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**Summary record of the 1198th meeting**

Topic:  
**Other topics**

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## 1198th MEETING

Thursday, 6 July 1972, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

*Present:* Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rosides, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

**Draft report of the Commission on the work of its twenty-fourth session**

(A/CN.4/L.190 and Add.1; A/CN.4/L.191)

(continued)

*Chapter III*

QUESTION OF THE PROTECTION AND INVOLABILITY OF DIPLOMATIC AGENTS AND OTHER PERSONS ENTITLED TO SPECIAL PROTECTION UNDER INTERNATIONAL LAW

*B. 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 chapter III, section B, of its draft report (A/CN.4/L.191), containing the draft articles, approved at previous meetings, on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, together with the commentaries to those articles. The commentaries, which had been prepared under great pressure in difficult conditions, were not yet in their final form, and any suggestions by members for additions and improvements could be incorporated in the final text.

2. He suggested that the Commission should begin with the adoption of the draft articles on first reading.

3. Mr. ALCÍVAR said that the Commission would recall the statement he had made after the introduction of the Working Group's report containing the first set of draft articles (A/CN.4/L.186), in which he had explained his reasons for disagreeing with the approach adopted and had reserved his position on the whole draft.<sup>1</sup> In those circumstances, his participation in the discussion of each individual article would have served no useful purpose, since he objected to the whole framework in which the topic had been considered.

4. Following the discussions in the Commission, the Working Group, in its second and third reports (A/CN.4/L.188 and Add.1 and A/CN.4/L.189), had admittedly made some improvements in certain articles, particularly article 9, where the original provision excluding all statutory limitation for prosecution of the crimes set forth in article 2 had been replaced by a provision under which

the limitation would be that fixed for the most serious crimes by the internal law of each State. Those changes had not, however, removed the obstacles in the way of his acceptance of the draft. Those obstacles could be summarized under nine heads.

5. First, it was the Commission's specific function to formulate rules of general international law that could be adopted by States in general multilateral treaties. As far as the protection of diplomatic and consular agents and their families was concerned, the relevant rules of general international law were to be found in the Vienna Convention on Diplomatic Relations<sup>2</sup> and the Vienna Convention on Consular Relations.<sup>3</sup>

6. Secondly, the offences mentioned in article 2 of the draft were already defined as punishable offences in the criminal law of all countries. They were therefore offences under internal law and, as such, a matter for the competent authorities of each State.

7. Thirdly, the sole justification for considering those acts in terms of the international legal order was that the kidnapping of diplomats and consuls for use as hostages in connexion with internal political struggles was becoming an increasingly serious problem.

8. Fourthly, to fulfil the mandate given to it in General Assembly resolution 2780 (XXVI), all the Commission had to do was to prepare a set of draft articles designed to strengthen the rules of general international law which placed a receiving State under an obligation to protect the life and property of persons entitled to special protection while those persons were in its territory.

9. Fifthly, that task would be essentially accomplished if the future convention established as a rule of general international law that, in the event of the kidnapping of a diplomatic or consular agent or of a member of his family, the Government of the receiving State had an absolute obligation to comply with the kidnapper's demands in order to save the life of the protected person concerned, and should not be allowed to invoke any reasons of domestic or foreign policy as a pretext for evading that obligation.

10. Sixthly, since there were as yet no rules of general international law to protect the officials of international organizations, the draft articles should have provided for their protection in the same way as for that of diplomatic agents.

11. Seventhly, the draft articles sought to deal with the problem of the international protection of diplomats and other protected persons by means of international judicial co-operation, a method which offered only a doubtful and exceptional solution to that problem.

12. Eighthly, the terms in which that co-operation was defined in article 6 might have the effect of endangering the traditional institution of asylum. The article would oblige the State in whose territory the alleged offender was present either to extradite him or to prosecute him. That State would not even be allowed to exercise its sovereign right to decide the preliminary question whether

<sup>1</sup> See 1184th meeting, paras. 9 *et seq.*

<sup>2</sup> United Nations, *Treaty Series*, vol. 500, p. 96.

<sup>3</sup> *Op. cit.*, vol. 596, p. 262.

a *prima facie* case had been made for the institution of proceedings against the "alleged offender".

13. Ninthly, the unlawful seizure of aircraft, with which the 1970 Hague Convention<sup>4</sup> was concerned, was a new offence, until recently unknown to internal law, and an offence which was necessarily committed in the international sphere. Kidnapping or abduction, on the other hand, was a punishable offence long known to the internal law of all States. The fact that it was now being committed against diplomatic or consular agents did not mean that a new offence had emerged, but rather that the international legal order was being perturbed by the commission of crimes punishable under internal law. The problem could not be solved by means of international judicial co-operation, but only by strengthening the rules of general international law relating to the inescapable obligations of States towards persons to whom they owed special protection.

14. He wished to place it on record that for those reasons he would vote against the draft articles. He also wished to record his absolute rejection of the suggestion made in paragraph 8 of the introduction to chapter III of the draft report that the General Assembly "might consider it important" to extend the scope of the problem to be studied beyond the question specified in resolution 2780 (XXVI).

15. Mr. CASTAÑEDA said he wished to place it on record that he was opposed to the draft articles and would vote against their adoption for the reasons he had given on two previous occasions.<sup>5</sup>

16. The second version of the draft articles submitted by the Working Group was an improvement on the first, particularly with respect to article 9 on the question of statutory limitation, but his basic objections to the draft remained unaffected.

17. Mr. HAMBRO said that, in order to save the Commission's time, he would submit his observations on the draft articles in writing for inclusion in the commentary.

18. Mr. BARTOŠ said that he would vote in favour of the draft articles as a whole, subject to the observation that the protected persons covered by the articles had a duty under public international law to behave honourably towards the country and people of the State in whose territory they were; a person who provoked the local population could not demand special protection, though it was not for private persons to judge such behaviour.

19. Mr. YASSEEN said he thought that general international law already contained almost complete rules on the question of protected persons. Nevertheless, since the General Assembly had asked the Commission to study the question, he had collaborated in preparing a draft. The text which the Commission was about to adopt on first reading was, of course, provisional; he would vote in favour of its adoption as a whole, but would reserve his final position on all points. That position would depend on the comments submitted by governments.

20. Mr. ELIAS urged that the commentaries to the draft articles should be supplemented by an account of the reservations expressed by some members on such provisions as articles 2 and 9.

21. Mr. CASTAÑEDA supported that request. He hoped that all the views expressed during the discussion would be reflected in the commentary, including the important views put forward by Mr. Bedjaoui,<sup>6</sup> who was absent.

22. The CHAIRMAN said that oral or written comments submitted by members on the various articles would be incorporated in the commentaries.

23. Mr. SETTE CÂMARA reiterated his view that the scope of the articles as a whole was too limited. He would, however, vote in favour of the draft on the understanding that it constituted a first step in the consideration of the wider problem of terrorism in general.

24. Mr. EL-ERIAN said that he had unfortunately been prevented from attending the meetings at which the draft articles on the protection of diplomats had been discussed. He did not intend at that stage to define his position on the issues which had been raised or on the solutions adopted in the draft articles. He merely wished to reserve his position and to stress the provisional character of the draft, which had not been prepared by the methods usually employed by the Commission.

25. He would not, however, vote against the draft articles, first, because of their provisional character and, secondly, because the Commission had wished to comply with the General Assembly's request and had produced a draft with a view to eliciting government comments.

26. Mr. ALCÍVAR pointed out that, according to paragraph 7 of the introduction to chapter III of the report, the draft articles were not entirely provisional, since at the end of that paragraph it was stated that they were submitted to the General Assembly "while leaving to the Assembly the decision whether, in view of the urgency of the matter, the articles should be submitted forthwith to an international conference for consideration or returned to the Commission for additional study in the light of governmental comments". Clearly, the draft articles would become definitive if the General Assembly adopted the first course and submitted them forthwith to an international conference.

27. Mr. YASSEEN said that he had made his views on that point perfectly clear from the outset. He had agreed to item 5 of the agenda being dealt with in a manner which departed from the Commission's usual procedure in that no special rapporteur had been appointed for the topic. But at the same time he had stressed the need to obtain government comments so that the Commission could take them into account in its second reading of the draft. He therefore took exception to the passage in paragraph 7 of the introduction to chapter III, to which Mr. Alcívar had just referred. The General Assembly was, of course, entitled to take any decision it pleased, but the Commission, for its part, should not suggest any procedure involving abandonment of the

<sup>4</sup> See *International Legal Materials*, vol. X, number 1, January 1971, p. 133.

<sup>5</sup> See 1151st meeting, paras. 10 *et seq.* and 1183rd meeting, paras. 3 *et seq.*

<sup>6</sup> See 1183rd meeting, paras. 23 *et seq.*

well-tried methods it usually followed in preparing carefully studied drafts.

28. Mr. ELIAS said that he, too, had understood that the Commission would undertake a second reading of the draft articles on the basis of government comments.

29. Mr. AGO suggested that the problem should be solved by deleting the passage quoted by Mr. Alcívar. The General Assembly would still remain free to choose whatever course it thought best.

30. Mr. THIAM said he agreed with Mr. Yasseen and Mr. Elias. In his view, the commentary should make it clear that the Commission awaited government comments.

31. Mr. USHAKOV said that the passage of the draft report which had been criticized merely stated the right, which the General Assembly possessed in any case, to decide whether to submit the draft articles forthwith to an international conference or to return them to the Commission for further study in the light of government comments. He could accept Mr. Ago's proposal that the passage in question should be deleted, since that would not affect the General Assembly's rights in the matter in any way.

32. Mr. USTOR said he could accept Mr. Ago's proposal, but could also accept paragraph 7 as it stood. The matter was one of exceptional urgency, as was shown by the General Assembly's appeal to the Commission.

33. Mr. RAMANGASOAVINA proposed that the passage under discussion should be replaced by some such phrase as "and at the same time, to communicate them to governments for their comments".

34. Mr. SETTE CÂMARA said that he could accept Mr. Ago's proposal on the understanding that the General Assembly would decide on the best course to be followed. He could, of course, also have accepted the original text of paragraph 7. It should not be forgotten that extensive observations had already been received from Member States.<sup>7</sup> The Commission had, indeed, rarely embarked on a new topic with such a wealth of government comment at its disposal.

35. Mr. YASSEEN said he wished to dispel a possible misunderstanding. When the Commission had discussed the best method of dealing with item 5 of the agenda, two opposing views had been expressed. The first had been that the Commission should prepare a definitive set of draft articles and submit it to the General Assembly; the second had been that the Commission should follow its usual procedure and appoint a special rapporteur for the topic. He himself had then proposed the compromise solution that the Commission, while dispensing with the appointment of a special rapporteur, should only take its final decision on the draft articles on second reading, in the light of the comments submitted by governments.<sup>8</sup>

36. Mr. USHAKOV said he would be glad to see the General Assembly adopt the draft articles as the basis for an international convention, as that would enhance the Commission's prestige.

37. Mr. ALCÍVAR said that the General Assembly had never specified a time-limit for the formulation of the draft articles. In its resolution 2780 (XXVI), it had merely requested the Commission to study the question of the protection of diplomats "as soon as possible". The logical course was therefore to adopt a provisional set of draft articles and submit it to the General Assembly and to governments for their comments, in accordance with the method the Commission had always followed in preparing its drafts.

38. After a brief discussion, in which Mr. USTOR, Mr. QUENTIN-BAXTER and Mr. ROSSIDES took part, the CHAIRMAN suggested that the last part of paragraph 7, beginning with the words: "while leaving to the Assembly", should be replaced by the words "and to submit them to Governments for comment".

*It was so agreed.*

#### Article 1

*Article 1 was adopted unanimously.*

#### Article 2

39. Mr. QUENTIN-BAXTER said that he would abstain from voting on article 2, but would vote in favour of the draft as a whole. He would submit a statement of his reasons in writing for inclusion in the commentary.

*Article 2 was adopted by 15 votes to none, with 1 abstention.*

#### Article 3

*Article 3 was adopted unanimously.*

#### Article 4

*Article 4 was adopted unanimously.*

#### Article 5

*Article 5 was adopted unanimously.*

#### Article 6

40. Mr. RAMANGASOAVINA pointed out that the words "*action pénale*" in the French text should be replaced by the word "*poursuites*", as had already been done in the French text of article 5.

*Article 6 was adopted unanimously, subject to that correction to the French text.*

#### Article 7

*Article 7 was adopted unanimously.*

#### Article 8

*Article 8 was adopted unanimously.*

#### Article 9

*Article 9 was adopted by 12 votes to none, with 4 abstentions.*

41. Mr. TSURUOKA said that, although he had voted in favour of article 9, he wished to place it on record that he had serious misgivings about the content of that article.

#### Article 10

42. The CHAIRMAN, speaking as a member of the Commission, proposed that in paragraph 1 the conclud-

<sup>7</sup> Documents A/CN.4/253 and Add.1 to 5.

<sup>8</sup> See 1151st meeting, para. 43.

ing word, "prosecution", should be replaced by the word "proceedings", so as to require the transmission not only of evidence for the prosecution, but also of evidence that could serve for the defence of the accused person.

*It was so agreed.*

*Article 10, as amended, was adopted unanimously.*

#### Article 11

*Article 11 was adopted unanimously.*

#### Article 12 (alternatives A and B)

43. Mr. QUENTIN-BAXTER said that the commentary should make it clear that the Commission did not endorse either of the two alternatives. It should also stress that those texts did not have the same standing as articles 1 to 11.

44. Mr. BARTOŠ and Mr. USHAKOV said that they would abstain from voting on article 12.

*Article 12 was adopted by 13 votes to none, with 3 abstentions.*

45. Mr. ALCÍVAR said he wished to place it on record that he had not participated in the voting on the individual articles, because he objected to the whole approach taken in the draft.

46. The CHAIRMAN invited the Commission to vote on the draft articles as a whole.

47. Mr. RAMANGASOAVINA said that the introduction should stress that the purpose of the draft was to ensure not only the punishment, but also the prevention of the crimes in question.

48. Mr. BARTOŠ said that he would vote in favour of the draft articles as a whole, but he wished to record his regret that the draft contained no rule stating that protected persons had a duty to behave honourably towards the country in which they were.

49. The CHAIRMAN said that the various views expressed would be reflected in the commentaries.

50. If there were no further comments, he would take it that the Commission agreed to adopt the draft articles as a whole, the contrary positions of Mr. Alcívar and Mr. Castañeda having been placed on record.

*It was so agreed.*

51. The CHAIRMAN invited the Commission to consider the commentaries to the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (A/CN.4/L.191).

#### Commentary to article 1

52. Mr. HAMBRO said the point had been made in the Commission that, in view of the definition of an internationally protected person, no protection was afforded to diplomats or other officials outside their duty station.

53. The CHAIRMAN suggested that, in order to cover that point, the commentary should state that some members had suggested that protection should be afforded to diplomats wherever they might be, but that other members had considered that, since the Commission was working within the framework of the Conventions

in diplomatic and consular relations, it could not go beyond the scope of those Conventions.

*It was so agreed.*

54. Mr. QUENTIN-BAXTER suggested that the commentary should mention the observation by one member of the Commission that the draft articles would not cover officials of the International Committee of the Red Cross, for example.

*It was so agreed.*

*The commentary to article 1 was approved, subject to the proposed additions.*

#### Commentary to article 2

55. Mr. ELIAS suggested that it should be made clear, in paragraph (5) of the commentary, that some members of the Commission had considered that there was no need to include threats to commit an attack. The commentary should also mention the general reservations expressed by some members of the Commission about the drafting of article 2.

*It was so agreed.*

*The commentary to article 2 was approved, subject to the proposed additions.*

#### Commentary to article 3

56. Mr. ROSSIDES said that the draft articles as a whole laid much more stress on the punishment of offenders than on prevention of the crimes in question. The commentary should mention the importance of prevention and the need for practical measures to protect diplomats in places where they were particularly at risk.

57. The CHAIRMAN suggested that something might be added to the end of paragraph (3) to reflect the concern expressed by Mr. Rossides, while making it clear that such protective measures fell outside the scope of the present articles. If there were no further comments, he would take it that, on that understanding, the Commission approved the commentary to article 3.

*It was so agreed.*

#### Commentaries to articles 4 and 5

*The commentaries to articles 4 and 5 were approved.*

#### Commentary to article 6

58. Mr. ELIAS suggested that, in view of the controversial nature of article 6, the commentary should reflect more fully some of the doubts and concern expressed by certain members of the Commission, which had affected the final formulation of the article.

*It was so agreed.*

*The commentary to article 6 was approved, subject to the proposed amplification.*

#### Commentary to article 7

59. The CHAIRMAN suggested that the commentary to article 7, too, should be amplified to describe in detail some of the misgivings expressed in the Commission.

*It was so agreed.*

*The commentary to article 7 was approved, subject to the proposed amplification.*

*Commentary to article 8*

60. The CHAIRMAN suggested that the commentary to article 8 should also be amplified.

*It was so agreed.*

*The commentary to article 8 was approved, subject to the proposed amplification.*

*Commentary to article 9*

61. The CHAIRMAN suggested that the commentary to article 9 should be revised, in order to convey the concern expressed by several members of the Commission regarding the problem of statutory limitation.

*It was so agreed.*

*The commentary to article 9 was approved, subject to the proposed revision.*

*Commentaries to articles 10 and 11*

*The commentaries to articles 10 and 11 were approved.*

*Commentary to article 12*

62. The CHAIRMAN suggested that the commentary should mention the fact that some members of the Commission had expressed doubts about the need to include a provision on the settlement of disputes in the draft articles, on the grounds that such disputes were unlikely to arise and, even if they did, would not readily lend themselves to the application of settlement procedures. The commentary should also indicate the reasons given by members of the Commission for preferring alternative A or alternative B.

*It was so agreed.*

*The commentary to article 12 was approved, subject to the proposed additions.*

*Section B of Chapter III as amended, was approved.*

*A. Introduction*

63. The CHAIRMAN invited the Commission to consider the introduction to Chapter III, containing a summary of the Commission's proceedings and a discussion of the scope, purpose and structure of the draft. A decision had already been taken to amend paragraph 7<sup>9</sup> and some suggestions had been made for amendment of the section dealing with the scope, purpose and structure of the draft. He suggested that a reference should be made in paragraph 6 to the fact that some members would have preferred to follow the Commission's traditional method of dealing with a subject, but that the majority had agreed to the appointment of a special Working Group.

*It was so agreed.*

64. Mr. HAMBRO said he thought the report did not adequately reflect the doubts that many members of the Commission had expressed about the utility of the whole project. Many members of the Commission had agreed to the adoption of the draft articles only because the Commission had been specifically requested by the General Assembly to help, in its technical capacity, in the preparation of a draft.

65. The CHAIRMAN suggested that, to meet Mr. Hambro's point the introduction should mention the fact some members of the Commission had considered that the net results of a convention of the kind proposed would not justify its adoption.

*It was so agreed.*

*Section A, as amended, was approved.*

*Chapter III, as a whole, as amended, was approved.*

*Chapter IV*

## PROGRESS OF WORK ON OTHER TOPICS (A/CN.4/L.190)

66. Mr. USTOR proposed that the fifth sentence of paragraph 5 should be deleted as being unnecessarily detailed.

*It was so agreed.*

67. The CHAIRMAN suggested that the words "conventional stipulation" in the sixth sentence of paragraph 5 should be replaced by the words "treaty provision".

*It was so agreed.*

*Chapter IV, as amended, was approved.*

*Chapter V*

## OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.190 and L.191/Add.1)

68. The CHAIRMAN suggested that the words "at a future session" in the second sentence of paragraph 1 should be deleted.

*It was so agreed.*

69. Mr. USTOR pointed out that, while the most-favoured-nation clause was mentioned in paragraph 2 as being on the Commission's agenda for its next session, there was no mention of that subject in paragraph 3. He therefore suggested that the following words should be added at the end of the first sentence of paragraph 3: "and to devote some time to the study of the most-favoured-nation clause".

*It was so agreed.*

70. Mr. ELIAS pointed out that the representative of the Asian-African Legal Consultative Committee had stated that the time and place of the Committee's fourteenth session would be notified later. Paragraph 12 should be amended accordingly.

*It was so agreed.*

71. The CHAIRMAN, referring to paragraph 31, suggested that the dates for the Commission's next session should be from 7 May 1973 to 13 July 1973.

*It was so agreed.*

72. Mr. HAMBRO suggested that, in paragraph 33, no reference should be made to the actual amount of the grant by the Brazilian Government for the first Gilberto Amado Memorial Lecture.

*It was so agreed:*

*Chapter V, as amended, was approved.*

The meeting rose at 6.20 p.m.

<sup>9</sup> See para. 38 above.