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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS FORTY-EIGHTH SESSION

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CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE
AND SECURITY OF MANKIND

D. Draft Code of Crimes Against the
Peace and Security of Mankind

[Articles 8 to 10]

Article 8

Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State Party is not precluded from trying its nationals for the crime set out in article 16.

Commentary

(1) Article 8 is the first in a series of articles contained in Part I which address procedural and jurisdictional issues relating to the implementation of the present Code. In this regard, article 8 addresses as a preliminary matter the establishment of the jurisdiction of a court to determine the question of the responsibility and, where appropriate, the punishment of an individual for a crime covered by the present Code by applying the principles of individual criminal responsibility and punishment contained in articles 2 to 7 of Part I in relation to the definitions of the crimes set out in articles 16 to 20 of Part II.

(2) Article 8 establishes two separate jurisdictional regimes for the crimes set out in articles 17 to 20 in the first instance and for the crime set out in article 16 in the second instance. The first regime provides for the concurrent jurisdiction of national courts and an international criminal court for the crimes set out in articles 17 to 20, namely, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. The second regime provides for the exclusive jurisdiction of an international criminal court with respect to the crime of aggression set out in article 16 subject to a limited exception. The Commission decided to adopt a combined approach to the implementation of the present Code based on the concurrent jurisdiction of national courts and an international criminal court for the crimes covered by the Code with the exception of the crime of aggression, as discussed below.

(3) As the twentieth century draws to a close, the world remains plagued by the all too frequent occurrence of the most serious crimes that are of concern to the international community as a whole, including genocide, crimes against humanity, crimes against United Nations and associated personnel and war

crimes. Since the Second World War, States have adopted a number of multilateral conventions in an effort to respond to these particularly serious crimes. The relevant conventions rely at least in part on national jurisdiction for the prosecution and punishment of offenders (e.g., the 1948 Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter Genocide Convention], article VI; 1/ the 1949 Geneva Conventions for the Protection of War Victims (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [hereinafter Geneva Convention I], article 49; 2/ Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [hereinafter Geneva Convention II], article 50; 3/ Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter Geneva Convention III], article 129; 4/ and Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Geneva Convention IV], article 146 5/); the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* [hereinafter *Apartheid* Convention], article V; 6/ and the 1994 Convention on the Safety of United Nations and Associated Personnel, article 14). 7/

(4) There are only two conventions which expressly provide for the possibility of the prosecution and punishment of offenders by an international criminal court, namely, the Genocide Convention (article VI) 8/ and the *Apartheid* Convention (article V). 9/ However, these conventions also

1/ United Nations, Treaty Series, vol. 78, p. 277.

2/ United Nations, Treaty Series, vol. 75, p. 31.

3/ United Nations, Treaty Series, vol. 75, p. 85.

4/ United Nations, Treaty Series, vol. 75, p. 135.

5/ United Nations, Treaty Series, vol. 75, p. 287.

6/ General Assembly resolution 3068 (XXVIII), Annex.

7/ General Assembly resolution 49/59, Annex.

8/ United Nations, Treaty Series, vol. 78, p. 277.

9/ General Assembly resolution 3068 (XXVIII), Annex.

envisage a role for national courts in the prosecution and punishment of offenders by providing for the concurrent, rather than the exclusive, jurisdiction of an international court. In the draft statute for an international criminal court which it recently elaborated, the Commission also opted for an international criminal court with concurrent jurisdiction that would complement rather than replace the jurisdiction of national courts. ^{10/} Similarly, the Statutes of the International Criminal Tribunals for the former Yugoslavia ^{11/} and for Rwanda ^{12/} provide for the concurrent jurisdiction of the international tribunals and national courts. Thus, the international community has recognized the important role to be played by an international criminal court in the implementation of international criminal law while at the same time recognizing the continuing importance of the role to be played by national courts in this respect. As a practical matter it would be virtually impossible for an international criminal court to single-handedly prosecute and punish the countless individuals who are responsible for crimes under international law not only because of the frequency with which such crimes have been committed in recent years, but also because these crimes are often committed as part of a general plan or policy which involves the participation of a substantial number of individuals in systematic or massive criminal conduct in relation to a multiplicity of victims.

(5) The Commission considered that the effective implementation of the present Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible

^{10/} See the preamble to the draft statute, UN document A/49/10, p. 43.

^{11/} Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [hereinafter Statute of the International Criminal Tribunal for the former Yugoslavia], article 9, U.N. document S/25704.

^{12/} Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 [hereinafter Statute of the International Criminal Tribunal for Rwanda], Security Council resolution 955 (1994).

jurisdiction of an international criminal court. The present article therefore establishes the principle of the concurrent jurisdiction of the national courts of all States parties to the present Code based on the principle of universal jurisdiction and the jurisdiction of an international criminal court for the crimes set out in articles 17 to 20 of Part II. This approach recognizes, on the one hand, that no permanent international criminal court is in existence at the present stage of development of the international legal structure and, on the other hand, that the General Assembly has recently decided to convene a preparatory committee to continue work on the draft statute for a permanent court elaborated by the Commission. ^{13/} In this regard, some members of the Commission regretted that there was no link between the present Code and the draft statute of such a court.

(6) The first provision of article 8 establishes the principle of the concurrent jurisdiction of the national courts of the States parties to the Code and an international criminal court for the crimes set out in articles 17 to 20 of Part II. As regards national court jurisdiction, the first provision of the present article is a corollary of article 9 which establishes the obligation of a State party to extradite or prosecute an individual who is allegedly responsible for such a crime. In this regard, the provision is intended to secure the possibility for the custodial State to fulfil its obligation to extradite or prosecute by opting for the second alternative with respect to such an individual. This alternative for the custodial State consists of the prosecution of that individual by its competent national authorities in a national court. It is meaningful only to the extent that the courts of the custodial State have the necessary jurisdiction over the crimes set out in articles 17 to 20 to enable that State to opt for the prosecution alternative. Failing such jurisdiction, the custodial State would be forced to accept any request received for extradition which would be contrary to the alternative nature of the obligation to extradite or prosecute under which the custodial State does not have an absolute obligation to grant a request for extradition. Moreover, the alleged offender would elude prosecution in such a situation if the custodial State did not receive any request for extradition which would seriously undermine the fundamental

^{13/} General Assembly resolution 50/46.

purpose of the *aut dedere aut judicare* principle, namely, to ensure the effective prosecution and punishment of offenders by providing for the residual jurisdiction of the custodial State.

(7) Jurisdiction over the crimes covered by the Code is determined in the first instance by international law and in the second instance by national law. As regards international law, any State party is entitled to exercise jurisdiction over an individual allegedly responsible for a crime under international law set out in articles 17 to 20 who is present in its territory under the principle of "universal jurisdiction" set forth in article 9. The phrase "irrespective of where or by whom those crimes were committed" is used in the first provision of the present article to avoid any doubt as to the existence of universal jurisdiction for those crimes.

(8) As regards the crime of genocide, the Commission noted that the Convention on the Prevention and Punishment of the Crime of Genocide (article VI) restricted national court jurisdiction for this crime to the State in whose territory the crime occurred. The present provision extends national court jurisdiction over the crime of genocide set out in article 17 to every State party to the Code. The Commission considered that such an extension was fully justified in view of the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein. Unfortunately, the international community had repeatedly witnessed the ineffectiveness of the limited jurisdictional regime provided by the Convention for the prosecution and punishment of individuals responsible for the crime of genocide during the last half century since its adoption. The impunity of such individuals remained virtually the rule rather than the exception notwithstanding the fundamental aims of the Convention. Moreover, this impunity deprived the prohibition of the crime of genocide of the deterrent effect that was an essential element of criminal law due to the absence of any real prospect of enforcing the principles of individual responsibility and punishment for this crime in most instances. This regrettable state of affairs was only partly due to the non-existence of the international penal tribunal envisaged in article VI of the Convention which, as a practical matter, could not possibly have prosecuted and punished all of the individuals who were responsible for crimes of genocide committed at

various times and in various places in the course of recent history. The Commission considered that a more effective jurisdictional regime was necessary to give meaning to the prohibition of genocide as one of the most serious crimes under international law which had such tragic consequences for humanity and endangered international peace and security.

(9) The present provision is intended to give effect to the entitlement of States parties to exercise jurisdiction over the crimes set out in articles 17 to 20 under the principle of universal jurisdiction by ensuring that such jurisdiction is appropriately reflected in the national law of each State party. The phrase "shall take such measures as may be necessary" defines the relevant obligation of a State party in flexible terms to take account of the fact that constitutional and other national law requirements for the exercise of criminal jurisdiction vary from State to State. Thus, a State party is required to take those measures, if any, that are necessary to enable it to exercise jurisdiction over the crimes set out in articles 17 to 20 in accordance with the relevant provisions of its national law.

(10) In addition, the present provision is intended to require a State party to enact any procedural or substantive measures that may be necessary to enable it to effectively exercise jurisdiction in a particular case with respect to an individual who is allegedly responsible for a crime set out in articles 17 to 20. ^{14/} Article 8 substantially reproduces paragraph 3 of article 2 of the draft on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons prepared by the Commission. As indicated in paragraph (11) of the commentary to the said provision, the intention is "to provide for the exercise of jurisdiction in a broad sense, that is as regards both substantive and procedural criminal law.

^{14/} In this regard, article V of the Convention on the Prevention and Punishment of the Crime of Genocide states as follows: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the acts enumerated in article III." United Nations, Treaty Series, vol. 78, p. 277. The Geneva Conventions on the Protection of War Victims also contain a common provision under which States parties "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches...." Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; Geneva Convention IV, article 146.

In order to eliminate any possible doubts on the point, the Commission decided to include ... a specific requirement, such as is found in The Hague and the Montreal Conventions and in the Rome draft, 15/ concerning the establishment of jurisdiction." 16/

(11) The recognition of the principle of the universal jurisdiction of the national courts of States parties to the Code for the crimes set out in articles 17 to 20 does not preclude the possibility of the jurisdiction of an international criminal court for those crimes, as indicated by the opening clause of the first provision which states that it is "without prejudice to the jurisdiction of an international criminal court". The possible jurisdiction of an international criminal court for the crimes set out in articles 17 to 20 was formulated as a without prejudice clause in view of the fact that the international legal system does not yet include such a court with jurisdiction over the crimes set out in the present Code, as such, in contrast to the International Criminal Tribunals for the former Yugoslavia and Rwanda which have jurisdiction over the crimes set out in their respective statutes. The jurisdiction of these tribunals extends to many of the crimes under international law set out in Part II of the present Code, but not as crimes against the peace and security of mankind under the Code. Thus, the present provision and indeed the present Code do not apply to those tribunals which are governed by their respective statutes.

(12) The present provision envisages the concurrent jurisdiction of an international criminal court in relation to the crimes set out in articles 17 to 20 to complement the national court jurisdiction envisaged for those crimes and thereby enhance the effective implementation of the Code in that respect. The priority to be given to national court jurisdiction or international court jurisdiction is not addressed in the present article since this question would no doubt be addressed in the statute of the international criminal court. The term "international criminal court" is used to refer to a competent, impartial and independent court or tribunal established by law in accordance with the right of an accused to be tried by such a judicial body which is recognized in the International Covenant on Civil and Political Rights (article 14, paragraph 1). In addition, this term should be understood as referring to a

15/ Yearbook...1972, vol. II, p. 335.

16/ Ibid., p. 336.

court established with the support of the international community rather than by a limited number of States acting on their own behalf. An international criminal court could effectively exercise jurisdiction over the crimes covered by the Code and thereby alleviate rather than exacerbate the threat to international peace and security resulting from those crimes only if it had the broad support of the international community. The international criminal court envisaged in the present provision could be established under the auspices of the United Nations, for example, by Security Council resolution, as in the case of the two ad hoc tribunals, or by multilateral treaty adopted by a General Assembly resolution or at a diplomatic conference convened under the auspices of the United Nations. Thus, the present provision envisaged the jurisdiction of an international criminal court established with the broad support of the international community without indicating the method of establishment for such a court. In this regard, the Commission noted that this question was presently under consideration within the framework of the United Nations in connection with the draft statute for an international criminal court adopted by the Commission in 1994.

(13) The second and third provisions of the present article comprise a separate jurisdictional regime for the crime of aggression set out in article 16. This jurisdictional regime provides for the exclusive jurisdiction of an international criminal court for the crime of aggression with the singular exception of the national jurisdiction of the State which has committed aggression. The term "international criminal court" has the same meaning in the first and second provision of the present article in relation to the two separate jurisdictional regimes envisaged for the crimes set out in articles 17 to 20 in the first instance and the crime set out in article 16 in the second instance. Thus, the criteria for an international criminal court discussed in the context of the first jurisdictional regime are equally applicable in the present context.

(14) The second provision of the present article establishes the principle of the exclusive jurisdiction of an international criminal court in determining the responsibility and, where appropriate, the punishment of individuals who are responsible for the crime of aggression set out in article 16 subject to the singular exception recognized in the third provision of the present article which is discussed below. This principle of exclusive jurisdiction is the result of the unique character of the crime of aggression in the sense

that the responsibility of an individual for participation in this crime is established by his participation in a sufficiently serious violation of the prohibition of certain conduct by States contained in Article 2, paragraph 4 of the United Nations Charter. The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The 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*. Moreover, 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.

(15) The third provision of the present article recognizes a singular national court jurisdiction exception to the otherwise exclusive jurisdiction of an international criminal court under the second jurisdictional regime for the crime of aggression. The only State that could try an individual for the crime of aggression in its national courts under this provision is the State referred to in article 16, namely the State whose leaders participated in the act of aggression. This is the only State which could determine the responsibility of such a leader for the crime of aggression without being required to also consider the question of aggression by another State. Thus, the national courts of such a State could determine the responsibility of an individual for the crime of aggression under the present Code or under such relevant provisions of national criminal law as may be applicable. The determination of the responsibility of the leaders for their participation in the crime of aggression by the national courts of the State concerned may be essential to a process of national reconciliation. In addition, the exercise of national jurisdiction by a State with respect to the responsibility of its nationals for aggression would not have the same negative consequences for international relations or international peace and security as the exercise of national jurisdiction in the same respect. In the event that the proceedings fail to meet the necessary standard of independence and impartiality, the

national court proceedings would not preclude a subsequent trial by an international criminal court in accordance with the exception to the principle *non bis in idem* set out in article 12, paragraph 2 (a) (ii). Since the national court jurisdiction for the crime of aggression, as a limited exception to the otherwise exclusive jurisdiction of an international criminal court, is formulated in permissive rather than obligatory terms, there is no corresponding obligation for a State party to establish the jurisdiction of its national courts with respect to this crime under the present article.

Article 9

Obligation to extradite or prosecute

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 articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

Commentary

(1) Article 8 of the present Code envisages the establishment of two separate jurisdictional regimes for the crimes set out in articles 17 to 20 in the first instance and for the crime set out in article 16 in the second instance. In the first instance, the national courts of States Parties would be entitled to exercise the broadest possible jurisdiction over genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes under the principle of universal jurisdiction. In addition, an international criminal court would be entitled to exercise concurrent jurisdiction over those crimes in accordance with its statute. In the second instance, an international criminal court would have exclusive jurisdiction over the crime of aggression with the singular exception of the national court jurisdiction of the State which committed aggression. Article 9 addresses the obligation of a State Party to extradite or prosecute an individual alleged to have committed a crime covered by Part II other than aggression in the context of the jurisdictional regime envisaged for those crimes, as indicated by the reference to articles 17 to 20. The present article does not address the transfer of an individual with respect to any crime covered by the Code to an international criminal court under either jurisdictional regime or the

extradition of an individual with respect to the crime of aggression to the State which committed aggression under the exception to the second jurisdictional regime, as discussed below.

(2) Article 9 establishes the general principle that any State in whose territory an individual alleged to have committed a crime set out in articles 17 to 20 of Part II is present is bound to extradite or prosecute the alleged offender. The *aut dedere aut judicare* principle is reflected in several of the relevant conventions referred to in the commentary to the previous article. The fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.

(3) The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. ^{17/} 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. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of "an individual alleged to have committed a crime". This phrase is used to refer to a person who is singled out, not on the basis of unsubstantiated allegations, but on the basis of pertinent factual information.

(4) The national laws of various States differ concerning the sufficiency of evidence required to initiate a criminal prosecution or to grant a request for extradition. The custodial State would have an obligation to prosecute an alleged offender in its territory when there was sufficient evidence for doing so as a matter of national law unless it decided to grant a request received for extradition. The element of prosecutorial discretion under which an

^{17/} The 1949 Geneva Conventions on the Protection of War Victims expressly provide for "the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches...." Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; and Geneva Convention IV, article 146.

alleged offender may be granted immunity from prosecution in exchange for giving evidence or assisting with the prosecution of another individual whose criminal conduct is considered to be more serious, which is recognized in some legal systems, is precluded with respect to the crimes covered by the present Code. Crimes under international law constitute the most serious crimes that are of concern to the international community as a whole. This is particularly true with respect to the crimes against the peace and security of mankind covered by the present Code. It would be contrary to the interests of the international community as a whole to permit a State to confer immunity on an individual who was responsible for a crime under international law such as genocide. The question of considering cooperation with the prosecution as a relevant mitigating factor to be taken into account in determining an appropriate punishment is discussed in the commentary to article 15.

(5) Whereas the sufficiency of evidence required to institute national criminal proceedings is governed by national law, the sufficiency of evidence required to grant an extradition request is addressed in the various bilateral and multilateral treaties. In terms of the sufficiency of evidence required for extradition, the Model Treaty on Extradition (article 5, paragraph 2 (b)) requires as a minimum "a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission". ^{18/} In this regard, the relevant provision that is common to the 1949 Geneva Conventions on the Protection of War Victims refers to the notion of a *prima facie* case. ^{19/}

(6) The custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial State may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other State or by prosecuting that individual in its national courts. Article 9 does not give priority to either alternative course of action. The custodial State has discretion to decide whether to transfer the individual to another jurisdiction for trial in response to a request received for extradition or to

^{18/} General Assembly resolution 45/116, Annex.

^{19/} Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; and Geneva Convention IV, article 146.

try the alleged offender in its national courts. The custodial State may fulfil its obligation under the first alternative by granting a request received for extradition and thereby transferring to the requesting State the responsibility for the prosecution of the case. However, the custodial State is not required to grant such a request if it prefers to entrust its own authorities with the prosecution of the case. Moreover, the custodial State is not required to give priority to a request for extradition made by a particular State if the custodial State receives a plurality of requests from more than one State. The draft article adopted on first reading recommended that particular consideration should be given to a request from the State in whose territory the crime was committed. The Special Rapporteur proposed on second reading that consideration should be given to including in a specific provision the priority of the request of the territorial State. However, the Drafting Committee considered that this question was not ripe for codification. Thus, the State which has custody of the alleged offender is given the discretion to determine where the case will be prosecuted. The discretion of the custodial State in this respect is consistent with the Model Treaty on Extradition (article 16).

(7) The custodial State may fulfil its obligation under the second alternative by prosecuting the alleged offender in its national courts. Any State Party in whose territory an alleged offender is present is competent to try the case regardless of where the crime occurred or the nationality of the offender or the victim. The physical presence of the alleged offender provides a sufficient basis for the exercise of jurisdiction by the custodial State. This exceptional basis for the exercise of jurisdiction is often referred to as "the principle of universality" or "universal jurisdiction". In the absence of a request for extradition, the custodial State would have no choice but to submit the case to its national authorities for prosecution. This residual obligation is intended to ensure that alleged offenders will be prosecuted by a competent jurisdiction, *i.e.* the custodial State, in the absence of an alternative national or international jurisdiction.

(8) The introductory clause of article 9 recognizes a possible third alternative course of action by the custodial State which would fulfil its obligation to ensure the prosecution of an alleged offender who is found in its territory. The custodial State could transfer the alleged offender to an international criminal court for prosecution. Article 9 does not address the

cases in which a custodial State would be permitted or required to take this course of action since this would be determined by the statute of the future court. The present article merely provides that the obligation of a State to prosecute or extradite an individual alleged to have committed a crime set out in articles 17 to 20 of the Code is without prejudice to any right or obligation that such a State may have to transfer such an individual to an international criminal court. For similar reasons, article 9 does not address the transfer of an individual alleged to have committed a crime of aggression to an international criminal court under the separate jurisdictional regime envisaged for this crime in article 8. Moreover, it does not address the extradition of an individual for the same crime to the State that committed aggression based on the limited exception to the exclusive jurisdiction of an international criminal court for this crime. The exceptional national court jurisdiction for the crime of aggression is formulated in permissive rather than obligatory terms in article 8. It would be for each State Party to decide whether to provide for the jurisdiction of its national courts with respect to this crime and whether to include this crime in its bilateral or multilateral extradition agreements with other States.

(9) The obligation to extradite or prosecute an alleged offender under the present article is further addressed in article 10 and article 8, respectively, with a view to facilitating and ensuring the effective implementation of either option.

Article 10

Extradition of alleged offenders

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. State Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

Commentary

(1) The provisions of articles 8 and 10 are corollaries of those of article 9. The obligation of a State Party to "extradite or prosecute" is formulated in the alternative in article 9 to provide the custodial State with two possible courses of action when it finds an alleged offender in its territory, namely, (1) to grant a request received from another State to extradite the alleged offender to its territory for trial or (2) to prosecute the alleged offender in its national courts. The custodial State will only have a genuine choice between these two alternatives, assuming that it receives a request for extradition, if it is capable of implementing either course of action. The implementation by the custodial State of the two possible courses of action is therefore addressed in articles 8 and 10.

(2) The provisions of article 10 are intended to enable the custodial State to select and effectively implement the first alternative. They do not, however, indicate a preference for either course of action. The custodial State may fulfil its obligation under the first alternative by granting an extradition request received from another State that is seeking to try the alleged offender for a crime set out in articles 17 to 20 of Part II. The aim of the present article is to ensure that the custodial State will have the necessary legal basis to grant such a request and thereby fulfil its obligation under article 9 in a variety of situations. Paragraph 1 addresses the situation in which there is an extradition treaty in effect between the States concerned which does not cover the crime for which extradition is sought. Paragraph 2 deals with the situation in which, under the law of the requested State, extradition is conditional on the existence of an extradition treaty and there is no such treaty when the extradition request is made. Paragraph 3 addresses the situation where under the law of the concerned

States extradition is not conditional on the existence of a treaty. In all of these situations, article 9 provides the custodial State with the necessary legal basis to grant a request for extradition.

(3) Under some treaties and national laws, the custodial State may only grant requests for extradition coming from the State in which the crime occurred. However, several anti-terrorism conventions contain provisions which are designed to secure the possibility for the custodial State, notwithstanding any such restriction, to grant requests for extradition received from certain States which have an obligation to establish their primary jurisdiction over the relevant offences. 20/ The more recent Convention on the Safety of United Nations and Associated Personnel also secures the possibility for the custodial State to grant such a request received from a State that intends to exercise jurisdiction on a permissive basis, for example, the passive personality principle. 21/ Paragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State Party to the Code with respect to the crimes covered in Part II. This broader approach is consistent with the general obligation of every State Party to establish its jurisdiction over the crimes set out in articles 17 to 20 in accordance with article 8 and finds further justification in the fact that the present Code does not confer primary jurisdiction on any particular States nor establish an order of priority among extradition requests.

20/ The question whether these provisions also extend to States seeking to exercise jurisdiction on a permissive basis has been raised in relation to paragraph 4 of article 10 of the Hostages Convention in the following terms: "This provision was added to the Hague Convention and each of the subsequent anti-terrorism conventions to cover the case of any requirement which may exist in treaties or domestic laws wherein extradition may only be had when the offence was committed in the territory of the requesting State. It may be noted that this fiction relates only to those States which are *required* to establish primary jurisdiction pursuant to Article 5(1). It would not appear to relate to those States which have established their jurisdiction pursuant to that provision on a permissive basis, i.e., the passive personality principle, and over stateless persons resident in their territory." Joseph J. Lambert, *Terrorism and Hostages in International Law--A Commentary on the Hostages Convention 1979*, p. 243 (citations omitted).

21/ General Assembly resolution 49/59, annex.

(4) Article 10 substantially reproduces the text of article 15 of the Convention on the Safety of United Nations and Associated Personnel. Similar provisions are also found in a number of other conventions, including the Convention for the Suppression of Unlawful Seizure of Aircraft (article 8), 22/ the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (article 8), 23/ and the International Convention against the Taking of Hostages (article 10). 24/

22/ United Nations, Treaty Series, vol. 680, p. 112.

23/ United Nations, Treaty Series, vol. 974, p. 177.

24/ General Assembly resolution 34/146, annex.