

**Draft articles on the prevention and punishment of crimes against
diplomatic agents and other internationally protected persons
with commentaries**

1972

Text adopted by the International Law Commission at its twenty-fourth session, in 1972, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 68). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1972*, vol. II.



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premises and accommodations.⁴⁵⁹ A variety of other categories of persons who as officials of a State or an international organization are engaged in carrying on international relations are similarly accorded special protection under general international law or international agreements.⁴⁶⁰

67. Violent attacks against diplomatic agents and other persons entitled to special protection under international law not only gravely disrupt the very mechanism designed to effectuate international co-operation for the safeguarding of peace, the strengthening of international security and the promotion of the general welfare of nations but also prevent the carrying out and fulfilment of the purposes and principles of the Charter of the United Nations. The increasing frequency with which those crimes are being committed makes particularly urgent the task of formulating legal rules aimed at reinforcing the atmosphere of personal security and absence of coercion within which persons selected by States or international organizations to represent them in their relations with other States or organizations should carry out their responsibilities. This is the purpose of the present draft. Basing itself on the existing legal obligations that are intended to contribute effectively to the inviolability and protection of the persons in question, these draft articles seek to achieve this purpose through the promotion of international co-operation for the prevention and punishment of crimes committed against those persons.

68. Specifically, the draft seeks to ensure that safe-havens will no longer be available to a person as to whom there are grounds to believe that he has committed serious offences against internationally protected persons. To achieve this end, the draft centres on two main points: it provides the basis for the assertion of jurisdiction over such crimes by all States party and it gives to States where the alleged offender may be found the option to extradite him or to submit the case to its competent authorities for the purpose of prosecution. Provisions to this effect are found in articles 2 and 6 of the draft.

69. Further, the draft envisages international co-operation at both the levels of prevention and suppression of crimes and is structured along a logical sequence of stages between those two levels. Thus, following the determination of the scope of the draft, *ratione personae* in article 1 and *ratione materiae* in article 2, article 3 takes up the situation when commission of the crime is in the preparatory stage and provides for international collaboration in its prevention. Article 4 refers to the case where the crime has been committed and the alleged offender is presumed to have fled abroad. Article 5 relates to the action to be taken when the alleged offender is found. Article 6 establishes the option given to the State in whose territory the alleged offender is present to extradite or

submit the case for prosecution; and article 7 seeks to make that option a real one as regards extradition. Articles 8 to 11 concern various aspects of the proceedings to be instituted against the alleged offender and article 12 provides for the settlement of the disputes that may arise between States party.

B. Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons

Article 1

For the purposes of the present articles:

1. "Internationally protected person" means:

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

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

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

3. "International organization" means an intergovernmental organization.

Commentary

(1) In accordance with the practice followed in many of the conventions adopted under the auspices of the United Nations, this article deals with those expressions to which a specific meaning is attributed for the purposes of the present draft.

(2) Paragraph 1 sets forth the meaning of the expression "internationally protected person", thus determining, *ratione personae*, the scope of the draft. For selecting that particular expression and determining its exact coverage, the Commission found guidance in the terms of its mandate as contained in paragraph 2 of section III of General Assembly resolution 2780 (XXVI).⁴⁶¹ Paragraph 1 of the present article describes in two separate sub-paragraphs the categories of persons to whom the expression is made applicable. In sub-paragraph (a) specific mention is made of a Head of State or a Head of Government. This is done on account of the exceptional protection which, under international law, attaches to such a status. The sub-paragraph emphasizes the special status of a Head of State or Head of Government when he travels abroad and which extends to members of his family who accompany him. A Head of State or Head of Government is entitled to special protection whenever he is in a foreign State and whatever may be the nature of his visit—official, unofficial

⁴⁵⁹ Part II (missions to international organizations), articles 23 and 28; part III (delegations to organs and to conferences), articles 54 and 59; and annex to the draft (observer delegations to organs and to conferences), articles M and N. See *Yearbook of the International Law Commission, 1971, vol. II (Part One)*, pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

⁴⁶⁰ In general, see C. W. Jenks, *International Immunities* (London, Stevens, 1961).

⁴⁶¹ See para. 56 above.

or private.⁴⁶² Some members of the Commission considered that the term "Head of State or Head of Government" included members of an organ which functioned in that capacity in a collegial fashion. Other members, however, were of the opinion that, given the criminal law character of the present draft, the categories of persons to whom the draft applied could not be extended by analogy. The Commission agreed that in enacting legislation to implement the articles, States should bear in mind the desirability of ensuring the fullest protection to all persons who have the quality of Head of State or Government.

(3) The Commission also considered whether persons of cabinet rank or holding equivalent status should also be included with the Head of State and the Head of Government as entitled to special protection at all times and in all circumstances when in a foreign State. The Commission decided that, while there was some support for extension of the principle to cabinet officers, it could not be based upon any broadly accepted rule of international law and consequently should not be proposed.⁴⁶³ A cabinet officer would, of course, be entitled to special protection whenever he was in a foreign State in connexion with some official function.

(4) The other persons who under the article are to be regarded as "internationally protected persons" are defined by a series of requirements in *sub-paragraph (b)*. This sub-paragraph requires that these persons be officials of either a State or an international organization and that they be, under general international law or an international agreement, entitled to special protection for or because of the performance of functions on behalf of their State or international organization. The sub-paragraph also extends to members of the family of such officials who are likewise entitled to special protection.

(5) The Commission decided in favour of the general formulation over an enumeration of the classes specified in particular conventions as being the best means of effectuating the stated desire of the General Assembly for the broadest possible coverage. In formulating sub-paragraph (b) the Commission found inspiration both in article 2 of the OAS Convention which refers to "those persons to whom the State has the duty to give special

protection according to international law" and in article 1 of the Rome draft which refers to:

(a) members of permanent or special diplomatic missions and members of consular posts;

(b) civil agents of States on official mission;

(c) staff members of international organizations in their official functions;

(d) persons whose presence and activity abroad is justified by the accomplishment of a civil task defined by an international agreement for technical co-operation or assistance;

(e) members of the families of the above-mentioned persons.

(6) Under sub-paragraph (b), whether or not an official of either a State or an international organization is to be regarded as an "internationally protected person" depends on his being entitled, pursuant to general international law or an international agreement, at the time when and in the place where a crime against him or his premises is committed, to special protection for or because of the performance of official functions. Thus, a diplomatic agent on vacation in a State other than a host or receiving State would not normally be entitled to special protection. Some members suggested that if the purpose of the convention was to reduce the incidence of attacks upon internationally protected persons as such the convention should apply whether they were in a foreign country on official business or in a foreign country on holiday. A kidnapping could as well be committed in the one place as the other for the purpose of bringing pressure on a host government of the sending State. The Commission in general considered that this extension of the existing rules regarding the requirements for inviolability and special protection would not be warranted. The basic purpose of the draft articles was to protect the system of communications among States and extension of special protection to, for example, diplomatic agents on leave in a third State, that might well be unaware of their presence, could not be justified under the international conventions currently in force or the applicable rules of international law.⁴⁶⁴

(7) As used in sub-paragraph (b), the expression "special protection" applies to all officials who are entitled to inviolability, as well as all others who are entitled to the somewhat more limited concept of protection. Also the use of the expression "general international law or an international agreement" makes it clear that as regards officials of States the internationally protected person will be the one who is in the service of a State other than the one which has the duty to afford special protection. One member drew attention to the obligation incumbent upon all persons entitled to special protection not to interfere in the internal affairs of the host or receiving State and, in particular not to interfere directly or indirectly in insur-

⁴⁶² See in general P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), Publications de l'Institut universitaire de hautes études internationales, No. 40, pp. 336-346.

⁴⁶³ For the status of Heads of State, Heads of Government, Ministers for Foreign Affairs and Cabinet Ministers, see the Commission's consideration of the matter in connexion with the question of high-level special missions: *Yearbook of the International Law Commission, 1965*, vol. II, p. 192, document A/6009, chap. III, annex; *Yearbook of the International Law Commission, 1967*, vol. I, pp. 157-168 and 235, 923rd-925th meetings and 937th meeting, paras. 68-75; *ibid.*, vol. II, pp. 36, 77 and 347, document A/CN.4/194 and Add.1-5, paras. 272-276, chap. III, article 17 *quarter* (new), and document A/6709/Rev.1, chap. II, sect. D, article 21.

Article 21 of the Convention on Special Missions and article 50 of the Commission's draft articles on the representation of States in their relations with international organizations (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D) refer to the facilities, privileges and immunities "accorded by international law" to Heads of State, Heads of Government, Ministers for Foreign Affairs and other persons of high rank.

⁴⁶⁴ Article 40 of the Vienna Convention on Diplomatic Relations, article 54 of the Vienna Convention on Consular Relations, article 42 of the Convention on Special Missions and article 78 of the Commission's draft articles on the representation of States in their relations with international organizations—all concerning transit through the territory of a third State—provide that the third State shall accord to the person concerned inviolability and such other immunities as may be required to ensure the transit through its territory while proceeding to take up or return to his post or functions in the receiving or host State or when returning to the sending State.

reactionist movements. The consensus in the Commission was that this duty was already adequately set forth in such provisions as article 41 of the Vienna Convention on Diplomatic Relations.⁴⁶⁵

(8) The expression "general international law" is used to supplement the reference to "an international agreement". In the absence of the first expression, for example, diplomatic agents stationed in a State not party to the Vienna Convention on Diplomatic Relations or a similar treaty would be excluded from the coverage of sub-paragraph (b). Further, the expression is designed to take into account developments in international law such as the need for protection of representatives of the sending State in a special mission and members of the diplomatic staff of the special mission within the meaning of the Convention on Special Missions; heads of mission, members of the diplomatic staff and members of the administrative and technical staff of the mission within the meaning of the draft articles on the representation of States in their relations with international organizations adopted by the Commission in 1971 as well as heads of delegations, other delegates, members of the diplomatic staff and members of the administrative and technical staff of the delegation within the meaning of the same draft articles. One member of the Commission suggested that reference should also be made to protection provided for foreign officials under the internal law of the host or receiving State as this law might encompass some categories of persons in addition to those comprehended under general international law or an international agreement as entitled to special protection. The addition was, however, considered unnecessary.

(9) Among the officials who, in the circumstances provided for in sub-paragraph (b), could be regarded as "internationally protected persons" by virtue of their entitlement to special protection under international agreements the following may likewise be mentioned by way of example: diplomatic agents and members of the administrative and technical staff of the mission within the meaning of the Vienna Convention on Diplomatic Relations; consular officers 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;⁴⁶⁶ experts on mission for the United Nations within the meaning of article VI of the Convention on the Privileges and Immunities of the United Nations and officials of the Specialized Agencies within the meaning of articles VI and VIII of the Convention on the Privileges and Immunities of the Specialized Agencies.⁴⁶⁷ In enacting legislation to put the draft articles into effect, it would be appropriate for States, in determining the

extent of coverage *ratione personae* to take account of the need to afford a wide range of foreign officials protection against terroristic activities.

(10) The entitlement to special protection referred to in sub-paragraph (b) must be for or because of the performance of official functions. The preposition "for" relates specifically to the special protection to be afforded by a receiving or host State; the preposition "because of" refers to the special protection to be afforded by a State of transit as required for example under article 40 of the Vienna Convention on Diplomatic Relations.

(11) As regards the members of the family envisaged also in sub-paragraph (b) the word "likewise" has been used to emphasize that their entitlement to special protection does not arise from the present draft but, as in the case of officials, must exist pursuant to general international law or an international agreement and, again, be applicable where and when the offence is committed. Thus, the wife of a diplomatic agent would be entitled to special protection under, and subject to the conditions of, article 37 of the Vienna Convention on Diplomatic Relations if her husband was assigned to a State party to that Convention.

(12) *Paragraph 2* concerns the meaning of the expression "alleged offender". The Commission considered it useful to employ this expression 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.

(13) *Paragraph 3* reproduces the meaning of the expression "international organization", as found in article 2, paragraph 1 (i), of the Vienna Convention on the Law of Treaties⁴⁶⁸ and article 1, paragraph 1 (1), of the draft articles on the representation of States in their relations with international organizations. The Commission considered whether the protection to be afforded the officials of international organizations should be limited to those of a universal character. It reached the conclusion that the special considerations that led to limiting the scope of the draft articles on the representation of States in their relations with international organizations did not apply in the case of protection. The essential and important work done by a great variety and number of such organizations led the Commission to extend the coverage of sub-paragraph (b) of paragraph 1 of the article to officials not only of international organizations of universal character but also of the regional and other intergovernmental organizations.

(14) The suggestion was made that, in view of their special character, major humanitarian organizations such as the International Committee of the Red Cross should likewise be included. The Commission concluded that it would not be desirable to propose extending the concept of special protection to officials of other than intergovernmental organizations.

⁴⁶⁵ And article 55 of the Convention on Consular Relations, article 47 of the Convention on Special Missions and article 75 of the Commission's draft articles on the representation of States in their relations with international organizations.

⁴⁶⁶ For the text of the Convention on the Privileges and Immunities of the United Nations, see United Nations, *Treaty Series*, vol. 1, p. 15.

⁴⁶⁷ For the text of the Convention on the Privileges and Immunities of the Specialized Agencies, see *ibid.*, vol. 33, p. 261.

⁴⁶⁸ For the text of the Convention on the Law of Treaties, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

Article 2

1. The intentional commission, regardless of motive, of:

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

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

(c) A threat to commit any such attack;

(d) An attempt to commit any 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 measures as may be necessary to establish its jurisdiction over these crimes.

Commentary

(1) The provisions of article 2 deal with two distinct though related matters: (a) the determination, *ratione materiae*, of the scope of the draft by setting forth the crimes to which it will apply, and (b) the determination of the competence of States party to prosecute and punish those crimes.

(2) The first of those aspects is dealt with in *paragraph 1*, which describes the crimes encompassed as first a violent attack either upon the person or liberty of an internationally protected person or upon the official premises or the private accommodation of such a person likely to endanger his person or liberty (sub-paragraphs (a) and (b)). This is followed by a series of ancillary offences: a threat or an attempt to commit any such attack or participation as an accomplice therein (sub-paragraphs (c), (d) and (e)).

(3) Articles 1 of the Montreal and The Hague Conventions, the Uruguay working paper and the Rome draft and article 2 of the OAS Convention also contain provisions describing the offences covered in those instruments. In the two latter texts specific reference is made to such individual crimes as "kidnapping, murder, and other assaults against the life or personal [physical] integrity, of those persons to whom the State has the duty to give special protection".⁴⁶⁹ Some members of the Commission preferred this method of listing the individual crimes to be covered by the draft articles. The principal basis for supporting this approach was that articles dealing with criminal matters should be as specific as possible because interpretation of the defined crimes would be on a restrictive basis.

⁴⁶⁹ For instance, article 2 of the OAS Convention reads as follows:

"For the purposes of this Convention, kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the State has the duty to give special protection according to international law, as well as extortion in connexion with those crimes, shall be considered common crimes of international significance, regardless of motive."

(4) 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 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. It appeared to the Commission that agreement upon such specific definitions might not be possible. Consequently it was decided to leave open to each individual State party the ability to utilize the various definitions which exist in its internal law for the specific crimes which are comprised within the concept of violent attack upon the person or liberty and upon official premises or accommodation, or to amend its internal law if necessary in order to implement the articles.

(5) As previously indicated, sub-paragraph 1 (a) of article 2 refers to a violent attack upon the person or liberty of an internationally protected person and examples of such kind of crimes are the murder, wounding or kidnapping of such a person. Sub-paragraph 1 (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. It incorporates a principle not found in the OAS Convention, the Uruguay working paper or the Rome draft. Such violent attacks, which have taken the form of bombing an embassy, forcible entry into the premises of a diplomatic mission or discharging firearms at the residence of an ambassador, have occurred with such frequency in recent times that it was essential to include them in the present draft. Again, the general term "violent attack" permits States to define the crimes covered by the term in accordance with internal practice. It should be noted, however, that sub-paragraph (b) is not intended to cover minor intrusions into the protected premises. Further, the Commission did not deem it necessary to include in article 1 on the use of terms provisions regarding the expressions "official premises" and "private accommodation" as it considered that they have a precise and generally recognized meaning.

(6) Sub-paragraphs 1 (c) and (d) refer respectively to a threat and an attempt to commit any of the violent attacks referred to in sub-paragraphs (a) and (b). Sub-paragraph (e) refers to participation as an accomplice in any such attacks. The concept of threat appears in article 1 of The Hague Convention. Attempt and participation are likewise included in The Hague and the Montreal Conventions and in the Uruguay working paper. Threat, attempt and participation as an accomplice are well defined concepts under most systems of criminal law and do not require, therefore, any detailed explanation in the context of the present draft. It should be noted, however, that some concern was expressed regarding both the scope of the provision on threat and the need for inclusion of this type of offence.

(7) Unlike the Uruguay working paper, paragraph 1 does not include conspiracy to commit any of the violent attacks referred to in sub-paragraphs (a) and (b) because of the great differences in its definition under the various systems of criminal law. Some systems do not even recognize it as a separate crime.

(8) As it is indicated by the first sentence of paragraph 1, the acts listed in sub-paragraphs (a) to (e) are crimes when committed intentionally, regardless of motive. 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 sub-paragraphs (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.

(9) 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 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.

(10) The second important aspect of article 2 is that paragraph 1 incorporates the principle of universality as the basis for the assertion of jurisdiction in respect of the crimes set forth therein. In determining a jurisdictional basis that is comparable to that over piracy, the provision of paragraph 1 places the present draft, for the purposes of jurisdiction, in the same category as those conventions which provide for co-operation in the prevention and suppression of offences which are of concern to the international community as a whole, such as the slave trade and traffic in narcotics.⁴⁷⁰ Each State party is, therefore, required to make the prescribed acts crimes under its internal law regardless where the acts may be committed. It should be noted that, unlike The Hague and the Montreal Conventions and the Rome draft which use the word "offence", the present article employs the term

"crime". In the context of The Hague and the Montreal Conventions the use of the word "offence" was justified by the novel character of the criminal acts to which it was intended to apply. The acts covered in the present draft have normally been regarded as crimes in domestic legislation, which is why they are so labelled in article 2.

(11) The provisions of paragraph 1 are intended to provide for the exercise of jurisdiction in a broad sense, that is as regards both substantive and procedural criminal law. In order to eliminate any possible doubts on the point, the Commission decided to include in *paragraph 3* a specific requirement, such as is found in The Hague and the Montreal Conventions and in the Rome draft, concerning the establishment of jurisdiction.

(12) *Paragraph 2* of article 2 provides that the crimes set forth in paragraph 1 be made "crimes punishable by severe penalties which take into account the aggravated nature of the offence". Some members of the Commission suggested that the reference to aggravated nature of the offence should be eliminated as unwarranted and unnecessary. In their view the nature of the crime was the essential determinant of the penalty to be imposed; to require that the same act be punished by a more severe penalty if an internationally protected person rather than an ordinary citizen were the victim would be an invidious distinction. Most members of the Commission considered that the reference to the aggravated nature of the offence was warranted. It was pointed out that the official capacity of the victim was readily recognized as affecting the gravity of the offence. The murder of a policeman in the performance of his duties was cited as a common example. Furthermore, severe penalties are likewise required in article 2 of The Hague Convention and article 3 of the Montreal Convention for the offences covered by those two instruments. The last phrase of paragraph 2 of the present article has been included to stress the idea that violent attacks directed against those persons who constitute the means for carrying on the work of the world community constitute a grave threat to the channels of communication upon which States depend for the maintenance of international peace and order. Consequently such attacks should be deterred by the imposition of penalties which take into account the importance of the world interests that are impaired by those attacks.

Article 3

States Party shall co-operate in the prevention of the crimes set forth in article 2 by:

(b) 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.

Commentary

(1) The provisions of article 3 are intended to result in more effective measures for the prevention of the crim

⁴⁷⁰ For instance, article 36, paragraph 1, of the 1961 Single Convention on Narcotic Drugs provides that:

"Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty." (United Nations, *Treaty Series*, vol. 520, p. 252.)

set forth in article 2, in particular through international co-operation. This is to be achieved by establishing for States party the double obligation to take measures to suppress the preparation in their territories of those crimes, irrespective of where they are to be committed, and to exchange information and co-ordinate the taking of those administrative measures which could lead to preventing such crimes from being carried out.

(2) Article 3 substantially reproduces the provisions of article 8, sub-paragraphs (a) and (b), of the OAS Convention and article 9, sub-paragraphs (a) and (b), of the Uruguay working paper. Sub-paragraph (a) of the present article embodies the well established principle of international law that every State must ensure that its territory is not used for the preparation of crimes to be committed in other States.⁴⁷¹ In addition, it expressly refers to the obligation of every State party to take preventive measures when the crimes in preparation are intended to be committed in its own territory, which constitutes compliance both with the principles of international law and the more special requirements to ensure inviolability and protection as set forth, for example, in the Vienna Conventions on diplomatic relations and on consular relations.

(3) As in other provisions of the present draft, the article limits itself to stating the general principle and does not go into the manner of implementation of the obligations imposed. Both the nature and the extent of the measures provided for in sub-paragraph (a), as well as of the information and administrative measures provided for in sub-paragraph (b), should be determined by States on the basis of their particular experience and requirements. They would, of course, include both police and judicial action as the varying circumstances might demand. In this connexion the Commission discussed the duty of host and receiving States to ensure that adequate steps were taken to guard internationally protected persons and premises. What constituted adequate steps obviously varied considerably from place to place. The type of protection required in a city with a high rate of violent crimes or with existing terrorist groups would be much more extensive than that in a city where these elements were absent. In the former case the host or receiving State might have to devote considerable resources to preventive measures but it is its clear duty to take all necessary protective measures.

Article 4

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

⁴⁷¹ "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof" (United States v. Arjona, in United States of America, Supreme Court, *United States Reports*, vol. 120, October term, 1886 (New York, The Banks Law Publishing Co., 1911), p. 484).

Commentary

(1) The present article is the first of a series of provisions setting up the system of notifications provided for in the draft as the necessary means for effectively implementing the obligations established therein. There is no parallel obligation in The Hague, the Montreal or the OAS Conventions. The Commission considered that, in the circumstances envisaged in the article, the State party in whose territory the crime has been committed should have the obligation to communicate to all other States party all pertinent facts regarding the crime and all available information regarding the identity of the alleged offender. Full latitude is left to that State as to the manner in which the communication should be made since the appropriate means may vary from case to case.

(2) The article does not provide for any specific action to be taken by the "other States Party" upon receipt of the information. It is assumed that standard procedures with respect to wanted criminals will be put into effect. As these would vary not only from State to State but also in light of the circumstances of the individual case, a general rule regarding any specific obligations to act upon receipt of the information appeared undesirable.

Article 5

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.

Commentary

(1) The provisions of article 5 concern the immediate action to be taken when the alleged offender is discovered on the territory of a State party following the commission of any of the crimes set forth in article 2. They must be considered in the light of the requirement stated in article 1, paragraph 2, that there be grounds to believe that the alleged offender has committed one or more of the crimes set forth in article 2. The article, while safeguarding the rights of the alleged offender, places on the State party in whose territory he is found the obligation to take the appropriate measures to prevent his escape pending that State's decision on whether he should be extradited or the case be submitted to its competent authorities for the purpose of prosecution as provided for in article 6.

(2) Article 5 substantially reproduces the provisions of article 6 of The Hague and the Montreal Conventions. As in the latter articles, the second sentence of *paragraph 1*

of article 5 specifically refers to those States which are particularly concerned, whether or not they may be parties to the instrument, to ensure that they shall be immediately notified of the measures taken. The purpose of the requirement is twofold. In the first place, it is desirable to notify States that are carrying on a search for the alleged offender that he has been found. In the second place it will permit any State with a special interest in the particular crime committed to determine if it wishes to request extradition and to commence the preparation of necessary documents and the collection of the required evidence.

(3) *Paragraph 2* of the article is designed to safeguard the rights of the alleged offender, thereby strengthening in this specific instance the general obligation established under article 8. The provision is similar to those found in many consular agreements.⁴⁷²

Article 6

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

Commentary

(1) Article 6 embodies the principle *aut dedere aut judicare*, which is basic to the whole draft. The same principle serves as the basis of article 5 of the OAS Convention, article 7 of The Hague and the Montreal Conventions, article 4 of the Rome draft and article 5 of the Uruguay working paper. The article gives to the State party in the territory of which the alleged offender is present the option either to extradite him or to submit the case to its competent authorities for the purpose of prosecution. In other words, the State party in whose territory the alleged offender is present is required to carry out one of the two alternatives specified in the article, it being left to that State to decide which that alternative will be. It is, of course, possible that no request for extradition will be received, in which case the State where the alleged offender is found would be effectively deprived of one of its options and have no recourse save to submit the case to its authorities for prosecution. On the other hand, even though it has been requested to extradite, it may submit the case to its competent authorities for the purpose of prosecution, for whatever reasons it may see fit to act upon. Some members of the Commission had been concerned to ensure that there is no impairment of the principle of *non-refoulement*. The article as drafted makes this point clear. Thus, if the State where the alleged offender is found considers that he would not receive a fair trial or would be subjected to any type of abusive treatment in a State which has requested extra-

dition, that request for extradition could, and should, be rejected.

(2) The obligation of the State party in whose territory the alleged offender is present, if it does not extradite him, is to submit the case to its competent authorities for the purpose of prosecution. Some members of the Commission considered that it should be made clear that the article is not a strait jacket for the authorities responsible for making decisions regarding prosecutions in criminal cases. As the article is drafted, it is clear that no obligation is created thereunder to punish or to conduct a trial. The obligation of the State where the alleged offender is present will have been fulfilled once it has submitted the case to its competent authorities, which will, in most States, be judicial in character, for the purpose of prosecution. It will be up to those authorities to decide whether to prosecute or not, subject to the normal requirement of treaty law that the decision be taken in good faith in the light of all the circumstances involved. The obligation of the State party in such case will be fulfilled under the article even if the decision which those authorities may take is not to commence criminal trial proceedings. To further emphasize the exact nature of the obligations created by this article, the Commission deemed it appropriate to add at the end the phrase "through proceedings in accordance with the laws of that State".

(3) Article 6 substantially reproduces the identical text of articles 7 of The Hague and the Montreal Conventions and article 4 of the Rome draft. The text of article 6 does not retain the phrase "whether or not the offence was committed in its territory", which would appear superfluous in view of the provision for extra-territorial jurisdiction contained in article 2, paragraph 1, of the present draft. On the other hand, the phrase "without undue delay" has been added in order that the actual implementation of the obligation may not be frustrated by unjustifiably allowing the passing of time; at the same time that phrase seeks to ensure that the alleged offender will not be kept in preventive custody beyond what is reasonable and fair, thus strengthening in that specific instance the general obligation laid down in article 8.

(4) The article does not include the second sentence found in the corresponding texts of the Montreal and The Hague Conventions and the Rome draft which reads as follows: "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". In the discussion of this article it was suggested that this second sentence should be maintained in its entirety. The point was made that the States present at The Hague and the Montreal conferences had, after substantial study, adopted this sentence in order to provide a necessary degree of tolerance to the officials charged with making the decision to prosecute or not to prosecute. Failure to include the sentence could make the draft article unacceptable to States that had sought this formula at The Hague and the Montreal conferences. As the obligation imposed on a State party is that of submitting the case to its competent authorities for the purpose of prosecution, the Commission considered it beyond the scope of the present draft to provide specific requirements as to the

⁴⁷² So far as consular law is concerned, the general rules on the communication and contact of consular officers with nationals of the sending State have been codified in article 36 of the Vienna Convention on Consular Relations.

manner in which those authorities should exercise their functions under internal law. Furthermore, any such provision would appear redundant in view of the provisions of article 2 of the present draft, in particular paragraph 2 thereof. Finally, in so far as the above-mentioned sentence might be interpreted as aiming at guaranteeing the rights of the alleged offender, it would appear unnecessary in view of the provisions of article 8. The Commission considered, in general, that all desirable effect of that sentence in the Montreal and The Hague Conventions and in the Rome draft could be more appropriately achieved by adding the phrase "through proceedings in accordance with the laws of that State" at the end of the present draft article.

Article 7

1. To the extent that the crimes set forth in article 2 are not listed as extraditable offences in any extradition treaty existing between 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 recognize 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.

Commentary

(1) The provisions of article 7 are a corollary to those of article 6. In the discussion of the relationship of this article to article 6 concern was expressed that no doubt be allowed that the provisions of article 7 are intended to assist in implementing the option provided in article 6 and not to make the alternative of extradition controlling. The Commission considers that any such doubt has been eliminated in articles 6 and 7 as formulated.

(2) If the option recognized in article 6 is to be effective, either alternative envisaged therein should be capable of implementation when an alleged offender is found in the territory of a State party. It is desirable, therefore, to provide in the present draft the legal basis for extradition of alleged offenders in a variety of situations so that the State in which the alleged offender is present will be afforded a real rather than an illusory choice. This, article 7 seeks to do in detail. *Paragraph 1* will apply when the States concerned have an extradition treaty in

effect between them which does not include the offence for which extradition is sought. *Paragraph 2* covers the situation of States party which make extradition conditional on the existence of an extradition treaty and no such treaty exists at the time when extradition is to be requested. *Paragraph 3* covers the situation between those States which do not make extradition conditional on the existence of a treaty. Similarly detailed provisions regarding the legal basis for extradition are to be found in the OAS, The Hague and the Montreal Conventions, in the Rome draft and in the Uruguay working paper.

(3) Article 7 substantially reproduces the text of articles 8 of The Hague and the Montreal Conventions and 5 of the Rome draft. The first sentence of article 8, paragraph 1, of the Montreal Convention reads as follows: "The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States". The first sentence of paragraph 1 of this article is worded differently in order to emphasize the distinction between the present draft and The Hague and the Montreal Conventions. In those two Conventions the wording of article 8 was required as they deal with novel offences not found in most extradition treaties. However, the crimes described in article 2 of the present draft are for the most part serious common crimes under the 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. Also, in the first sentence of paragraph 1 the word "listed" has been substituted for "included" in order to emphasize that the reference being made is to those specific provisions of an extradition treaty which describe the "extraditable offences". Those provisions may take the form of an actual list of the offences which are extraditable or may be couched in the form of a penalty test, that is, the offences for which extradition is envisaged are described by reference to the seriousness of the penalties prescribed.⁴⁷³ Although the provisions of paragraph 2 of article 2 would seem in themselves sufficient to achieve, as regards extradition treaties which use the penalty test, the purposes of paragraph 1 of article 7, the Commission, in order to leave no doubt on the point, deemed it necessary to stress that the paragraph is intended to cover all extradition treaties, irrespective of the manner in which the extraditable offences may be described therein.

⁴⁷³ Typical offences listed in extradition treaties include murder, murderous assault, mutilation, piracy, arson, rape, robberies, larcenies, forgeries, counterfeiting, embezzlement and kidnapping (see, for example, article III of the Treaty between the United States of America and the Republic of Mexico for the Extradition of Criminals of 11 December 1861, in G. P. Sanger, ed., *The Statutes at Large, Treaties and Proclamations, of the United States of America*, vol. XII (Boston, Little, Brown, 1865), pp. 1200-1201). For an example of a treaty provision describing offences by reference to the seriousness of the penalties prescribed, see article 1 b of the Convention on Extradition adopted by the Seventh International Conference of American States signed at Montevideo on 26 December 1933 (League of Nations, *Treaty Series*, vol. CLXV, p. 45). See also article 2 of the draft convention on extradition prepared by the Research in International Law of the Harvard Law School (*Supplement to the American Journal of International Law*, Washington D.C. (January and April 1935), vol. 29, Nos. 1 and 2, p. 21).

(4) In the first sentence of paragraph 2 the phrase "if it decides to extradite" has been included in substitution of the phrase "at its option", found in the Montreal and The Hague Conventions and the Rome draft, in order to further clarify the relationship between the provisions of article 7 and those of article 6. The use of the latter phrase might create a false impression as to the priority of the alternatives open to the requested State. Under article 6 that State may, at its option, decide to extradite or to submit the case to its competent authorities for the purpose of prosecution. If it chooses to do the first, it is authorized, in the circumstances envisaged in paragraph 2 of article 7, to consider the present draft as the legal basis for the implementation of its choice in the particular case.

(5) Both in paragraphs 2 and 3 of article 7 the phrase "procedural provisions" has been substituted for the phrase in the Montreal and The Hague Conventions and the Rome draft—"other conditions provided"—in order to make clear that what is concerned is the effective implementation of the decision to extradite made by the requested State.

(6) *Paragraph 4* of article 7 is a new provision included to cover the case of conflicting requests for extradition. Among such requests as may be received by the State party in whose territory the alleged offender is present, priority is to be given to the request from the State in which the crimes were committed. In so providing, paragraph 4 is simply reaffirming the generally acknowledged primacy of the principle of territoriality in matters of jurisdiction. The system of priority thus established operates only within a six-month period following the making of the communication required under paragraph 1 of article 5. That period of time was deemed sufficient not only as a means of inducing the territorial State to submit promptly its request for extradition but also to allow for the procedural requirements connected with such a request to be fulfilled in the normal manner. In this respect the Commission deems it necessary to stress that the time limit thus fixed in no way prejudices the freedom of choice recognized for States party under article 6. If in the exercise of the option granted by that article a State party has within the six-month period already submitted the case to its competent authorities for the purpose of prosecution, the fact of its being seized with a request for extradition from the State where the crime was committed before the expiry of such period does not affect the course of the proceedings thus instituted. There would, however, be no obstacle to complying with this or any other request for extradition while terminating its own action in so far as the draft articles are concerned.

(7) Article 7 does not include a provision similar to that of paragraph 4 of the corresponding articles in The Hague and the Montreal Conventions and the Rome draft, in view of the provisions of article 2 concerning extra-territorial jurisdiction.

Article 8

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

Commentary

Article 8, which finds inspiration in articles 4 and 8 (c) of the OAS Convention and 4 and 9 (c) of the Uruguay working paper, is intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case. The expression "fair treatment" was preferred, because of its generality, to more usual expressions such as "due process", "fair hearing" or "fair trial" which might be interpreted in a narrow technical sense. The expression "fair treatment" is intended to incorporate all the guarantees generally recognized to a detained or accused person. An example of such guarantees is found in article 14 of the International Covenant on Civil and Political Rights.⁴⁷⁴ As has been noted in the commentaries on certain other articles, specific protections for the alleged offender have been provided for when such action appeared desirable.

Article 9

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

Commentary

(1) This article was the subject of considerable discussion in the Commission. Some members considered that, in view of the effect of the crimes concerned upon the maintenance of international relations and the conspiratorial content of many of such crimes, the draft articles should provide that there be no limitation upon the time within which prosecution could be brought for these offences. Other members opposed any reference to the problem in the draft articles. In their view the basic purposes of prescriptive periods with respect to crimes apply with respect to the crimes dealt with in the draft articles. These purposes include the protection of innocent persons against the filing of charges after passage of so much time that evidence cannot be obtained to present a defence. Article 9 as adopted by the Commission represents a compromise between these points of view. A number of members, however, expressed doubts as to the desirability of the compromise.

(2) The provisions of the article are intended to prevent the frustration of the objectives of the draft by the operation of the statutes of limitation regarding the categories of crimes specified in article 2, in particular

⁴⁷⁴ For the text of the Covenant, see General Assembly resolution 2200 A (XXI), annex. Article 14 of the Covenant states, *inter alia*, in its paragraph 1, that

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Paragraphs 2 to 7 of that article set forth in detail a certain number of minimum guarantees, particularly in connexion with the determination of a criminal charge.

where the time-limits for prescription are relatively short. This explains the description in the article of the applicable statutory limitations by reference to the seriousness of the crimes. Under internal law the seriousness of a crime, which can be measured in terms of the gravity of the penalty ascribed to it, is normally in direct relationship to the length of the time-limit fixed for prescription. The provisions of article 9 are, therefore, consequential upon those of article 2, paragraph 2, of this draft.

(3) Article 9 deals only with the statutory limitation as to the time within which prosecution may be instituted. It does not refer to prescription as regards punishment. This distinction is a reflection of the nature of one of the two alternatives open to States party under article 6, which is not to punish but rather to submit the case to their competent authorities for the purpose of prosecution. Also, the provisions of this article are, obviously, not intended to apply to those States party whose systems of criminal law do not contain rules on prescription.

Article 10

1. States Party shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the crimes set forth in article 2, including the supply of all evidence at their disposal necessary for the proceedings.

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

Commentary

(1) Article 10 envisages co-operation between States party in connexion with criminal proceedings brought in respect of the crimes set forth in article 2 by providing for an obligation to afford one another the greatest measure of judicial assistance. Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article.

(2) Article 10 substantially reproduces the provisions of article 10 of The Hague Convention, article 11 of the Montreal Convention and article 6 of the Rome draft. Provisions concerning mutual judicial assistance are also found in article 9, sub-paragraph *e*, of the Uruguay working paper. In *paragraph 1* of the present article the phrase "including the supply of all evidence at their disposal necessary for the proceedings" has been added in order to ensure that the article is not given a limited construction on the basis of the narrow technical meaning sometimes attributed to the expression "mutual judicial assistance". Clearly if the alleged offender is to be tried in a State other than that in which the crime was committed it will be necessary to make testimony available to the court hearing the case and in such form as the law of that State requires. In addition, part of the required evidence may be located in third States. Consequently the obligation is imposed upon all States party. Finally, the

expression "assistance in criminal matters" as used in the analogous conventions has been replaced by "judicial assistance" in *paragraph 2* to eliminate any possible ambiguity.

Article 11

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

Commentary

This article completes the system of notifications established in the draft. It relates to the final outcome of the legal proceedings regarding the alleged offender. The notification of such outcome to the other States party is an effective means of assuring the protection of the interests of both those States and the individuals concerned. Provisions similar to those of article 11 are found in article 11 of The Hague Convention and article 13 of the Montreal Convention. Under the latter two articles, the Council of ICAO is made the final recipient of the notification in question. The present article 11, however, makes States party the final recipients, through the intermediary of the Secretary-General of the United Nations.

Article 12

ALTERNATIVE A

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

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

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

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

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

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

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

ALTERNATIVE B

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

2. Each Party may at the time of signature or ratification of these articles or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Parties shall not be bound by the preceding paragraph with respect to any Parties having made such a reservation.

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

Commentary

(1) Article 12 contains provisions regarding the settlement of disputes arising out of the application or interpretation of the articles. The article is presented in alternative formulations which provide, respectively, for the reference of the dispute to conciliation (*Alternative A*) or to an optional form of arbitration (*Alternative B*). Some members of the Commission expressed doubts as to the necessity for including provisions on disputes settlement in the draft articles as such disputes were unlikely to arise. When they did arise, their nature would be such as to make them unamenable to the application of settlement procedures. In general, however, the Commission considered that a variety of disputes could arise out of the draft articles and that it would be appropriate to suggest methods of settling them. In submitting alternative formulations, the Commission is seeking an expression of

views from Governments regarding the actual means of settlement to be eventually embodied in that instrument. The Commission limited itself to suggesting a conciliation or an optional arbitration procedure since it concluded that they represent the largest measure of common ground that would appear to exist at present among governments on the question of dispute settlement. The members of the Commission favouring the method of conciliation viewed it as the settlement procedure that would obtain the widest measure of acceptance under present conditions. The view was expressed that the optional arbitration proposal was merely a variant on the optional protocol method adopted in connexion with other conventions without great acceptance. Those members favouring the optional arbitration alternative considered conciliation inappropriate for the type of dispute that might arise. They also held the view that it was desirable to have procedures, even if optional, that provided finality.

(2) The Commission deemed it sufficient to reproduce in each alternative, with the necessary formal adaptations, texts which, although established within contexts different from that of the present draft, reflect the current approach to each of the means of settlement envisaged.

(3) *Alternative A* reproduces, with the requisite adaptations, article 82 of the draft articles on the representation of States in their relations with international organizations adopted by the Commission at its twenty-third session in 1971.⁴⁷⁵ The settlement procedure laid down in that article took into account evidence of recent State practice including article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto and the Claims Commission provided for in the Convention on International Liability for Damage Caused by Space Objects.⁴⁷⁶ The observations set forth in paragraphs 8 to 11 and 13 of the commentary to article 82 of the Commission's 1971 draft apply, in general, to the provisions of *Alternative A*. As an example of the kind of textual adjustment that it might be found necessary to make if *Alternative A* were to be finally adopted, it was suggested that, since officials of the United Nations are included among the internationally protected persons envisaged in article 1, the President of the International Court of Justice should be given subsidiary or exclusive competence to appoint a member of the conciliation commission in the circumstances provided for in *paragraph 3*, which presently attribute such competence to the Secretary-General of the United Nations.

(4) *Alternative B* reproduces the text of article 14 of the Montreal Convention. It limits itself to providing for recourse to compulsory arbitration but allowing to each Party the possibility to enter a reservation to that particular provision. The Commission believes that this text could give rise to certain difficulties. Among other problems, the phrase "organization of the arbitration" in *paragraph 1* raises the question whether "organization" includes the appointment of members or only agreement on how members are to be appointed. In its Advisory

⁴⁷⁵ *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D.

⁴⁷⁶ General Assembly resolution 2777 (XXVI), annex.

Opinion of 18 July 1950 on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania ⁴⁷⁷ the

⁴⁷⁷ *I.C.J. Reports 1950*, pp. 221 *et seq.*

International Court of Justice adopted the principle that the Court does not consider itself competent to supply a basic deficiency regarding the appointment of arbitrators contained in the agreement providing for arbitration.

Chapter IV

PROGRESS OF WORK ON OTHER TOPICS

70. As already indicated,⁴⁷⁸ the Commission was unable, owing to the lack of time, to discuss several topics on the agenda of the present session. However, the Special Rapporteurs on four of those topics made further progress in their work which is reflected in the reports they submitted to the Commission. These are briefly reviewed below.

A. Succession of States: succession in respect of matters other than treaties

71. A fifth report (A/CN.4/259)⁴⁷⁹ on succession of States in respect of matters other than treaties was submitted at the present session by the Special Rapporteur, Mr. Mohammed Bedjaoui. It reviewed and completed Mr. Bedjaoui's third⁴⁸⁰ and fourth⁴⁸¹ reports, submitted respectively at the Commission's twenty-second and twenty-third sessions. The fourth report, it will be recalled, contained a set of fifteen draft articles on succession to public property. The fifth report proposed revised versions of three of those articles, namely article 1 (irregular acquisition of territory), article 5 (definition and determination of public property), and article 6 (property appertaining to sovereignty). It suggested that a provision should be included in the draft to deal with the dual problem of, on the one hand, transferability to State property and, on the other, the amenability of jurisdiction of other public property in relation to the juridical order of the successor State. It also completed the review of State practice contained in the commentary appearing in the third report on the provision relating to archives and public libraries (article 7, renumbered 14 in the fourth report).

B. State responsibility

72. Mr. Roberto Ago, the Special Rapporteur, submitted at this session a fourth report, (A/CN.4/264),⁴⁸²

⁴⁷⁸ See para. 9 above.

⁴⁷⁹ See p. 61 above.

⁴⁸⁰ *Ibid.*, 1970, vol. II, p. 131, document A/CN.4/226.

⁴⁸¹ *Ibid.*, 1971, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

⁴⁸² See p. 71 above.

designed to continue and complete the consideration of that part of the topic which relates to the conditions for attribution to the State of an act that many constitute a source of an international responsibility. The report dealt first with the particularly complex problem of attribution to the State of acts or omissions on the part of organs acting *ultra vires* or contrary to the provisions of municipal law applicable to them. It then took up the question whether acts or omissions on the part of individuals acting as such could be attributed to the State as a subject of international law; and, more generally, whether and in what sense the existence of an internationally wrongful act might be envisaged in the event of certain conduct on the part of individuals. Lastly, the report considered whether acts or omissions on the part of persons acting on the territory of a State on behalf of another subject of international law could be attributed to that State or whether the conduct of such persons should be ascribed only to the other subject in question. Also in this connexion, the report examined whether and in what sense the existence of an internationally wrongful act of the State might be envisaged in the event of certain conduct on the part of organs of another subject of international law.

73. At its twenty-fifth session, at which it proposes to begin a detailed study of the topic of international responsibility, the Commission will thus have before it two extensive reports covering a substantial part of the topic.

C. The most-favoured-nation clause

74. A third report on the most-favoured-nation clause (A/CN.4/257 and Add. 1)⁴⁸³ was submitted at the present session by the Special Rapporteur, Mr. Endre Ustor. The report contained a set of draft articles on the topic with commentaries. The articles defined the terms used in the draft, in particular the terms "most-favoured-nation clause" and "most-favoured-nation treatment". The commentary pointed out that the undertaking to accord most-favoured-nation treatment was a constitutive element of any most-favoured-nation clause. The report recalled the rule that most-favoured-nation treatment can be claimed solely on the basis of a treaty provision. It pointed out that the right of the beneficiary State to claim the advantages accorded by the granting State to a third

⁴⁸³ See p. 161 above.