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Summary record of the 1184th 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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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.

4. There was therefore no reason to believe, as did Mr. Castañeda, that the régime of asylum would be disturbed by the existence of a convention on the lines of the Working Group's text. That régime had never been intended for the protection of terrorists, particularly such as committed the offences covered by the draft articles.

5. He was prepared to accept articles 1 and 2 as they stood.

6. Some members had argued that the draft should also cover the case where the Head of a State or Government was kidnapped in his own country. In his view, such a situation was governed by the internal laws of the country in question. In fact, the reason why the draft referred to Heads of State and Heads of Government was because they were regarded as forming part of the diplomatic machinery. If, however, an act of violence was committed against them in their own country, the matter was one for traditional national justice.

7. The same applied to another hypothetical case mentioned by Mr. Hambro, namely, that of an attack at Divonne on a diplomat stationed at Geneva.[1] Personally he felt that the draft articles were less likely to command wide acceptance if they departed from the narrow but traditional criterion of the performance of official functions.

8. With regard to the term "international organization", as used in article 1, paragraph (*b*), the words "of universal character" might be deleted, since that provision contained an adequate guarantee in itself, namely, special protection for the official in question pursuant to international law or an international agreement.

9. Mr. ALCÍVAR said he wished to repeat his grave concern at the fact that the General Assembly should have chosen to refer to the Commission, which was a body of legal experts, a highly political subject such as the one now under discussion, thereby creating a situation fraught with danger for the Commission.

10. The Commission had invariably worked on the codification of the rules of general international law and, in that process, had already codified a large part of diplomatic law. Some aspects of that law still remained to be codified; in particular, the Commission had so far prepared draft articles only on representatives of States to international organizations; there still remained the question of the law applicable to international officials and to the organizations themselves. The Commission should concentrate on the type of work which it had been carrying out so far.

11. Attacks on diplomats had always been offences punishable under municipal law. He had serious doubts about the approach now proposed by the Working Group, which involved international judicial co-operation; he was not at all certain that that method would be of any assistance in the prevention of such offences.

12. As a general rule, the kidnapping of a diplomat led to a demand for the release of political prisoners—and only very occasionally to a request for an economic advantage—in return for the release of the diplomat. The use of those methods was certainly reprehensible and totally unjustifiable, but such acts could not be confused with ordinary crimes committed by gangsters.

13. In any case, the provisions of the draft now under discussion did not serve much purpose. They envisaged the case where the offender took refuge in another country after committing an offence against a diplomat, but in reality, individuals who committed such acts rarely sought refuge in a foreign country; those who did seek refuge abroad were the political prisoners whose release was secured as a result of the commission of the act.

14. It was the fundamental duty of the Government of a receiving State to protect diplomats accredited to it. If, as unfortunately sometimes occurred, it was unable to prevent the kidnapping of a diplomat, it had to take every possible step to secure his release. It had to pay whatever price was necessary to save his life. That obligation was not specified in the draft now under discussion, and he believed that the absence of such a provision constituted a serious gap. It could even be said that, by diverting attention in another direction, the draft articles under discussion tended to evade that obligation.

15. He was concerned that the draft did not contain any clause which safeguarded the right of asylum. He also had serious reservations regarding the proposed provisions on extradition,

16. Finally, he found the provisions of article 9 totally unacceptable. As a matter of principle, he could not agree that there should be no statutory limitation as to the time within which prosecutions might be instituted for a crime. Whatever the seriousness of an offence, the right to institute criminal proceedings must be subject to some time limit.

17. He welcomed the comment made at the previous meeting by Mr. Bartoš that while a diplomat was entitled to special protection, he was also under a duty not to interfere in the internal affairs of the receiving State.[2]

18. He reserved his position with regard to the draft articles as a whole.

19. Mr. USHAKOV said that interference by a diplomat in the internal affairs of the receiving State was strictly prohibited under article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations.[3] If a diplomat infringed that obligation, it was for the receiving State to take action. That State could declare the diplomat in question *persona non grata* at any time, without giving any reason.

20. The purpose of the articles, which was clearly defined, was the protection of diplomats. In that respect, they represented progress.

21. Mr. REUTER said it was the duty of the Commission, when a text was referred to it by the General Assembly for study, to make every effort to furnish a prompt reply to that request at the technical level. That was absolutely essential for the future of the Commission. The Working Group which had prepared the draft

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

[2] See 1183rd meeting, para. 41.

[3] United Nations, *Treaty Series*, vol. 500, p. 120.

articles on the basis of the Chairman's draft had shown that, in an emergency, it was possible for the Commission to adopt an accelerated procedure.

22. He did not consider himself qualified to pass judgment on the suitability and efficacy of the solutions proposed in the draft articles. As in the case of hi-jacking, the position of Governments varied according to whether or not they were directly concerned. It was probable that those which now adopted a very liberal approach would soon change their attitude if confronted with the difficulties which the draft articles were attempting to solve.

23. It might perhaps have been useful if the Working Group had submitted alternative texts, but no doubt it had sound reasons for not doing so. In fact, the Group had adopted "maximum" solutions on all difficult points. It also seemed to him that some of his own observations had not been taken into account.

24. Articles 1 and 2 called for little comment. In article 2, violent attacks had been defined very broadly, in other words, without reference to their motive. That provision should be read in conjunction with article 6, which departed considerably from article 7 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft.[4] In its present form article 6 was more stringent than article 7 of the Hague Convention. It would be desirable to draft a milder version of article 6, because some States would otherwise be reluctant to accept it. It was in fact conceivable that an offence committed in a given State might be followed by a coup d'état favourable to the perpetrators of the offence; in that case, no request would be made for extradition, but, under article 6 in its present form, the State in question would nevertheless be required to punish the offenders.

25. As regards the concept of international organization, the words "of universal character" should be deleted, because there were no compelling reasons for such a restriction.

26. Mr YASSEEN said that if there was one field in which international law was almost perfect, it was that of the protection of diplomats. Diplomatic law had been customary law before being codified and diplomats were adequately protected by contemporary international law.

27. He was convinced of the primacy of international over internal law. He therefore believed that the Commission's main concern should be to ensure that States adapted their internal law to the requirements of international law.

28. The purpose of article 2 seemed to be, in part, to ensure that internal law met the requirements of international law in that field, but the French translation of the phrase following sub-paragraph (*d*) did not seem to render accurately the substance of the English text.

29. It would have been better if the Working Group had submitted alternative rather than "maximum" solutions, especially in regard to extradition and political offences, since it would have been useful to be able to offer alternative solutions to the international community. The Working Group and the Chairman were nevertheless to be commended for excellent work.

30. Mr. AGO said he approved of the draft as a whole.

31. Some of his colleagues appeared to think that the obligations of the receiving State were not sufficiently clearly stated and one had maintained it should be expressly required to release political prisoners without hesitation if such action could safeguard the lives of diplomats. While he agreed that States must unfortunately bow to necessity in such cases, he thought that the Vienna Convention on Diplomatic Relations already gave sufficiently precise guidance on that point. However, he saw no objection to reminding States of that obligation in the draft.

32. The duty of neutrality incumbent on diplomats was also adequately brought out in the Vienna Convention on Diplomatic Relations. The purpose of the draft was to ensure international co-operation with a view to putting a stop to acts of violence against diplomats. To that end, third States must refrain from encouraging the preparation of such acts in their territory for commission in the receiving State. Furthermore, when the suspected perpetrator of a crime fled to a third State, he must not be allowed to remain there unpunished on the strength of a claim that he had acted for political motives. The right of asylum of any political prisoners released as a result of such an act of violence was of course in no way questioned. Only the perpetrator of the crime himself must be denied asylum.

33. The reason why the Working Group had not submitted alternatives was because the issues dealt with in the draft did not lend themselves to more than one solution. In the case of the motive of the crime, for example, there could be no question of protecting diplomats solely against non-political acts of violence.

34. The same applied to extradition. Those who considered that the possibility of extraditing the offenders specified in the draft should not be deemed to be included in all existing extradition treaties based their case on respect for internal law. It was, however, evident that most systems of criminal law excluded political offences from the grounds for extradition. In that connexion, it should also be noted that, if article 7 of the draft were retained in its present form, it would hardly ever lead to extradition.

35. Although a distinction between universal and non-universal international organizations might be justified in other draft conventions, it was not appropriate in provisions designed to protect individuals. To restrict protection to officials of universal international organizations would be to expose those of non-universal organizations to an even greater risk of acts of violence. Similarly, unless the officials of international organizations, whether universal or not, were also protected, they would be at a disadvantage compared with diplomats.

36. Lastly, he regretted that the procedure for the settlement of disputes provided for in article 12 was less effective than that laid down in the 1970 Hague Convention.[5]

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

[5] *Ibid.*

37. Mr. RUDA said he agreed with Mr. Reuter that the Commission's mandate required it to deal with the present topic from a strictly technical and juridical standpoint.[6] Yet it was obvious that there were no juridical standards for determining whether an offence was a common crime or a political crime. Moreover, a political crime might be defined by reference either to an objective or to a subjective criterion. In the former case, it might be a crime against the security of the State, such as an armed rebellion. In the latter case, it would be necessary to take motivation into account or, in other words, to determine whether the crime had been committed for purely political motives.

38. Unfortunately, no standards existed, either in doctrine or in practice, for the application of those two criteria. The Commission, therefore, should be very cautious in framing the draft articles, since they dealt with criminal law, which generally provided certain guarantees of personal liberty. If the draft articles were couched in ambiguous language, the Commission would not be fulfilling its duty to ensure the protection of diplomats.

39. He fully agreed with paragraph 9 of the comments of the United Kingdom Government (A/CN.4/253), which stated: "Fourthly, the offence covered and the persons protected by the convention should be sufficiently and satisfactorily defined", and with paragraph 4 of the French Government's comments (A/CN.4/253/Add.3) that there could be "no question of referring, without further particulars, to international law or to the duty of States to give special protection to important persons who are not expressly mentioned". In his opinion, therefore, article 1, which referred only to "internationally protected persons", should be amended to state clearly who those persons were, so that the matter would not be left to "general international law or an international agreement".

40. With regard to article 2, he agreed completely with the statement by the French Government in the same paragraph of its comments that "In addition, the Commission should take particular care in defining the acts to which the convention would apply. In the opinion of the French Government, no attempt should be made to define a new offence. Kidnapping, murder and illegal restraint are... perfectly well known to national law, and States might be reluctant to accept a text which created special categories for such crimes according to the status of the victim".

41. He shared Mr. Alcívar's objections to article 9, which provided that there should be "no statutory limitation as to the time within which prosecution might be instituted for the crimes set forth in article 2".

42. The CHAIRMAN, summing up the discussion on article 1, said that the Commission appeared to be in general agreement with the approach adopted by the Working Group with respect to that article, which attempted to provide a relatively brief definition of the persons covered by it.

43. Some members had admittedly raised objections of a drafting nature, while others had questioned whether the word "official" was necessary before the words "functions on behalf of his Government or international organization" in paragraph 1 (*b*). Doubts had also been expressed as to the need to include a reference in that paragraph to "general international law or an international agreement" or to "members of his family forming part of his household".

44. On the other hand, the Commission seemed to be substantially in agreement that, if protection was to be provided for officials of international organizations, it should be extended to those of all such organizations and not merely to those of a universal character.

45. In the circumstances, it seemed to him that the best course was for the Commission to refer article 1 back to the Working Group for further consideration in the light of the discussion.

46. Mr. TSURUOKA, speaking as Chairman of the Working Group, said that the procedure suggested by the Chairman was completely acceptable to the Working Group.

87. The CHAIRMAN asked whether any members had further specific comments to make on article 2.

48. Mr. REUTER said that article 2, in its present French version, clearly covered acts which it should not cover, such as for example, car accidents in which an *acte de violence* was committed without criminal intent. As he understood it, the aim of the article was to provide for the punishment of offences committed with criminal intent but not of every offence which took the form of an *acte de violence*. As at present drafted, the article was too broad. To exclude offences such as crimes of passion or car accidents, a sentence referring to criminal intent or premeditation would need to be added. The Commission included experts in criminal law better qualified than himself to propose an appropriate wording.

49. With regard to Mr. Ruda's remarks, he thought that, despite the observations submitted by the French Government (A/CN.4/253/Add.3), the best solution would be to propose a definition of the crimes in question for incorporation in internal law. As the definitions of crimes varied greatly from country to country, the Commission would find itself in difficulties if it did not give an independent definition of the crimes covered by the present draft. It would therefore be better to make the definition more precise.

50. Mr. USTOR thought that Mr. Ruda had confronted the Working Group with an impossible task if he expected it to produce specific definitions of crimes and offences which were very differently defined in the criminal laws of all the countries of the world. In his own opinion, what was needed was a general, neutral definition such as that contained in the present text, although the latter might be open to improvement.

51. Mr. SETTE CÂMARA, referring to the observations of Mr. Reuter and Mr. Ruda, said that the Working Group had been mindful of the need to be as clear-cut as possible in its draft, while not including categories of crimes which were not recognized by the internal laws of some countries, such as conspiracy and assault.

52. He suggested that Mr. Reuter's difficulty might be met by using the words of article 1, paragraph 1, of the

[6] See para. 21 above.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971,[7] which stated: "Any person commits an offence if he unlawfully and intentionally...". The list of the acts in question would then follow.

53. The CHAIRMAN said that the difficulty appeared to be due to the fact that the French term "*acte de violence*" did not entirely correspond to the English term "violent attack". The element of intention implicit in the term "violent attack", as used in English law, was perhaps not present in the French term "*acte de violence*".

54. Mr. REUTER said he had an insufficient knowledge of the criminal law of the common law countries to give a firm opinion on the point, which was one which should be settled by the Drafting Committee. It seemed to him, however, that the acts covered by the draft might imply something more than intention, possibly an element of premeditation.

55. Mr. SETTE CÂMARA said he agreed with Mr. Reuter that the idea of intention should be included, but not premeditation, since not all the acts in question implied premeditation.

The meeting rose at 1 p.m.

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

1185th MEETING

Thursday, 22 June 1972, at 3.10 p.m.

Chairman: Mr. Richard D. KEARNEY

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

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

2. Mr. BEDJAOUI asked whether the words "under its internal law" in article 2 were to be construed as meaning that States would have to adapt their law or merely take it into consideration.

3. The CHAIRMAN said that the problem mentioned by Mr. Bedjaoui arose mainly in connexion with the concluding clause of the article: "whether the commission of the crime occurs within or outside of its territory". He believed it was true to say that, in nearly all countries, special legislation would be required to confer jurisdiction on the domestic courts to try an offence committed abroad by an alien against an alien. Jurisdiction over offences committed abroad by a national or by an alien against a national, was, of course, known to many legal systems. In the present draft, as in such existing international treaties as the 1961 Single Convention on Narcotic Drugs [2] and the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,[3] provision was in fact made for the prosecution in a State Party of certain offences, even if committed abroad by an alien against an alien. Some kind of legislation would therefore have to be enacted in almost every State to extend its jurisdiction to cover such cases. As far as the actual offences were concerned, each State would have to consider whether any new legislation would be required to bring the substantive provisions of its internal criminal law into line with the requirements of the draft articles.

4. Mr. BILGE asked whether the violent attack referred to in sub-paragraph (*a*) of article 2 was in itself of a particularly grave nature justifying a severe penalty, as seemed to be suggested by the words "which take into account the aggravated nature of the offence", or whether the attack had to be committed with intent, as Mr. Reuter maintained.

5. Mr. USHAKOV said that the gravity of the attack did not change, but the fact that it was directed against a person enjoying international protection was an aggravating circumstance for the purposes of determining the penalty. The words "*à raison de la gravité particulière de l'acte*" in the French text would have to be amended to give clearer expression to that idea, which was better conveyed by the English text.

6. The translation of the expression "violent attack" raised problems in both Russian and French; it might perhaps be better to alter the English text and replace the word "attack" by "act". Apart from those drafting points article 2 was perfectly acceptable.

7. The CHAIRMAN said that replacement of the word "attack" by the word "act" in the English text might have the effect of bringing an unintentional act, such as the causing of a traffic accident, within the scope of the draft.

8. Mr. SETTE CÂMARA agreed with Mr. Ushakov that the part of the French text dealing with the aggravated nature of the offence would have to be amended to bring it more closely into line with the English. The intention was clearly to indicate that the fact of the victim

[1] For text see 1182nd meeting, para. 18.

[2] United Nations, *Treaty Series*, vol. 520, p. 204.

[3] *International Legal Materials*, vol. X, number 1, January 1971, p. 133.