

Document:-  
**A/CN.4/L.188 and Add.1**

**Second report of the Working Group: Revised draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons - reproduced in A/CN.4/SR.1191 and SR.1192**

Topic:  
**Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law**

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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.*<sup>6</sup>

The meeting rose at 1 p.m.

<sup>6</sup> 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 Waldoock, 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.<sup>1</sup> 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.

<sup>1</sup> 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.<sup>2</sup>

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.

<sup>2</sup> 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<sup>3</sup>

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.

<sup>3</sup> 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,<sup>4</sup> 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 cir-

cumstances 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

<sup>4</sup> 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.<sup>5</sup> 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.*<sup>6</sup>

#### ARTICLE 3<sup>7</sup>

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.

<sup>5</sup> *P.C.I.J.*, series A, No. 10, p. 92.

<sup>6</sup> For resumption of the discussion see 1193rd meeting.

<sup>7</sup> 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<sup>8</sup>

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<sup>9</sup>

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<sup>10</sup>

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.

<sup>8</sup> For previous discussion see 1186th meeting.

<sup>9</sup> For previous discussion see 1186th meeting, paras. 3 *et seq.*

<sup>10</sup> 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.<sup>11</sup>

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 extraditer 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.<sup>12</sup>

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.

## 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.

### 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<sup>1</sup>

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

<sup>11</sup> See *International Legal Materials*, vol. X, 1971, number 1, pp. 134-135, article 7 and number 6, p. 1154, article 7.

<sup>12</sup> See 1186th meeting, para. 32 and 1188th meeting, para. 7.

<sup>1</sup> For previous discussion see 1188th meeting.



offences between themselves subject to the procedural provisions of the law of the requested State.

4. An extradition request from the State in which the crimes were committed shall have priority over other such requests if received by the State in whose territory the alleged offender has been found within six months after the communication required under paragraph 1 of article 5 has been made.

2. The first sentence of paragraph 1 had been reworded because the text in the Working Group's first report (A/CN.4/L.186) failed to take account of the fact that many of the crimes described in article 2 would already be covered in existing extradition treaties by the standard article listing extraditable offences. Hence the use in the revised text of the word "listed", which made it clear that the reference was to such standard clauses and not to any other provisions of extradition treaties which might set conditions for, or limitations on, extradition.

3. In paragraphs 1 and 3, the expression "extraditable crimes" had been replaced by "extraditable offences", which was the expression customarily used in extradition treaties.

4. In response to the remarks made by Mr. Tammes and Mr. Elias,<sup>2</sup> paragraph 2 had been reworded so as to clarify the relationship between the provisions of articles 6 and 7. The language now used made it clear that the requested State had the exclusive right to decide whether to extradite the alleged offender or to prosecute him.

5. In both paragraphs 2 and 3, the reference to the "conditions provided for by the law of the requested State" had been replaced by a reference to the "procedural provisions" of that law. The intention had, in fact, been to refer to the procedure that would be put into effect in the absence of treaty provisions on extradition.

6. Lastly, in paragraph 4, the words "over other such requests" had been inserted after the words "shall have priority", in order to make it clear that the priority operated only as between two or more States requesting extradition.

7. Mr. QUENTIN-BAXTER thanked the Working Group for having taken a wide variety of suggestions into account and having introduced improvements that made the text more generally acceptable.

*Article 7 was approved.*

#### ARTICLE 8<sup>3</sup>

8. The CHAIRMAN invited the Commission to consider the revised text of article 8 submitted by the Working Group, which read:

##### *Article 8*

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

9. The only change made in the earlier text (A/CN.4/L.186) had been to replace the words "fair trial" by the words "fair treatment". That broad expression was

intended to cover such matters as humane treatment for the alleged offender while under arrest and the fair conduct of all legal proceedings.

*Article 8 was approved.*

#### ARTICLE 9<sup>4</sup>

10. The CHAIRMAN invited the Commission to consider the revised text of article 9 submitted by the Working Group, which read:

##### *Article 9*

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

11. The Working Group had taken into account the objections raised in the Commission to the idea of eliminating statutory limitations altogether, as provided in the original text of article 9 (A/CN.4/L.186). It had therefore decided to drop that idea and to substitute the formula put forward by Mr. Hambro.<sup>5</sup> Accordingly, the text of article 9 now specified that the period of statutory limitation for the crimes set forth in article 2 would be that fixed for the most serious crimes under internal law.

12. It had been considered that the draft should include some provision on statutory limitation in order to ensure that prosecution was not prevented in countries where the period of limitation for some of the offences coming under article 2 was short. The crimes set forth in article 2 were usually committed by persons who operated underground and were difficult to trace, and in view of the serious implications of those crimes for the international community, national law enforcement authorities should be allowed as long as possible to search for the criminals.

13. Mr. ELIAS said he was not in favour of including a provision on statutory limitation in the draft, so he could not support article 9.

14. Mr. USTOR pointed out that criminal law drew a distinction between the period of statutory limitation for the prosecution of an offence and the period of statutory limitation for the execution of a sentence.

15. The CHAIRMAN said that the scope of article 9 was confined to the institution of legal proceedings. No attempt had been made to enter into the complex question of the periods of limitation which existed in many countries for the execution of sentences.

16. Mr. RAMANGASOAVINA reminded the Commission that, during the consideration of article 6 at the previous meeting, he had pointed out that the replacement of the word "*poursuites*" by the words "*action pénale*" in the French text was not justified, since the latter expression excluded civil proceedings.<sup>6</sup> The use of the words "*action pénale*" would be admissible in article 9, since the reference to internal law covered civil proceedings, but in the interests of concordance with the English text, it would be better to revert to the word "*poursuites*".

<sup>2</sup> See 1186th meeting, para. 26 and 1188th meeting, para. 27.

<sup>3</sup> For previous discussion see 1189th meeting.

<sup>4</sup> For previous discussion see 1189th meeting, paras. 29 *et seq.*

<sup>5</sup> See 1189th meeting, para. 32.

<sup>6</sup> See previous meeting, paras. 77 and 79.

17. Mr. REUTER said that in the French text it would be more elegant to replace the words “*en matière de*” by “*relative au*”.

18. With regard to the substance, if article 9 was to achieve its purpose in all cases, the Commission itself should fix the period of limitation, which would then be the same for all States, rather than leave it to each State’s internal law. That would eliminate the possibility that there might be neither extradition nor prosecution if a State which decided to prosecute and not to extradite, as it was entitled to do—and which thereby met its obligation under the treaty—was precluded from prosecuting because the period of limitation had expired. He could have accepted the absence of statutory limitation if the offences covered by the draft articles had been more strictly defined. But since that was not the case, the formula proposed in article 9 was probably the only one on which the Commission could agree.

19. Mr. TSURUOKA said that he could accept article 9 as now proposed, but only as a compromise. The meaning was not clear. It was hard to decide whether “the most serious crimes” meant those specified in the State’s internal law or those set forth in article 2, paragraph 1 (b), and whether the statutory limitation applied to the former or the latter. He acknowledged, however, that the Commission did not have time to prepare a new text and he would therefore be willing to accept the one proposed, on condition that the meaning was explained in a commentary.

20. Mr. HAMBRO said that the problems involved were perhaps not as complicated as some of the remarks made during the discussion might suggest. In most countries, the criminal law divided criminal offences into various categories, classified according to the penalties applicable. The purpose of article 9, in its present form, was simply to ensure that the crimes set forth in article 2 should be classified in the category of the most serious crimes for purposes of the application of the provisions of internal law relating to statutory limitations.

21. The rule stated in article 9 had an important corollary. Where the internal law of a country specified that there was no statutory limitation for the prosecution of the most serious category of crimes, it followed that, in the case of that country, there would also be no statutory limitation for the prosecution of the crimes set forth in article 2.

22. At the same time, the present text of article 9 provided a safeguard for those States which believed strongly that, for reasons of general policy, there must be a statutory limitation on the prosecution of all crimes. A provision on the lines of article 9 would permit such States to accept the draft without making any reservations.

23. He proposed that a full explanation of all those points should be included in the commentary.

24. Mr. SETTE CÂMARA said he fully agreed with the remarks of the previous speaker.

25. The CHAIRMAN said that, if there were no further comments, he would assume that the Commission agreed to approve article 9 on the understanding that its purpose would be explained in the commentary as suggested by Mr. Hambro.

*It was so agreed.*

#### ARTICLE 10<sup>7</sup>

26. The CHAIRMAN invited the Commission to consider the revised text of article 10 submitted by the Working Group, which read:

##### *Article 10*

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

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

27. The only change made in the previous text (A/CN.4/L.186) had been to replace the words “in particular by supplying all evidence...”, in paragraph 1, by the words “including the supply of all evidence...”. That amendment had been made to clarify the meaning; no change of substance was involved.

28. Mr. USTOR suggested that the word “crimes” in paragraph 1 should be replaced by the phrase “crimes set forth in article 2”, to bring the wording of article 10 into line with that of articles 7, 8 and 9.

29. Mr. REUTER suggested that, in the French text, the words “*y compris*” should be replaced by the word “*notamment*”.

30. In paragraph 2, he proposed that the words “in criminal matters” be deleted. Since the idea of judicial assistance covered more than purely criminal proceedings he would prefer more general wording.

31. Mr. USHAKOV supported that proposal and pointed out that the English text should be amended to read “mutual judicial assistance”.

32. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 10 with the amendments proposed by Mr. Ustor, Mr. Reuter and Mr. Ushakov.

*It was so agreed.*

#### ARTICLE 11<sup>8</sup>

33. The CHAIRMAN invited the Commission to consider the revised text of article 11 submitted by the Working Group, which read:

##### *Article 11*

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

34. The only change made in the earlier text (A/CN.4/L.186) had been the replacement of the words “judicial proceedings” by “legal proceedings”, so as to cover not only court proceedings, but the preliminary hearing or investigation as well.

*Article 11 was approved.*

<sup>7</sup> For previous discussion see 1189th meeting, paras. 54 *et seq.*

<sup>8</sup> For previous discussion see 1189th meeting, paras. 60 *et seq.*

ARTICLE 12<sup>9</sup>

35. The CHAIRMAN invited the Commission to consider the alternative texts for article 12 submitted by the Working Group, which read:

*Article 12**Alternative A*

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

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

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

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

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

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

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

*Alternative B*

1. Any dispute between two or more Parties concerning the interpretation or application of the present articles which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each Party may at the time of signature or ratification of these articles or accession thereto, declare that it does not consider itself

bound by the preceding paragraph. The other Parties shall not be bound by the preceding paragraph with respect to any Parties having made such a reservation.

3. Any Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary Governments.

36. The Working Group had decided to submit two alternative texts for article 12 to the Commission. Alternative A was based on the conciliation method and corresponded to article 12 in the draft contained in the Working Group's first report (A/CN.4/L.186); an article of that kind had been included in both the Hague and the Montreal Conventions.<sup>10</sup> Alternative B was based on the system of arbitration and judicial settlement. It would be for the Commission to decide which of those texts it wished to submit to the General Assembly. It could, of course, decide to submit both and leave it to governments to choose between them.

37. Mr. YASSEEN said that acceptance of compulsory jurisdiction was a highly political matter, which depended on the circumstances of the case and on the attitude of States towards international jurisdiction. Alternatives A and B should both be submitted to governments, since the Commission could not choose for them.

38. The development of conciliation as a method of settling disputes was worth noting. At first essentially optional, conciliation was acquiring a compulsory character without thereby becoming unacceptable to States, because its conclusions always remained recommendations. Although the recommendations were not binding, they carried a moral authority which put pressure on States to reach a solution. Because of the new function assigned to it—the settlement of purely legal matters relating to treaties—conciliation was becoming a procedure similar to expertise, whereby a body specially set up for the purpose was asked to give a ruling on a legal problem. That new trend in conciliation should be clearly brought out in the article.

39. Mr. HAMBRO agreed with Mr. Yasseen that it would be wiser to submit both alternatives to governments. He personally was in favour of the International Court of Justice having jurisdiction, or, if that was not accepted, the solution proposed in alternative B, because conciliation, as provided for in alternative A, resulted only in recommendations and not in final solutions.

40. Mr. REUTER said that he too was in favour of submitting both alternatives to governments. He had always urged the Commission, whose role was essentially a technical one, to propose alternative texts and he regretted that it had done so only in the case of article 12.

41. With regard to the substance of the article, he had some comments to make on the two versions proposed. As to alternative A, it would be better to say in paragraph 3 that the third member should be appointed by the Secretary-General, "or failing him, by the President of the International Court of Justice". Where conciliation commissions were concerned, it had been the practice, since the United Nations Conference on the Law of

<sup>9</sup> For previous discussion see 1189th meeting, paras. 65 *et seq.*

<sup>10</sup> See *International Legal Materials*, vol. X, 1971, number 1, p. 133 and number 6, p. 1151.

Treaties, to give the Secretary-General a role instead of the President of the International Court. He had as much confidence in the Secretary-General as in the President of the International Court, but he had already drawn attention, in vain, when the Commission had been preparing the draft articles on relations between States and international organizations, to a very important point, namely, that the Secretary-General could not be both a judge and a party.<sup>11</sup> Since the present draft articles were intended to protect representatives of international organizations, who might be officials, agents or representatives of the United Nations, there could be many situations in which the Secretary-General might well prefer, for reasons of natural discretion which were quite understandable, that the appointment should be made by the President of the International Court of Justice.

42. As to alternative B, the text could be further elaborated. The tradition that what had been done in the past should be respected, even in the case of conventions of secondary importance such as the Montreal Convention, was not always a good one. For arbitration, a more flexible procedure should have been proposed, leaving it to the parties to choose between arbitration and, if they agreed, recourse to the International Court of Justice, and machinery should have been provided for to make good the failure of one party to play its part in appointing the arbitral tribunal. States might be willing to accept arbitration, but not the International Court of Justice. That was a fact. Whether they were right or wrong was not for the Commission to decide. In any event, a more fully perfected solution would do credit to the Commission, which was above all a technical body.

43. Mr. YASSEEN said he agreed that the Secretary-General should not be responsible for appointing the third member of the conciliation commission. That was more a matter for the President of the International Court of Justice, since one of the Court's main tasks was the interpretation of treaties.

44. With regard to alternative B, the arbitration procedure provided for was not satisfactory, because there was no provision governing the appointment of arbitrators or the measures to be taken if one party did not appoint its arbitrator. If the Commission really wished to establish compulsory jurisdiction, the principle it should lay down was that of recourse to the International Court of Justice as the principal judicial organ of the United Nations, the possibility of resorting to arbitration being left open to the parties.

45. The CHAIRMAN said he fully agreed that alternative B was not an ideal draft clause on arbitration and judicial settlement. It had, however, been included in the Hague and Montreal Conventions and could be used at the present stage to elicit the views of governments. Once governments had decided which of the two methods of settlement of disputes they preferred, the Commission could embark on the difficult task of improving the text of alternative A or alternative B, as the case might be.

46. One suggestion which had been made during the present discussion might perhaps be embodied in alternative A, however, namely, that paragraph 3 should be amended so as to entrust the President of the International Court of Justice with the task of appointing members of the conciliation commission, as an alternative to, or in place of, their appointment by the Secretary-General.

47. Mr. USHAKOV said he thought it was too late to try to amend a text which followed the wording of the corresponding provision in the draft articles drawn up by the Commission at its previous session.<sup>12</sup> Besides, that would give the impression that the previous text was not satisfactory. If governments wished to amend it, they would propose the necessary changes.

48. With regard to Mr. Reuter's comment on the role of the Secretary-General, it was of little importance in a dispute between States whether the person involved was an international official. The Secretary-General would only be called upon to act if the parties failed to do so. It would therefore be better not to change the text of alternative A.

49. Alternative B followed the Hague and Montreal Conventions and it would be too long and complicated a task for the Commission to draft a new text.

50. Mr. ELIAS proposed that alternatives A and B should be submitted unchanged to the General Assembly and to governments. It was undesirable for the Commission to try to introduce into those texts amendments which might hinder the acceptance of the whole draft. The experience of the United Nations Conference on the Law of Treaties had shown that issues relating to the settlement of disputes could deter States from accepting the otherwise useful substantive provisions of a draft. When governments had made their choice between the two texts, the Commission could attempt to improve on the one selected.

51. The commentary to article 12 should, however, mention the various suggestions made during the present discussion. In particular, in regard to alternative A, reference should be made to the proposal that the task of appointing members of the conciliation commission should be entrusted to the President of the International Court of Justice instead of the Secretary-General of the United Nations, or, as an alternative, that that task should be entrusted to the President of the Court if the Secretary-General declined to make the appointment.

52. Mr. HAMBRO said he fully supported Mr. Elias' remarks.

53. Mr. YASSEEN said that while it was desirable to respect what had been done in the past, that was no reason for holding up progress if an improvement was possible. To entrust the President of the International Court of Justice with the task of appointing members of the conciliation commission would be to vest that power in someone who was in a position to exercise it, because it came within the scope of his main functions. He him-

<sup>11</sup> See *Yearbook of the International Law Commission*, 1971, vol. I, p. 335, paras. 47 *et seq.*

<sup>12</sup> See Document A/8410/Rev.1, chapter II, section D, article 82, reproduced in *Yearbook of the International Law Commission*, 1971, vol. II, Part One.

self would not hesitate to make that change in the text, especially as circumstances too had changed since the drafting of the Vienna Convention on the Law of Treaties.

54. Alternative B was not the solution adopted in the Vienna Convention. When the Vienna Conference had accepted compulsory jurisdiction, it had accepted, as a general principle, that of the International Court of Justice, leaving the parties free to reach agreement to resort to arbitration. That was the solution which, under the Vienna Convention, was applied to disputes concerning *jus cogens*,<sup>13</sup> and which should also be adopted in the present case if the parties were to be allowed a choice in the matter of recourse to compulsory jurisdiction.

55. Mr. REUTER said he agreed that at that stage the Commission could not start rewriting texts on the settlement of disputes. He could support Mr. Elias' proposal that certain questions should be dealt with in a commentary, on condition that the commentary stated frankly that it was not for the Commission to make proposals at the present stage on procedures for the settlement of disputes and that it could well have omitted article 12, but that in order to elicit comments from governments it had nevertheless reproduced the texts appearing in previous drafts. In that way the Commission would avoid sponsoring a text it had not drawn up itself—alternative B—or a text which was too recent to carry weight—alternative A.

56. He was sorry to have to disagree with Mr. Ushakov, but he could not believe that the Secretary-General would not disclaim competence if he was required to appoint a member to a conciliation commission called upon to settle a dispute between States arising out of a case in which an international official was the victim and in which, consequently, the interests of the Organization, and hence those of the Secretary-General, were involved. A formula such as "the Secretary-General, or, failing him, by the President of the International Court of Justice", would leave the Secretary-General free to avoid an obligation which it would be morally difficult for him to assume, since he could ask the President of the International Court of Justice to make the appointment in his place.

57. Mr. USHAKOV said it was equally conceivable that the President of the International Court of Justice might be concerned with a situation in which a member of the Court or its secretariat was involved. There was therefore no reason to provide for a choice between him and the Secretary-General. It would be better to leave the text as it was.

58. Mr. USTOR said that alternative A was based on article 82 of the Commission's 1971 draft on the representation of States in their relations with international organizations, a text which was likely to receive considerable support in the General Assembly. He would therefore favour including that text in the present draft

and mentioning other alternatives, such as that embodied in alternative B, in the commentary for the consideration of governments.

59. Another possible course was not to include any provision on the settlement of disputes, which was a delicate political matter. In any case, a provision of that kind belonged to the final clauses and the Commission did not usually attach final clauses to its drafts.

60. Mr. QUENTIN-BAXTER said he supported the method of arbitration and judicial settlement embodied in alternative B. A conciliation procedure such as that embodied in alternative A was not suitable for dealing with disputes on the interpretation of a legal text.

61. That being said, he hoped that, if the Commission decided to submit alternatives A and B to governments, it would do so on a different basis from the rest of the draft. It would be generally agreed that neither of those texts measured up to the Commission's standards of drafting; they were adequate only for the purpose of determining the preference of governments for one or the other method of settling disputes.

62. The CHAIRMAN said that there appeared to be general support for the proposal by Mr. Elias that alternatives A and B should be submitted to the General Assembly with a suitable commentary which would state, among other things, that the Commission did not endorse either of those texts. The commentary would also mention the various suggestions for improvements, such as the inclusion of a reference to the President of the International Court of Justice in paragraph 3 of alternative A. If there were no further comments, he would take it that the Commission agreed to adopt that proposal.

*It was so agreed.*

#### Programme of work for the twenty-fifth session

63. The CHAIRMAN said that the group consisting of the officers of the Commission, special rapporteurs and former chairmen had discussed the programme of work for the next session and arrived at certain conclusions, on the assumption that the Commission would be able to complete its work on the draft articles on items 1 (a) and 5 of the agenda at the present session.

64. The first topic that would be taken up at the twenty-fifth session would be State responsibility, followed by succession of States in respect of matters other than treaties and the most-favoured-nation clause. It was hoped that the Commission would also be able to allocate a brief period to the discussion of the Special Rapporteur's report on the question of treaties concluded between States and international organizations or between two or more international organizations, and possibly to a discussion of the Commission's long-term programme of work.

65. Bearing in mind that the Commission had been requested, by General Assembly resolution 2780 (XXVI), to deal with the topic of the law of the non-navigational uses of international watercourses, it had also been agreed that the Secretariat should be requested to begin compiling relevant material, with specific reference to problems of pollution of such watercourses. It was

<sup>13</sup> 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. 298, article 66 and p. 301, annex.

desirable that the Commission should move ahead with the study of that aspect of the topic in view of the great importance being attached by the international community to environmental problems.

66. Mr. BARTOŠ said that the Commission should not give priority to the law of the non-navigational uses of international watercourses at the expense of other topics which were already high on its agenda, such as State responsibility and succession of States in matters other than treaties.

67. The CHAIRMAN assured Mr. Bartoš that there was no question of the Commission giving priority to the law of the non-navigational uses of international watercourses. The study of the relevant background material would take several years and the Commission could not begin to consider the topic before that preliminary work was done. For the time being, the only decision to be taken was the decision to request a Secretariat study.

68. Mr. BARTOŠ said that he was satisfied with that reply.

69. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to endorse the proposals on the programme for the next session, and to request the Secretariat to compile materials on the law of the non-navigational uses of international watercourses.

*It was so agreed.*

70. The CHAIRMAN said he had an announcement to make concerning the circulation of reports by Special Rapporteurs. Those reports would have to be submitted by 1 February 1973 in order to be circulated in all the official languages in time for the Commission's next session. If a report was submitted after that date, there was a risk that all the language versions might not be ready in time, because of the pressure of other work and the shortage of staff in the language services of the Secretariat resulting from the economy measures taken by the United Nations. As for sections of reports submitted during the session, the United Nations Office at Geneva, with the staff at its disposal, could not give any assurance that they could be translated in time for consideration by the Commission.

#### 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 4; 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 1190th meeting)*

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

##### ARTICLES 22 and 22 (bis)

71.

##### Article 22

##### *Succession of States in respect of boundary settlements*

##### Alternative A

1. The continuance in force of a treaty which establishes a boundary is not affected by reason only of the occurrence of a succession of States in respect of a party.

2. In such a case the treaty is considered as in force in respect of the successor State from the date of the succession of States, with the exception of any provisions which by reason of their object and purpose are to be considered as relating only to the predecessor State.

##### Alternative B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of a boundary settlement which has been established by a treaty.

2. In such a case the boundary settlement is to be considered as comprising any provisions of the treaty relating to the boundary.

##### Article 22 (bis)

##### *Succession in respect of certain treaties of a territorial character*

##### Alternative A

1. The continuance in force of a treaty is not affected by reason only of the occurrence of a succession of States in respect of a party if the treaty creates obligations and rights relating to the user or enjoyment of territory of a party and it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely or for a specified period to the particular territory in question and such rights either:

(a) Correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality; or

(b) To be accorded to a group of States or to States generally.

2. In such a case the treaty is considered as in force in respect of the successor State from the date of the succession of States.

3. "Territory" for the purposes of the present article means all or any part of the land, internal waters, territorial sea, contiguous zone, seabed or air space of the party in question.

##### Alternative B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of obligations and rights arising from a treaty and relating to the user or enjoyment of territory of a party if it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely or for a specified period to the particular territory in question and such rights either:

(a) Correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality; or

(b) To be accorded to a group of States or to States generally.

2. In such a case the obligations and rights in question are to be considered as subject to any provisions of the treaty relating to such obligations or rights.

3. "Territory" for the purposes of the present article means all or any part of the land, internal waters, territorial sea, contiguous zone, seabed or air space of the party in question.

72. The CHAIRMAN invited the Special Rapporteur to introduce articles 22 and 22 (bis) of his draft (A/CN.4/256/Add.4).

73. Sir Humphrey WALDOCK (Special Rapporteur) said that he had begun his commentary with an analysis of the literature on succession in respect of boundary settlements and other territorial treaties, in order to see if any clear guidelines could be derived from that source before considering the practice. Some modern writers did not recognize that there was any category of treaties

that constituted an exception to the "clean slate" principle and the "moving treaty-frontiers" rule, treating boundaries simply as a question of situations and asserting that the principle of self-determination equally required that localized treaties should not be succeeded to automatically any more than other treaties. There was, however, a general current of opinion that such categories did exist, even though writers gave no clear guidance as to the treaties which fell within them. He had then briefly examined the proceedings of international tribunals and some of the practice. He suspected that there were other cases where no question had arisen because the parties had simply assumed the continuance of treaties. As such cases were not normally included in the literature it was possible that there was further practice which would provide a stronger basis for developing some categories of treaties constituting an exception.

74. Although the two articles were closely related, he hoped the Commission would consider separately the two problems of boundary treaties and other territorial treaties. In his view, it was essential that the draft articles should contain some kind of provision on the question of boundaries. It would therefore be useful to know whether the Commission wished to include a provision along the lines of article 22 and, if so, whether, in its view, it was the situation or the treaty that constituted the exception. Similarly, in regard to article 22 (*bis*), he wished to know whether the Commission accepted that category of treaty, what it thought to be the nature of the treaties falling within it and whether it was the régime established by the treaty that was the exception or whether it was the treaty itself that continued in force.

75. Mr. TABIBI said that while he did not intend to comment on draft articles 22 and 22 (*bis*) in detail, he wished to state at the outset that neither of the alternatives dealing with the question of boundary settlements was acceptable to him and that he also had some reservations on article 22 (*bis*). He did not accept the permanency of boundary treaties and the succession of States in respect of such treaties if they were not lawful in the first place, and if their continuation was a source of tension and political instability. Nor did he believe that it was possible to lump other territorial treaties together and create a single rule that could be applied to all of them.

76. In that connexion, he favoured the more cautious approach adopted by Sir Gerald Fitzmaurice in regard to both multilateral and bilateral territorial treaties, quoted by the Special Rapporteur in paragraph (3) of his commentary. Modern international law did not give prominence to the real right attached to the territory as such, but to the right attached to the people of the territory. Obviously, where localized or territorial treaties had been legally concluded and were in the interests of a group of States, or of States generally, they should be respected; but the case of a bilateral treaty, which was subject to the tacit agreement of two States, was quite different. He fully supported the view of Professor Rousseau, referred to in paragraph (6) of the commentary, that, in the case of boundaries, succession occurred only through the tacit agreement of the neighbouring State. Where there was a lawful boundary settlement with the tacit agreement of the neighbouring States, no dispute

occurred; but where that was not the case, it should not be for other nations to impose the treaty contrary to the wishes of the State concerned.

77. Moreover, when the International Law Association had adopted its 1968 resolutions on State succession,<sup>14</sup> it had made no distinction between treaties of a territorial character and other kinds of treaties, and thus had not endorsed the doctrine that territorial treaties were binding *ipso jure* upon a successor State. The International Law Commission, too, should be extremely cautious and refrain from establishing rules that might create fresh problems.

78. Article 22 had been formulated by analogy with article 62, paragraph 2 (*a*), of the Vienna Convention on the Law of Treaties, which excepted boundary treaties from the fundamental change of circumstances rule. He merely wished to remind the Commission that the Vienna Convention was concerned with the validity of treaties and the rights of third States. It had been made quite clear at the United Nations Conference on the Law of Treaties that the exception in article 62, paragraph 2 (*a*), in no way impeded the independent operation of the principle of self-determination, and the article had been accepted on the understanding that it dealt only with lawful boundary treaties.<sup>15</sup> In his view, to apply that provision in a different context and in a different convention would create more problems than it would solve. Article 22 (*bis*) would be acceptable only if the Commission carefully differentiated between various categories of localized and territorial treaties, and included only those which had a real and permanent character and were in the interests of a group of States or of States generally.

79. The Special Rapporteur had referred, in paragraph (22) of his commentary, to the endorsement by the newly independent States of Africa, in article III, paragraph 3, of the Charter of the Organization of African Unity,<sup>16</sup> of the principle of respect for established boundaries. That paragraph merely proclaimed a well-known principle of international law, "respect for the sovereignty and territorial integrity of each State", which was also embodied in the Charter of the United Nations. Moreover, the question of African boundaries was a special case, because they had been established to serve the interests of the colonial Powers and not on the basis of geographical, ethnic, racial, linguistic or historical factors. To alter African boundaries would shatter the whole fabric of the African States, but it was wrong to apply the case of Africa to the rest of the world. It was argued by some jurists that in Latin America the principle of *uti possidetis* was applied, but that was clearly not the case, since most boundary disputes there had been settled by arbitration. Moreover, many jurists believed that

<sup>14</sup> See *Yearbook of the International Law Commission*, 1969, vol. II, pp. 47-49.

<sup>15</sup> See *Official Records of the United Nations Conference on the Law of Treaties*, First Session, 63rd, 64th, 65th and 81st meetings of the Committee of the Whole, and Second Session, 22nd plenary meeting.

<sup>16</sup> United Nations, *Treaty Series*, vol. 479, p. 74.



international boundaries concerned only the neighbouring countries and that any disputes should be settled by international adjudication or arbitration.

80. In paragraph (25) of his commentary, the Special Rapporteur referred to the Treaty of Kabul of 1921.<sup>17</sup> That Treaty was not in fact a boundary treaty, but a treaty of friendship concluded after the third Anglo-Afghan war of 1919. It had been terminated in 1953, by one year's notice given under article XI, and it contained no provisions indicating that any part of it was intended to be permanent or dealing with the question of succession. The interpretation given by the United Kingdom was one-sided and even contrary to the provisions of the Indian Independence Act; it was also contrary to the various promises, written and unwritten, given to Afghanistan. The boundary in question was not a demarcation line, but a political boundary made for the purpose of safeguarding British India's security against possible invasion from the north. The area comprising the North-West Frontier Province and the Free Tribal Area, to which the Indian Independence Act referred, had not been a part of the Indian administration, because the Free Tribal Area had been independent at the time of British rule in India. Even today, although they were behind the so-called Durand line, the North-West Frontier Province and the Free Tribal Area were administered separately. The whole frontier to which the 1921 Treaty referred had not been demarcated by the Joint Commission as stipulated in the Durand Treaty, itself an unequal and colonial treaty.

81. The statement in the United Kingdom note in *Materials on Succession of States*,<sup>18</sup> quoted in paragraph (25) of the commentary, that "the withdrawal of British rule from India had not caused the Afghan Treaty to lapse and that it was hence still in force", was contrary to article XI of the Treaty, which clearly stated that the Treaty could be terminated by giving one year's notice. There were, however, other documents in the same publication which should also be included in paragraph (25) of the commentary in order to balance the views of the two countries. One was a letter from the Head of the British Mission, Sir Henry Dobbs, to the Afghan Foreign Minister in 1921, recognizing Afghanistan's interest in the question of the Indian boundary beyond the Durand line and recognizing that the frontier tribes were not citizens of India. Another was the Declaration of 3 June 1947 by the United Kingdom Government, which dealt with the special case of the North-West Frontier Province and the Free Tribal Area<sup>19</sup> and did not accord with the note quoted by the Special Rapporteur in paragraph (25).

82. While he wished to express his deepest appreciation to the Special Rapporteur for his valuable research and commentary, he hoped that the Commission would give very careful consideration to the question whether

boundary treaties really came within the scope of the present convention, and whether they were the same as, or quite different from, other territorial treaties. He also urged that, if a rule on other territorial treaties was formulated, it should distinguish between the different subjects of such treaties.

83. Sir Humphrey WALDOCK (Special Rapporteur) said that it was not his practice, in the commentary, to try to pronounce on the legal validity of any arguments in a controversy. He thought that, in paragraph (25) of the commentary, he had set out the views of both sides and that the presentation was a balanced one. He only wished to point out that the general reservation included, as article 4, in his first report<sup>20</sup> fully protected the position of any State which had legal grounds for challenging the validity of a boundary. His intention was precisely the same in the proposed draft article 22; it was designed solely to exclude the idea that, by virtue of the "clean slate" principle of the "moving treaty-frontiers" rule, the mere occurrence of a succession could open the way to every kind of claim with regard to boundaries. In his view, to accept that idea would have disastrous consequences.

84. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur whether the provisions of article 22 (*bis*) would apply to an air transit agreement that was in effect prior to a succession.

85. Sir Humphrey WALDOCK (Special Rapporteur) replied that, in his view, air transport agreements were not localized treaties. He had included the reference to air space in article 22 (*bis*) because the possibility could not be excluded that air transport over a particular corridor might be the subject of a special agreement granting international air transit rights similar to the special rights of passage through the Dardanelles, for example.

The meeting rose at 12.55 p.m.

<sup>20</sup> See *Yearbook of the International Law Commission*, 1968, vol. II, p. 92.

## 1193rd MEETING

Monday, 3 July 1972, at 3.25 p.m.

Chairman: Mr. Richard D. KEARNEY

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

<sup>17</sup> League of Nations, *Treaty Series*, vol. XIV, p. 67.

<sup>18</sup> United Nations, *Legislative Series*, ST/LEG/SER.B/14, pp. 186-187.

<sup>19</sup> *Ibid.*, pp. 5-6.