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Fourth report on the obligation to extradite or prosecute (*aut dedere aut judicare*)

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I. Introduction

1. The International Law Commission, at its fifty-seventh session in 2005, decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work. At its fifty-eighth (2006) and fifty-ninth (2007) sessions, the Commission received and considered the preliminary and second reports of the Special Rapporteur (A/CN.4/571 and A/CN.4/585 and Corr.1).

2. At the sixtieth session, in 2008, the Special Rapporteur presented his third report (A/CN.4/603), which was considered by the Commission together with comments and information received from Governments (A/CN.4/599 and Add.1-4). The third report of the Special Rapporteur was aimed at continuing the process of formulation of questions addressed both to States and to members of the Commission on the most essential aspects of the topic. The questions were intended to enable the Special Rapporteur to draw final conclusions regarding the main issue of whether the obligation to extradite or prosecute (*aut dedere aut judicare*) exists under customary international law.

3. On 31 July 2008, the Commission decided to establish a Working Group on the topic under the chairmanship of Alain Pellet. The mandate and membership of the Working Group was to be determined at the sixty-first session.

4. At the sixty-first session (2009), the Commission had before it the last portion of comments and information received from Governments. At the same session an open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) was re-established under the chairmanship of Alain Pellet. Culminating from its discussion, a general framework for consideration of the topic, with the aim of specifying the issues to be addressed, was drawn up. The Commission subsequently took note of the oral report presented by the Chairman of the Working Group.

5. The Working Group proposed the following general framework for the Commission's consideration of the topic: (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation to extradite or prosecute; (c) the content of the obligation to extradite or prosecute; (d) the relationship between the obligation to extradite or prosecute and other principles; (e) the conditions for the triggering of the obligation to extradite or prosecute; (f) the implementation of the obligation to extradite or prosecute; and (g) the relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal.[1]

II. Consideration of the topic at the sixty-second session of the International Law Commission (2010)

6. At its sixty-second session, in 2010, the Commission reconstituted the Working Group, which, in the absence of its Chair, was presided over by Enrique Candioti. At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report presented by the temporary Chair of the Working Group.

[1] The proposed general framework prepared by the Working Group was included in the report of the Commission on its sixty-first session (A/64/10, chap. IX, sect. B.2).

7. The Working Group continued its discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur. It had before it a survey of multilateral conventions which may be of relevance for the Commission's work on the topic, prepared by the Secretariat (A/CN.4/630), together with the general framework elaborated by the Working Group in 2009.

8. The survey identified more than 60 multilateral instruments, at the universal and regional levels, that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. It proposed a description and a typology of the relevant instruments in the light of those provisions, and examined the preparatory work of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also pointed out the differences and similarities between the provisions in different conventions and their evolution.

9. On the basis of the survey, overall conclusions were offered 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 (see A/CN.4/630, sect. III).

10. The Working Group also had before it a working paper prepared by the Special Rapporteur on the bases for discussion in the Working Group on the topic (A/CN.4/L.774), containing observations and suggestions based on the general framework prepared in 2009 and drawing upon the survey by the Secretariat. In particular, the Special Rapporteur drew attention to questions concerning (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation; (c) the content of the obligation; and (d) the conditions for the triggering of the obligation.

11. The Working Group affirmed the continuing relevance of the general framework agreed upon in 2009. It was recognized that the Secretariat survey had helped to elucidate aspects of the general framework, had helped to clarify issues concerning the typology of treaty provisions, differences and similarities in the formulation of the obligation to extradite or prosecute in those provisions and their evolution, under the rubric "the legal bases of the obligation to extradite or prosecute" of the general framework.

12. It was also noted that, in seeking to throw light on the questions agreed upon in the general framework, the multilateral treaty practice on which the Secretariat survey had focused needed to be complemented by a detailed consideration of other aspects of State practice (including but not limited to national legislation, case law and official statements of governmental representatives).

13. In addition, it was pointed out that, insofar as the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment, based on State practice, needed to be made of the extent to which that duty could elucidate, as a general rule or in relation to specific crimes, work on the topic, including work in relation to the material scope, the content of the obligation to extradite or prosecute and the conditions for the triggering of that obligation.

14. The Working Group reaffirmed, taking into account the practice of the Commission in the progressive development of international law and its

codification, that the general orientation of future reports of the Special Rapporteur should be towards presenting draft articles for consideration by the Commission, based on the general framework agreed upon in 2009.

III. Discussions in the Sixth Committee during the sixty-fifth session of the General Assembly

General comments

15. Several delegations reiterated the importance that they attached to the topic and its relevance in the fight against impunity,[2] and expressed concern that relatively little progress had been made so far.[3] It was hoped that the Commission would make substantial progress thereon at its sixty-third session.[4] In that context, some delegations considered that the general framework elaborated by the Working Group in 2009 continued to be relevant for the Commission's work.[5] The cautious approach by the Special Rapporteur and the Working Group was also commended and the need for a thorough review of State practice was emphasized.[6]

16. While several delegations welcomed the survey prepared by the Secretariat (A/CN.4/630),[7] it was also suggested that it be expanded to include other aspects of State practice, such as national legislation.[8] For that purpose, reference was made to the comments made by States at the request of the Commission.[9]

17. While some delegations expressed support for the formulation of draft articles on this topic, based on the general framework, the appropriateness of such an endeavour, and the extension of the obligation to extradite or prosecute beyond binding instruments containing such an obligation, was also questioned.[10]

Legal bases of the obligation

18. Some delegations considered that the question concerning the legal bases of the obligation to extradite or prosecute, and the content and nature of such obligation, in particular in relation to specific crimes, merited further

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[2] 20th meeting: Slovenia (A/C.6/65/SR.20, para. 40), Colombia (SR.20, para. 76); 21st meeting: Hungary (see statement); 25th meeting: Austria (see statement), Portugal (see statement); 26th meeting: Sri Lanka (SR.26, para. 47), Netherlands (SR.26, para. 49), Cuba (SR.26, para. 54), Spain (SR.26, para. 73).

[3] 19th meeting: Denmark (on behalf of the Nordic countries) (SR.19, para. 64); 21st meeting: Hungary (SR.21, para. 27); 25th meeting: United Kingdom (SR.25, para. 81); 26th meeting: Netherlands (SR.26, para. 49).

[4] 19th meeting: Austria (see statement); 20th meeting: Belgium (SR.20, para. 31), Slovenia (SR.20, para. 40); 21st meeting: Libyan Arab Jamahiriya (SR.21, para. 24), Nigeria (see statement); 25th meeting: Portugal (see statement); 26th meeting: Netherlands (SR.26, para. 49), Spain (SR.26, para. 73).

[5] 25th meeting: Austria (see statement), New Zealand (see statement); 26th meeting: Spain (SR.26, para. 73).

[6] 26th meeting: Poland (SR.26, para. 58).

[7] 21st meeting: Nigeria (SR.21, para. 42); 25th meeting: Austria (SR.25, para. 60), New Zealand (SR.25, para. 66), Portugal (see statement), United Kingdom (SR.25, para. 81); 26th meeting: Thailand (SR.26, para. 3), Israel (SR.26, para. 29).

[8] 25th meeting: Portugal (SR.25, para. 72).

[9] See A/CN.4/579 and Add.1-4, A/CN.4/599 and A/CN.4/612.

[10] Poland (21st meeting, see statement); Portugal (SR.25, para. 72), Netherlands (SR.26, para. 49).

examination.[11] Other delegations reiterated their position that the obligation could not yet be regarded as a rule or principle of customary law.[12]

19. It was pointed out that the relevant treaty terms must govern both the crimes in respect of which the obligation arises and the question of implementation.[13] The view was also expressed that the question of a possible customary norm in this area should only be considered after a careful analysis of the scope and content of the obligation under existing treaty regimes, and that any examination thereof required a broader range of reporting by States on relevant practice.[14]

20. Some delegations expressed support for the examination of the duty to cooperate in the fight against impunity as underpinning the obligation to extradite or prosecute.[15]

Conditions for the triggering of the obligation and implementation

21. The view was expressed that the Commission should examine the conditions for the triggering of the obligation to extradite or prosecute,[16] the conditions of extradition, and the question of surrendering an alleged offender to an international court or tribunal (the "third alternative"),[17] when the State concerned was unable or unwilling to proceed with prosecution. It was also suggested that the Commission examine the question of when the obligation might be regarded as satisfied in situations where it proved difficult to implement, for example, for evidentiary reasons.[18]

Relationship with other principles

22. While the view was expressed that the obligation to extradite or prosecute had to be clearly distinguished from the principle of universal jurisdiction,[19] some delegations considered them to be inextricably linked.[20] In that context, it was suggested that the Special Rapporteur take into account the report prepared by Secretary-General on the basis of comments and observations of Governments on the scope and application of the principle of universal jurisdiction (A/65/181).[21] The relationship between the Commission's work on the obligation to extradite or prosecute and on other topics on its long-term programme of work, in particular the issue of extraterritorial jurisdiction, was also highlighted.[22]

IV. Sources of the obligation to extradite or prosecute

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[11] Colombia (SR.20, para. 76), New Zealand (SR.25, para. 66), Poland (26th meeting, see statement), Thailand (SR.26, para. 3).
[12] United Kingdom (SR.25, para. 81), United States (SR.26, para. 18), Israel (SR.26, para. 29), Republic of Korea (SR.26, para. 64).
[13] United Kingdom (SR.25, para. 81).
[14] United States (SR.26, para. 18).
[15] New Zealand (SR.25, para. 66), Brazil (SR.26, para. 72).
[16] Poland (26th meeting, see statement).
[17] Thailand (SR.26, para. 4).
[18] New Zealand (SR.25, para. 66).
[19] Israel (SR.26, para. 29).
[20] Cuba (SR.26, para. 54), Poland (SR.26, para. 58), Republic of Korea (SR.26, para. 64).
[21] Poland (SR.26, para. 58).
[22] Spain (SR.26, para. 73).

23. The main problem on which we would like to concentrate in this report is the question of principal sources of the obligation to extradite or prosecute. Already in the preliminary report in 2006 we identified such sources as international treaties, international custom and general principles of law, as well as national legislation and practice of States (see A/CN.4/571, sect. IV). Among these sources, as it was established subsequently, the leading position is taken by international treaties and international custom, since these are the most important and generally applicable sources of international law. Consequently, we will limit ourselves in the present report to these two sources of the obligation *aut dedere aut judicare*.

24. In the proposed general framework for the Commission's consideration of the topic "The obligation to extradite or prosecute", prepared and agreed upon by the Working Group in 2009 (see A/64/10, chap. IX, sect. B.2), it is recommended that the legal bases of the obligation to extradite or prosecute be the first problem to be considered. Within this problem, the Working Group identified a set of more detailed questions, including the following: (a) the obligation to extradite or prosecute and the duty to cooperate in the fight against impunity; (b) 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); (c) whether and to what extent the obligation to extradite or prosecute has a basis in customary international law; (d) whether the obligation to extradite or prosecute is inextricably linked with certain particular "customary crimes" (e.g. piracy); and (e) whether regional principles relating to the obligation to extradite or prosecute may be identified.

25. The Working Group suggested that a final determination on questions (c), (d) and (e) above might 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.

A. Duty to cooperate in the fight against impunity

26. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. For instance, Article 1 (3) of the Charter of the United Nations clearly lists among the purposes of the United Nations:

> "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

27. The general duty to cooperate was confirmed as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

> "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the

general welfare of nations and international cooperation free from discrimination based on such differences."[23]

28. The positive approach to the said duty is also clearly expressed in the Rome Statute of the International Criminal Court of 1998. In the preamble to the Statute, the States parties affirm that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", and that the parties are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

29. The duty to cooperate in the fight against impunity, as a sui generis primary source of the obligation *aut dedere aut judicare*, appeared in the leading position among the legal bases of the obligation to extradite or prosecute proposed by the Working Group of the International Law Commission in 2009 (see para. 24 above). It was confirmed again in 2010 in the discussions of the Working Group, in which it was stated that "the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute" (A/65/10, para. 339).

30. Impunity itself has been a matter of legal analysis.[24] The question of the duty to cooperate in the fight against impunity appears in international relations in various aspects, either (a) as a universal problem, or (b) as a question of regional application, or (c) as a matter connected with particular kinds of crimes.

31. An interesting example of formulating such a duty on a regional basis (Council of Europe) and concerning particular crimes (human rights violations) may be found in the "Guidelines of the Committee of Ministers of the Council 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.

32. Though the said guidelines concentrate on eradicating impunity for serious human rights violations, they include rules applicable to other categories of the most serious international crimes. Guideline XII, on international cooperation, states that:

> "International cooperation plays a significant role in combating impunity. In order to prevent and eradicate impunity, States must fulfil their obligations, notably with regard to mutual legal assistance, prosecutions and extraditions, in a manner consistent with respect for human rights (…) and in good faith. To that end, States are encouraged to intensify their cooperation beyond their existing obligations."

33. Such cooperation is recognized by some States as their international obligation. For instance, in its commentary submitted to the Commission in 2009 (A/CN.4/612, para. 33), Belgium stated:

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[23] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[24] For example, the updated set of principles for the protection and promotion of human rights through action to combat impunity, submitted to the Commission on Human Rights on 8 February 2005 (E/CN.4/2005/102/Add.1), defined impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".

> "Belgium considers that all States must cooperate in suppressing certain extremely serious crimes — particularly crimes of international humanitarian law (crimes against humanity, genocide and war crimes) — since such crimes pose a threat, both qualitatively and quantitatively, to the most fundamental values of the international community. This contribution to the suppression effort may take the form of direct prosecution of the alleged perpetrators of such crimes or of extradition of those responsible to any State that wishes to prosecute them."

34. It is indisputable that the fight against impunity for the perpetrators of serious international crimes is a fundamental policy of the international community.[25] The efforts to combat impunity for the perpetrators of serious crimes are conducted, in general, using two methods.

35. The first method relates to establishing international tribunals, which has been the case since the Nuremberg and Tokyo Tribunals in the aftermath of the Second World War. This method is limited, because international tribunals necessarily have limited jurisdiction. They cannot address the problems of impunity in general, but only those aspects of it which are covered by their mandate as specified in their statutes. Even if this mandate is quite general, as in the case of the International Criminal Court, the actual extent to which impunity will be combated still depends on the voluntary decision of States to become party to the statute.

36. The second method reflects the limited nature of international criminal tribunals. The remaining problems of impunity are addressed through the exercise of jurisdiction by national courts. This is reflected in the fact that the multiplication of international criminal tribunals over the past 15 years has not caused any decline in the activities of national courts in this field. Quite the contrary, the growth of international criminal jurisdiction has been accompanied by the equally remarkable growth of national criminal jurisdiction to address international crimes, including those committed extraterritorially.

37. It has to be added that the duty to cooperate in the fight against impunity has been already considered by some States and by the doctrine as a customary rule creating a clear obligation for States. As was stated before the International Court of Justice by Eric David in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* on 7 April 2009:

> "That rule, which obliges States to combat impunity or to bring to trial the perpetrators of crimes under international law — the expressions may vary — is not only contained in the texts I mentioned yesterday and which I have just recalled [i.e., international treaties]; it is to be found in almost 40 resolutions adopted by the Security Council since 2003".[26]

38. As concerns the content of the right invoked by Belgium, Professor David rightly stated that this right is:

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[25] As the International Court of Justice emphasized in the *Arrest Warrant* case, the functionally and temporarily limited immunity of the Minister for Foreign Affairs of the Democratic Republic of the Congo was not the same as according impunity to that official, because the number of ways of prosecuting him remained intact (*Arrest Warrant of 11 April 2000, Judgment, I.C.J. Reports 2002*, p. 3, paras. 60 and 61).

[26] International Court of Justice, document CR 2009/10 (www.icj-cij.org/docket/files/144/15131.pdf), p. 7.

> "… the right for Belgium to see States fulfil their obligation to prosecute or extradite the perpetrator of a crime under international law. This right is ultimately nothing more than the transposition into law by the international community of a fundamental moral and social value which has now become a legal requirement — not to let some of the very gravest of crimes go unpunished."[27]

Article 2: Duty to cooperate[28]

39. In any case, independently of which category of the mentioned methods is going to be applied — international tribunals or internal courts — it seems that the duty to cooperate in the fight against impunity may be realized in the best and most effective way by the application of the principle *aut dedere aut judicare*.

40. Summing up the above considerations, we can say that the provisions dealing with the duty of States to cooperate in the fight against impunity may be added as an introductory article when codifying the principle *aut dedere aut judicare*. These two kinds of provisions seem to be closely interrelated:

> **Article 2**
> **Duty to cooperate**
>
> 1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with competent international court and tribunals, in the fight against impunity as it concerns crimes and offences of international concern.
>
> 2. For this purpose, the States will apply, wherever and whenever appropriate, and in accordance with these draft articles, the principle to extradite or prosecute (*aut dedere aut judicare*).

B. The obligation to extradite or prosecute in existing treaties

41. Already in the preliminary report of 2006 (A/CN.4/571), the Special Rapporteur placed international treaties first on the list of the sources of the obligation to extradite or prosecute.[29] Simultaneously, he remarked that a preliminary task in future codification work on the topic in question would be to complete a

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[27] Ibid., pp. 7-8.

[28] Draft article 2 (Duty to cooperate) presented in para. 40 below shall replace the former article 2 (Use of terms) (A/CN.4/603, para. 121), which shall be deleted. Draft article 1 (Scope of the draft articles) shall remain as presented by the Special Rapporteur in his third report (A/CN.4/603, para. 20): "The present draft articles shall apply to the establishment, content, operation and effects of the alternative obligation of States to extradite or prosecute persons under their jurisdiction". It may be recalled that in the same report (A/CN.4/603, para. 116), the Special Rapporteur, taking into account comments made by the members of the Commission and delegates in the Sixth Committee, and the opinions of States, also proposed an "alternative type" version of draft article 1: "The present draft articles shall apply to the establishment, content, operation and effects of the legal obligation of States to extradite or prosecute persons [under their jurisdiction] [present in the territory of the custodial State] [under the control of the custodial State]".

[29] Other sources of the said obligation identified by the Special Rapporteur were international custom and general principles of law, and national legislation and practice of States.

comparative list of relevant treaties and formulations used by them to reflect this obligation.

42. At the same time, a first classification of those treaties was proposed by the Special Rapporteur, differentiating two categories: "… substantive treaties, defining particular offences and requiring their criminalization and the prosecution or extradition of offenders, as well as procedural conventions, dealing with extradition and other matters of legal cooperation between States" (A/CN.4/571, para. 35).

1. Variety of possible classifications of international treaties establishing the obligation *aut dedere aut judicare*

43. There is no legally binding classification of treaties or their formulations reflecting the obligation to extradite or prosecute. Various classifications and a catalogue of international treaties are, however, available in the doctrinal or other non-governmental research works. Some of them may be taken into account by the Commission in its codification task.

(a) Bassiouni and Wise classification

44. A comprehensive catalogue may be found, as mentioned in the preliminary report, in the well-known book of M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, published in 1995. Annexed to this work, a rich collection of international criminal law conventions establishing a duty to extradite or prosecute has been gathered, classified into numerous categories and commented on by those two authors. Their classification is based generally on differentiation between substantial and procedural treaties, although there is a certain lack of proportion in the number of conventions considered substantial (24) and procedural (6). The first category includes conventions dealing with such crimes as "(1) the prohibition against aggression, (2) war crimes, (3) unlawful use of weapons, (4) crimes against humanity, (5) the prohibition against genocide, (6) racial discrimination and apartheid, (7) slavery and related crimes, (8) the prohibition against torture, (9) unlawful human experimentation, (10) piracy, (11) aircraft hijacking and related offences, (12) crimes against the safety of international maritime navigation, (13) use of force against internationally protected persons, (14) taking of civilian hostages, (15) drug offences, (16) international traffic in obscene publications, (17) protection of national and archaeological treasures, (18) environmental protection, (19) theft of nuclear materials, (20) unlawful use of the mails, (21) interference with submarine cables, (22) counterfeiting, (23) corrupt practices in international commercial transactions, and (24) mercenarism".

45. The second category, that of procedural conventions, comprises three clusters of conventions elaborated under the auspices of three international organizations: the United Nations, the Council of Europe and the Organization of American States.

46. This catalogue, though intended to cover all categories of treaties concerned, has become non-exhaustive, not including — for instance — the most recent counter-terrorism treaties, as well as conventions on the suppression of various international or transnational crimes.[30]

[30] See, for example, the United Nations Convention on Transnational Organized Crime, Palermo,

(b) Amnesty International classifications

47. Another catalogue of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations is contained in a memorandum prepared by Amnesty International in 2001. It includes 21 conventions concluded during the period 1929-2000 which are considered by the authors as most representative for the question of universal jurisdiction and *aut dedere aut judicare* obligations: (a) 1929 International Convention for the Suppression of Counterfeiting Currency, (b) 1949 Geneva Conventions, (c) 1958 Convention on the High Seas, (d) 1961 Single Convention on Narcotics Drugs, (e) 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, (f) 1971 Convention on Psychotropic Substances, (g) 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (h) 1972 Protocol to the Single Convention on Narcotics Drugs, (i) 1973 Convention on the Suppression and Punishment of the Crime of Apartheid, (j) 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, (k) 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (l) 1979 International Convention against the Taking of Hostages, (m) 1979 Convention on the Physical Protection of Nuclear Material, (n) 1982 Convention on the Law of the Sea, (o) 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (p) 1988 Convention for the Suppression of Unlawful Acts against Maritime Navigation, (q) 1989 Convention against the Recruitment, Use, Financing and Training of Mercenaries, (r) 1994 Convention on the Safety of United Nations and Associated Personnel, (s) 1997 International Convention for the Suppression of Terrorist Bombings, (t) 2000 International Convention for the Suppression of Financing of Terrorist, and (u) 2000 Convention on Transnational Crime.[31]

48. Eight years later, in 2009, Amnesty International published another memorandum,[32] this time devoted to the presentation of the obligation to extradite or prosecute in the context of the work of the International Law Commission. Although the substantial scope of this memorandum is narrower and limited to the question of the obligation *aut dedere aut judicare*, selected treaties are not classified substantially, but territorially in four groups: international treaties (24), and selected treaties adopted under the auspices of the Organization of American States (7), the Council of Europe (3) and the African Union (3).

49. This presentation of Amnesty International is lacking more developed or comparative analysis of selected treaties, instead of which it gives more information of a technical nature, like reservations, declarations, signatures and ratifications. There are also quoted provisions of the treaties dealing directly with universal jurisdiction and the obligation to extradite or prosecute.

2000, and its Protocols (General Assembly resolutions 55/25 and 55/255), or the International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 2005. See also the Council of Europe Convention on the Prevention of Terrorism, Warsaw, 2005, which in article 18 provides for the obligation to "extradite or prosecute" although it does not deal directly with acts of terrorism but only with offences connected with terrorism.

[31] See Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001), chap. 15, p. 18.

[32] Amnesty International, *International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)* (London, February 2009).

50. One year later, in 2010, Amnesty International produced another report, dealing this time mainly with the question of universal jurisdiction, but also containing valuable information concerning the principle *aut dedere aut judicare* and continuing the presentation and analysis of appropriate international treaties made in the previous report of 2009. In chapter III of the 2010 report, entitled "The widespread acceptance of universal jurisdiction and the obligation to extradite or prosecute", the authors of the report gave a more recent review of ratified treaties "with *aut dedere aut judicare* obligations to exercise jurisdiction over foreigners suspected of committing certain crimes abroad against other foreigners" (combined with universal jurisdiction). The review of ratifications of some of these treaties indicated how widespread is such acceptance:

> "194 states have ratified the Geneva Conventions of 12 August 1949, which provide for universal jurisdiction with regard to those war crimes in international armed conflict defined as grave breaches; 107 states are party to the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) (1973), which provides for universal jurisdiction for conduct amounting to apartheid; 170 states ratified the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), which provides for universal jurisdiction over grave breaches of that protocol; 167 states are party to the International Convention against the Taking of Hostages (Hostage Taking Convention) (1979), providing for the obligation to extradite or prosecute; 160 states parties to the United Nations Convention on the Law of the Sea (Law of the Sea Convention) (1982), which provides for universal jurisdiction for piracy; 147 states are party to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture) (1984), which provides for universal jurisdiction, if the state decides not to extradite the person concerned to another state; 164 states have ratified the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention) (1997), which provides for the obligation to extradite or prosecute; 146 states have ratified the United Nations Convention against Corruption (Corruption Convention) (2003), which provides for the obligation to extradite or prosecute; 19 states are party to the International Convention for the Protection of All Persons from Enforced Disappearance (Disappearances Convention) (2006), which provides for universal jurisdiction, unless the state extradites to another state or surrenders the person to an international criminal court whose jurisdiction it has recognized."

51. At the end of the said report, Amnesty International recommended that States participating in the discussion in the Sixth Committee in October 2010 should make the following points in support of universal jurisdiction as an essential tool to enforce international justice, showing simultaneously a close relationship of this rule with the principle *aut dedere aut judicare*:

> "It is vital that all states uphold their commitment to universal jurisdiction, a long-established rule of international law, and reaffirm the duty of every state to exercise its jurisdiction over those responsible for crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.

> "Under the related obligation to extradite or prosecute (*aut dedere aut judicare*) a state is required either to exercise jurisdiction (which would necessarily include exercising universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime."

(c) Mitchel classification

52. Another valuable and current attempt to classify international conventions or treaties containing the *aut dedere aut judicare* clause was made by Claire Mitchel in her book *Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law*.[33] The author starts her work with the chapter entitled "Sources of the *aut dedere aut judicare* obligation", in which "conventions or treaties" take a leading position. This chapter is divided into two main parts — "Multilateral treaties" and "Extradition treaties" — although this classification uses two rather incompatible criteria (number of parties and substance of treaty).

53. Analysing the two categories of treaties, the author notes that several writers have suggested that extradite or prosecute clauses appear in at least 70 international criminal law conventions (recalling the book of Bassiouni and Wise quoted above).[34]

54. In annex 1 to the said publication the author decided to recall and quote just 30 multilateral conventions and 18 regional conventions dealing with the obligation in question. As in the case of the research done by Amnesty International, Ms. Mitchel considers the first convention containing an extradite or prosecute clause to be the 1929 International Convention for the Suppression of Counterfeiting Currency, which provided for two important obligations:

> "First, that where a State's domestic law did not allow the extradition of nationals, nationals returning to their State after committing a crime under the Convention 'should' be punishable in the same manner as if the crime had been committed in that State;
>
> "Secondly, foreigners who commit an offence under the Convention abroad and are now in a country whose domestic legislation recognises the extra-territorial application of criminal law 'should' be punished as if the crime had occurred within that State, provided that there had been a request

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[33] Claire Mitchel, *Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law* (Geneva, The Graduate Institute of International and Development Studies, 2009).

[34] But, on the other hand, she rightly observes that not all of these treaties in fact introduce an alternative obligation in question: "Whilst there may well be over 70 international treaties that require the parties to 'proscribe, prosecute or punish' particular conduct (Bassiouni and Wise, at 8), considerably less than 70 of these require States to elect either to extradite or to prosecute offenders present on their territory. For example, the Genocide Convention does contain obligations for States to prosecute (where the genocide occurred on its territory) and to extradite (articles 3-6, and article 7 respectively), but these are not an *aut dedere aut judicare* obligation, where a State is required to do one or the other. (So, if a person accused of committing genocide elsewhere is present on a State's territory, that State may be obliged to extradite him or her to a requesting State with whom it has an existing extradition treaty or other extradition arrangements but is not obliged to prosecute, whether or not an extradition request is made.)" (Ibid., p. 9).

made for the offender's extradition that had been refused for reasons not connected with the offence."[35]

55. These were the beginnings of the modern treaty approach to the question of the obligation *aut dedere aut judicare*. The last (universal) treaty recalled by the said author is the International Convention for the Protection of All Persons from Enforced Disappearance of 2006. Its extradite or prosecute clause (article 9 (2)) says that each State party shall take "such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized".

56. As concerns the "conventions or treaties" dealing with the obligation in question and concluded in the period between 1929 and 2006, Claire Mitchel points out certain conventions which, in her opinion, have played the most important role in the process of modern formulation of the *aut dedere aut judicare* obligation. Among them, she noticed that:

> "The four Geneva Conventions of 1949 all include an identical form of the extradite or prosecute clause in respect of grave breaches, obliging High Contracting Parties to enact legislation necessary to provide effective penal sanctions for those committing grave breaches regardless of nationality, and to search for, and prosecute, offenders. As an alternative, the State may elect to 'hand such persons over for trial' to another High Contracting party, provided that the other State has made out a prima facie case."[36]

57. She also stresses that the best known version of the *aut dedere aut judicare* clause was first drafted for the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, which provides:

> "Article 4(2): Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article VIII to any of the States mentioned in paragraph 1 of this Article.
>
> "Article 7: The 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. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

58. This formula has been applied, "more or less word for word", in 15 further multilateral conventions.

(d) International Law Commission secretariat classification

59. The most recent study, prepared by the secretariat of the International Law Commission in June 2010 (A/CN.4/630), aims at assisting the Commission by

[35] Ibid., pp. 9-10.
[36] Ibid., p. 11.

providing information on multilateral conventions which may be of relevance to its future work on the present topic. It should be recalled, in this respect, that the Working Group highlighted this issue in section (a) (ii) of the proposed general framework (A/64/10, chap. IX, sect. B.2), which refers to "the obligation to extradite or prosecute in existing treaties".

60. The Secretariat conducted an extensive survey of multilateral conventions, both at the universal and regional levels, which resulted in the identification of 61 multilateral instruments that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders.

61. Section II of the study proposes a typology of the relevant instruments in the light of those provisions, and examines the preparatory works of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also points out the differences and similarities between provisions in different conventions and their evolution.

62. Section III proposes some overall conclusions regarding (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.

63. The annex contains a chronological list of the conventions found by the Secretariat to contain provisions combining extradition and prosecution and reproduces the text of those provisions.

64. The typology proposed by the Secretariat, with a view to providing a comparative overview of the content and evolution of the relevant provisions in conventional practice, divides the conventions including such provisions into four categories: (a) the 1929 International Convention for the Suppression of Counterfeiting Currency and other conventions following the same model; (b) the 1949 Geneva Conventions and the 1977 Additional Protocol I; (c) regional conventions on extradition; and (d) the Convention for the Suppression of Unlawful Seizure of Aircraft (1970 Hague Convention) and other conventions following the same model.

65. This classification combines chronological and substantive criteria. First of all, it roughly reflects an evolution in the drafting of provisions combining the options of extradition and prosecution, which is useful for understanding the influence that certain conventions (such as the 1929 Counterfeiting Convention or the 1970 Hague Convention) have exercised over conventional practice and how such provisions have changed over time. Secondly, the classification highlights some fundamental similarities in the content of provisions pertaining to the same category, thus facilitating a better understanding of their precise scope and of the main issues that have been discussed in the field.

66. However, it must be pointed out at the outset that this classification, while revealing some general tendencies in the field, should not be understood as reflecting a separation of the relevant provisions into rigid categories. Conventions pertaining to the same category are often very different in their content, and drafting techniques adopted by certain conventions have sometimes been followed by conventions belonging to a different category.

67. In section II of the study, under each of the categories mentioned in paragraph 64 above, the Secretariat identifies one or more key conventions that have served as models in the field and provides a description of the mechanism for the punishment of offenders provided therein, their relevant preparatory works and reservations affecting the legal effect of the provisions combining the options of extradition and prosecution.

68. Section II further lists other conventions that belong to each category and describes how these conventions have followed, or have departed from, the original model, with information about the relevant aspects of preparatory works and reservations.

69. Section III of the study, entitled "Conclusions", aims at recapitulating the main variations of clauses which may be of relevance to the study of the topic as found in the various instruments, following three thematic issues:

(a) The relationship between extradition and prosecution resulting from the clause (which reveals the overall structure and logic of that clause). Under this aspect, the relevant provisions contained in multilateral conventions may be classified into two main categories: (i) those clauses which impose 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; and (ii) those clauses for which the obligation to prosecute is only triggered by the refusal to surrender the alleged offender following a request of extradition (clauses imposing an obligation to prosecute only when extradition has been requested and not granted);

(b) The conditions applicable to extradition;

(c) The conditions applicable to prosecution.

It then proposes some general conclusions arising from the examination of the previous work of the Commission on related topics and the conventional practice with respect to the obligation to extradite or prosecute.

2. Article 3: Treaty as a source of the obligation to extradite or prosecute

70. The third draft article proposed by the Special Rapporteur in his third report (A/CN.4/603, para. 123) dealt with treaties as a source of the obligation to extradite or prosecute. This suggestion had already been made by the Special Rapporteur in the second report, and since it was not opposed either in the Commission or in the Sixth Committee, it seems that the text of the first paragraph of that draft article could be as follows:

Article 3
Treaty as a source of the obligation to extradite or prosecute

1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.

71. However, taking into account the variety and differentiation of provisions concerning the obligation in question, contained in particular treaties (see paras. 43-69 above), it seems useful to add a second paragraph concerning practical realization and application of the said obligation by individual States. It could read as follows:

2. Particular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party, in accordance with the treaty establishing such obligation and with general principles of international criminal law.

72. The review presented above of various classifications of international treaties containing appropriate clauses and formulating the obligation in question, as well as the growing number of such treaties, support the formal confirmation of this first and most applied legal basis of the obligation to extradite or prosecute.

73. The conventional rights invoked by States before international courts in connection with this obligation seem also to be the most useful legal tool applied by the parties to any dispute. Such is the situation in a dispute between Belgium and Senegal before the International Court of Justice (see paras. 37 and 38 above).

C. Principle *aut dedere aut judicare* as a rule of customary international law

74. Although the formula contained in the title of the present section has been questioned by many scholars, as well as by numerous States, it seems to have gained a significant number of supporters in recent years. As has been pointed out in the doctrine:

> "In principle, the duty to extradite or prosecute can also be established by customary international law. Customary international law, which is just as binding upon States as treaty law, arises from a general and consistent practice of States followed by them from a sense of legal obligation referred to as opinio iuris. In recent years, several leading scholars including C. Bassiouni, L. Sadat, C. Edelenbos, D. Orentlicher, and N. Roht-Arriaza have argued that there is a customary international law duty to prosecute persons accused of crimes against humanity.
>
> "These scholars recognize that there is a great deal of State practice embracing amnesties and exile arrangements, but focus on resolutions by the United Nations General Assembly, hortative declarations of international conferences, and reports of the United Nations Secretary-General , as evidence of an emerging rule requiring prosecution of those who commit crimes against humanity."[37]

75. Those invoking a customary international law obligation to prosecute or extradite usually quote the Declaration on Territorial Asylum of 1967 (General Assembly resolution 2312 (XXII)) as the earliest international recognition of a customary law obligation to prosecute perpetrators of crimes against humanity. Article 1, paragraph 2, of the Declaration provides that "the right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a … crime against humanity".

76. However, as the historic record of elaboration of this resolution shows,

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[37] Michael P. Scharf, *"Aut dedere aut judicare", Max Planck Encyclopedia of Public International Law* (www.mpepil.com), paras. 6 and 7.

> "[t]he majority of members stressed that the draft declaration under consideration was not intended to propound legal norms or to change existing rules of international law, but to lay down broad humanitarian and moral principles upon which States might rely in seeking to unify their practices relating to asylum.[38]

77. This language suggests that, from the outset, the General Assembly resolutions and other non-binding international instruments concerning the prosecution of crimes against humanity were meant to be aspirational only, and not intended to create any legal duties.[39]

D. Customary character of the obligation in the discussions held in the Sixth Committee during the sixty-fourth session of the General Assembly (2009)

78. Although the question of the possible customary nature of the obligation *aut dedere aut judicare* has been discussed in the Sixth Committee at all sessions of the General Assembly since 2006, including the sixty-fifth session (see para. 18 above), there was especially rich and fruitful discussion on this subject in the Sixth Committee in 2009.

79. Some delegations — like Hungary, Mexico, Cuba, the Islamic Republic of Iran and Uruguay — considered that the source of the obligation to extradite or prosecute was not limited to international treaties and was customary in nature, notably for serious international crimes.[40] Among the crimes referred to in this context by some delegations were piracy,[41] slave trade, apartheid, terrorism, torture, corruption, genocide, crimes against humanity and war crimes.[42]

80. Other delegations — like Germany, the Republic of Korea, the United Kingdom, Malaysia, the United States, Israel and Jamaica — were of the contrary view that the obligation did not exist beyond the provisions of international treaties.[43] It was indicated, in this regard, that the customary character of the obligation could not necessarily be inferred from the existence of customary rules prohibiting specific international crimes.[44] According to some delegations, a customary rule might be in the process of emerging in the field.[45] It was also noted that, in any event, the obligation would be applicable to a limited category of offences.[46]

81. Many delegations — including Hungary, Finland, the Netherlands, the Republic of Korea, Japan, Mexico, the United Kingdom, New Zealand, Italy, Cuba, Poland, Argentina and Portugal — supported further study by the Commission of the

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[38] *United Nations Yearbook 1976*, pp. 758 and 759.

[39] M. P. Scharf, note 37 above, para. 8.

[40] A/C.6/64/SR.20, para. 33; SR.23, para. 58; SR.24, para. 30; SR.24, para. 47 and SR.25, para. 13, respectively.

[41] Islamic Republic of Iran (SR.24, para. 47).

[42] Hungary (SR.20, para. 33), Cuba (SR.24, para. 30), Uruguay (SR.25, para. 13).

[43] SR.22, para. 58; SR.23, para. 26; SR.23, para. 68; SR.23, para. 81; SR.23, para. 88; SR.24, para. 74; and SR.24, para. 79, respectively.

[44] Germany (SR.22, para. 59); Islamic Republic of Iran, (SR.24, para. 47).

[45] Romania (SR.24, para. 83).

[46] United Kingdom (SR.23, para. 68), Canada (SR.24, para. 60).

question of the possible customary source of the obligation and the crimes covered by it.[47] It was noted that, for this purpose, the Commission should rely on a systematic survey of the relevant State practice,[48] including international treaties,[49] domestic legislation[50] and both national and international judicial decisions.[51] While some delegations — like Finland — argued that a perceived lack of information from Governments should not delay the work of the Commission,[52] others — like the United States, Poland and Argentina — urged the Commission to allow sufficient time to receive and evaluate information from Governments.[53]

E. Customary basis of the rights invoked before the International Court of Justice

82. The most comprehensive presentation of the customary grounds of the obligation *aut dedere aut judicare* was made by Eric David in the aforementioned case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* in 2009 before the International Court of Justice. His statement of 6 April 2009 on the customary basis of the rights invoked by Belgium seems to be so important that is worth to be fully quoted here:

> "… 19. The rule *judicare vel dedere* is a rule of customary international law expressed by the United Nations General Assembly and the International Law Commission. In its resolution 3074 (XXVIII), adopted by the United Nations General Assembly, with no dissenting votes, on 3 December 1973, the Assembly proclaims:
>
> > '1. War crimes and crimes against humanity, *wherever they are committed*, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.' (Emphasis added.)
>
> "20. Likewise, the International Law Commission states in Article 9 of its Draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996:
>
> > '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 or 20 [war crimes] is found *shall extradite or prosecute that individual*.' (Emphasis added.)

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[47] SR.20, para. 33; SR.22, para. 57; SR.22, para. 65; SR. 23, para. 26; SR.23, para. 43; SR.23, para. 58; SR.23, para. 68; SR.24, para. 13; SR.24, para. 23; SR.24, para. 29; SR.24, para. 58; SR.24, para. 69; SR.25, para. 8, respectively.

[48] Hungary (SR.20, para. 33), United Kingdom (SR.23, para. 68), United States (SR.23, para. 89), New Zealand (SR.24, para. 13 and statement), Cuba (SR.24, para. 29), Argentina (SR.24 and para. 89), Romania (SR.24, para. 83), Italy (SR.24, para. 23).

[49] Italy (SR.24, para. 23).

[50] Hungary (SR.20, para. 33), Cuba (SR.24, para. 29), Argentina (SR.24, para. 69).

[51] Germany (SR.22, para. 59), United Kingdom (SR.23, para. 58), Cuba (SR.24, para. 29).

[52] SR.22, para. 56.

[53] SR.23, para. 89; SR.24, para. 58; and SR.24, para. 69, respectively.

"21. The preamble to the Statute of the International Criminal Court confirms the foregoing: the States Parties to the Statute (and, as already noted this morning, that is the case for both Senegal and Belgium), those States affirm

> 'that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" (fourth considerandum)';

they further declare (also in the preamble) that they are 'determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' (fifth considerandum). Lastly, the States Parties to the Statute recall 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' (sixth considerandum).

"These excerpts from the preamble [to the Statute] of the International Criminal Court are significant: it is clear that, by the dignified and formal wording employed, the States are expressing what they deem to be the *opinio juris* of the international community, i.e., the obligation to prosecute alleged perpetrators of war crimes, crimes against humanity and crimes of genocide, all of which being crimes targeted by the Statute of the International Criminal Court (arts. 6-8).

"In repeating the same idea — combating impunity — three times, the States simply wish to express the force and incontestable scope of the customary rule calling for prosecution of alleged perpetrators of the crimes referred to above.

"22. In addition to these rules stand the conventional rules which I enumerated a few moments ago, because there can be no doubt that the 1949 Geneva Conventions and the 1984 Convention against Torture also express customary international law. Obviously, the Court does not need any reminding, for example, that it has called the Geneva Conventions 'intransgressible principles of international customary law' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 257, para. 79). Similar reasoning could be adopted in respect of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Moreover, Senegal, like Belgium, recognizes that genocide, war crimes and crimes against humanity are criminal offences customary in nature, because it is set out in the statement of grounds for the Senegalese law which I cited a few moments ago and which brings these crimes within the Senegalese Penal Code that this represents the 'incorporation of international rules of conventional and customary origin', rules which, according to the same statement of grounds, have the 'character of *jus cogens*' (these are not my words but those in the statement of grounds for the Senegalese law).

"23. In short, (…) as does conventional international law, customary international law requires States to prosecute or extradite perpetrators of the crimes under international law which I have referred to. Given that this obligation is borne by the obligor towards all other States, Belgium has rights which are the corollary to Senegal's customary obligation in the case of

Mr. Hissène Habré: that is to say, and I beg the Court's forgiveness for repeating myself once again, the right to see Senegal directly try Mr. Hissène Habré or, failing which, the right to have him extradited."[54]

83. Furthermore, we may find a more condensed opinion formulated by Belgium in its Application of 16 February 2009 instituting proceedings in the same case, where the customary basis of the obligation to prosecute or to extradite Hissène Habré is invoked.[55]

F. Identification of categories of crimes and offences which could be classified as those originating the customary obligation *aut dedere aut judicare*

84. There are various classifications of crimes under international law or crimes under national law of international concern. The international element of these crimes creates a possibility for their international suppression. This suppression may be connected both with the possibility of application of universal jurisdiction and with the applicability of the obligation *aut dedere aut judicare* to them.

85. When the basis for the application of the said obligation is of a conventional nature, the situation seems to be relatively simple, though the application in practice may depend on the existence or non-existence of particular treaty conditions, such as a prior extradition request before exercising universal jurisdiction. In the commentary submitted by Belgium to the International Law Commission in 2009

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[54] International Court of Justice, document CR.2009/08, 6 April 2009 (www.icj-cij.org/docket/files/144/15119.pdf), pp. 23-25.

[55] Paragraph 12 of the Application of Belgium contains the following statement:

"Under customary international law, Senegal's failure to prosecute Mr. H. Habré, or to extradite him to Belgium to answer for the crimes against humanity which are alleged against him, violates the general obligation to punish crimes under international humanitarian law which is to be found in numerous texts of secondary law (institutional acts of international organizations) and treaty law.

"The crimes alleged against Mr. H. Habré can be characterized as including crimes against humanity. At the time when Mr. H. Habré was President of Chad (1982-1990), a policy of widespread human rights violations was carried out against political opponents, members of their families and members of certain ethnic groups: the Hadjerai in 1987 and the Zaghawa in 1989. According to a report by the National Committee of Enquiry of the Chadian Ministry of Justice (1992), over 40,000 persons were summarily executed or died in detention.

"Such acts correspond to the definition of crimes against humanity, namely murders and acts of torture 'committed as part of a widespread or systematic attack directed against any civilian population'; these defining elements of crimes against humanity reflect customary international law as expressed, for example, by the Statute of the International Criminal Court (ICC) (Article 7), by which Senegal and Belgium have been bound since 2 February 1999 and 26 June 2000, respectively.

"The obligation to prosecute the perpetrators of such crimes is indicated in the resolutions of the General Assembly of the United Nations (see, for example, resolution 3074 (XXVIII), para. 1), the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 (Article 9), and in numerous calls by the international community to combat impunity (see, for example, the preamble of the Statute of the ICC, 4th-6th consideranda, the Constitutive Act of the African Union, Article 4 (c), and various Security Council resolutions)." (www.icj-cij.org/docket/files/144/15054.pdf)

(A/CN.4/612, para. 15), we can even find a specific classification of such treaties which differentiates between those containing an *aut dedere aut judicare* clause in the classic sense of the word and those containing a *judicare vel dedere* clause.[56]

86. On the other hand, it is much more complicated and difficult to find and prove the existence of a customary basis for the obligation in question, in regard both to an obligation in general and to specific, limited categories of crimes. Since, as we already have shown in previous reports, it is rather difficult in the present situation to prove the existence of a general international customary obligation to extradite or prosecute, one should rather concentrate on identifying those particular categories of crimes which may create such a customary obligation, recognized as binding by the international community of States, though limited as to its scope and substance.

87. As mentioned in previous reports, there have been numerous attempts to identify such crimes of international concern which could be recognized as giving a sufficient customary basis for the application of the principle *aut dedere aut judicare*. What is also important, is the necessity of differentiating between ordinary criminal offences — criminalized under national laws of States — and a "qualified" form of such offences or crimes, named in different ways as international crimes, crimes of international concern, grave breaches, crimes against international humanitarian law, etc. These last crimes, in particular, possessing a combination of additional elements of international scope or a special grave character, may be considered as giving a sufficient customary basis for the application of the obligation *aut dedere aut judicare*.

88. The question arises whether such "internationalization" of crimes gives them the right to be subordinated to the obligation "to extradite or prosecute", with all consequences. In looking for the answer to this question, we may take into account the following opinion expressed by William Schabas:

> "The result of the recognition of an offence as an international crime is that it imposes duties upon the States with respect to investigation, prosecution and extradition. This is sometimes expressed with the Latin expression *aut dedere aut iudicare*."[57]

89. An interesting attempt to identify such specific categories of crimes has been made by the International Law Commission, which in article 9 of its Draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996, qualified certain kinds of crimes as those which, being committed, originate the necessity of exercising the obligation to extradite or prosecute. The said draft article provided that:

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[56] Two types of treaties are identified there, with the purpose of differentiating between two kinds of obligations:

> "(a) Treaties which make the obligation to prosecute conditional upon refusal of a request for extradition of the alleged perpetrator of an offence. These treaties contain an *aut dedere aut judicare* clause in the classic sense of the word;
>
> "(b) Treaties which require States to exercise universal jurisdiction over perpetrators of the serious offences covered by these conventions, without making this obligation conditional upon refusal to honour a prior extradition request. These treaties contain a *judicare vel dedere* clause."

[57] William A. Schabas, *The UN Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, 2008), p. 158.

> "… 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."[58]

90. Another important step towards identifying other possible customary bases for the application of the principle *aut dedere aut judicare* was taken with the adoption of the Rome Statute of the International Criminal Court in 1998. Apart from stressing in its preamble the need for the international community as a whole to combat impunity for the most serious crimes and the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, the Statute gives in article 5 a legal classification of crimes within the jurisdiction of the Court. Among these crimes are: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

91. The first three categories of crimes, following to a great extent the model elaborated by the International Law Commission in the aforementioned Draft Code of 1996 (see para. 89 above), may be recognized as a good directory of customary rules appropriate to serve as bases for the obligation to extradite or prosecute. For that purpose, however, it seems that the crimes in question (genocide, crimes against humanity and war crimes) should possess specific characteristics, provided in articles 6, 7 and 8 of the Statute, in addition to the general criminal law description of each offence.[59]

G. *Jus cogens* as a source of a duty to extradite or prosecute

92. Some commentators have suggested that the international law concept of *jus cogens* may also create a duty to extradite or prosecute. Thus, pursuant to the *jus cogens* concept, States are prohibited from committing crimes against humanity and an international agreement between States to facilitate commission of such crimes would be void *ab initio*. Furthermore, there is growing recognition that all States have a right to prosecute or entertain civil suits against the perpetrators of *jus cogens* crimes who are later found on their territory. From this, some commentators take the next logical step and argue that the concept of *jus cogens* also creates a duty to extradite or prosecute those who have committed crimes against humanity.[60]

93. To some extent support for this view can be found in the advisory opinion rendered by the International Court of Justice on 9 July 2004 on the *Legal*

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[58] See *Yearbook of the International Law Commission, 1996*, vol. II, Part Two (United Nations publication, Sales No. E.98.V.9 (Part 2)), p. 30.

[59] "Article 6: Genocide ... 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ... Article 7: Crimes against humanity ... 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack … Article 8: War crimes: 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. 2. For the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention …"

[60] M. P. Scharf, note 37 above, paras. 14 and 17.

Consequences of the Construction of a Wall in the Occupied Palestinian Territory. In that case the Court stated:

> "Given the character and the importance of the rights and obligations involved, the court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction."[61]

94. Although without any doubt there are certain norms in the realm of international criminal law which have reached the status of *jus cogens* norms (such as the prohibition of torture), which are based not only on treaty regulations but also on customary recognition, there are, however, some doubts whether the obligation *aut dedere aut judicare* deriving from such peremptory norms also possesses characteristics of *jus cogens*. There are differences of opinion among scholars concerning this interdependence.

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

95. On the basis of the presentation and analysis made above in sections 4 D to G above, the Special Rapporteur proposes to add the following draft article to the set of draft articles concerning the obligation *aut dedere aut judicare*:

> **Article 4**
> **International custom as a source of the obligation *aut dedere aut iudicare***
>
> 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.

96. The list of crimes and offences covered by paragraph 2 seems to be still open and subject to further consideration and discussion.

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[61] *I.C.J. Reports 2004*, p. 136, para. 159.