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Bases for discussion in the Working Group on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)"

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I. Introduction

1. During the sixty-first session of the Commission, in 2009, the Working Group on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" proposed a general framework for the Commission's consideration of the topic consisting of an outline setting out, as comprehensively as possible, the questions to be considered, without assigning any order of priority.[1] As explained in the Commission's report, "the general framework should not be considered as providing a definitive answer as to how general the Commission's approach should be in its consideration of the topic",[2] and it would be for the Special Rapporteur to determine the exact order of the questions to be considered, as well as the structure of, and linkage between, his planned draft articles on the various aspects of the topic.[3]

[1] See Report of the International Law Commission, Sixty-first session (4 May-5 June and 6 July-7 August 2009), *Official Records of the General Assembly, Sixty-fourth session, Supplement No. 10* (A/64/10), paras. 202 and 204.
[2] *Ibid.*, para. 202.
[3] *Ibid.*, para. 203.

2. At the current session, the Secretariat has submitted to the Commission a Study containing an extensive survey of multilateral conventions which may be of relevance for the Commission's work on this topic (hereinafter "the Study").[4] The Study has identified as many as sixty-one multilateral instruments that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. It proposes a description and typology of the relevant instruments in light of these 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 the reviewed provisions and their evolution.

3. The Study may constitute a suitable basis for the consideration of the topic by the Working Group at the present session. In light of the conventional practice in the field, as it stems from the description contained in the Study, the Working Group could continue its debate on the issues to be addressed in this context, provide some tentative answers to some of the questions raised, and determine the way forward for the consideration of the topic by the Commission.

II. Issues to be addressed by the Working Group

4. The present document contains some observations and suggestions as to the issues that the Working Group may wish to address at the current session, based on the general framework proposed last year.

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

5. The examination of multilateral conventions in the field reveals that, as pointed out by the Working Group at the last session,[5] those clauses that may be considered as

[4] *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*)": Study of the Secretariat*.

[5] See paragraph (a)(i) of the proposed general framework for the Commission's consideration of the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*), prepared by the Working Group, Report of the International Law Commission, Sixty-first session (4 May-5 June and 6 July-7 August 2009),

containing obligations in relation to extradition and prosecution are linked to the objective of imposing a duty to cooperate in the fight against impunity for certain crimes.[6] The Study evidences, however, that there is a great diversity in the formulation, content and scope of these obligations in conventional practice. This may affect how the Commission should consider the issues whether and to what extent the obligation to extradite or prosecute has a basis in customary international law and whether it is inextricably linked with certain particular "customary crimes".[7]

6. The Study proposes a typology of relevant treaty provisions by classifying the conventions reviewed into the following four categories:

(a) The 1929 Convention for the Suppression of Counterfeiting Currency and other conventions which have followed the same model;
(b) The 1949 Geneva Conventions and the 1977 Additional Protocol I;
(c) Regional conventions on extradition; and
(d) The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions which have followed the same model.

7. This classification, which combines chronological and substantive criteria, is successful in highlighting the differences and similarities between those provisions, as well as their evolution, as contemplated by the Working Group.[8] As pointed out in the Study, however, other classifications could be considered (for instance, one that would distinguish multilateral conventions on extradition and conventions concerning specific offences of international concern),[9] which the Commission may also want to envisage in order to address certain aspects of the present topic.

Official Records of the General Assembly, Sixty-fourth session, Supplement No. 10 (A/64/10), para. 204 (hereinafter "General Framework).
[6] See Study, para. 150.
[7] Paragraph (a)(iii) and (iv) of the General Framework.
[8] Paragraph (a)(ii) of the General Framework.
[9] Study, para. 152.

8. It is suggested that the Working Group determine, in light of the survey of multilateral conventions contained in the Study, whether it is advisable for the Commission to adopt a general approach to the topic or whether it should focus its attention on certain specific categories of obligations (e.g., those found in conventions on terrorism). In this regard, the Working Group should consider which typology of treaty provisions better serves the objectives pursued by the Commission in its consideration of the present topic.

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

9. The Study confirms that clauses of the kind considered by the Commission under the present topic are included in multilateral conventions dealing with a wide range of crimes, such as counterfeiting, terrorism, traffic in illicit drugs and psychotropic substances, traffic in persons, war crimes, torture, mercenaries, crimes against the safety of United Nations personnel, transnational crime, corruption, forced disappearance, etc. The Study also reveals, however, that in conventional practice the formulation and content of the obligation may vary from one category of crimes to the other and, in some cases at least, from one convention to the other dealing with the same category of crimes. As a consequence, the Commission could identify preliminarily which categories of crimes are relevant for the purpose of addressing the issues relating to the material scope of the obligation highlighted in the general framework.[10]

10. It is suggested that the Working Group determine, in light of the conventional practice described in the Study, whether it is advisable to examine the material scope of the obligation to extradite or prosecute on the basis of a classification of the crimes concerned. The Working Group could consider, in particular, whether the Commission should focus its attention on certain categories of crimes (for instance, whether the obligation to extradite or prosecute applicable to grave breaches under the Geneva Conventions extends to other crimes under international law, such as other war crimes, crimes against humanity or genocide; or whether the obligation included in many

[10] See paragraph (b) of the General Framework.

conventions on terrorism extends to other offences of terrorism not covered in those conventions or to other crimes of international concern).

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

11. The survey of multilateral conventions in the field provides valuable elements for the Commission to assess, at least in conventional practice, the meaning and scope of each of the two elements of the obligation to extradite or prosecute, as well as the relationship between these two elements, including those issues that were highlighted in the general framework.[11]

12. As regards, in particular, the question whether one of the elements has priority over the other, and the power of free appreciation of the requested State in choosing whether to extradite or prosecute, the Study reveals that, while some treaty provisions appear to impose an obligation to prosecute as soon as the offender is known to be present in the territory of the State, which the latter may be liberated from by granting extradition, in some other provisions the obligation to prosecute is only triggered by the refusal to surrender the alleged offender following a request for extradition.[12] The interpretation of the relevant provisions under this aspect raises however some difficulties, as illustrated by the question whether the clause contained in the 1970 Hague Convention (and similar provisions included in other conventions) should be read as triggering the obligation as soon as it is ascertained that the alleged offender is present in the territory of the State, independently of a request for extradition.[13] The question also arises as to what are the factors that determine the content of the obligation to extradite or prosecute, such as the nature of the convention, the degree of cooperation in judicial matters, the seriousness of the crime concerned, etc.

13. It is suggested that the Working Group, taking into account the conventional practice as described in the Study, consider the issue of the relationship between the two

[11] See paragraph (c) of the General Framework.
[12] Study, para. 126.
[13] See Study, paras. 130-131.

elements of the obligation to extradite or prosecute. The Working Group could determine, for example, whether, in light of the case-law of the Committee against Torture,[14] *the various provisions contained in contemporary conventions should be interpreted as imposing an obligation to prosecute as soon as the presence of the alleged offender in the territory of the State is ascertained, and whether a similar obligation exists in customary international law for one or more categories of crimes.*

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

14. The Study contains some elements that may contribute to a further discussion on the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction.[15] It is apparent from the preparatory works reviewed that earlier conventions had been cautious not to infringe on fundamental principles of the States' internal legal systems, in particular with respect to their attitude on the general issue of criminal jurisdiction as a question of international law and the exercise of extraterritorial jurisdiction. As a result, the mechanism for the prosecution of offenders in such conventions appeared to have various loopholes which limited the scope of the obligation to extradite or prosecute.[16] This issue was addressed in the 1970 Hague Convention, and other subsequent conventions, which establish a double-layered system of jurisdiction, under which the obligation incumbent upon States having a connection with the crime to establish their jurisdiction is complemented with the further obligation of each State to "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" to any of the above-mentioned States.[17] In other words, these conventions, as well as the Geneva Conventions and Additional Protocol I, envisage an obligation to exercise universal jurisdiction at least in some circumstances.

[14] *Ibid*., para. 130.
[15] See paragraph (d)(i) of the General Framework.
[16] See Study, paras. 17-18, 22, 24, 41-42 and 144.
[17] See Study, paras. 103-104, 113 and 144.

15. The preparatory works of the various conventions reviewed in the Study also demonstrate that the principle of non-extradition of nationals, enshrined in various legislations and constitutions, played a central role in leading governments to devise a mechanism for the prosecution of offenders that would combine the options of prosecution by the State where the individual is found or extradition to another State claiming a special connection with the crime.

16. The Study further shows that the question of the relationship of the present topic with general principles of criminal law (*nullum crimen sine lege, nulla poena sine lege, non bis in idem*) and the possible problem arising from conflicting principles or constitutional limitations were very present in international negotiations in the field and have had an effect on the formulation of the relevant provisions.

17. It is suggested that the Working Group examine further the extent to which the obligation to extradite or prosecute is linked to the principle of universal jurisdiction, at least for certain categories of crimes, and in particular whether the duty of the State to establish its jurisdiction over a certain crime when the alleged offender is present in its territory is a necessary element to ensure the proper implementation of the obligation to extradite or prosecute. The Working Group may also wish to consider to what extent the relationship of the present topic with other principles, in particular general principles of criminal law, needs to be addressed by the Commission.

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

18. As already noted above, the issue of the conditions for the triggering of the obligation to extradite or prosecute is very present in the negotiations of the conventions reviewed in the Study, and is closely linked to the question of the relationship between the two elements of the obligation. In particular, it appears that, while some conventions (for example, the Counterfeiting Convention and, for obvious reasons, conventions on extradition) explicitly subject the obligation to prosecute to the refusal of a request for

extradition,[18] some other conventions impose such an obligation as soon as the presence of the alleged offender in the territory of the State is ascertained.[19] In this regard, due note should be taken of the case-law of the Committee against Torture, according to which the relevant obligation under the 1984 Torture Convention to prosecute an individual "does not depend on the prior existence of a request for his extradition".[20] As also reported in the Study, issues such as the standard of proof that should be satisfied by the request for extradition and the existence of circumstances that might exclude the operation of the obligation have also been addressed in conventional practice.[21]

19. *It is suggested that the Working Group should consider the issue whether the obligation to extradite or prosecute is triggered by the presence of the alleged offender in the territory of the State or by a previous request for extradition being refused in connection with the question of the relationship between the two elements of the obligation (see paragraph 13 above). The Working Group could also explore, in light of the conventional practice in the field, to what extent other issues relating to the request for extradition (standard of proof, political nature of the offence, immunities, etc.) have an impact on the operation of the obligation.*

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

20. The survey of conventional practice undertaken in the Study evidences that most treaties contain, to a greater or lesser extent, specific provisions regarding the implementation of the obligation. In particular, it appears that the scope of the obligation of the State, if it does not extradite, to take action for the prosecution of the offender has been a recurrent feature in negotiations of such conventions and has determined the formulation of the relevant provisions. The main issue in this respect seems to be whether the submission by the executive of the case to competent judicial authorities would

[18] Study, paras. 133-135.
[19] Study, paras. 127-131.
[20] *Decisions of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Thirty-sixth session, Communication No. 181/2001: Senegal, 19 May 2006 (CAT/C/36/D/181/2001),* para. 9.7, reproduced in Study, para. 130.
[21] See, for example, Study, paras. 141 and 148.

necessarily result in the prosecution and punishment of the offender, i.e., whether these authorities enjoy any prosecutorial discretion in this regard.[22] The conventions reviewed sometimes also contain detailed regulations of specific aspects of extradition and judicial proceedings (e.g., how to deal with multiple requests for extradition, procedural guarantees for the individual, etc.).[23] With respect to the control of the implementation of the obligation, it is noteworthy that some conventions impose upon the requested State a duty to report the final outcome of the proceedings to the requesting State.[24]

21. It is suggested that the Working Group examines, in particular, in light of conventional practice, the scope of the obligation of the requested State to take proceedings against the alleged offender, including the question of prosecutorial discretion enjoyed by national judicial authorities in this respect.

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

22. The Study reveals that the possibility for a State to discharge its obligation under an *aut dedere aut judicare* provision by surrendering an alleged offender to a competent international criminal tribunal (the so-called "third alternative") has been contemplated in certain international instruments. The most far-reaching example of such a mechanism would be the aborted 1937 Convention for the Prevention and Punishment of Terrorism, in which case an international criminal court were to be established with jurisdiction over the crimes defined in the Convention.[25] Nevertheless, the Study also discloses that the idea of handing over an alleged offender to an international criminal court is found in at least one more recent treaty, namely the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[26] While conventional practice in this area is scarce, one may argue, based on the language of the provisions of these two examples,

[22] Study, paras. 145 to 147.
[23] *Ibid*., paras 142 and 148.
[24] *Ibid*., para. 116 *in fine*.
[25] *Ibid*., para. 40.
[26] *Ibid*., paras. 113 and 116 (third indent).

that States taking advantage of such a mechanism for the punishment of offenders are deemed to have fulfilled their obligations thereunder.

23. It is suggested that the Working Group determines, in light of the scarce conventional practice, whether it would be desirable to examine, if, and to what extent, a State that surrenders an alleged offender to a competent international criminal tribunal has fulfilled its obligation to extradite or prosecute.