

Chapter VI

THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

A. Introduction

57. The Commission, at its fifty-seventh session (2005), decided to include the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur.⁴⁰¹

58. The Special Rapporteur submitted four reports. The Commission received and considered the preliminary report at its fifty-eighth session (2006), the second report at its fifty-ninth session (2007), the third report at its sixtieth session (2008) and the fourth report at its sixty-third session (2011).⁴⁰²

59. At the sixty-first session (2009), an open-ended Working Group was established under the chairpersonship of Mr. Alain Pellet,⁴⁰³ and from its discussions, a proposed general framework for consideration of the topic, specifying the issues to be addressed by the Special Rapporteur, was prepared.⁴⁰⁴ At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its Chairperson, was chaired by Mr. Enrique Candioti.⁴⁰⁵ The Working Group had before it a survey of multilateral conventions which might be of relevance for the topic prepared by the Secretariat.⁴⁰⁶

60. At the sixty-fourth (2012) and sixty-fifth (2013) sessions, the Commission established an open-ended Working Group on the obligation to extradite or prosecute

(*aut dedere aut judicare*), under the chairpersonship of Mr. Kriangsak Kittichaisaree, to undertake an evaluation of the progress of work on the topic in the Commission, particularly in the light of the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite* case, of 20 July 2012,⁴⁰⁷ and to explore possible future options to be taken by the Commission.⁴⁰⁸

B. Consideration of the topic at the present session

61. At the present session, the Commission constituted a Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairpersonship of Mr. Kriangsak Kittichaisaree. The Working Group continued to evaluate work on this topic, particularly in the light of comments made in the Sixth Committee at the sixty-eighth session of the General Assembly on the 2013 report of the Working Group.⁴⁰⁹ The Working Group held two meetings, on 6 May and 4 June 2014.

62. The Working Group considered several options for the Commission in deciding how to proceed with its remaining work on the topic. After careful consideration, the Working Group deemed it appropriate that the Commission expedite its work on the topic and produce an outcome that was of practical value to the international community. The 2013 report constituted the basis of the final report of the Working Group. The Working Group also discussed the issues that were partially or not covered by its 2013 report but were subsequently raised in the Sixth Committee during the sixty-eighth session of the General Assembly, namely: gaps in the existing conventional regime; the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; the customary international law status of the obligation to extradite or prosecute; and other matters of continued relevance in the 2009 general framework.⁴¹⁰ The Working Group’s consideration of the above issues exhausted all the issues remaining to be analysed in relation to the topic.

⁴⁰¹ At its 2865th meeting, on 4 August 2005 (*Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 500). The General Assembly, in paragraph 5 of resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission at its fifty-sixth session (2004), on the basis of the proposal annexed to that year’s report (*Yearbook ... 2004*, vol. II (Part Two), p. 120, paras. 362–363).

⁴⁰² Preliminary report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571; second report: *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585; third report: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603; and fourth report: *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648.

⁴⁰³ During its sixtieth session, at its 2988th meeting on 31 July 2008, the Commission decided to establish a working group on the topic under the chairpersonship of Mr. Alain Pellet, with a mandate and membership to be determined at the sixty-first session (see *Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 315, and *Yearbook ... 2009*, vol. II (Part Two), p. 142, para. 198).

⁴⁰⁴ For the proposed general framework prepared by the Working Group, see *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

⁴⁰⁵ At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the temporary Chairperson of the Working Group (*Yearbook ... 2010*, vol. II (Part Two), pp. 191–192, paras. 336–340).

⁴⁰⁶ “Survey of multilateral instruments 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*)’”, *ibid.*, vol. II (Part One), p. 317, document A/CN.4/630.

⁴⁰⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422.

⁴⁰⁸ At its 3152nd meeting, on 30 July 2012, the Commission took note of the oral report of the Chairperson of the Working Group (*Yearbook ... 2012*, vol. II (Part Two), pp. 74–76, paras. 207–221) and at its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Working Group (*Yearbook ... 2013*, vol. II (Part Two), p. 74, para. 149).

⁴⁰⁹ The report of the Working Group is reproduced in *Yearbook ... 2013*, vol. II (Part Two), annex I, p. 84.

⁴¹⁰ See footnote 404 above.

63. At its 3217th meeting, on 7 July 2014, the Commission took note of the report of the Working Group (A/CN.4/L.844), which, *inter alia*, contained the recommendation that the Commission: (a) adopt the 2013 and 2014 reports, which provide useful guidance for States; and (b) conclude its consideration of the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)”.

64. At its 3242nd meeting, on 7 August 2014, the Commission adopted the final report on the topic, “Obligation to extradite or prosecute (*aut dedere aut judicare*)” (see section C, below) and decided to conclude its consideration of the topic. It also expressed its deep appreciation to the Chairperson of the Working Group, Mr. Kriangsak Kittichaisaree, for his very valuable contribution and the work done in an efficient and expeditious manner. The Commission also recalled, with gratitude, the work of the former Special Rapporteur on the topic, Mr. Zdzislaw Galicki.

C. Final report on the topic

65. 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 in this matter.

1. OBLIGATION TO FIGHT IMPUNITY IN ACCORDANCE WITH THE RULE OF LAW

(1) The Commission notes that 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,⁴¹¹ and in accordance with the rule of law.⁴¹² 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 Government and heads of delegation 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.”⁴¹³ The obligation to cooperate in combating such impunity is given effect in numerous conventions, *inter alia*, through the obligation to extradite or prosecute.⁴¹⁴ The view that the obligation

to extradite or prosecute plays a crucial role in the fight against impunity is widely shared by States;⁴¹⁵ 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.

(2) 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.”⁴¹⁶ 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.

2. THE IMPORTANCE OF THE OBLIGATION TO EXTRADITE OR PROSECUTE IN THE WORK OF THE INTERNATIONAL LAW COMMISSION

(3) The topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” 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 fourteen topics at the first session of the Commission in 1949.⁴¹⁷ It is also addressed in articles 8 (Establishment of jurisdiction) and 9 (Obligation to extradite

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].” (p. 443, para. 50). The Court adds that “[t]he States parties to the Convention 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” (p. 451, para. 74; see also para. 75).

In his fourth report (*Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648, paras. 26–33), Special Rapporteur Zdzislaw Galicki dealt at length with the issue of the duty to cooperate in the fight against impunity. He cited the following examples of international instruments which 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 Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 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).

⁴¹⁵ 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 Commission, 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); the Russian Federation (*ibid.*, para. 64); and India (*ibid.*, para. 81).

⁴¹⁶ H. Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by F. W. Kelsey, *The Law of War and Peace*, Oxford/London, Clarendon Press/Humphrey Milford, 1925, pp. 527–529, at p. 527).

⁴¹⁷ *Yearbook ... 1949*, p. 281, paras. 16–17; see also United Nations, *The Work of the International Law Commission*, 8th ed., vol. I, (United Nations publication, Sales No. E.12.V.2), pp. 35–36.

⁴¹¹ 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 the “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”.

⁴¹² General Assembly resolution 67/1 of 24 September 2012.

⁴¹³ *Ibid.*, para. 22.

⁴¹⁴ See Part 3 below. In the case concerning *Questions relating to the Obligation to Prosecute or Extradite* (footnote 407 above), the

or prosecute) of the draft code of crimes against the peace and security of mankind, adopted by the Commission at its forty-eighth session in 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.⁴¹⁸ The principle *aut dedere aut judicare* is said to have derived from “a number of multilateral conventions”⁴¹⁹ 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 actual State practice and *opinio juris*.⁴²⁰ 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.⁴²¹ While the draft code’s focus is on core crimes,⁴²² the material scope of the obligation to extradite or prosecute covers most crimes of international concern, as mentioned in paragraph (1) above.

3. SUMMARY OF WORK

(4) The following summarizes several key aspects of the Commission’s work on this topic. In the past, some members of the Commission, including Special Rapporteur Zdzislaw Galicki, doubted the use of the Latin formula

⁴¹⁸ “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 article, *Yearbook ... 1996*, vol. II (Part Two), pp. 31–32.

⁴¹⁹ Draft code of crimes against the peace and security of mankind, article 8, paragraph (3) of the commentary, *ibid.*, p. 28.

⁴²⁰ *Yearbook ... 1994*, vol. II (Part Two), p. 80, para. 142.

⁴²¹ Draft code of crimes against the peace and security of mankind, 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.

⁴²² 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, use, 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 Nürnberg 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 central role in 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, article 8, paragraph (14) of the commentary, *Yearbook ... 1996*, vol. II (Part Two), p. 30).

“*aut dedere aut judicare*”, especially in relation to the term “*judicare*”, which they considered as not reflecting precisely the scope of 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”.⁴²³ The report of the Commission decided to proceed 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.

(5) The Commission considered useful to its work a wide range of materials, particularly: the survey prepared by the Secretariat of multilateral conventions which may be of relevance for the Commission’s work on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”⁴²⁴ (hereinafter “Secretariat’s 2010 survey”), which identified multilateral instruments at the universal and regional levels that contain provisions combining extradition and prosecution as alternatives for the punishment of offenders; and the judgment of 20 July 2012 of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*.⁴²⁵

(a) Typology of provisions in multilateral instruments

(6) The Secretariat’s 2010 survey 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 reviewed provisions 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 for the protection of war victims and the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); and (d) the 1970 Convention for the

⁴²³ Third report of Special Rapporteur 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), pp. 1089–1116, at pp. 1107–1108, on the formulas *aut dedere aut punire*, *aut dedere aut prosequi* and *aut dedere aut judicare*.

⁴²⁴ A/CN.4/630 (see footnote 406 above).

⁴²⁵ See footnote 407 above.

suppression of unlawful seizure of aircraft and other conventions that have followed the same model.

(7) The International Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model⁴²⁶ 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 that take 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 that 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 was not affected by its participation in the convention; and (f) contain a "without 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.

(8) Numerous regional conventions and arrangements on extradition also contain provisions that combine options of extradition and prosecution,⁴²⁷ although those instruments typically emphasize the obligation to 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.⁴²⁸

⁴²⁶ For example: (a) Convention of 1936 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 Single Convention on Narcotic Drugs, 1954; and (e) the 1971 Convention on psychotropic substances.

⁴²⁷ 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 Convention on Extradition; and (g) the 2002 London Scheme for Extradition within the Commonwealth.

⁴²⁸ It may also be recalled that 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). See also the 2004 Model Law on Extradition prepared by the United Nations Office on Drugs and Crime, available from www.unodc.org/pdf/model_law_extradition.pdf. See also Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, available from www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf.

(9) The four 1949 Geneva Conventions for the protection of war victims 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.⁴²⁹ 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.⁴³⁰ 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 by *renvoi* to the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).⁴³¹

(10) The 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 without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution". This "Hague formula" is a variation of the formula in the Geneva Conventions for the protection of war victims and has served as a model for several subsequent conventions aimed at the suppression of specific offences, principally in 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).⁴³² However, many of those

⁴²⁹ Articles 49, 50, 129 and 146, respectively, of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II), the Geneva Convention relative to the Treatment of Prisoners of War (Convention III) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV). The reason these Conventions use the term "hand over" instead of "extradite" is explained in the Secretariat's 2010 survey (A/CN.4/630 (see footnote 406 above), para. 54).

According to Claus Kreß ("Reflection on the *judicare* limb of the grave breaches regime", *Journal of International Criminal Justice*, vol. 7, No. 4 (2009), p. 789), what the *judicare* limb of the grave breaches regime actually entails is a duty to investigate and, where so warranted, to prosecute and convict.

⁴³⁰ See J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV, Geneva, ICRC, 1958, p. 593.

⁴³¹ Article 85, paragraphs 1 and 3, and article 88, paragraph 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977.

⁴³² 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 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) 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

subsequent instruments have modified the original terminology which sometimes affect the substance of the obligations contained in the “Hague formula”.

(11) In his separate opinion in the judgment of 20 July 2012 of the International Court of Justice in the case concerning *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.⁴³³ The first category of international conventions contained clauses that impose an obligation 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 that gives priority to extradition to

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 SAARC [South Asian Association for Regional Cooperation] Regional Convention on Suppression of Terrorism and the 2004 Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism; (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 the 2005 Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel; (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 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 Convention 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 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 Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism; (hh) 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.

⁴³³ Separate opinion of Judge Yusuf in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), paras. 19–22. See also the Secretariat’s 2010 survey (A/CN.4/630 (footnote 406 above)), para. 126. See also the comments submitted by Belgium to the Commission in 2009, where Belgium identified two types of treaties: (a) treaties that 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 that 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 Special Rapporteur Galicki in his fourth report (*Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648, p. 201, para. 85 and footnote 86).

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 the alleged offender to prosecution, 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 are article 9, paragraph 22 of the 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 contains clauses that impose an obligation to submit to prosecution, with extradition being an available option, as well as clauses which impose an obligation to submit to prosecution, with extradition becoming an obligation if the State fails to do so. Such clauses in that category can be found in, for example, the relevant provisions of the four 1949 Geneva Conventions, article 7 of the 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.

(12) In the light of the above, the Commission considers that when drafting treaties, States can decide for themselves 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 attempt to harmonize the various treaty clauses on the obligation to extradite or prosecute.⁴³⁴

(13) Although the Commission 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 use of “Hague formula” that serves “as a model for most of the contemporary conventions for the suppression of specific

⁴³⁴ As the Secretariat’s 2010 survey concludes (A/CN.4/630 (see footnote 406 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 variations in the provisions relating to prosecution and extradition appear 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.”

offences”⁴³⁵ Of the conventions drafted on 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 to: (a) criminalize the relevant offence under its domestic laws; (b) 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) make provisions to ensure that the alleged offender is under custody and there is a preliminary enquiry; and (d) treat the offence as extraditable.⁴³⁶ In particular, under the prosecution limb of the obligation, the conventions only emphasize that the case 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.

(14) The Commission 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,⁴³⁷ war crimes other than grave breaches, and war crimes in non-international armed conflict.⁴³⁸

⁴³⁵ *Ibid.*, p. 338, para. 91.

⁴³⁶ *Ibid.*, p. 342, para. 109.

⁴³⁷ 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.

⁴³⁸ The underlying principle of the four Geneva Conventions for the protection of war victims is the establishment of universal jurisdiction over grave breaches of the Conventions. Each Convention contains an article describing what acts constitute grave breaches that follows immediately after the extradite-or-prosecute provision.

For the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) and the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention 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 the Geneva Convention relative to the Treatment of Prisoners of War (Convention II) stipulates: “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 the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) provides: “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

In relation to genocide, the international cooperation regime could be strengthened beyond the rudimentary regime under the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. As explained by the International Court of Justice in the case concerning *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 only obligates contracting parties to institute and exercise territorial criminal jurisdiction as well as to cooperate with an “international penal tribunal” under certain circumstances.⁴³⁹

(b) *Implementation of the obligation to extradite or prosecute*

(15) *The Hague formula.* The Commission views the judgment of the International Court of Justice in the case concerning *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 (article 5), the obligation to engage in a preliminary inquiry (article 6) and the obligation to prosecute or extradite (article 7).⁴⁴⁰ 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 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 Convention for the suppression of unlawful seizure of aircraft and other conventions that have followed the same formula.⁴⁴¹ As the Court

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.”

The four 1949 Geneva Conventions and the 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, either.

⁴³⁹ *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 and 229, paras. 442 and 449. Article VI reads: “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.” In paragraph 442 of its judgment, the Court 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”.

⁴⁴⁰ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), pp. 450–461, paras. 71–121.

⁴⁴¹ 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 Convention

also holds that the prohibition of torture is a peremptory norm (*jus cogens*),⁴⁴² the prosecute-or-extradite formula under the Convention against torture and other cruel, inhuman or degrading treatment or punishment 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.

(16) The Court determined that States parties to the Convention against torture and other cruel, inhuman or degrading treatment or punishment 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 declared: “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”.⁴⁴³ The obligation under article 7, paragraph 1, “to submit the case to the competent authorities for the purpose of prosecution”, which the Court called 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.⁴⁴⁴ In particular, the Court ruled 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”.⁴⁴⁵ The Court also noted that both the 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 that State”.⁴⁴⁶

(17) *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, establishing jurisdiction over the offences and the person present in the territory of the State, investigating or undertaking

for the suppression of unlawful seizure of aircraft (*ibid.*, pp. 454–455, para. 90). As Judge Donoghue put 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 *Questions relating to the Obligation to Prosecute or Extradite*, *ibid.*, p. 590, para. 21.)

⁴⁴² *Ibid.*, p. 457, para. 99.

⁴⁴³ *Ibid.*, p. 455, para. 91. See also pp. 451–452 and 456, paras. 74–75, 78 and 94.

⁴⁴⁴ *Ibid.*, pp. 454–456, paras. 90 and 94.

⁴⁴⁵ *Ibid.*, p. 456, para. 95.

⁴⁴⁶ Article 7, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment and article 7 of the Convention for the suppression of unlawful seizure of aircraft, *ibid.*, para. 90.

primary inquiry, apprehending the suspect, and submitting the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extraditing, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect.

(18) *Establishment of the necessary jurisdiction.* Establishing jurisdiction is “a logical prior step” to the implementation of an obligation to extradite or prosecute an alleged offender present in the territory of a State.⁴⁴⁷ 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,⁴⁴⁸ which is “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events”⁴⁴⁹ 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 under 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.⁴⁵⁰ Several international instruments, such as the very widely ratified four Geneva Conventions for the protection of war victims 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.

⁴⁴⁷ Report of the AU-EU 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 407 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 (p. 451, para. 74).

⁴⁴⁸ According to one author, “[t]he 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/Oxford, Intersentia, 2005, p. 122).

⁴⁴⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, pp. 3 *et seq.*; see, in particular, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, p. 75, para. 42.

⁴⁵⁰ It should be recalled that the “Obligation to extradite or prosecute” in 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 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, para. (7)).

(19) *Delay in enacting legislation.* According to the Court in the case concerning *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.⁴⁵¹ The State's obligation extends beyond merely enacting national legislation. The State must also actually exercise its jurisdiction over a suspect, starting by establishing the facts.⁴⁵²

(20) *Obligation to investigate.* According to the Court in the case concerning *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;⁴⁵³

The obligation is intended to corroborate the suspicions regarding the person in question.⁴⁵⁴ The starting point is the establishment of the relevant facts, which is an essential stage in the process of the fight against impunity.⁴⁵⁵

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 immediately be initiated. This point is reached, at the latest, when the first complaint is filed against the person,⁴⁵⁶ at which stage the establishment of the facts becomes imperative;⁴⁵⁷

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,⁴⁵⁸

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;⁴⁵⁹

An inquiry taking place on the basis of universal jurisdiction must be conducted according to the same standards

⁴⁵¹ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), pp. 451–452, paras. 76–77.

⁴⁵² *Ibid.*, p. 453, para. 84.

⁴⁵³ *Ibid.*, p. 454, para. 86.

⁴⁵⁴ *Ibid.*, p. 453, para. 83.

⁴⁵⁵ *Ibid.*, pp. 453–454, paras. 85–86.

⁴⁵⁶ *Ibid.*, p. 454, para. 88.

⁴⁵⁷ *Ibid.*, para. 86.

⁴⁵⁸ *Ibid.*, pp. 453–454, para. 85.

⁴⁵⁹ *Ibid.*, p. 453, para. 83.

in terms of evidence as when the State has jurisdiction by virtue of a link with the case in question.⁴⁶⁰

(21) *Obligation to prosecute.* According to the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the obligation to prosecute consists of certain elements:

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.⁴⁶¹ 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;⁴⁶²

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;⁴⁶³

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.⁴⁶⁴

(22) *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;⁴⁶⁵

Fulfilling the obligation to extradite cannot be substituted by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State.⁴⁶⁶ Formal extradition requests entail important

⁴⁶⁰ *Ibid.*, para. 84.

⁴⁶¹ See also *Chili Komitee Nederland v. Public Prosecutor*, 4 January 1995, Court of Appeal of Amsterdam, *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 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 University Press, 2011, p. 88, footnote 132.

⁴⁶² *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), pp. 454–456, paras. 90 and 94.

⁴⁶³ *Ibid.*, pp. 460–461, paras. 115–117.

⁴⁶⁴ *Ibid.*, paras. 114–115. See the separate opinion of Judge Cançado Trindade at pp. 546–548, paras. 148, 151–153; the dissenting opinion of Judge *ad hoc* Sur in the same case at p. 620, para. 50; and the dissenting opinion of Judge Xue, at p. 578, para. 28.

⁴⁶⁵ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), p. 461, para. 120.

⁴⁶⁶ See draft article 12 of the draft articles on the expulsion of aliens adopted by the Commission on second reading in the current session (see page 36 above) and European Court of Human Rights, *Bozano v. France*, Judgment of 18 December 1986 (footnote 44 above), paras. 52–60, 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.

human rights protections which may be absent from informal forms of dispatching the suspect to another State, such as extraordinary renditions. Under the 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.

(23) *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.⁴⁶⁷ It is also worth recalling that, by virtue of article 27 of the 1969 Vienna Convention, 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.⁴⁶⁸ Besides, the steps taken must be in accordance with the rule of law.

(24) 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.⁴⁶⁹

(25) *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, “[u]nless a different intention appears from the treaty or is otherwise established”.⁴⁷⁰ 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.⁴⁷¹ 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.⁴⁷² However, nothing prevents the State from investigating or prosecuting acts committed before the entry into force of the treaty for that State.⁴⁷³

⁴⁶⁷ See the reasoning in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), pp. 453–454, paras. 85–86. Therefore, the Court ruled that financial difficulties do not justify the failure by Senegal to comply with the obligations under the Convention against torture and other cruel, inhuman or degrading treatment or punishment (*ibid.*, p. 460, para. 112). Likewise, seeking guidance from the African Union does not justify the delay by Senegal in complying with its obligation under the Convention (*ibid.*).

⁴⁶⁸ *Ibid.*, para. 113.

⁴⁶⁹ *Ibid.*, p. 461, para. 120. As also explained by Judge Cançado Trindade, “[t]he 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” (*ibid.*, p. 508, para. 50; see also his full reasoning at pp. 505–508, paras. 44–51).

⁴⁷⁰ *Ibid.*, pp. 457–458, paras. 100–102, citing article 28 of the 1969 Vienna Convention, which reflects customary international law.

⁴⁷¹ *Ibid.*, p. 458, paras. 103–105.

⁴⁷² *Ibid.*, p. 451, para. 75.

⁴⁷³ *Ibid.*, p. 458, paras. 102 and 105.

(26) *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 engaging the responsibility of the State.⁴⁷⁴ As long as all measures necessary for the implementation of the obligation have not been taken, the State remains in breach of its obligation.⁴⁷⁵ 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).⁴⁷⁶

(27) *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.⁴⁷⁷ This third alternative is stipulated, for example, in article 11, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.⁴⁷⁸

(28) In her dissenting opinion in the case concerning *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, they would not have breached their 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.⁴⁷⁹ Of course, if “a different intention appears from the treaty or is otherwise established”⁴⁸⁰ 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.

⁴⁷⁴ *Ibid.*, p. 456, para. 95.

⁴⁷⁵ *Ibid.*, pp. 460–461, para. 117.

⁴⁷⁶ *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 are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

⁴⁷⁷ Article 9 of the 1996 draft code of crimes against the peace 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).

⁴⁷⁸ “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 jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.”

⁴⁷⁹ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), dissenting opinion of Judge Xue, at p. 582, para. 42 (dissenting on other points).

⁴⁸⁰ Article 28 of the 1969 Vienna Convention.

(29) 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.

(30) *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.⁴⁸¹

(c) *Gaps in the existing conventional regime and the “third alternative”*

(31) As noted in paragraph (14) above, the Commission reiterates that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute, notably in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict. It also notes that it had placed on its programme of work in 2014 the topic “Crimes against humanity”, which would include as one element of a new treaty an obligation to extradite or prosecute for those crimes.⁴⁸² It further suggested that, in relation to genocide, the international cooperation regime could be strengthened beyond the one that exists under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.⁴⁸³

(32) Instead of drafting a set of model provisions to close the gaps in the existing conventional regime regarding the obligation to extradite or prosecute, the Commission recalls that an obligation to extradite or prosecute for, *inter alia*, genocide, crimes against humanity and war crimes is already stipulated in article 9 of the 1996 draft code of crimes against the peace and security of mankind, which reads:

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.⁴⁸⁴

(33) The Commission also refers to the “Hague formula”, quoted in paragraph (10) above. As noted in that paragraph, the Hague formula has served as a model for most contemporary conventions containing the obligation

to extradite or prosecute,⁴⁸⁵ including the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, which have been mentioned by several delegations in the Sixth Committee in 2013 as a possible model to close the gaps in the conventional regime. In addition, the judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* is helpful in construing the Hague formula.⁴⁸⁶ The Commission recommends that States consider the Hague formula in undertaking to close any gaps in the existing conventional regime.

(34) The Commission further acknowledges that some States⁴⁸⁷ have inquired about the link between the obligation to extradite or prosecute and the transfer of a suspect to an international or special court or tribunal, whereas other States⁴⁸⁸ treat such a transfer differently from extradition. As pointed out in paragraph (27) above, the obligation to extradite or prosecute may be satisfied by surrendering the alleged offender to a competent international criminal tribunal.⁴⁸⁹ A provision to this effect appears in article 11, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which reads:

The State party in the territory under whose jurisdiction a person alleged to have committed [an act of genocide/a crime against humanity/a war crime] 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 a competent international criminal tribunal or any other competent court whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

(35) Under such a provision, the obligation to extradite or prosecute may be satisfied by a “third alternative”, which would consist of the State surrendering the alleged offender to a competent international criminal tribunal or a competent court whose jurisdiction the State concerned has recognized. The competent tribunal or court may take a form similar in nature to the Extraordinary African Chambers, set up within the Senegalese court system by an agreement dated 22 August 2012 between Senegal and the African Union, to try Mr. Habré in the wake of the judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*.⁴⁹⁰ This kind

⁴⁸⁵ See *Yearbook ... 2013*, vol. II (Part Two), annex I, para. 16 and accompanying footnote 29. See also paragraph (10) above and the footnote thereto.

⁴⁸⁶ *Yearbook ... 2013*, vol. II (Part Two), annex I, paras. 21–22. See also paragraphs (15) and (16) above.

⁴⁸⁷ Chile, France and Thailand.

⁴⁸⁸ Canada and the United Kingdom of Great Britain and Northern Ireland.

⁴⁸⁹ See also the Council of Europe, *Extradition, European Standards: Explanatory Notes on the Council of Europe Convention and Protocol and Minimum Standards Protecting Persons subject to Transnational Criminal Proceedings*, Council of Europe Publishing, Strasbourg, 2006, where it is stated that “[i]n the era of international criminal tribunals, the principle [*aut dedere aut judicare*] may be interpreted *lato sensu* to include the duty of the State to transfer the person to the jurisdiction of an international organ, such as the International Criminal Court” (p. 119, footnote omitted).

⁴⁹⁰ Signed at Dakar on 22 August 2012 (see ILM, vol. 52 (2013), pp. 1024 *et seq.*). The Extraordinary African Chambers have jurisdiction to try the person or persons most responsible for international crimes committed in Chad between 7 June 1982 and 1 December 1990. The Trial Chamber and the Appeals Chamber are each composed of two

⁴⁸¹ This possibility was raised by Special Rapporteur Galicki in his preliminary report, *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, pp. 267–368, paras. 49–50.

⁴⁸² *Yearbook ... 2013*, vol. II (Part Two), annex II.

⁴⁸³ *Ibid.*, annex I, para. 20. A study by Chatham House suggested that the Commission’s future work on this topic should concentrate on drafting a treaty obligation to extradite or prosecute in respect of core international crimes and emulate the extradite-or-prosecute mechanism developed in article 7 of the Convention for the suppression of unlawful seizure of aircraft and incorporated in the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment and, most recently, in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. See M. Zgonec-Rozej and J. Foakes, “International criminals: extradite or prosecute?” Chatham House Briefing Paper, IL BP 2013/01, July 2013.

⁴⁸⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 30; see also the Commission’s commentary to this article in *ibid.*, pp. 31–32.

of “internationalization” within a national court system is not unique. As a court established by the agreement between Senegal and the African Union, with the participation of national and foreign judges in these Chambers, the Extraordinary African Chambers follow the examples of the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

(36) The above examples highlight the essential elements of a provision containing the obligation to extradite or prosecute, and may assist States in choosing the formula that they consider to be most appropriate for a particular context.

(d) *The priority between the obligation to prosecute and the obligation to extradite, and the scope of the obligation to prosecute*

(37) The Commission takes note of the suggestion made by one delegation⁴⁹¹ to the Sixth Committee in 2013 to analyse these two aspects of the topic. It also notes the suggestions of other delegations⁴⁹² that the Commission establish a general framework of extraditable offences or guiding principles on the implementation of the obligation to extradite or prosecute. It wishes to draw attention to the Secretariat’s 2010 survey⁴⁹³ and paragraphs (6) to (13) above, which have addressed these issues.

(38) In summary, beyond the basic common features, provisions containing the obligation to extradite or prosecute in multilateral conventions vary considerably in their formulation, content and scope. This is particularly so in terms of the conditions imposed on States with respect to extradition and prosecution and the relationship between these two courses of action. Although the relationship between the obligation to extradite and the obligation to prosecute is not identical, the relevant provisions seem to fall into two main categories; namely, (a) those clauses pursuant to which the obligation to prosecute is only triggered by a refusal to surrender the alleged offender following a request for extradition; and (b) those imposing an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition.

(39) Instruments containing clauses in the first category impose on States parties (at least those that do not have a special link with the offence) an obligation to prosecute only when extradition has been requested and not granted, as opposed to an obligation *ipso facto* to prosecute the alleged offender present in their territory. They recognize the possibility that a State may refuse to grant a request for extradition of an individual on grounds stipulated either in the instrument or in national legislation. However, in the event of refusal of extradition, the State is obliged to prosecute the individual. In other words, these instruments primarily focus on the option of extradition and provide the alternative of prosecution as a safeguard against

impunity.⁴⁹⁴ In addition, instruments in this category may adopt very different mechanisms for the punishment of offenders, which may affect the interaction between extradition and prosecution. In some instances, there are detailed provisions concerning the prosecution of offences that are the subject of the instrument, while in other cases, the process of extradition is regulated in greater detail. The 1929 International Convention for the Suppression of Counterfeiting Currency and subsequent conventions inspired by it⁴⁹⁵ belong to this first category.⁴⁹⁶ Multilateral conventions on extradition also fall into this category.⁴⁹⁷

(40) Clauses in the second category impose upon States an obligation to prosecute *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition. Only in the event that a request for extradition is made does the State concerned have the discretion to choose between extradition and prosecution.⁴⁹⁸ The clearest example of such clauses

⁴⁹⁴ *Ibid.*, para. 132. In effect, these conventions appear to follow what was originally foreseen by Hugo Grotius when he referred to the principle *aut dedere aut punire* (Grotius (footnote 416 above), pp. 527–529, at p. 527).

⁴⁹⁵ For example, the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs; the 1937 Convention for the Prevention and Punishment of Terrorism; the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; the Single Convention on Narcotic Drugs, 1961; and the 1971 Convention on psychotropic substances. See also the Secretariat’s 2010 survey (A/CN.630 (footnote 406 above)), para. 29.

⁴⁹⁶ The overall structure of the mechanism for the punishment of offenders in these conventions is based on the idea that the State in whose territory the crime was committed will request the extradition of the offender who has fled to another State and that extradition should, in principle, be granted. These conventions, however, recognize that States may be unable to extradite in some cases (most notably when the individual is their national or when they have granted asylum to him) and provide for the obligation to prosecute as an alternative (see the Secretariat’s 2010 survey (A/CN.4/630 (footnote 406 above)), para. 133 and footnote 327 citing Marc Henzelin, *Le principe de l’universalité en droit pénal international. Droit et obligation pour les États de poursuivre et de juger selon le principe de l’universalité*, Basel/Geneva, Helbing and Lichtenhahn/Faculté de droit de Genève/Bruylant, 2000, p. 286, who qualifies the system as *primo dedere secundo judicare*).

⁴⁹⁷ For example, the 1981 Inter-American Convention on extradition; the 1957 European Convention on Extradition; the 1961 General Convention on Judicial Cooperation (*Convention générale de coopération en matière de justice*); the 1994 Economic Community of West African States Convention on Extradition; and the 2002 London Scheme for Extradition within the Commonwealth. These Conventions are based on the general undertaking by States parties to surrender to one another all persons against whom the competent authorities of the requesting party are proceeding for an offence or who are wanted for the carrying out of a sentence or detention order. However, the obligation to extradite is subject to a number of conditions and exceptions, including when the request involves the national of the requested State. When extradition is refused, the conventions impose an alternative obligation to prosecute the alleged offender as a mechanism to avoid impunity. See also the Secretariat’s 2010 survey (A/CN.4/630 (footnote 406 above)), para. 134).

⁴⁹⁸ Secretariat’s 2010 survey (A/CN.4/630 (footnote 406 above)), para. 127, and footnote 262. Those opining that the accused must be present in the territory of the State concerned as a precondition of the assertion of universal jurisdiction include Judges Higgins, Kooijmans and Buergenthal (joint separate opinion in the *Arrest Warrant* case (footnote 449 above), p. 80, para. 57). See also the separate opinion of Judge Guillaume, *ibid.*, para. 9; and G. Guillaume, “Terrorisme et droit international”, *Collected Courses of the Hague Academy of International Law*, vol. 215 (1990), pp. 368–369. However, Henzelin (footnote 496 above) argues that the presence of the alleged offender in the territory of the State is not required for prosecution under the relevant provision of the 1949 Geneva Conventions (p. 354).

Senegalese judges and one non-Senegalese judge, who presides over the proceedings. See the Statute of the Extraordinary African Chambers, articles 3 and 11, ILM, *ibid.*, pp. 1028 and 1030–1031.

⁴⁹¹ Mexico.

⁴⁹² Cuba and Belarus, respectively.

⁴⁹³ A/CN.4/630 (see footnote 406 above).

is the relevant common article of the Geneva Conventions for the protection of war victims, which provides that each State party “shall bring” persons alleged to have committed, or to have ordered to be committed, grave breaches to those Conventions, regardless of their nationality, before its own courts, but “may also, if it prefers”, hand such persons over for trial to another State party concerned.⁴⁹⁹ As for the Hague formula, its text does not unequivocally resolve the question of whether the obligation to prosecute arises *ipso facto* or only once a request for extradition is submitted and not granted.⁵⁰⁰ In this regard, the findings of the Committee against Torture and the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, in relation to a similar provision contained in article 7 of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment,⁵⁰¹ are instructive. The Committee against Torture has explained that

the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished.⁵⁰²

⁴⁹⁹ While this provision appears to give a certain priority to prosecution by the custodial State, it also recognizes that this State has the discretion to opt for extradition, provided that the requesting State has made out a *prima facie* case (see the Secretariat’s 2010 survey (A/CN.4/630 (footnote 406 above)), para. 128, citing D. Costello, “International terrorism and the development of the principle *aut dedere aut iudicare*”, *The Journal of International Law and Economics*, vol. 10 (1975), p. 486; M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht/Boston/London, Martinus Nijhoff, 1995, p. 15; and C. Maierhöfer, “*Aut dedere—aut iudicare*”. *Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung*, Berlin, Duncker and Humblot, 2006, pp. 340–350. Authors who emphasize the priority attributed to prosecution in the 1949 Geneva Conventions are said to include L. Condorelli, “Il sistema della repressione dei crimini di guerra nelle Convenzioni di Ginevra del 1949 e nel primo Protocollo addizionale del 1977”, in P. Lamberti Zanardi and G. Venturini (eds.), *Crimini di guerra e competenza delle giurisdizioni nazionali: Atti del Convegno, Milano, 15–17 maggio 1997*, Milan, Giuffrè, 1998, pp. 35–36; and Henzelin (footnote 496 above), p. 353 (who qualifies the model of the Geneva Conventions for the protection of war victims as *primo prosequi secundo dedere*). See also article 88, paragraph (2) of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which calls on States Parties to “give due consideration to the request of the State in whose territory the alleged offence has occurred”, thus implying that prosecution by the latter State would be preferable.

⁵⁰⁰ Article 7 of the Convention for the suppression of unlawful seizure of aircraft provides 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”.

⁵⁰¹ Article 7, paragraph 1, states: “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

⁵⁰² *Guengueng et al. v. Senegal* (Merits), Communication No. 181/2001, Decision of the Committee Against Torture under Article 22 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, 36th session, 17 May 2006, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44 (A/61/44)*, pp. 171–172, para. 9.7.

(41) Likewise, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the International Court of Justice considered article 7, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment as requiring

the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request.⁵⁰³

(42) Accordingly, it follows that the choice between extradition and submission for prosecution under the Convention did not mean that the two alternatives enjoyed the same weight: extradition was an option offered to the State by the Convention while prosecution was an obligation under the Convention, the violation of which was a wrongful act resulting in State responsibility.⁵⁰⁴

(43) With respect to the Commission’s 1996 draft code of crimes against the peace and security of mankind, article 9 provides that the State Party in whose territory an individual alleged to have committed these crimes is found “shall extradite or prosecute that individual”. The commentary to article 9 clarifies that the obligation to prosecute arises independently from any request for extradition.⁵⁰⁵

(44) The scope of the obligation to prosecute has already been elaborated in paragraphs (21) to (26) above.

(e) *The relationship of the obligation to extradite or prosecute with erga omnes obligations or jus cogens norms*

(45) The Commission notes that one delegation⁵⁰⁶ to the Sixth Committee in 2013 raised the issue of the impact of the *aut dedere aut iudicare* principle on international responsibility when it relates to *erga omnes* obligations or *jus cogens* norms, such as the prohibition of torture. The delegation suggested an analysis of the following issues: (a) in respect of whom the obligation exists; (b) who can request extradition; and (c) who has a legal interest in invoking the international responsibility of a State for being in breach of its “obligation to prosecute or extradite”.

⁵⁰³ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), p. 456, paras. 94–95.

⁵⁰⁴ *Ibid.*, para. 95.

⁵⁰⁵ “The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition” (*Yearbook ... 1996*, vol. II (Part Two), p. 31, paragraph (3) of the commentary to article 9). Reference should also be made to article 8 of the draft code (whereby each State party “shall take such measures as may be necessary to establish its jurisdiction” over the crimes set out in the draft code “irrespective of where or by whom those crimes were committed”) (*ibid.*, p. 27).

⁵⁰⁶ Mexico.

(46) Several members of the Commission pointed out that this area was likely to concern the interpretation of conventional norms. The statements of the International Court of Justice in this regard in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* must be read within the specific context of that particular case. There, the Court interpreted the object and purpose of the Convention against torture and other cruel, inhuman or degrading treatment or punishment as giving rise to “obligations *erga omnes partes*”, whereby each State party had a “common interest” in compliance with such obligations and, consequently, each State party was entitled to make a claim concerning the cessation of an alleged breach by another State Party.⁵⁰⁷ The issue of *jus cogens* was not central to this point. In the understanding of the Commission, the Court was saying that insofar as States were parties to the Convention against torture and other cruel, inhuman or degrading treatment or punishment, they had a common interest to prevent acts of torture and to ensure that, if they occurred, those responsible did not enjoy impunity.

(47) Other treaties, even if they may not involve *jus cogens* norms, may lead to *erga omnes* obligations as well. In other words, all States parties may have a legal interest in invoking the international responsibility of a State party for being in breach of its obligation to extradite or prosecute.

(48) The State that can request extradition normally will be a State party to the relevant convention or have a reciprocal extradition undertaking/arrangement with the requested State, having jurisdiction over the offence, being willing and able to prosecute the alleged offender, and respecting applicable international norms protecting the human rights of the accused.⁵⁰⁸

(f) *The customary international law status of the obligation to extradite or prosecute*

(49) The Commission notes that some delegations to the Sixth Committee opined that there was no obligation to extradite or prosecute under customary international law, whereas others were of the view that the customary international law status of the obligation merited further consideration by the Commission.⁵⁰⁹

(50) It may be recalled that, in 2011, the then Special Rapporteur Galicki, in his fourth report, proposed a draft

⁵⁰⁷ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), pp. 449–450, paras. 67–70. See also the separate opinion of Judge Cançado Trindade, pp. 527–529, paras. 104–108, and the declaration of Judge Donoghue, pp. 586–589, paras. 9–17. See the dissenting opinion of Judge Xue, pp. 571–577, paras. 2–23, and dissenting opinion of Judge *ad hoc* Sur, pp. 608 and 610–611, paras. 13, 19–20. See also the separate opinion of Judge Skotnikov, pp. 482–485, paras. 9–22.

⁵⁰⁸ See, for example, Council of Europe, *Extradition, European Standards* (footnote 489 above), sect. III, chap. 4 (Material human rights guarantees as limitations to extradition), pp. 123 *et seq.*; *Code of Minimum Standards of Protection to Individuals Involved in Transnational Proceedings*, Report to the Committee of Experts on Transnational Criminal Justice, European Committee on Crime Problems, Council of Europe (PC-TJ/Docs 2005/PC-TJ (2005) 07 E.Azaria), Strasbourg, 16 September 2005.

⁵⁰⁹ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session, prepared by the Secretariat (A/CN.4/666), para. 60

article on international custom as a source of the obligation *aut dedere aut judicare*.⁵¹⁰

(51) However, the draft article was not well received in either the Commission⁵¹¹ or the Sixth Committee.⁵¹² There was general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes.

(52) Determining whether the obligation to extradite or prosecute has become or is becoming a rule of customary international law, or at least a regional customary law, may help indicate whether a draft article proposed by the Commission codifies or is progressive development of international law. However, since the Commission has decided not to have the outcome of the Commission’s work on this topic take the form of draft articles, it has found it unnecessary to come up with alternative formulas to the one proposed by Mr. Galicki.

(53) The Commission wishes to make clear that the foregoing should not be construed as implying that it has found that the obligation to extradite or prosecute has not become or is not yet crystallizing into a rule of customary international law, be it a general or regional one.

(54) When the Commission adopted the draft code of crimes against the peace and security of mankind in 1996, the provision on the obligation to extradite or prosecute thereunder represented progressive development of international law, as explained in paragraph (3) above. Since the completion of the draft code, there may have been further developments in international law that reflect State practice and *opinio juris* in this respect.

(55) The Commission notes that in 2012 the International Court of Justice, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, ruled that it had no jurisdiction to entertain the claims by

⁵¹⁰ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648, para. 95. The draft article read as follows:

“Article 4. *International custom as a source of the obligation aut dedere aut judicare*

“1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.

“2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

“3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2.”

⁵¹¹ *Ibid.*, vol. II (Part Two), pp. 166–167, paras. 320–326.

⁵¹² In particular, some States disagreed with the conclusion that the customary nature of the obligation to extradite or prosecute could necessarily be inferred from the existence of customary rules proscribing specific international crimes (see the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat (A/CN.4/650 [and Add.1]), para. 48 (mimeographed; available from the Commission’s website, documents of the sixty-fourth session). See also the positions of Argentina (*Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 22nd meeting*, A/C.6/62/SR.22, para. 58); and the Russian Federation (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/599, p. 142, para. 22).

Belgium relating to the alleged breaches by Senegal of obligations under customary international law because, at the date of the filing by Belgium of the application, the dispute between Belgium and Senegal did not relate to breaches of obligations under customary international law.⁵¹³ Thus, an opportunity has yet to arise for the Court to determine the customary international law status or otherwise of the obligation to extradite or prosecute.⁵¹⁴

(g) *Other matters of continued relevance in the 2009 general framework*

(56) The Commission observes that the 2009 general framework⁵¹⁵ continued to be mentioned in the Sixth

⁵¹³ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 407 above), at pp. 444–445, paras. 53–55, and p. 462, para. 122 (2), with Judge Abraham and Judge *ad hoc* Sur dissenting on this point (*ibid.*, separate opinion of Judge Abraham, pp. 471–476, paras. 3–20; dissenting opinion of Judge *ad hoc* Sur, p. 610, para. 17).

⁵¹⁴ Judge Abraham and Judge *ad hoc* Sur concluded that the Court, if it had found jurisdiction, would not have upheld the claim by Belgium of the existence of the customary international law obligation to prosecute or extradite. In his separate opinion, Judge Abraham considered there was insufficient evidence, based on State practice and *opinio juris*, of a customary obligation for States to prosecute before their domestic courts individuals suspected of war crimes or crimes against humanity on the basis of universal jurisdiction, even when limited to the case where the suspect was present in the territory of the forum State (*ibid.*, separate opinion of Judge Abraham, pp. 476–480, paras. 21, 24–25 and 31–39).

In his dissenting opinion, Judge *ad hoc* Sur said that despite the silence of the Court, or perhaps because of such silence, “it seems clear that the existence of a customary obligation to prosecute or extradite, or even simply to prosecute, cannot be established in positive law” (*ibid.*, dissenting opinion of Judge *ad hoc* Sur, p. 610, para. 18).

By contrast, the separate opinions of Judge Cançado Trindade (*ibid.*, separate opinion of Judge Cançado Trindade, p. 544, para. 143) and of Judge Sebutinde (*ibid.*, separate opinion of Judge Sebutinde, p. 604, paras. 41–42) both stressed that the Court only found that it had no jurisdiction to address the merits of the customary international law issues given the facts presented in the case.

In any case, any reference to the existence or non-existence of the customary law obligation in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* was to the obligation in the cases of crimes against humanity and war crimes in internal armed conflicts. It did not touch upon such obligation in the context of genocide, war crimes in international armed conflicts, or other crimes of international concern like acts of terrorism.

⁵¹⁵ For ease of reference, the 2009 general framework (see footnote 404 above) is reproduced here. It reads as follows:

List of questions/issues to be addressed

“(a) The legal bases of the obligation to extradite or prosecute

“(i) the obligation to extradite or prosecute and the duty to cooperate in the fight against impunity;

“(ii) the obligation to extradite or prosecute in existing treaties: typology of treaty provisions; differences and similarities between those provisions, and their evolution (cf. conventions on terrorism);

“(iii) whether and to what extent the obligation to extradite or prosecute has a basis in customary international law;*

“(iv) whether the obligation to extradite or prosecute is inextricably linked with certain particular “customary crimes” (for example, piracy);*

“(v) whether regional principles relating to the obligation to extradite or prosecute may be identified.*

“(b) The material scope of the obligation to extradite or prosecute

Identification of the categories of crimes (for example crimes under international law; crimes against the peace and security of mankind; crimes of international concern; other serious crimes) covered by the obligation to extradite or prosecute according to conventional and/or customary international law:

“(i) whether the recognition of an offence as an international crime is a sufficient basis for the existence of an obligation to extradite or prosecute under customary international law;*

Committee⁵¹⁶ as relevant to the Commission’s work on the topic.

“(ii) if not, what is/are the distinctive criterion/criteria? Relevance of the *ius cogens* character of a rule criminalizing certain conduct?*

“(iii) whether and to what extent the obligation also exists in relation to crimes under domestic laws.

“(c) The content of the obligation to extradite or prosecute

“(i) definition of the two elements; meaning of the obligation to prosecute; steps that need to be taken in order for prosecution to be considered “sufficient”; question of timeliness of prosecution;

“(ii) whether the order of the two elements matters;

“(iii) whether one element has priority over the other—power of free appreciation (*pouvoir discrétionnaire*) of the requested State?

“(d) Relationship between the obligation to extradite or prosecute and other principles

“(i) the obligation to extradite or prosecute and the principle of universal jurisdiction (does one necessarily imply the other?);

“(ii) the obligation to extradite or prosecute and the general question of “titles” to exercise jurisdiction (territoriality, nationality);

“(iii) the obligation to extradite or prosecute and the principles of *nullum crimen sine lege* and *nulla poena sine lege*;**

“(iv) the obligation to extradite or prosecute and the principle *non bis in idem* (double jeopardy);**

“(v) the obligation to extradite or prosecute and the principle of non-extradition of nationals;**

“(vi) what happens in case of conflicting principles (for example non-extradition of nationals versus no indictment in national law? obstacles to prosecute versus risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged?); constitutional limitations.**

“(e) Conditions for the triggering of the obligation to extradite or prosecute

“(i) presence of the alleged offender in the territory of the State;

“(ii) State’s jurisdiction over the crime concerned;

“(iii) existence of a request for extradition (degree of formalism required); relations with the right to expel foreigners;

“(iv) existence/consequences of a previous request for extradition that had been rejected;

“(v) standard of proof (to what extent must the request for extradition be substantiated);

“(vi) existence of circumstances that might exclude the operation of the obligation (for example, political offences or political nature of a request for extradition, emergency situations, immunities).

“(f) The implementation of the obligation to extradite or prosecute

“(i) respective roles of the judiciary and the executive;

“(ii) how to reconcile the obligation to extradite or prosecute with the discretion of the prosecuting authorities;

“(iii) whether the availability of evidence affects the operation of the obligation;

“(iv) how to deal with multiple requests for extradition;

“(v) guarantees in case of extradition;

“(vi) whether the alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution; or possibilities of other restrictions to freedom;

“(vii) control of the implementation of the obligation;

“(viii) consequences of non-compliance with the obligation to extradite or prosecute.

“(g) The relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal (the “third alternative”)

“(i) to what extent the “third” alternative has an impact on the other two.

** [It might be that a final determination on these questions will only be possible at a later stage, in particular after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. It might also be advisable to examine the customary nature of the obligation in relation to specific crimes.]

*** [This issue might need to be addressed also in relation to the implementation of the obligation to extradite or prosecute (f).]

⁵¹⁶ At the Sixth Committee debate in 2012, Austria, the Netherlands and Vietnam considered the 2009 general framework a valuable supplement to the work of the Commission. In the opinion of the Netherlands,

(57) The 2009 general framework raised several issues in relation to the obligation to extradite or prosecute that are covered in the preceding paragraphs, but some issues have not, namely: the obligation's relationship with the principles of *nullum crimen sine lege* and *nulla poena sine lege* and the principle *non bis in idem* (double jeopardy); the implications of a conflict between various principles (for example, non-extradition of nationals versus no indictment in national law; obstacles to prosecution versus risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged); constitutional limitations; circumstances excluding the operation of the obligation (for example, political offences or political nature of a request for extradition; emergency situations; immunities); the problem of multiple requests for extradition; guarantees in case of extradition; and other issues related to extradition in general.

(58) The Commission notes that the United Nations Office on Drugs and Crime has prepared the 2004 Model Law on Extradition, which addresses most of these issues.⁵¹⁷ The Secretariat's 2010 survey has also explained that multilateral conventions on extradition usually stipulate the conditions applicable to the extradition process.⁵¹⁸ Nearly all such conventions subject extradition to the conditions provided by the law of the requested State. There may be grounds of refusal that are connected to the offence (for example, the expiry of the statute of limitations, the failure to satisfy requirements of double criminality, specialty, *nullum crimen sine lege* and *nulla poena sine lege* or *non bis in idem*, or the fact that the crime is subject to death penalty in the requesting State) or not so connected (for example, the granting of political asylum to the individual or the existence of humanitarian reasons to deny extradition). The degree of specificity of the conditions applicable to extradition varies depending on factors such as the specific concerns expressed during the course

the work of the Commission should eventually result in presenting draft articles based on that general framework. At the Sixth Committee debate in 2013, Austria reiterated the usefulness of the 2009 general framework to the work of the present Working Group.

⁵¹⁷ See footnote 428 above. See also the Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, *ibid.*

⁵¹⁸ Secretariat's 2010 survey (A/CN.4/630 (footnote 406 above)), para. 139.

of negotiations (for example, non-extradition of nationals, application or non-application of the political exception or fiscal exception clauses), the particular nature of the offence (for example, the risk of refusal of extradition based on the political character of the offence appears to be more acute with respect to certain crimes), and drafting changes to take into account problems that may have been overlooked in the past (for example, the possible triviality of the request for extradition or the protection of the rights of the alleged offender) or to take into account new developments or a changed environment.⁵¹⁹

(59) The relationship between the obligation to extradite or prosecute and other principles as enumerated in the 2009 general framework belongs not only to international law, but also to the constitutional law and domestic law of the States concerned. Whatever the conditions under domestic law or a treaty pertaining to extradition, they must not be applied in bad faith, with the effect of shielding an alleged offender from prosecution in, or extradition to, an appropriate criminal jurisdiction. In the case of core crimes, the object and purpose of the relevant domestic law and/or applicable treaty is to ensure that perpetrators of such crimes do not enjoy impunity, implying that such crimes can never be considered political offences and be exempted from extradition.⁵²⁰

⁵¹⁹ *Ibid.*, para. 142.

⁵²⁰ A good example is article 1 of the Additional Protocol to the European Convention on Extradition, of 15 October 1975, which reads:

"For the application of Article 3 [on political offences] of the Convention, political offences shall not be considered to include the following:

"(a) The crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;

"(b) The violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;

"(c) Any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions."