THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS, INCLUDING DIPLOMATIC AGENTS

By

MICHAEL C. WOOD *

I. INTRODUCTION

THE Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, was adopted by the General Assembly of the United Nations by resolution 3166 (XXVIII) of December 14, 1973.[1] It provides that persons alleged to have committed certain attacks against diplomatic agents and others should either be extradited or have their case submitted to the authorities for the purpose of prosecution. It contains, in addition, provisions concerning co-operation, the transmission of information, and the treatment to be accorded to alleged offenders.

The elaboration of the Convention, on the basis of draft articles prepared by the International Law Commission in 1972,[2] took up much of the Sixth Committee's time during the twenty-eighth session of the General Assembly. In many respects, the new Convention follows closely the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16,

* Assistant Legal Adviser, Foreign and Commonwealth Office, London.

[1] The views expressed in this article are the personal views of the author, and do not have any official standing. Resolution 3166 (XXVIII), to which the Convention is annexed, was adopted by consensus at the 2,202nd meeting of the General Assembly. *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 30(A/9030)*, p. 146.

[2] *Report of the International Law Commission on the work of its twenty-fourth session, Official Records of the General Assembly, Twenty-seventh Session, Supplement No.* 10 (*A/8710/Rev* 1) [1972] *I.L.C.* Report pp. 91–102. The Commission prepared the draft articles in the course of a single session, much of which was taken up with completing the work on the topic "Succession of States: succession in respect of treaties." This departure from normal working methods was criticised both within and outside the Commission. On the draft articles, see Kearney, "The Twenty-Fourth Session of the International Law Commission" (1973) 67 A.J.I.L. 84, at pp. 84–92; Przetacznik, "Prevention and punishment of crimes against internationally protected persons," (1973) 13 *Indian J. Internat. L.* 65–86, Rozakis, "Terrorism and the Internationally Protected Persons in the light of the ILC's Draft Articles", (1974) 23 I.C.L.Q. 32–72.

1970[3] (the "Hague Convention"), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,[4] done at Montreal on September 23, 1971 (the "Montreal Convention"). But one would be wrong to suppose that this was a case where precedent was followed unquestioningly. On the contrary, the Commission's draft articles departed radically from the two earlier Conventions, and so the Sixth Committee was obliged to consider the precedents afresh. Only after prolonged debate was a text drawn up which could command a consensus. That this text represents, in general, a return to the language of the Hague and Montreal Conventions may be seen as confirmation that those Conventions contain the most widely acceptable solutions to the problems they deal with. As has been said in respect of the Hague Convention, in terms which are equally applicable to the new Convention:

> some States would have liked a somewhat stronger Convention which would have bound each contracting State in every case either to prosecute a hijacker found in its territory or to extradite him (whether he had committed the offence of hijacking for political reasons or not) to a State which would prosecute him. However it was apparent that many States could not accept such provisions and the purpose of the Convention would be frustrated if it were not widely adopted.[5]

What follows is a short account of the elaboration of the Convention in the Sixth Committee, and a discussion of resolution 3166 (XXVIII) and of the main provisions of the Convention. No attempt will be made to comment on the policy behind the Convention or to predict its effectiveness.

II. THE ELABORATION OF THE CONVENTION

The course of events in the General Assembly and the International Law Commission up to the completion of the Commission's draft articles on this subject is conveniently summarised in paragraphs 54 to 64 of the Commission's 1972 Report.[6] The Commission's draft articles were first considered by the Sixth Committee at the twenty-seventh session of the General Assembly in 1972 (which was also the session at which the Sixth Committee first had on its agenda the item on international terrorism[7]). The outcome of the debate was

[3] ICAO, document 8920, p. 1; U.K.T.S. 39 (1972).

[4] ICAO, document 8966, p. 1; U.K.T.S. 10 (1974).

[5] Gillian M. E. White, "The Hague Convention for the Suppression of Unlawful Seizure of Aircraft" (1971) 6 *The Review of the International Commission of Jurists*, p. 44.

[6] [1972] *I.L.C. Report*, pp. 88–90. For brief summaries of the Sixth Committee's debate on the draft articles at the twenty-sixth session of the General Assembly, see (1973) 14 Harv.Intl.L.J. 598–560; XVIII A.F.D.I. [1972] 548–550.

[7] Item 92 entitled "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study

that the Assembly, by resolution 2926 (XXVII) of November 28, 1972, decided to include in the provisional agenda of its twenty-eighth session an item entitled " Draft convention on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons " with a view to the final elaboration of a convention by the Assembly This became item 90 on the agenda of the twenty-eighth session and was allocated to the Sixth Committee. The Report of the Sixth Committee on this item [8] contains a most helpful summary of the proceedings in the Sixth Committee, including the texts of all proposals and amendments.

The Sixth Committee had before it, as the basic proposal, the International Law Commission's draft articles, together with comments and observations by States and international organisations.[9] In addition, the Hague and Montreal Conventions, concluded under the auspices of the International Civil Aviation Organisation, were frequently referred to in the Sixth Committee; so also were the Vienna Convention on Diplomatic Relations,[10] the Vienna Convention on Consular Relations [11] and the Convention on Special Missions,[12] since many delegates regarded the present Convention as constituting a means of giving practical effect to the concepts of inviolability and special protection that are expressed in those earlier Conventions. Also relevant were a number of texts which had been before the International Law Commission: the Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and related Extortion that are of International Significance, done at Washington on February 2, 1971 [13] (the " OAS

of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes." See General Assembly resolution 3034 (XXVII) of December 18, 1973. The Report of the *Ad Hoc* Committee on International Terrorism, *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 28* (A/9028), was to have been considered at the twenty-eighth session but, because of lack of time, the item was deferred and included in the provisional agenda of the twenty-ninth session. See " Terrorism and Political Crimes in International Law " 1973 *Proceedings of the American Society of International Law*, 87–111, (1973) 67 A.J.I.L. (No. 5); Franck and Lockwood, " Preliminary Thoughts towards an International Convention on Terrorism " (1974) 68 A.J.I.L., 69–90.

[8] A/9407.

[9] A/9127 and Add. 1.

[10] 500 U.N.T.S. 95; U.K.T.S. 19 (1965).

[11] 596 U.N.T.S. 261; U.K.T.S. 14 (1973).

[12] *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30* (A/7630); Cmnd. 4300.

[13] *Official Documents of the Organization of American States,* OEA/Ser.A/17 p. 6; (1971) X I.L.M. 255. See Brach, " The Inter-American Convention on the Kidnapping of Diplomats," (1971) 10 *Colum.J.Transnat'l.L.* 392–412; Jullard, " Les enlèvements de diplomates," (1971) XVII A.F.D.I. 205, at pp. 223–231; Strechel, " Terrorist Kidnapping of Diplomatic Personnel " (1972) 5 *Cornell Int'l.L.J.* 189, at pp. 210–213; Przetacznik, " Convention on the Special Protection of

Convention "); a draft Convention concerning crimes against diplomats elaborated by representatives of a group of States meeting in Rome in February 1971 [14] (the " Rome draft "); a draft Convention concerning crimes against diplomats submitted to the twenty-sixth session of the General Assembly by the delegation of Uruguay [15] (the " Uruguay working paper "); and draft articles concerning crimes against persons entitled to special protection under international law, contained in a working paper [16] prepared by Mr. Kearney, the Chairman of the Commission.

The Secretariat had prepared a Note " on the methods of work and procedures followed by the Sixth Committee in the preparation of the Convention on Special Missions ",[17] and on the basis of this the Sixth Committee decided to proceed immediately to consider the Commission's draft articles, article by article, without any general debate, and to establish a Drafting Committee composed of 15 States.[18] The Sixth Committee later decided to apply to its consideration of the draft articles the procedure outlined in paragraph 6 of the Secretariat's Note, which read:

> After a discussion of each article and the amendments thereto, the amendments which raised important questions of principle or seemed to cause divergencies of view unbridgeable by a compromise text were voted on and, if adopted, were incorporated in the text of the article. That text was then referred to the Drafting Committee together with the draft amendments adopted and suggestions of a minor character which had not been the subject of votes. The Drafting Committee then prepared a new text for the article, which was submitted to the Sixth Committee for a vote.

Only three votes were taken on the substance of the draft articles in the course of the Sixth Committee's first reading.[19] After a debate on each provision, all the texts and amendments remaining on the table were referred to the Drafting Committee.

Officials of Foreign States and International Organisations," (1973) IX *Revue belge de droit international* 455–470.

[14] [1972] *I.L.C. Report*, pp. 114–115.

[15] A/C.6/L.822.

[16] A/CN.4/L.182.

[17] A/C.6/L.898.

[18] A/C.6/SR.1407 p. 11 (references to page numbers in the verbatim and summary records of the twenty-eighth session of the General Assembly are to page numbers in the provisional verbatim and summary records). The Drafting Committee was composed of: Bulgaria, Colombia, France, Federal Republic of Germany, India, Japan, Kenya, Mali, Mexico, Sweden, Tunisia, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America. The representative of Yugoslavia, Vice-Chairman of the Sixth Committee (Mr. Šahović) was Chairman of the Drafting Committee and, in his absence, the last meeting of the Drafting Committee was chaired by the representative of Nigeria, Vice-Chairman of the Sixth Committee (Mr. Shitta-Bey).

[19] On jurisdiction (part of draft article 2), prescription (draft article 9) and the settlement of disputes (draft article 12).

The Drafting Committee, therefore, frequently had to consider a large number of amendments and suggestions in order to adopt a single text for each provision of the draft Convention.[20] During the Sixth Committee's second reading of the draft articles, a large number of amendments, both new ones and ones which had been considered and rejected by the Drafting Committee, were discussed and voted upon. The texts adopted by the Sixth Committee on second reading were referred to the Drafting Committee for final review, and the final text was adopted by the Sixth Committee on December 6, 1973. The text recommended by the Committee was adopted without change, and without prior debate, by the General Assembly on December 14, 1973.[21]

The most difficult problem to arise during the elaboration of the Convention did not clearly emerge until the Sixth Committee's second reading of the draft articles. On November 12 the Committee was informed that an additional article would be proposed which would make the Convention "inapplicable" to peoples struggling against colonialism, foreign occupation, racial discrimination and *apartheid*.[22] This new article, slightly amended, was introduced on November 15 and read:

> No provision of the present articles shall be applicable to peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and *apartheid* in the exercise of their legitimate rights to self-determination and independence.[23]

There were only four speakers in the Sixth Committee's debate on this proposal: the representative of Mali, who introduced it, and the representatives of Morocco, Afghanistan and China.[24] While these speakers—with one possible exception—did not say that motive could excuse the commission of the crimes covered by the Convention, they each expressed the fear that, without the additional article, the Convention might serve as a pretext for the suppression of the right of peoples to self-determination and independence. This fear may have been particularly directed towards the provisions concerning co-operation in Article 4.[25]

The new article was clearly unacceptable to many delegations

[20] These texts, sometimes adopted with reservations on the part of one or more members of the Drafting Committee, were submitted to the Sixth Committee in documents A/C.6/L.944 and Adds. 1 to 3. They are also reproduced in document A/9407.

[21] See A/PV.2202, p. 98. There were twenty-one statements after the adoption of the Convention.

[22] A/C.6/SR.1435, p. 9.

[23] A/C.6/L.951/Rev. 1.

[24] A/C.6/SR.1439, pp. 4–10. See also A/C.6/SR.1455, p. 12 (Niger).

[25] See the explanations of vote on Article 4 (draft article 3) of the representatives of Algeria and Senegal—A/C.6/SR.1436, pp. 5 and 6.

and, in an effort to achieve a compromise, the Chairman of the Sixth Committee, Mr. Gonzalez Galvez, held lengthy consultations. When it appeared to him that he could not reconcile further the divergent views, and with only two days remaining for the Committee's work at the twenty-eighth session, he submitted a proposal,[26] based on these consultations, consisting of two Parts. Part A was a draft resolution, the operative part of which read:

> *The General Assembly,*
>
> 1. *Adopts* the text of the Convention annexed to the present resolution;
> 2. *Re-emphasises* the great importance of the rules of international law concerning the inviolability of and special protection to be afforded to internationally protected persons and the obligations of States in relation thereto;
> 3. *Considers* that the annexed Convention will enable States to carry out their obligations more effectively;
> 4. *Considers also* that the provisions of the annexed Convention cannot in any way prejudice the exercise of the legitimate right to self-determination and independence in accordance with the principles and purposes of the Charter of the United Nations and the Declaration on Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and *apartheid*;
> 5. *Invites* States to become parties to the annexed Convention;
> 6. *Decides* that the present resolution, whose provisions are related to the annexed Convention, shall be published together with it.* [27]

Part B was an additional article permitting reservations to articles of the Convention other than Articles 1, 2, 3, 7, 9 and 11 (which contain the basic mechanism of the Convention). Part B was, however, unacceptable to certain States, who also proposed amendments to the draft resolution. At this point, the Chairman considered that "the only solution seemed to be to adopt a resolution deferring consideration of the item until the next session." Indeed, the representative of Colombia declared that a "miracle would be needed to find a compromise solution", but the representative of Mexico made the more practical suggestion that a decision be deferred to enable the Drafting Committee, scheduled to hold its thirty-sixth meeting that afternoon, to try to reach a compromise.[28] This suggestion was accepted by the Committee and, as a result of the further discussion which took place in the Drafting Committee, the Acting Chairman of the Drafting Committee was able, the next day, to submit a revised version of the Chairman's proposal.[29] The main change was that Part

[26] Compromise proposal of the Chairman of the Sixth Committee based on consultations—A/C.6/L.965.

[27] The footnote read: "*This will be explained in the report of the Sixth Committee as meaning: 'published in the Treaty Series."

[28] A/C.6/SR.1455, p. 11 (Chairman), p. 14 (Colombia) and p. 13 (Mexico).

[29] Compromise proposal of the Drafting Committee—A/C.6/L.965/Rev.1.

B of the Chairman's proposal (the article on reservations) was to be replaced by a sentence in the Report of the Sixth Committee reading: " Part B has been withdrawn as unnecessary since it includes articles considered to incorporate the object and purpose of the Convention." This sentence takes up the language of Article 19 (c) of the Vienna Convention on the Law of Treaties,[30] which states the general rule on reservation: where the treaty is silent, a State may formulate a reservation unless the reservation is incompatible with the object and purpose of the treaty. The Sixth Committee was able, on the basis of this compromise proposal of the Drafting Committee, to adopt the resolution and Convention by consensus.[31]

III. THE RESOLUTION

The Convention was adopted by and is annexed to General Assembly resolution 3166 (XXVIII). The provisions of the resolution are, in its own words, related to the Convention. It is arguable that this makes them part of the context for the purpose of interpretation, as contemplated in Article 31 of the Vienna Convention on the Law of Treaties.[32] But, however this may be, it is clear that the resolution is not in any sense part of the Convention.[33] It is the Convention that is an annex to the resolution and not the resolution that is an annex to the Convention. In this connection, it was explained in the Sixth Committee that the provisions of operative paragraph 6 of the resolution relating to publication mean merely that the United Nations Secretariat is obliged always to publish the Convention together with the resolution; and it was on this basis that the Committee agreed to include the word " always " in operative paragraph 6.

As regards operative paragraph 4 of the resolution, it is clear that the paragraph does not purport to make any exception to the crimes covered by the Convention or to qualify in any way the obligations assumed by States Parties to the Convention and that such was not its purpose. Indeed, its purpose was quite different. In recognising, in this paragraph, that the Convention could not prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the principles and purposes of the Charter of the United Nations and the Declaration on Friendly Relations and Co-operation among States in accordance with the

[30] Cmnd. 4818.
[31] A/C.6/SR.1457 p. 8.
[32] See A/PV.2202, p. 99 (Iraq).
[33] *Pace* the representative of Algeria—A/PV.2202, p. 126.

Charter of the United Nations,[34] the Assembly recorded its opinion both that the crimes covered by the Convention cannot constitute the legitimate exercise of the right to self-determination and independence and, by the same token, that the Convention should not be used as a pretext for suppressing the legitimate exercise of that right. But it is clear that if an internationally protected person is kidnapped or murdered by a member of a national liberation movement, that crime will fall within the Convention and the States Parties must act in relation to it in accordance with the obligations which the Convention imposes on them. A number of speakers made this point in their statements in the General Assembly. For example, the representative of Italy said:

> As far as paragraph 4 is concerned, it is a known fact that my Government has always approved of the legitimate exercise, in accordance with the Principles and Purposes of the Charter of the United Nations of the right to self-determination and independence; and certainly it is not even conceivable that our Organization which has already done so much to eliminate from the world the evils of colonialism should adopt an instrument in contradiction with its very principles. It is appropriate, therefore, to state in paragraph 4 of the resolution that the Convention should in no way be utilized as an instrument of repression of national liberation movements, as one might perhaps consider possible, through its norms dealing with the prevention of crimes against internationally protected persons. We have created an instrument for the prosecution of criminals, not an instrument for the persecution of peoples exercising their rights, in accordance with the principles and purposes of the Charter.[35]

The representative of Canada spoke in similar terms:

> It is the purpose of the Convention which the General Assembly has just adopted to reaffirm this very important rule of inviolability in explicit terms and to provide strong and specific remedies to ensure that it is observed. No exception can be justified which would legitimize the perpetration of any crime against diplomats and other internationally protected persons. For any State to pretend the contrary would clearly constitute an attack on the fundamental rules of diplomatic, and thus of inter-State, relations.
>
> Seen in this light, it must be understood that the resolution by which the General Assembly has adopted the Convention cannot, in any way, affect the legal obligations set out in the Convention itself. The resolution expresses a self-evident fact when it states that the Convention cannot prejudice in any way the exercise of the legitimate right of peoples to self-determination and independence, in accordance with the principles and purposes of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[36]

[34] General Assembly resolution 2625 (XXV) of October 24, 1970.

[35] A/PV.2202, pp. 108–110.

[36] A/PV.2202, p. 100. See also *ibid.*, p. 102 (Federal Republic of Germany), pp. 111–112 (United Kingdom), p. 129 (Portugal), p. 130 (Netherlands), p. 136 (United States of America). A somewhat different view was expressed by the representative of Algeria, *ibid.*, pp. 126–7. The substantive part of the United Kingdom statement in the General Assembly on the Convention is reproduced in *United Nations No. 1 (1974) Report* (Cmnd. 5568), pp. 108–110.

IV THE CONVENTION

The provisions of the Convention will be considered under five headings: the definitions of "internationally protected person" and "alleged offender" (Article 1); the crimes covered by the Convention (Article 2 (1)); the Convention system (Articles 2 to 11); asylum (Article 12); settlement of dispute and final articles (Articles 13 to 20).

The definitions of "internationally protected person" and "alleged offender" (Article 1)

The crimes which fall within the scope of the Convention are certain crimes committed against an "internationally protected person," a term which is defined for the purposes of the Convention [37] in Article 1 (1):

> "internationally protected person" means:
>
> (a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;
>
> (b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household;

The term "internationally protected person" is new and has no meaning in international law outside the Convention. The idea underlying the definition is that there are certain persons in respect of whom international law imposes a special duty of protection over and above that owed to other persons. As is said in the preamble to the Convention, crimes against these persons jeopardising their safety "create a serious threat to the maintenance of normal international relations which are necessary for co-operation among States" Special protection is, however, enjoyed in differing degrees and the definition in Article 1 (1) is to a certain extent arbitrary. The definition is in two parts: a person within Article 1 (1) (a) is

[37] Article 1 (1), being merely a definition of the term "internationally protected person" for the purposes of the Convention, does not alter the scope or content of the duty of special protection which States owe in respect of most persons within the definition, neither does it affect the rules of State responsibility which may be applicable in a particular case. Among recent writings on the duty of special protection and these rules of State responsibility are: J. Sztucki, "Some reflections on the von Spreti case," (1970) 40 *Nordisk Tidsskrift for International Ret* 15–46; Weber, "Wieweit schützt das Völkerrecht den ausländischen Diplomaten im Falle seiner Entführung?" (1970) 3 *Verfassung und Recht im Übersee* 309–321; Juillard, *loc. cit.* at note 13 above, pp. 208–219; Strechel, *loc. cit.* at note 13 above, pp. 190–202 and 206–209; Rozakis, *loc.* cit. at note 2 above, pp. 33–42.

an " internationally protected person " whenever he is in a foreign State, for whatever reason; whereas Article 1 (1) (b), which includes the majority of persons within the definition, extends only to a person entitled to special protection " at the time when and in the place where " the crime is committed.

Article 1 (1) (a) covers Heads of State, Heads of Government and Ministers for Foreign Affairs. These persons have traditionally played a major role in international relations.[38] The reference to " any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned " does not appear in other treaties where reference is made to Heads of State. It was included at the request of certain East European States in order " to cover cases where the functions of Head of State were exercised by a collective body " [39] The International Law Commission, after having considered the question, had not expressly mentioned such collegial bodies in the draft articles, but nevertheless referred in its Report to the desirability of ensuring the fullest protection to all persons who have the quality of Head of State or Government.[40]

A number of changes, largely of a drafting nature, were made to the Commission's text of Article 1 (1) (b), and only the more significant will be mentioned. First, the clause " at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed " was added. This made express what the Commission regarded as clearly implied in its draft,[41] and reflects the fact that the enjoyment of special protection is limited in time and place. Second, the kind of special protection referred to in the Commission's text was " special protection for or because of the performance of functions on behalf of his State or international organisation " It was felt that the scope of this was unclear; and indeed it might even have been interpreted as covering any person who enjoyed any degree of immunity from jurisdiction.[42] While apparently starting from the concept of inviolability, the Commission nevertheless included among its

[38] For example, they are specifically referred to in Article 7 of the Vienna Convention on the Law of Treaties and in Article 21 of the Convention on Special Missions.

[39] A/C.6/SR.1410, p. 7 (German Democratic Republic).

[40] [1972] *I.L.C. Report*, p. 92. See Rozakis, *loc. cit.* at note 2 above, p. 44.

[41] [1972] *I.L.C. Report*, pp. 92–93.

[42] It has been said that the Commission's draft of Article 1 (1) (b) retained " a penumbral area of some proportions ". Kearney, *loc. cit.* at note 2 above, p. 88. See also Rozakis, *loc. cit.* at note 2 above, pp. 44–48. A similar problem arises in connection with the OAS Convention, which refers to " persons to whom the state has the duty according to international law to give special protection "— see Brach, *loc. cit.* at note 13 above, pp. 396–398; Przetacznik, *loc. cit.* at note 13 above, pp. 458–461.

examples of persons covered very broad categories, which included persons not all of whom enjoy inviolability, *e.g.* all officials of the United Nations and its specialised agencies.[43] The Convention, on the other hand, refers to "special protection from any attack on his person, freedom or dignity" This wording is taken from Article 29 of the Vienna Convention on Diplomatic Relations, Article 40 of the Vienna Convention on Consular Relations and Article 29 of the Convention on Special Missions, and the categories of persons entitled to such protection may be identified more precisely The United Kingdom representative in the General Assembly referred to Article 1 (1) (b) in the following terms:

> as regards article 1 (1) (b) and as the language of the provision itself makes clear, we understand that the persons who, in the circumstances specified in that subparagraph, are within the ambit of that subparagraph are those who fall within any of the following categories of persons, that is to say: persons who are entitled to the benefit of article 29 of the Vienna Convention on Diplomatic Relations, article 40 of the Vienna Convention on Consular Relations or article 29 of the New York Convention on Special Missions; persons who are high officials or agents of international organizations and who, under the relevant international agreements are, as such, entitled to the like benefit; and persons who, under customary international law or by virtue of some other specific international agreement, are entitled to special protection from any attack on their person, freedom or dignity. The subparagraph, of course, also covers members of the families of such persons, forming part of their households.[44]

The reference to members of the family is not, as it was in the Commission's draft, restricted to members of the family likewise entitled to special protection. Thus, the wife of a diplomatic agent entitled to special protection who is not herself so entitled is nevertheless an "internationally protected person" for the purposes of the Convention.

Finally, it should be mentioned that, at the suggestion of the representative of the United Arab Emirates, the Sixth Committee included the following paragraph in its Report:

> 23. The Sixth Committee interprets the term "internationally protected person" appearing in article 1, paragraph 1 as applying to nationals of third States appointed by sending States to international organizations if such representatives or officials are accepted by the international organizations in question, provided that they are not nationals of the host States where such international organizations have their headquarters.[45]

Thus, the Sixth Committee understood the term "internationally protected person" to include a person appointed by a sending State to an international organisation who was neither a national of the

[43] [1972] *I.L.C. Report*, p. 92.

[44] A/PV.2202, p. 112. The representative of the Netherlands spoke in similar terms, and in addition referred expressly to Article 40 of the Vienna Convention on Diplomatic Relations (transit through third States)—A/PV.2202, pp. 130–131.

[45] A/9407 p. 11; see also A/C.6/SR.1433, pp. 11–13.

sending State nor of the host State but would have been entitled to special protection had he been a national of the sending State. This extension of the definition should, however, have little effect in practice since under most agreements on privileges and immunities possession of the nationality of a third State does not exclude special protection.

Article 1 (2) contains the definition of "alleged offender" and reads: "alleged offender" means a person as to whom there is sufficient evidence to determine *prima facie* that he has committed or participated in one or more of the crimes set forth in article 2." This definition is somewhat unsatisfactory. The term was not defined in the Hague and Montreal Conventions, but the Commission included a definition in its draft articles "to make clear that in order to set in motion the machinery envisaged in the articles against an individual there must be grounds to believe that he has committed one of the crimes to which the draft articles apply." [46] The Sixth Committee voted to replace the Commission's text by the present definition, which, in the words of the representative of the United States of America, "while couched in apparently technical language, must of course be read more broadly so that it can be applied by the various legal systems." [47]

The crimes covered by the Convention (Article 2 (1))

The crimes covered by the Convention are referred to throughout as "the crimes set forth in article 2", *i.e.* the crimes listed in paragraph 1 of Article 2. They comprise certain attacks upon the person or liberty of an internationally protected person or upon his official premises, private accommodation or means of transport, and also threats and attempts to commit, and participation as an accomplice in such attacks. The precise coverage of Article 2 (1) will depend upon the municipal laws of the States Parties to the Convention since the exact definition of the offences may differ somewhat under the various systems of criminal law. Nevertheless, Article 2 (1) indicates reasonably clearly the acts covered.

The exceptional measures provided for in the Convention apply only to serious crimes. This was the intention both in the International Law Commission [48] and in the Sixth Committee. The text

[46] [1972] *I.L.C. Report*, p. 93.

[47] A/PV.2202, p. 134. See also the statement of the representative of the United Kingdom, *ibid.*, p. 113.

[48] "The Commission considered however that it would be preferable to use the general expression 'violent attack' in order both to provide substantial coverage of *serious offences* and at the same time to avoid the difficulties which arise in connexion with a listing of specific crimes in a convention intended for adoption

proposed by the Drafting Committee for subparagraph (a) was "a murder, kidnapping or other serious attack upon the person or liberty of an internationally protected person." The word "serious" was subsequently deleted "since it restricted the scope of the convention by introducing an element of uncertainty."[49] Nevertheless, it seems unlikely that the Convention can properly be interpreted as covering offences that are not serious. Thus, the representative of the United States of America said in the General Assembly:

> The Legal Committee decided to cover serious crimes, as was the initial intention of the International Law Commission. Subparagraph 1 (a) has been clarified so that instead of referring to "violent attack" it refers to "murder", "kidnapping" or "other attack". Obviously, the words "other attack" mean attacks of a similar serious nature to those expressly mentioned—murder and kidnapping. Covering threats, attempts and accessoryship is appropriate, because of the initial seriousness of the acts covered under subparagraph (a) and (b) of paragraph 1.[50]

Article 2 (1) covers the "intentional" commission of certain acts. The Commission's commentary reads as follows

> The word "intentional", which is similar to the requirement found in article 1 of the Montreal Convention, has been used both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim as well as to eliminate any doubt regarding exclusion from the application of the article of certain criminal acts which might otherwise be asserted to fall within the scope of subparagraphs (a) or (b), such as the serious injury of an internationally protected person in an automobile accident as a consequence of the negligence of the other party.[51]

It would appear from this passage that the word "intentional" covers two distinct ideas: the act must be committed intentionally and not merely negligently; and the offender must know that the victim belongs to one of the categories covered by the definition of "internationally protected person" in Article 1 (1), *i.e.* he must know that the victim holds a certain position.

The extent to which mention should be made of the motive or knowledge of the offender was much discussed during the elaboration of the Convention. On the one hand, it was proposed that the Convention should apply only to crimes "where one of the determining motives is the status of the victim."[52] At the other extreme, some

by a great many States... In view of the difference in definitions of *murder, kidnapping or serious bodily assault* that might be found in a hundred or more varying criminal systems if the method of listing individual crimes were to be used, it would seem necessary to adopt the difficult approach of including for re-incorporation into internal law a precise definition of such crimes." (emphasis added) [1972] *I.L.C. Report*, p. 94.

49 A/C.6/SR.1434, p. 12.

50 A/PV.2202, p. 134. See also *ibid.*, p. 113 (United Kingdom) and p. 131 (Netherlands).

51 [1972] *I.L.C. Report*, p. 95.

52 A/C.6/L.948, as amended by the Congo and Gabon.

considered that even the Commission's requirement of knowledge was undesirable. A number of intermediate positions were suggested, but ultimately the Commission's proposal was retained. Principle might have suggested that the Convention should apply only where the motive had some connection with the victim's status, but the practical consequence of having such a connection might have been to deprive the Convention of much of its effectiveness in view of the difficulty of proving motive.

The Commission's text of Article 2 (1) included the words "regardless of motive" after "intentional commission" These were explained in its commentary as follows

> While criminal intent is regarded as an essential element of the crimes covered by article 2, the expression "regardless of motive" restates the universally accepted legal principle that it is the intent to commit the act and not the reasons that led to its commission that is the governing factor. Such an expression is found in article 2 of the OAS Convention and article 1 of the Uruguay draft. As a consequence the requirements of the Convention must be applied by a State party even though, for example, the kidnapper of an ambassador may have been inspired by what appeared to him or is considered by the State party to be the worthiest of motives.[53]

It is thus clear that any force the words "regardless of motive" might have had would have been political rather than legal. In the Sixth Committee many delegates held that they were superfluous and might even be confusing to a municipal tribunal,[54] and they were deleted. Their deletion does not affect the meaning of the paragraph.

The Convention system (Articles 2 to 11)

The machinery in the International Law Commission's draft articles differed in important respects from that in the Hague and Montreal Conventions. In particular, the Commission's text provided that every State Party should have jurisdiction over the crimes concerned, and the Commission appears to have intended that every State Party should have a *locus standi* to seek extradition. In addition, there were departures from the wording of the Hague and Montreal Conventions, the exact significance of which was not always clear, such as the provision that the penalties for the crimes should take account of their "aggravated nature" The trend throughout the Sixth Committee's work was towards bringing the system of the new Convention closer to that of the Hague and Montreal Conventions. As a result, the machinery established by the new Convention is essentially the same as that of the Hague and Montreal Conven-

[53] [1972] *I.L.C. Report*, p. 95.
[54] See A/C.6/SR.1434, p. 7 (Tunisia); A/C.6/SR.1435, p. 3 (United Kingdom, United States of America).

tions. Minor departures from the wording of the Hague and Montreal Conventions were not intended to import a difference of substance.[55] The drafting history of certain provisions in the new Convention is therefore of interest for the interpretation of the corresponding provisions in the Hague and Montreal Conventions; and, conversely, in interpreting the new Convention, it may be necessary to have regard to the drafting history of the earlier Conventions.

Article 2

Article 2 (1) provides that the acts covered by the Convention " shall be made by each State Party a crime under its internal law " There is no provision corresponding to this in the Hague or Montreal Conventions, though it is clearly necessary that the offences covered by those Conventions be crimes in the internal law of each State Party. This paragraph was completed in the Commission's text by the words " whether the commission of the crime occurs within or outside of its territory." These words were omitted in the text adopted by the Sixth Committee and the extent of the obligation to take jurisdiction is now dealt with in Article 3. Article 2 (1) is thus concerned only with the definition of the acts covered by the Convention.

Unlike hijacking, the acts covered by the Convention will in general already be offences under the criminal law of most States, and it would thus seem that the substantive criminal law of most States will require little modification to give effect to the Convention. There is no intention to establish in the substantive law of States Parties a new category of " offences against internationally protected persons." It is probable also that the crimes set forth in Article 2 are already " punishable by appropriate penalties which take into account their grave nature ", as is required by Article 2 (2). This paragraph is similar in effect—if not in language—to Article 2 of the Hague Convention and Article 3 of the Montreal Convention. The International Law Commission's text of Article 2 (2), which would have made the crimes " punishable by severe penalties which take into account the aggravated nature of the offence ", had been criticised in so far as it suggested that the punishment should be greater merely because the victim was an internationally protected person.

The crimes set forth in Article 2 are serious attacks on internationally protected persons and do not include other attacks on

[55] See A/PV.2202, p. 116 (United Kingdom) and p. 134 (United States of America).

their person and freedom or attacks on their dignity, for which the measures provided for in the Convention would not be appropriate. Because of this limited coverage, certain delegates in the Sixth Committee considered it desirable to affirm, in paragraph 3 of Article 2, that paragraphs 1 and 2 " in no way derogate from the obligations of States Parties under international law to take all appropriate measures to prevent other attacks on the person, freedom or dignity of an internationally protected person." [56] It should also be said that the Convention in no way derogates from the obligations of States to take all appropriate measures to prevent the attacks falling within the scope of the Convention. At the same time, a State which is not a party to the Convention is not necessarily bound to adopt the machinery provided for in the Convention in order to fulfil its obligation to take all appropriate measures to prevent these attacks. In short, the adoption of this machinery is neither necessary nor, in itself, sufficient for a State to fulfil its obligations under the existing law It is merely one possible measure open to States when seeking to fulfil their duty of special protection.

Article 3

Article 3 sets out the circumstances in which a State Party is obliged to establish its jurisdiction over the crimes set forth in Article 2. It is modelled closely on Article 4 of the Hague Convention and Article 5 of the Montreal Convention. The States mentioned in paragraph 1, all of which have some connection with the crime, are obliged to establish their jurisdiction over the crime *ab initio.* This may be described as " primary jurisdiction " Under paragraph 2, any other State Party has to establish its jurisdiction in cases where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 (" secondary jurisdiction "). Paragraph 3 provides that the Convention does not exclude any criminal jurisdiction exercised in accordance with internal law

The Commission's text had provided that the crimes set forth in Article 2 should be made by each State Party crimes under its internal law " whether the commission of the crime occurred within or outside of its territory " and that each State Party should " take such measures as may be necessary to establish its jurisdiction over these crimes." It had thus sought to bring these crimes into that very limited class of offences in respect of which there is universal

[56] " Paragraph 3 of article 2 does not add to the crimes covered by the Convention, but merely states a basic fact that would be true whether or not this paragraph were included in the Convention."—A/PV.2202, p. 134 (United States of America).

jurisdiction. The majority of delegates in the Sixth Committee, however, favoured the jurisdictional system of the Hague and Montreal Conventions. A new article, proposed by Japan, the Netherlands and the Philippines, was adopted by a substantial majority and became, with minor drafting changes, Article 3 of the Convention.[57]

Article 3 (1) reads:

> Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:
>
> (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
>
> (b) when the alleged offender is a national of that State;
>
> (c) when the crime is committed against an internationally protected person as defined in Article 1[58] who enjoys his status as such by virtue of functions which he exercises on behalf of that State.

It has been suggested that under Article 4 (1) of the Hague Convention, States undertook not only to take measures to establish their jurisdiction but also to exercise it under the regime of the Convention.[59] Yet Article 4 (1) of the Hague Convention, like Article 5 (1) of the Montreal Convention and Article 3 (1) of the present Convention, says nothing about the exercise of jurisdiction, which is dealt with in later provisions. The obligation in Article 3 (1) of the present Convention is an obligation to establish jurisdiction, *i.e.* the Article requires States Parties to ensure that the rules of their municipal law concerning jurisdiction in criminal cases permit trial of an alleged offender under certain circumstances. Fulfilment of the obligation in Article 3 is no more than a step towards implementing the system *aut dedere aut punire* on which the Convention is based.[60]

Article 3 (1) (a) covers criminal jurisdiction taken upon the basis of the territorial principle and requires little comment. The generally accepted extension of the territorial principle to include ships and aircraft registered in the State concerned is expressly covered.[61] A State is entitled to establish such jurisdiction under customary international law. However, unlike certain earlier Conventions, the present Convention contains no express provision

[57] For a discussion of the universal jurisdiction provisions elaborated by the International Law Commission, see Rozakis, *loc. cit.* at note 2 above, p. 52. The new article proposed by Japan, the Netherlands and the Philippines is in A/C.6/L.912 Rev. 1.

[58] The words " as defined in article 1 " would appear to be superfluous.

[59] See Shubber, " Aircraft Hijacking under the Hague Convention 1970—a New Regime? " (1973) 22 I.C.L.Q. 687 at pp. 706–7.

[60] See Miss G. M. E. White, *loc. cit.* at note 5 above, pp. 41–42.

[61] Both the Dutch and the United Kingdom representatives in the General Assembly said that other references to " territory " should be interpreted as including ships and aircraft—A/PV.2202, pp. 113 and 131.

requiring States establishing joint air transport operating organisations or international operating agencies, which operate aircraft which are subject to joint or international registration, to designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registration for the purposes of the Convention.[62] This omission may reflect the fact that the present Convention is not primarily concerned with offences committed on board or against aircraft. It would seem entirely reasonable, and in accordance with the object and purpose of the Convention, to interpret it as at least permitting the States concerned to designate a State among them to establish jurisdiction.

Article 3 (1) (b) requires the State of nationality of the alleged offender to establish jurisdiction, and is likewise a basis of criminal jurisdiction well-founded in customary international law. It is not, however, a title of jurisdiction widely applied in municipal law, at least in the United Kingdom. Neither the Hague nor the Montreal Conventions require the State of nationality of the offender to establish primary jurisdiction.

Article 3 (1) (c) might be thought to be similar to the controversial "passive personality" principle and is probably an extension of the jurisdiction which a State may exercise under customary international law[63] There is no exact equivalent in the Hague or Montreal Conventions, but it is somewhat akin to the provisions concerning the State of the principal place of business or permanent residence of the lessee of the aircraft (Article 4 (1) (c) of the Hague Convention and Article 5 (1) (d) of the Montreal Convention) and to the provision concerning the State of registration of the aircraft against which an offence is committed (Article 5 (1) (b) of the Montreal Convention).

Article 3 (2) requires a State Party to establish jurisdiction where the alleged offender is in its territory and is not extradited. It follows precisely Article 4 (2) of the Hague Convention and Article 5 (2) of the Montreal Convention. A Dutch amendment[64] providing that the obligation to establish jurisdiction should arise only if a request for extradition had been received and rejected was not pressed to the vote. Article 3 (2) is concerned solely with jurisdiction

[62] See Article 18 of the (Tokyo) Convention on Offences and certain other Acts Committed on board Aircraft (704 U.N.T.S. 220, U.K.T.S. 126 (1969)); Article 5 of the Hague Convention; Article 9 of the Montreal Convention.

[63] "[The passive personality principle] is perhaps the most questionable of all grounds that have been advanced to justify extraterritorial jurisdiction"—Professor R. Y Jennings in "Extraterritorial Jurisdiction and the United States Antitrust Laws" (1957) XXXIII B.Y.I.L. 146, at p. 155.

[64] A/C.6/L.955. A related amendment is discussed below in connection with Article 7.

and does not affect extradition. But the fact that jurisdiction is only to be taken in the absence of extradition suggests that extradition will be the normal procedure, and jurisdiction under Article 3 (2) will only come into play in those exceptional cases where extradition is not possible. This jurisdiction, which goes beyond what is normally permitted by customary international law, was acceptable only as a secondary jurisdiction, where for any reason extradition did not take place. It is necessary in order to implement the *aut dedere aut punire* system. The considerations set out in the preamble to the Convention presumably led States to feel this extension of criminal jurisdiction to be justified. It may be asked whether a State Party may, under customary international law, exercise the jurisdiction provided for in Article 3 (2)—or in Article 3 (1) (c)—over an alleged offender who is a national of a State which it is not a Party to the Convention.[65] It is possible that the adoption of the Convention by consensus in the General Assembly amounts to a sufficient degree of State acceptance to establish that such jurisdiction is permissible under international law in relation to the particular crimes set forth in Article 2 of this Convention.

Article 3 (3) provides that the Convention " does not exclude any criminal jurisdiction exercised in accordance with internal law " This provision is not strictly necessary,[66] and clearly does not extend the titles of jurisdiction permitted under customary international law

Article 4

This Article provides for co-operation between States Parties in the prevention of the crimes set forth in Article 2. The Sixth Committee adopted the Commission's text (draft Article 3), which was based upon Article 8 (a) and (b) of the OAS Convention, with only minor changes. There is no corresponding provision in the Hague or Montreal Convention, though Article 10 (1) of the latter does require Contracting States to endeavour to take all practicable measures to prevent the offences covered by the Convention. The present Convention contains a number of provisions relating to co-operation between States Parties. These provisions are all in very general terms, and their actual implementation in any given

[65] The same question arises in connection with the Hague and Montreal Conventions. And see the remarks of the representatives of the United Kingdom and the United States of America on the jurisdictional aspects of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted by General Assembly resolution 3068 (XXVIII) of November 30, 1973—A/PV.2185, pp. 12–16 and 23–25.

[66] See Shubber, *loc. cit.* at note 59 above, p. 713.

situation must clearly depend upon what is reasonable in the circumstances. The representative of the United Kingdom said in the General Assembly: "it is implicit in the texts of these articles [4, 5 and 10], as we read them, that the obligations assumed in this respect must be subject to the limitations imposed by national law and by the practicalities of the situation in each case." [67]

Article 5

Article 5 concerns the communication of information. Paragraph 1, which is the Commission's draft Article 4 as amended by the Sixth Committee, concerns the communication of information with a view to the alleged offender being apprehended. Paragraph 2, which originated in a proposal made by the Federal Republic of Germany, recognises the interest which the State on whose behalf the victim was exercising his functions has in being kept fully informed. There are no equivalent provisions in the Hague, Montreal or OAS Conventions.

Article 6

The first sentence of this Article reads: "Upon being satisfied that the circumstances so warrant, the 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 the purpose of prosecution or extradition." There follow provisions concerning the notification of measures to interested States and international organisations and the rights of persons in custody. This Article is similar to Article 6 of the Hague Convention and Article 6 of the Montreal Convention but the reference to stateless persons in paragraphs 1 (b) and 2 (a) is new.

Article 7

This Article is the key provision of the Convention. It reads:

> 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.

It was adopted by the Sixth Committee unchanged from the Commission's text, and corresponds to Article 7 of the Hague Convention and Article 7 of the Montreal Convention. A comparison of the three Articles will show that Article 7 of the Montreal Convention is identical with Article 7 of the Hague Convention, and

[67] A/PV.2202, p. 113.

that Article 7 of the present Convention, though somewhat differently worded, is substantially the same in content. The words "whether or not the offence was committed in its territory", which occur in the Hague and Montreal Conventions, were omitted by the Commission because it had provided for universal jurisdiction in draft article 2 (1), but they would appear to have been superfluous in any event. The words "without undue delay" do not appear in the Hague or Montreal Conventions and do not add anything to the content of the obligation since if there were undue delay there would certainly not be a good faith performance of the obligation. The Hague and Montreal Conventions contain a second 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." This is replaced by "through proceedings in accordance with the laws of that State."

Miss White has written the following about Article 7 of the Hague Convention:

> Article 7 was the subject of a considerable controversy at the Diplomatic Conference. A number of States, including both the United States and the Soviet Union, argued that States should be under an obligation in every case either to extradite or prosecute the hijacker. However such a provision would have been unacceptable to many other States who considered that there could be exceptional cases where, perhaps for lack of evidence or for humanitarian reasons, the circumstances would not justify bringing a prosecution. Those States considered that, although cases where proceedings were not brought would be rare, they could not accept a fetter on the discretion enjoyed by their prosecuting authorities to decide whether or not to prosecute in the light of all the facts of a case.[68]

A Dutch amendment to Article 7 would have added after the word "present" the words "and which has received a request for extradition not later than three months after dispatch of the notification mentioned in article [6]"[69] This amendment, which was related to the Dutch amendment to Article 3 (2) mentioned above, was rejected. The Dutch representative spoke as follows in the General Assembly:

> it is now clear that a State party, where an alleged offender is found, will be bound to submit the case to prosecution even if the States which have primary jurisdiction under the terms of article 3 all shirk requesting extradition. I wish to make it clear that we regard the listing of States with primary jurisdiction as the expression of those States' duty to bear, as a rule, the heaviest burden of the Convention. In other words, the primarily interested States have at least a moral duty to request extradition when the alleged offender is found in a State which, under normal jurisdictional rules, would have no involvement with the crime at all.[70]

[68] *Loc. cit.* at note 5 above, p. 42.
[69] A/C.6/L.954.
[70] A/PV.2202, p. 131.

Article 8

This Article, which contains the machinery necessary to make extradition an effective option to submission to the competent authorities for the purposes of prosecution, reproduces, with a few drafting changes,[71] Article 8 of the Hague Convention and Article 8 of the Montreal Convention. On the other hand, it differs substantially from the International Law Commission's text. In particular, the Commission's draft article 7 (4), which would have established a rigid system of priority of extradition requests, was omitted and Article 8 (4), concerning the *locus* of the crime, was added. The drafting history and effect of Article 8 of the Hague Convention have been admirably summarised by Miss White in terms equally applicable to Article 8 of the present Convention.[72] The following point made by Miss White is particularly important (and is sometimes overlooked)[73]:

> Apart from [Article 8 (4)], Article 8 in no way affects any restriction there may be in national law on the extradition of an offender. Thus, for example, the law of many States prohibits the extradition of political offenders or of nationals of the State requested to extradite. The Convention does not require such rules to be waived: it merely provides that hijacking is an extraditable offence and leaves it to national law to determine whether in any given case the hijacker should be extradited.

Article 9

This provision, which is unchanged from the Commission's text, guarantees fair treatment to any person regarding whom proceedings are being carried out in connection with any of the crimes set forth in Article 2. There is no corresponding provision in the Hague or Montreal Conventions, and—according to the Commission's commentary—the Article "finds inspiration in articles 4 and 8 (c) of the OAS Convention and 4 and 9 (c) of the Uruguay working paper"[74]

Article 10

This Article concerns assistance in connection with criminal proceedings and is the same as the Commission's text. In the Commission's words, it "substantially reproduces the provisions of article 10 of the Hague Convention, article 11 of the Montreal Convention and article 6 of the Rome draft."[75] The Chairman of the Drafting Committee, in introducing the text, made some points in clarification:

[71] See A/PV.2202, pp. 113–4.
[72] *Loc. cit.* at note 5 above, pp. 43–44.
[73] See, *e.g.*, Shubber, *loc. cit.* at note 59 above, pp. 717–8.
[74] [1972] *I.L.C. Report*, p. 99. See Rozakis, *loc. cit.* at note 2 above, pp. 60–62.
[75] [1972] *I.L.C. Report*, p. 100.

> First, the expression "assistance in connection with criminal proceedings" in paragraph 1 should be understood as covering assistance not only in connection with the trial of a case but also in connection with the proceedings leading up to trial. Secondly, article 10 would require States parties to supply only such evidence as was at their disposal in accordance with their national legislation.[76]

Article 11

This provides that a State Party in whose territory an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations. Unlike the corresponding provisions in the Hague and Montreal Conventions, Article 11 does not apply to extradition proceedings but only to prosecutions.[77]

Asylum (Article 12)

The Hague and Montreal Conventions contain no provision on asylum. The OAS Convention, on the other hand, does contain such a provision (Article 6), the effect of which is not wholly clear.[78] Eleven Latin American States proposed that a similar provision be inserted in the present Convention,[79] but after informal negotiations this was not put to the vote and Bolivia proposed a new text [80] which, slightly amended by the Drafting Committee, became Article 12 of the Convention. This reads:

> The provisions of this Convention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those Treaties; but a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a party to those Treaties.

The effect of Article 12 is carefully circumscribed. The Treaties on Asylum have only a very limited application, if any at all, to the crimes covered by the Convention.[81] In addition, the following points

[76] A/C.6/SR.1437 p. 11.

[77] *Cf.* Article 11 of the Hague Convention and Article 13 of the Montreal Convention. And see the remarks of the Chairman of the Drafting Committee in A/C.6/SR.1437, pp. 11–12 and A/C.6/S.R.1447, p. 5.

[78] Article 6 of the OAS Convention reads: "None of the provisions of this convention shall be interpreted so as to impair the right of asylum." See Brach, *loc. cit.* at note 13 above, pp. 402–405.

[79] A/C.6/L.928: "None of the provisions of this Convention shall be construed as modifying the treaties on asylum." The 11 States were Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Peru, Uruguay and Venezuela.

[80] A/C.6/L.943*

[81] See, *e.g.*, the statement in the Sixth Committee by the representative of Colombia, when introducing the eleven-power draft, "that none of the 11 Governments sponsoring the proposal had ever invoked the procedures established in the treaties on asylum to protect persons guilty of the crimes to which the Commission's draft was directed"—A/C.6/SR.1421, p. 3. See also statements by the

should be noted. First, Article 12 refers only to the Treaties on Asylum which were in force at the date of the adoption of the Convention, *i.e.* on December 14, 1973. Second, Article 12 is similar in effect to an agreement to modify a multilateral treaty (the Convention) between certain of the parties only (the States which are parties to the Treaties on Asylum). Such agreements are covered by Article 41 of the Vienna Convention on the Law of Treaties. It has been said that certain of the rules set out in Article 41 constitute progressive development rather than codification,[82] but it is nevertheless of interest to consider Article 12 in the light of Article 41 of the Vienna Convention. Article 41 reads:

> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
> (a) the possibility of such a modification is provided for by the treaty; or
> (b) the modification in question is not prohibited by the treaty and:
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
> 2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

This Article does not, of course, cover the present case since there is, in fact, no agreement to modify the Convention; rather the Convention, by its terms, applies differently as between certain parties. The provisions of Article 12 are, however, similar to the rules concerning agreements to modify multilateral treaties between certain of the parties only. In particular, Article 12 includes a restriction on the effects of the modification identical with that set out in Article 41 (1) (b) (i) of the Vienna Convention; as explained by a number of representatives in the Sixth Committee and in the General Assembly, the Article in no way affects the position of States Parties to the Convention which are not parties to the Treaties on Asylum in force on December 14, 1973. The representative of the United States of America gave some useful examples:

> The article states that this Convention shall not affect the application of treaties on asylum in force as between parties to those treaties *inter se*. That is to say, even if the alleged offender is present on the territory of one party to such a treaty and the State on the territory of which the crime

representatives of Bolivia (A/C.6/SR. 1432, p. 3), Brazil (A/C.6/SR.1439, p. 13) and Guatemala (A/C.6/SR.1447 p. 13). It may be significant, in this connection, that Article 2 of the OAS Convention provides that the crimes covered by that Convention " shall be considered common crimes of international significance, regardless of motive " (but see Article 6 of that Convention, quoted at note 78 above).

[82] I. M. Sinclair *The Vienna Convention on the Law of Treaties* (1973), p. 16.

has taken place is also a party to such a treaty, if the internationally protected person attacked exercised his functions on behalf of a State not party to such a treaty or the alleged offender was a national of a State not party to such a treaty, the State where the alleged offender is present may not invoke that treaty with respect to the non-party State. Thus, the non-party State can hold the State where the alleged offender is present to its obligations under article 7 and may, if it wishes, request extradition under article 8.[83]

Settlement of disputes (Article 13) and final articles (Articles 14 to 20)

The International Law Commission's text contained alternatives for the settlement of disputes. Alternative A provided for the submission to a conciliation commission, at the request of one party, of any dispute not settled by negotiation. Alternative B provided for the submission to arbitration, at the request of one party, of any dispute not settled by negotiation, but permitted a State to opt out of this procedure. Alternative B followed exactly Article 12 of the Hague Convention and Article 14 of the Montreal Convention. The United States of America submitted an amendment [84] which combined these alternatives and provided for arbitration subject to opting-out in favour of conciliation. In the end, however, this amendment was withdrawn, and the Sixth Committee decided in favour of alternative B, which became Article 13 of the Convention.[85]

The Commission's text did not contain final articles. The preparation of draft final articles was entrusted by the Sixth Committee to a small Working Group. Its draft,[86] which provided *inter alia* for participation by "all States" and for the Secretary-General of the United Nations to be depositary, was considered briefly in the Sixth Committee, and then referred to the Drafting Committee. The text submitted by the Drafting Committee [87] contained a number of changes; in particular, entry into force was to be after the deposit of the twenty-second instrument of ratification or accession rather than the tenth; and a new article was included making express provision for denunciation.

[83] A/PV.2202, pp. 135–6. See also *ibid.* p. 116 (United Kingdom), p. 119 (Belgium) and p. 132 (Netherlands). A few Latin American delegations had doubts about Article 12, *e.g.* El Salvador, *ibid.*, p. 142.

[84] A/C.6/L.938.

[85] The Drafting Committee made some minor amendments to alternative B, which were described by the representative of the United States of America in the General Assembly as "minor technical improvements improvements which we consider reflect more precisely the intention of the drafters of the provision in the Hague and Montreal Conventions"—A/PV.2202, p. 136. For a more detailed analysis of alternatives A and B see Rozakis, *loc. cit.* at note 2 above, pp. 65–71.

[86] A/C.6/L.940. The Working Group was composed of the representatives of Austria, Ghana, India, Poland and Uruguay.

[87] A/C.6/L.944/Add. 3.

The question of reservations played an important role in the search for a compromise on the issue of self-determination. As we have seen, the compromise proposal of the Chairman of the Sixth Committee included a new Article which would have permitted a State to make reservations to Articles of the Convention other than Articles 1, 2, 3, 7, 9 and 11. This Article was subsequently withdrawn on the understanding that the Report of the Sixth Committee would record that it had been "withdrawn as unnecessary since it includes articles considered to incorporate the object and purpose of the Convention." The Convention as adopted therefore contains no Article on reservations. (Article 13 (2), which permits a State to declare that it is not bound by the arbitration provision, does not have the effect of excluding other reservations.) The question of reservations is therefore governed by the general rule that a State may formulate a reservation unless the reservation is incompatible with the object and purpose of the treaty. In any application of this rule to the present Convention, due weight will have to be given to the statement in the Report of the Sixth Committee referred to above, and to what was said by a number of representatives concerning the object and purpose of the Convention.[88]

The combination of participation by "all States" and the Secretary-General as depositary was open to the objection that the Secretary-General would be placed in the invidious position of having to decide whether a given entity was or was not a State. This had been avoided in the past either by the use of the "Vienna formula," under which the States entitled to participate were clearly identified, or by employing the device of multiple depositaries. A solution to this problem, which in the past had been highly contentious, was evolved within the Drafting Committee: the provisions relating to participation by "all States" and the Secretary-General as depositary were retained, and the General Assembly adopted the following understanding:

> In accordance with its terms, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, will be open to participation by all States and the Secretary-General of the United Nations will act as depositary. It is the understanding of the General Assembly that the Secretary-General, in discharging his functions as depositary of a convention with an "all States" clause, will follow the practice of the General Assembly in implementing such a clause and, whenever advisable, will request the opinion of

[88] A/PV.2202, p. 101 (Canada), p. 107 (Italy), p. 130 (Netherlands), pp. 134–5 (United States of America).

the Assembly before receiving a signature or an instrument of ratification or accession.[89]

It will be noted that this understanding, while referring to and adopted at the same time as the present Convention, is couched in general terms and is applicable to any treaty with an "all States" clause where the Secretary-General is depositary. This solution to a long-standing problem was welcomed by a number of delegations, and by the Chairman of the Sixth Committee.[90]

[89] *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 30 (A/9030)*, p. 150.

[90] See A/PV.2202, p. 103 (Federal Republic of Germany); *ibid.*, p. 136 (United States of America); A/C.6/SR.1449, p. 3 (Union of Soviet Socialist Republics). The Chairman of the Sixth Committee said that the controversy between the Vienna and the "all States" formulae had been "settled for all time"—A/C.6/SR. 1455, p. 11. The solution was adopted in the Sixth Committee by 85 votes to none, with 4 abstentions (Burma, Cuba, Libyan Arab Republic, Sudan)—A/C. 6/SR.1451, pp. 13–14. The representatives of both the United States of America and the United Kingdom referred to the Drafting Committee's solution at the time of the adoption of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* and said that, if the General Assembly were to adopt the understanding, it would enable their Governments to lift their objections to the final articles of that Convention—A/PV.2185, pp. 16 and 26.