

## Annex I

# REPORT OF THE WORKING GROUP ON THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

### A. Introduction

1. *Purpose.* This report is intended to summarize and to highlight particular aspects of the work of the Commission on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, in order to assist States and to facilitate discussion on the topic in the Sixth Committee.

2. *Obligation to fight impunity in accordance with the rule of law.* States have expressed their desire to cooperate among themselves, and with competent international tribunals, in the fight against impunity for crimes, in particular offences of international concern,<sup>1</sup> and in accordance with the rule of law.<sup>2</sup> In the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, the Heads of State and of Government and heads of delegations attending the meeting on 24 September 2012 committed themselves to “ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law”.<sup>3</sup> The obligation to cooperate in combating such impunity is given effect in numerous conventions, *inter alia*, through the obligation to extradite or prosecute.<sup>4</sup> The view that the obligation to extradite or prosecute plays a crucial role in the fight against

impunity is widely shared by States;<sup>5</sup> the obligation applies in respect of a wide range of crimes of serious concern to the international community and has been included in all sectoral conventions against international terrorism concluded since 1970.

3. The role the obligation to extradite or prosecute plays in supporting international cooperation to fight impunity has been recognized at least since the time of Hugo Grotius, who postulated the principle of *aut dedere aut punire* (either extradite or punish): “When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal.”<sup>6</sup> The modern terminology replaces “punishment” with “prosecution” as the alternative to extradition in order to reflect better the possibility that an alleged offender may be found not guilty.

4. *The importance of the obligation to extradite or prosecute in the work of the International Law Commission.* The topic may be viewed as having been encompassed by the topic “Jurisdiction with regard to crimes committed outside national territory”, which was on the provisional list of 14 topics at the first session of the Commission in 1949.<sup>7</sup> It is also addressed in articles 8 (Establishment of jurisdiction) and 9 (Obligation to extradite or prosecute) of the 1996 draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission at its

<sup>1</sup> See, for example, General Assembly resolution 2840 (XXVI) of 18 December 1971, entitled “Question of the punishment of war criminals and of persons who have committed crimes against humanity”; General Assembly resolution 3074 (XXVIII) of 3 December 1973 on “Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity”; and principle 18 of the Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions, annexed to Economic and Social Council resolution 1989/65 of 24 May 1989, entitled “Effective prevention and investigation of extra-legal, arbitrary and summary executions”.

<sup>2</sup> General Assembly resolution 67/1 of 24 September 2012.

<sup>3</sup> *Ibid.*, para. 22.

<sup>4</sup> See sect. C below. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice states, “Extradition and prosecution are alternative ways to combat impunity in accordance with article 7, paragraph 1 [of the Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984]” (*Judgment, I.C.J. Reports 2012*, p. 422, at p. 443, para. 50). The Court adds that the States parties to the Convention against torture have “a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity” (*ibid.*, p. 449, para. 68). The Court reiterates that the object and purpose of the Convention are “to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts” (*ibid.*, p. 451, para. 74, and cf. also para. 75).

The fourth report by Mr. Zdzislaw Galicki, Special Rapporteur (*Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648, paras. 26–33), dealt at length with the issue of the duty to cooperate in the fight against impunity. He cited the following examples of international instruments that provide a legal basis for the duty to cooperate: Article 1, paragraph 3, of the Charter of the United Nations; the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), 24 October 1970, annex); the preamble to the 1998 Rome Statute of the International Criminal Court; and guideline XII of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 March 2011 (Council of Europe, CM/Del/Dec(2011)1110, 4 April 2011).

<sup>5</sup> For example, Belgium (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/612, p. 182, para. 20); Denmark, Finland, Iceland, Norway and Sweden (*Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 26th meeting, A/C.6/66/SR.26, para. 10); Switzerland (*ibid.*, para. 18); El Salvador (*ibid.*, para. 24); Italy (*ibid.*, para. 42); Peru (*ibid.*, para. 64); Belarus (*ibid.*, 27th meeting, A/C.6/66/SR.27, para. 41); Russian Federation (*ibid.*, para. 64); and India (*ibid.*, para. 81).

<sup>6</sup> H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Oxford, Clarendon Press; London, Humphrey Milford, 1925), vol. II, p. 527 (English translation by Francis W. Kelsey).

<sup>7</sup> *Yearbook ... 1949*, p. 281, paras. 16–17; see also United Nations, *The Work of the International Law Commission*, 8th ed. (United Nations publication, Sales No. E.12.V.2, 2012), vol. I, p. 37.

forty-eighth session (1996). Article 9 of the draft Code stipulates an obligation to extradite or prosecute for genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.<sup>8</sup> The principle *aut dedere aut judicare* is said to have derived from “a number of multilateral conventions”<sup>9</sup> that contain the obligation. An analysis of the draft Code’s history suggests that draft article 9 is driven by the need for an effective system of criminalization and prosecution of the said core crimes, rather than by actual State practice and *opinio juris*.<sup>10</sup> The article is justified on the basis of the grave nature of the crimes involved and the desire to combat impunity for individuals who commit these crimes.<sup>11</sup> While the draft Code’s focus is on core crimes,<sup>12</sup> the material scope of the obligation to extradite or prosecute covers most crimes of international concern, as mentioned in paragraph 2 above.

5. *Use of the Latin terminology “aut dedere aut judicare”*. In the past, some members of the Commission, including Mr. Zdzislaw Galicki, Special Rapporteur, doubted the use of the Latin formula “*aut dedere aut judicare*”, especially in relation to the term “*judicare*”, which they considered as not reflecting precisely the scope of

<sup>8</sup> “Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [Genocide], 18 [Crimes against humanity], 19 [Crimes against United Nations and associated personnel] or 20 [War crimes] is found shall extradite or prosecute that individual.” See also the Commission’s commentary on this draft article (*Yearbook ... 1996*, vol. II (Part Two), pp. 31–32).

<sup>9</sup> Draft Code of Crimes against the Peace and Security of Mankind, with commentaries, article 8, paragraph (3) of the commentary (*ibid.*, p. 28).

<sup>10</sup> *Yearbook ... 1994*, vol. II (Part Two), p. 80, para. 142.

<sup>11</sup> Draft Code of Crimes against the Peace and Security of Mankind, with commentaries, article 8, paragraphs (3), (4) and (8) of the commentary, and article 9, paragraph (2) of the commentary (*Yearbook ... 1996*, vol. II (Part Two), pp. 28–29 and 31).

<sup>12</sup> At the first reading, in 1991, the draft Code comprised the following 12 crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and wilful and severe damage to the environment (see *Yearbook ... 1991*, vol. II (Part Two), pp. 94 *et seq.*, para. 176). At its sessions in 1995 and 1996, the Commission reduced the number of crimes in the final draft Code to four crimes: aggression; genocide; war crimes; and crimes against humanity, adhering to the Nuremberg legacy as the criterion for the choice of the crimes covered by the draft Code (see *Yearbook ... 1995*, vol. II (Part Two), pp. 16 *et seq.*, paras. 37 *et seq.*; and *Yearbook ... 1996*, vol. II (Part Two), pp. 16 *et seq.*, paras. 43 *et seq.*). The primary reason for this approach appeared to have been the unfavourable comments by 24 Governments to the list of 12 crimes proposed in 1991 (see *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/448 and Add.1, pp. 62 *et seq.*). A fifth crime, crimes against United Nations and associated personnel, was added at the last moment on the basis of its magnitude, the seriousness of the problem of attacks on such personnel and “its centrality to the maintenance of international peace and security”.

The crime of aggression was not subject to the provision of article 9 of the draft Code. In the Commission’s opinion, “[t]he determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet* ... [and] the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security” (draft Code of Crimes against the Peace and Security of Mankind, with commentaries, article 8, paragraph (14) of the commentary (*Yearbook ... 1996*, vol. II (Part Two), p. 30)).

the term “prosecute”. However, the Special Rapporteur considered it premature at that time to focus on the precise definition of terms, leaving them to be defined in a future draft article on “Use of terms”.<sup>13</sup> The report of the Working Group proceeds on the understanding that whether the mandatory nature of “extradition” or that of “prosecution” has priority over the other depends on the context and applicable legal regime in particular situations.

## B. Summary of the Commission’s work since 2006

6. The Commission included the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” in its programme of work at the fifty-seventh session (2005) and appointed Mr. Zdzislaw Galicki as Special Rapporteur.<sup>14</sup> This decision was endorsed by the Sixth Committee of the General Assembly.<sup>15</sup> From its fifty-eighth session (2006) to its sixty-third session (2011), the Commission received and considered four reports and four draft articles submitted by the Special Rapporteur.<sup>16</sup> A Working Group on the topic was established in 2009 under the chairpersonship of Mr. Alain Pellet to draw up a general framework for consideration of the topic, with the aim of specifying the issues to be addressed and establishing an order of priority.<sup>17</sup> The Commission took note of the oral report of the Chairperson of the Working Group and reproduced the proposed general framework for consideration of the topic, prepared by the Working Group, in its annual report of the sixty-first session (2009).<sup>18</sup>

7. Pursuant to section (a) (ii) of the proposed general framework, which refers to “The obligation to extradite or prosecute in existing treaties”, the Secretariat conducted a “Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’”<sup>19</sup> (Secretariat’s Survey (2010)). The study identified multilateral instruments at

<sup>13</sup> Third report of the Special Rapporteur, Mr. Zdzislaw Galicki, on the obligation to extradite or prosecute (*aut dedere aut judicare*), *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603, p. 122, paras. 36–37. In his preliminary report, the Special Rapporteur discussed various Latin formulas relevant to this topic, namely *aut dedere aut punire*; *judicare aut dedere*; *aut dedere aut prosequi*; *aut dedere, aut judicare, aut tergiversari*; and *aut dedere aut poenam persequi* (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, pp. 261–262, paras. 5–8). See also R. van Steenberghe, “The obligation to extradite or prosecute: Clarifying its nature”, *Journal of International Criminal Justice*, vol. 9 (2011), p. 1089, at pp. 1107–1108, on the formulas *aut dedere aut punire*, *aut dedere aut prosequi* and *aut dedere aut judicare*.

<sup>14</sup> At its 2865th meeting, on 4 August 2005 (*Yearbook ... 2005*, vol. II (Part Two), para. 500).

<sup>15</sup> General Assembly resolution 60/22 of 23 November 2005, para. 5.

<sup>16</sup> The Special Rapporteur produced the preliminary report (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571) in 2006, his second report (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585) in 2007, his third report (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603) in 2008, and his fourth report (*Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648) in 2011. Mr. Zdzislaw Galicki proposed the draft articles in his second report (A/CN.4/585, para. 76), his third report (A/CN.4/603, paras. 110–129) and, three years later, his fourth report (A/CN.4/648, paras. 40, 70–71, and 95).

<sup>17</sup> At its 2988th meeting, on 31 July 2008 (*Yearbook ... 2008*, vol. II (Part Two), para. 315).

<sup>18</sup> *Yearbook ... 2009*, vol. II (Part Two), para. 204.

<sup>19</sup> *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/630.

the universal and regional levels that contain provisions combining extradition and prosecution as alternatives for the punishment of offenders.

8. In June 2010, the Special Rapporteur submitted a working paper entitled “Bases for discussion in the Working Group on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’”<sup>20</sup> making observations and suggestions on the 2009 proposed general framework and drawing upon the Secretariat’s Survey (2010). In particular, the Special Rapporteur drew attention to questions concerning (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation to extradite or prosecute; (c) the content of the obligation to extradite or prosecute; and (d) the conditions for the triggering of the obligation to extradite or prosecute.

9. In 2010, the Working Group, under the acting chairpersonship of Mr. Enrique Candioti, recognized that the Secretariat’s Survey (2010) helped to elucidate aspects of the proposed general framework of 2009. It was noted that, in seeking to throw light on the questions agreed upon in the proposed general framework, the multilateral treaty practice on which the Secretariat’s Survey (2010) had focused needed to be complemented by a detailed consideration of other aspects of State practice (including, but not limited to, national legislation, case law and official statements of governmental representatives). In addition, it was pointed out that, as far as the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment of State practice in that regard was necessary. This would clarify the extent to which that duty influenced, as a general rule or in relation to specific crimes, the Commission’s work on the topic, including work in relation to the material scope, the content of the obligation to extradite or prosecute and the conditions for the triggering of the obligation.

10. At its sixty-fourth session (2012), the Commission established an open-ended Working Group under the chairpersonship of Mr. Kriangsak Kittichaisaree to evaluate the progress of work on the topic in the Commission and to explore future possible options for the Commission to take.<sup>21</sup> At that juncture, no Special Rapporteur was appointed to replace Mr. Zdzislaw Galicki, who was no longer a member of the Commission. The Chairperson of the Working Group submitted four informal working papers at the sixty-fourth session (2012) and another four informal working papers at the sixty-fifth session (2013). The Working Group’s discussion of those informal working papers forms the basis of this report.

### C. Consideration by the Working Group in 2012 and 2013

11. The Working Group considered the Secretariat’s Survey (2010) and the judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*<sup>22</sup> useful in its work.

<sup>20</sup> *Ibid.*, document A/CN.4/L.774.

<sup>21</sup> *Yearbook ... 2012*, vol. II (Part Two), para. 206.

<sup>22</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 4 of the present annex above).

12. *Typology of provisions in multilateral instruments.* The Secretariat’s Survey (2010) proposed a description and a typology of the relevant instruments in the light of these provisions and examined the preparatory work of certain key conventions that had served as models in the field. For some provisions, it also reviewed any reservations made. It pointed out the differences and similarities between the provisions reviewed in different conventions and their evolution, and offered overall conclusions as to (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions. The survey classified conventions that included such provisions into four categories: (a) the 1929 International Convention for the Suppression of Counterfeiting Currency, and other conventions that have followed the same model; (b) regional conventions on extradition; (c) the 1949 Geneva Conventions and the 1977 additional Protocol I; and (d) the 1970 Convention for the suppression of unlawful seizure of aircraft, and other conventions that have followed the same model.

13. The 1929 International Convention for the Suppression of Counterfeiting Currency, and other conventions that have followed the same model<sup>23</sup> typically (a) criminalize the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) make provision for prosecution and extradition which takes into account the divergent views of States with regard to the extradition of nationals and the exercise of extraterritorial jurisdiction, the latter being permissive rather than compulsory; (c) contain provisions which impose an obligation to extradite, with prosecution coming into play once there is a refusal of extradition; (d) establish an extradition regime by which States undertake, under certain conditions, to consider the offence as extraditable; (e) contain a provision providing that a State’s attitude on the general issue of criminal jurisdiction as a question of international law is not affected by its participation in the convention; and (f) contain a non-prejudice clause with regard to each State’s criminal legislation and administration. While some of the instruments under this model contain terminological differences of an editorial nature, others modify the substance of the obligations undertaken by States Parties.

14. Numerous regional conventions and arrangements on extradition also contain provisions that combine the options of extradition and prosecution,<sup>24</sup> although those instruments typically emphasize the obligation to

<sup>23</sup> For example: (a) the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs; (b) the 1937 Convention for the Prevention and Punishment of Terrorism; (c) the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; (d) the 1961 Single Convention on Narcotic Drugs; and (e) the 1971 Convention on psychotropic substances.

<sup>24</sup> These instruments include (a) the 1928 Convention on Private International Law, also known as the Bustamante Code, under Book IV (International Law of Procedure), Title III (Extradition); (b) the 1933 Convention on Extradition; (c) the 1981 Inter-American Convention on extradition; (d) the 1957 European Convention on Extradition; (e) the 1961 General Convention on Judicial Cooperation (*Convention générale de coopération en matière de justice*); (f) the 1994 Economic Community of West African States (ECOWAS) Convention on Extradition; and (g) the 2002 London Scheme for Extradition within the Commonwealth.

extradite (which is regulated in detail) and only contemplate submission to prosecution as an alternative to avoid impunity in the context of that cooperation. Under that model, extradition is a means to ensure the effectiveness of criminal jurisdiction. States parties have a general duty to extradite unless the request fits within a condition or exception, including mandatory and discretionary grounds for refusal. For instance, extradition of nationals could be prohibited or subject to specific safeguards. Provisions in subsequent agreements and arrangements have been subject to modification and adjustment over time, particularly in respect of conditions and exceptions.<sup>25</sup>

15. The four Geneva Conventions of 1949 contain the same provision whereby each High Contracting Party is obligated to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and to bring such persons, regardless of their nationality, before its own courts. However, it may also, if it prefers, and in accordance with its domestic legislation, hand such persons over for trial to another High Contracting Party concerned, provided that the latter has established a *prima facie* case.<sup>26</sup> Therefore, under that model, the obligation to search for and submit to prosecution an alleged offender is not conditional on any jurisdictional consideration, and that obligation exists irrespective of any request for extradition by another party.<sup>27</sup> Nonetheless, extradition is an available option subject to a condition that the prosecuting State has established a *prima facie* case. That mechanism is made applicable to the 1977 additional Protocol I by *renvoi*.<sup>28</sup>

16. The 1970 Convention for the suppression of unlawful seizure of aircraft stipulates in article 7 that “[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged ... to submit the case to its competent authorities for the purpose of prosecution”. This “Hague formula” is a variation of the 1949 Geneva Conventions formula and has served as a model for several subsequent conventions aimed at the suppression of specific offences, principally in the field of the fight against terrorism, but also in many other areas (including torture, mercenarism, crimes against United Nations and associated personnel, transnational crime, corruption and enforced disappearance).<sup>29</sup> However, many

of those subsequent instruments have modified the original terminology, which sometimes affects the substance of the obligations contained in the Hague formula.

17. In his separate opinion in the judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite*, Judge Yusuf also addressed the typology of “treaties containing the formula *aut dedere aut judicare*” and divided them into two broad categories.<sup>30</sup> The first category comprised clauses which impose an obligation

the safety of civil aviation; (c) the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; (d) the 1977 European Convention on the suppression of terrorism; (e) the 1977 Organization of African Unity Convention for the elimination of mercenarism in Africa; (f) the 1979 International Convention against the taking of hostages; (g) the 1979 Convention on the physical protection of nuclear material; (h) the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment; (i) the 1985 Inter-American Convention to Prevent and Punish Torture; (j) the 1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism, and its 2004 Additional Protocol; (k) the 1988 Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Convention for the suppression of unlawful acts against the safety of civil aviation; (l) the 1988 Convention for the suppression of unlawful acts against the safety of maritime navigation; (m) the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; (n) the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries; (o) the 1994 Inter-American Convention on the Forced Disappearance of Persons; (p) the 1994 Convention on the Safety of United Nations and Associated Personnel, and its 2005 Optional Protocol; (q) the 1996 Inter-American Convention against Corruption; (r) the 1997 Inter-American Convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives and other related materials; (s) the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; (t) the 1997 International Convention for the Suppression of Terrorist Bombings; (u) the 1998 Convention on the Protection of the Environment through Criminal Law; (v) the 1999 Criminal Law Convention on Corruption; (w) the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict; (x) the 1999 International Convention for the Suppression of the Financing of Terrorism; (y) the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; (z) the 2000 United Nations Convention against Transnational Organized Crime, and its Protocols; (aa) the 2001 Council of Europe Convention on cybercrime; (bb) the 2003 African Union Convention on Preventing and Combating Corruption; (cc) the 2003 United Nations Convention against Corruption; (dd) the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; (ee) the 2005 Council of Europe Convention on the Prevention of Terrorism; (ff) the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; (gg) the 2007 ASEAN Convention on Counter-Terrorism; (hh) the 2010 Protocol supplementary to the Convention for the suppression of unlawful seizure of aircraft; and (ii) the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.

<sup>30</sup> Separate opinion of Judge Yusuf in *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 4 of the present annex above), paras. 19–22. See also the Secretariat’s Survey (2010) (A/CN.4/630 (footnote 19 of the present annex above), para. 126). Cf. also Belgium’s comments submitted to the Commission in 2009, in which Belgium identified two types of treaties: (a) treaties which contain an *aut dedere aut judicare* clause with the obligation to prosecute conditional on refusal of a request for extradition of the alleged perpetrator of an offence; and (b) treaties which contain a *judicare vel dedere* clause with the obligation on States to exercise universal jurisdiction over perpetrators of the offences under the treaties, without making this obligation conditional on refusal to honour a prior extradition request (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/612, p. 179, para. 2), quoted by Mr. Zdzislaw Galicki in his fourth report (*Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648, para. 85 and footnote 86).

<sup>25</sup> It may also be recalled that the General Assembly has adopted the Model Treaty on Extradition (resolution 45/116 of 14 December 1990, annex) and the Model Treaty on Mutual Assistance in Criminal Matters (resolution 45/117 of 14 December 1990, annex).

<sup>26</sup> Articles 49, 50, 129 and 146, respectively, of Geneva Conventions I, II, III and IV. The reason these Geneva Conventions use the term “hand over” instead of “extradite” is explained in the Secretariat’s Survey (2010) (A/CN.4/630 (see footnote 19 of the present annex above), para. 54).

According to Claus Krefß (“Reflection on the *iudicare* limb of the grave breaches regime”, *Journal of International Criminal Justice*, vol. 7 (2009), p. 789), what the *iudicare* limb of the grave breaches regime actually entails is a duty to investigate and, where so warranted, to prosecute and convict.

<sup>27</sup> See J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV (Geneva, International Committee of the Red Cross, 1958), p. 593.

<sup>28</sup> Article 85, paragraphs (1) and (3), and article 88, paragraph (2), of additional Protocol I of 1977.

<sup>29</sup> These include, *inter alia*, (a) the 1971 Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance; (b) the 1971 Convention for the suppression of unlawful acts against

to extradite, and in which submission to prosecution becomes an obligation only after the refusal of extradition. Those conventions are structured in such a way as to give priority to extradition to the State in whose territory the crime is committed. The majority of those conventions do not impose any general obligation on States parties to submit to prosecution the alleged offender, and such submission by the State on whose territory the alleged offender is present becomes an obligation only if a request for extradition has been refused, or some factors such as nationality of the alleged offender exist. Examples of the first category can be found in article 9, paragraph 2, of the 1929 International Convention for the Suppression of Counterfeiting Currency, article 15 of the African Union Convention on Preventing and Combating Corruption, and article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

The second category of international conventions comprises clauses that impose an obligation to submit to prosecution, with extradition being an available option, as well as clauses that impose an obligation to submit to prosecution, with extradition becoming an obligation if the State fails to do so. Clauses in the latter category can be found in, for example, the relevant provisions of the four Geneva Conventions of 1949, article 7 of the 1970 Convention for the suppression of unlawful seizure of aircraft, and article 7, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

18. In the light of the above, the Working Group considers that when drafting treaties States can decide for themselves as to which conventional formula on the obligation to extradite or prosecute best suits their objective in a particular circumstance. Owing to the great diversity in the formulation, content and scope of the obligation to extradite or prosecute in conventional practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute.<sup>31</sup>

19. Although the Working Group finds that the scope of the obligation to extradite or prosecute under the relevant conventions should be analysed on a case-by-case basis, it acknowledges that there may be some general trends and common features in the more recent conventions containing the obligation to extradite or prosecute. One of the most relevant trends appears to be the Hague formula that serves

<sup>31</sup> As the Secretariat's Survey (2010) concludes (A/CN.4/630 (see footnote 19 of the present annex above), para. 153):

"The examination of conventional practice in this field shows that the degree of specificity of the various conventions in regulating these issues varies considerably, and that there exist very few conventions that adopt identical mechanisms for the punishment of offenders (including with respect to the relationship between extradition and prosecution). The variation in the provisions relating to prosecution and extradition appears to be determined by several factors, including the geographical, institutional and thematic framework in which each convention is negotiated ... and the development of related areas of international law, such as human rights and criminal justice. It follows that, while it is possible to identify some general trends and common features in the relevant provisions, conclusive findings regarding the precise scope of each provision need to be made on a case-by-case basis, taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works."

"as a model for most of the contemporary conventions for the suppression of specific offences".<sup>32</sup> Of the conventions drafted in or after 1970, approximately three quarters follow the Hague formula. In those post-1970 conventions, there is a common trend that the custodial State shall, without exception, submit the case of the alleged offender to a competent authority if it does not extradite. Such obligation is supplemented by additional provisions that require States parties (a) to criminalize the relevant offence under their domestic laws; (b) to establish jurisdiction over the offence when there is a link to the crime or when the alleged offender is present on their territory and is not extradited; (c) to make provisions to ensure the alleged offender is under custody and there is a preliminary enquiry; and (d) to treat the offence as extraditable.<sup>33</sup> In particular, under the prosecution limb of the obligation, the conventions only emphasize that the case should be submitted to a competent authority for the purpose of prosecution. To a lesser extent, there is also a trend of stipulating that, absent prosecution by the custodial State, the alleged offender must be extradited *without exception whatsoever*.

20. The Working Group observes that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity,<sup>34</sup> war crimes other than grave breaches and war crimes in non-international armed conflict.<sup>35</sup> In relation

<sup>32</sup> *Ibid.*, para. 91.

<sup>33</sup> *Ibid.*, para. 109.

<sup>34</sup> The 2006 International Convention for the Protection of All Persons from Enforced Disappearance follows the Hague formula, and refers to the "extreme seriousness" of the offence, which it qualifies, when widespread or systematic, as a crime against humanity. However, outside of this, there appears to be a lack of international conventions with the obligation to extradite or prosecute in relation to crimes against humanity.

<sup>35</sup> The underlying principle of the four Geneva Conventions of 1949 is the establishment of universal jurisdiction over grave breaches of the Conventions. Each Convention contains an article describing what acts constitute grave breaches, which follows immediately after the extradite-or-prosecute provision.

For Geneva Conventions I and II, this article is identical (arts. 50 and 51, respectively): "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

Article 130 of Geneva Convention III stipulates as follows: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

Article 147 of Geneva Convention IV provides as follows: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

to genocide, the international cooperation regime could be strengthened beyond the rudimentary regime under the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. As explained by the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, article VI of the Convention on the Prevention and Punishment of the Crime of Genocide only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction, as well as to cooperate with an “international penal tribunal” under certain circumstances.<sup>36</sup>

#### D. Implementation of the obligation to extradite or prosecute

21. *The Hague formula.* The Working Group views the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite* to be helpful in elucidating some aspects relevant to the implementation of the obligation to extradite or prosecute. The judgment confines itself to an analysis of the mechanism to combat impunity under the Convention against torture and other cruel, inhuman or degrading treatment or punishment. In particular, the judgment focuses on the relationship between the different articles on the establishment of jurisdiction (art. 5), the obligation to engage in a preliminary inquiry (art. 6) and the obligation to prosecute or extradite (art. 7).<sup>37</sup> While the Court’s reasoning relates to the specific implementation and application of issues surrounding that Convention, since the relevant prosecute-or-extradite provisions of the Convention against torture are modelled upon those of the Hague formula, the Court’s ruling may also help to elucidate the meaning of the prosecute-or-extradite regime under the 1970 Convention for the suppression of unlawful seizure of aircraft, and other conventions which have followed the same formula.<sup>38</sup> As the Court has also held that the prohibition of torture is a

peremptory norm (*jus cogens*),<sup>39</sup> the prosecute-or-extradite formula under the Convention against torture could serve as a model for new prosecute-or-extradite regimes governing prohibitions covered by peremptory norms (*jus cogens*), such as genocide, crimes against humanity and serious war crimes.

22. The Court determined that States parties to the Convention against torture have obligations to criminalize torture, establish their jurisdiction over the crime of torture so as to equip themselves with the necessary legal tool to prosecute that offence and make an inquiry into the facts immediately from the time the suspect is present in their respective territories. The Court declares, “These obligations, taken as a whole, might be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven”.<sup>40</sup> The obligation under article 7, paragraph 1, “to submit the case to the competent authorities for the purpose of prosecution”, which the Court calls the “obligation to prosecute”, arises regardless of the existence of a prior request for the extradition of the suspect. However, national authorities are left to decide whether to initiate proceedings in the light of the evidence before them and the relevant rules of criminal procedure.<sup>41</sup> In particular, the Court rules that “[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State”.<sup>42</sup> The Court also notes that both the 1970 Convention for the suppression of unlawful seizure of aircraft and the Convention against torture and other cruel, inhuman or degrading treatment or punishment emphasize “that the 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 the State concerned”.<sup>43</sup>

23. *Basic elements of the obligation to extradite or prosecute to be included in national legislation.* The effective fulfilment of the obligation to extradite or prosecute requires undertaking necessary national measures to criminalize the relevant offences, establish jurisdiction over the offences and the person present in the territory of the State, investigate or undertake primary inquiry, apprehend the suspect, and submit the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extradition, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect.

24. *Establishment of the necessary jurisdiction.* Establishing jurisdiction is “a logical prior step” to the implementation of an obligation to extradite or prosecute

The four Conventions and additional Protocol I of 1977 do not establish an obligation to extradite or prosecute outside of grave breaches. No other international instruments relating to war crimes have this obligation.

<sup>36</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at pp. 226–227, para. 442, and p. 229, para. 449. Article VI reads as follows: “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” The Court, at paragraph 442, did not exclude other bases when it observed that “Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.”

<sup>37</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 4 of the present annex above), paras. 71–121.

<sup>38</sup> The Court notes that article 7, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment is based on a similar provision contained in the 1970 Convention for the suppression of unlawful seizure of aircraft (*ibid.*, para. 90). As Judge Donoghue puts it, “The dispositive paragraphs of today’s Judgment bind only the Parties. Nonetheless, the Court’s interpretation of a multilateral treaty (or of customary international law) can have implications for other States. The far-reaching nature of the legal issues presented by this case is revealed by the number of questions

posed by Members of the Court during oral proceedings” (Declaration of Judge Donoghue in *ibid.*, p. 590, para. 21).

<sup>39</sup> *Ibid.*, para. 99.

<sup>40</sup> *Ibid.*, para. 91. See also paras. 74–75, 78 and 94.

<sup>41</sup> *Ibid.*, paras. 90 and 94.

<sup>42</sup> *Ibid.*, para. 95.

<sup>43</sup> *Ibid.*, para. 90, referring to article 7, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, and article 7 of the 1970 Convention for the suppression of unlawful seizure of aircraft.

an alleged offender present in the territory of a State.<sup>44</sup> For the purposes of the present topic, when the crime was allegedly committed abroad with no nexus to the forum State, the obligation to extradite or prosecute would necessarily reflect an exercise of universal jurisdiction,<sup>45</sup> which is “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events”<sup>46</sup> where neither the victims nor alleged offenders are nationals of the forum State and no harm was allegedly caused to the forum State’s own national interests. However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction on other bases. Thus, if a State can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.

Universal jurisdiction is a crucial component for prosecuting alleged perpetrators of crimes of international concern, particularly when the alleged perpetrator is not prosecuted in the territory where the crime was committed.<sup>47</sup> Several international instruments, such as the very widely ratified four Geneva Conventions of 1949 and the Convention against torture and other cruel, inhuman or degrading treatment or punishment, require the exercise of universal jurisdiction over the offences covered by these instruments, or, alternatively, the extradition of alleged offenders to another State for the purpose of prosecution.

25. *Delay in enacting necessary legislation.* According to the Court in *Questions relating to the Obligation to Prosecute or Extradite*, delay in enacting necessary legislation in order to prosecute suspects adversely affects the State party’s implementation of the obligations to conduct a preliminary inquiry and to submit the case to its competent authorities for the purposes of prosecution.<sup>48</sup> The State’s

<sup>44</sup> Report of the African Union–European Union Technical *ad hoc* Expert Group on the Principle of Universal Jurisdiction (8672/1/09/Rev.1), annex, para. 11. The International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 4 of the present annex above) holds that the performance by States parties to the Convention against torture and other cruel, inhuman or degrading treatment or punishment of their obligation to establish universal jurisdiction of their courts is a necessary condition for enabling a preliminary inquiry and for submitting the case to their competent authorities for the purpose of prosecution (para. 74).

<sup>45</sup> According to one author, “The principle of *aut dedere aut judicare* overlaps with universal jurisdiction when a State has no other nexus to the alleged crime or to the suspect other than the mere presence of the person within its territory” (M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Antwerp, Intersentia, 2005), p. 122).

<sup>46</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3; see, in particular, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, p. 75, para. 42.

<sup>47</sup> It should be recalled that the “Obligation to extradite or prosecute” in draft article 9 of the 1996 draft Code of Crimes against the Peace and Security of Mankind is closely related to the “Establishment of jurisdiction” under draft article 8 of the draft Code, which requires each State party thereto to take such measures as may be necessary to establish its jurisdiction over genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes, irrespective of where or by whom those crimes were committed. The Commission’s commentary to article 8 makes it clear that universal jurisdiction is envisaged (*Yearbook ... 1996*, vol. II (Part Two), p. 29, paragraph (7)).

<sup>48</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 4 of the present annex above), paras. 76–77.

obligation extends beyond merely enacting national legislation. The State must also actually exercise its jurisdiction over a suspect, starting by establishing the facts.<sup>49</sup>

26. *Obligation to investigate.* According to the Court in *Questions relating to the Obligation to Prosecute or Extradite*, the obligation to investigate consists of several elements:

– As a general rule, the obligation to investigate must be interpreted in the light of the object and purpose of the applicable treaty, which is to make more effective the fight against impunity.<sup>50</sup>

– The obligation is intended to corroborate the suspicions regarding the person in question.<sup>51</sup> The starting point is the establishment of the relevant facts, which is an essential stage in the process of the fight against impunity.<sup>52</sup>

– As soon as the authorities have reason to suspect that a person present in their territory may be responsible for acts subject to the obligation to extradite or prosecute, they must investigate. The preliminary inquiry must be immediately initiated. This point is reached, at the latest, when the first complaint is filed against the person,<sup>53</sup> at which stage the establishment of the facts becomes imperative.<sup>54</sup>

– However, simply questioning the suspect in order to establish his/her identity and inform him/her of the charges cannot be regarded as performance of the obligation to conduct a preliminary inquiry.<sup>55</sup>

– The inquiry is to be conducted by the authorities who have the task of drawing up a case file and collecting facts and evidence (for example, documents and witness statements relating to the events at issue and to the suspect’s possible involvement). These authorities are those of the State where the alleged crime was committed or of any other State where complaints have been filed in relation to the case. In order to fulfil its obligation to conduct a preliminary inquiry, the State in whose territory the suspect is present should seek cooperation of the authorities of the aforementioned States.<sup>56</sup>

– An inquiry taking place on the basis of universal jurisdiction must be conducted according to the same standards in terms of evidence as when the State has jurisdiction by virtue of a link with the case in question.<sup>57</sup>

27. *Obligation to prosecute.* According to the Court in *Questions relating to the Obligation to Prosecute or Extradite*, the obligation to prosecute consists of certain elements:

<sup>49</sup> *Ibid.*, para. 84.

<sup>50</sup> *Ibid.*, para. 86.

<sup>51</sup> *Ibid.*, para. 83.

<sup>52</sup> *Ibid.*, paras. 85–86.

<sup>53</sup> *Ibid.*, para. 88.

<sup>54</sup> *Ibid.*, para. 86.

<sup>55</sup> *Ibid.*, para. 85.

<sup>56</sup> *Ibid.*, para. 83.

<sup>57</sup> *Ibid.*, para. 84.

– The obligation to prosecute is actually an obligation to submit the case to the prosecuting authorities; it does not involve an obligation to initiate a prosecution. Indeed, in the light of the evidence, fulfilment of the obligation may or may not result in the institution of proceedings.<sup>58</sup> The competent authorities decide whether to initiate proceedings, in the same manner as they would for any alleged offence of a serious nature under the law of the State concerned.<sup>59</sup>

– Proceedings relating to the implementation of the obligation to prosecute should be undertaken without delay, as soon as possible, in particular once the first complaint has been filed against the suspect.<sup>60</sup>

– The timeliness of the prosecution must be such that it does not lead to injustice; hence, necessary actions must be undertaken within a reasonable time limit.<sup>61</sup>

28. *Obligation to extradite.* With respect to the obligation to extradite:

– Extradition may only be to a State that has jurisdiction in some capacity to prosecute and try the alleged offender pursuant to an international legal obligation binding on the State in whose territory the person is present.<sup>62</sup>

– Fulfilling the obligation to extradite cannot be substituted by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State.<sup>63</sup> Formal extradition requests entail important human rights protections which may be absent from informal forms of dispatching the suspect to another State, such as extraordinary renditions. Under extradition law of most, if not all, States, the necessary requirements to be satisfied include double criminality, *ne bis in idem*, *nullem crimen sine lege*, speciality, and non-extradition of the suspect to stand trial on the grounds of ethnic origin, religion, nationality or political views.

<sup>58</sup> Cf. also *Chili Komitee Nederland v. Public Prosecutor*, Court of Appeal of Amsterdam (Netherlands), 4 January 1995, *Netherlands Yearbook of International Law*, vol. 28 (1997), pp. 363–365, in which the Court of Appeal held that the Dutch Public Prosecutor did not err in refusing to prosecute former Chilean President Pinochet while he was visiting Amsterdam because Pinochet might be entitled to immunity from prosecution and any necessary evidence to substantiate his prosecution would be in Chile, with which the Netherlands had no cooperative arrangements regarding criminal proceedings. See K. N. Trapp, *State Responsibility for International Terrorism: Problems and Prospects* (Oxford, Oxford University Press, 2011), p. 88, footnote 132.

<sup>59</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 4 of the present annex above), paras. 90 and 94.

<sup>60</sup> *Ibid.*, paras. 115 and 117.

<sup>61</sup> *Ibid.*, paras. 114–115. Cf. separate opinion of Judge Cançado Trindade in that case, at paras. 148 and 151–153; dissenting opinion of Judge *ad hoc* Sur in the same case, at para. 50; and dissenting opinion of Judge Xue, at para. 28.

<sup>62</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 4 of the present annex above), para. 120.

<sup>63</sup> Cf. draft article 13 of the draft articles on the expulsion of aliens, adopted by the Commission on first reading in 2012 (*Yearbook ... 2012*, vol. II (Part Two), chap. IV, paras. 45–46); see also *Bozano v. France*, 18 December 1986, paras. 52–60, Series A no. 111, where the European Court of Human Rights has held that extradition, disguised as deportation in order to circumvent the requirements of extradition, is illegal and incompatible with the right to security of person guaranteed under article 5 of the European Convention on Human Rights.

29. *Compliance with object and purpose.* The steps to be taken by a State must be interpreted in the light of the object and purpose of the relevant international instrument or other sources of international obligation binding on that State, rendering the fight against impunity more effective.<sup>64</sup> It is also worth recalling that, by virtue of article 27 of the 1969 Vienna Convention on the law of treaties, which reflects customary international law, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.<sup>65</sup> Besides, the steps taken must be in accordance with the rule of law.

30. In cases of serious crimes of international concern, the purpose of the obligation to extradite or prosecute is to prevent alleged perpetrators from going unpunished by ensuring that they cannot find refuge in any State.<sup>66</sup>

31. *Temporal scope of the obligation.* The obligation to extradite or prosecute under a treaty applies only to facts having occurred after the entry into force of the said treaty for the State concerned, “unless a different intention appears from the treaty or is otherwise established”.<sup>67</sup> After a State becomes party to a treaty containing the obligation to extradite or prosecute, it is entitled, with effect from the date of its becoming party to the treaty, to request another State party’s compliance with the obligation to extradite or prosecute.<sup>68</sup> Thus, the obligation to criminalize and establish necessary jurisdiction over acts proscribed by a treaty containing the obligation to extradite or prosecute is to be implemented as soon as the State is bound by that treaty.<sup>69</sup> However, nothing prevents the State from investigating or prosecuting acts committed before the entry into force of the treaty for that State.<sup>70</sup>

32. *Consequences of non-compliance with the obligation to extradite or prosecute.* In *Questions relating to the Obligation to Prosecute or Extradite*, the Court found that the violation of an international obligation under the Convention against torture and other cruel, inhuman or degrading treatment or punishment is a wrongful act

<sup>64</sup> See the reasoning in *Questions relating to the Obligation to Prosecute or Extradite* (footnote 4 of the present annex above), paras. 85–86. Therefore, the Court rules that financial difficulties do not justify Senegal’s failure to comply with the obligations under the Convention against torture and other cruel, inhuman or degrading treatment or punishment (*ibid.*, para. 112). Likewise, seeking guidance from the African Union does not justify Senegal’s delay in complying with its obligation under the Convention (*ibid.*).

<sup>65</sup> *Ibid.*, para. 113.

<sup>66</sup> *Ibid.*, para. 120. As also explained by Judge Cançado Trindade:

“The conduct of the State ought to be one which is conducive to compliance with the obligations of result (in the *cas d’espèce*, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly ‘good conduct’ of the State concerned” (Separate opinion of Judge Cançado Trindade in *ibid.*, para. 50; see also his full reasoning in paras. 43–51).

<sup>67</sup> *Ibid.*, paras. 100–102, citing article 28 of the 1969 Vienna Convention on the law of treaties, which reflects customary international law.

<sup>68</sup> *Ibid.*, paras. 103–105.

<sup>69</sup> *Ibid.*, para. 75.

<sup>70</sup> *Ibid.*, paras. 102 and 105.

engaging the responsibility of the State.<sup>71</sup> As long as all measures necessary for the implementation of the obligation have not been taken, the State remains in breach of its obligation.<sup>72</sup> The Commission's articles on responsibility of States for internationally wrongful acts stipulate that the commission of an internationally wrongful act attributable to a State involves legal consequences, including cessation and non-repetition of the act (art. 30), reparation (arts. 31 and 34–39) and countermeasures (arts. 49–54).<sup>73</sup>

33. *Relationship between the obligation and the "third alternative"*. With the establishment of the International Criminal Court and various *ad hoc* international criminal tribunals, there is now the possibility that a State, faced with an obligation to extradite or prosecute an accused person, might have recourse to a third alternative—that of surrendering the suspect to a competent international criminal tribunal.<sup>74</sup> This third alternative is stipulated in article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.<sup>75</sup>

<sup>71</sup> *Ibid.*, para. 95.

<sup>72</sup> *Ibid.*, para. 117.

<sup>73</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. The articles on responsibility of States for internationally wrongful acts, adopted by the Commission at its fifty-third session, appear in the annex to General Assembly resolution 56/83 of 12 December 2001.

<sup>74</sup> Draft article 9 of the 1996 draft Code of Crimes against the Peace and Security of Mankind stipulates that the obligation to extradite or prosecute under that article is "[w]ithout prejudice to the jurisdiction of an international criminal court" (*Yearbook ... 1996*, vol. II (Part Two), p. 30).

<sup>75</sup> "The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose

34. In her dissenting opinion in *Questions relating to the Obligation to Prosecute or Extradite*, Judge Xue opines that had Senegal surrendered the alleged offender to an international tribunal constituted by the African Union to try him, it would not have breached its obligation to prosecute under article 7 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, because such a tribunal would have been created to fulfil the purpose of the Convention, and this is not prohibited by the Convention itself or by State practice.<sup>76</sup> Of course, if "a different intention appears from the treaty or is otherwise established"<sup>77</sup> so as not to permit the surrender of an alleged offender to an international criminal tribunal, such surrender would not discharge the obligation of the States parties to the treaty to extradite or prosecute the person under their respective domestic legal systems.

35. It is suggested that, in the light of the increasing significance of international criminal tribunals, new treaty provisions on the obligation to extradite or prosecute should include this third alternative, as should national legislation.

36. *Additional observation*. A State might also wish to fulfil both parts of the obligation to extradite or prosecute, for example, by prosecuting, trying and sentencing an offender and then extraditing or surrendering the offender to another State for the purpose of enforcing the judgment.<sup>78</sup>

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jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution."

<sup>76</sup> *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 4 of the present annex above), dissenting opinion of Judge Xue, at para. 42 (dissenting on other points).

<sup>77</sup> Article 28 of the 1969 Vienna Convention on the law of treaties.

<sup>78</sup> This possibility was raised by Mr. Zdzisław Galicki in his preliminary report (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, pp. 267–268, paras. 49–50).

## Annex II

### CRIMES AGAINST HUMANITY

(Mr. Sean D. Murphy)

#### A. Introduction

1. In the field of international law, three core crimes have emerged: war crimes; genocide; and crimes against humanity.<sup>1</sup> While all three crimes have been the subject of jurisdiction within the major international criminal tribunals established to date, only two of them have been addressed through a global treaty that requires States to prevent and punish such conduct and to cooperate among themselves towards those ends. War crimes have been codified by means of the “grave breaches” provisions of the 1949 Geneva Conventions<sup>2</sup> and additional Protocol I.<sup>3</sup> Genocide has been codified by means of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Yet no comparable treaty exists concerning crimes against humanity, even though the perpetration of such crimes remains an egregious phenomenon in numerous conflicts and crises worldwide.

2. For example, the mass murder of civilians perpetrated as part of an international armed conflict would fall within the grave breaches regime of the 1949 Geneva Conventions, but the same conduct arising as part of an internal armed conflict (as well as internal action below the threshold of armed conflict) would not. Such mass murder might meet the special requirements of the Genocide Convention, but often will not, as was the case with respect to the Khmer Rouge in Cambodia. Consequently, when mass murder or other atrocities occur, there will often be no applicable treaty that addresses inter-State cooperation.<sup>4</sup>

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<sup>1</sup> A fourth core crime is expected to become an operable part of the International Criminal Court’s jurisdiction—the crime of aggression. Further, important treaties regulate specific types of crimes (e.g. torture, apartheid or enforced disappearance) that, if committed on a widespread or systematic basis, may constitute crimes against humanity.

<sup>2</sup> Geneva Conventions for the protection of war victims: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War.

<sup>3</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (1977).

<sup>4</sup> Existing treaties may address limited aspects of the atrocities. See, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at pp. 444–445, paras. 53–55 (where, despite alleged crimes against humanity, the relevant inter-State cooperation focused solely on conduct falling within the scope of the Convention against torture and other cruel, inhuman or degrading treatment or punishment).

3. As such, a global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international criminal law and international human rights law. The objective of the International Law Commission on this topic, therefore, would be to draft articles for what would become a convention on the prevention and punishment of crimes against humanity (crimes against humanity convention).

#### B. Emergence of the concept of “crimes against humanity”

4. The “Martens Clause” of the 1899/1907 Hague Conventions respecting the laws and customs of war on land made reference to the “laws of humanity and the ... dictates of public conscience” in the crafting of protections for persons in time of war.<sup>5</sup> Thereafter, further thought was given to a prohibition on “crimes against humanity”, with the central feature being a prohibition upon a Government from inflicting atrocities upon its own people, and not necessarily in time of war. The tribunals established at Nuremberg and Tokyo in the aftermath of the Second World War included as a component of their jurisdiction “crimes against humanity”, characterizing them as

murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>6</sup>

5. The principles of international law recognized in the Nuremberg Charter were reaffirmed in 1946 by the General Assembly,<sup>7</sup> which also directed the International Law Commission to “formulate” those principles. The Commission then studied and distilled the Nuremberg Principles in 1950, defining crimes against humanity as

[m]urder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on

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<sup>5</sup> Hague Convention respecting the laws and customs of war on land, 18 October 1907, preamble.

<sup>6</sup> Agreement for the prosecution and punishment of the major war criminals of the European Axis, annex, Charter of the International Military Tribunal, 1945, art. 6 (c); Charter of the International Military Tribunal for the Far East, 19 January 1946, art. 5 (c), amended 26 April 1946 (see C. I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776-1949*, vol. 4 (Washington, D.C., Department of State, 1968), p. 20, at p. 28). No persons, however, were convicted of this crime at the Tokyo Tribunal.

<sup>7</sup> Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, General Assembly resolution 95 (I), 11 December 1946.

political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.<sup>8</sup>

6. The Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted by the General Assembly in 1968, called upon States to criminalize nationally “crimes against humanity” as defined in the Nuremberg Charter and to set aside statutory limitations on prosecuting the crime.<sup>9</sup> Consisting of just four substantive articles, that convention is narrowly focused on statutory limitations; while it does call upon parties to take steps “with a view to making possible” extradition for the crime, the convention does not expressly obligate a party to exert jurisdiction over crimes against humanity. The convention has, to date, attracted adherence by 54 States.

7. In 1993, the statute of the International Tribunal for the Former Yugoslavia included “crimes against humanity” as part of its jurisdiction,<sup>10</sup> as did the statute for the International Tribunal for Rwanda in 1994.<sup>11</sup> In 1996, the Commission defined “crimes against humanity” as part of its 1996 draft Code of Crimes against the Peace and Security of Mankind,<sup>12</sup> a formulation that would heavily influence the incorporation of the crime within the 1998 Rome Statute of the International Criminal Court. Among other things, the Rome Statute defined the crime as being “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.<sup>13</sup>

### C. Key elements to be considered for a convention

8. There are several possible elements of a crimes against humanity convention, which would need to be studied carefully by the Commission in the course of its work. The key elements that would appear necessary are as follows:

- To define the offence of “crimes against humanity” for purposes of the convention as it is defined in article 7 of the Rome Statute;

- To require the parties to criminalize the offence in their national legislation, not just with respect to acts on their territory or by their nationals, but also with respect to acts by non-nationals committed abroad who then turn up in the party’s territory;

- To require robust inter-State cooperation by the parties for investigation, prosecution and punishment of the offence, including through mutual legal assistance and extradition, and recognition of evidence; and

- To impose an *aut dedere aut judicare* obligation when an alleged offender is present in a party’s territory.

<sup>8</sup> *Yearbook ... 1950*, vol. II, document A/1316, p. 374, at p. 377.

<sup>9</sup> General Assembly resolution 2391 (XXIII) of 26 November 1968, annex.

<sup>10</sup> Statute of the International Tribunal for the Former Yugoslavia, Security Council resolution 827 (1993), 25 May 1993, annex, art. 5 (see S/25704, annex).

<sup>11</sup> Statute of the International Tribunal for Rwanda, Security Council resolution 955 (1994), 8 November 1994, annex, art. 3.

<sup>12</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 17, at p. 47, art. 18.

<sup>13</sup> Article 7.

Many conventions on other crimes have focused only on these core elements and the Commission could decide that a streamlined convention is also best in this instance.<sup>14</sup> In the course of its work on this topic, however, the Commission might identify additional elements that should be addressed.

### D. Relationship between the convention and the International Criminal Court

9. A natural question is how a crimes against humanity convention would relate to the International Criminal Court. Certainly the drafting of the convention would benefit considerably from the language of the Rome Statute and associated instruments and jurisprudence. At the same time, adoption of the convention would advance key initiatives not addressed in the Rome Statute, while simultaneously supporting the mission of the Court.

10. First, the Rome Statute regulates relations between its States Parties and the Court, but does not regulate matters among the Parties themselves (nor among Parties and non-Parties). At the same time, Part IX of the Rome Statute, on “International cooperation and judicial assistance”, implicitly acknowledges that inter-State cooperation on crimes within the scope of the Court will continue to operate outside the Rome Statute. The convention would help promote general inter-State cooperation in the investigation, apprehension, prosecution and punishment of persons who commit crimes against humanity, an objective fully consistent with the Rome Statute’s object and purpose.

11. Second, while the Court will remain a key international institution for prosecution of high-level persons who commit this crime, it was not designed (nor given the resources) to prosecute all persons who commit crimes against humanity. Rather, the Court is predicated on the notion that national jurisdiction is, in the first instance, the proper place for prosecution, in the event that appropriate national laws are in place (the principle of complementarity). In the view of many, given that the Court does not have the capacity to prosecute all persons who commit crimes against humanity, effective prevention and prosecution of such crimes are necessary through the active cooperation among, and enforcement by, national jurisdictions.

12. Third, the convention would require the enactment of national laws that prohibit and punish crimes against humanity, which many States so far have not done.<sup>15</sup>As

<sup>14</sup> See, for example, Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (1973). Drafted by the Commission at its twenty-fourth session in 1972 (see *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 312), the Convention was opened for signature in 1973, entered into force in 1977, and at present has 176 States Parties.

<sup>15</sup> Various studies have attempted to assess the existence of national legislation on crimes against humanity. See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (London, 2011); C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge, United Kingdom, Cambridge University Press, 2011) (see chapter 9, entitled “A survey of national legislation and prosecutions for crimes against humanity”); International Committee of the Red Cross, *International Humanitarian Law National Implementation Database* (updated periodically; available from [www.icrc.org/ihl-nat.nsf](http://www.icrc.org/ihl-nat.nsf)). A study undertaken by the George Washington University Law School,

such, the convention would help fill a gap, and in doing so might encourage all States to ratify or accede to the Rome Statute. For States that have already adopted national laws on crimes against humanity, those laws often only allow for national prosecution of crimes committed by that State's nationals or on its territory; the convention would also require the State Party to extend its law to cover other offenders who are present in its territory (non-nationals who commit the offence in the territory of another Party to the convention).

13. Fourth, in the event that a State Party to the Rome Statute receives a request from the International Criminal Court for the surrender of a person to the Court and also receives a request from another State for extradition of the person pursuant to the convention, the Rome Statute provides, in article 90, for a procedure to resolve the competing requests. The convention can be drafted to ensure that States Parties to both the Rome Statute and the convention may continue to follow that procedure.

#### E. Whether the topic meets the Commission's standards for topic selection

14. The Commission has previously determined that any new topic should (a) reflect the needs of States in respect of the progressive development and codification of international law; (b) be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and (c) be concrete and feasible for progressive development and codification.<sup>16</sup>

15. With respect to (b) and (c), this topic is sufficiently advanced in terms of State practice, given the emergence of national laws addressing crimes against humanity in approximately half of United Nations Member States and the considerable attention given to this crime over the past twenty years in the constituent and associated instruments and jurisprudence of the international criminal tribunals, including the International Criminal Court, International Tribunal for the Former Yugoslavia, International Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor and the Extraordinary Chambers in the Courts of Cambodia. Further, the drafting of a convention appears technically feasible at this time, given the large number of analogous conventions covering other types of crimes. The drafting of the convention would build upon the Commission's prior work in this area, such as its reports and the Secretariat's study concerning *aut dedere aut judicare*,<sup>17</sup> and the Commission's 1996 draft Code

of Crimes against the Peace and Security of Mankind,<sup>18</sup> which sought to promote, *inter alia*, cooperation among States in the criminalization, prosecution and extradition of persons who commit crimes against humanity.

16. With respect to (a), States have shown a considerable interest in promoting measures that would punish serious international crimes, as is evident in the establishment of the International Criminal Court, as well as in concluding global instruments that define international criminal offences and call upon States to prevent and punish offenders. At present, there is considerable interest in developing national capacity to address serious international crimes, especially to ensure a well-functioning principle of complementarity. In the light of these trends, States may wish to adopt a well-crafted convention on crimes against humanity. Further, the possibility of a convention of this type has received support in recent years from numerous judges and prosecutors of the International Criminal Court and of other international criminal tribunals, from former United Nations and government officials and from those in the academic community.<sup>19</sup>

#### F. Possible timetable

17. If the Commission were to add this topic to its long-term programme of work during its sixty-fifth session, it then could seek the views of States in the Sixth Committee in late 2013. If those reactions are favourable, the Commission could proceed during its sixty-sixth session with the topic as appropriate, perhaps through the appointment of a special rapporteur and the submission of a first report. Thereafter, completion of the project would depend on many factors, but the existence of analogous conventions, as well as a considerable foundation derived from the existing international criminal tribunals, suggests that the Commission may be able to adopt a full set of draft articles on first reading before the end of the current quinquennium.

#### G. Background materials

##### INTERNATIONAL LAW COMMISSION

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, *Yearbook ... 1950*, vol. II, document A/1316, p. 374.

Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

Preliminary, second, third and fourth reports on the obligation to extradite or prosecute (*aut dedere aut judicare*) (2006–2008 and 2011): *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571; *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585; *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603; and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648, respectively.

International Human Rights Clinic projects that about half of United Nations Member States have not adopted national legislation on crimes against humanity—a statistic that does not significantly change when limited to just States that are Parties to the Rome Statute, even though the preamble of the Rome Statute identifies a duty to adopt national laws. See Rome Statute, preamble, paragraph 6 (recalling that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”). Further, the study indicates that States that have adopted national legislation often have not included all the elements of the Rome Statute and/or have not criminalized conduct by non-nationals committed abroad (see “Comparative law study and analysis of national legislation relating to crimes against humanity and extraterritorial jurisdiction” (July 2013), available from [www.law.gwu.edu/ihrc](http://www.law.gwu.edu/ihrc)).

<sup>16</sup> *Yearbook ... 1997*, vol. II (Part Two), para. 238.

<sup>17</sup> *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/630.

<sup>18</sup> See footnote 12 of the present annex above.

<sup>19</sup> See L. N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (Cambridge, United Kingdom, Cambridge University Press, 2011) (containing testimonials and endorsements).

## CASE LAW

**International Criminal Court**

Various cases, including *Bemba Gombo, Gbagbo and Katanga & Ngudjolo* (see [www.icc-cpi.int/](http://www.icc-cpi.int/)).

**International Tribunal for the Former Yugoslavia**

Various cases, including *Blaškić, Milutinović, Kordić, Kunarac, Kupreškić, Martić, Šešelj, Sikirica, Simić, Stakić, Stanković, Strugar, Tadić and Vasiljević* (see [www.icty.org/](http://www.icty.org/)).

**International Tribunal for Rwanda**

Various cases, including *Akayesu, Bagilishema, Bagosora, Bisengimana, Bikindi, Bucyibaruta, Gacumbitsi, Kajelijeli, Kambanda, Kamuhanda, Karemera, Karera, Kayishema & Ruzindana, Mpambara, Muhimana and Musema* (see <http://unictr.unmict.org/>).

**Special Court for Sierra Leone**

Various cases, including *Brima, Fofana and Kondewa, Sesay and Taylor* (see [www.rscsl.org/index.html](http://www.rscsl.org/index.html)).

**Special Panels for Serious Crimes in East Timor**

Various cases, including the decisions available from <http://socrates.berkeley.edu/~warcrime/ET-special-panels-docs.htm>.

**Extraordinary Chambers in the Courts of Cambodia**

Various cases, including *Kaing Guek Eav and Nuon Chea et al.* (see [www.eccc.gov.kh/en/](http://www.eccc.gov.kh/en/)).

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