

Document:-  
**A/CN.4/SR.1182**

**Summary record of the 1182nd 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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82. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ago's point could be covered by amending the opening words of paragraph 3 to read: "When, under the terms of the treaty or by reason of the limited number of the negotiating States...".

83. It should be noted, however, that in article 20 of the Vienna Convention on the Law of Treaties (Acceptance of and objection to reservations), paragraph 2, which dealt with restricted multilateral treaties, made no allowance for the possibility of the treaty containing a specific clause to the effect that a reservation would require the consent of all the parties. He wished to place it on record that the proposal he had just made did not imply any uncertainty with regard to the interpretation of that provision of the Vienna Convention. There could be no doubt that if a restrictive clause of that type on the subject of reservations were included in any treaty, it would preclude reservations which were not accepted by all the parties.

84. Mr. USHAKOV said that he had no objection to the Special Rapporteur's proposal, but questioned whether it could not be interpreted as an endorsement of the so-called "Vienna clause", which restricted not the number of parties, but the categories of States which could become parties to the treaty.

85. Mr. AGO said he did not think that interpretation was possible. The purpose was simply to deal with the case where, as in the Treaty of Rome constituting the EEC, the treaty itself contained a specific clause on the subject.

86. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 7, with the amendment suggested by the Special Rapporteur.

*It was so agreed.*

*Article 7, as amended, was approved.<sup>26</sup>*

87. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend paragraph 3 of article 8 in the same manner as paragraph 3 of article 7.

*It was so agreed.*

*Article 8, as amended, was approved.<sup>27</sup>*

The meeting rose at 1 p.m.

<sup>26</sup> and <sup>27</sup> For subsequent abridgment of title, see 1187th meeting, para. 25, and for deletion of the phrase "made in conformity with article 11", in the second line, see 1187th meeting, para. 28. Articles 7 and 8, as thus amended, were adopted at the 1197th meeting.

## 1182nd MEETING

*Tuesday, 20 June 1972, at 10.10 a.m.*

*Chairman:* Mr. Richard D. KEARNEY

*Present:* Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Ruda, Mr. Sette Câmara,

Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, 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]

*(resumed from the 1164th meeting)*

#### REPORT OF THE WORKING GROUP

1. The CHAIRMAN invited Mr. Tsuruoka, Chairman of the Working Group established by the Commission at its 1150th meeting, to introduce the Working Group's report (A/CN.4/L.186).

2. Mr. TSURUOKA (Chairman of the Working Group) said that the Commission had been requested by the General Assembly, in operative paragraph 2 of part III of resolution 2780 (XXVI) to study the question which formed the subject of item 5 of the Commission's agenda, "with a view to preparing a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law for submission to the General Assembly at the earliest date which the Commission considers appropriate."<sup>1</sup> The Commission had taken up the item at the very beginning of the present session and had set up a Working Group to review the problems involved and prepare a set of proposals for submission to the Commission. Between 24 May and 17 June the Working Group had held seven meetings, which had been attended by all its members except Mr. Thiam, who had been absent from Geneva during that period. In accordance with the Commission's decision, those meetings had also been attended by its Chairman, who had prepared the working paper containing draft articles circulated as document A/CN.4/L.182.

3. Apart from that document, the Working Group had considered the written observations submitted by Member States (A/CN.4/253 and Add.1 to 5), the text of a draft convention submitted by Uruguay to the General Assembly at its twenty-sixth session (A/C.6/L.822) and the draft convention which the Government of Denmark had attached to its written observations (A/CN.4/253/Add.2). Other documents had been made available to the Working Group by the Secretariat, including the "Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance" of the Organization of American States (OAS) of 2 February 1971,<sup>2</sup> and the two conventions concluded under the auspices of the International Civil Aviation Organization (ICAO), namely, the Convention for the Suppression of Unlawful

<sup>1</sup> See *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 29*, p. 137.

<sup>2</sup> See *International Legal Materials*, vol. X, p. 255.

Seizure of Aircraft, signed at The Hague on 16 December 1970,<sup>3</sup> and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.<sup>4</sup>

4. The Working Group had first held a general exchange of views on the basis of an analytical summary of the Commission's debates at its 1150th, 1151st, 1152nd and 1153rd meetings and of a list of points for discussion drawn up by the Secretariat. At the Working Group's request, the Secretariat had then prepared a set of draft articles covering the points on which a general understanding had emerged among members of the Group. On the basis of that draft, the Group had proceeded to a more detailed consideration of the substance of the matter, article by article. The understanding reached on concrete formulations, some of them alternative, had been embodied in a second draft, the discussion of which had led to the Working Group's adoption of the set of draft articles contained in document A/CN.4/L.186.

5. In preparing those draft articles, the Working Group had kept in mind that, in conformity with standard practice, the outcome of the Commission's work on the subject to be submitted to the General Assembly at the end of the present session would be subject to review in the light of Government comments. In order to facilitate discussion in the Commission and subsequent comment by Governments, the Working Group had therefore decided to submit a text consistently aimed at ensuring the maximum protection for the persons concerned. It was in that spirit that the members of the Working Group had subscribed to the draft, even though some of them might wish to express their separate views on certain of the draft articles during the forthcoming discussion. That approach also explained why the Working Group had been able to agree on the submission of a single text for every article with the sole exception of article 1, where the words "of universal character" had been placed in square brackets in sub-paragraph (b).

6. As indicated by its title, the draft, which consisted of twelve articles, envisaged international co-operation relating to both the prevention and the punishment of crimes. The first aspect was specifically dealt with in article 3. The second centred on the obligation specified in article 2 for each State party to make the offences in question crimes under its internal law "punishable by severe penalties which take into account the aggravated nature of the offence", irrespective of the place of commission.

7. With a view to furthering international co-operation in the matter of punishment, articles 5, 6 and 7 of the draft contemplated the possibility of extradition in respect of the crimes in question. Article 4, paragraph 1 of article 5, and article 11 established certain obligations regarding the furnishing of information at all stages of proceedings resulting from the commission of one of those crimes. Article 10 made provision for mutual judicial assistance by States. Article 12 instituted a conciliation procedure for any disputes that might arise between

the parties regarding the application or interpretation of the draft articles. Lastly, the scope of the draft was determined *ratione personae* by article 1, which defined the terms "internationally protected person" and "alleged offender", and *ratione materiae* by article 2, which set forth the criminal offences covered by the draft.

8. The purpose of the Working Group's draft was to make it easier to obtain the considered views of Governments on the whole question. In preparing its draft, the Group had drawn inspiration from recent international instruments dealing with other offences of international concern. The Working Group hoped that the Commission would find the draft a useful working tool.

9. The CHAIRMAN, speaking as a member of the Commission, said he understood that the Working Group had discussed at length the problem of terrorist activity as a whole and the feasibility of dealing with that problem. It had been agreed that a reference to the subject should be included in the commentary—probably in the introductory comments which would precede the whole draft—so as to draw the General Assembly's attention to the need to consider the possibility of taking action in the matter.

10. Mr. RAMANGASOAVINA, speaking on a point of order, and supported by Mr. BEDJAOUÏ, said that those members of the Commission who were not members of the Working Group had not had time to study document A/CN.4/L.186. He therefore hoped that the Chairman would postpone the general discussion on the draft articles until the following day.

11. Mr. USHAKOV, supported by Mr. BARTOŠ, suggested that those members of the Commission who had already formed an opinion on the text proposed by the Working Group, especially those who had participated in its work, be asked to express their views forthwith. In particular, it would be useful if they could indicate the main points discussed in the Working Group.

12. Sir Humphrey WALDOCK said that the Commission had already had a general discussion on the whole question at its 1150th to 1153rd meetings. It now had a set of draft articles before it and there was no need for another general discussion. The Commission could perhaps advance its work at the present stage by a discussion of articles 1 and 2 of the Working Group's draft, which determined the scope of the whole draft, the former by defining the terms "internationally protected person" and "alleged offender", and the latter by listing the offences covered. It could discuss those important general provisions without necessarily engaging in a discussion of the articles that followed. He therefore suggested that a member of the Working Group should explain the background to articles 1 and 2 and the reasons why the particular formulations appearing in document A/CN.4/L.186 had been adopted.

13. Mr. ALCÍVAR said that he wished to press for a general discussion because he had serious reservations on the draft as a whole. Indeed, he was much more concerned at what had been omitted than at what had been included. In his view, it was essential that there should be a general discussion before the Commission took up the draft article by article.

<sup>3</sup> *Ibid.*, p. 133 (ICAO DOC. 8920).

<sup>4</sup> *Ibid.*, p. 1151 (ICAO DOC. 8966).

14. The CHAIRMAN, speaking as a member of the Commission, welcomed Sir Humphrey Waldock's suggestion that some explanation should be given of the reasons that had led to the adoption of the particular wording of each article. Since the articles had been drafted in English and since he himself had made some contribution to the drafting, he would be prepared to give some preliminary information on each of them, beginning with articles 1 and 2.

15. Mr. BEDJAOUI said it would be helpful if those members of the Commission who already had a thorough knowledge of the subject, including the Chairman, could state their views.

16. Mr. AGO suggested that the Chairman be requested to give a general account of the Working Group's proceedings, explaining, in particular, the criteria which had been adopted. The general discussion could be postponed until the following day.

17. Mr. TSURUOKA (Chairman of the Working Group) said he agreed that it would be useful if the Chairman could provide some information on each of the articles proposed by the Working Group, beginning with articles 1 and 2.

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF  
CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTER-  
NATIONALLY PROTECTED PERSONS

ARTICLES 1 and 2

18. *Article 1*

For the purpose of the present articles:

1. "Internationally protected person" means:

(a) A Head of State and a Head of Government, whenever he is in a foreign State, as well as members of his family who accompany him;

(b) Any official of either a foreign government or an international organization [of universal character] whenever he is in a State for or because of the performance of official functions on behalf of his Government or international organization and who is entitled to special protection by that State, pursuant to general international law or an international agreement, as well as members of his family forming part of his household, or as the case may be, who accompany him.

2. "Alleged offender" means a person as to whom there are grounds to believe that he has committed one or more of the crimes set forth in article 2.

*Article 2*

The commission, regardless of motive, of:

(a) A violent attack upon the person or liberty of an internationally protected person,

(b) A violent attack upon the official premises or the private accommodation of an internationally protected person likely to endanger his person or liberty,

(c) An attempt to commit any such attacks, and

(d) Participation as an accomplice in any such attacks,

shall be made by each State Party a crime under its internal law that is punishable by severe penalties which take into account the aggravated nature of the offence, whether the commission of the crime occurs within or outside of its territory.

19. The CHAIRMAN, speaking as a member of the Commission, said that article 1 dealt with the essential problem of determining the persons to be protected on the basis of general international law and of existing agreements, such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, and the general conventions of 1946 and 1947 on the privileges and immunities of the United Nations and of the specialized agencies.

20. The Working Group had at first considered two alternative drafts for article 1. The first had made specific reference to the relevant convention, while the second had been much shorter and had ultimately served as a basis for the text of article 1 in document A/CN.4/L.186. One argument in favour of that shorter text had been the need to avoid difficulties with regard to the status of the various protected persons. It was, of course, desired to protect not only diplomats accredited to States but also members of permanent missions to international organizations and representatives of States at international conferences. The latter two categories, however, were not covered by any existing convention and were dealt with only in the Commission's draft articles on representatives of States to international organizations, which were included in the Commission's report on its twenty-third session<sup>5</sup> and on which the General Assembly had not yet taken a decision.

21. In view of the need for the broadest possible coverage, the Working Group had therefore preferred the more general formulation appearing in article 1. In that connexion, it had discussed at some length the desirability of qualifying the expression "an international organization" by adding the words "of universal character" and those words had been placed in square brackets so as to leave the matter open. They would be dropped if the Commission were to decide that the draft articles should cover not only universal organizations but also regional and smaller organizations, some of which were of considerable importance. In that case, however, the Commission would provide a further argument in favour of a general formulation of article 1, since it was not possible to list all the very numerous headquarters agreements and other relevant conventions on the protection of persons accredited to or working for those non-universal organizations.

22. He now wished to give some preliminary information on the wording of article 1. Paragraph 1 (a) of that article mentioned Heads of State and Government but not persons of cabinet rank, although their inclusion had been proposed. Apart from the doubts which existed regarding the exact meaning of the term "cabinet rank", the Working Group had come to the conclusion that, under contemporary international law, a Minister of State who happened to be visiting a foreign country on holiday was not entitled to claim special protection. It believed that paragraph 1 (a), in referring only to foreign Heads of State and Government and to members of their

<sup>5</sup> See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 276-299.

families accompanying them, reflected the accepted rules of international law at the present time.

23. The provisions of paragraph 1 (b) dealt with officials of foreign Governments or of international organizations and laid down three general requirements for their entitlement to special protection. The first was that the official should be in the service of the Government of a State other than the one from which special protection was claimed or of an international organization, regardless in that case of his nationality. The second requirement was that the official should be in that State "for or because of the performance of official functions" on behalf of his government or organization; the preposition "for" covered the special protection to be afforded by a receiving State, or host State, as the case might be, while the preposition "because" covered the special protection to be afforded by a transit State which an official might have to cross in order to be able to carry out his functions. The third requirement was that the official should be entitled to special protection "pursuant to general international law or an international agreement". The words "under general international law" were perhaps a little vague but some degree of imprecision was unavoidable if broad coverage was to be provided.

24. The Working Group had considered using the phrase "inviolability or special protection" in article 1 but had reached the conclusion that the term "special protection" would include all persons entitled to inviolability; it had therefore preferred to use the broader term.

25. With regard to the coverage of members of the family of protected officials, two expressions had been used in article 1: "forming part of his household", in order to cover the families of ordinary diplomatic agents, consular officials and the like, and "who accompany him", in order to cover the family of a visiting Head of State or Government, or of a member of a delegation to a conference.

26. The Working Group had considered whether it was necessary to include a definition of the person charged with committing one of the crimes to which the draft articles applied. It had decided that such a definition was necessary for the purpose of drafting the other articles and a definition of the term "alleged offender" had accordingly been included in paragraph 2.

27. Lastly, the Working Group had discussed the possibility of including definitions of the terms "official premises" and "private accommodation", which were used in sub-paragraph (b) of article 2, but had decided that their meaning was sufficiently clear not to require any explanation.

28. He would provide some information on article 2 at a later stage.

29. Mr. TAMMES said that he had already expressed his misgivings during the earlier discussions regarding the work which the Commission was then about to undertake on item 5.<sup>6</sup>

30. The draft, which the Working Group had produced in a remarkably short time, without the benefit of the

well-trying methods of the Commission, followed the outline and, in parts, even reproduced the actual language of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.<sup>7</sup> But the solution it proposed for certain important issues differed completely from the decisions taken by States by large majorities either at the Hague Conference, which had adopted the 1970 Convention, or in the General Assembly during the discussions which had led to the convening of that Conference. Since no commentaries were attached to the present draft articles, it would be very useful, not only to members of the Commission but also to Governments, if a careful explanation were included in the Commission's own report of the reasons why the 1970 model had, or had not, been followed in each particular case.

31. At the present stage, he would merely point out that there were differences between the 1970 model and the present draft in regard to basic principles, such as the extradition of offenders and the prosecution of offences. The relevant basic principles were, however, the same both for the offences covered by the 1970 Convention and for those it was proposed to cover in the present draft, even though the two categories of offences might be different.

32. The CHAIRMAN said that the suggestion by Mr. Tammes would certainly be taken fully into account when the Commission's commentaries to the various articles were drafted.

33. Mr. USTOR said that he would speak only on article 1, which met with his general approval. It was a commendably short text and it made for a broad coverage. While it might give rise to some difficulties of interpretation, that would be true of any text.

34. With regard to the drafting, he suggested that consideration might be given to aligning the texts of paragraph 1 (a) and 1 (b) in one respect. In paragraph 1 (a), the adjective "foreign" was used to qualify the State which had the duty to provide special protection, whereas, in paragraph 1 (b), the same adjective was used to qualify the government of the State to which the official himself belonged.

35. He suggested that the commentary to article 1 should make it clear that the term "Head of State" included members of a collective organ, since in some countries executive powers were vested in such an organ. The commentary should also explain that the words "a Head of State and a Head of Government" covered persons assimilated to Heads of State or Government, such as members of the highest political organ or the highest party leaders.

36. In paragraph 1 (b), it might perhaps be enough to state that the official should be "entitled to special protection" by the State concerned "pursuant to international law or an international agreement". It was not absolutely necessary to specify that he should be in the State concerned "for or because of the performance of official functions"; in most cases, that requirement would be covered by the stipulation that entitlement to special

<sup>6</sup> See 1151st meeting, paras. 2-9.

<sup>7</sup> See *International Legal Materials*, vol. X, p. 153 (ICAO DOC. 8920).

protection should exist under international law. It was, however, necessary to allow for the fact that, under international agreements, officials of foreign governments were sometimes entitled to protection even if their presence in the State concerned was not attributable to the exercise of official functions.

37. Mr. HAMBRO said that he had raised certain important points in the Working Group which had not been supported by other members. He did not intend to make any formal proposals at the present stage, but would nevertheless mention those points, in the hope that other members might wish to pursue them further.

38. In the first place, he found the provisions of paragraph 1 satisfactory with regard to protection, but not fully adequate with regard to the prosecution and punishment of offences. In the matter of protection, it was correct to confine those provisions to foreign Heads of State or Government and members of their families but, where questions of prosecution, punishment and extradition were concerned, it was also necessary to cover the case where the victim was the Head of State or Head of Government of the country in which the offence was committed. A group of terrorists or freedom fighters, according to the term one chose to apply, might kidnap the Head of State or Government of another country, or a member of his family, and remove him to their own country as a hostage; their aims would be exactly the same as those pursued by offenders attempting to kidnap a Head of State or Government who was in a foreign country. Since both the crime and the purpose would be the same, there was no reason why the same provisions on punishment and extradition should not apply to both categories of offenders.

39. The same remark was true of the provisions of paragraph 1 (b). A diplomat or international official stationed at Geneva might be kidnapped or murdered while attending a concert at Divonne. If the offence was of the same character as that envisaged in paragraph 1 (b) and the purpose was the same, the provisions on punishment and extradition should apply whether the crime was committed in Switzerland or in France.

40. Lastly, he favoured the deletion of the words "of universal character", which had been placed in square brackets in paragraph 1 (b). There was no reason why a representative to the Organization of American States (OAS) or a high official of the secretariat of that organization, or again a judge of the European Court of Human Rights, should not enjoy the same protection as a representative to a United Nations body or a high official of the United Nations Secretariat. He was therefore opposed to restricting the scope of the draft to the protection of officials of international organizations "of universal character".

41. Mr. YASSEEN said that article 1 was the key article of the draft, in that it defined the scope of protection and punishment and, consequently, of the draft as a whole. It must therefore be worded clearly and unambiguously, so as to ensure that it could be effectively applied.

42. The draft articles came under the heading of international criminal law, and since individual liberty was

involved, an appropriate method of interpretation was required in international law as in municipal law. Criminal law texts had to be interpreted strictly, so that their scope could not be extended either by analogy or by any process of free scientific research. It was solely a question of interpreting the law, not of making it. Thus the categories of persons to whom the draft applied were clearly defined in article 1 and could not be extended by analogy, or even by reference to the preparatory work, namely, the Commission's commentary. He therefore did not agree with Mr. Ustor that the term "Head of State" could be applied to a collective organ. It could perhaps be applied to all the persons composing such an organ, but not to some of them only. If that was the Commission's intention, it should be clearly stated. The criminal law permitted recourse to analogy *in bonam partem*, in favour of the accused, but not against him. In the present case, the basis of the charge was the definition of the categories of persons to be protected and, since it was impossible to extend the charge by analogy, the protection provided for in the draft could not be extended to the persons whom Mr. Ustor had described as "persons assimilated" to Heads of State or Government, even if they deserved to be protected.

43. He agreed with Mr. Hambro that there was no reason to limit the scope of protection to representatives to, or officials of, international organizations of universal character, especially in view of the fact that protection must be based on general international law or an international agreement. The words "of universal character", which had been left in square brackets in sub-paragraph (b), should therefore be deleted.

44. The CHAIRMAN, speaking as a member of the Commission, suggested that in paragraph 1 (b) of article 1 the phrase "and who is entitled to special protection by that State, pursuant to general international law or an international agreement" be amended to provide broader coverage by adding the phrase "or has been accorded special protection by that State under its internal laws".

45. Article 2 was somewhat different from the corresponding text in other drafts, particularly that prepared by OAS, inasmuch as it made no specific reference to such individual crimes as kidnapping, murder or assault. The Working Group had considered it better to use more general language in order to avoid possible disputes concerning the precise definition of a particular crime, since definitions would inevitably differ from country to country, depending on their system of criminal law. It had accordingly decided to use the expression "violent attack", which would include not only kidnapping but any forcible attempt to occupy the official premises or private accommodation of an internationally protected person, an act which might or might not constitute kidnapping under local criminal legislation. It was a non-technical definition, aimed at providing broad coverage and meeting the criticisms which had been directed against the formulation in the OAS draft convention.

46. Sub-paragraph (b) incorporated a new idea that was not found in the OAS draft convention. Recently, violent attacks upon the official premises or the private accommodation of internationally protected persons, which might take the form of bombing an embassy,

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.<sup>8</sup>

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.

<sup>8</sup> 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.