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Summary record of the 1189th 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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created. As he saw it, the purpose of including the words "at its option" in the Hague and Montreal Conventions had been to release the State concerned from the obligation to extradite in the case of political offences.

56. The CHAIRMAN, speaking as a member of the Commission, said that there was an obligation to extradite if the State decided not to submit the case to its competent authorities for the purpose of prosecution. The State had, in fact, an option between the two courses.

57. Mr. USHAKOV pointed out that paragraphs 1 and 3 of article 7 were modelled on the corresponding provisions of the Hague and Montreal Conventions. Hence it could not be claimed that the relationship between article 6 and those two paragraphs was different from the relationship between the corresponding provisions of the two existing Conventions; and whether paragraph 2 differed from the corresponding provision in those Conventions or not, the relationship between the two articles was the same. In any case, he could not accept the interpretation given to the words "at its option".

58. Mr. TAMMES said that, if he had understood the two previous speakers correctly, it was claimed that article 6 had priority over article 7.

59. The CHAIRMAN, speaking as a member of the Commission, said that that was precisely the basis of the whole draft.

Articles 6 and 7 were referred back to the Working Group for reconsideration in the light of the discussion.[5]

The meeting rose at 1.10 p.m.

[5] For resumption of the discussion see 1191st meeting, para. 74 and 1192nd meeting.

1189th MEETING

Tuesday, 27 June 1972, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, 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

1. The CHAIRMAN invited the Commission to consider the text of article 8 of the draft submitted by the Working Group (A/CN.4/L.186), which read:

ARTICLE 8

Article 8

Any person regarding whom proceedings are being carried out in connexion with any of the crimes set forth in article 2 shall be guaranteed a fair trial at all stages of the proceedings.

2. The provisions of article 8 were somewhat similar to those of article 4 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[1] They were in the nature of a guarantee of due process. The Working Group had adopted the formula "a fair trial at all stages of the proceedings", which would cover every action taken throughout the proceedings against the alleged offender, from the time of his arrest. Government comments indicated that, in their view, a clause of that kind constituted a fundamental element of any draft on the prevention and punishment of crimes against diplomats and other protected persons.

3. Mr. BILGE pointed out that article 13 of the draft articles in the Chairman's working paper (A/CN.4/L.182) guaranteed accused persons "fair and impartial administration of justice". When that article had been discussed by the Commission, he had suggested introducing the notion of an independent tribunal.[2] He therefore wished to know whether the formula adopted by the Working Group would fully meet his concern that the accused should enjoy all the necessary safeguards. If so, he would be content with an explanatory statement to that effect in the commentary; otherwise, the present wording of article 8 would have to be improved.

4. Mr. USHAKOV said that the French translation did not reflect the idea, clearly expressed in the English text, that the persons concerned should receive fair treatment at all stages of the criminal proceedings, including judgment.

5. Mr. TSURUOKA supported that view.

6. Mr. SETTE CÂMARA said he fully agreed with Mr. Bilge. There was general agreement on the substance of the matter, but the introduction of a reference to "an independent tribunal" might not be acceptable to States, because of the possible inference that there were courts which were not independent.

7. He also agreed on the need to adjust the French text.

8. Mr. ELIAS suggested that the words "fair trial" should be replaced by "fair treatment". That wording would better convey the intention, which was to guarantee to the alleged offender not only that he would have a fair trial at the hearing in court, but also that he would be properly treated during earlier stages of the proceedings.

9. It was interesting to note, in that connexion, that the constitutions of the fourteen African States which were former United Kingdom dependencies stated the right of accused persons to be tried before a court which had been established by law and whose independence and impartiality were guaranteed.

[1] See *International Legal Materials*, vol. X, number 6, November 1971, p. 1151.

[2] See 1153rd meeting, para. 17.

10. The CHAIRMAN, speaking as a member of the Commission, said that he too was inclined to favour the replacement of the term "trial" by a more suitable term.

11. Mr. BARTOŠ said he thought the question raised by Mr. Bilge deserved careful consideration. French wording must be found to convey the idea expressed in the original English text that the persons concerned should be guaranteed fair treatment throughout the proceedings and a fair trial by an independent court. The concept of an independent court was important because the courts set up to deal with political cases were not always independent.

12. Mr. USTOR said that the basic purpose was clear in everyone's mind, but suitable language had to be found in both English and French to express the idea not only of a fair hearing at the trial, but also of equitable treatment in all proceedings.

13. Mr. YASSEEN said that he, too, thought the French text needed improvement.

14. He also wished to point out that the provision in article 8 might lead to a form of discrimination. For in cases where internal law gave persons charged with a criminal offence guarantees that were above the international standard, the question would arise which standard—national or international—should be applied. The solution would be to require that persons covered by the article should enjoy the safeguards generally accorded by the law of all countries to every accused person. It was not intended to make the persons covered by article 8 into a special category of accused persons; they should be neither favoured nor penalized. But the application of an abstract standard such as that laid down in article 8 might lead to discrimination of that kind.

15. Mr. SETTE CÂMARA said that the concept of a "fair trial" for accused persons had already been present in the Charter of the Nürnberg Tribunal. The International Law Commission had embodied that concept in its formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, which it had adopted in 1950, as Principle V which read: "Any person charged with a crime under international law has the right to a fair trial on the facts and law".[3]

16. Mr. ELIAS suggested that, since the Commission was in general agreement on the intended meaning, it should leave it to the Working Group to find the most suitable language. The point raised by Mr. Bilge should be covered by including in the commentary a reference to the guarantee of a trial by an independent and impartial court, as well as to fair and equitable treatment from the time of arrest until judgement.

17. Mr. BILGE explained that his remarks were not confined to the French version of the article. What he was asking for was that a reference to safeguards should be introduced into article 8. Since article 2 required each State party to make the offences covered by the draft crimes under its internal law that were punishable by severe penalties, it was quite natural also to provide that the alleged offenders should enjoy certain safeguards, supplementary ones, if need be. There was no question of discrimination.

18. The CHAIRMAN, speaking as a member of the Commission, said it would be necessary to use fairly general language in order to allow for the great differences, between countries, in systems of criminal justice and safeguards for accused persons.

19. Mr. YASSEEN said he still believed that there could be discrimination in cases where the internal law of a State gave all accused persons safeguards superior to those required under international law. If an international standard was to be formulated, it should serve to remedy any gaps or inadequacies in internal law, not to deprive an accused person of any superior safeguards which that law might grant him, by giving a State a pretext to apply safeguards inferior to those granted to every accused person under its internal law. The alleged offenders covered by article 8 should not receive treatment different from that of other persons accused under the ordinary law. It was in that respect that there might be discrimination. The article should specify that accused persons must be given all the normal safeguards laid down by the internal law of the State concerned, provided that those safeguards were not below the recognized international standard.

20. Mr. USTOR suggested that the matter should be dealt with in accordance with the appropriate provisions of the International Covenant on Civil and Political Rights adopted by the General Assembly in its resolution 2200 (XXI).

21. Mr. YASSEEN said that the standard laid down by the Universal Declaration of Human Rights [4] was the minimum demanded by the international community, and there was nothing to prevent a State from going beyond it. But the concept of "fair treatment" was an abstract and imprecise criterion. It would be better to require the same treatment as was enjoyed by every accused person under the ordinary law.

22. Mr. BARTOŠ said that the point at issue was the observance of a rule of general international law laid down in the Universal Declaration of Human Rights and regarded as binding on all States, whether or not they formally accepted the clause in which that rule was embodied. The clause was a standard one, to be found with varying wording not only in the Universal Declaration of Human Rights, but also in such regional human rights conventions as the European Convention for the Protection of Human Rights and Fundamental Freedoms [5] and in such instruments as the Charters of the Nürnberg and Tokyo Military Tribunals, and the International Covenant on Civil and Political Rights. The essential need, therefore, was to find a general formula to express the idea of the standard clause, and that had certainly been the Working Group's intention. Even if

[3] See *Yearbook of the International Law Commission, 1950*, vol. II, p. 375.

[4] General Assembly resolution 217 (III).

[5] United Nations, *Treaty Series*, vol. 213, p. 222.

better wording could not be found, the provisions of article 8 should be interpreted as the expression of a rule of general international law.

23. Mr. ELIAS said it was undesirable to make any sweeping changes in the wording of article 8. Any attempt to introduce a detailed description of the desired safeguards could give rise to the same problems as the rule on the exhaustion of local remedies. The language used in article 8 should be sufficiently general to express ideas that were common to all legal systems.

24. Mr. HAMBRO said it was important to bear in mind that all the progress achieved in the international protection of human rights had been made by refusing to accept any purely national standard. At the same time, the draft articles should not attempt to interfere too much with national judicial systems.

25. Mr. BILGE said that his proposal had been based on article 14 of the International Covenant on Civil and Political Rights. If it was explained in the commentary that the expression "fair trial" covered all the elements mentioned in article 14 of that Covenant, he would not press for amendment of the wording of article 8.

26. Mr. YASSEEN urged that the article should not specify minimum safeguards, but should ensure that a country providing safeguards above the international standard would not penalize the category of accused persons covered by the draft by granting them only the safeguards it prescribed. That was the danger of discrimination it was necessary to guard against, not only by laying down an international standard, but also by requiring that the national standard should be applied if it was higher.

27. Mr. BARTOŠ said he thought that Mr. Yasseen's misgivings were justified and that the Commission should settle the point. As a lawyer, he was convinced that States were not under any general obligation to give aliens more favourable treatment than that enjoyed by their own nationals. In other words, a State must apply to the aliens covered by the draft articles the rules normally applied in the country, provided that they did not fall below the international standard recognized as a United Nations standard; otherwise, the latter would apply. That had always been the position in private international law, and the Commission should therefore state clearly, as Mr. Yasseen asked, that any person charged with one of the offences covered by the draft had the right to enjoy both the safeguards provided by the internal law of the country where the proceedings took place, and safeguards conforming to the international standard, where that standard was higher.

28. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 8 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.[6]

ARTICLE 9

29. *Article 9*

There shall be no statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in article 2.

30. The CHAIRMAN said that none of the three conventions which had served as models contained any provision on the lines of article 9. The issue of statutory limitation had been discussed extensively in the Working Group and there had been a very close division of opinion on the sweeping provision of article 9. One suggestion made during the discussion had been that, instead of excluding any time limitation, article 9 should specify that the period of limitation for the crimes set forth in article 2 should be that fixed for the most serious crimes in each State party.

31. Mr. YASSEEN said he could not accept article 9, which went too far. Without going into all the arguments in favour of statutory limitation for criminal proceedings, he wished to stress that such limitation existed in most systems of internal law, not for the benefit of offenders, but for general reasons of public policy. The Commission would remember the efforts which had been needed to secure the adoption by the United Nations of a resolution excluding statutory limitations for the prosecution of war crimes.[7] Certainly, crimes against diplomats were abominable and they must be protected, but not at the cost of upsetting nearly all the world's systems of criminal law.

32. Mr. HAMBRO said he fully agreed that the provisions of article 9 went too far. He did not believe that a provision on the subject of time limitation was really necessary in the draft but, if other members wished to retain it, he would suggest a compromise formula on the following lines:

> "The statutory limitation as to the time within which prosecution may be instituted for the crimes set forth in article 2 shall be, in each State Party, that fixed for the most serious crimes under its internal law".

33. The purpose of statutory time limitation, or "prescription", was not to protect the criminal; it was based on a general rule of policy and was intended to protect innocent people from accusations which would be difficult to refute because they related to events that had taken place in a remote past.

34. In order to make the whole draft acceptable to States, it was necessary to avoid the difficulties that would be created by retaining the categorical provisions of article 9 in its present form.

35. Mr. BARTOŠ, referring to Mr. Yasseen's remarks, said it was true that the object of prescription was to maintain the general public order and that it was not a measure of clemency towards offenders. But since periods of prescription and the very concept of statutory limitation itself varied widely from one country to another, it had been decided that war crimes should not be subject to the rules of time limitation, in order to prevent pro-

[6] For resumption of the discussion see 1192nd meeting, para. 8.

[7] General Assembly resolution 2391 (XXIII).

secutions for them from becoming statute-barred after a comparatively short period in certain countries.

36. In the case of crimes against diplomats, the operation of time-limits might give rise to discrimination as between accused persons who were aliens and those who were nationals of the country where the proceedings took place. Under the provisions of the draft, the future convention would not apply to crimes committed by nationals of a country against other nationals of the same country; but no provision was made for the case in which a national who committed a crime against a foreign diplomat would be in a better position than an alien committing the same offence. That was a gap in the draft which should be filled.

37. A distinction should be made between the period of limitation for instituting proceedings and the period for granting a pardon. A pardon was sometimes granted automatically after a certain period so that it was in fact a disguised amnesty or a form of statutory limitation. There again, the practice varied from one country to another and a uniform rule should be laid down under international law. The Working Group should therefore study that point. The purpose of article 9 should be to ensure equal punishment for all who committed crimes against diplomats or other crimes of an international character.

38. Mr. BILGE said he was opposed to article 9 and could not accept a compromise solution. The question of statutory limitation was highly controversial and in some countries it was governed by the constitution. That was why Turkey had not accepted the principle of no statutory limitation, even for war crimes.

39. Article 9 was not necessary, since it was already stipulated in article 2 that the crimes covered by the draft should be made "punishable by severe penalties" and the period of limitation for crimes so punishable was usually quite long. Furthermore, the draft provided elsewhere for inter-State co-operation in the prevention and punishment of those crimes.

40. Mr. ELIAS urged that article 9 with its highly controversial provisions should be dropped from the draft altogether.

41. Mr. Hambro's suggestion that the longest period allowed by internal law should be adopted as a yardstick raised the problem of those legal systems which had no limitation at all; separate provision would have to be made for that sort of situation. He therefore appealed to Mr. Hambro to withdraw his suggestion and to agree to the deletion of article 9.

42. The main purpose of the proposed convention would be more than served by the provisions of articles 2, 6, 7 and 8; the only other important procedural provision was that in article 12. If the Commission agreed to drop article 9, it would not only be saving itself considerable difficulty, but would also be making it easier for those who had doubts about articles 6 and 7 to accept the final draft.

43. Mr. SETTE CÂMARA said he was in favour of retaining article 9 as it stood. The problem had to be considered in the light of both principle and practice.

44. From the standpoint of principle, he recognized that there were some grounds for doubt about the article, because it constituted a departure from one of the most highly respected principles of criminal law. The Commission had, however, already departed from some of those principles in its draft. It had set aside the principle of territorial jurisdiction for crimes as well as that of the unilateral legal characterization of crimes in cases of extradition. It was now called upon to decide whether to set aside one more principle. that of the so-called "prescription" of crimes.

45. If the criminal law of any country was examined, it would be found that there was an article which gave a definition of each crime and specified the penalty for it, thereby determining the period of limitation that was applicable. The draft now under discussion did not cover only the gravest offences; its scope ranged from the killing of a Head of State to some minor attack against the private accommodation of a protected person. For some of the offences covered, the period of statutory limitation could be very short, perhaps 6 months or even less. It would therefore be very easy for a country to defeat the whole purpose of the future convention simply by postponing the initiation of proceedings against the criminals.

46. From the practical point of view, a serious loophole would be left in the draft if the Commission decided to drop article 9. From the remarks made on the subject of war crimes during the discussion, it was clear that it was not the first time that the possibility of setting aside statutory limitations for crimes was being considered.

47. He realized, however, that the wording of article 9 was too categorical and he was prepared to agree that the Working Group should be asked to consider suggestions such as that made by Mr. Hambro. At the same time, he wished to place on record his support for the retention of the article as it stood.

48. Mr. QUENTIN-BAXTER said he could not agree with the previous speaker. His own country's legal system did not know any statute of limitations for criminal offences, so he thought his views could not be regarded as biased. He had, however, attended many meetings at which the question of the so-called "imprescriptibility" of war crimes had been discussed, and he therefore appreciated how deep-seated the difficulties were. The inclusion in the draft of the principle stated in article 9 would unquestionably make it more difficult for States to ratify the future convention. He believed the Commission would be justified in not adopting that principle, because it had chosen the course of inviting States, in article 2, to make the offences in question crimes under their own internal law, rather than the other, more general course of attempting to promote an international criminal law.

49. With regard to principles, his own view was that the draft departed from only one fundamental principle, namely, the principle of territorial jurisdiction. For that departure, however, there were good precedents, dating back as much as a century, in the statutes against the slave trade. He believed that the best chance of persuading the world to support the proposed convention was to show, not that the draft had departed from a large number of fundamental principles, but rather that it embodied only one innovation and that a very honourable one.

50. Mr. TSURUOKA said he was in favour of deleting article 9, mainly for the reasons given by Mr. Bilge, Mr. Elias and Mr. Quentin-Baxter. In practice, the provision would do nothing to further the purpose of the draft, which was to protect diplomats against acts of terrorism.

51. Mr. HAMBRO said he would be prepared to accept the deletion of article 9.

52. Mr. USHAKOV said he agreed with Mr. Sette Câmara that article 9 should be retained. The concept of imprescriptibility could be introduced into the draft in the same way as that of extraterritorial jurisdiction. If article 9 as it stood was not acceptable to the majority of the Commission, the Working Group should try to find a compromise solution. But it was essential that the draft should contain a provision to prevent offenders from escaping prosecution simply because the period of limitation was short, as it was in certain countries. Lastly, he wished to stress that article 9 related to prescription with respect to prosecution, not with respect to punishment.

53. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 9 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.[8]

ARTICLE 10

54. *Article 10*

1. States Party shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the crimes, in particular by supplying all evidence at their disposal necessary for the prosecution.

2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual assistance in criminal matters embodied in any other treaty.

55. The CHAIRMAN explained that the provisions of article 10 were based on those of article 11 of the 1971 Montreal Convention. The last clause of paragraph 1 had been added to overcome the difficulties which the State concerned would have in proving the case against the offender if it did not receive the evidence which other States had at their disposal.

56. Mr. BILGE pointed out that the expression "*entraide judiciaire*", used in the French text of paragraph 1, normally covered such matters as notification of a writ, but not the transmission of evidence, which was more a matter of administrative or police co-operation. The wording of the final clause of paragraph 1 should therefore be reconsidered.

57. Mr. YASSEEN stressed the need to make provision for judicial co-operation in the draft and expressed his full support for article 10. He nevertheless shared Mr. Bilge's doubts about the wording of the final clause of paragraph 1.

58. Mr. ELIAS said that on the whole article 10 was satisfactory, but the Working Group should consider improving the wording in some respects. He suggested that the last clause of paragraph 1 should begin with the words "including the supply of all evidence...".

59. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 10 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.[9]

ARTICLE 11

60. *Article 11*

The final outcome of the judicial proceedings regarding the alleged offender shall be communicated by the State where the proceedings are conducted to the Secretary-General of the United Nations, who shall transmit the information to the other States Party.

61. The CHAIRMAN said that article 11 was modelled on article 13 of the 1971 Montreal Convention, but the reference to reporting to the Council of the International Civil Aviation Organization had been replaced by a reference to communication to the Secretary-General of the United Nations. Article 11 of the draft was less elaborately worded than article 13 of the Montreal Convention, but it made provision for similar procedures.

62. Mr. QUENTIN-BAXTER said that the question arose of determining which cases had to be reported.

63. The CHAIRMAN, speaking as a member of the Commission, suggested the deletion of the word "judicial" before the word "proceedings". All legal proceedings, even if not in court, should be the subject of a communication. For example, even where a case did not go beyond the office of the Director of Public Prosecutions, it should still be reported.

64. Speaking as Chairman, he said that if there were no further comments he would take it that the Commission agreed to refer article 11 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.[10]

ARTICLE 12

65. *Article 12*

1. Any dispute between the Parties arising out of the application or interpretation of the present articles that is not settled through negotiation may be brought by any State Party to the dispute before a conciliation commission to be constituted in accordance with the provisions of this article by the giving of written notice to the other State or States Party to the dispute and to the Secretary-General of the United Nations.

2. A conciliation commission will be composed of three members. One member shall be appointed by each party to the dispute. If there is more than one party on either side of the dispute they shall jointly appoint a member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the Chairman, shall be chosen by the other two members.

[8] For resumption of the discussion see 1192nd meeting, para. 10.

[9] For resumption of the discussion see 1192nd meeting, para. 26.

[10] For resumption of the discussion see 1192nd meeting, para. 33.

3. If either side has failed to appoint its member within the time-limit referred to in paragraph 2, the Secretary-General shall appoint such member within a further period of two months. If no agreement is reached on the choice of the Chairman within five months of the written notice referred to in paragraph 1, the Secretary-General shall within the further period of one month appoint as the Chairman a qualified jurist who is not a national of any State Party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It shall be competent to ask any organ that is authorized by or in accordance with the Charter of the United Nations to request an advisory opinion from the International Court of Justice to make such a request regarding the interpretation or application of the present Convention.

6. If the commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the depositary. The report shall include the commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months' time-limit may be extended by decision of the Commission.

7. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States.

66. The CHAIRMAN said that article 12 made provision for a conciliation procedure on the lines of article 82 of the Commission's 1971 draft articles on the representation of States in their relations with international organizations.[11] A few changes had been made to take account of the fact that the present draft dealt with somewhat different cases.

67. Unlike article 82 of that 1971 draft, the article now under discussion did not provide for the involvement of an international organization in the dispute, even though the present draft provided for the protection of officials of international organizations. The reason was that the disputes which could arise with regard to an offence committed against an international official were likely to involve only States, namely, the States of which the victim and the criminal were nationals, and the States in whose territory the offence had been committed.

68. Like the corresponding provision of the 1969 Vienna Convention on the Law of Treaties, article 12 designated the Secretary-General of the United Nations as the appointing authority in the event of the failure of one of the parties to appoint its member to the conciliation commission.

69. The Working Group had discussed the possibility of allowing the conciliation commission to request an advisory opinion from the International Court of Justice. It had decided that there was no objection in principle and had therefore included the provision in paragraph 5, under which the conciliation commission would be competent to ask any organ that was authorized by, or in accordance with, the Charter of the United Nations to request an advisory opinion, to make such a request.

70. Mr. YASSEEN observed that the Working Group had followed the 1969 Vienna Convention on the Law of Treaties [12] and the 1971 draft articles on the representation of States in their relations with international organizations. It should be noted, however, that conciliation was normally resorted to for disputes that were less directly legal in character than those referred to in article 12.

71. It was true that that method of settling disputes had certain advantages. In particular, States agreed to accept the recommendation of a conciliation commission, which were not mandatory, more readily than they would undertake in advance to comply with a mandatory award. However, the functions of the conciliation commission, as set out in paragraph 6, in particular, should be adapted to the case in question. It should be clearly specified that the conciliation commission would express its opinion on the interpretation of the convention, thus giving a ruling on a point of law.

72. As to the faculty of requesting an advisory opinion from the International Court of Justice, as provided for in paragraph 5, he was all in favour of encouraging that practice. The wording of the provision could, however, be improved in the light of the text of the Charter, so as to remove certain obscurities.

73. The CHAIRMAN said that article 14 of the 1971 Montreal Convention provided for the settlement of disputes by arbitration, or by a decision of the International Court of Justice if, within six months from the date of the request for arbitration, the parties were unable to agree on the organization of the arbitration. The Working Group, however, had thought that a conciliation procedure might be more acceptable in the present case.

74. Mr. BILGE said he had always been in favour of extending the jurisdiction of the International Court of Justice, which was the principal judicial organ of the United Nations.

75. Mr. HAMBRO said that he shared that view. A conciliation procedure did not really lead to a settlement of the dispute, so that the proposed text of article 12 represented a retrograde step. In particular, paragraph 7 did not provide an answer to the problem with which it purported to deal, since it could be maintained that the provisions of article 12 would, with respect to the cases covered by the draft articles, supersede any previous agreement on the settlement of disputes. It could also be argued that the provisions of article 12 constituted *lex specialis* and, as such, cut through any pre-existing general agreements on the settlement of disputes.

76. In order to overcome those difficulties, he had suggested in the Working Group that the substance of paragraph 7 should be incorporated in the opening words of paragraph 1, so as to confine the scope of the whole paragraph to cases in which there was no agreement between the parties on the settlement of disputes. It

[11] See document A/8410/Rev.1, chapter II, section D, reproduced in *Yearbook of the International Law Commission, 1971*, vol. II, Part One.

[12] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 301, annex.

would thus be made clear that there was no intention of imposing upon States any new obligation to submit cases to arbitration or to judicial settlement; at the same time, there would be no risk of weakening existing clauses which provided for compulsory arbitration or for the jurisdiction of the International Court of Justice.

77. Mr. USHAKOV said that, for his part, he would prefer the draft not to provide for any procedure for the settlement of disputes. It was difficult to see what disputes could arise between States parties on the interpretation of the draft articles, since the articles merely gave States a choice between prosecuting and extraditing offenders. However, if the majority of the Commission considered a provision on the subject essential, article 82 of the 1971 draft on the representation of States in their relations with international organizations should be reproduced verbatim. If the Commission were to depart from the text previously adopted, it would be disowning its own work. The suggestion made by Mr. Hambro did not seem justified, in view of the explanations given by the Commission in its commentary to the corresponding provision of the 1971 draft.

78. Mr. AGO said he shared Mr. Yasseen's view that conciliation procedure was not suitable in all cases. Where a dispute related to a claim for the termination of a treaty, for example, by reason of a fundamental change of circumstances, a conciliation commission could be very useful in settling questions of fact or dealing with political problems. Conciliation procedure was therefore appropriate in the 1971 draft. But it might be doubted whether that system should be introduced into the present draft, because the disputes that might arise over its interpretation would be essentially legal in character.

79. He welcomed the reference to the International Court of Justice in paragraph 5, though he doubted that it would have much practical significance. It was difficult to see how a conciliation commission could ask the General Assembly, for example, to request an advisory opinion from the International Court of Justice.

80. In conclusion, he thought that the system provided for in article 14 of the 1971 Montreal Convention would be more suitable for inclusion in the draft, even though some States might find it necessary to make reservations.

81. The CHAIRMAN, speaking as a member of the Commission, said that one type of dispute which might arise would concern the question whether a State had carried out its obligations under the future convention in good faith; that question could be a highly political one, for example, in the case of refusal to extradite an offender.

82. Mr. YASSEEN reiterated his view that the traditional method of conciliation was not suitable for the settlement of disputes relating to the interpretation of the draft. The interpretation must be objective and strictly legal in character. The conciliation system provided for in article 12 thus presented new features, in that the proposed conciliation commission was to give its opinion on a legal and technical dispute, without that opinion being binding on the parties.

83. Mr. USHAKOV said he could see no difference between the interpretation of one convention and that of another. If a conciliation commission could deal with disputes on the interpretation of the 1969 Vienna Convention on the Law of Treaties, there was no valid reason why a similar commission should not settle disputes on the interpretation of another international instrument. However, an interpretation given by a conciliation commission was never mandatory, whereas one given in an advisory opinion by the International Court of Justice was binding on the parties which had requested it. In principle, there were several valid procedures which could be adopted for the settlement of disputes; it was a matter of choosing the one best suited to a particular convention.

84. Mr. YASSEEN pointed out that the International Law Commission itself had never proposed a conciliation procedure. That mode of settlement had emerged from the work of the United Nations Conference on the Law of Treaties, where it had been accepted as a compromise to save the Conference from failure. That being so, the Commission should not hesitate to improve the text adopted at Vienna in 1969, taking into account the legal and technical problems which the interpretation of the future convention might raise.

85. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 12 back to the Working Group for reconsideration in the light of the discussion.

It was so agreed.[13]

The meeting rose at 6.05 p.m.

[13] For resumption of the discussion see 1192nd meeting, para. 35.

1190th MEETING

Wednesday, 28 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, 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 and Add.1 to 3; A/CN.4/L.183 and Add.1 to 3; A/CN.4/L.184 and L.185)

[Item 1 (*a*) of the agenda]

(resumed from the 1187th meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 21 (Other dismemberments of a State into two or more States) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of draft article 21 submitted by the

[1] For text see 1187th meeting, para. 47.