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Summary record of the 1188th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

predecessor State". It might be better to call the predecessor State something else.

66. Sir Humphrey WALDOCK (Special Rapporteur) said that the problem might be solved by referring in paragraph 1 to the "division and extinction of that State", and then in paragraph 2 to the "rights of a successor State", because paragraph 2 was meant to cover extinction as well as division. In the case of extinction there was more than one successor State and no continuation of the predecessor State. There were several ways of looking at the situation, but the only conclusion that could be drawn from practice was that there was a tendency for one entity to cling to the personality of the former State and thus to be regarded as a predecessor State for the purposes of the law.

67. Mr. BILGE asked the Special Rapporteur whether he had used the expression "in force in respect of that part" in a sense different from that of the expression "in respect of the territory" used in all the other articles, or whether it was merely a drafting point.

68. Sir Humphrey WALDOCK (Special Rapporteur) said that the phrase "treaties ... in force in respect of that part" in paragraph 1 referred to treaties in force in respect of the original State. It might perhaps be more correct to say "in respect of that part of the territory".

69. Mr. USHAKOV said that in the case of a unitary State, only localized treaties applied to one part of the territory alone. The expression "in force in respect of that part" was therefore not appropriate. If, as the Special Rapporteur said, paragraph 2 covered both the case of separation, in which the original State subsisted and the case of complete division, in which it did not subsist, it would be difficult to accept the "clean slate" principle in the latter case, because under some treaties—commercial treaties, for example—obligations which were sometimes of a very concrete nature continued to exist between the various States resulting from the division and third States.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that the "clean slate" principle was a very inexact expression. The rules in articles 7 to 17, while they imposed no obligation, provided a basis for the continuity of both multilateral and bilateral treaties. If there was a complete split, with extinction of the original State, both parts would be placed in a completely different situation. It would be difficult to require the new States to take over the obligations of the previous State despite the radical change in their situation. Fortunately, such cases did not arise in practice.

71. The CHAIRMAN asked whether there was any way of objectively defining extinction. It would be hard to apply the purely subjective rule that whenever a division of a State occurred the status of any treaties in force depended on whether one or another of the resultant States asserted its claim to be a continuation of the original State.

72. Sir Humphrey WALDOCK (Special Rapporteur) said two factors were involved—the assertion of a claim by the new entity and recognition by the international community. It might be argued that, in the case of Bangladesh for example, where there was a major division of territory, it ought to be irrelevant whether one of the resultant States chose to call itself by the former name or not, since the effects of division were so radical that the whole situation was transformed.

73. The CHAIRMAN asked whether that meant that States which had treaties with Pakistan were free to say that those treaties had ceased to apply.

74. Sir Humphrey WALDOCK (Special Rapporteur) said that the attitude taken by the World Health Organization and the International Labour Organisation could be taken as a pointer to how to deal with that situation. What had formerly been West Pakistan was being treated as Pakistan, and the other half of the country as a new State.

75. The CHAIRMAN observed that if the article referred to division and extinction of the former State without defining extinction, the question whether the former State continued to exist or not would be open to dispute.

76. Mr. USHAKOV said he agreed with the view Mr. Ustor had expressed on previous occasions that it was necessary to take into account cases in which the division took place by mutual consent, obligations towards third States being shared among the States resulting from the division by means of a devolution treaty. In the absence of such consent there was not a division, but a separation.

77. Sir Humphrey WALDOCK (Special Rapporteur) said that, under the rules established by the law of treaties, a devolution treaty could not by itself create a sufficient legal nexus for continuity. The expression of consent to be bound was required for that purpose. In cases of the kind Mr. Ushakov had in mind, there was usually some kind of settlement, also involving third States.

78. Mr. USHAKOV said that although there might be some doubt about succession in respect of treaties, in respect of matters other than treaties third States retained certain obligations towards new States, for example, with regard to debts to be shared out among several successor States. It was perhaps worth considering whether the same did not apply to treaties.

The meeting rose at 6.5 p.m.

1188th MEETING

Tuesday, 27 June 1972, at 9.40 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. 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 and L.186)

[Item 5 of the agenda]

(resumed from the 1186th meeting)

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

ARTICLE 6 *(continued)* [1] and ARTICLE 7

1. The CHAIRMAN invited the Commission to continue consideration of article 6 of the draft submitted by the Working Group (A/CN.4/L.186), in conjunction with article 7, which read:

Article 7

1. The crimes set forth in article 2 shall be deemed to have been included as extraditable crimes in any extradition treaty existing between Parties. Parties undertake to include those crimes as extraditable crimes 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 shall consider the present draft articles as the legal basis for extradition in respect of the crimes. Extradition shall be subject to the other conditions provided for by 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 crimes between themselves subject to the conditions provided for by the law of the requested State.

4. An extradition request from the State in which crimes were committed shall have priority 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 provisions of article 7 were based on the relevant provisions of the Montreal and the Hague Conventions.[2] There was a substantial change in paragraph 2 in that the Working Group had decided to use the stronger formula "it shall consider", rather than the formula "it may at its option consider", used in the earlier Conventions. Paragraph 4 of article 8 of the Montreal Convention was an expression of a legal position already covered in article 2 of the present draft, so it was not necessary to repeat it.

3. Paragraph 4 of the present draft introduced the question of the procedure for dealing with requests for extradition from more than one State. The Working Group had thought it best to give priority to the State in which the crime had been committed, because prosecution was greatly simplified if the trial took place in that State and it was that State which had an obligation to protect the person or persons injured. If a request was received from the State in which the crime had been committed within six months of its being notified that the alleged offender had been found, that State would be given priority. Although that might delay the trial, it had been decided that such a period should be allowed, because of the rather complicated procedures governing extradition requests.

4. Mr. QUENTIN-BAXTER said he was prepared to accept the wording of article 6, because it corresponded to that of article 7 of the Montreal and the Hague Conventions. He thought, however, that the second sentence of article 7 of the earlier Conventions, which slightly softened the peremptory nature of the first sentence, should also be included in the draft.

5. There was an obvious difference between article 7 of the draft and the corresponding articles of the Montreal and the Hague Conventions. In those two Conventions it was clearly a question of adding new offences to the calendar of crimes, but the offences listed in article 2 of the draft were confined to serious offences against the person, all of which came into the category of common crimes. Thus, while the first sentence of article 7 was essential in the earlier Conventions, it was not so in the present draft, because States would normally include those offences in their extradition treaties. He therefore suggested that the first sentence of article 7, paragraph 1 might be redrafted to read: "If any of the crimes set forth in article 2 are not included as extraditable offences in extradition treaties, then they shall be deemed to be so included." That wording would make it clear to States that they were not being asked to introduce any new crimes, but simply to extend the scope of their jurisdiction. He had deliberately used the term "extraditable offences" instead of the term "extraditable crimes" used in the draft, because the former term had been universally used in the past and there seemed to be no good reason for the innovation.

6. He was surprised that, in paragraph 2 of article 7, the Working Group had not followed the precedents it had followed so closely earlier in the draft, but had used the compulsory rather than the optional formula. It was difficult to imagine that the Montreal and the Hague Conventions would have received the same support if that formula had not been used. If support was to be mustered for the draft convention, it was important that it should adhere as closely as possible to the precedents where they were applicable.

7. Mr. REUTER said it was his understanding that article 6 would be supplemented by a fundamental principle of international law already given expression in the Hague and Montreal Conventions, namely, discretion regarding the expediency of prosecution. In France, that principle was applied even in the case of an attempt on the life of a Head of State. If the State in whose territory the alleged offender was found decided that, for political reasons, in particular, it was not expedient to prosecute, it should not on that account be regarded as under an obligation to extradite, since it would have taken the alternative course provided for in article 6.

8. If that was so, article 7 called for two comments. First, the obligation to extradite under existing or future

[1] For text see 1186th meeting, para. 24.

[2] See *International Legal Materials*, vol. X, 1971, number 6, p. 1151 and number 1, p. 133.

treaties, laid down in paragraph 1, must be understood in the light of the alternative provided for in article 6. As it stood, that provision of article 7 was much stricter than article 6.

9. His second comment could be illustrated by a purely hypothetical case. Suppose that a Cuban national belonging to an insurgent movement had fled to France after having murdered a Cuban ambassador in the United States of America, and that his accomplices had subsequently seized power in Cuba: on the basis of the text before the Commission, the United States Government might give France the choice between the two alternatives laid down in article 6. France would be in a very embarrassing position if the Cuban Government then informed it that the extradition or prosecution of its national would cause serious deterioration in relations between the two countries. Moreover, under article 7, paragraph 4, an extradition request from the State in which the crime had been committed would have priority. In order to avoid situations of that kind, he proposed the insertion in article 7 of a provision under which the State in whose territory the offender had been found might consider itself relieved of the obligation to extradite or prosecute when the State presenting it with that choice was the State in which the crime had been committed, not the State of which the victim was a national.

10. He would not press for the inclusion of such a provision, but wished to point out that unless article 7 was amended on those lines, States would probably reserve the right not to prosecute, on the strength of the principle of expediency.

11. Mr. USHAKOV said that not only the draft articles relating to extradition, but many others might be difficult to apply in certain exceptional situations with which any State might be faced. It should be borne in mind, however, that the Commission's duty was to prepare articles calculated not only to protect diplomats and assimilated persons, but also to preserve friendly relations between States. It should therefore confine itself to the situations most likely to arise. Moreover, States could be expected to be wise enough not to request extradition where it might lead to a deterioration of the political situation. He therefore considered articles 6 and 7, as proposed by the Working Group, acceptable.

12. In article 7, paragraph 2, the option provided for in the corresponding provision of the Montreal Convention had been converted into an obligation to extradite, if the State in question decided not to prosecute the alleged offender. The option clause was a strange one, since it did not offer a choice between extradition and prosecution, but rather expressed the faculty of the State concerned not to extradite the offender and to grant him asylum. For two stages had to be distinguished. First, the State must decide whether prosecution was expedient. If its decision was negative, there was obviously no question of either extraditing or punishing the alleged offender, who could then only be granted asylum. It was only in the opposite case that there was a choice between extradition and prosecution.

13. Mr. AGO, referring to Mr. Reuter's statement, said that article 7 might give the impression of laying down an obligation to extradite. In fact, under that article States remained entirely free to extradite or not to extradite. Article 7, as drafted, was only intended to ensure that extradition was not rendered impossible by the existence of a treaty or of internal laws excluding political crimes from the list of extraditable offences. Once those obstacles had been removed the State nevertheless remained free to decide whether it wished to extradite or whether it preferred to prosecute the alleged offender itself. The only obligation it could not evade was to choose one course or the other. That system seemed logical, but it was essential to formulate it clearly.

14. Unlike Mr. Reuter, he did not think the last sentence of article 7 of the Montreal Convention should be regarded as a saving clause. That sentence read: "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." It did not seem that a State could use that provision as a pretext for neither extraditing nor prosecuting the alleged offender. He considered the sentence ambiguous and doubted, in any case, whether a loophole was needed to cover the case in which the perpetrators of a violent attack seized power. Their crime remained reprehensible whatever the situation, and such a case had no place in the articles under consideration. Perhaps the clause he had quoted from the Montreal Convention could be inserted in the draft between square brackets, so that governments could give their views on the question.

15. Mr. RAMANGASOAVINA said that the purpose of article 7, paragraph 1, was to provide a legal basis for all cases of extradition, whether there was an extradition treaty between the States concerned or not. To attain that end, a clause extending the scope of existing treaties had first been included, but he thought it would have been better to emphasize agreement between the parties than to provide for compulsory extension of their extradition treaties. The provision might then be drafted on the following model: "The Parties agree [undertake] to treat the crimes set forth in article 2 as extraditable under any extradition treaty." It would not be necessary to add the words "existing between Parties", since the rule would be formulated in general terms. That drafting change was important, for it would make it possible to view the problem from a totally different angle.

16. Mr. REUTER, referring to Mr. Ago's statement, said that article 5 of the 1971 OAS Convention [3] was drafted in clear terms: "the requested State ... is obliged to submit the case to its competent authorities for prosecution, as if the act had been committed in its territory". That was the sole obligation of the State with regard to prosecution. If the national authorities took a negative decision, the obligation to extradite was not revived. It should be noted that in most countries it was a judicial authority that decided whether prosecution was expedient having regard to the facts of the case. True, a State should not exert pressure on its judicial authorities, but it might very well decide that there would be no prosecution in a particular case. That prerogative

[3] *Ibid.*, number 2, p. 256.

was reduced in the Montreal Convention, however, and was to be entirely eliminated in the draft under consideration. He could not agree that a State which did not punish the alleged offender when its judicial authorities had decided against prosecution, must extradite him. Once again, he must express his opposition to the "maximum" solutions adopted in the draft. There was certainly no need to fear that States would abuse the principle of the expediency of prosecution in order to avoid instituting proceedings in the case of an outrageous murder. Unlike Mr. Ushakov, who relied on the wisdom of States, he thought that political considerations might lead many States to demand the full application of the text.

17. Although the definition of a violent attack was very wide, which was in itself to be welcomed, States must nevertheless be left free to apply the principle of the expediency of prosecution—a fundamental principle of criminal procedure which most of them were not prepared to abandon.

18. Mr. YASSEEN said he seriously doubted whether States would accept the articles on extradition. Those articles not only confronted them with a difficult choice between extradition and prosecution, but went so far as to modify extradition treaties concluded on the basis of concepts to which some States were strongly attached. Moreover, it was obvious that the questions raised in that part of the draft were highly political and that their settlement was in practice based on considerations of expediency rather than of legality. And the draft excluded *ab initio* the régime of asylum, to which many States attached great importance.

19. The crimes covered by the draft should, if possible, be the subject of prosecution, but the nature of international relations and of the international legal order must be taken into account. The attitudes of States to those crimes varied widely, and they should not be obliged to act in ways that were clearly incompatible with their political convictions.

20. The alternative in article 6 should therefore be interpreted as allowing the national authorities to decide, in accordance with internal law, not to prosecute the alleged offender, which would relieve the State concerned of its obligation to extradite.

21. In view of political realities and the need to make the Commission's work effective, he thought the provisions in articles 6 and 7 were too rigid: they unduly reduced the freedom of States to use their own judgment, which was often based on political considerations. In any case, it was difficult to regard those articles as reflecting positive international law.

22. Mr. SETTE CÂMARA said he was in favour of retaining draft articles 6 and 7 as they stood. The system envisaged by the Working Group was based on the alternatives of extradition and prosecution. If another possibility was introduced—the faculty of a State to decide whether or not it was expedient to prosecute—the present situation would remain unchanged and the draft convention would serve no purpose. If, in referring to the decision whether or not to prosecute, Mr. Reuter had in mind the stage in criminal proceedings when the judge, on the basis of the preliminary investigation, made a decision on whether further proceedings should be taken, his position was perfectly acceptable. If, on the other hand, he meant that the government itself had another option and could decide neither to extradite nor to prosecute, that would defeat the purpose of the convention.

23. He agreed with Mr. Ago's suggestion that the last sentence of article 7 of the Montreal Convention should be included between square brackets, because he, too, found the wording ambiguous.

24. Mr. AGO observed that the discussion turned on a question of criminal procedure. The State concerned did not have to choose between extradition and punishment, but between extradition and prosecution. In the event of prosecution, it was not obliged to punish; for the examining magistrate might find that there were no grounds for prosecution or the court might find the accused not guilty. Substantive criminal law would have to be amended only to ensure that the acts covered by the draft, if their authors were prosecuted in the country and found guilty by the court, would be punished with special severity; in addition, criminal procedure would have to be so amended that, if extradition were refused, a State could not invoke the principle of territoriality to claim that it had no jurisdiction.

25. Thus article 6 did not lay down an obligation to punish, but an obligation to examine the case for the purpose of prosecution, and the form of words used in the OAS Convention might perhaps be preferable because it was more explicit. Members had therefore been wrong in thinking they saw "maximum" solutions in the text, the provisions of which were essentially the same as those of the conventions on which the articles under consideration were based. Hence he saw no reason why the draft should not be more closely modelled on the existing Conventions, particularly if that would increase its chances of acceptance.

26. Mr. ELIAS said it was his understanding that the purpose of the draft convention was to create a new situation, ruling out the possibility of asylum being granted where there was proof that one of the offences listed in article 2 had been committed. Several members of the Commission had warned that if the obligation to prosecute or extradite was set against the right to give asylum in absolute terms, it would be difficult to secure support for the draft convention. There was considerable force in that argument. The problem lay in the fact that, under article 6, the State in whose territory the alleged offender was found was allowed only two possibilities: prosecution or extradition. If, however, the term "prosecution" was interpreted to mean that the State in question should apply its normal internal machinery, including the procedure to establish the *prima facie* liability of the alleged offender to punishment, he did not think there was any cause for concern. The article did not say that the alleged offender must be punished in every case, since States could clearly not be asked to presume his guilt. In his view, it would be contrary to the normal rules of interpretation to place any other construction on the article. If the State would ultimately be able to decide whether or not to punish the offender, even if he was found guilty, the present

situation would remain unchanged and there would be no point in preparing the draft convention.

27. Mr. Reuter had said that, whereas article 6 laid down the choice between prosecution and extradition, article 7 dealt entirely with problems of extradition, and the link between the two articles was not clear. To meet that point, a phrase such as "Subject to the provisions of article 6" might be inserted at the beginning of article 7, thus indicating that article 7 should be interpreted in the light of article 6.

28. Mr. Quentin-Baxter had argued that, unlike the Montreal and Hague Conventions, the present draft was not concerned with a new kind of offence. It was, however, attempting to create a new situation whereby offences against diplomats would no longer be tolerated and States would not be given too wide discretion once guilt had been established. The new ideas put forward in the draft convention should be submitted to governments and to the General Assembly for their consideration. While there might be room for improvement in the drafting of articles 6 and 7 along the lines he had indicated, the substance of those provisions was fully acceptable.

29. Mr. USHAKOV said that the words "*aux fins de poursuites*" at the end of the French text of article 6 should be replaced by the words "*pour l'exercice de l'action pénale*", as in article 7 of the Hague and Montreal Conventions. Article 6 of the draft followed the first sentence of article 7 of those Conventions almost word for word, except that the phrase "and whether or not the offence was committed in its territory" had been deleted, the Working Group having considered it superfluous because extraterritorial jurisdiction was provided for in article 2 of the draft. In addition, the phrase "and without undue delay" had been added. Thus there was not, as Mr. Reuter thought, such a great difference between article 6 of the draft and article 7 of the previous Conventions.

30. The Working Group had thought it preferable to replace the last sentence of article 7 of the Hague and Montreal Conventions by article 8 of the draft, which was stronger. He would have no objection to restoring that sentence to article 6 of the draft, but he preferred article 8.

31. It could thus be seen that the draft articles followed the previous Conventions quite closely, and if the provisions of those Conventions had been accepted, there was no reason why article 6 should not.

32. Mr. TSURUOKA (Chairman of the Working Group) said he agreed with the views expressed by Mr. Ago and Mr. Ushakov. The draft as a whole, and articles 6 and 7 in particular, was conceived on the same lines as the previous Conventions. It was based, first, on the idea that States parties should make the crimes specified in article 2 punishable under their internal law by severer penalties than similar crimes against persons not enjoying international protection; and secondly, on the idea that States parties must recognize extraterritorial jurisdiction over such crimes.

33. The draft also specified how States parties were to collaborate in dealing with terrorism against internationally protected persons. It was very simple and did not constitute an innovation in relation to previous instruments. Some members of the Working Group had even found it too moderate. The exceptional cases cited by members of the Commission would be dealt with on an exceptional basis. The fears that had been expressed were exaggerated. In any case, the draft was only a provisional one, on which governments would make their comments and which, in accordance with the action taken on it by the Sixth Committee, would be given further consideration in the light of the comments made by governments, the Sixth Committee and members of the Commission.

34. Mr. USTOR said he did not share the misgivings expressed by Mr. Yasseen regarding the future of the present draft. The political decision had already been taken by the General Assembly, leaving the Commission only the technical task of drawing up the text of a draft convention.

35. Surprise had been expressed at the failure to include a reference to the right of asylum. In that connexion, it should be borne in mind that the offences covered by the draft articles constituted crimes against the purposes and principles of the United Nations —crimes which were expressly excluded from the scope of most international instruments on the question of asylum.

36. He was opposed to the suggestion that the last sentence of article 7 of the 1970 Hague Convention and of the 1971 Montreal Convention should be introduced into article 6. In the first place, it would add nothing to the text of article 6 to say that the authorities concerned should take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of their State. Under the text of draft article 6 it went without saying that the whole matter would be subject to the laws of the State concerned. It had, however, been suggested that the sentence in question might provide a convenient loophole. If such an interpretation was possible, then he saw in that fact an even stronger reason for its omission. He, for one, did not wish to leave any loopholes in the text.

37. Paragraphs 2 and 3 of article 7 stated clearly that extradition was governed by the law of the State concerned. That point was extremely important because most extradition laws had certain principles in common. In the first place, the laws of many countries precluded the extradition of their nationals. In the second place, such important principles as *ne bis in idem* were generally recognized; there could be no extradition for an offence for which a person had already been tried.

38. With regard to paragraph 4 of article 7, he thought some explanation was needed of how the system of priority would operate. Clearly, the State in which the crime had been committed would have priority, for purposes of obtaining extradition, over another requesting State. It was not clear, however, whether it would also have priority over the State where the alleged offender had been found. Would that State be under an obligation to extradite the offender even if criminal proceedings were already under way? Some clarification would also

be required, possibly in the commentary, regarding the operation of the six months' time-limit. Where a request was made after the expiry of that time-limit, the question arose whether it would in any way affect proceedings initiated in the State where the alleged offender had been found.

39. The CHAIRMAN, speaking as a member of the Commission, said that the Working Group's intention in drafting paragraph 4 of article 7 had been that an extradition request made by the State in which the crime had been committeed should have priority over any other extradition request. The State in whose territory the alleged offender had been found could always prosecute the offender and, of course, could do so before the expiry of the six-month period mentioned in the paragraph.

40. Mr. QUENTIN-BAXTER said that, in view of the comments made by other members, he wished to amplify two points he had made in his earlier statement.

41. In the first place, his remarks on the difference between the present draft and the Hague and Montreal Conventions related solely to the nature of the offences. The 1971 Montreal Convention covered a number of offences against air navigation, such as damage to an aircraft or to air navigation facilities and the spreading of false information, which endangered the safety of aircraft in flight. The Hague Convention likewise covered certain specified acts against aircraft. The main ingredients in many of those offences were not adequately reflected in the lists of extraditable offences embodied in normal extradition treaties. It had therefore been found necessary to include in both of those Conventions a clause, the effect of which was to extend the catalogue of extraditable crimes, such as: "The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States".

42. The position was quite different with regard to the present draft, which dealt solely with serious crimes against the person. Those crimes were normally at the head of the list included in all existing extradition treaties. In that respect, therefore, the draft asked for much less than the Hague and Montreal Conventions. It would be only in very rare cases that the list embodied in article 2 of the draft would add anything to the lists of extraditable offences in existing extradition treaties.

43. For those reasons, he had suggested that it would be more accurate if an additional proviso were inserted at the beginning of article 7, paragraph 1, on the following lines: "If any of the crimes set forth in article 2 are not included as extraditable offences in any extradition treaty between Parties, then they shall be deemed to be so included."

44. The second point he wished to amplify related to the words "at its option" which appeared in article 8, paragraph 2, of the Montreal Convention, but which did not appear in the present draft. It was one thing to invite governments to regard the new multilateral instrument as an extradition treaty: it was quite another to require them to do so. In many countries such an obligation would, if accepted, entail a radical revision of the legislation governing extradition, and the abandonment of the principle that extradition was essentially a bilateral matter. Thus, the omission of the phrase "at its option" could constitute a major obstacle to the acceptance of the proposed convention.

45. Mr. REUTER said that when governments were not in agreement on some point, an ambiguous text, which each could interpret in its own way, could be convenient, but in the Commission clarity was essential. He therefore wished to make his position clear.

46. Some members of the Commission seemed to think that if the Commission did not fully accept their views it would have done nothing to change the existing situation. He did not agree. The Commission had been given a certain task, which it had discharged very honourably, and even if it were to accept his own interpretation, it would be changing a great deal. First, there would no longer be any right of political asylum. Secondly, States would be obliged to amend their laws to give themselves jurisdiction to punish crimes committed abroad against the public order of a foreign country; in other words they would deprive themselves of the easy pretext for not prosecuting, that they had no jurisdiction. Thirdly, if the prosecution did not result in the desired severe punishment, the draft nevertheless placed a government under the formidable obligation to explain its conduct, at the risk of finding itself in a very delicate situation if repudiated by the other parties. Even according to his own interpretation of it, therefore, the draft would have important consequences; and many Governments which were prepared to commit themselves to a certain extent would not accept a categorical text.

47. The point on which there was a difference of opinion in the Commission was the exact meaning to be given to the term "prosecute" or the words "submit for the purpose of prosecution" or, as Mr. Ago had said, "examine the case for the purpose of prosecution". That was what had to be decided. He himself had made the mistake of talking about punishment. It was quite clear that the Working Group's text did not involve an obligation to punish. Under all legal systems it was, in fact, the judge who punished, and a government could not make a commitment on behalf of its judge. Hence even if the word "prosecute" were interpreted in the strictest sense, there would be acquittals. In many countries it was not professional judges who made the final decision, but jurors, that was to say ordinary citizens, who were often swayed by the prevailing atmosphere and lawyers' arguments.

48. He wished to make it quite clear what the obligation to prosecute meant. Where prosecutions were concerned, criminal procedure comprised various stages. Under the future convention, the first stage would involve intergovernmental relations, and all members of the Commission were agreed in recognizing that it was not the government as such which decided whether or not to prosecute. If it were, the "obligation" would derive from a purely voluntary clause. The government could not decide whether or not to prosecute, but it was obliged to transmit the request to a judicial authority, which, whether it was the Attorney-General in common law countries or the *ministère public* in continental countries, decided, after examining the case, whether criminal

proceedings were justified or not. If so, it set the criminal procedure in motion by referring the case to a judge —in common law countries—or an examining magistrate —in continental countries—who in turn duly decided whether charges should be brought or not; in other words, he decided on the desirability of prosecution. In his own view, as soon as the government referred the case to the first judicial authority, it had wholly fulfilled its obligation to prosecute. Even if the *ministère public* subsequently decided that criminal proceedings should not be instituted, the government would nevertheless have fulfilled its obligation under the convention. That was the central issue on which the members of the Commission were not in agreement.

49. The judicial authority might decide not to prosecute, either because it could see at once that there was not sufficient evidence, or because the circumstances were such that the guilty person—who was none the less a criminal—had the support of public opinion, so that to prosecute would be to run the risk of an improper trial. But however that might be, the government would have fulfilled the obligation to prosecute and there could be no question of extradition. Even if it were called upon to justify itself, the government could shelter behind the decision of its judicial authority. It was a very small loophole that was left open, but it was essential, and without it many governments would not accept the draft. Some people believed that it was always possible to find a compromise for exceptional cases. He himself thought that, on the contrary, it was the exceptional cases which aroused public opinion. A public prosecutor could not be asked to lose a case; that would have exactly the opposite of the desired result, which was to punish the criminal. The Hague Convention was quite clear on that point. The Montreal Convention was less so, which no doubt explained why it had received fewer signatures. The Commission's draft left many points in doubt and he would not vote for a doubtful text, because he did not wish the Commission's authority to be invoked in a discussion in an international forum. That was why he would have preferred to leave it to governments to choose between different versions.

50. Mr. SETTE CÂMARA said that, under draft articles 6 and 7, as under the corresponding provisions of the Hague and Montreal Conventions, once a State had submitted the case to its competent authorities for the purpose of prosecution, it had performed its international duty. Clearly, it would be for those competent authorities to decide whether, in their judgement, there was a basis for initiating criminal proceedings or not. The powers of decision which belonged, under many legal systems, to the Director of Public Prosecutions or the Attorney-General, depending on the country, would be left intact by the proposed provisions. For those reasons, he was convinced that the draft as it stood met the points raised by Mr. Reuter.

51. Mr. AGO said he did not think there was any difference of opinion among members of the Commission on the substance of the matter. The essential purpose of the draft articles was to oblige States to amend their laws so as to make either prosecution or extradition possible. As he had already pointed out, a first reform would have to be made in substantive criminal law, and a second in the rules on jurisdiction. It was true, as Mr. Reuter had said, that the government could only hand the alleged offender over to the judicial authorities for them to apply the law, but the substantive law would, precisely, have been changed. It was also true that the desirability of prosecutions was left to the discretion of the *ministère public* and the examining magistrate, but there, again, reasonable limits should be observed. While not calling the normal application of the criminal law in question, he did not believe the convention would be implemented if a judicial authority dismissed the charge or gave an improper acquittal. If members of the Commission were agreed on that fundamental point, it only remained to find satisfactory wording. Perhaps the last sentence of article 7 of the Hague Convention should be reproduced, or it might be provided, for example, that the State was obliged to hand over the alleged offender to the competent judicial authorities.

52. Mr. USHAKOV said that if the alleged offender was acquitted, there could obviously be no further question of punishment or extradition. If he had understood Mr. Reuter aright, it was the second sentence of article 7 of the Hague and Montreal Conventions which gave governments a loophole. He saw no particular objection to including that sentence in the draft, but it was unnecessary, because the obligation to refer the case to the competent authorities for the purpose of prosecution was already provided for. In addition, the phrase "in the case of any ordinary offence" raised problems for some countries. The second sentence of article 7 of the previous Conventions thus had advantages and disadavantages, depending on the country concerned. He therefore considered that it would be better not to change the draft.

53. The CHAIRMAN, speaking as a member of the Commission, said he would not object to article 6 being amended purely to make it clear that the normal procedures and the normal legislation of the country concerned applied. He would, however, oppose any wording which might open the door to decisions regarding prosecution being based on political instead of legal considerations.

54. After hearing the discussion, he had become convinced that the words "it may at its option consider this Convention as the legal basis for extradition", which were used in the Montreal Convention, did not have any different effect from the wording used in paragraph 2 of article 7: "it shall consider the present draft articles as the legal basis for extradition". The fact of the matter was that the State concerned would have an option to extradite, if it decided not to submit the case to its competent authorities for the purpose of prosecution.

55. Mr. TAMMES said that he had previously raised the question of the relationship between articles 6 and 7.[4] That relationship was not the same as the one between the corresponding articles of the Hague and Montreal Conventions, because of the Working Group's decision to replace the Montreal wording "it may at its option" by the words "it shall". He had also explained his views on the strict obligation to extradite, which was thereby

[4] See 1186th meeting, paras. 26 and 27.

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

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

1189th MEETING

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

Chairman: Mr. Richard D. KEARNEY

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

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

(A/CN.4/253 and Add.1 to 5; A/CN.4/L.182 and L.186)

[Item 5 of the agenda]

(continued)

DRAFT ARTICLES ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST DIPLOMATIC AGENTS AND OTHER INTERNATIONALLY PROTECTED PERSONS

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

ARTICLE 8

Article 8

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

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

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

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

5. Mr. TSURUOKA supported that view.

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

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

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

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

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

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