Document:-

A/CN.4/SR.1190

Summary record of the 1190th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

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.

Special Rapporteur in his fifth report on succession in respect of treaties (A/CN.4/256/Add.3).

2. Mr. YASSEEN said that no two cases of secession, separation or division were alike and that, since circumstances varied so much, the question should be treated with the greatest caution and flexibility. The Special Rapporteur had rightly shown caution in proposing that, if all possible cases were to be covered in a single article, the régime applicable to newly independent States should be adopted, that was to say that there should be no succession *ipso jure*.

3. It was reasonable to lay down, as in paragraph 2, that there could be no succession save by notification, applying the system established by articles 7 to 17 for newly independent States. The part which had separated from the rest of the territory remained perfectly free to succeed or not to succeed to any treaty, multilateral or bilateral, under the conditions laid down in those articles.

4. There was nevertheless an element of continuity in the case contemplated in article 21, namely the continued existence of an original State, or more precisely, of a State recognized as the continuation of the former State, but with diminished territory. That was a controversial question and the Commission could not settle it at the present stage. It would therefore be wise to accept the solution proposed by the Special Rapporteur, namely, that the loss of part of its territory neither released a State from its treaty obligations nor deprived it of its treaty rights; it remained a party to the treaties it had concluded. It was, of course, necessary to provide for cases in which it might be right and proper to opt for non-continuity of treaties concluded by the predecessor State; that was what the Special Rapporteur had done in paragraph 3, sub-paragraphs (*a*), (*b*) and (*c*), which were perfectly acceptable.

5. He could therefore accept the substance of article 21. The drafting of the French text could be improved, however, by avoiding the undue repetition of the word "*Etat*", in paragraph 1, and by replacing the words "*du reste du territoire*", in paragraph 3, by the words "*ce qui reste du territoire*" or some other appropriate phrase.

6. Mr. USTOR observed that the essential purport of paragraph 2 was that, in the case of newly independent States formed through a dismemberment other than that covered by article 20, the provisions of articles 7 to 17 applied. The novel feature of article 21 was paragraph 3, which defined the position of the remaining territory of the predecessor State after a part of the original State had become independent. He could accept the substance of the provisions of that paragraph, but he thought that a more logical place could be found for them in a concluding section of Part III, of the draft articles dealing with newly independent States.[2]

7. The question would then arise whether, in the case of a separation or secession—that was to say a dismemberment other than that covered by article 20—there was room for a provision parallel to article 20. The Special Rapporteur's commentary to article 21 indicated that there were few if any cases of dissolution, into parts equal in status, of a State whose subdivisions had no separate identity; the distinguishing feature of the cases covered by article 20 was that the constituent parts did have separate identity. Perhaps the Special Rapporteur might consider the possibility of formulating a provision to deal with that admittedly rare case.

8. Mr. SETTE CÂMARA agreed that a more logical place should be found for the provisions of article 21; the Drafting Committee should consider that problem. For paragraph 2, which made the rules of articles 7 to 17 applicable, the best place was probably Part III, on newly independent States. The provisions of paragraph 3 could either be included in Part III as an exception to the general rule, or placed elsewhere in the draft.

9. He fully agreed with the Special Rapporteur that there could be no question of adopting, for the cases covered by article 21, a rule of *ipso jure* continuity. The whole rationale of adopting that rule, as embodied in article 20, alternative A (A/CN.4/256/Add.2), in the case of dissolution of a union of States was based on the previous existence, as sovereign States, of the constituent political divisions, and the need to ensure the continuity of international commitments in the interests both of the parties and of the international community as a whole.

10. He suggested that the Drafting Committee should seek a better term than "division" to use in paragraph 1 of article 21. The "other dismemberments" referred to in the title of the article could be of two kinds: the first was separation or secession, which could be called partial dismemberment; the second was total dismemberment, in which none of the parts could be regarded as "the remaining territory of the predecessor State". The term "division" was inadequate to describe such a situation.

11. Mr. USHAKOV saw no fundamental difference between the dissolution of a union of States, dealt with in article 20, and the dismemberment of a State which was not a union of States, dealt with in article 21. Seen from the outside, that was to say from the standpoint of international law, a State, whether unitary or composite, was a State. When part of it separated from the rest, there was necessarily some basis for the separation: political, economic, social, cultural or other. For it was inconceivable that an area of territory should separate arbitrarily from the rest of the State; it was only because it already had at least an embryo of separate personality that separation could take place. Thus the distinction between articles 20 and 21 was artificial, and since the situation was substantially the same, the Commission could not adopt a different solution for each case: *ipso jure* continuity in article 20 and a "clean slate" in article 21. An acceptable solution would be to provide that, irrespective of the State's internal organization, separation would produce a newly independent State to which the "clean slate" principle would apply, subject to certain reservations, while division, which produced two or more States on an equal footing, would entail *ipso jure* continuity of treaties, those States remaining bound by their treaty obligations to third States and *vice versa*.

12. Mr. REUTER said that he shared Mr. Ushakov's doubts about the substance of the matter. Leaving aside

[2] For final arrangement of articles in the draft see document A/8710/Rev.1, chapter II, section C, reproduced in volume II of this *Yearbook*.

cases of decolonization, which were entirely special cases, the difficulties in article 21 arose from its connexion with article 20 and from the comparison between what the Commission decided when it considered the problems from the formal standpoint of treaties and what it might decide when it came to consider Mr. Bedjaoui's report on succession in respect of matters other than treaties.

13. When articles 20 and 21 were compared, the essential difficulty lay in the definition of the term "union of States", on which several members of the Commission had already expressed doubts. A union of States was a State; hence it was solely considerations of internal law, that was to say purely unilateral considerations, which determined the choice between two radically different solutions. There were admittedly cases in which internal law made it possible to identify in advance the units that were going to separate from each other. But if that was where the difference lay, the question nevertheless arose whether, in the case of certain treaties, in particular economic treaties, such identification justified the adoption, in the case covered by article 21, of a less rigorous solution than was provided for in that article. That necessarily raised the question of localization, on which the Commission had not yet taken a position. A single case of localization was covered by the exceptions in paragraph 3, but he wondered whether it could not be said of any treaty previously applicable to the whole of a State that it retained some effect which could be localized in the States born of a dismemberment or division. In the case of division the matter was not in doubt, because the new States unilaterally recognized themselves as continuations of the previous State. But even in cases of dismemberment—leaving aside decolonization—it was possible that for certain economic treaties there could be an economic analysis which would leave the treaties concluded some meaning. The problem was thus extremely complex.

14. He had no radical objection to a proposal based on the idea of personality of the State; that was a consequence of the initial choice which the Commission had made and which it had imposed on the Special Rapporteurs on State succession, namely, that the question of treaties should be dealt with separately from situations created by treaties. But even so the situations created by economic treaties must be taken into account.

15. Sir Humphrey WALDOCK (Special Rapporteur) said that he himself had long hesitated over articles 20 and 21 and over the distinction to be drawn between the two categories of cases covered by those articles. The vital point to remember was that article 20 dealt with a "union of States". An examination of the practice showed evidence for a possible *ipso jure* continuity rule with respect to the dissolution of a union of States. It also provided, however, some evidence of continuity by agreement, express or tacit. For article 20 he had accordingly submitted alternative texts based respectively on *ipso jure* continuity and on consent.

16. If the Commission had chosen alternative B for article 20, it would have been an easy matter to frame a rule common to the cases covered by article 20 and those covered by article 21. But the Commission had favoured alternative A. That had made it necessary to prepare a separate article on dismemberment of States otherwise than by dissolution of a union of States because, in such cases of dismemberment, there was no support at all under the existing law for any *ipso jure* continuity rule; practice pointed clearly to the rule of consent in those cases.

17. The essential reason for adopting a different rule for the cases covered by article 20 was that the constituent political divisions of a union of States were, or had been international persons that had had their own treaties in the past. Contrary to what had been suggested by the last speaker, the rule in the matter appeared to derive not from localization, but from the separate international identity of the constituent political divisions. Questions of internal constitutional identity were irrelevant so far as international law was concerned, unless accompanied by recognition of some measure of international identity.

18. Another point to be considered was the case of total disintegration: in other words, of a situation in which none of the parts of the predecessor State was recognized as a continuation of that State. It had been suggested that *ipso jure* continuity of treaties should apply to each part. But a disintegration of that kind was likely to have a more radical effect than another form of dismemberment, and there did not seem to be any grounds, either of logic or of practice, for an *ipso jure* continuity rule in such a case.

19. The separation of Singapore from the Federation of Malaysia in 1965, referred to in paragraph 12 of the commentary to article 21, had been treated as a case of a newly independent State: continuance of Federation treaties in force had been regarded as a matter of mutual consent. That was so even though in the twilight period prior to its decolonization and adherence to the Federation in 1963, Singapore had already come close to possessing separate international identity, so that the case might perhaps have been viewed rather as one of a union of States.

20. It had been suggested that economic treaties were in some way localized so that, after a total dismemberment, they would continue in force for the territory of the political subdivision concerned. However, he saw no evidence in State practice that would justify treating economic treaties differently from other treaties.

21. Mr. QUENTIN-BAXTER said that he agreed to some extent with the views expressed by Mr. Ushakov and Mr. Reuter.

22. All would agree that a residual article on the lines of article 21 was needed in the draft. The problem was to determine the scope of application of the rule laid down in that article. What he liked most about article 21 was that it did not attempt to lay down an absolute rule distinguishing cases of separation from cases of division. In the former cases there would be a residual predecessor State with continuity of treaty rights and obligations; in the latter there would only be new States not bound by a rule of *ipso jure* continuity. There must often be a margin of appreciation in deciding whether a particular case was one of separation or of division, and it was right the the Commission should not attempt to eliminate that margin.

23. By way of contrast, the proposed definition of a "union of States"[3] would lay down a hard-and-fast rule distinguishing the dissolution of a union from any other kind of separation or division. A new State arising from the dissolution of a union would be bound by a rule of *ipso jure* continuity: a new State arising from other forms of separation or division would not. In that context, there would be no scope for any margin of appreciation. Under the proposed definition, the dissolution rule in article 20 could apply only if the predecessor State had originally been formed by the uniting of two sovereign States. All other cases were of necessity referred to the rule in article 21.

24. He did not, however, believe that such an absolute distinction in terms of origin could be sustained. The State practice on which the distinction was based was too scanty to provide a statistical sample, and it mainly referred to unions which had not long survived. Yet there was in principle no reason why a process of devolution, occurring over a long period of time within a unitary State, should not produce a situation analogous to the dissolution of a union of States.

25. The way in which the State was originally formed might well be a relevant factor, but it need not be the decisive factor. In the case of Bangladesh, the dominant consideration was the way in which the rupture had come about, not the fact that the predecessor State happened to be outside the definition of a "union of States".

26. There was no way of escaping the need for margins of appreciation. They were necessary because of an interplay of constitutional—or internal—and international considerations. In fact, to borrow a dictum from another branch of the law, one could think of the emergence of a new State as a unilateral act which must always have an international aspect.

27. Of course, in cases of decolonization United Nations doctrine could be regarded as creating a conclusive presumption in favour of *tabula rasa*, but in other cases the appropriate rule must be selected by interpreting constitutional facts. That was why he had placed some emphasis on the post-colonial situation of a self-governing associated State. Such an associated State—and there were likely to be more of them in future, because many of the remaining colonies were very small, isolated communities which might shrink from full independence—might come to have a position comparable with that of Iceland during the period of the Danish-Icelandic Union.

28. Mr. ELIAS said he was impressed by the full commentary, which set forth the up-to-date practice in the matter, but he was not altogether satisfied with the provisions of article 21 itself.

29. Paragraph 3 covered fairly satisfactorily the point which should be dealt with in an article of that kind. Paragraph 2 did not add very much to what was already covered by the draft articles. Most of the difficulties arising during the discussion, however, had been due to the provisions of paragraph 1.

30. The title "Other dismemberments" made it clear from the outset that article 21 covered cases of dismemberment other than those of dissolution of a union of States, dealt with in the previous article. Paragraph 1 of article 21 endeavoured to draw a distinction between cases of "separation" and cases of "division"; he suggested that an attempt should be made to simplify the cumbersome language of the paragraph and to draw a clearer distinction between a separation, which brought into play the provisions of paragraph 3, and a so-called "division".

31. He welcomed the explanations given by the Special Rapporteur in reply to Mr. Ushakov and Mr. Reuter, but he thought the real problem was not a matter of the origin of a composite State. The problem was that once a State—whether a federal union or not—was created, it was necessary to determine the legal effects of a separation. The Commission need not be unduly impressed either by considerations deriving from the personality of the component units or by the differences between States with a federal structure and other States.

32. The essential provision of article 21 was paragraph 3, which dealt with the fate of treaties in relation to what might be called the cardinal unit, namely "the remaining territory of the predecessor State". That unit must be recognized as the "predecessor State" if the element of continuity was to be maintained in accordance with the main rule laid down in the opening sentence of paragraph 3.

33. There was little to be gained by exploring what would happen in a case of complete dismemberment in which none of the parts of the divided State could be described as a predecessor State. There were very few, if any, such cases. Should such a case arise, however, some agreement between the States concerned would undoubtedly be needed, in order to organize the responsibilities attaching to the separate units.

34. In any case, the provisions of paragraph 3 were the only real justification for including article 21 in the draft. Those provisions could either be treated as a complement to article 20, alternative A, or be placed elsewhere in the draft as suggested by Mr. Ustor and Mr. Sette Câmara. The Drafting Committee should consider the possibility of placing them at the end of Part III.

35. Mr. USHAKOV drew attention to the definition of the term "union of States" preceding article 19 and to the examples of constitutional unions of States given in the commentary to that article. Whatever name might be given to the entities making up a State—state, province, department or anything else—a State was always a State in international law. Thus international law made no distinction between the United States of America and France. The internal organization of States was no guide to the solution of problems of international law. Hence there was no difference between the situations contemplated in articles 20 and 21. In view of the complexity of the problem it would be advisable to go into it more deeply and perhaps to draft several articles dealing with the different situations.

36. Mr. ALCÍVAR said that, while there were perhaps a few drafting points that could be dealt with by the

[3] See article 19 (A/CN.4/256/Add.1).

Drafting Committee, he fully supported the basic approach adopted by the Special Rapporteur in article 21. He appreciated the difficulties mentioned by Mr. Ushakov and Mr. Reuter, but thought they could easily be resolved within the limits of the article.

37. On the question of the separate international personality of federal States, he reminded the Commission that it had submitted to the United Nations Conference on the Law of Treaties a draft article providing that States members of a federal union might possess a capacity to conclude treaties.[4] That provision had been rejected by the Conference and had not been included in the Vienna Convention on the Law of Treaties.[5]

38. He agreed with the Special Rapporteur's general practice of applying the law of treaties to succession of States.

39. The CHAIRMAN, speaking as a member of the Commission, said that he, too, had a number of difficulties with article 21 and the commentary. It was not clear what, if anything, the practice cited in the commentary proved. He also thought that it would be very difficult indeed to draft an adequate definition of a union of States. Originally, for example, the United States of America had clearly been a union of States, but the country's subsequent history might have changed the situation somewhat. The United States was clearly not in the same position as France, because individual states could enter into international agreements with the approval of Congress; but he doubted whether it could be easily decided whether the United States was still a union of States. Furthermore, the fact that a state member of a federal union could enter into a treaty did not necessarily mean that it had a separate international personality.

40. There were some cases of separation of States in which there was no particular reason to adopt the "clean slate" principle. If, for example, the predecessor State had entered into an agreement with the consent and in accordance with the free will of the population of the whole territory, there was no reason to reject that free will because one part of the territory had separated from the other. Earlier in the draft articles, the Commission had adopted the "clean slate" principle for former colonies and territories which had been under the dominion of other Powers. A major basis for that decision had been that they had not participated in or accepted the treaties concluded by the predecessor State. He doubted whether that underlying reason held good for the cases of separation envisaged in article 21 although, where there was a violent disruption of the State, the situation of the separated State might well be akin to that of a former colony. There were many factors involved that needed careful study, and he was not sure that the present draft of article 21 proposed the best solution and took account of all those factors. He would, however, propose that the Commission should proceed generally along the lines of the proposed article and submit it to governments for their comments.

41. Mr. BARTOŠ said that a distinction should be made, in the commentary to article 21, between two different situations which could have identical results. On the one hand, a composite State might be composed of entities having a certain status in international law; on the other hand, part of the territory of a unitary State might enjoy a special status without possessing the capacity to conclude treaties. In the latter case, such an area was represented internationally by the central authorities. If it had been the subject of international treaties and then separated from the unitary State, it raised particular problems of State succession in respect of treaties.

42. For example, the free zone of the *pays de Gex* was an area of French territory granted a special status which had consequences in international law. Not only Customs reasons, but also questions of neutrality or political considerations might account for such a situation. Mount Athos, in Greece, was an autonomous territory for internal purposes and enjoyed certain international guarantees. The special régime of the right bank of the Danube, near Serbia, before the First World War, had constituted a kind of servitude in favour of Hungary. Modern examples included the Suez Canal, the Firth of Tay and a strait in Turkey.

43. It would be enough to mention those situations in the commentary to article 21; otherwise the article was satisfactory.

44. Mr. HAMBRO said that the question under consideration was extremely complicated and confused. Some of the doubts he had felt on first reading the commentary to article 21 had not been dispelled by the discussion in the Commission; in the circumstances, however, he thought the text proposed by the Special Rapporteur was the best basis for further consideration.

45. Sir Humphrey WALDOCK (Special Rapporteur) said that he had deliberately tried to exclude from the draft articles provisions whose application would depend on the question of free will. Such factors were not really susceptible of codification, despite their relevance as underlying considerations. However, it was very unlikely that separation of States would come about except as a result of political tension. Indeed, the very cause of separation was frequently the sense of being in a minority position in a State and dissatisfaction at inadequate representation and an inadequate say in the State's affairs. When discussing articles 19 and 20, the Commission had considered that in the case of a union or fusion of States, and in the case of the dissolution of such a union, the principle of *ipso jure* continuity had to apply. It would, however, be much more difficult to introduce that principle in article 21, since in such cases there was no element of separate personality, and practice was solidly in favour of the "clean slate" principle. What he had tried to do generally in the draft articles was to reflect the majority practice. The Drafting Committee should

---

[4] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 191, article 5.

[5] 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. 290, article 6.

look at articles 19, 20 and 21, as a whole since they were closely interrelated.

46. Until comparatively recently the concept of a union of States had been reasonably clear, the key element being the question of separate international personality, but it had been somewhat obscured by recent events such as the formation of the United Arab Republic. Although that had appeared to be a clear case of a union of two quite separate entities, the constitution of the United Arab Republic had in fact been as much like that of a unitary State as it could be. The Constitution had specified that the Union legislature in Cairo should be the legislature of the whole territory of the Union and had not provided for any separate legislature in Syria at all. Because of the existence of such a precedent and the application of the principle of *ipso jure* continuity on the grounds that Egypt and Syria were two separate entities, what had once been a clear line of division had become blurred. Once the dividing line was no longer the actual retention of separate international personality, the difficulty of defining a union of States was considerable.

47. The concept he had tried to put forward in the draft articles was not fully expressed in the definition of a union of States, because that definition was concerned primarily with the formation of such unions. In practice there was either a union of States because the component parts were States before the union was formed, or a union of territories in which the territories achieved international personality, as in the case of Norway-Sweden and Iceland-Denmark. The main question was whether the Commission was going to make a category of unions of States that would necessarily depend on recognition of some element of separate personality. In his view the United States of America, for example, was a union of States, because a certain element of separate international personality remained, whereas the United Kingdom, which had originally been a union of States, was one no longer, because no such element of separateness remained.

48. The CHAIRMAN suggested that draft article 21 should be referred to the Drafting Committee.

It was so agreed.[6]

The meeting rose at 1 p.m.

[6] For resumption of the discussion see 1196th meeting, para. 59.

1191st MEETING

Thursday, 29 June 1972, at 10.15 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. Thiam, 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, L.186 and L.188 and Add.1)

[Item 5 of the agenda]

(resumed from the 1189th meeting)

SECOND REPORT OF THE WORKING GROUP: DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

ARTICLE 1

1. The CHAIRMAN invited the Commission to consider the revised text of article 1 submitted by the Working Group in its second report (A/CN.4/L.188 and Add.1) which read:

Article 1

For the purposes of the present articles:

1. "Internationally protected person" means:

(*a*) A Head of State or 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 State or an international organization who is entitled, pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State or international organization, as well as members of his family who are likewise entitled to special protection.

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.

3. "International organization" means an intergovernmental organization.

2. Paragraph 1 (*b*) had been substantially changed to take account of the various objections and suggestions made during the Commission's discussion of the first draft.[1] It had been argued that the expression "foreign government" caused some confusion, particularly as the word "State" was used elsewhere in the paragraph, so the Working Group had decided to substitute the word "State". There had been general agreement in the Commission that the words "of universal character", included in square brackets in the first draft, should be deleted. Doubts had been expressed concerning the meaning of the phrase "whenever he is in a State". The Working Group had decided that the basic test was whether a person was entitled to special protection at the time when the offence occurred; it had therefore deleted that phrase and had rearranged the whole paragraph to make the point clear. The Working Group had also decided that the same test should apply to members of the family. The word "official" before the word "functions" had been deleted because it was considered to be superfluous. In his view, the new version of paragraph 1 (*b*) was considerably simpler and easier to understand.

[1] See 1182nd to 1185th meetings and document A/CN.4/L.186.