Document:-

**A/CN.4/SR.1191**

**Summary record of the 1191st 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:-

**1972, vol. I**

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.

3. No change had been made in paragraph 2. Because of the deletion of the words "of universal character" in paragraph 1 (*b*), a new paragraph 3 had been added, giving the definition of an international organization contained in the Vienna Convention on the Law of Treaties.[2]

4. Mr. YASSEEN pointed out that the scope of paragraph 1 (*a*) was more or less the same in the revised text: it covered only Heads of State and Heads of Government. Hence it could not apply in the case of a collegiate presidency. Since the draft articles were concerned with matters of criminal law, their provisions could not be extended by analogy.

5. The expression "members of his family who are likewise entitled to special protection", at the end of paragraph 1 (*b*), should be clarified, because it might be taken to mean that the right to special protection derived from the draft itself. It should be made clear that, as in the case of the officials referred to at the beginning of paragraph 1 (*b*), the right to such protection must derive from international law or an international agreement.

6. Mr. BARTOŠ said he agreed with Mr. Yasseen's last remark. He also wished to point out that paragraph 1 (*b*) did not specify the circumstances in which members of the family were entitled to special protection. It was not, of course, the intention of the Working Group or of the Commission that such persons should be entitled to special protection when they were not accompanying the head of the family, particularly when they travelled to another country for their own purposes. Hence they should not enjoy individual protection, but protection linked with that of the head of the family.

7. Because the text was not clear on those points, he would be obliged to vote against article 1.

8. The CHAIRMAN, speaking as a member of the Commission, said that, so far as special protection for members of the family was concerned, the same test was applied whether the right to protection was derived from the official or whether members of the family were entitled to it on a personal basis. It would perhaps be clearer to repeat the phrase "pursuant to general international law or an agreement" at the end of paragraph 1 (*b*). There had been some discussion of the problem of a collegiate presidency but, because of the lack of precedents, the Working Group had decided to retain the standard formula used in a number of conventions.

9. Mr. ELIAS said that to repeat the phrase "pursuant to general international law or an international agreement" at the end of paragraph 1 (*b*) would make the text somewhat unwieldy. He suggested that the reference to members of the family should be placed earlier in the sentence and that paragraph 1 (*b*) should end with the words "international organization". So far as the problem of the collegiate system was concerned, it might be useful to add the words "or a member of a collegiate presidency" in paragraph 1 (*a*).

10. Mr. BARTOŠ said that it was not unusual for diplomat's wives, or even their children, to claim the right to special protection when they were travelling as tourists. It was therefore essential to specify the circumstances in which members of the family would be covered by the draft articles, especially as provision was made for more severe penalties.

11. Mr. USTOR said that, in his view, article 1 had been greatly improved by the Working Group. He was quite satisfied with the text of paragraph 1 (*b*) as it stood. The article was concerned with definitions, and paragraph 1 (*b*) could hardly be interpreted as conferring the right to special protection on anyone. The normal interpretation would be that the persons referred to were already entitled to special protection pursuant to general international law or an international agreement. Similarly, it was extremely unlikely that any State which introduced changes in its internal law on the basis of the draft convention would exclude any person or persons who performed the functions of a Head of State in a State having a collegiate presidency. The Commission could make a specific reference to that case, as suggested by Mr. Elias, but even if it did not, the members of the college would be entitled to protection.

12. Mr. USHAKOV said that he wished to raise some drafting points relating to the French text. In paragraph 1 (*b*), the words "any official" had been translated into French by the words "*toute personnalité officielle ou tout fonctionnaire*", which applied both to States and to international organizations. There could be no doubt, however, that the scope of the provision would be restricted if it referred to "*personnalités officielles*" of States. In the same sub-paragraph, the word "entitled" should be translated by an expression which would indicate, better than the words "*a droit*", that the person did not in himself have a right to special protection, but that it had been accorded to him. Lastly, he did not think that "*également*" was equivalent to the English word "likewise".

13. Mr. QUENTIN-BAXTER said that the definition of an international organization in paragraph 3 would not cover the International Committee of the Red Cross (ICRC), which had specific duties to perform under the Geneva Conventions. The ICRC was in a very special position and was in need of the kind of protection afforded by the draft far more than certain other international organizations which would be covered by the definition.

14. The CHAIRMAN, speaking as a member of the Commission, said it was very difficult to draw a line, but if the ICRC was included, many other non-governmental organizations would claim to have an equal right. He doubted whether, under general international law, ICRC representatives would be entitled to special protection.

15. Mr. HAMBRO said he entirely agreed with Mr. Quentin-Baxter that the ICRC had a very special status, though unfortunately he did not see how it could be included in the present draft convention. He could not, however, accept any suggestion that the ICRC was on a par with other non-governmental organizations.

[2] 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. 289.

16. The CHAIRMAN, speaking as a member of the Commission, said that the reference to members of the family in paragraph 1 (*b*) could not be placed earlier in the sentence, as Mr. Elias had suggested, because of the subsequent reference to the performance of functions. He agreed with Mr. Ustor that the text was quite satisfactory as it stood, but he saw no great harm in repeating the phrase "pursuant to general international law or an international agreement".

17. Mr. ELIAS said it would be better to leave paragraph 1 (*b*) as it stood and give further explanations in the commentary.

18. The CHAIRMAN, speaking as a member of the Commission, agreed. He suggested that paragraph 1 (*a*) should also be left in its present form and that its application to a collegiate presidency should likewise be explained in the commentary.

19. Mr. YASSEEN said it should be recorded in the commentary that some members of the Commission considered that, given the way in which the articles should be interpreted, paragraph 1 (*a*) could apply only to Heads of State and Heads of Government, whereas other members had taken a contrary view.

20. Mr. BARTOŠ said that such a statement would have no practical effect. The commentaries to the articles had only a theoretical value, because they were not adopted by States. Even when they expressed the unanimous view of the Commission, they had no binding force.

21. Mr. USTOR said he agreed with Mr. Bartoš that the commentary did not have any real standing in law. However, as there were differences of opinion among members of the Commission and the draft would subsequently be considered by the General Assembly or at a conference, it would be useful to explain those differences of opinion in the commentary.

22. Mr. USHAKOV suggested that paragraph 1 (*a*) should refer to "a Head of State, a Head of Government or other personality of high rank".

23. The CHAIRMAN, speaking as a member of the Commission, said that the Commission had already considered the use of such a phrase in its work on special missions and relations between States and international organizations, but had decided against it because its meaning was not sufficiently precise.

24. Mr. USTOR said he thought the best solution would be to accept the suggestion made by Mr. Ushakov; failing that, the matter should be explained in the commentary.

25. Mr. HAMBRO said he was opposed to including the phrase suggested by Mr. Ushakov. The Commission had discussed its use on several occasions and had always agreed not to adopt it.

26. The CHAIRMAN suggested that the Commission should approve draft article 1 provisionally, on the understanding that the different views on paragraphs 1 (*a*) and 1 (*b*) would be explained in the commentary.

*It was so agreed.*

ARTICLE 2 [3]

27. The CHAIRMAN invited the Commission to consider the revised text of article 2 submitted by the Working Group, which read:

*Article 2*

1. The intentional commission, regardless of motive, of:

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

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

(*c*) An attempt to commit any such attack; and

(*d*) Participation as an accomplice in any such attack,

shall be made by each State Party a crime under its internal law, whether the commission of the crime occurs within or outside of its territory.

2. Each State Party shall make these crimes punishable by severe penalties which take into account the aggravated nature of the offence.

3. Each State Party shall take such measures as may be necessary to establish its jurisdiction over these crimes.

28. The first major change made by the Working Group was the insertion of the word "intentional" before the word "commission" in paragraph 1. It had been argued in the Commission that, in view of the phrase "regardless of motive", paragraph 1 might be interpreted as applying, for example, to a manslaughter charge resulting from an automobile accident. The Working Group had therefore decide to include the word "intentional" in order to preclude that interpretation.

29. To simplify the drafting, the reference to "severe penalties which take into account the aggravated nature of the offence" had been put in a new paragraph 2. The Working Group had decided to retain the word "aggravated", because it had concluded that the acts in question were being treated as aggravated offences and that it was for that reason that States were required to make them punishable by severe penalties. A new paragraph 3 had also been added to meet the criticism that the draft did not specifically provide for the establishment of jurisdiction over the crimes with which it was concerned. The Working Group had thought that the phrase "within or outside of its territory", in paragraph 1, was sufficient for the purpose, but had included paragraph 3 to be on the safe side.

30. Mr. REUTER observed that the Working Group had not made it clear in article 2 that the crimes referred to must have been committed because of the victim's functions. Since he had always attached importance to that point, he would have to vote against article 2. He would also have to take the same position on article 6, since there, too, his remarks had not been taken into account.

31. The French text of article 2 called for two comments. The first was that the expression "*attaque violente*", in paragraph 1, was modelled on the English term, although the latter had a very special meaning in common law.

[3] For previous discussion see 1182nd to 1185th meetings.

The French text of paragraph 1 (*a*) should perhaps be completely reworded on the following lines: "*d'attaquer l'intégrité physique ou la liberté d'une personne jouissant d'une protection internationale, en recourant à la violence*".

32. Even then, the text of paragraph 1 would not be completely satisfactory, because it did not cover threats. An attempt, which was the subject of paragraph 1 (*c*), implied a beginning of commission, but terrorists might confine themselves to making threats. It was important to take account of that case, which was a characteristic example of the offences with which the Commission was concerned. Threats against persons of the kind protected by the draft always related to the State or organization those persons represented. He would therefore suggest adding the following phrase to the text he had proposed for paragraph 1 (*a*): "*ou en menaçant de le faire*" (or the threat of such attack).

33. His second comment on the French text related to paragraph 2. It was essential that there should be a reference to the nature of the offence, and he would therefore suggest that the French version of the last phrase should be more closely modelled on the English version and read: "*qui prennent en considération la nature aggravée de l'infraction*". In particular, the word "*infraction*", should be substituted for "*acte*".

34. Paragraph 3 was essential and must certainly be retained. It contained one of the most valuable innovations in the draft.

35. Mr. ELIAS said he found little to criticize in the new text of article 2. He was not sure, however, that the addition of the word "intentional" in paragraph 1 was the best solution to the problem. In his view, there was some slight contradiction in terms, particularly when the introductory phrase was linked with sub-paragraph (*c*), for example. It might perhaps be preferable to delete the word "intentional".

36. Mr. BARTOŠ said that he accepted the content of article 2 in principle, but must point out that it did not cover preparation for the crimes referred to. Under article 3, States had to take measures to prevent preparation for those crimes. Preparation must be distinguished from an attempt, which was already a beginning of commission, and from complicity.

37. He would like to know whether the Working Group had deliberately omitted the case of preparation, which had earlier been excluded from the Convention on Genocide,[4] at the request of the common-law countries. In those countries the conditions constituting a criminal offence were held not to exist until an attempt had been made.

38. Mr. RAMANGASOAVINA said he approved of the wording of the introductory sentence of paragraph 1. The word "intentional" was not superfluous, because it defined the exact scope of article 2, which, as had already been said, should not apply to a mere traffic accident. The expression "regardless of motive" helped to establish the nature of the crime; it showed that all the circumstances which might give rise to the situations dealt with in the draft were covered.

39. The expression "*attaque violente*" in the French text was not entirely adequate, because the idea of violence covered a whole range of offences from assault and wounding to murder. The wording proposed by Mr. Reuter would therefore be a considerable improvement. He did not, however, support the suggestion that the words "or the threat of such attack" should be added, since that would raise thorny problems. In particular, it would be hard to judge what constituted a threat not followed by commission, in view of the fact that an attempt not followed by a beginning of commission was not generally punishable.

40. As far as paragraph 2 was concerned, it should be noted that a more severe penalty was justified not only by the special status of the victims, but also by the very nature of the acts committed against them. Perhaps the Working Group could find more suitable wording.

41. Mr. BILGE said that he would have to vote against article 2 if it did not cover threats, as he had expressed the hope that it would. He believed that attempts on the liberty of diplomats were nearly always preceded by threats. It was only if the person concerned offered some degree of resistance that an act of violence was committed.

42. Mr. THIAM, referring to the expression "violent attack" said that it would be preferable to omit the idea of violence because it limited the scope of paragraph 1 (*a*). As to threats, they were sometimes a means of blackmail and should be covered by the draft articles in the same way as preparations.

43. Mr. SETTE CÂMARA said he agreed entirely with Mr. Reuter, Mr. Thiam and Mr. Bilge that the article should not exclude the notion of "threat". The threat to commit a crime, which had nothing to do with the attempt to commit a crime, could cause very severe moral and material damage, and in many modern penal codes was treated as a crime in itself.

44. Mr. USHAKOV said that threats were sometimes more serious than acts of violence themselves. He therefore considered they should be covered by the article.

45. Referring to the last phrase of paragraph 1, he pointed out that the word "crime" in the English text did not correspond to the word "*attaque*" in the French.

46. Mr. RAMANGASOAVINA said he wished to clarify his views on the question of threats. He knew what a serious matter threats could be, particularly where they took the form of blackmail. The reason why it was difficult to include the idea in the draft was that the gravity of threats was hard to assess. It depended not only on the strength of the criminals, but also on the victim's ability to defend himself. It could even happen that courts assessed the gravity of threats according to the sex of the victim. To cover the case, the words "*ou morale*" might possibly be inserted after the words "*l'intégrité physique*" in the French text of paragraph 1 (*a*), since an attack upon a person's *intégrité morale* often took the form of threats.

47. Mr. REUTER said he could imagine a case in which, contrary to what Mr. Bilge had said, threats were not followed by the commission of an act of violence. If

[4] See United Nations, *Treaty Series*, vol. 78, p. 278.

terrorists threatened to attack the diplomatic representative of a State unless it released a certain number of prisoners, other States parties had a duty to take preventive measures under article 3. And if the persons making the threat were subsequently identified, it was obvious that they should be severely punished. Such acts complicated the preventive task of States and considerably disturbed relations between them. In such cases the threats constituted a means of terrorism and created a situation of precisely the kind that the Commission was seeking to prevent.

48. Mr. QUENTIN-BAXTER said he had not yet formed a definite opinion on the desirability of including a reference to threats. He agreed that threats could be extremely serious, but a reference to them in article 2 would involve difficulties in regard to proof; there was also a danger of the procedure being abused. Very careful consideration would therefore have to be given to the form of words to be used.

49. He agreed with Mr. Elias that the phrase "intentional commission" in paragraph 1 had a strange ring, especially to a common-law lawyer, but he nevertheless attached very great importance to it and urged its retention unless a better way of expressing the idea could be found. He was reminded of a passage in the dissenting opinion of Judge Moore in the *Lotus* case, pointing out that, according to one concept of extraterritorial jurisdiction, a man in a seaport town where people of different nationalities gathered, could unwittingly be subject to the criminal jurisdiction of a dozen States.[5] In the present instance, the number of States that would have extraterritorial jurisdiction might be much greater, unless it was made clear in the draft that a protected person must be the target of the attack. If that was not made clear, he would have to vote against article 2.

50. He was a little disappointed by the retention of the reference to the aggravated nature of the offence in paragraph 2, since it would give rise to difficulties in interpreting the obligations imposed on States. Under the proposed text, it would not be enough for a State to extend its jurisdiction to crimes committed abroad; it would also have to enact legislation providing for specially severe penalties for the offences. He believed that many Ministers of Justice would be deterred from accepting the draft if that idea were retained in it.

51. He welcomed the inclusion of paragraph 3. Personally, he would have preferred the whole of article 2 to be framed in terms of an extension of criminal jurisdiction, not of a definition of crimes.

52. Mr. ELIAS said he wished to make it clear that he did not object to the substance of the opening phrase of paragraph 1. He had simply wished to suggest that the language might be improved, particularly with regard to the use of the word "intentional". But if the majority of the members wished to retain that term, he would not oppose the approval of the article.

53. Mr. AGO said he thought the idea of threats should be included, provided that it was qualified in such a way as to make it clear that only serious threats were meant and not threats made without any real intention of carrying them out. A formula such as "serious and deliberate threat" might be used.

54. Mr. HAMBRO strongly urged that the word "intentional" should be retained in the opening sentence of paragraph 1.

55. He had been convinced by the arguments put forward during the discussion that it was desirable to include provisions covering not only threats, but also preparation for crimes. That could be done either by amending paragraph 1 (*c*) or by adding a new sub-paragraph to paragraph 1.

56. The CHAIRMAN noted that there was a substantial majority in favour of including a reference to threats in article 2. Clearly, it would not be to every form of threat, nor would it be enough to speak of a "serious" threat. The purpose should be to deal only with such threats as would bring into play the government's machinery for the protection of diplomats. That machinery would not be used, for example, in the case of a threatening letter written by an unbalanced individual who obviously had no intention of carrying out his threats. One method of dealing with the difficulty would be to link the question of threats with that of attempts to extort a sum of money or to obtain some particular form of government action.

57. There also appeared to be general support for the idea of covering preparation for crimes. That would introduce into article 2 a type of offence akin to conspiracy, with all its attendant difficulties.

58. He suggested that the Working Group should be invited to re-examine the text of article 2 with a view to covering threats and preparation; it could at the same time consider the drafting problem involved in the use of the expression "intentional commission". Because of the shortage of time, the text it produced would have to be included in the set of draft articles submitted to the Commission for final approval. If there were no further comments, he would take it that that suggestion was acceptable to the Commission.

*It was so agreed.*[6]

ARTICLE 3[7]

59. The CHAIRMAN invited the Commission to consider the revised text of article 3 submitted by the Working Group, which read:

*Article 3*

States Party shall co-operate in the prevention of the crimes set forth in article 2 by:

(*a*) Taking measures to prevent the preparation in their respective territories for the commission of those crimes either in their own or other territories;

(*b*) Exchanging information and co-ordinating the taking of administrative measures to prevent the commission of those crimes.

[5] *P.C.I.J.*, series A, No. 10, p. 92.

[6] For resumption of the discussion see 1193rd meeting.

[7] For previous discussion see 1185th meeting, paras. 51 *et seq.*

60. The main change made to the previous text (A/CN.4/L.186) was the omission of the words "in accordance with their internal law" from the opening sentence. Those words had been considered redundant because the State concerned would always act in accordance with its internal law.

61. The text of sub-paragraph (*a*) had been made shorter and clearer.

62. Mr. BARTOŠ said that he had no objection to the new text of article 3.

63. Mr. ELIAS said he accepted article 3, but wished to suggest that the concluding words of sub-paragraph (*a*) "in their own or other territories" should be corrected to read: "in their own or in other territories".

*Article 3 was approved with that amendment.*

ARTICLE 4 [8]

64. The CHAIRMAN invited the Commission to consider the text of article 4 submitted by the Working Group, which read:

*Article 4*

The State Party in which one or more of the crimes set forth in article 2 have been committed shall, if it has reason to believe an alleged offender has fled from its territory, communicate to all other States Party all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender.

65. He pointed out that no change had been made in the previous text (A/CN.4/L.186).

*Article 4 was approved.*

ARTICLE 5 [9]

66. The CHAIRMAN invited the Commission to consider the revised text of article 5 submitted by the Working Group, which read:

*Article 5*

1. A State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for prosecution or extradition. Such measures shall be immediately notified to the State where the crime was committed, the State of which the alleged offender is a national, the State of which the internationally protected person concerned is a national and all interested States Party.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is a national and to be visited by a representative of that State.

67. A few changes had been made in the previous text of paragraph 1 (A/CN.4/L.186). In the first sentence the words "is found" after "alleged offender" had been replaced by the words "is present". The second sentence, which had required immediate notification of the measures in question "to all other States Party", had been expanded by mentioning specifically the three States which were particularly concerned: the State where the crime had been committed, the State of which the alleged offender was a national and the State of which the protected person concerned was a national. The intention had been to ensure that those three specially interested States, whether parties or not, were immediately advised; in view of the urgency, it was necessary to avoid the delays which might occur if a large number of States were placed on the same footing for purposes of notification. Of course, the requirement of notification of "all interested States Party" remained.

68. No change had been made in paragraph 2.

69. Mr. BARTOŠ said that in order to allow for dual nationality, which was now a recognized institution, the phrase "the State of which the alleged offender is a national", in the second sentence of paragraph 1, should be amended to read "the States of which...".

70. Mr. USTOR proposed that the concluding words of paragraph 1 "all interested States Party" should be replaced by the words "all other interested States". It was quite possible that a State not a party, other than one of the three States specifically mentioned in the revised version of the second sentence, might also be very much concerned. One such State would be the State of permanent residence of the alleged offender; even if that State was not a party, it should be notified.

71. The problem of dual nationality could be covered by saying "the State or States of which the alleged offender is a national". The words that followed should be amended in the same way to cover cases in which the protected person had dual nationality.

72. Mr. BARTOŠ said he could agree that in the case of stateless persons it was the State in which the person concerned was resident or whose protection he enjoyed that must be considered, though it was not necessary to say so explicitly in the text, because the idea was covered by the expression "all interested States Party". On the other hand, for those who had a nationality, the only possible wording was "the States of which the alleged offender is a national".

73. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved article 5 with the amendments proposed by Mr. Ustor. Mr. Bartoš' remarks would be taken into account in the commentary.

*It was so agreed.*

ARTICLE 6 [10]

74. The CHAIRMAN invited the Commission to consider the revised text of article 6 submitted by the Working Group, which read:

*Article 6*

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

[8] For previous discussion see 1186th meeting.

[9] For previous discussion see 1186th meeting, paras. 3 *et seq.*

[10] For previous discussion see 1186th meeting, paras. 24 *et seq.*

75. An important change had been made in the previous text (A/CN.4/L.186), in that the words "through proceedings in accordance with the laws of that State" had been added at the end of the article to indicate that, once a decision had been made to submit the case to the competent authorities for the purpose of prosecution, all further proceedings would be in accordance with the laws of the State in whose territory the alleged offender was present. The Working Group had thus taken into account one of the reasons put forward in favour of introducing into article 6 the sentence. "Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State", which appeared in the corresponding articles of the Hague and Montreal Conventions.[11]

76. It should be clearly understood, however, that neither the words added to article 6 nor the corresponding sentence in the Hague and Montreal Conventions could be interpreted as constituting an escape clause that might enable a government to take a decision on the question of prosecution without due regard to legal considerations.

77. Mr. RAMANGASOAVINA said he did not think the Working Group had been justified in replacing the expression "*aux fins de poursuites*" in the French text of the article by "*aux fins de l'action pénale*". "*Action pénale*" did not necessarily lead to a penalty any more than "*poursuites*". There was thus no difference in meaning. It would be better to go back to the phrase "*aux fins de poursuites*", which was closer to the English term "prosecution".

78. Mr. USHAKOV explained that the Working Group had wished to reproduce the term used in the official translation of the Hague and Montreal Conventions, which was "*pour l'exercice de l'action pénale*". The phrase "*s'il décide de ne pas extrader ce dernier*" should read "*s'il n'extrade pas ce dernier*", because the Working Group had reverted at the last minute to its original idea, which had been restored in the English text but not in the French. The phrase "*selon une procédure conforme à la législation de cet Etat*" should be amended to correspond more closely to the English text.

79. Mr. RAMANGASOAVINA said that the phrase "*aux fins de l'action pénale*" was restrictive. There was no reason to assume that only criminal proceedings would be taken; there might also be civil proceedings. The phrase "*aux fins de poursuites*" would cover both.

80. Mr. THIAM said he shared that view. Referring to the last comment made by Mr. Ushakov, he proposed that the phrase "*selon une procédure conforme à la législation de cet Etat*" should be replaced by "*selon la procédure prévue par la législation de cet Etat*".

81. Mr. REUTER said he maintained the position he had stated when the Commission had previously considered article 6.[12]

82. Mr. ELIAS urged that the text of article 6 proposed by the Working Group should be retained.

83. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve the text of article 6, on the understanding that an attempt would be made to improve the French version.

*It was so agreed.*

The meeting rose at 12.55 p.m.

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## 1192nd MEETING

*Friday, 30 June 1972, at 9.30 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.

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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, L.186 and L.188 and Add.1)**

[Item 5 of the agenda]

*(continued)*

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

ARTICLE 7[1]

1. The CHAIRMAN invited the Commission to consider the revised text of article 7 submitted by the Working Group in its second report (A/CN.4/L.188/Add.1), which read:

*Article 7*

1. To the extent that the crimes set forth in article 2 are not listed as extraditable offences in any extradition treaty existing between Parties they shall be deemed to have been included as such therein. Parties undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

2. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may, if it decides to extradite, consider the present articles as the legal basis for extradition in respect of the crimes. Extradition shall be subject to the procedural provisions of the law of the requested State.

3. Parties which do not make extradition conditional on the existence of a treaty shall recognize the crimes as extraditable

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[11] See *International Legal Materials*, vol. X, 1971, number 1, pp. 134-135, article 7 and number 6, p. 1154, article 7.

[12] See 1186th meeting, para. 32 and 1188th meeting, para. 7.

[1] For previous discussion see 1188th meeting.