

# CONVENTION ON THE SPECIAL PROTECTION OF OFFICIALS OF FOREIGN STATES AND INTERNATIONAL ORGANIZATIONS

by

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The subject of this article is the analysis in light of international law of «the Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance», adopted by the General Assembly of the Organization of American States at Washington on February 2, 1971<sup>1</sup>.

## GENERAL CONSIDERATIONS

In the last few years a new form of common crimes of international significance, directed against diplomatic agents and other officials of foreign States has developed. More than twelve incidents of kidnapping and violence directed at the officials of foreign States have occurred in six countries of Western Hemisphere in the last three years, nine of which involved United States personnel<sup>2</sup>. The object of such crimes have been also officials of Brazil, Federal Republic of Germany, Israel, Japan, Paraguay, Switzerland, the United Kingdom and the Union of Soviet Socialist Republics<sup>3</sup>. Four officials, including two Ambassadors, have been murdered by their kidnappers or in kidnapping attempts<sup>4</sup>, and one Ambassador remained captive for several months<sup>5</sup>.

<sup>1</sup> *Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance, Message from the President of the United States transmitting this Convention to the Senate, 92nd Congress, 1st Session, Senate, Executive D, quoted hereafter Ex. Rept. 92-D, p. 12.*

<sup>2</sup> *Ibidem*, p. 3, cf. also ROUSSEAU, Ch., «Chronique des faits internationaux», *R.G.D.I.P.*, 1967, pp. 285, 754-755; 1968, p. 795; 1969, pp. 455-456, 1126; 1970, pp. 694-695; 1971, pp. 143-150, 152-154, 157, 189, 474-475- 795, 800, 805.

<sup>3</sup> *Ex. Rept. 92-D, p. 3.*

<sup>4</sup> *New York Times*, August 29, 1968, p. 1; ROUSSEAU, Ch., «Chronique des faits internationaux», *R.G.D.I.P.*, 1971, pp. 13 and ff.

<sup>5</sup> *Ex. Rept. 92-D, p. 3.*

Having in minds all these incidents, President R. Nixon, in his letter of transmittal of May 11, 1971 to the Senate stated :

« Kidnapping and other crimes against foreign officials have become increasingly serious threats to the normal conduct of international relations. The kidnapping of officials for extortion purposes is a barbarous development which should be of serious concern to all civilized nations regardless of their political persuasion <sup>6</sup>. »

With respect to the international aspect of special protection of the officials of foreign States it is unnecessary to say that all States are interested in their officials in foreign countries having a complete guarantee of safety to ensure the efficient performance of their functions <sup>7</sup>. It should be noted that at the very beginning of diplomacy between various groups of primitive savage tribes the personal inviolability of their emissaries or envoys was firmly established <sup>8</sup>.

From ancient times the personal inviolability of officials of foreign nations and the necessity of their protection has been acknowledged not only in the doctrine <sup>9</sup>, but also in the practice of States <sup>10</sup>. Since it has been recognized

<sup>6</sup> *Ibidem*, p. 1.

<sup>7</sup> This principle, *inter alia*, is referred in paragraph 4 of the preamble to the Vienna Convention on Diplomatic Relations, Done at Vienna, on 18 April 1961, *R.T.N.U.*, vol. 500, p. 95; in paragraph 5 of the preamble to the Vienna Convention on Consular Relations, Done at Vienna on April 24, 1963, *ibidem*, vol. 596, p. 261; and in paragraph 7 of the preamble to the Convention on Special Missions, *Juridical Yearbook of the United Nations*, quoted hereafter *J.Y.U.N.*, 1969, p. 125. W. Rogers, Secretary of State of the United States, stated in the Third Special Session of the OAS General Assembly that « All nations, regardless of ideology or political system, have a common interest in effective international measures to combat crimes against diplomats and other foreign officials », *The Department of State Bulletin*, vol. LXIV, N<sup>o</sup>. 1652, February 22, 1971, p. 229.

<sup>8</sup> BRITTON, R.S., « Chinese Interstate Intercourse before B.C. », *A.J.I.L.*, vol. 29, 1935, p. 626; CALVO, Ch., *Le droit international théorique et pratique*, Paris, 1896, vol. III, p. 296; NICOLSON, H., *Diplomacy*, New York, 1966, pp. 5 and ff.; NUMELIN, R., *The Beginning of Diplomacy*, London, 1950, pp. 126 and ff.; PRZETACZNIK, F., « Special Missions as a Form of the Contemporary Diplomacy » (in Polish), *International Affairs*, 1969, N<sup>o</sup>. 10, pp. 91 and ff.

<sup>9</sup> Cf., *inter alia*, BLUNTSCHLI, J.K., *Le droit international codifié*, Paris, 1881, p. 144; CYBICHOWSKI, Z., *Das antike Völkerrecht*, Breslau, 1907, p. 96; FAUCHILLE, P., *Traité de droit international public*, Paris, 1926, vol. I, pt. III, p. 63; HOSACK, J., *On the Rise and Growth of the Law of Nations*, London, 1881, pp. 6 and ff.; NYS, E., *Le droit international*, Bruxelles, 1904, vol. III, pp. 335 and ff.; PHILLIPSON, C., *The International Law and Custom of Ancient Greece and Rome*, London, 1911, vol. I, pp. 328 and ff.; PRZETACZNIK, F., *Personal Inviolability of the Diplomatic Agent* (in Polish), Warsaw, 1970, pp. 13-48; DE LA VEGA, G., *Guide pratique des agents politiques du ministère des Affaires étrangères de Belgique*, Paris, 1899, p. 319; VISWANATHA, V., *International Law in Ancient India*, Bombay, 1925, pp. 29 and ff.

<sup>10</sup> Cf. *Introductory Comment to Draft Convention on Diplomatic Privileges and Immunities*, prepared by the Harvard Law School in 1932, *Research in International Law*, Cambridge Mass., 1932, pp. 26-31; PRZETACZNIK, F., *Personal Inviolability*, pp. 44-48.

that the maintenance of peaceful relations and the preservation of a stable international order depend upon the personal security of the officials of States charged with the conduct of diplomatic relations.

It is worthy to note that the United States Supreme Court in *Respublica v. De Longchamps* case well illustrated the nature of the interest which the States have in the special protection of diplomatic agents and other officials of foreign States. The court held that :

« The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of crime against the whole world <sup>11</sup>. »

In light of the above mentioned view, it is fully understandable that the special protection of officials of foreign States is not only a matter between the two States primarily concerned, i.e., the sending and receiving States, but also it concerns the other States of international community. This idea is well expressed by the Acting Secretary of State, John N. Irwin II, in his Report of April 14, 1971 to President R. Nixon, indicating that the attacks upon foreign officials :

« present a special threat to the integrity of the machinery of international life... Terrorist acts directed against officials of governments and public international organizations entitled to this special protection of international law violate the norms that govern relations between states <sup>12</sup>. »

Bearing in mind these reasons, the General Assembly of the Organization of American States adopted on June 30, 1970 a resolution 4, which strongly condemned such acts when perpetrated against representatives of foreign States, as violations of the norms that govern international relations <sup>13</sup>.

The concept that the special protection of officials of foreign States and international organizations is a matter which interests all States, has been confirmed in the preamble to the Convention on Special Protection <sup>14</sup>. Paragraph 3 of its preamble recognizes that criminal acts against such officials are occurring frequently and such acts are of international significance because of consequences which they may have for relations among States. Paragraph 4 of the preamble states that it is advisable to adopt general standards which will progressively develop international law with respect to cooperation in the prevention and punishment of such acts.

<sup>11</sup> MOORE, J.B., *A Digest of International Law*, Washington, 1906, vol. IV, p. 627.

<sup>12</sup> *Ex. Rept. 92-D*, p. 3.

<sup>13</sup> *OAS doc. AG/RES. 4/1-E/70*.

<sup>14</sup> *Ex. Rept. 92-D*, p. 9.

# MEANING OF THE TERM PERSONS TO WHOM THE STATE HAS THE DUTY TO GIVE SPECIAL PROTECTION ACCORDING TO INTERNATIONAL LAW

As to the scope of the term *persons to whom the State has the duty to give special protection according to international law*, it should be noted that it is very broad and does not have a precise meaning. On the one hand, this wording has a value, since its wide scope may include a great number of persons, but on the other hand, because the scope is not precise, in practice it may occasion differences and even disputes between States concerning its interpretation and application.

In this regard the Acting Secretary of State reports that in the deliberation of the General Assembly of the Organization of American States it was made clear that it includes

« ... not only diplomatic agents, consular officers, and members of their families, but also other officials of public international organizations entitled to special protection under international law <sup>15</sup>. »

Moreover, he indicates that references frequently were made to the Vienna Diplomatic Convention, the Vienna Consular Convention, and the Convention on Special Missions, adopted by the General Assembly of the United Nations on December 8, 1969 <sup>16</sup>. These references are of very great importance because they show the intention of the authors of the Convention on Special Protection <sup>17</sup>. Thus, the term the persons to whom the State has the duty to give special protection covers officials of foreign States and officials of public international organizations.

The officials of foreign States are : the diplomatic agents, the diplomatic members of a special mission, the diplomatic members of the permanent mission to a public international organization, the consular officers, and the members of governmental delegation to an international conference having diplomatic rank.

In accordance with article 1 sub-paragraph e) of the Vienna Diplomatic Convention a diplomatic agent is the head of a permanent diplomatic mission or a member of the diplomatic staff of the mission. Pursuant to sub-paragraph a)

<sup>15</sup> *Ibidem*, p. 5. W. Rogers, in the mentioned in footnote N° 7 statement declared that this Convention « should apply not only to diplomatic and consular agents but to other government officials, to officials of international organizations... », *ibidem*, p. 229.

<sup>16</sup> *Ex. Rept. 92-D*, p. 5.

<sup>17</sup> Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance, will be quoted the Convention on the Special Protection. The Vienna Convention on Diplomatic Relations will be quoted as the Vienna Diplomatic Convention, and the Vienna Convention on Consular Relations, as Vienna Consular Convention.

of this article the head of the mission is the person charged by the sending State with the duty of acting in that capacity<sup>18</sup>. According to sub-paragraph d) of the said article the members of the diplomatic staff are the members of the staff of the mission having diplomatic rank<sup>19</sup>.

The diplomatic members of a special mission are : the head of a special mission<sup>20</sup>, the representative of the sending State in a such mission, and the members of its diplomatic staff. In pursuance of sub-paragraph d) of article 1 of the Convention on Special Missions the head of a special mission is the person charged by the sending State with the duty of acting in that capacity. In accordance with sub-paragraph e) of this article a representative of the sending State in the special mission is any person on whom the sending State has conferred that capacity. Pursuant to sub-paragraph h) of the said article the members of the diplomatic staff are the members of the staff of the special mission who have diplomatic status for the purposes of the special mission<sup>21</sup>.

The diplomatic members of a permanent mission to a public international organization are the permanent representative, and the members of its diplomatic staff<sup>22</sup>. According to sub-paragraph e) of the draft articles on Representatives of States to International Organizations, adopted by the International Law Commission at its twentieth session in 1968, the permanent representative is the person charged by the sending State with the duty of acting as the head of a permanent mission. In pursuance of sub-paragraph h) of the said article the members of the diplomatic staff are the members of the staff of the permanent mission, including experts and advisers, who have diplomatic status<sup>23</sup>.

Under article 1, paragraph 1, sub-paragraph d) of the Vienna Consular

<sup>18</sup> *R.T.N.U.*, vol. 500, p. 95.

<sup>19</sup> *Ibidem*, pp. 95-96; WHITEMAN, M.M., *Digest of International Law*, Washington, 1970, vol. VII, p. 13.

<sup>20</sup> Pursuant to article 1, sub-paragraph a) A « special mission » is a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task, *J.Y.U.N.*, 1969, p. 126.

<sup>21</sup> *Ibidem*, p. 126.

<sup>22</sup> In accordance with sub-paragraph d) of the draft articles on Representatives of States to International Organizations, adopted by the International Law Commission at its twentieth session : A « permanent mission » is mission of representative and permanent character sent by a State member of an international organization to the Organization, *Y.I.L.C.*, 1968, vol. II, p. 196. In his third report of draft articles on Representatives of States to International Organizations A. El-Erian, the Special Rapporteur had proposed the following definition of an international organization « an association of States established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the member States; article 1, sub-paragraph a), *Y.I.L.C.*, 1968, vol. II, p. 124. However, the definition of the international organization has not yet been agreed upon by the International Law Commission.

<sup>23</sup> *Ibidem*, p. 196.

Convention, consular officer means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions<sup>24</sup>. According to sub-paragraph c) of this article the head of consular post means the person charged with the duty of acting in that capacity<sup>25</sup>.

A precise definition of the term *the members of governmental delegation to an international conference* has not yet been agreed upon in any international agreement. In practice delegations to most conferences on the United Nations system are composed of : a head of delegation usually called a chairman of a delegation, one or more representatives one of whom could be indicated as the deputy head of delegation, one or more alternate representatives, and one or more advisers or experts. The head of a delegation is the person charged by the sending State with the duty of acting in that capacity. A representative or alternate representative of the sending State in a delegation is any person on whom the sending State has conferred that capacity. The members of the diplomatic staff are the members of the staff of a delegation who have diplomatic status for the purposes of a delegation.

We do not find also a precise definition of the term « official of public international organization » in international agreements and in the doctrine of international law. In accordance with the existing international practice this expression means any member of the staff of public international organization, specified by its Secretary-General (in the case of the United Nations), or by its Director-General (in the case of a Specialized Agency)<sup>26</sup>.

A definition of special protection has not yet been agreed upon. In our opinion, for the purposes of the Convention on the Special Protection, the term *the special protection* is used in contradistinction to the usual protection due to private persons. The protection owed to officials exceeds that due to aliens who sojourn in the territory of the receiving State since such State is under a duty to take all adequate steps to prevent and impede any offense, injury, or violence against the inviolability of those officials.

The special protection in the meaning of the Convention in question encompasses not only the prevention of acts of terrorism, especially kidnapping, murder,

<sup>24</sup> *R.T.N.U.*, vol. 596, pp. 261 and ff.; United Nations Conference on Consular Relations, Vienna, March 4, April 22, 1963, Official Records, Annexes, Vienna Convention on Consular Relations..., vol. II, doc. *A/Conf. 25/16/Add. 1*, p. 175.

<sup>26</sup> Article V of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946, United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, doc. *ST/LEG/SER. B/10*, p. 187; article V, section 14, of Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, signed at Bern on 11 June 1945, and at New York on 1 July 1946, *ibidem*, p. 199.

and other assaults against the life or physical integrity of the officials of foreign States and international public organizations, but also punishment of the perpetrators of such acts.

### THE DUTY OF STATES TO GUARANTEE THE SPECIAL PROTECTION

The Convention on the Special Protection establishes a general obligation to cooperate to prevent and punish kidnapping, murder, and other assaults against the life or personal integrity of officials of foreign States and international public organizations, including especially the duty of each contracting State to take all measures within its power, and in accordance with its laws, to prevent preparation in its territory for the commission of crimes directed against officials protected by this Convention that are to be carried out in the territory of another contracting State. Article 1 of the Convention imposes a general duty of cooperation between the contracting States, which should guide them to the strict implementation of all its provisions.

The duty of cooperation established in this article imposes upon the contracting States the following obligations, namely :

- 1) To take all effective measures within their power under their laws to prevent and impede the preparation in their respective territories of kidnapping, murder, and other assaults against the life or physical integrity of the officials of foreign States and international public organization;
- 2) To take all effective measures established in the Convention to prevent and impede such acts;
- 3) To take all effective measures under their laws to punish the persons guilty of any such crimes;
- 4) To take the effective measures instituted in the Convention to punish the persons guilty of the same kind of crime.

The first consequence arising from the provision of article 1 of the Convention on the Special Protection is that States should have in their municipal legislation the provisions concerning special protection of foreign officials. This principle is established also in article 8 sub-paragraph d) of the Convention, which provides that the contracting States accept the obligation to endeavor to have the criminal acts contemplated in this Convention included in their penal laws, if not already so included <sup>27</sup>.

In this respect, the authors of the Convention established a new principle of international law, since till now there was a strong body of opinions among

<sup>27</sup> *Ex. Rep. 92-D*, p. 11.

lawyers that the establishment of the rules of penal law, including the rules concerning the protection of foreign officials, is the matter which lies essentially within the domestic jurisdiction of States<sup>28</sup>. The practice of States also confirms this thesis since not all States have in their municipal legislations the provisions concerning the protection of foreign officials providing the sanctions for offenses committed against them<sup>29</sup>. C. Hurst, discussing this question, indicates that a State incurs some risk in not enacting any such provision but it is under no obligation to do so<sup>30</sup>.

### THE DUTY TO PREVENT THE COMMISSION OF OFFENSES AGAINST FOREIGN OFFICIALS

It is noteworthy that the duty of the special protection by the receiving State of foreign officials is not new, because it is already recognized not only in the doctrine of international law<sup>31</sup>, but also in the practice of States<sup>32</sup>. Article 3 of resolution of the *Institute of International Law* of 1895 provides that the government of the receiving State is required to protect officials of foreign States by unusually severe penalties, from all offense, injury, or violence on the part of the inhabitants of the country<sup>33</sup>. The same idea is reflected in article 20 of Project No. 22 of *American Institute of International Law on Diplomatic Agents*, 1925<sup>34</sup>.

<sup>28</sup> Cf. BÉNEZET, J., *Etude théorique sur les immunités diplomatiques*, Toulouse, 1901, p. 28; CAHIER, Ph., *Le droit diplomatique contemporain*, Genève, 1964, 231; HURST, C., *International Law*, London, 1950, pp. 181-182; LEVIN, D.B., *Diplomatic Immunity* (in Russian), Moscow, 1949, p. 311.

<sup>29</sup> PRZETACZNIK, F., *Personal Inviolability*, p. 93.

<sup>30</sup> HURST, C., « Les immunités diplomatiques », *R.C.A.D.I.*, 1926, II, p. 129.

<sup>31</sup> BÉNEZET, J., *op. cit.*, p. 23; BRX, G., *Précis élémentaire de droit international public*, Paris, 1906, p. 338; GIULIANO, M., « Les relations et immunités diplomatiques », *R.C.A.D.I.*, 1960, II, vol. 100, p. 185; MAKOWSKI, J., *Organs of the State in International Relations* (in Polish), Warsaw, 1957, p. 64; LYONS, A.B., « Personal Immunities of Diplomatic Agents », *B.Y.B.I.L.*, 1954, vol. 31, p. 304; PRADIER-FODÉRÉ, P., *Cours de droit diplomatique*, Paris, 1899, vol. II, p. 12; STRISOWER, L., « L'exterritorialité et ses principales applications », *R.C.A.D.I.*, vol. I, p. 238; STUART, G.H., « Le droit et la pratique diplomatique et consulaire », *R.C.A.D.I.*, 1934, II, vol. 48, p. 511; WARD, R., *An Inquiry into the Foundation and History of the Law of Nations in Europe*, London, 1795, vol. II, 495; DE VATTTEL, E., *The Law of Nations*, Philadelphia, 1859, p. 465.

<sup>32</sup> Cf. KISS, A.Ch., *Répertoire de la pratique française en matière de droit international public*, Paris, 1965, vol. III, pp. 292 and ff.; FELLER, A.H. and HUDSON, M.O., *A Collection of the Diplomatic and Consular Law and Regulations of Various Countries*, Washington, 1933, vol. I, pp. 38, 118, 157, 233, 271, 482, 537, 545, 562, 604, vol. II, pp. 847, 848, 929, 995, 1080, 1156, 1178 and 1340; PRZETACZNIK, F., *Personal Inviolability*, pp. 83-105.

<sup>33</sup> *A.I.D.I.*, vol. 14, p. 240.

<sup>34</sup> *H.L.S.R.*, p. 170.



One year later E.A. Korovin indicated the necessity of the establishment in the way of international agreement and also in the municipal legislation of States the special responsibility for all kinds of offenses committed against the persons enjoying diplomatic immunities<sup>85</sup>. Moreover, this principle was stated clearly in general form by the Committee of Jurists appointed by the Council of the League of Nations to answer a number of legal questions arising out of the dispute between Italy and Greece as the result of the murders of Tellini upon Greek territory in 1922. The Committee of Experts stated :

« The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance of his behalf<sup>86</sup>. »

In addition, it should be noted that the Swiss Government, in his letter of November 8, 1926 addressed to the League of Nations, declared that the duty of the State :

« ... is to prevent, so far as possible, crimes against the official representatives of other States when on official business within its territory<sup>87</sup>. »

The duty of special protection of officials of foreign States is incorporated in article 29 of the Vienna Diplomatic Convention, in article 40 of the Vienna Consular Convention and in article 29 of the Convention on Special Missions. The mentioned articles provide that the receiving State shall take all appropriate steps to prevent any attack on the persons of officials of foreign States, on their freedom or dignity<sup>88</sup>. The obligation set forth in these articles has been regarded as a part of customary international law. Now this obligation is the rule of positive international law, which recognizes that States have a special duty to take all appropriate steps to prevent any attack on the persons of such officials and on their freedom or dignity.

Failure to do so would amount to a breach of international responsibility. Thus, it is to be noted that the principles concerning the special protection of foreign officials underlying the Convention on the Special Protection are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.

<sup>85</sup> KOROVIN, E.A., *On International Responsibility of the State by reason of Offenses committed in its Territory against Diplomatic Representatives of other States* (in Russian), Revolutionary Legislation, 1926, №. 11-12, p. 41.

<sup>86</sup> *L. of N., O.J.*, 1924, p. 524.

<sup>87</sup> *L. of N., C.* 196. M. 70. V., p. 251.

<sup>88</sup> *R.T.N.U.*, vol. 500, p. 110; doc. A/Conf. 25/16/Add. 1, p. 181; *J.Y.U.N.*, 1969, p. 132.

## THE DUTY TO PUNISH PERPETRATORS GUILTY OF CRIMES AGAINST FOREIGN OFFICIALS

The receiving State is under a duty not only to take proper steps to prevent kidnapping, murder, and other assaults against the life or personal integrity of officials of foreign States and public international organizations on the part of private persons by providing for adequate police protection in times of need taking into account the exigencies of the situation, but also to take all necessary steps to bring the offenders guilty of such crimes to justice<sup>39</sup>. The origins and character of the Convention on the Special Protection, the objects pursued by the General Assembly of the Organization of American States and the contracting parties show that it was their intention to condemn and punish kidnapping, murder, and other assaults against mentioned officials as common crimes under international law.

The object of this Convention were the condemnation of 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 and the guaranty of the co-operation required in order to prevent the international relations from such an odious scourge. It is obvious that the duty to guarantee the special protection to officials of foreign States and public international organizations consists also of the punishment of perpetrators guilty of specified crimes. This principle is reflected in articles 1, 5 and 8 of the Convention on the Special Protection.

Article 1 commits the contracting States to co-operate by taking effective measures under their laws and in accordance with the Convention to punish the crimes described in its article 2<sup>40</sup>. Under article 8 the contracting States accept, *inter alia*, the obligation to have in their penal laws the provisions providing the punishment of crimes specified in the Convention. Article 5 calls on a receiving State, if it resists surrender of a person charged or convicted of crime specified in article 2 either because he is a national of the requested State or because of some legal impediment, to submit the case to its competent authorities for prosecution as if the act had been committed in its territory.

In this connection, the Acting Secretary of State informs that the United States will enact legislation extending the jurisdiction of the Federal courts with a view to implement this provision of the Convention. Since the United States believes

« this provision is important to establish the principle that a person who commits one of the crimes covered by this Convention is a criminal subject to prosecution wherever he may flee<sup>41</sup>. »

<sup>39</sup> Article 8 of the Convention on the Special Protection, *Ex. Rept. 92-D*, p. 10.

<sup>40</sup> *Ibidem*, p. 9.

<sup>41</sup> *Ibidem*, p. 6.

This provision is designated to prevent offenders guilty of kidnapping, murder, and other assaults against officials of foreign States and public international organizations escaping prosecution and punishment for their crimes. Thus, if a delinquent commits a crime specified in this Convention in one country and takes refuge in another, he will normally be either prosecuted in that country or surrendered by it. This principle was already recommended by H. Grotius, who asserted that every State has a duty either to prosecute itself a fugitive or to surrender him to the justice of the offended State.

The Convention on the Special Protection, on the one hand requests the contracting States to punish the persons guilty of kidnapping, murder, and other assaults against the life or personal integrity of officials of foreign States and international organizations, and on the other hand, it pledges these States to guarantee to every person deprived of his freedom through the application the legal guarantees of due process <sup>42</sup>.

In accordance with generally recognized principles of international law the State which fails to punish perpetrators guilty of crimes against officials of foreign States and public international organizations bears international responsibility <sup>43</sup>. These principles were expressed, inter alia, by the Committee of Experts of the League of Nations, which stated that the responsibility of State is involved by the commission in its territory of a crime of such nature if the State has neglected « the pursuit, arrest and bring to justice of the criminal » <sup>44</sup>. The responsibility of State for not having used sufficient diligence in the apprehension and prosecution of persons guilty of murder of the attachés of the Belgian Embassy in Madrid served a basis for delivery of judgment by the Permanent Court of International Justice in the dispute between Belgium and Spain, arising from the assassination of J. Borchgrave, on December 22, 1936 <sup>45</sup>.

### CRIMES AGAINST FOREIGN OFFICIALS ARE NOT POLITICAL OFFENSES

In pursuance of article 2 of the Convention on the Special Protection kidnapping, murder, and other assaults against the life or personal integrity of the officials of foreign States and public international organizations shall be considered common crimes of international significance regardless of motive. This

<sup>42</sup> Article 4 and article 8, sub-paragraph c, *ibidem*, 10.

<sup>43</sup> Cf. ACCIOLY, H., *Traité de droit international public*, Paris, 1941, vol. I, p. 313; EAGLETON, C., « The Responsibility of State for the Protection of Foreign Officials », *A.J.I.L.*, 1925, vol. 19, pp. 293 and ff.; PRZETACZNIK, F., « International Responsibility of the State for Moral and Political Injuries Caused to Another State », (in Polish), *State and Law*, 1965, N° 4, pp. 807 and ff.

<sup>44</sup> *L. of N.*, *O.J.*, 1924, p. 524.

<sup>45</sup> *C.P.J.I.*, *Affaire Borchgrave*, série C, N° 83, p. 23.

provision is very important, because it states expressly that crimes of violence against officials of foreign States and public international organizations are common crimes regardless of the motive for which they were committed. The effect of this provision is that such crimes are not to be considered as political offenses and consequently the perpetrators of such crimes would not be entitled to enjoy asylum and as common criminals they should be subject to extradition.

Under this provision the perpetrators guilty of specified offenses against foreign officials would not enjoy asylum, but the Convention on the Special Protection does not contain the precise provision in this regard. However, the Acting Secretary of State indicates that the perpetrators of these offenses :

« ... would not be eligible for the diplomatic asylum... or for territorial asylum which is often extended to the perpetrators of political offenses<sup>46</sup>. »

Such a clarification is necessary, since there are different forms of asylum; asylum granted by a State in its territory, called territorial asylum, and asylum granted outside its territory, i.e., diplomatic asylum and asylum accorded on warships and military aircraft<sup>47</sup>. Not all signatories of the Convention on the Special Protection recognize diplomatic asylum, which is a regional institution acknowledged formally and applied legally only in most Latin American States, in Spain and Portugal in their mutual relations<sup>48</sup>.

Although the Convention on the Special Protection does not contain the precise provision prohibiting the grant of asylum to the perpetrators guilty of kidnapping, murder and other assaults against the life or personal integrity of officials of foreign States and public international organizations, it arises from its article 2 and other provisions that such perpetrators should not enjoy any kind of asylum. Since such exclusion from the scope of asylum of the perpetrators of these crimes was intended by the General Assembly of the Organization of American States as well as by the authors of this Convention.

<sup>46</sup> *Ex. Rept. 92-D*, p. 4.

<sup>47</sup> With regard to asylum granted by States outside their territory the Resolution on Asylum adopted at the 1950 session of the *Institute of International Law* at Bath discerns the following types of asylum : a) diplomatic asylum, b) asylum in consular premises, c) asylum on board warships, d) asylum on board vessels used for public purposes and e) asylum on board military aircraft, *A.I.D.I.*, 1950, vol. 43, II, pp. 243-244.

<sup>48</sup> The principle of diplomatic asylum had been regulated between the Latin American States in the Convention on Asylum signed at the sixth pan-American Conference in Havana on February 20, 1928, and in the three other Conventions concerning asylum, cf. PRZETACZNIK, F., « Declaration on Territorial Asylum and International Law, *The Indian Year Book of International Affairs*, 1966-1967, p. 581. The application of the right of diplomatic asylum by the States of that region served as a basis for delivery of two judgments by the International Court of Justice in the dispute between Colombia and Peru, in V.R. Haya de la Torre case, *I.C.J.*, *Asylum Case*, Judgment of November 20, 1950 and June 13, 1951.

The adoption of the Convention on the Special Protection shall not be prejudicial to existing instruments dealing with the right of asylum. Article 6 provides that none of the provisions of this Convention shall be interpreted as to impair the right of asylum. In this connection the Acting Secretary of State explains that this provisions :

« ... was included to express the purpose of the Contracting States to enhance and not to impair the institution of asylum by excluding from its scope this class of common crimes regardless of motive. The governments proposing this provision recognize, as does the United States Government, that under existing international law and extradition practice terrorist acts should not be regarded as political offenses <sup>49</sup>. »

The Convention on the Special Protection, recognizing kidnapping, murder and other assaults against the life or personal integrity of officials of foreign States and public international organizations, shall not impair the existing international agreements dealing with the right of asylum and extradition, since all such agreements contain provisions prohibiting the grant of asylum to common criminals. Article 17 of the Treaty on International Penal Law signed at the First South-American Congress of International Law at Montevideo, 1889, provides that common criminals shall be extradited <sup>50</sup>. The Havana Convention on Asylum of 1928 stipulates in article 1 that States are prohibited to grant asylum to persons charged with or convicted for common crimes <sup>51</sup>. According to the provisions of article 1 of the Montevideo Convention on Political Asylum of 1933 States are not permitted to grant asylum to persons charged with common crimes and such persons should be extradited <sup>52</sup>. This principle is also embodied in a number of other international agreements <sup>53</sup>.

Thus, the perpetrators of specified crimes would be subject to extradition under existing extradition treaties covering such crimes as murder and kidnapping and would not be able to benefit themselves of the defense that they were being sought for political offenses.

#### PERSONS GUILTY OF CRIMES COMMITTED AGAINST SPECIFIED OFFICIALS ARE EXTRADITABLE

Article 3 of the Convention on the Special Protection provides that persons charged or convicted of crimes specified in article 2 shall be subject to extradition under the provisions of existing treaties or, in the case of States that do not make extradition dependent on the existence of a treaty, in accordance with

<sup>49</sup> *Ex. Rept. 92-D*, p. 6.

<sup>50</sup> *Cf. I.C.J., Asylum Case, Application*, vol. I, p. 97.

<sup>51</sup> *Ibidem*, p. 101.

<sup>52</sup> *Ibidem*, pp. 102-103.

<sup>53</sup> *Cf. PRZETACZNIK, F., Declaration on Territorial Asylum*, p. 588.

their own laws. Since murder, kidnapping and other assaults and acts of violence against persons are in principle covered by existing extradition treaties, therefore as it was pointed out that it was not necessary to consider this Convention as constituting a multilateral extradition treaty in itself<sup>54</sup>. Nevertheless the effect of articles 2 and 3 is to amend existing extradition treaties between contracting States to the extent of excluding expressly the crimes specified in article 2 of this Convention from the exception to extradition for common crimes of a political character established in those extradition treaties. All other provisions of existing extradition treaties remain in force<sup>55</sup>.

Moreover, article 3 of the Convention confirms the existing principle of international law that it is the exclusive responsibility of the State which may be asked to grant asylum or extradition to determine the nature of the acts and decide whether the standards of this Convention are applicable. This question is very essential because the qualification and evaluation of the nature of a crime or activity for the commission of which a person is accused or prosecuted differ in various States and under various legal and political systems.

The principle under reference, formulated in many international agreements, is reflected in article 7 of the Treaty on International Private Law of 1879, in article 4 of the Bolivarian Agreement of 1911 on Extradition, in article 2 of the Montevideo Convention on Asylum and Political Refugee of 1939, in article 4 of the Caracas Convention on Diplomatic Asylum of 1954 and in a number of other international agreements<sup>56</sup>.

Although the question of the qualification and evaluation of the nature of a crime for the commission of which a person is accused or persecuted is very important in the granting asylum, with regard to the perpetrators guilty of the offenses referred to in article 2 this principle has rather theoretical significance. Since article 2 specifies the acts which are considered common crimes, and it does not make, in principle, the application of this Convention discretionary. The Secretary of State, W. Rogers, in his statement of January 27, 1971, delivered at the third Special Session of the General Assembly of the Organization of American States, declared :

« We all agree that regardless of motive, they — kidnapping and other terrorists acts against foreign officials F.P. — should be treated as common crimes, and not political offenses, for purposes of asylum and extradition<sup>57</sup>. »

<sup>54</sup> *Ex. Rept. 92-D*, p. 5.

<sup>55</sup> *Ibidem*, p. 5.

<sup>56</sup> This principle was embodied, *inter alia*, in the Convention of August 1876 between France and Great Britain, in the Franco-Spanish Convention of 14 December 1877, and in the Treaty of 11 March 1890, between Great Britain and the United States, *cf. doc. A/C.3/SR.1195*, p. 305; PRZETACZNIK, F., *Declaration on Territorial Asylum*, p. 591.

<sup>57</sup> *The Department of State Bulletin*, vol. LXIV, p. 229.

This statement shows that the intention of the contracting parties was to bring before a court and punish the perpetrators guilty of kidnapping, murder, and other assaults against officials of foreign States and public international organizations as common crimes under international law.

The Convention further invites in article 7 the contracting States to include kidnapping, murder and other assaults against the life or personal integrity of foreign officials as extraditable offenses in any future extradition treaty concluded among them. Article 7 also stipulates that States which do not make an extradition dependent upon a treaty obligation shall consider the crimes specified in article 2 as extraditable crimes pursuant to conditions established by the laws of the requested State.

### THE PARTICIPATION IN THE CONVENTION

Although concluded within the forum of the Organization of American States, the Convention on the Special Protection is open to accession by non-member States of that Organization because its norms relate to problems of interest to the entire international community. In accordance with article 9 the Convention in question shall remain open for signature by the member States of the Organisation of American States, as well as by any other State that is member of the United Nations or any of its specialized agencies, or any State that is a party to the Statute of the International Court of Justice, or any other State that may be invited to sign it<sup>58</sup>. The Secretary of State, W. Rogers stated in this subject as follows :

« We believe it important that the Convention be open to accession by States outside the hemisphere, many of which are watching our efforts with particular interest. ... And non-hemispheric countries are also potential places of refuge for terrorists. All nations regardless of ideology or political system, have a common interest in effective international measures to combat crimes against diplomats and other foreign officials<sup>59</sup>. »

In other statements of February 2, 1971, he expressed hope that :

« ... States outside the hemisphere will accede to this Convention or, even if they do not, will recognize in their own practice the principles it articulates<sup>60</sup>. »

The Secretary of State was right that all nations have a common interest in effective international measures to combat crimes against foreign officials, since the object of such crimes have been also officials outside the hemisphere. The object and purpose of the Convention on the Special protection imply that it was the intention of the General Assembly of the Organization of American

<sup>58</sup> *Ex. Rept. 92-D*, p. 11.

<sup>59</sup> The quoted *Department of State Bulletin*, p. 229.

<sup>60</sup> *Ibidem*, p. 230.

States and of the States which adopted it that as many States as possible should participate.

Since a broad international acceptance of its principles by States of all ideologies would signify that the maintenance of peaceful international order requires universal respect for the personal security of officials of foreign States and public international organizations. The general acceptance of this Convention by the international community and strict implementation of its provisions would constitute a strong deterrent to the specified crimes.

Pursuant to article 12 the Convention shall enter into force among the States that ratify it immediately upon deposit of their instruments of ratification, and shall remain in force indefinitely. This article shows that the intention of its authors is that it should enter into force as soon as possible. Article 13 of the Convention provides that any of the contracting States may denounce it. One year following the denunciation the Convention shall cease to be in force for the denouncing State.

In conclusion it should be pointed out that the foregoing considerations indicate that the Convention on the Special Protection make an important contribution to international law by specifically establishing a mechanism for dealing effectively with the perpetrators guilty of the crimes committed against specified foreign officials.