As regard the second point which requires consideration with regard to this paragraph, namely, whether the concept embodied in the expression "*regardless of motive*" should be acceptable, the Commission in its *Commentary* has explained that "regardless of motive" does not mean unintentional. The *Commentary* states that if an offence has been committed without any intention on the part of the offender, such as, traffic accidents or when the identity of the person is not known, the provisions of this article shall not apply. What is sought to be conveyed by the expression "regardless of motive" is that if the offender commits an act out of political or similar other motive, that would still be regarded as a crime. In other words, what the Commission has done is to exclude the possibility of the application of the doctrine which generally holds good in extradition law that political offenders are not to be extradited. This position has been more specifically and clearly set out in article 2 of the Working Paper prepared by Mr. Kearney.

There are two views possible on this question. On the one hand, it may be argued that the entire object of the Convention would be defeated if offences committed out of political motive are excluded from its purview. It may be further argued that the person of the Head of State, the Head of Government and other persons entitled to immunity under international law or international conventions are so sacrosanct or that their need for special protection on account of functional necessity is so important that crimes committed against their persons, for whatever motives may be, need to be punished and that the concept of "political offence" should be excluded from the scope of the provisions of these articles. It is well known that crimes are sometimes committed against such persons by offenders who wish thereby to ventilate their grievances against the home State of the person entitled to protection or at times even to embarrass their own government by attempting to establish that the government is incapable of securing the guarantees which they are required to ensure under international law or international conventions. Consequently, it may be stated that if offences of this character were to be excluded, then the immunities of the Heads of States, Heads of Governments and other privileged persons would become so imperfect that it may fetter relations

between nations. It is also to be noted that under the various municipal systems the motives of the offender in committing a criminal act is hardly of any consequence and the perpetrator of the crime is to be punished according to the gravity of the crime and not on the basis of his motive.

On the other hand, it may be stated that the crimes enumerated in this article are not ordinary offences since according to the provisions of the Commission's draft States are expected to punish the offender irrespective of the place of commission of the offence and the nationality of the offender. In such a case the principles applicable to extradition law ought to be applicable. It may, therefore, be unjust that the principle which has held the field for a considerable period of time that a person who commits a crime out of political motive ought not be extradited is a wholesome principle which ought be applicable, and there is no reason why it should be excluded in the case where the victim happens to be a person falling within the category mentioned in article 1 of this Convention. It may be pointed out that there are numerous instances where courts have refused to extradite persons who were alleged to have committed serious offences in another State once the Court was satisfied that the offence was committed out of political motive and if the person was to be sent back, he was certain to be condemned for his revolutionary activities. We cannot overlook the fact that even today certain parts of Asia and Africa are either under colonial domination or subjected to rule of alien people and it may be urged that it would be unjust to subscribe to any principle which would have the effect of curtailing the right of the people to free themselves or to work for a government of their own.

The International Law Commission in its *Commentary* to this article has clearly explained the scope and meaning of the contents of sub-paragraphs (a) to (e) of paragraph 1 of this article. The domestic legislations of various States on the law of crimes often contain different terms with different connotations and the Commission appears to have made a distinct contribution in finding expressions which are reasonably well understood in various municipal legislations. It is difficult to suggest any

improvement in the wording of these sub-paragraphs but the acceptability of some of the provisions would very much depend on what decision is taken on the two major questions discussed above. For example, it may be possible for some States to agree to treat all the acts enumerated in sub-paragraphs (a) to (e) as crimes when committed in their territory but they may not be prepared to treat (c) or (d) and possibly (e) as crimes if the obligation is to regard these acts as crimes even when committed outside their territories.

Sub-paragraphs (a) and (b) of paragraph 1 of this article are concerned with violent attacks either upon the person or liberty of an internationally protected person or upon the official premises or the private accommodation of such a person which is likely to endanger his person or liberty. Sub-paragraphs (c), (d) and (e) incorporate a series of ancillary offences, namely, a threat or an attempt to commit a violent attack or participation as an accomplice therein. The Montreal, the Hague and the O. A. S. Conventions as well as Uruguay's Working Paper and the Rome draft had followed the method of enumerating specific offences which were to be regarded as crimes under those Conventions but the Commission has adopted a different approach for reasons stated in the commentary to this article. The Commission has explained that it had decided to use the general expression "violent attack" in order to provide substantial coverage of serious offences and at the same time to avoid the difficulties which arise in connection with the listing of specific crimes in a Convention intended for adoption by a large number of States. The Commission has explained that it would be open to each individual State which becomes a party to the Convention to enumerate in its own legislation the various offences which would fall under its own legal system within the concept of violent attack upon the person or liberty or upon official premises or accommodation. We consider the approach of the Commission to be preferable in the circumstances.

Sub-paragraph (a) refers to a violent attack upon the person or liberty of an internationally protected person such as murder, wounding or kidnapping. Sub-paragraph (b) refers to a violent attack upon the official premises or the private

accommodation of an internationally protected person likely to endanger his person or liberty. The principle embodied in this sub-paragraph is new and is not to be found in the O. A. S. Convention, the Uruguay's Working Paper or the Rome Draft. The Commission has explained that it was imperative to make specific reference to such actions in a separate paragraph in view of the frequency of acts like throwing of bombs at or forcible entry into the premises of diplomatic missions, and of discharging of fire-arms at the residence of an Ambassador. The Commission has, however, stated that sub-paragraph (b) was not intended to include minor intrusion.

Sub-paragraphs (c), (d) and (e) refer respectively to a threat, an attempt to commit a violent attack under (a) and (b), and participation as an accomplice in any such acts. It may be stated that Article 1 of the Hague Convention incorporates the concept of threat whilst the Montreal Convention, Uruguay's Working Paper and the Rome Draft include the other two concepts incorporated in these sub-paragraphs.

The word "intentional" was expressly used by the Commission to stress the fact that the offender must be aware of the status of the internationally protected person enjoyed by the victim and also to avoid the application of the article in cases not falling within the scope of the paragraph such as injury in an accident resulting from negligence. Article (1) of the Montreal Convention includes a similar provision.

Paragraph 2 of this article provides that the crimes set forth in paragraph 1 should be made in internal laws of each State party to the proposed Convention as "crimes punishable by severe penalties which take into account the aggravated nature of the offence". The Hague and Montreal Conventions also provide that the offences covered by those two instruments should attract severe penalties. There can be no doubt that violent attacks against those persons who are the instrumentalities of States for conducting relations among nations constitute a grave threat to world peace and security and that the perpetrators of such crimes deserve to be severely punished in cases where their acts are regarded by the international community as

crimes. The expression "severe penalties" used in paragraph 2 of this article, however, may be regarded as somewhat vague because what may be regarded as severe penalty in one country may not be regarded as severe in another country. If one were to proceed on the traditional basis that a State's obligation was to punish crimes committed within its territories, then the provisions of paragraph 2 would be quite appropriate because a person committing a crime within the territory of a State would be dealt with in accordance with the standard applied by that State as to severe penalties. But if it is the intention that the crimes committed even outside the territory of a State should be punished by every State, then certain uniformity in the standard of punishment would be required to be prescribed. For example, in the case of piracy or war crimes, the standard of punishment to be meted out by each State is fairly uniform; and if it is the intention that the crimes of the nature enumerated in this article should be punished by all States on the same basis as piracy or war crimes, then a more specific provision would be necessary in regard to the measure of punishment.

The scope of *paragraph 3* of this article is not very clear although similar provisions are found in the Hague and Montreal Conventions and in the Rome Draft. Paragraph 1 of this article is comprehensive enough in as much as it provides that each State shall regard the categories of acts specified therein as crimes under its internal laws, and if that is so, it will certainly have jurisdiction over those crimes. The Commission considered the provisions of paragraph 3 to be necessary in order to remove any possible doubts but it appears to us that if paragraph 3 is retained, it may be rather confusing and the interpretation of paragraph 1 itself may be in some doubt. We would, therefore, suggest the deletion of paragraph 3 from this article in view of the very specific provisions of paragraph 1 itself.

Article 3

(Text as adopted by the Commission)

States party shall co-operate in the prevention of the crimes set forth in Article 2 by :

(a) taking measures to prevent the preparation in their respective territories for the commission of those crimes either in their own or in other territories;

(b) exchanging information and co-ordinating the taking of administrative measures to prevent the commission of those crimes.

The provisions of this article. according to the Commission, are intended to result in more effective measures for the prevention of the crimes set out in Article 2 of the draft. The corresponding provision in Mr. Kearney's working paper is Article 6, and substantially the same provisions have been made in Article 2, paragraphs (a) and (b) of the O. A. S. Convention and Article 9, paragraphs (a) and (b) of Uruguay draft.

There can be no doubt that it is a matter of considerable importance to ensure that States do take measures to prevent the commission of crimes of the nature covered by the Convention and this is perhaps more important than the punishment of the offender. But the questions which arise for consideration are whether the principle embodied in this article can reasonably be said to be applicable to the situation and also whether this article is not laying somewhat of an undue burden on the States.

The well-known rules concerning State responsibility enjoin upon States to prevent their territory from being used for unlawful or subversive activities against another State and that doctrine appears to have been imported in paragraph (a) of this article. Although the commission of a crime against a State functionary of the category set out in Article 1 can perhaps be regarded as an injury to the home State of the protected person, nevertheless it is doubtful whether the doctrine of State responsibility which enjoins a State to prevent its territory from being used for unlawful activities against another State can be applicable to a situation where a State itself is under an obligation to treat such acts as crimes under its own laws and to punish the offender for the same. There can be no objection if an obligation is cast on a State to take measures for prevention of crimes within its own territory, but to impose an obligation on a State that it should take measures to prevent commission of such crimes in the territory of another State may be too heavy a burden and lead to unnecessary controversy between two or more States.

For example, the home State of an internationally protected person who is the victim of a violent attack may blame the State in whose territory the crime was committed whilst the latter may pass on the blame to a third State alleging that the crime was really organised in the territory of that third State. From a practical point of view it would be more effective to provide that each State shall take measures to prevent the commission of the crimes in its own territory.

Paragraph (*b*) of this article is directed to ensuring international co-operation for prevention of such crimes when they are planned and organised on a basis whereunder criminal acts are committed systematically by members of a group in more than one country. In such cases, preventive action can be taken only by co-ordination and exchange of information among the States concerned and for this reason we consider the provisions of paragraph (b) to be appropriate.

Article 4

(Text as adopted by the Commission)

"The State party in which one or more of the crimes set forth in Article 2 have been committed shall, if it has reason to believe that an alleged offender has fled from its territory, communicate to all other States party all the pertinent facts regarding the crime committed and all available information regarding identity of the alleged offender."

This article deals with the case where the crime has been committed and the alleged offender has fled from the territory of the State where the crime had been committed. Under the provisions of this article, the State where the crime has been committed is under an obligation to communicate to all other States party to the Convention the relevant facts and information regarding the commission of the offence and the identity of the alleged offender. The principle embodied in this article does not have an equivalent either in the Montreal, the Hague or the O. A. S. Convention nor is there a corresponding provision in

Mr. Kearney's Working Paper. The reason behind the provisions of this article appears to flow from the provisions of Article 2 which imposes an obligation on each State to punish a crime against an internationally protected person irrespective of the place of the commission of the offence or the nationality of the offender. If such an obligation were to be cast on the States it could effectively be carried out only if information was available regarding the commission of the offence and the identity of the offender from the State where the crime was committed.

We have already discussed under Article 2 the arguments for and against having a provision which imposes an obligation on States to punish crimes committed outside its own territory. The provisions of this article, however, would be appropriate even if a view is taken that only the State where the crime is committed should be competent to punish the offender because that State would need to know where the offender is before sending a request for extradition.

We would, therefore, recommend that the provisions of this article should be acceptable.

Article 5

(Text as adopted by the Commission)

1. 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 prosecution or extradition. Such measures shall be immediately notified to the State where the crime was committed, the State or States of which the alleged offender is a national, the State or States of which the internationally protected person concerned is a national and all interested States.

2. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is

a national and to be visited by a representative of that State.

This article lays down what action is to be taken when the alleged offender is found on the territory of a State party to the Convention following the commission of any of the crimes set forth in Article 2. The Commission in its commentary has clarified that action in accordance with the provisions of this article would be taken only when there are grounds to believe that the alleged offender has committed one or more of the crimes. This article reproduces substantially the provisions of Article 6 of the Hague and Montreal Conventions. The principles embodied in this article are also to be found in several articles of Mr. Kearney's Working Paper.

Paragraph 1 of this article postulates that the alleged offender may either be tried and punished in the State where he is found or he can be extradited to the State where the offence has been committed or even a third State, though the obligation imposed by this article is merely to ensure that the alleged offender does not escape from the territory of the State where he is found. We have already discussed under Article 2 the merits of the proposition that crimes covered by this Convention shall be punishable by all States on the basis of which the Commission's draft articles have been adopted. We have also suggested an alternative basis that the crime shall be punished only by the State in whose territory it has been committed. Even if the latter view were to prevail, the provisions of this paragraph would be appropriate because pending finalization of extradition proceedings it is necessary to secure the presence of the alleged offender in the territory of the State where he is found. The principles embodied in this paragraph should, therefore, be acceptable.

An important question which would need to be examined both in regard to this paragraph and Article 6 of the draft articles is : what should be the criteria for determining the cases where the alleged offender should be tried in the State where he is found and the cases where he should be extradited ? If the view is accepted that it is only the State in whose territory the

crime had been committed should be the State competent to punish the offender, no complication would arise because in that event, the obligation of the State where the offender is found is merely to extradite him and he can be held in that State until the extradition proceedings had been finalized. But if the basis of the Commission's draft is accepted, that is, every State is competent to punish the offender irrespective of where the crime is committed or the nationality of the offender, it would be necessary to formulate certain principles whereby any possible disputes may be resolved where more than one State, and particularly the State where the offender is found and the State where the crime has been committed wish to try and punish the offender. Since the acts specified in Article 2 are to be regarded as crimes under internal laws of each State and the standard of punishment to be awarded under different laws are bound to vary, it may be of some consequence to the offender where he is to be tried. Can be claim that he should be punished in the State where he is found or can he claim that he should be extradited ? Principles would, therefore, need to be formulated for determining the matter when the accused person makes a formal request that he should be tried in that particular country or if he requests that he should be extradited to the State where the alleged offence has been committed or to the State of his nationality.

There is one other matter which needs to be examined in connection with paragraph 1 of this article, that is, the requirement of notification to all interested States in addition to the State where the crime has been committed, the State of the nationality of the alleged offender and the State of the nationality of the internationally protected person. How is a State to find out which are the other interested States and what is the criteria for judging this matter ? We feel that the words "and all interested States" should be omitted from this paragraph.

Paragraph 2 of this article, which is designed to safeguard the rights of the alleged offender, is very similar to those found in a large number of bilateral or multilateral consular agreements. Although this paragraph contains a healthy provision for safeguarding the interests of the accused person, what needs

to be considered is how to afford such safeguards to a person who is either stateless or whose country is under colonial domination or under the rule of an alien people. The person may be a refugee from his homeland and does not wish to avail of the services of his home State for protecting his interests; there may be cases where the home State does not wish to give him protection. Some provision ought to be made for notification in the case of such a person either to a competent organ of the United Nations or such other authority as may be agreed upon by States parties to the Convention.

Article 6

(Text as adopted by the Commission)

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.

This article proceeds on the basis that every State has the right and the obligation to prosecute an offender for crimes enumerated in Article 2 irrespective of the place of the commission of the offence. The basic question as to whether this should be so or whether the State in whose territory the crime has been committed should alone be competent to prosecute the offender has already been discussed above, and the applicability or otherwise of this article would depend upon the attitude of States on that basic question. If the view is held that the State where the crime is committed should alone be competent to prosecute the offender, then the obligation of other States would merely be to extradite him and no obligation or competence would devolve to prosecute the offender by such States.

From the manner in which this article has been worded it seems that the primary obligation of the State where the alleged offender is found is to extradite him though the article is not at all clear as to which State the offender is to be extradited. An

option is, however, given to that State to proceed against the alleged offender in accordance with the laws of that State. The right of option under this article is wholly that of the State where the offender is found and the only obligation on that State is that if it decides not to extradite the alleged offender, then it must proceed forthwith against the alleged offender, by sending the case to its competent authorities for the purpose of prosecution. Once the option has been exercised by the State and the case is sent to its competent authorities, there is clearly no further obligation to extradite the offender even if the competent authorities of that State find that there is no case for prosecution or when he is acquitted by a court of law.

The Commission in its *Commentary* has explained that no obligation is created under this article for a State to punish or to prefer a charge against the offender. Its obligation is discharged once it submits the case to its competent authorities for the purpose of prosecution, and it will be up to those authorities to decide whether to prosecute the alleged offender or not. The Commission clarifies that if the action is taken in good faith, the decision which those authorities may take regarding initiation of criminal proceedings or the eventual acquittal of the alleged offender is immaterial.

The principles embodied in this article are also to be found in Article 5 of the O.A.S. Convention, Article 7 of the Hague and Montreal Conventions, Article 4 of the Rome Draft and Article 5 of the Uruguay's Working Paper. Similar provisions have also been made in Articles 10, 11 and 12 of Mr. Kearney's Working Paper.

If one were to proceed on the basis that every State is competent to prosecute the offender, which alone can be the basis of acceptance of this article, it appears to be somewhat doubtful whether the provisions of this article would serve the object of the Convention that the perpetrators of the crimes enumerated in Article 2 are to be severely punished. In any event, this article in its present form is likely to lead to considerable friction between States. As already stated no criteria has been laid down for the exercise of option by the State, that

is, whether to extradite the alleged offender or to proceed against him locally. Furthermore, the accused person does not seem to have any choice in the matter. Disputes may arise in cases where the State where the offence has been committed wishes to extradite the alleged offender and the authorities of the State where the alleged offender is found decide to proceed against him in their own courts and the offender is acquitted for want of evidence even though the State has acted in good faith in exercising its option. One could perhaps justify the provisions of this article on the ground that under extradition law, political offenders are not normally extradited and in such a case the State where the offender is found would be obliged to prosecute him, but then the draft articles themselves appear to proceed on the basis that the concept of political offence is not to be recognised.

If this article is to be retained we would suggest for consideration of the governments certain modifications by which an objective test should be introduced for the exercise of the option by the State concerned. The test to be laid down could very well be that the alleged offender should as a general rule be extradited if the State where the offence has been committed requests for his extradition, but if any other State wishes to extradite him, then the option could be exercised at the discretion of the State where the offender is found. The option could also be exercised with the agreement of the State where the offence has been committed or in the cases where it is clear that evidence would be more easily available in the State where the alleged offender is found than in the State where the offence has been committed. An exception to the general rule could also be made where the State is satisfied that if the offender were to be extradited, he would be subjected to inhuman or degrading punishment in the State which has requested for his extradition.

Article 7

(Text as adopted by the Commission)

1. To the extent that the crimes set forth in Article 2 are not listed as extraditable offences in any extradition treaty existing between States party they shall be deemed to have been included as such therein. States party undertake to include those crimes as extraditable offences in every future extradition treaty to be concluded between them.

2. If a State party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State party with which it has no extradition treaty, it may, if it decides to extradite, consider the present articles as the legal basis for extradition in respect of the crimes. Extradition shall be subject to the procedural provisions of the law of the requested State.

3. States party which do not make extradition conditional on the existence of a treaty shall recognise the crimes as extraditable offences between themselves subject to the procedural provisions of the law of the requested State.

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

This article is connected with Article 7 and applies when a State decides to extradite the alleged offender. The provisions of this article with minor modifications will still be appropriate even if the view is held that a State where the offence has been committed is the only one competent to deal with the offender because extradition proceedings will have to be initiated in order to bring back the alleged offender to the place of his prosecution. This article would be inapplicable only on a possible view that the alleged offender must be punished by the State where he is found and that he need not be extradited at all.

Under the current international practice, some States extradite offenders only when a extradition treaty exists between

the requested State and the requesting State whilst certain other States are prepared to extradite offenders even in the absence of a treaty. Both the categories of States, however, require that the offence for which the extradition has been requested is an extraditable offence under the laws of both the requested and the requesting States. The object of this article serves the purpose of providing a legal basis for extradition of the offenders in accordance with existing law and practice. Similar provisions are to be found in the O.A.S., the Hague and Montreal Conventions as also in the Rome Draft and in the Uruguay's Working Paper.

Paragraph 1 of this article is applicable when the States concerned either have an extradition treaty in force between them or when they subsequently enter into such a treaty. The Commission in its *Commentary* has pointed out that most of the crimes described in Article 2 are serious common crimes under internal law of practically all States and as such would normally be listed in existing extradition treaties under such categories as murder, kidnapping, bombing, breaking and entering and the like. This paragraph is, therefore, intended to cover any possible case where any particular offence or offences might not have been so listed in the existing extradition treaties.

Paragraph 2 of this article covers the case of States party to the Convention which make extradition conditional on the existence of an extradition treaty and where no such treaty exists at the time when extradition is requested. The words in this paragraph "if it decides to extradite" follow from the provisions of Article 6 which gives the State concerned an option in the matter. Whether or not these words should be retained would depend upon the view that may be taken on Article 6. The provision made in this paragraph that "extradition shall be subject to the procedural provisions of the law of the requested State" is in a accordance with normal extradition practice and should be accepted. This provision, however, appears to be confined to procedural aspects only and takes no note of substantial matters which some countries follow in principle, that is, non-extradition of political offenders. Whether a provision should

be made to cover such cases is a matter which needs consideration.

Paragraph 3 of this article cover the situation between those States which do not make extradition conditional on the existence of a treaty. Here also extradition is made subject to procedural provisions of the law of the requested State.

Paragraph 4 deals with the case where conflicting requests for extradition have been made and it provides that among such requests priority is to be given to the request of a State in which the crimes are committed. This provision has been found to be necessary in view of the general principle adopted in the draft articles that every State has a right to prosecute and punish the offender irrespective of where the crime has been committed. Whether or not this provision should be retained would depend upon the major question as to whether the offender is to be dealt with only by the State where the offence has been committed or by all States irrespective of the place of the commission of the offence or the nationality of the offender.

Article 8

(As adopted by the Commission)

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

This article incorporates the principles of natural justice which are known to all civilised canons of jurisprudence and includes certain guarantees available to a detained or accused person under various legal systems. The Commission in its *Commentary* to this article has stated that the provisions of Article 8 are intended to safeguard the rights of the alleged offender from the moment he is found until the time when a final decision is taken on his case. We are of the view that this clarification, which is stated in the *Commentary*, should find a place in the article itself since the proposed Convention, when