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Report of the Working Group on the Obligation to extradite or prosecute (*aut dedere aut judicare*)

1. Introduction

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

(2) *Obligation to fight impunity in accordance with the rule of law.* States have expressed their desire to cooperate among themselves, and with competent international tribunals, in the fight against impunity for crimes, in particular offences of international concern¹ and in accordance with the rule of law.² In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, the Heads of State and Government and heads of delegation attending the meeting on 24 September 2012 committed themselves to “ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law ...”.³ The obligation to cooperate in combating such impunity is given effect in numerous conventions, *inter alia*, through the obligation to extradite or prosecute.⁴ The view that the obligation to extradite or

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

² General Assembly resolution 67/1 of 30 November 2012.

³ *Ibid.*, para. 22.

⁴ See Part 3 below. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice states: “... Extradition and prosecution are alternative

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

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

(4) *The importance of the obligation to extradite or prosecute in the work of the International Law Commission.* The topic may be viewed as having been encompassed by the topic “Jurisdiction with regard to crimes committed outside national territory” which was on the provisional list of fourteen topics at the first session of the Commission in 1949.⁷ It is also addressed in articles 8 (Establishment of jurisdiction) and 9 (Obligation to extradite or prosecute) of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. Article 9 of the Draft Code stipulates an obligation to extradite or prosecute for genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.⁸ The principle *aut dedere aut judicare* is said to have derived

ways to combat impunity in accordance with Article 7, paragraph 1 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984].” (Judgment of 20 July 2012, para. 50). The Court adds that the States parties to the Convention against Torture have “a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity” (*ibid.*, para. 68). The Court reiterates that the object and purpose of the Convention are “to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts” (*ibid.*, para. 74 and cf. also para. 75).

Special Rapporteur Zdzisław Galicki’s fourth report dealt at length with the issue of the duty to cooperate in the fight against impunity. He cited the following examples of international instruments which provide a legal basis for the duty to cooperate: Art. 1(3) of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the preamble to the 1998 Rome Statute of the International Criminal Court, and guideline XII of the Guidelines of the Committee of Ministers of the Council of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 Mar. 2011, A/CN.4/648, paras. 26–33.

⁵ E.g., Belgium (A/CN.4/612, para. 33); Denmark, Finland, Iceland, Norway and Sweden (A/C.6/66/SR.26, para. 10); Switzerland (*ibid.*, para. 18); El Salvador (*ibid.*, para. 24); Italy (*ibid.*, para. 42); Peru (*ibid.*, para. 64); Belarus (A/C.6/66/SR. 27, para. 41); Russian Federation (*ibid.*, para. 64); and India (*ibid.*, para. 81).

⁶ Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey, Oxford/London: Clarendon Press/Humphrey Milford, 1925, pp. 527–529 at 527).

⁷ United Nations, *The Work of the International Law Commission*, Eighth edition (New York: 2012), vol. 1, p.37.

⁸ “Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual”. See also the Commission’s commentary on this article (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, chap. II).

from “a number of multilateral conventions”⁹ that contain the obligation. An analysis of the Draft Code’s history suggests that article 9 is driven by the need for an effective system of criminalization and prosecution of the said core crimes, rather than actual State practice and *opinio juris*.¹⁰ The article is justified on the basis of the grave nature of the crimes involved and the desire to combat impunity for individuals who commit these crimes.¹¹ While the Draft Code’s focus is on core crimes,¹² the material scope of the obligation to extradite or prosecute covers most crimes of international concern, as mentioned in (2) above.

(5) *Use of the Latin terminology* “aut dedere aut judicare”. In the past, some members of the Commission, including Special Rapporteur Zdzisław Galicki, doubted the use of the Latin formula “aut dedere aut judicare”, especially in relation to the term “judicare”, which they considered as not reflecting precisely the scope of the term “prosecute”. However, the Special Rapporteur considered it premature at that time to focus on the precise definition of terms, leaving them to be defined in a future draft article on “Use of terms”.¹³ The report of the Working Group proceeds on the understanding that whether the mandatory nature of “extradition” or that of “prosecution” has priority over the other depends on the context and applicable legal regime in particular situations.

⁹ *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries*, art. 8, para. (3) (*ibid.*).

¹⁰ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10)*, p. 80, para. 142.

¹¹ *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries*, art. 8, paras. (3), (4) and (8) and art. 9, para. (2) (*ibid.*, *Fifty-first Session, Supplement No. 10 (A/51/10)*).

¹² At its first reading in 1991, the list of crimes covered by the Draft Code comprised the following 12 crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and willful and severe damage to the environment. At its sessions in 1995 and 1996, the Commission reduced the number of crimes in the final Draft Code to four crimes: aggression; genocide; war crimes; and crimes against humanity, adhering to the Nuremberg legacy as the criterion for the choice of the crimes covered by the Draft Code. The primary reason for this approach appeared to have been the unfavorable comments by 24 Governments to the list of 12 crimes proposed in 1991. A fifth crime, crimes against United Nations and associated personnel, was added at the last moment on the basis of its magnitude, the seriousness of the problem of attacks on such personnel and “its centrality to the maintenance of international peace and security” (A/CN.4/448 and Add.1).

The crime of aggression was not subject to the provision of art. 9 of the Draft Code. In the Commission’s opinion, “[t]he determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parent imperium non habet*. ... [and] the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.”

(*Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, p. 30, para. 14).

¹³ A/CN.4/603, paras. 36–37. In his preliminary report, the Special Rapporteur discussed various Latin formulas relevant to this topic; namely: *aut dedere aut punire*; *judicare aut dedere*; *aut dedere aut prosequi*; *aut dedere, aut judicare, aut tergiversari*; and *aut dedere aut poenam persequi* (A/CN.4/571, paras. 5–8). See also: Raphaël van Steenberghe, “The Obligation to Extradite or Prosecute: Clarifying its Nature” (*Journal of International Criminal Justice*, vol. 9 (2011), p.1089 at 1107-8, on the formulas *aut dedere aut punire*, *aut dedere aut prosequi*, and *aut dedere aut judicare*.

2. Summary of the Commission's work since 2006

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

(7) Pursuant to section (a) (ii) of the proposed general framework which refers to “The obligation to extradite or prosecute in existing treaties”, the Secretariat conducted a *Survey of multilateral conventions which may be of relevance for the Commission's work on the topic “The obligation to extradite or prosecute (aut dedere aut judicare)”*¹⁹ (hereinafter “Secretariat's Survey (2010)”). The study identified multilateral instruments at the universal and regional levels that contain provisions combining extradition and prosecution as alternatives for the punishment of offenders.

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

(9) In 2010, the Working Group, under the acting chairmanship of Mr. Enrique J.A. Candioti, recognized that the Secretariat's Survey (2010) helped to elucidate aspects of the proposed general framework of 2009. It was noted that, in seeking to throw light on the questions agreed upon in the proposed general framework, the multilateral treaty practice on which the Secretariat's Survey (2010) had focused needed to be complemented by a detailed consideration of other aspects of State practice (including, but not limited to, national legislation, case law and official statements of governmental representatives). In addition, it was pointed out that, as far as the duty to cooperate in the fight against impunity

¹⁴ At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500).

¹⁵ General Assembly resolution 60/22 of 23 November 2005.

¹⁶ The Special Rapporteur produced the preliminary report (A/CN.4/571) in 2006, his second report (A/CN.4/585 and Corr.1) in 2007, his third report (A/CN.4/603) in 2008, and his fourth report (A/CN.4/648) in 2011. Special Rapporteur Galicki proposed the draft articles in his second report (A/CN.4/585, para. 76), third report (A/CN.4/603, paras. 110–129) and, three years later, in his fourth report (A/CN.4/648, paras. 40, 70–71, and 95).

¹⁷ At its 2988th meeting, on 31 July 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 315.

¹⁸ *Ibid.*, *Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 204.

¹⁹ A/CN.4/630.

²⁰ A/CN.4/L.774.

seemed to underpin the obligation to extradite or prosecute, a systematic assessment of State practice in that regard was necessary. This would clarify the extent to which that duty influenced, as a general rule or in relation to specific crimes, the Commission's work on the topic, including work in relation to the material scope, the content of the obligation to extradite or prosecute and the conditions for triggering of the obligation.

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

3. Consideration by the Working Group in 2012 and 2013

(11) The Working Group considered the Secretariat Survey (2010) and the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* useful in its work.

(12) *Typology of provisions in multilateral instruments.* The Secretariat's Survey (2010) proposes a description and a typology of the relevant instruments in light of these provisions, and examines the preparatory work of certain key conventions that have served as models in the field. For some provisions, it also reviews any reservations made. It points out the differences and similarities between the reviewed provisions in different conventions and their evolution, and offers overall conclusions as to: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions. The survey classifies conventions that include such provisions into four categories: (a) the 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model; (b) regional conventions on extradition; (c) the 1949 Geneva Conventions and the 1977 Additional Protocol I; and (d) the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions that have followed the same model.

(13) The 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model²² typically: (a) criminalize the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) make provision for prosecution and extradition which take into account the divergent views of States with regard to the extradition of nationals and the exercise of extraterritorial jurisdiction, the latter being permissive rather than compulsory; (c) contain provisions which impose an obligation to extradite, with prosecution coming into play once there is a refusal of extradition; (d) establish an extradition regime by which States undertake, under certain conditions, to consider the offence as extraditable; (e) contain a provision providing

²¹ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 206.

²² E.g., (a) 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs; (b) the 1937 Convention for the Prevention and Punishment of Terrorism; (c) the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; (d) the 1961 Single Convention on Narcotic Drugs; and (e) the 1971 Convention on Psychotropic Substances.

that a State's attitude on the general issue of criminal jurisdiction as a question of international law was not affected by its participation in the Convention; and (f) contain a non-prejudice clause with regard to each State's criminal legislation and administration. While some of the instruments under this model contain terminological differences of an editorial nature, others modify the substance of the obligations undertaken by States Parties.

(14) Numerous regional conventions and arrangements on extradition also contain provisions that combine options of extradition and prosecution,²³ although these instruments typically emphasize the obligation to extradite (which is regulated in detail) and only contemplate submission to prosecution as an alternative to avoid impunity in the context of that cooperation. Under this model, extradition is a means to ensure the effectiveness of criminal jurisdiction. States parties have a general duty to extradite unless the request fits within a condition or exception, including mandatory and discretionary grounds for refusal. For instance, extradition of nationals could be prohibited or subject to specific safeguards. Provisions in subsequent agreements and arrangements have been subject to modification and adjustment over time, particularly in respect of conditions and exceptions.²⁴

(15) The four Geneva Conventions of 1949 contain the same provision whereby each High Contracting Party is obligated to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and to bring such persons, regardless of their nationality, before its own courts. However, it may also, if it prefers, and in accordance with its domestic legislation, hand such persons over for trial to another High Contracting Party concerned, provided that the latter has established a *prima facie* case.²⁵ Therefore, under this model, the obligation to search for and submission to prosecution an alleged offender is not conditional on any jurisdictional consideration and this obligation exists irrespective of any request for extradition by another party.²⁶ Nonetheless, extradition is an available option subject to a condition that the prosecuting State has established a *prima facie* case. This mechanism is made applicable to Additional Protocol I of 1977 by *renvoi*.²⁷

(16) The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, stipulates in article 7 that "[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged ... to submit the case to its competent authorities for the purpose of prosecution". This "Hague formula" is a variation of the Geneva Conventions formula and has served as a model for several subsequent

²³ These instruments include: (a) the 1928 Convention on Private International Law, also known as the "Bustamante Code", under Book IV (International Law of Procedure), Title III (Extradition); (b) the 1933 Convention on Extradition; (c) the 1981 Inter-American Convention on Extradition; (d) the 1957 European Convention on Extradition; (e) the 1961 General Convention on Judicial Cooperation (*Convention générale de coopération en matière de justice*); (f) the 1994 Economic Community of West African States (ECOWAS) Convention on Extradition; and (g) the London Scheme for Extradition within the Commonwealth.

²⁴ It may also be recalled that General Assembly has adopted the Model Treaty on Extradition (resolution 45/116, annex) and the Model Treaty on Mutual Assistance in Criminal Matters (resolution 45/117).

²⁵ Arts. 49, 50, 129, and 146, respectively, of the first, second, third, and fourth Geneva Conventions. The reason these Geneva Conventions use the term "hand over" instead of "extradite" is explained in the Secretariat's Survey (2010) at para. 54.

According to Claus Kieß ("Reflection on the *Iudicare* Limb of the Grave Breaches Regime" *Journal of International Criminal Justice*, vol. 7 (2009), p. 789, what the *iudicare* limb of the grave breaches regime actually entails is a duty to investigate and, where so warranted, to prosecute and convict.

²⁶ See Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV (International Committee of the Red Cross 1958) 593.

²⁷ Art. 85 (1), (3) and art. 88 (2) of Additional Protocol I of 1977.

conventions aimed at the suppression of specific offences, principally in the field of the fight against terrorism, but also in many other areas (including torture, mercenarism, crimes against United Nations and associated personnel, transnational crime, corruption, and enforced disappearance).²⁸ However, many of these subsequent instruments have modified the original terminology which sometimes affect the substance of the obligations contained in the Hague formula.

(17) In his Separate Opinion in the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judge Yusuf also addresses the typology of “treaties containing the formula *aut dedere aut judicare*” and divides them into two broad categories.²⁹ The first category

²⁸ These include, *inter alia*,: (a) the 1971 Organization of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance; (b) the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (c) the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; (d) the 1977 European Convention on the Suppression of Terrorism; (e) 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa; (f) the 1979 International Convention against the Taking of Hostages; (g) the 1979 Convention on the Physical Protection of Nuclear Material; (h) the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (i) the 1985 Inter-American Convention to Prevent and Punish Torture; (j) the 1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism and the 2004 Additional Protocol thereto; (k) the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (l) the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; (m) the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; (n) the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries; (o) the 1994 Inter-American Convention on the Forced Disappearance of Persons; (p) the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Optional Protocol; (q) the 1996 Inter-American Convention against Corruption; (r) the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; (s) the 1997 Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; (t) the 1997 International Convention for the Suppression of Terrorist Bombings; (u) the 1998 Convention on the Protection of the Environment through Criminal Law; (v) the 1999 Criminal Law Convention on Corruption; (w) the 1999 Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict; (x) the 1999 International Convention for the Suppression of the Financing of Terrorism; (y) the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; (z) the 2000 United Nations Convention against Transnational Organized Crime and its Protocols; (aa) the 2001 Council of Europe Convention on Cybercrime; (bb) the 2003 African Union Convention on Preventing and Combating Corruption; (cc) the 2003 United Nations Convention against Corruption; (dd) the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; (ee) the 2005 Council of Europe Convention on the Prevention of Terrorism; (ff) the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; (gg) the 2007 Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism; (hh) 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; and (ii) the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.

²⁹ Separate Opinion of Judge Yusuf in *Belgium v. Senegal*, paras. 19–22. See also Secretariat survey (2010), para. 126. Cf. also Belgium’s commentary submitted to the International Law Commission in 2009, where Belgium identified two types of treaties: (a) treaties which contain an *aut dedere aut judicare* clause with the obligation to prosecute conditional on refusal of a request for extradition of the alleged perpetrator of an offence; and (b) treaties which contain a *judicare vel dedere* clause with

comprises clauses which impose an obligation to extradite, and in which submission to prosecution becomes an obligation only after the refusal of extradition. These conventions are structured in such a way that gives priority to extradition to the State in whose territory the crime is committed. The majority of these conventions do not impose any general obligation on States parties to submit to prosecution the alleged offender, and such submission by the State on whose territory the alleged offender is present becomes an obligation only if a request for extradition has been refused, or some factors such as nationality of the alleged offender exist. Examples of this first category are article 9, paragraph 22 of the 1929 International Convention for the Suppression of Counterfeiting Currency, article 15 of the African Union Convention on Preventing and Combating Corruption, and article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

The second category of international conventions comprises clauses which impose an obligation to submit to prosecution, with extradition being an available option, as well as clauses which impose an obligation to submit to prosecution, with extradition becoming an obligation if the State fails to do so. Such clauses in this second category can be found in, for example, the relevant provisions of the four Geneva Conventions of 1949, article 7, paragraph 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and article 7, paragraph 1 of the Convention against Torture.

(18) In light of the above, the Working Group considers that when drafting treaties States can decide for themselves as to which conventional formula on the obligation to extradite or prosecute best suits their objective in a particular circumstance. Owing to the great diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute.³⁰

(19) Although the Working Group finds that the scope of the obligation to extradite or prosecute under the relevant conventions should be analyzed on a case-by-case basis, it acknowledges that there may be some general trends and common features in the more recent conventions containing the obligation to extradite or prosecute. One of the most relevant trends appears to be the “Hague formula” that serves “as a model for most of the contemporary conventions for the suppression of specific offences”.³¹ Of the conventions drafted on or after 1970, approximately, three-quarters follow the “Hague formula”. In these post-1970 conventions, there is a common trend that the custodial State shall, without

the obligation on States to exercise universal jurisdiction over perpetrators of the offences under the treaties, without making this obligation conditional on refusal to honour a prior extradition request (A/CN.4/612, para. 15), quoted by Special Rapporteur Galicki in his fourth report (A/CN.4/648, para. 85 and fn. 56).

³⁰ As the Secretariat’s Survey (2010) concludes (A/CN.4/630, pp. 77–78):

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

³¹ *Ibid.*, para. 91.

exception, submit the case of the alleged offender to a competent authority if it does not extradite. This obligation is supplemented by additional provisions that require States parties: (a) to criminalize the relevant offence under its domestic laws; (b) to establish jurisdiction over the offence when there is a link to the crime or when the alleged offender is present on their territory and is not extradited; (c) to make provisions to ensure the alleged offender is under custody and there is a preliminary enquiry; and (d) to treat the offence as extraditable.³² In particular, under the prosecution limb of the obligation, the conventions only emphasize that the case be submitted to a competent authority for the purpose of prosecution. To a lesser extent, there is also a trend of stipulating that, absent prosecution by the custodial State, the alleged offender must be extradited *without exception whatsoever*.

(20) The Working Group observes that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity,³³ war crimes other than grave breaches, and war crimes in non-international armed conflict.³⁴ In relation to genocide, the international cooperation regime could be strengthened beyond the rudimentary regime under the Convention for the Prevention and Punishment of the Crime of Genocide of 1948. As

³² *Ibid.*, para. 109.

³³ The 2006 International Convention for the Protection of All Persons from Enforced Disappearance follows the Hague formula, and refers to the “extreme seriousness” of the offence, which it qualifies, when widespread or systematic, as a crime against humanity. However, outside of this, there appears to be a lack of international conventions with the obligation to extradite or prosecute in relation to crimes against humanity.

³⁴ The underlying principle of the four Geneva Conventions of 1949 is the establishment of universal jurisdiction over grave breaches of the Conventions. Each Convention contains an article describing what acts constitute grave breaches that follows immediately after the extradite-or-prosecute provision.

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

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

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

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

explained by the International Court of Justice in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, article VI of the Genocide Convention only obligates Contracting Parties to institute and exercise territorial criminal jurisdiction as well as to cooperate with an “international penal tribunal” under certain circumstances.³⁵

4. Implementation of the obligation to extradite or prosecute

(21) *The Hague formula.* The Working Group views the Judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* to be helpful in elucidating some aspects relevant to the implementation of the obligation to extradite or prosecute. The Judgment confines itself to an analysis of the mechanism to combat impunity under the Convention against Torture. In particular, the Judgment focuses on the relationship between the different articles on the establishment of jurisdiction (article 5), the obligation to engage in a preliminary inquiry (article 6), and the obligation to prosecute or extradite (article 7).³⁶ While the Court’s reasoning relates to the specific implementation and application of issues surrounding that Convention, since the relevant prosecute-or-extradite provisions of the Convention against Torture are modeled upon those of the “Hague formula”, the Court’s ruling may also help to elucidate the meaning of the prosecute-or-extradite regime under the 1970 Hague Convention and other conventions which have followed the same formula.³⁷ As the Court has also held that the prohibition of torture is a peremptory norm (*jus cogens*),³⁸ the prosecute-or-extradite formula under the Convention against Torture could serve as a model for new prosecute-or-extradite regimes governing prohibitions covered by peremptory norms (*jus cogens*), such as genocide, crimes against humanity, and war serious crimes.

(22) The Court determined that States parties to the Convention against Torture have obligations to criminalize torture, establish their jurisdiction over the crime of torture so as to equip themselves with the necessary legal tool to prosecute this offence, and make an inquiry into the facts immediately from the time the suspect is present in their respective territories. The Court declares: “These obligations, taken as a whole, might be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven”.³⁹ The obligation under article

³⁵ *I.C.J. Reports 2007*, p. 43, paras. 442, 449. Art. VI reads: “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” The Court at para. 442 did not exclude other bases when it observed that “Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.”

³⁶ *Belgium v. Senegal*, paras. 71–121.

³⁷ The Court notes that art. 7 (1) of the Convention against Torture is based on a similar provision contained in the 1970 Hague Convention (*ibid.*, para. 90). As Judge Donoghue puts it: “The dispositive paragraphs of today’s Judgment bind only the Parties. Nonetheless, the Court’s interpretation of a multilateral treaty (or of customary international law) can have implications for other States. The far-reaching nature of the legal issues presented by this case is revealed by the number of questions posed by Members of the Court during oral proceedings.” (Declaration of Judge Donoghue in *Belgium v. Senegal*, para. 21.)

³⁸ *Belgium v. Senegal*, para. 99.

³⁹ *Ibid.*, para. 91. See also paras. 74–75, 78, 94.

7, paragraph 1, “to submit the case to the competent authorities for the purpose of prosecution”, which the Court calls the “obligation to prosecute”, arises regardless of the existence of a prior request for the extradition of the suspect. However, national authorities are left to decide whether or not to initiate proceedings in light of the evidence before them and the relevant rules of criminal procedure.⁴⁰ In particular, the Court rules that “[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State”.⁴¹ The Court also notes that both the 1970 Hague Convention and the Convention against Torture emphasize “that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned”.⁴²

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

(24) *Establishment of the necessary jurisdiction.* Establishing jurisdiction is “a logical prior step” to the implementation of an obligation to extradite or prosecute an alleged offender present in the territory of a State.⁴³ For the purposes of the present topic, when the crime was allegedly committed abroad with no nexus to the forum State, the obligation to extradite or prosecute would necessarily reflect an exercise of universal jurisdiction,⁴⁴ which is “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events”⁴⁵ where neither the victims nor alleged offenders are nationals of the forum State and no harm was allegedly caused to the forum State’s own national interests. However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other bases. Thus, if a State can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfillment of the obligation to extradite or prosecute.

Universal jurisdiction is a crucial component for prosecuting alleged perpetrators of crimes of international concern, particularly when the alleged perpetrator is not prosecuted in the

⁴⁰ *Ibid.*, paras. 90, 94.

⁴¹ *Ibid.*, para. 95.

⁴² Art. 7, para. 2 of the Convention against Torture and art. 7 of the Hague Convention of 1970, *ibid.* para. 90.

⁴³ Report of the AU-EU Technical *ad hoc* Expert Group on the Principle of Universal Jurisdiction (8672/1/09/ Rev.1), annex, para. 11. The International Court of Justice in *Belgium v. Senegal* holds that the performance by States parties to the Convention against Torture of their obligation to establish universal jurisdiction of their courts is a necessary condition for enabling a preliminary inquiry and for submitting the case to their competent authorities for the purpose of prosecution (*Belgium v. Senegal*, Judgment, para. 74).

⁴⁴ According to one author, “The principle of *aut dedere aut judicare* overlaps with universal jurisdiction when a State has no other nexus to the alleged crime or to the suspect other than the mere presence of the person within its territory.” (Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, 2005), p. 122).

⁴⁵ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* I.C.J. Reports 2002, p. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 42.

territory where the crime was committed.⁴⁶ Several international instruments, such as the very widely ratified four Geneva Conventions of 1949 and the Convention against Torture, require the exercise of universal jurisdiction over the offences covered by these instruments, or, alternatively to extradite alleged offenders to another State for the purpose of prosecution.

(25) *Delay in enacting legislation.* According to the Court in *Senegal v. Belgium*, delay in enacting necessary legislation in order to prosecute suspects adversely affects the State party's implementation of the obligations to conduct a preliminary inquiry and to submit the case to its competent authorities for the purposes of prosecution.⁴⁷ The State's obligation extends beyond merely enacting national legislation. The State must also actually exercise its jurisdiction over a suspect, starting by establishing the facts.⁴⁸

(26) *Obligation to investigate.* According to the Court in *Senegal v. Belgium*, the obligation to investigate consists of several elements.

- As a general rule, the obligation to investigate must be interpreted in light of the object and purpose of the applicable treaty, which is to make more effective the fight against impunity.⁴⁹
- The obligation is intended to corroborate the suspicions regarding the person in question.⁵⁰ The starting point is the establishment of the relevant facts, which is an essential stage in the process of the fight against impunity.⁵¹
- As soon as the authorities have reason to suspect that a person present in their territory may be responsible for acts subject to the obligation to extradite or prosecute, they must investigate. The preliminary inquiry must be immediately initiated. This point is reached, at the latest, when the first complaint is filed against the person,⁵² at which stage the establishment of the facts becomes imperative.⁵³
- However, simply questioning the suspect in order to establish his/her identity and inform him/her of the charges cannot be regarded as performance of the obligation to conduct a preliminary inquiry.⁵⁴
- The inquiry is to be conducted by the authorities who have the task of drawing up a case file and collecting facts and evidence (for example, documents and witness statements relating to the events at issue and to the suspect's possible involvement). These authorities are those of the State where the alleged crime was committed or of any other State where complaints have been filed in relation to the case. In order to fulfill its obligation to conduct a preliminary inquiry, the State in whose territory the

⁴⁶ It should be recalled that the "Obligation to extradite or prosecute" in art. 9 of the 1996 Draft Code is closely related to the "Establishment of jurisdiction" under art. 8 of the Draft Code, which requires each State party thereto to take such measures as may be necessary to establish its jurisdiction over genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes, irrespective of where or by whom those crimes were committed. The Commission's commentary to art. 8 makes it clear that universal jurisdiction is envisaged (*Official Record of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, para. 7).

⁴⁷ *Belgium v. Senegal*, paras. 76, 77.

⁴⁸ *Ibid.*, para. 84.

⁴⁹ *Ibid.*, para. 86.

⁵⁰ *Ibid.*, para. 83.

⁵¹ *Ibid.*, paras. 85–86.

⁵² *Ibid.*, para. 88.

⁵³ *Ibid.*, para. 86.

⁵⁴ *Ibid.*, para. 85.

suspect is present should seek cooperation of the authorities of the aforementioned States.⁵⁵

- An inquiry taking place on the basis of universal jurisdiction must be conducted according to the same standards in terms of evidence as when the State has jurisdiction by virtue of a link with the case in question.⁵⁶

(27) *Obligation to prosecute.* According to the Court in *Senegal v. Belgium*, the obligation to prosecute consists of certain elements.

- The obligation to prosecute is actually an obligation to submit the case to the prosecuting authorities; it does not involve an obligation to initiate a prosecution. Indeed, in light of the evidence, fulfillment of the obligation may or may not result in the institution of proceedings.⁵⁷ The competent authorities decide whether to initiate proceedings, in the same manner as they would for any alleged offence of a serious nature under the law of the State concerned.⁵⁸
- Proceedings relating to the implementation of the obligation to prosecute should be undertaken without delay, as soon as possible, in particular once the first complaint has been filed against the suspect.⁵⁹
- The timeliness of the prosecution must be such that it does not lead to injustice; hence, necessary actions must be undertaken within a reasonable time limit.⁶⁰

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

- Extradition may only be to a State that has jurisdiction in some capacity to prosecute and try the alleged offender pursuant to an international legal obligation binding on the State in whose territory the person is present.⁶¹
- Fulfilling the obligation to extradite cannot be substituted by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State.⁶² Formal extradition requests entail important human rights protections which may be absent from informal forms of dispatching the suspect to another State, such as extraordinary renditions. Under extradition law of most, if not all, States, the

⁵⁵ *Ibid.*, para. 83.

⁵⁶ *Ibid.*, para. 84.

⁵⁷ Cf. also *Chili Komitee Nederland v. Pinochet*, Ct. of Appeal of Amsterdam, 4 Jan. 1995 *Netherlands Yearbook of International Law*, vol. 28 (1997) pp. 363–365, in which the Court of Appeal held that the Dutch Public Prosecutor did not err in refusing to prosecute former Chilean President Pinochet while visiting Amsterdam because Pinochet might be entitled to immunity from prosecution and any necessary evidence to substantiate his prosecution would be in Chile with which the Netherlands had no cooperative arrangements regarding criminal proceedings. See Kimberley N. Trapp, *State Responsibility for International Terrorism* (Oxford: Oxford University Press 2011), p. 88, fn. 132.

⁵⁸ *Belgium v. Senegal*, paras. 90, 94.

⁵⁹ *Ibid.*, paras. 115, 117.

⁶⁰ *Ibid.*, paras. 114, 115. Cf. Separate Opinion of Judge Çancado Trindade in that case at paras. 148, 151–153; Dissenting Opinion of Judge *ad hoc* Sur in the same case at para. 50; and Dissenting Opinion of Judge Xue, at para. 28.

⁶¹ *Belgium v. Senegal*, para. 120.

⁶² Cf. Draft article 13 of the Draft articles on the Expulsion of aliens adopted by the Commission on first Redding in 2012, see *Official Records of the General Assembly, Sixty-seventh session, Supplement 10* (A/67/10), chap. IV and European Court of Human Rights, *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, paras. 52–60, where the European Court of Human Rights has held that extradition, disguised as deportation in order to circumvent the requirements of extradition, is illegal and incompatible with the right to security of person guaranteed under art. 5 of the European Convention on Human Rights.

necessary requirements to be satisfied include double criminality, *ne bis in idem*, *nullem crimen sine lege*, speciality, and non-extradition of the suspect to stand trial on the grounds of ethnic origin, religion, nationality or political views.

(29) *Compliance with object and purpose.* The steps taken by a State must be interpreted be in light of the object and purpose of the relevant international instrument or other sources of international obligation binding on that State, rendering the fight against impunity more effective.⁶³ It is also worth recalling that, by virtue of article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.⁶⁴ Besides, the steps taken must be in accordance with the rule of law.

(30) In cases of serious crimes of international concern, the purpose of the obligation to extradite or prosecute is to prevent alleged perpetrators from going unpunished by ensuring that they cannot find refuge in any State.⁶⁵

(31) *Temporal scope of the obligation.* The obligation to extradite or prosecute under a treaty applies only to facts having occurred after its the entry into force of the said treaty for the State concerned, “unless a different intention appears from the treaty or is otherwise established”.⁶⁶ After a State becomes party to a treaty containing the obligation to extradite or prosecute, it is entitled, with effect from the date of its becoming party to the treaty, to request another State party’s compliance with the obligation to extradite or prosecute.⁶⁷ Thus, the obligation to criminalize and establish necessary jurisdiction over acts proscribed by a treaty containing the obligation to extradite or prosecute is to be implemented as soon as the State is bound by that treaty.⁶⁸ However, nothing prevents the State from investigating or prosecuting acts committed before the entry into force of the treaty for that State.⁶⁹

(32) *Consequences of non-compliance with the obligation to extradite or prosecute.* In *Belgium v. Senegal*, the Court found that the violation of an international obligation under the Convention against Torture is a wrongful act engaging the responsibility of the State.⁷⁰ As long as all measures necessary for the implementation of the obligation have not been taken, the State remains in breach of its obligation.⁷¹ The Commission’s articles on

⁶³ See the reasoning in *Belgium v. Senegal*, paras. 85–86. Therefore, the Court rules that financial difficulties do not justify Senegal’s failure to comply with the obligations under the Convention against Torture (*ibid.*, para. 112). Likewise, seeking guidance from the African Union does not justify Senegal’s delay in complying with its obligation under the Convention (*ibid.*).

⁶⁴ *Ibid.*, para. 113.

⁶⁵ *Belgium v. Senegal*, para. 120. As also explained by Judge Cançado Trindade,

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

⁶⁶ *Belgium v. Senegal*, paras. 100–102, citing art. 28 of the Vienna Convention on the Law of Treaties, which reflects customary international law.

⁶⁷ *Ibid.*, paras. 103–105.

⁶⁸ *Ibid.*, para. 75.

⁶⁹ *Ibid.*, paras. 102, 105.

⁷⁰ *Ibid.*, para. 95.

⁷¹ *Ibid.*, para. 117.

responsibility of States for internationally wrongful acts stipulate that the commission of an internationally wrongful act attributable to a State involves legal consequences, including cessation and non-repetition of the act (article 30), reparation (articles 31, 34–39) and countermeasures (articles 49–54).

(33) *Relationship between the obligation and the “third alternative”.* With the establishment of the International Criminal Court and various *ad hoc* international criminal tribunals, there is now the possibility that a State faced with an obligation to extradite or prosecute an accused person might have recourse to a third alternative – that of surrendering the suspect to a competent international criminal tribunal.⁷² This third alternative is stipulated in article 11, paragraph 1 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.⁷³

(34) In her dissenting opinion in *Belgium v. Senegal*, Judge Xue opines that had Senegal surrendered the alleged offender to an international tribunal constituted by the African Union to try him, they would not have breached their obligation to prosecute under article 7 of the Convention against Torture, because such a tribunal would have been created to fulfill the purpose of the Convention, and this is not prohibited by the Convention itself or by State practice.⁷⁴ Of course, if “a different intention appears from the treaty or is otherwise established”⁷⁵ so as not to permit the surrender of an alleged offender to an international criminal tribunal, such surrender would not discharge the obligation of the States parties to the treaty to extradite or prosecute the person under their respective domestic legal systems.

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

(36) *Additional observation.* A State might also wish to fulfill both parts of the obligation to extradite or prosecute, for example, by prosecuting, trying and sentencing an offender and then extraditing or surrendering the offender to another State for the purpose of enforcing the judgment.⁷⁶

⁷² Art. 9 of the 1996 Draft Code of Crimes against the Peace of Mankind stipulates that the obligation to extradite or prosecute under that article is “[w]ithout prejudice to the jurisdiction of an international criminal court”.

⁷³ “The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.”

⁷⁴ Dissenting Opinion of Judge Xue, at para. 42 (dissenting on other points).

⁷⁵ Article 28 of the Vienna Convention on the Law of Treaties.

⁷⁶ This possibility was raised by Special Rapporteur Galicki in his preliminary report (A/CN.4/571), paras. 49–50.