(i) INTRODUCTORY NOTE

During its twenty-third session held in 1971 the International Law Commission received a communication from the Security Council drawing its attention to a request received from the representative of the Netherlands concerning the need for action to ensure the protection and inviolability of diplomatic agents in view of the increasing number of incidents that were taking place in various parts of the world. The Commission decided at that session that if the U. N. General Assembly so requested, it would prepare at its 1972 session a set of draft articles on this subject with a view to submitting the same to the twenty-seventh session of the General Assembly.

By resolution 2780 (XXVI) of 3 December 1971, the General Assembly requested the International Law Commission to study the question as soon as possible and to prepare a set of draft articles dealing with offences committed against diplomats and other persons entitled to special protection under international law. The General Assembly also requested the Secretary-General to invite comments from member States on this subject.

In pursuance of the aforesaid decision, the Commission took up this work during its 1972 session on the basis of a working paper prepared by Mr. Kearney (the then Chairman of the Commission) containing certain draft articles and the observations that were received from 24 member States. The Commission had also before it the text of a Draft Convention, known as the 'Rome Draft', a working paper containing the text of a Draft Convention submitted to the twenty-sixth session of the General Assembly by the Delegation of Uruguay, the text of the OAS Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and related Extortions that are of International Significance, signed at Washington in February 1971, the Convention for the Suppression of

Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, and the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1971.

The Commission gave detailed consideration to the subject at its 1972 session and provisionally adopted a set of 12 draft articles on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons, which was submitted by the Commission to the General Assembly. The Commission in transmitting the draft articles to the General Assembly indicated that it was up to the General Assembly to decide whether in view of the urgency of the matter the articles should be submitted forthwith to an international conference for consideration or return the same to the Commission for further study in the light of governmental comments. The General Assembly during its twenty-seventh session decided that the question should be included in the agenda of its twenty-eighth session, to be held during 1973, with a view to the elaboration of a Convention.

Under Article 3(a) of its Statutes, the Asian-African Legal Consultative Committee is required to consider the work of the International Law Commission and to give its comments thereon with a view to assisting the member governments of the Committee in examining the draft articles prepared by the Commission. Pursuant to the aforesaid mandate of the Committee, the Committee's Secretariat prepared certain comments on the draft articles on protection and inviolability of diplomats prepared by the Commission and placed it before the Committee at its fourteenth session held in New Delhi in January 1973.

The draft articles prepared by the Commission were based on the fundamental premise that certain categories of officials characterised as 'internationally protected persons' were entitled to special protection, and towards that end the draft articles provided that acts enumerated in Article 2 thereof be regarded as crimes by all States under their municipal laws; and that the

offender be prosecuted and punished by any State irrespective of the place of commission of the offence or the nationality of the accused person. The draft articles also imposed an obligation on the State where the alleged offender might be found either to extradite him or to proceed against him under its own laws.

The main question which the Secretariat urged the Committee to consider in respect of the draft articles was : which State or States should be competent or obliged to deal with the offender in order to effectuate in the best possible manner, the intention behind the proposed Convention and also with a view to eliminate causes of friction between States whilst implementing the provisions of the Convention ? The Secretariat pointed out that one possible view was that the State where the offence had been committed should be the only State competent and that State ought to under an obligation to prosecute and punish the offender and the State where the offender might be found should be under a legal obligation to extradite the offender. Another view was that the offender should be prosecuted and punished by the State where he was found. The third view, which in fact had been adopted by the Commission, was that every State was entitled to punish the offender and the State where the offender was found would have the option either to extradite him or to deal with him itself under its own laws.

Another question which the Secretariat posed for consideration of the Committee was whether crimes committed out of political motive should be treated any differently for the purposes of the proposed Convention. The Commission had proceeded on the basis that it should not be so.

At the New Delhi session, this matter was taken up in the fifth plenary meeting held on the 13th of January 1973 Although certain observations of a preliminary nature were made during the discussions in the Committee, it was not in a position to examine the draft articles and to give its views thereon since some of the Delegates expressed the view that the governments should have sufficient time to consider carefully the

draft articles prepared by the Commission in view of the complexity of the subject and the delicate nature of the matter covered by the draft articles. It was, however, decided that the comments prepared by the Secretariat should be circulated to the member governments so that they could be taken into account by the governments whilst considering the draft articles. The comments on the draft articles were also transmitted to the United Nations in response to the invitation extended by the General Assembly in its resolution 2926 (XXVII) of 29 November 1972.

(ii) COMMENTS PREPARED BY THE SECRETARIAT OF THE COMMITTEE ON THE DRAFT ARTICLES PROVISIONALLY ADOPTED BY THE INTERNATIONAL LAW COMMISSION

Article 1

TEXT AS PREPARED BY THE

International Law Commission)

For the purposes of the present articles :

1. "Internationally protected person" means :

   (a) A Head of State or a Head of Government, whenever he is in a foreign State, as well as members of his family who accompany him;

   (b) any official of either a State or an international organisation who is entitled pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State or international organisation, as well as members of his family who are likewise entitled to special protection.

2. "Alleged offender" means a person as to whom there are grounds to believe that he has committed one or more of the crimes set forth in Article 2.

3. "International organisation" means an inter-governmental organisation.

This article fulfils a two-fold purpose, namely, it gives specific meanings to certain expressions attributed for the purposes of the draft articles and secondly, by so doing it determines the scope of the applicability of the provisions of the draft articles. This is in accordance with the practice followed in

many of the conventions adopted under the auspices of the United Nations.

The corresponding provision in the I.L.C. working paper prepared by Mr. Kearney is Article 3. Similar provisions have been incorporated in the conventions dealing with allied matters.

Paragraph 1 of this article defines what is meant by the term "internationally protected persons" thus determining the exact coverage of the scope of the draft articles in accordance with the mandate of the Commission. contained in paragraph 2 Part III of the General Assembly Resolution 2780 (XXVI) dated the 3rd December 1971. This paragraph differentiates between the two categories of persons who, in the view of the Commission, are to be accorded special protection. Sub-paragraph (a) specifically refers to the special protection to be accorded to Heads of States or Heads of Governments regardless of the nature of their visit, whether official, unofficial or private. While the Commission refrained from specifically mentioning "presidential collegiate" in this sub-paragraph. it interpreted the sub-para to include members of an organ which functioned in the capacity of Head of State or Government in collegiate fashion (See paragraph 2 of the Commentary to the draft articles prepared by the Commission). This position could perhaps be clarified by an Explanatory note to this article.

This principle of inviolability of Heads of States and diplomatic agents stemming from the fact that they were considered sacrosanct has long been acknowledged by classical international law as essential to the conduct of relations among sovereign States (See Oppenheim, 8th Edition, Vol. I. p. 789). In the case of States, inviolability is based on the principle of *par in parem non habet imperium* while in the case of diplomatic agents on the principle of *functional necessity* for fulfilling their duty. Special protection in classical international law did not only imply safety of their persons but included inflicting of severe punishment for offenders (See Hudson, *Cases on International Law*, p. 780, Hackworth's *Digest* Vol. IV, page 398). In the modern context the position or Heads of Governments should

be taken to be at par with Heads of States for the purposes of immunity under international law in view of the fact that when the doctrine of immunity for the Heads of States was evolved, the Heads of States in fact also were the Heads of their Governments. The Commission is, therefore, fully justified in including these categories of persons among these entitled to special protection. The visits of Heads of States and Governments are very frequent in modern times and it is necessary to ensure that full protection is afforded to them. We should, therefore, accept this provision in the I.L.C. Draft.

There is, however, one point which needs to be considered. The Minister for Foreign Affairs has always enjoyed a special position under international law as he is the person through whom International affairs of a State are conducted. (See Oppenheim, Vol. I, p. 764). In traditional international law the Foreign Minister was accordingly entitled to special protection. It is, therefore, suggested that the Minister for Foreign Affairs should also be included in sub-paragraph (a). In the Working Paper prepared by Mr. Kearney all Ministers of Government were brought in at par with Heads of States and Governments in paragraph 1 of Article 3 of his draft, The Commission does not appear to have accepted this position. While there may be little justification to bring in all Ministers within this category, the position of the Foreign Minister is different and has been so regarded in international law. We, therefore, recommend that "Minister for Foreign Affairs" be included in sub-paragraph (a) of this Article.

Sub-paragraph (b) defines other persons who are to be regarded as "internationally protected persons". Persons falling under this category are officials of either a State or an international organization entitled to special protection under international law or an international agreement, while on functional duty for the State or the international organization as the case may be. Members of the family of such officials are also included in this sub-paragraph for receiving special protection.

In formulating the text of sub-paragraph (b) the Commission decided in favour of the descriptive method of approach rather than an enumerative approach as being the best way of conveying the broadest scope possible

for the application of the draft articles. Mr. Kearney in his Working Paper had followed an enumerative approach in paragraph 3 of his draft. The Commission in adopting the descriptive method appears to have been influenced by article 2 of the O.A.S. Convention and Article 1 of the Rome draft which were before the Commission. We recommend that the method of approach adopted by the Commission be regarded as correct.

The Commission in its commentary to this article explains that the accordance of special protection to categories of persons mentioned in sub-paragraph (b) is connected with the performance of official functions. Thus a diplomatic agent on vacation in a State other than the host or the receiving State would not ordinarily be entitled to special protection. We recommend that this position be accepted as correct.

The Commission in its commentary has explained that the preposition "for" used in this sub-paragraph relates to the special protection to be afforded by a receiving or host State and the preposition "because of" refers to that afforded by a State of transit. The Commission has also explained that the special protection envisaged here applies to all officials who are entitled to inviolability as well as those entitled to a more limited concept of protection. We feel that this position may be clarified by an explanatory note to this article.

The use of both expressions "general international law" and "international agreement" in sub-paragraph (b) was adopted by the Commission to enable the broadest scope of application of the draft; for example, if the expression "general international law" was not mentioned, diplomatic agents of States not party to the Vienna Convention on Diplomatic Relations might be considered as excluded from the application of sub-paragraph (b). The draft also takes account of the new progressive trend in international law which includes the protection of members of special missions.

The Commission in its *Commentary* on this sub-paragraph explains that it intended to cover within the purview of sub-paragraph (b) diplomatic agents and members of the administrative and technical staff of the mission within the meaning of the

Vienna Convention on Diplomatic Relations; consular officials and their staff within the meaning of the Vienna Convention on Consular Relations; officials of the United Nations within the meaning of Articles V and VII of the Convention on the Privileges and Immunities of the United Nations; experts on missions for the United Nations within the meaning of Article VI of the aforesaid Convention: and officials of specialised agencies within the meaning of Articles VI and VIII of the Convention on the Privileges and Immunities of Specialised Agencies. The *Commentary* further states that Heads of special missions and members of their diplomatic, administrative and technical staff and Heads of Delegations, other delegates together with members of their diplomatic, administrative and technical staff are also to be included within the category mentioned in sub-paragraph (b). It also appears from the I.L.C's *Commentary* to paragraph 3 of this article that officials of regional and other inter-governmental organisations are also included in the category covered by sub-paragraph (b) of paragraph 1 of this article.

On a close examination of this sub-paragraph we find that whilst there would be no difficulty in according special protection to diplomatic and consular officers together with their administrative and technical staff (as they would be covered either by the Vienna Conventions or general principles of international law) and persons connected with the United Nations and Specialised Agencies either as delegates or as officials or specialists who are covered by the two United Nations Conventions mentioned above, some difficulty may be experienced about the position of persons who are included in delegations to *ad hoc* conferences or are sent to foreign countries either on goodwill visits or for transaction of governmental business such as negotiating agreements of various characters. The Convention on special Missions adopted in 1969 has yet to be ratified by many States, and it is possible to visualise some cases which may not be covered by this Convention.

Having regard to the modern tendency and practice of nations to send official delegations for important governmental business which are often headed by Ministers of Cabinet rank, we consider that a specific provision should be made in the draft

articles which would clearly and without any doubt whatsoever provide for special protection of such persons in this Convention. There can be no doubt that the protection of Cabinet Ministers and important officials who are sent on such delegations is of equal, if not greater, importance to the home States than the protection of their diplomatic agents. In fact, Mr. Kearney in his Working Paper had specifically provided for protection of this category of persons in Article 3(2) (g) of his draft even though in Article 3(2) (c) he had separately included the categories of persons who would be entitled to personal inviolability under the Convention on Special Missions.

We recommend that a provision similar to Article 3 (2) (g) of Mr. Kearney's Working Paper should be included as sub-paragraph (c) in paragraph 1 of Article 1 of the International Law Commission's draft, at least by way of abundant caution, even though it may be possible to take the view that they are already included in sub-paragraph (b) of that article.

Paragraph 2 of this Article defines the expression "alleged offender". The definition ought to be acceptable but we may point out that difficulties could arise in its practical application when a State may choose to proceed under this Convention. This paragraph provides that there must be grounds to believe that a person has committed a crime of the prescribed category - and it ought to be so. But the question is who has to be satisfied about the existence of the grounds and in what manner — should it be subjective satisfaction of the Authority or should it be examined objectively ? Unless this matter is clarified in the draft, possible conflicts may arise in certain cases between two or more States and particularly the State of nationality when a State may choose to proceed against a person on its own satisfaction that grounds do exist for trying him as an alleged offender.

Paragraph 3 defines what is an "international organization" within the meaning of the draft articles. In its *Commentary*, the Commission has clarified that "international organizations" include not only those of a universal character but also regional and other inter-governmental organisations. For the reasons given in the *Commentary*, this provision should be acceptable.

A question arose before the Commission whether the expression "international organisations" should include non-governmental organisations of a certain character such as the International Red Cross by reason of the fact that the officials of such non-governmental organisations had to perform functions which were in certain cases more important than those performed by officials of governmental organisations. The Commission did not accept this proposal in view of the fact that it would be difficult to draw a line, if non-governmental organisations were also to be included. In the circumstances, we may accept the recommendations of the Commission although it might have been desirable to include officials of the International Red Cross within the category of persons entitled to special protection.

Article 2

(Text as adopted by the Commission)

"The international commission, regardless of motive of :

(a) a violent attack upon the person or liberty of an internationally protected person,

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

(c) a threat to commit any such attack,

(d) an attempt to commit such attack, and

(e) participation as an accomplice in any such attack,

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

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

3. Each State party shall take such measure as may be necessary to establish its jurisdiction over these crimes."

This article deals with two distinct though related matters, namely, (a) the determination *ratione materiae* of the scope of

the draft articles by setting out the nature of the crime to which the Convention will apply, and (b) the obligation of the States parties to the Convention to prosecute and punish those crimes.

Articles 1, 2 and 4 of the Working Paper prepared by Mr. Kearney covered the subject-matter of the present draft article. Similar, though not identical, provisions were also incorporated in the Rome draft, the O.A.S. Convention and the draft Convention prepared by the Delegation of Uruguay.

Paragraph 1 of this article makes it the obligation of a State party to the Convention to regard the acts enumerated in this paragraph as crimes under its internal law *irrespective of whether the commission of the act takes place within or outside its territory*. A further obligation is imposed upon States to treat such acts as crimes *regardless of the motives* of the offender in committing the offence.

Two questions need consideration in regard to this paragraph, namely: (i) Should a State be obliged to treat the acts enumerated in this paragraph as crimes under its own internal law even though they are committed outside its territory with a view to punishing the offender, and (ii) whether the motive of the offender ought to be disregarded in treating the specified acts as crimes.

Under customary international law, a State is competent to regard a particular act or omission as a crime under its internal law when it is committed in its own territory and to punish the offender if the crime has been committed within its territory regardless of the nationality of the offender. A State is also competent to punish its own nationals for their acts or omissions which would be regarded as crimes under its internal law even though the same are committed outside its territory. The article as provisionally adopted by the Commission, however, contemplates that every State would regard the acts specified in paragraph 1 of this article, wherever they may be committed, as crimes under its internal law so that the offender may be punished irrespective of the place of the commission of the offence and irrespective of his nationality. This position, though

somewhat inconsistent with the doctrine that 'crime is local', has been applied in the case of *piracy jure gentium* and in respect of war crimes.

It may be argued that if the proposed Convention is to have any effective force, it is necessary that all States must regard the acts specified in paragraph 1 of this article as crimes under its internal law irrespective of the place of the commission of the offence on the same footing as piracy or war crimes and as such punishable by every State irrespective of the place of the commission of the offence. It may be said that international co-operation is essential for suppression of acts of terrorism against internationally protected persons and the same can be achieved best in the manner contemplated in this draft article. On the other hand, it may be argued that international law places an obligation on every State to prosecute and punish the offender whenever acts of the nature mentioned in this article are committed in its territory and that the scope of the proposed Convention ought to be limited to emphasizing that obligation. Thus, it may be contended that the State where the acts enumerated in this paragraph have been committed should regard such acts as crimes and deal with the offender in the usual manner, namely, by apprehending and punishing him if he is found in its territory or by taking out extradition proceedings if the offender has taken refuge in the territory of some other State; and on this basis it would be quite unnecessary to provide that a State must regard the acts as crimes even if they are committed outside its territory. In any view of the matter, there should be no objection to accepting the recommendations of the International Law Commission that the acts enumerated in this paragraph shall be made by each State a crime under its internal law because that will ensure that every State would regard acts of this character as crimes if they are committed within its territory and to that extent the provisions of this article would have served a very useful purpose. As already stated, the point which needs careful consideration is whether the expression used in this paragraph "*whether the commission of the crime occurs within or outside of its territory*" should or should not be retained. In the first view of the matter, this has to be retained whilst in the second view, this should be omitted.