
7. On the general question of jurisdiction, the text produced by the Chairman seemed largely appropriate, although in connexion with one or two particular points he would prefer the Working Group to draw inspiration from the Hague Convention for the suppression of unlawful seizure of aircraft,¹ especially with respect to the discretion to be left to prosecuting authorities as to whether they should grant extradition or prosecute the offenders themselves. Some flexibility of action in that regard was necessary, since the problems of protection were more of a practical than of a legal nature. The convention should be strict, but on the other hand it should not be cast in such absolute terms as to make it too difficult to provide the protection aimed at.
8. Mr. NAGENDRA SINGH said the Chairman was to be congratulated on having produced a draft single-handed on such a controversial and complex subject. The draft was by no means perfect, but it furnished a basis for discussion. He was prepared to go further and say that it could furnish the foundation for a codification exercise. However, it needed several amendments. In regard to the guide lines for the Working Group, he had several observations to make.
9. First, the Working Group should do its utmost to satisfy the fears and apprehensions of the Latin American members of the Commission. In no circumstances should the time-honoured institution of political asylum be interfered with. He agreed with Mr. Castañeda that it was a key institution in the political life of the Latin American States and the Working Group must find an appropriate formula which would maintain it.
10. As far as he could see, article 2 of the Chairman's draft did not come in conflict with the institution of asylum. In that connexion he drew attention to the provisions of article 6 of the draft submitted by Uruguay to the Sixth Committee of the General Assembly in 1971.² It should be possible for the Working Group to adopt the Uruguayan principle embodied in that article which read as follows: "Nothing in this Convention shall be deemed to impair the right of asylum in so far as relates to those States which recognize it as an institution under international law". Article 2 of the Chairman's draft, which spoke of a political offence, was not inconsistent

¹ See *International Legal Materials*, vol. X, number 1, January 1971, p. 133.

² Document A/C.6/L.822.

with that principle either. Asylum was granted under the ancient laws of India to a person who had not committed any offence except that he had earned the "wrath of the sovereign". Thus when India had granted asylum to the Dalai Lama of Tibet, Mr. Nehru, the Prime Minister, had taken great pains to ascertain whether the Dalai Lama had committed any offence under Indian law, such as murder or theft. After satisfying himself that the Dalai Lama had not committed any legal offence, Mr. Nehru had granted him asylum in accordance with the ancient laws of Manu.

11. He agreed with Mr. Castañeda that the subject under consideration was not suitable for treatment by an experimental method, namely, the short-cut method of dispensing with a special rapporteur. That novel, radical method might be tried for making rapid progress in codification, but the subject of the protection of diplomats, because of its controversial character, should be treated in the traditional fashion. However, the Commission had taken the plunge by adopting the short-cut method and it must therefore face the difficulties and carry on, rather than give up the project.

12. The second observation he had to make related to the presentation of as many alternatives as possible. The intention behind the formulation of any convention was to make it widely acceptable, for therein lay its utility. For the particular subject under study, it was necessary to adopt as broad an approach as possible and to present as many alternatives as possible, both to the Commission and later to the General Assembly when the draft was ultimately put into final form.

13. His third observation was that the closest possible study should be made of all relevant and connected conventions, in particular, the Hague Convention for the suppression of unlawful seizure of aircraft. There were other conventions too which the Working Group should examine closely, such as the Convention of the Organization of African Unity, and it should study the efforts made by the Inter-American Juridical Committee in that field. However, the closest parallel was with the Convention for the suppression of unlawful seizure of aircraft, of 16 December 1970. In that regard he believed that the principle of *stare decisis*, or precedent law, had a great role to play, not only in the adjudicatory processes where the common law principle was effectively enshrined, but also in the field of legislative measures involving codification. For example, although article 2 of the 1970 Hague Convention was very vague in prescribing "severe penalties" for offences punishable under the Convention, he was prepared to consider that formulation because of the precedent it had established. In the circumstances, article 7 of the Chairman's draft, which closely followed the wording of the article 2 of the Hague Convention was acceptable to him despite its vagueness—"severe penalties" could be interpreted as 10 years' rigorous imprisonment or a death sentence or even 5 years' rigorous imprisonment—and he thought the Working Group should accept it.

14. It was certainly necessary to obtain comments from governments, but it took time and he thought a time-limit might be considered. In any case, there was a certain element of repetition involved: first the Commis-

sion consulted governments during the formulation of the draft articles; then the Sixth Committee invited governments to comment on the Commission's draft; then there was a third opportunity for governments to advance their views during the plenipotentiary conference. The Commission would therefore be wise to consider a time-limit of six months or less, and if comments were not received from all governments, not to wait for them indefinitely.

15. He agreed that the term "international crime" should be replaced by the word "crime" or possibly "heinous crime".

16. Lastly, the Working Group should consider the case of a Head of State who was assassinated in his own territory by a foreign national who subsequently escaped from that territory.

17. Mr. BILGE said that at a previous meeting he had suggested providing for an accelerated procedure in article 10 of the draft.³ He had made that suggestion because the Turkish courts had hitherto applied the normal procedure to the crimes covered by the draft articles. In the meantime, he had noticed that the International Covenant on civil and political rights⁴ used two forms of wording which expressed the same idea, namely, the right to trial "within a reasonable time", in article 9, paragraph 3 and "without undue delay", in article 14, paragraph 3 (c). The Working Group might take them as a basis and amend article 13 of the draft accordingly, rather than article 10. It might also introduce the notion of an independent tribunal, which was to be found in article 14 of the Covenant.

18. Mr. HAMBRO said that, after listening to the numerous speakers, he had decided to abstain from making any statement in the general debate. He would reserve his comments for the Working Group and, at a later stage, for the Commission itself.

19. Mr. CASTAÑEDA said he wished to state once more that he had the most serious reservations concerning the procedure which the Commission had adopted for dealing with item 5. Although the matter was urgent and important, he saw no reason why the Commission should depart from the traditional procedure which it had followed for the past twenty-two years and which offered the best possible guarantee for serious and constructive work. The topic had political and even ideological connotations; it simply did not lend itself to such brief and summary treatment, and he did not think that a draft convention produced under such circumstances would be supported by many States in the General Assembly.

20. While fully respecting the Chairman's motives, he considered his draft a dangerous one, since, by providing for automatic extradition for acts which had always been considered to be of a political nature, it would destroy the traditional institution of political asylum. As Mr. Reuter had observed, the question of asylum constituted the "hard core" of the draft, and if that element was removed from it, nothing would be left.

³ See 1150th meeting, para. 31.

⁴ General Assembly resolution 2200 (XXI) section A, annex.

21. Mr. Ustor had said that the essential rule was that laid down in article 7, whereby each Party would undertake to make the international crimes described in article 1 punishable by severe penalties; surely, however, such an undertaking related to a national measure and all that was needed was an international recommendation to the same effect. The draft convention was even more restrictive of national sovereignty than the OAS Convention,⁵ which had gone as far in that direction as most Latin American States could accept.

22. Lastly, he thought the Commission's appointment of the Working Group had been premature and precipitate, since a much longer procedure of study and consultation was obviously called for. However, if the Working Group was to function at all, it should not attempt to draft articles immediately, but should draw up a questionnaire for submission to governments concerning the points of international law involved. When the replies of governments had been received, the Commission could proceed on a much more solid foundation and produce a more viable draft.

23. Mr. SETTE CÂMARA said he fully shared the reservations expressed by Mr. Castañeda about the Commission's method of work and agreed with him that the Working Group should not begin by drawing up articles on the basis of the Chairman's draft, but should discuss the topic in broad terms and attempt to isolate and define the most important problems. It had been with that procedure in mind that he had agreed to participate in the Working Group and if it adopted any other approach he feared that he could be of little help to it and would have to ask to be relieved of his responsibilities.

24. Mr. AGO said that draft articles such as it was intended to prepare did not deserve to be called reactionary, since no one was thinking of impairing the right of political asylum in general or reducing the chances of those who might benefit by it. Nor was anyone thinking of any general impairment of the principle of non-extradition of persons who had committed political offences. He was in favour of political asylum, but the purpose of the future convention was to prevent certain political movements from resorting to means unworthy of their aims and thus seriously endangering relations between States. In the last resort, it was the interest of the international community that should prevail.

25. Mr. USHAKOV emphasized the slowness of the Commission's usual procedure of appointing a special rapporteur. That procedure was to be recommended only in normal circumstances. In the present case, the Commission had decided to give the General Assembly an undertaking that it would prepare a set of articles at its current session. That decision had been unanimous and the Commission was bound to give effect to it.

26. In making their comments on the draft articles submitted by the Chairman, some members seemed to have lost sight of its purely personal character. It was merely

a basis for discussion, which the Working Group might or might not take as a model.

27. He hoped the Secretariat would prepare unofficial summaries of the Commission's discussions, which, together with the observations of governments and the documentation circulated by the Secretariat, would enable the Working Group to start work at once.

28. Mr. SETTE CÂMARA said that there had been no discussion on the problem of the protection of diplomatic agents at the Commission's previous session. It was precisely for that reason that paragraph 134 of the Commission's 1971 report to the General Assembly⁶ had been carefully drafted in very general terms. Nor should it be forgotten that the Commission, as now constituted, was newly elected. Hence no obligation to prepare a set of draft articles at the current session could be said to exist. Moreover, the General Assembly had not requested the Commission to draft such articles forthwith, but merely "as soon as possible".

29. Mr. TABIBI said he agreed that there was probably no obligation to complete a draft convention at the current session, but that did not mean that eight years should be allowed to elapse. It was true that the views of Member States would first have to be ascertained. Perhaps the Working Group should prepare a series of questions, as proposed by Mr. Castañeda, which could be sent to the Secretary-General for transmission to Member States.

30. Sir Humphrey WALDOCK said he thought that to circulate a questionnaire to governments was not a good idea. Some governments would not reply, because on a question such as the protection of diplomats they would want to see a text on which they could comment. The best course would be for the Working Group to produce a text, perhaps with a number of alternatives, as suggested by Mr. Reuter. Such a document could be very usefully discussed in the Working Group and in the Commission. If the Commission failed to produce a set of draft articles, it would disappoint governments.

31. The CHAIRMAN said he had felt it desirable to prepare a draft, if only to direct attention to the difficulties, and he certainly appeared to have succeeded in that object. He had by no means expected the Commission to approve his document as it stood.

32. Mr. NAGENDRA SINGH said he thought it was imperative that the Commission's procedure should be approved throughout by its Latin American members, and the views expressed by Mr. Castañeda and Mr. Sette Câmara should certainly be respected. The Working Group should consider all the aspects of the matter and report to the Commission on what was possible. It should be left to the Working Group to use the Chairman's draft as it saw fit. The Group would of course take note of all the points that had been raised in the discussion and then make its recommendations; it need not be given any directions.

33. Mr. ROSSIDES said that, on the question of procedure, it should be remembered that the General

⁵ See *International Legal Materials*, vol. X, number 2, March 1971, p. 255.

⁶ See *Yearbook of the International Law Commission*, 1971, vol. II, document A/8410/Rev.1.

Assembly had had before it the report of the Sixth Committee,⁷ which was very explicit and referred to the Commission's report. The General Assembly had admittedly left the Commission some latitude, but it had described the item as a matter of urgency and events were also making the protection of diplomatic agents a pressing matter.

34. He could not agree that the Commission was relieved of all responsibility to act on its own proposal merely because its membership had changed; the Commission was a continuing body. The articles need not necessarily be completed at the current session, but their preparation must not be allowed to take eight years.

35. Sir Humphrey Waldock's suggestion that a draft be circulated among Member States should, if adopted, meet Mr. Castañeda's wishes, since it would enable governments to express their views.

36. As to the substance, Mr. Castañeda's fears that the right of asylum might be endangered were real, but perhaps exaggerated. It was not only the right of asylum that should be protected, but also diplomatic agents who were entirely unconnected with the political struggle that had engendered the violence against them. Perhaps the Working Group could draft a text which would afford extra protection—going beyond the protection given to diplomatic agents under the existing conventions—only to such "innocent" diplomatic agents.

37. Mr. TSURUOKA said that at its previous session the Commission had taken its decision on the topic under consideration only after he himself, as Chairman at the time, had asked each member for his opinion, and the General Assembly had reached its decision only after long discussion. If the Assembly had not addressed the Commission in direct terms, that was because it had considered that it should not give the Commission orders, but its intention was plain enough: it wished the Commission to study the question as quickly as possible and take concrete steps, if possible at the present session.

38. Speaking as Chairman designate of the Working Group and after consulting its members, he could assure the Commission that the Working Group regarded itself as the instrument of the Commission, that it would bear in mind the discussions at plenary meetings, that it would try faithfully to interpret all the views expressed in the International Law Commission and in the Sixth Committee and that it would take into account the observations of Member States and endeavour, in accordance with the Commission's sound tradition, to reconcile differing opinions on controversial points. On that basis it would prepare preliminary draft articles, which would be submitted to the Commission and to governments for their observations and put into more final form at the Commission's next session. The Group would base its work on a summary of the essential points in the discussions which had taken place in the Commission and on the working papers before the Commission, namely, the draft articles submitted by the Chairman, the draft submitted by Uruguay in the Sixth Committee

and the drafts which Denmark and Italy had announced that they intended to submit.

39. The CHAIRMAN said he might add to Mr. Tsuruoka's statement that the delay in discussing the question of the protection of diplomats had not been due to any reluctance on the part of the Commission to tackle it at the previous session, but to the fact that the Commission had understood that the Italian Government was considering convening an international conference on the subject.

40. Mr. ALCÍVAR said he had not objected to the adoption of a method of work which departed from the Commission's usual procedure; the reason for that departure was the time factor. Diplomatic agents were constantly exposed to serious danger, which was now all the greater because many governments were unable or unwilling to negotiate with revolutionary groups.

41. He was not opposed to the establishment of the Working Group, but would request that, having noted the views expressed in the Commission, it should submit a list of points to the Commission as a basis for further action, so that the Commission could lay down specific term of reference for the Group before it began to draft articles. That procedure might reconcile the different views expressed in the Commission. Any over-hasty procedure would not produce quick results, and might only lead to embarrassment.

42. Mr. CASTAÑEDA said that when the Commission had drafted paragraph 134 of its 1971 report to the General Assembly, it had not been aware of all the complex aspects of the question. Moreover, when the General Assembly had asked for the preparation of draft articles "as soon as possible", it had had in mind precisely the opposite of what several members ascribed to it. On similar occasions in the past, when the Assembly had wished certain texts to be prepared for a particular session it had said so expressly; the use of the words "as soon as possible" meant that greater latitude was allowed.

43. At the previous meeting Mr. Ushakov had described the Chairman's draft as a document which the Working Group could take as a basis, but now he was calling it a purely personal product. That was a contradiction.

44. Sir Humphrey Waldock was right in saying that governments preferred a specific text to a questionnaire as a vehicle for expressing their views. It was precisely for that reason that the Commission was in the habit of asking a Special Rapporteur to submit a report. No such report existed as yet. If the Commission followed its usual procedure, a text would emerge in due course.

45. As he had emphasized earlier, the Working Group should not draft any articles at the current session. On the other hand, it could draw up a few specific questions for consideration by the Commission, which might include: the question whether the concept of an international crime should be used or not; the definition of a political crime; the obligation to extradite persons committing such crimes and the consequences of that obligation for the right of asylum. It was desirable that the most appropriate procedure should be devised for

⁷ *Official Records of the General Assembly, Twenty-sixth Session, Annexes, agenda item 88, document A/8537.*

consultation between the Working Group, the Commission and Member Governments.

46. Mr. USHAKOV said he regarded all the working papers as of equal value and it was only by an oversight that he had omitted to mention the draft submitted by Uruguay.

47. The CHAIRMAN said he thought that the Working Group would inevitably report back to the Commission for guidance, though in view of the Commission's timetable, he was not certain whether it would be possible for it to report its general conclusions to the Commission and receive further instructions if draft articles were to be reproduced during the current session.

48. Without pronouncing on the different procedural ideas which had been advanced, he thought that the General Assembly had certainly desired the Commission to go ahead with all speed. Perhaps the Secretariat could prepare a working paper reproducing articles of the 1971 OAS Convention to prevent and punish acts of terrorism, the 1970 ICAO Convention for the suppression of unlawful seizure of aircraft, and his own draft, side by side.

49. Mr. TSURUOKA said he thought that the proposals put forward by Uruguay, Denmark and Italy for the protection of diplomats should also be considered.

50. Mr. TAMMES suggested that the Working Group might also study the Convention governing the specific aspects of refugee problems in Africa, adopted by the Organization of African Unity in September 1969.⁸ The approach of that Convention to the problem of political refugees differed completely from the approach adopted in the Chairman's draft.

51. Mr. USHAKOV said that the Working Group was free to make use of any document it considered useful.

52. Mr. AGO said that the Commission should not consider itself bound by any draft. The documents before it might help the Working Group, but to give it formal terms of reference would impair its efficiency. Its first task would be to determine what should be included in the draft articles, in what order and for what reasons.

53. Mr. BARTOŠ said that the Working Group should consider not only the problems dealt with in the working papers before the Commission, but also the ideas connected with them, and was free to take up any point it thought useful for the accomplishment of its task.

54. Mr. CASTAÑEDA asked whether any formal decision had been taken on the Working Group's terms of reference.

55. The CHAIRMAN replied that it was his understanding that the Working Group had been instructed to produce a set of draft articles in accordance with the terms of General Assembly resolution 2780 (XXVI).

56. Mr. CASTAÑEDA said he wished his opposition to that decision to be noted in the record.⁹

The meeting rose at 6 p.m.

⁸ See *International Legal Materials*, vol. VIII, number 6, November 1969, p. 1288.

⁹ For resumption of the discussion on item 5 of the agenda see 1182nd meeting.

1154th MEETING

Tuesday, 9 May 1972, at 11 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of Treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (a) of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce the topic of succession of States in respect of treaties, which was item 1 (a) on the Commission's agenda.

2. Sir Humphrey WALDOCK (Special Rapporteur) said that, although much of the abundant material on succession of States in respect of treaties was available in the Commission's printed Yearbooks, some of it was to be found only in mimeographed documents. To facilitate discussion it was therefore desirable, even essential, that members of the Commission, particularly the newer members, should be provided with a list or index of the basic documents, showing where they could be found.

3. Again, since the draft articles to be considered at the present session appeared in his four last reports, it would be useful to have them reproduced in a single paper, without the commentaries, for easy reference during the discussions. Perhaps the Secretariat could arrange for the two necessary papers to be issued.

4. The topic of succession of States in respect of treaties had been under consideration by the Commission for many years. At the present stages, he wished only to recall the Commission's decisions on the topic at its fifteenth session, in 1963. At that session, the Commission had had before it the report of its Sub-Committee on Succession of States and Governments,¹ containing the records of the Sub-Committee's proceedings and a series of memoranda submitted by members of the Sub-Committee. It was on the basis of that report that the Commission had decided on its approach to the whole subject of State succession. It had decided that the subject should be subdivided into three topics: State succession in respect of treaties, State succession in respect of matters other than treaties and State succession in respect of membership of international organizations, and that the third of those topics should be left aside for the time being, except, of course, insofar as the constituent instruments of international organizations were themselves

¹ See *Yearbook of the International Law Commission*, 1963, vol. II, p. 260.