

**THE OBLIGATION *AUT DEDERE AUT JUDICARE* ('EXTRADITE OR PROSECUTE')
IN INTERNATIONAL LAW: SCOPE, CONTENT, SOURCES AND APPLICABILITY
OF THE OBLIGATION 'EXTRADITE OR PROSECUTE'**

by

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**A thesis submitted to the University of Birmingham for the degree of DOCTOR OF
PHILOSOPHY (Ph.D.)**

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ABSTRACT

The thesis focuses on the scope, content, sources and applicability of the obligation *aut dedere aut judicare* pertaining to certain international crimes such as genocide, war crimes, crimes against humanity, the prohibition of torture, drug trafficking, hijacking of civil aviation and terrorist bombing and financing of terrorism in international law. The general framework of the thesis focuses on the legal base of the obligation *aut dedere aut judicare*, the scope and content of the obligation, the triggering mechanisms of the duty, and state responsibility for breaches of the obligation.

The relevant core crimes and transnational crimes are examined in relation to the obligation, based on and formulated in various multilateral, widely-ratified conventions and state practice. State practice and *opinio juris* indicate that a customary *aut dedere aut judicare* duty has formed or crystallized for certain international crimes such as the prohibition of torture, genocide, grave breaches of international humanitarian law, including war crimes, and crimes against humanity. As regards the offences against the safety of civil aviation and hijacking, terrorism-related crimes, international drug trafficking, and crimes against UN personnel, the evidence is mixed and it is more appropriate to conclude that an emerging custom of the obligation 'extradite-or-prosecute' for these crimes is forming.

DEDICATION

To my parents and my brother to whom I owe everything.

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This doctoral thesis reflects my interest in public international law and international criminal law that I have developed during my undergraduate and postgraduate studies at DePauw University, Georgetown University, Leiden University and Birmingham Law School, and professional experience at the ICTY.

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INTRODUCTION

The scope of the current thesis focuses on the content and nature of the obligation *aut dedere aut judicare* pertaining to certain international crimes such as genocide, war crimes, crimes against humanity, the prohibition of torture, drug trafficking, hijacking of civil aviation and crimes related to terrorist bombing and financing of terrorism in international law. The crux of the research addresses practical approaches to the notion of impunity and how impunity could be minimized through international cooperation in the framework of a strict respect and full applicability of the relevant international standards in the processes of prosecution and extradition. The main research questions that the thesis seeks to answer are: what are the origin and content of the obligation *aut dedere aut judicare* in its treaty form and to what crimes it pertains; what are the exceptions to the obligation pertaining to extradition proceedings and how does the obligation interact with human rights law; is there a customary *aut dedere aut judicare* obligation to a set of international crimes; and what is the applicability of the state responsibility regime to violations of the obligation ‘extradite or prosecute’?

The general framework of the thesis focuses on the legal base of the obligation *aut dedere aut judicare*, the scope and content of the obligation, and the triggering mechanisms of the duty. Additionally, an examination of the conditions for custom formation is provided. The work examines the notion of harm to the global or local communities in terms of international criminal activities which trigger certain procedural mechanisms on international and supranational levels such as extradition proceedings or obligation to prosecute international crimes in domestic judicial systems. The thesis also provides detailed analysis of the conditions for state responsibility in cases of violation of the *aut dedere aut judicare* principle.

The thesis begins with an exploration of the current normative status of the international society in its relation to and influence on the obligation *aut dedere aut judicare*, and an attempt to provide some of the core principles and bases of the obligation, namely upholding individual responsibility for international crimes and the fight against impunity for certain international crimes.

The opening chapter explores the oscillation of the international society between peace, war, justice, accountability and impunity. The vacillating nature and undertones of individual criminal responsibility, recourse to judicial proceedings and eradication of impunity through State's obligation to extradite or prosecute is captured through an analysis of the existing relation between perpetration of international crimes and the legal order of humanity. The chapter does not attempt to propose a *civitas maxima* as a normative category but rather aims at offering an intellectual rationalization of the purpose of the *aut dedere aut judicare* principle. The duty has existed and interacted in certain legal frameworks, dating back to the writings of Vitoria onwards, and it is important to realize how the current form of the obligation has emerged and interacted in the international society through the ages.

Chapter 2 examines the substantive elements and content of the obligation *aut dedere aut judicare*. The Chapter begins with a proposal for the definition and meaning of 'prosecution' for the relevant international crimes. The duty to prosecute and the subsidiary obligation to extradite are examined through the lens of complementarity in order to reflect the nature and interaction of both prongs of the *aut dedere aut judicare* rule. Through the analogous application of the complementarity framework, it is established that if the prosecution obligations fail to be satisfied by the requested State, the same State has recourse to extradite the relator to another

State willing and able to prosecute the individual. Hence, the meaning and applicability of the prosecution part of the obligation are analysed in its relation to the concepts of genuine investigation, unwillingness, shielding, unjustified delay, lack of independence or impartiality of the State authorities and organs involved in the process of submitting the case for the purpose of prosecution, inability to prosecute due to total and substantive collapse of the judicial system.

The chapter also looks at the inherent connection between effective extradition and the requirement for criminalization of the relevant offences, the conditions for preliminary inquiries, universal jurisdiction, and criminal cooperation on inter-state level. The relation between the two prongs of extradition and prosecution in the *aut dedere aut judicare* obligation is analysed. A crime-based framework for triggering the obligation is proposed.

Two main types of the obligation may be identified depending on the crime triggering the duty: first, an obligation with an emphasis on the duty to prosecute for core crimes of international law such as genocide, torture, grave violations of international humanitarian law and crimes against humanity; and, second, an ‘either-or’ disjunctive obligation with no exact preference for extradition or prosecution for transnational crimes such as hijacking of the civil aviation and terrorism-related activities. Correspondingly, a classification of core crimes and transnational crimes is provided and analysed.

The work continues with analysing the term ‘extradition’ in international law. The definition and scope of ‘extradition’ is defined as the surrender of an individual suspected, accused or convicted of a crime by the State within whose territory or under whose effective control the individual is found to a State under whose laws the individual is alleged to have committed or have been convicted of the crime. The scope and applicability of extradition as part of the obligation *aut*

dedere aut judicare is derived from a thorough examination of the clause contained in various multilateral conventions relating to the crimes of genocide, torture, war crimes, crimes against humanity, terrorism-related crimes, hostage taking and crimes against the civil aviation.

In order to fully evaluate the efficacy of the application of the extradition as a legal mechanism in international law, an examination of the exceptions to extradition is necessary as the pertinent issue is how the trifocal balance is achieved between surrendering the individual, protecting the human rights of the subject of extradition proceedings, and ensuring that efficient criminal law enforcement against alleged perpetrators of certain international crimes is achieved. If the exceptions to extradition are widely construed, the perpetrator of an international offence would not be surrendered to a jurisdiction willing and able to prosecute, and there is a significant chance that the crime would go unpunished. On the other hand, there must be a mechanism for ensuring protection of human rights in cases where there is a well-founded fear of violation of the fundamental human rights in the territory of the requesting State availing the possibility for bar to extradition.

Chapter 3 analyses the intricate interplay between human rights protection and the international enforcement of criminal justice through the process of extradition. The chapter examines the applicability of the traditional exceptions to transfer of fugitives such as the political offence exception, bars to extradition to jurisdictions with issues with fair trials and torture records, and refusal to extradite own nationals. These exceptions and bars are analysed through the prism of the obligation *aut dedere aut judicare* and how the obligation actually bolsters the human rights protection of the alleged perpetrators. The chapter concludes with a short reflection on the

interrelated topic of procedural aspects of extradition and prosecution such as the dual criminality, inquiry and specialty principles.

After analysing the conventional scope and content of the obligation, the crux of the thesis as regards the customary character of the obligation *aut dedere aut judicare* is provided in Chapter 4 which examines whether the principle *aut dedere aut judicare* has attained customary status in international law as regards certain international crimes. The chapter answers the question of why customary international law is necessary to be examined as regards the obligation *aut dedere aut judicare*. The crimes are divided in two subsets, based on their effect on the international community, gravity, and, most importantly, the mode of the obligation ‘extradite-or-prosecute’. The relevant core crimes and transnational crimes are examined in relation to the obligation, based on and formulated in various multilateral, widely-ratified conventions and state practice. The chapter also looks at whether *jus cogens* violations impose a special standard of non-derogability of the *aut dedere aut judicare* principle. Traditional, widely accepted indicators for evidence of state practice and *opinio juris* are utilised.

It is asserted that at the current moment it is hard to claim that there is a free standing version of the ‘extradite or prosecute’ obligation to all crimes in international law. Based on the analysis of state practice and *opinio juris*, the customary *aut dedere aut judicare* duty has formed or crystallized for core crimes or some *jus cogens* prohibitions such as torture, genocide, grave breaches of international humanitarian law, including war crimes, and crimes against humanity. As regards the offences against the safety of civil aviation and hijacking, terrorism-related activities, international drug trafficking, and crimes against UN personnel, the evidence is mixed

and it might be more appropriate to conclude that an emerging custom of the obligation ‘extradite-or-prosecute’ for the said crimes is forming.

The customary character of the ‘extradite-or-prosecute’ duty for certain international crimes is established through an examination of state practice and *opinio juris* in terms of ratifications of multi-lateral, widely-ratified treaties, containing the crimes and their *aut dedere aut judicare* clause, alongside their negotiating histories, UN General Assembly and Security Council resolutions on the relevant subject matter, and subsequent state practice through various international and domestic judicial decisions. The chapter is divided in two parts: Part I lays down the methodology behind the interaction of the two relevant sources of international law on the particular issue, namely custom and treaties, and Part II examines whether the *aut dedere aut judicare* duty has attained a customary status as regards the relevant crimes.

The thesis concludes with Chapter 5 which examines the applicability of the State responsibility regime to the conventional and customary obligation *aut dedere aut judicare*. The chapter follows the structure of the definition and material scope of wrongful acts, breaches, exceptions and defences to State responsibility, invocation of State responsibility, *erga omnes* obligations and State responsibility, available countermeasures, all applied to the customary obligation *aut dedere aut judicare*. Attention is paid to the novel concepts of assistance and commission of the breach of the obligation *aut dedere aut judicare*, the applicability of precluding principles to wrongfulness such as consent, *force majeure* and necessity to the obligation ‘extradite or prosecute’. The chapter also analyses the status of the customary obligation *aut dedere aut judicare* as an *erga omnes* obligation in international law by examining various international and

domestic judicial decisions and state practice. The work concludes with the effects of state responsibility for breaches of the obligation 'extradite or prosecute' such as restitution, compensation, satisfaction, and in what circumstances States can apply countermeasures against a State who violates the obligation.

CHAPTER 1

THE OBLIGATION ‘EXTRADITE-OR-PROSECUTE’ AND THE FIGHT AGAINST IMPUNITY FOR INTERNATIONAL CRIMES THROUGH THE AGES

I. Introduction

The following chapter briefly examines the interests of the international society in suppressing criminal activity on international level through the ages. It also outlines the relation of the international society to the obligation *aut dedere aut judicare*, broadly defined as the duty of a state, which has custody of a person who is accused of committing a crime to either hand over the person to another state willing and able to try him or initiate legal proceedings against the same person in its own domestic legal system.¹ The chapter also examines some core principles such as responsibility for international crimes and the fight against impunity.² The chapter focuses on the vacillating undertones of individual accountability, recourse to judicial proceedings and eradication of impunity through State’s obligation to ‘extradite or prosecute’ by reflecting upon the existing relation between perpetration of international crimes³ and the legal order of humanity.

Individual criminal responsibility and the fight against impunity are strongly facilitated through the obligation *aut dedere aut judicare* in order to uphold the rule of law at both international and

¹ For detailed analysis of the content of the obligation *aut dedere aut judicare*, see Chapter 2.

² The following lines should not be taken as a categorical exploration and definition of what constitutes international society. I aspire to select examples of the status of international society directly relevant to the research topic.

³ Core crimes are analyzed in details in Chapter 2.

national levels.⁴ Some authors propose a general framework of *civitas maxima* that avails States, acting as intermediaries in a more global society encompassing all humanity,⁵ to each other's assistance in the cooperation to repress the relevant international crimes and to promote accountability and rule of law as the common underlying good of the humankind.⁶ Although *civitas maxima* may influence the scope and nature of the obligation 'extradite or prosecute', the focus of the current work is on the actual function of the obligation in international law at the current moment. The thesis does not attempt to answer the question whether *civitas maxima* exists or not in international law, but aims at analysing the role of the *aut dedere aut judicare* principle in the international legal order.

As examined in Chapters 2 and 5 below, the methodology of the thesis is structured around the premise that the duty 'extradite or prosecute' does not have a free standing status in international law at the current moment, meaning that the obligation is triggered by and related to certain crimes. The work does not explore the theoretical or normative premise and argument that any criminal activity, be it domestic or international, affects the interests of the international society. Hence, the obligation is analysed not from a purely theoretical perspective but from a more practical framework. Although from theoretical point of view, any criminal activity may be

⁴ The connection between the rule of law and elimination of impunity is recognizable—a firm rule of law is solidified when the gravest perpetrators of international crimes are prosecuted in a court of law according to the highest judicial standards. The UN General Assembly recognizes the general principle of rule of law in “the need for universal adherence to and implementation of the rule of law at both the national and international levels” and “commitments to an international order based on the rule of law and international law” are pertinent issues. See on The Rule of Law at the National and International Levels, UNGA Res 63/128 (11 December 2008) 63rd Session (A/Res/63-128) fourth preambular para.

⁵ M Cherif Bassiouni and EM Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute In International Law* (Martinus Nijhoff Publishers 1995) 28-30. Its core postulate is “the ultimate reality of this *civitas maxima* that underlies the assertions about a common interest in repressing crime wherever it occurs and also assertions about the existence of a genuine body of international criminal law.”

⁶ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Dissenting Opinion to Order of Request for the Indication of Provisional Measures, Judge Cancado-Trindade) [28 May 2009] <<http://www.icj-cij.org/docket/files/144/15154.pdf>> accessed 23 August 2014, paras 102, 104.

deemed to hurt the interests of States, it is the purview of this work that it would be practically impossible to prosecute any primarily domestic crimes abroad. Nonetheless, it would be incomplete to explore the obligation without emphasizing whether the *aut dedere aut judicare* principle is legally or morally contingent on “the international legal principles of accountability, justice and the rule of law.”⁷ The current paradigm containing the ‘extradite or prosecute’ duty promulgates a broad judicial cooperation on international level that “can prevent, deter, punish, provide accountability and reduce impunity”.⁸

Although the *civitas maxima* is not used in the current analysis as a normative category, a legal framework could be applied as a rationalization of the purpose of the *aut dedere aut judicare* obligation. The purpose of the section aims at delineating the intellectual legal tradition from Vitoria onwards in terms of briefly outlining the legal framework behind the attempt to minimize impunity in the international legal order. The intellectual tradition and the rationale behind the obligation *aut dedere aut judicare* did not arise out of nothing but could be traced back in the legal intellectual scholarship through the years as legal scholars have thought of the justification behind the obligation and its relation to a broader goal such as minimization of impunity in particular ways. Hence, the following sections attempt to explore how far the existing legal framework captures the aspirations for an international society by various classical legal scholars. The framework is based on the reasoning for ending impunity for certain criminal behaviour at international level. The current chapter analyses the relationship between the general framework to end impunity and one of the available mechanisms, namely the obligation

⁷ UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005), Preambular section.

⁸ M Cherif Bassiouni, ‘The History of Universal Jurisdiction and Its Place in International Law’ in S Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2004) 62.

‘extradite or prosecute’, through the ages. Such mechanisms are labelled as accountability mechanisms.

II. Where It All Began: Vitoria, Gentili and Grotius

1) Vitoria

The following sections show that there is an identifiable undertone of the elimination of impunity through the legal mechanisms of accountability, individual criminal responsibility, and, most importantly for the purposes of the current work, prosecution.

The first theoretical notions were originally proffered in Fransisco de Vitoria’s concept that the law of nations is not only applicable between a few selected statesmen but also is foundational as universal, all-encompassing and binding natural law, thus setting out the agenda for expansion of the international legal order in the mid-16th century.⁹ Vitoria’s writings imply that accountability for international wrongdoings is established and anchored in the supremacy of international law in the international order of States.

Vitoria, among other Spanish theologians such as Suarez, proposed the first original structure of an international order with a binding and authoritative rule of international law. The first trace of rationalization of an international society with binding rules could be linked to the assertion that

⁹ Vitoria’s *Reflectiones theologicae* consists of two major lectures, *Reflectiones De Indis* and *De jure belli Hispanorum in Barbaros*. His main works concern the interaction between the Spaniards and the Native Americans in the newly discovered America. See also, JL Brierly, *The Law of Nations* (6th ed, Clarendon Press 1963) 26; B Kingsbury and B Straumann, ‘The State of Nature and Commercial Sociability in Early Modern International Legal Thought’ (2005) NUY School of Law, Public Law & Legal Theory Research Working Paper No. 11-04, 5.

“although a given sovereign state, commonwealth, or kingdom may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also...a member of that universal society.”¹⁰

Vitoria logically asserted the link between the international society and the notion of the obligation to prosecute via the law of nations as binding through its communitarian origin on various actors, involved in State affairs. For example, the universal commonwealth avails the power to prosecute when “the tyrants...were able to injure and oppress the good and innocent without punishment.”¹¹ The intention and ground for punishment of transgressors are inferred as deriving its binding nature and applicability in the global society from customs of various domestic laws.¹²

States require mutual assistance in order to promote their own and common welfare, occasionally realized through accountability and prosecution of transgressors of international law as it is in their best interest not to allow their territory to be used as a safe haven by individuals who later in the development of international law would be labelled *hostis humanis*.¹³ In this manner, the first general delineations of the no-impunity paradigm, based on broad societal value and individual responsibility through prosecution for certain criminal acts, were vaguely but

¹⁰ Francisco Suarez, *Tractatus de Legibus ac Deo Legislatore* (Carnegie Translation trs ed) Book II, ch 19, para 9.

¹¹ F Vitoria, ‘*De Jure Belli*’, q 1, art 1, translated in A Pagden and J Lawrence (eds), *Vitoria: Political Writings* (CUP 1991). The use of “punishment” may not relate directly to prosecutorial action; “punishment” might also be attained through the resort to just war against the transgressor or other types of countermeasures.

¹² A Wagner, ‘Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth’ 31(3) OJLS 565, 572-573.

¹³ See Chapter 5, discussion on the *Kiobel* case.

discernibly promulgated.¹⁴ In essence, the presence and justification of the concept of individual responsibility and the obligation on the State to take acts against individuals are vaguely discernable in the very early moments of the development of international law.

2) Gentili

The normative premise that every member of the international society has a vested interest in protecting the rule of law through securing appropriate prosecution for transgressions of the law of nations can be cautiously discerned in this early period. The initial, rough contours of the jurisprudential foundation of the obligation *aut dedere aut judicare* were furthered in Gentili's universalization of international law.

Gentili postulated that there are certain acts which constitute crimes against natural law, and reason and nature equally bestow upon any nation the right to resort to correct such violations. The sanction inflicted against the transgressor is based on the authority, vested by the international community because "[i]f the commonwealth has these powers of punishment against its own members, there can be no doubt that the whole world has the same powers against any harmful and evil men"¹⁵ although it is doubtful whether the community can resort to collective actions.¹⁶

¹⁴ In addition, the origin of the idea that human beings possessed legal reason and character regardless of their origin, which would later shape individual responsibility as a principle in international criminal law is recognized. See A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 16-22.

¹⁵ A Gentili, 'De Jure Belli' reprinted in JB Scott (ed), *Classics of International Law* (J Rolfe tr, Clarendon 1933) ch 1.4, 19.

¹⁶ Wagner (n 12) 579.

Gentili originally formulated the principle that there was “an inherent right of intervention since crimes against nature, as crimes against humanity, are a threat to all mankind.”¹⁷ Natural law must apply to States and individuals.¹⁸ A duty to redress a violation of the law of nations through prosecution and punishment is placed upon all societal agents since the infringement threatens the fabric of the whole order.¹⁹ The source of the power to act against the transgressors against “all mankind” originates in the international society itself as the harm or threat inflicted is against the international legal order. As the society serves as the source of sanctioning authority, the link between perpetrating a wrong against the values and laws of the global society and bearing responsibility for the same act is hereby established as a corrective mechanism to restore the balance in the global society. The intellectual tradition of linking the aspirations and visions for a response on international level to certain criminal activities is furthered by Gentili.

For example, Gentili classified piracy as “contrary to the law of nations and the league of human society.” The injury is to the norms of society and all society members have the obligation to punish such transgressions.²⁰ The mere societal belonging of various agents, primarily States, avails the society members to defend and enforce against violations of certain rights.

¹⁷ A Pagden, ‘Gentili, Vitoria, and the Fabrication of a ‘National Law of Nations’’ in B Kingsbury and B Straumann (eds), *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP 2010) 356.

¹⁸ Patrick Capps, ‘Natural Law and the Law of Nations’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 65.

¹⁹ Although the meaning of punishment might differ in Gentili’s work as a cause for just war, the source of such resort is what I am attempting to analyze.

²⁰ Gentili, *De Jure Belli* (n 15) ch 1.25, 202. Gentili states that “since we may also be injured as individuals by those violators of nature, war will be made against them by individuals. And no rights will be due to these men who have broken all human and divine laws and who, though joined with us by a similarity of nature, have disgraced this union with abominable stains.”

3) Grotius

Hugo Grotius significantly contributed to the development of the rationalization of the principles of accountability and justice in international law since Grotius “gave it added authority and dignity by making an integral part of the exposition of a system of law.”²¹

In the Grotian legal order, members of society must play by the rules or otherwise pay for their failure to do so. Bull sums up the paradigm, “[o]n the one hand princes and peoples had indeed become independent of one another and of central authorities and were sovereign. But on the other hand they were not in a state of nature, but part of the great society of all mankind, *magna communitas humani generis*.”²² This is what many authors label as the Grotian tradition—a state of nature of the monarch’s whims is replaced by an international society with the rule of law at its core. Here the aspirations of the legal scholars peak by pushing for the development of an international society. As actors become more independent to structure and engage in legal relations, the need for legal certainty and rule of law on global level also increased in order to ensure a functioning global society with rules and principles.

Grotius placed justice as the highest value in the international legal order. For him, the demand of justice, upheld through accountability, knows no borders.²³ Justice is part of the social nature of man, and without it no community can exist.²⁴ Rules and rights, emanating from and of

²¹ Hirsch Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 BYIL 1, 24.

²² Hedley Bull, ‘The Importance of Grotius in the Study of International Relations’ in H Bull, B Kingsbury and A Roberts (eds), *Hugo Grotius and International Relations* (OUP 1990) 73.

²³ Hugo Grotius, *De Jure Belli ac Pacis*, (F.W. Kelsey tr, Clarendon Press 1925) Prolegomena, 23.

²⁴ Brierly (n 9) 31.

justice, are not pure requirements of nature, but also established in and by law.²⁵ This positive law exists not only for the benefit of the individual States, but also for the advantage of the whole mankind, “the great society of states.”²⁶

The recognition of the link State-individual- international community is crucial for the *aut dedere aut judicare* obligation because the obligation is a manifestation of obliging the State to prosecute or extradite an alleged perpetrator for international crimes.²⁷ Such recognition could be vaguely discerned through the manifestation of the duty of the State towards upholding the societal order. States are willing to defend societal, communitarian values according to Grotius. A resort to punishment is available not only against States that inflict injury on other States “but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.”²⁸

For example, Grotius asserted that States can intervene in case of gross violations of the law of nature and nations such as cannibalism or piracy.²⁹ While every single State has the right to initiate proceedings against the pirate, the rule of law is all-encompassing and whatever the nature and severity of their crimes, pirates, brigands and tyrants as human beings are individually

²⁵ Kingsbury and Straumann (n 9) 10-11.

²⁶ Hugo Grotius, *De Jure Belli ac Pacis*, (F.W. Kelsey tr, Clarendon Press 1925) Prolegomena, para. 17. See also, R Vincent, ‘Grotius, Human Rights and Intervention’ in B Kingsbury and B Straumann (eds), *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP 2010) 242.

²⁷ For more, see Chapters 4 and 5.

²⁸ Hugo Grotius, *De Jure Belli ac Pacis*, book II, ch 20, para 40.

²⁹ Hugo Grotius, *De Jure Belli ac Pacis* Book II, ch 20, para 40. See Patrick Capps, ‘Natural Law and the Law of Nations’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 79.

responsible while also enjoying inherent protection by the law of nations.³⁰ Grotius also constructed a notion of an international community by emphasizing the possibility of application of countermeasures against the wrongdoer³¹, thus linking the process to an early version of *erga omnes* actions against the breaching State. In this manner, the rational mechanisms to eliminate impunity for certain acts are clearly identifiable in the works of Grotius.

Grotius was the first one to coin the phrase *aut dedere aut punire*.³² He incorporated the duty as part of State responsibility. When a crime is committed, the sovereign is indirectly injured by that offence. When a fugitive flees to another State, the crime remains unpunished. The harbouring State of the fugitive becomes liable in two ways according to Grotius. First, the custodial State fails to prevent recurrent injurious acts towards the requesting State by not apprehending the fugitive which Grotius called *patientia*. Second, the State is liable for harbouring the fugitive which protracts the non-punishment of the injury to another State, which Grotius labeled *receptus*.³³ Later Vattel supported Grotius' notion about *aut dedere aut judicare* as Vattel perceived the principle as an obligation owed by a State to an injured State based on the reciprocity principle instead of an existing common, global value to be upheld in a society of States.³⁴ Hence, a State in breach of the duty would incur State responsibility for the wrongful act and an injured State would invoke the responsibility of another State if the obligation is breached.

³⁰ H Suganami, 'Grotius and International Equality' in H Bull, B Kingsbury and A Roberts (eds), *Hugo Grotius and International Relations* (OUP 1990) 236.

³¹ Hugo Grotius, *De jure belli ac Pacis*, Book II, ch 10, para 3. The violator loses its sovereign equality and is susceptible for punishment by other states.

³² Hugo Grotius, *De Jure Belli ac Pacis*, Book II, ch 21, paras 3-4. See E Wise, 'The Obligation to Extradite or Prosecute' (1993) 27 Isr LR 268, 277.

³³ Hugo Grotius, *De Jure Belli ac Pacis*, Book II, ch 21, para 2.

³⁴ E Vattel, 'The Law of Nations' in C Fenwick (ed), *Classics of International Law* (1916), Book II, ch 6, 136-137.

The duty to extradite or punish was enshrined in general international law in Grotius' framework.³⁵ Although the obligation might be construed in state responsibility terms, the duty is rooted in the interest of the international community³⁶ and all States to suppress international crime, a mechanism to balance the fluctuating legal order, based on the connection between individual-State-international societies. In such a manner, the centrality of the rule of law in inter-state relations are upheld as "surely also that association which binds together the human race, or binds many nations together, has need of law."³⁷

III. Wolff and Vattel

1) Wolff

Directly related to the purposes of this work, Wolff treated the process of extradition as primarily bilateral in his theoretical notion of the *civitas maxima*. *Civitas maxima* in Wolff's understanding alludes to a network of interconnectedness among States as in "every country, from the most prosperous to the least prosperous, is at an intersection of internalities and externalities."³⁸ In such framework, the role of individual criminal responsibility, accountability and realization of

³⁵ Wise, 'The Obligation to Extradite or Prosecute' (n 32) 278.

³⁶ Bassiouni & Wise (n 6) 22. See also C van den Wyngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Kluwer Academic 1980) 8-9. However, Wise asserts that the obligation is "an aspect of what we would now call the law of state responsibility for acts of private individuals." See also Wise, 'Obligation to Extradite or Prosecute' (n 32) 278.

³⁷ Hugo Grotius, *De Jure Belli ac Pacis*, Proleg., para 23.

³⁸ Phillip Allott, 'International Law and International Revolution: Reconceiving the World' in D Freestone, S Subedi and S Davidson (eds), *Contemporary Issues in International Law* (Kluwer 2002) 81.

justice through prosecutions can be interpreted to be effective tools, realized through close judicial cooperation, aiming at a common good of crime suppression.³⁹

Wolff would be expected to belong to the category of those believing that suppression of criminal acts is in the common interest of the international community. However, he aligned himself with Beccaria, who stipulated that crime generally concerns only the State where it occurs and correspondingly there is no general obligation to prosecute or punish fugitives.⁴⁰

From a historical perspective, Wolff's support for territoriality enforcement makes sense as a rationalization of how the mechanism to minimize impunity through prosecution would effectively function: the States at that period of time were solidifying their role in maintaining law and order within their territories, which explains the appeal of territorial jurisdiction.⁴¹ Wolff's approach does not diminish the function of his notion of *civitas maxima*, meaning that before or after the nation-state came into existence, some sort of uniting, global society of humanity had existed and "the society of the whole human race continues to exist even after the creation of the nation-states."⁴² The *locus delicti* State is vested with the primary territorial authority to address impunity through effective prosecution.

³⁹ The vestige of *civitas maxima* is in each individual in the availability of moral obligation for our actions and omissions since it is "a responsibility which we owe to a billion human beings as we owe it to one human being." See Allott, 'Reconceiving the World' (n 38) 82.

⁴⁰ C Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 82, cited in Bassiouni and Wise (n 6) 37.

⁴¹ Nico Kreijzer, 'Locus Delicti Exception' in N Keijzer and E van Sliedregt (eds), *The European Arrest Warrant in Practice* (TMC Asser 2009) 90-91. The term territorial jurisdiction concerns the ability of the state to extend adjudicative and prescriptive jurisdiction to any offence which is committed in its territory regardless of the nationality of the alleged perpetrator.

⁴² Phillip Allott, 'International Law and International Revolution: Reconceiving the World' in D Freestone, S Subedi and S Davidson (eds), *Contemporary Issues in International Law* (Kluwer 2002) 89.

Jean Bodin's account of the great society also promulgates a communitarian argument that crime wherever committed is evil and all legal agents have interest in suppressing it.⁴³ Such rationalization of the role of an international society supports the ultimate goal to achieve happiness, since "the most perfect society is that whose purpose is the most general and supreme happiness."⁴⁴ As evil is inherent in the perpetration of crime, happiness might be defined as the lack of evil. Bodin linked the suppression of crime again to the default obligation to avoid injury to the sovereign instead of upholding the common interest to repress crime.⁴⁵ However, if the default duty of the sovereign does not materialize, then communitarian realization of justice might be applied in a complementarity manner in order to ensure individual responsibility for criminal acts.

2) Vattel

In contrast to Wolff, Vattel doubted the existence of the *civitas maxima*.⁴⁶ He emphasized the emerging positivist character of international law⁴⁷ as the law was linked to human experience and consent.⁴⁸ Vattel asserted that a nation "means a sovereign State, an independent political society."⁴⁹ Vattel acknowledged that society was designed as a measure to end the natural state

⁴³ J Bodin, *The Six Bookes of a Commonweale* (Kenneth McRae tr.ed., Cambridge 1962) Book III, ch VII, 361, cited in Nicholas Onuf, 'Civitas Maxima: Wolff, Vattel and the Fate of Republicanism' (1994) 88 AJIL 280, 293. The republic is at the apex, since it depends on all lower constitutive parts and demands sovereignty. The bottom layer is reserved for the natural family and civil community/college, the corporation in the middle of the spectrum, the *universitas* towards the top, and the republic at the top. See also, J Bodin, *The Six Bookes of a Commonweale*, 359.

⁴⁴ Leibniz depicts societies as a staircase with each step as a different level to climb towards the common good of ultimate happiness. Patrick Raley (ed), *Leibniz: Political Writings* (CUP 1972) 165, 181.

⁴⁵ Bodin (n 43) 359-360, cited in Bassiouni and Wise (n 6) 38.

⁴⁶ Nicholas Onuf, 'Civitas Maxima: Wolff, Vattel and the Fate of Republicanism' (1994) 88 AJIL 280, 282-283.

⁴⁷ JL Brierly, *The Law of Nations*, (6th ed, Clarendon Press 1963) 12-13, provides a succinct and powerful description of the Hobbesian world.

⁴⁸ Onuf (n 46) 284.

⁴⁹ Emerick de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and Affairs of Nations and of Sovereigns*, (Carnegie ed, 1916), 8a, cited in Onuf (n 59) 297.

of men in order to achieve favorable conditions for perfection and mutual assistance.⁵⁰ Equality of States was crucial for Vattel as “each independent State claims to be, and actually is, independent of all others.”⁵¹ The size and power of each State does not matter since “a dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom.”⁵²

Although Vattel strongly propagated a voluntary, discretionary basis of State’s obligations, in a surprising turn of jurisprudential reasoning⁵³, he defined his first general law as the duty of assistance to other nations extending as far as the nation’s well-being and freedom permit.⁵⁴ Such a formulation resembles Wolff’s stand on mutual assistance, albeit significantly qualified. Nonetheless, the duty to assist might be interpreted as a concession to communitarianism as without common stand against grave international crimes, the State would lose its role as the main benefactor and beneficent of its relation with other States in a framework, based on the rule of law. The well-being of the State would be compromised if crimes go unpunished, a thread discernible in all scholars of that period, delineating an intellectual tradition and aspiration. Vattel’s perception on inter-state cooperation on criminal matters of international concern seems to point in a direction of a communitarian approach on a higher, state-to-state level.

Vattel argued that there is a duty to extradite in the law of nations.⁵⁵ The duty to prosecute or extradite is owed to the other State since “a sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or finally to deliver him up, makes himself in a way an

⁵⁰ Vattel, *The Law of Nations* (n 49) Introduction, 5-7.

⁵¹ Onuf (n 46) 297.

⁵² Brierly (n 9) 37; Vattel, *The Law of Nations* (n 49) Introduction, 5-7.

⁵³ As with Wolff’s stand on the duty, Vattel seemingly delivered a mirror image interpretation of the obligation against his general jurisprudential stand.

⁵⁴ Onuf (n 46) 298.

⁵⁵ Vattel, *The Law of Nations* (n 49) Book II, ch VI, 136-137.

accessory to the deed, and becomes responsible for it.”⁵⁶ Vattel followed the reasoning of Bodin and, to some extent, Grotius in classifying extradition as a means for the State to avoid responsibility for acts of individuals. Vattel’s reasoning allows for such an accumulation or transfer of responsibility from the individual perpetrator to the State in terms of responsibility for not prosecuting the individual. In such manner, the rationale for a complex response to international crimes through various mechanisms such as prosecution, extradition and some early notion of state responsibility is offered. The conceptualization of ending impunity by implementing legal mechanisms in a complex framework is clearly identifiable. Seemingly, the framework works whether it is based on bilateral or communitarian reasons; the scope is determined to cover a larger area if the basis is communitarian.

Despite Vattel’s opposition to the *civitas maxima*, his take on extradition clearly strikes the upbeat of State responsibility in terms of prevention, punishment or assurance that the violators are brought to justice, a recurring theme of finding the balance in the inter-state society through eradication of impunity. Even in a State-centered, primarily bilateral-oriented legal order, the refrain of accountability and elimination of crimes continues to hold a strong rational undertone.

Hence, Vattel’s acceptance of a general duty to punish evil through prosecution or extradition does not seem so radical. It is in the best interest of the State to prosecute or transfer the relator to another State in order for the person to be tried for the alleged acts. Vattel thereby promulgated a duty to compensate, punish or deliver the relator which is linked to State responsibility in case of a duty breach. Such interpretation resembles in surprising details the

⁵⁶ Vattel, *The Law of Nations* (n 49) Book II, ch VI, 136-137.

current paradigm of State responsibility for a breach of the obligation *aut dedere aut judicare* as explored in Chapter 5 of the current work.

IV. *Aut Dedere Aut Judicare* and Accountability in Modern Times

After the brief exploration of the attempts to rationalize the function of various legal mechanisms including the obligation *aut dedere aut judicare* in order to respond to impunity through the ages, the main accent of this sub-section is to explore to what degree the existing legal framework has captured the aspirations and visions of the classical scholars. The following section analyses the relationship of the framework with certain principles and obligations such as the *aut dedere aut judicare* duty. As will be shown below, the identifiable undertones of the rationalization of the purpose of the obligation through the ages remain valid nowadays.

One of the mechanisms to achieve the coveted purpose of minimization of impunity for international crimes is the obligation ‘extradite-or-prosecute’, influential for the proper functioning of the principle of rule of law in international law. Impunity means “the impossibility, de jure and 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”.⁵⁷ Impunity includes the lack of inquiry or investigation which might lead to eventual arrest or trial, a failure on part of the State to fulfil its obligation to investigate violations of international law. Impunity is addressed by taking appropriate measures against perpetrators “by

⁵⁷ Economic and Social Council ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, 6.

ensuring that those suspected of criminal responsibility are prosecuted” along with providing victims with effective remedies and potential reparations.⁵⁸

It is interesting to reflect upon to what degree the legal framework based on a common interest of States to suppress certain criminal activities on international level as a shared value is enforced and protected by applicable rules such as the *aut dedere aut judicare* principle. For example, the traditional “autonomous will of the State” is subjected to the realization of *erga omnes* duties⁵⁹ for protection of fundamental rights in an endeavor to impose state responsibility and enhance human dignity on global level. This type of interaction between the State’s obligations, communitarian norms and individual criminal responsibility is a well-known rational refrain from the past as established above.

The elimination of recurring mass atrocities, repression and violence⁶⁰ through the obligations provided for in multiple widely ratified conventions and customary law form a mutual guarantee of the protected rights.⁶¹ The response to violations of international law is effective, and victims are availed some closure through an obligation to “investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly

⁵⁸ *ibid* Principle I.

⁵⁹ The ICJ defines *erga omnes* as “obligations towards the international community as a whole” in *Barcelona Traction, Light and Power Company Case (Belgium v Spain)* (Merits) [1970] ICJ Rep 3, paras 33-34.

⁶⁰ States that have initiated court proceedings against officials responsible for the commission of international crimes exhibit lower subsequent levels of torture, disappearances and other international law violations. See K Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton & Co. 2011).

⁶¹ There can be no law without society and no society without law as the law translates the ideal into reality while society espouses the common interest to bridge the gap between crime and accountability. Allott, *The Health of Nations*, paras 3.30, 10.15. See also Allott, *The Health of Nations*, para 5.6 for the dual function of the law.

responsible” as well as “the duty to submit to prosecution the person allegedly responsible for the violations.”⁶²

The duty to prosecute is one of the mechanisms in international law to address impunity and prevent and deter further grave violations of international law among other mechanisms such as preliminary inquiries, criminalization of international crimes, and appropriate jurisdiction bases. The rule ‘extradite-or-prosecute’ retains a central position in the system as without its effective applicability, it is hardly possible to envisage a situation in which perpetrators would be held responsible for their crimes through legal means.

The function of various international institutions reflects the will and capability of the international society to respond to violations of international law. Although international institutions in their modern form and function could hardly be envisioned by Vitoria, Gentili or Grotius, such institutions capture the aspirations through the ages for a response on international level to complex criminal activities. The role of international criminal tribunals and the UN Security Council also plays a pertinent role to the functioning of the *aut dedere aut judicare* obligation and the elimination of impunity. As the international tribunals and the UN could be perceived as embodiments of communitarian interests in the fight against impunity, a proper analysis is called for their role in relation to the obligation *aut dedere aut judicare*.

⁶² UNGA, ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution, adopted by the General Assembly, (21 March 2006) UN Doc A/RES/60/147.

The modern period of international criminal law could be said to begin with Nuremberg. The Nuremberg legacy serves as a proclamation that individuals stand behind the acts of States and bear responsibility for the gravest violations of international law.⁶³ From Vitoria through Gentili and Grotius to the modern days, the mechanism of individual criminal liability is one of the manifestations of the legal framework and serves as a tool to ascertain its viability and function, to link its effect and source to one of the original agents in the paradigm, the individual. Nuremberg provided a practical model for a criminal regime with effective enforcement procedures.⁶⁴ As prosecution of States is not a viable option at the current moment⁶⁵, the Nuremberg paradigm of individual criminal responsibility links individual criminal responsibility and minimization of impunity. The framework, as seen through its historical development, incorporates the notion of individual criminal responsibility in terms of avoiding ‘transferring’ liability on States with the purpose of shielding the perpetrators of international crimes. As shown below, the obligation ‘extradite or prosecute’ plays a particular role in ascertaining criminal responsibility for individuals and ensuring that States follow their obligations in this regard.

⁶³ The Nuremberg postulate on individual responsibility is noteworthy, “crimes against international law are committed by men, not abstract entities, and only by punishing who commit such crimes can the provisions of international law be enforced.” *The Judgment of Nuremberg*, 41 AJIL 172, 221, cited in R Cryer, ‘The Philosophy of International Criminal Law’ in Alexander Orakhelashvili (ed), *Handbook of the Philosophy of International Law* 232-267 (Edward Elgar 2011) 235.

⁶⁴ C Tomuschat, ‘The Legacy of Nuremberg’ (2006) 4 J Int’l Crim. Justice 830, 839.

⁶⁵ See, James Crawford and Simon Olleson, ‘The Nature and Forms of International Responsibility’ in M Evans (ed), *International Law* (Oxford 2006) 457-458. For rejection of criminal responsibility for States, see Ian Brownlie, *System of the Law of Nations: State Responsibility* (OUP 1983) 23. See also, the history of Article 19 of DARSIIWA in J Weiler, A Cassese and M Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (De Gruyter 1989). cf. A Pellet, ‘The New Draft Articles of the International Law Commission... A Requiem for States’ Crimes’, (2001) 32 Netherlands YBIL 55.

When there is need and necessity based on the gravity of the criminal conduct as well as the political predispositions of States, the framework seems to serve the communitarian undertone in terms of availing mechanisms for individual criminal responsibility, seen in the establishment of two *ad hoc* tribunals, the SCSL, the Lebanon Tribunal, the ECCC, and the permanent ICC. Top officials could no longer hide behind the iron curtain of State sovereignty and live undeterred and unpunished under comfortable immunity.⁶⁶ States cannot use the excuse of lack of domestic criminalization of international crimes and other deficiencies since criminal responsibility does not depend on it.⁶⁷ International agents, including States and institutions, are vested with the task to uphold the rule of law beyond state borders as individual criminal responsibility has been present in the framework as guiding principles for a long time.

The jurisprudence of the ICTY, ICTR, and various hybrid courts⁶⁸, built on the Nuremberg legacy, indicates that impunity for the most flagrant breaches of international law cannot be tolerated and must be eliminated as top military and political leaders of States and organized groups were held accountable for the perpetration of core crimes. The framework is robust and strong when the international community witnessed the prosecution of Slobodan Milošević, Radoslav Karadžić and Charles Taylor. The ICTY has pronounced that most norms of the law of

⁶⁶ The ICTY's *Tadić* decision proclaims that "[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well." *Prosecutor v. Tadić* (Decision on Defence Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 97.

⁶⁷ Tomuschat (n 64) 840.

⁶⁸ The ICTY has indicted 161 persons, no one is at large, of whom 64 have been convicted and sentenced, there are ongoing trial or appeal proceedings against 37, 13 have been referred to domestic jurisdictions and 12 individuals have been acquitted. In comparison, 47 ICTR defendants have been convicted, 8 have been acquitted, 20 are still in court, and 10 are still at large. As for the Special Panels for East Timor, the number of convicted stands at 84 with 3 persons acquitted, albeit the complexity of trials cannot be compared to the ICTY and ICTR since low-level direct perpetrators were tried at the Special Panels. The SCSL concentrated on total of 5 trials.

war are of a peremptory, non-derogable character and correspondingly create an entitlement and obligation for investigation, prosecution and punishment or extradition of the responsible individuals.⁶⁹ The scope of the framework has been clearly demarcated: the most responsible perpetrators of war crimes, crimes against humanity, genocide, torture, terrorism affecting the whole international community must not go unpunished.⁷⁰

The mentioned international or internationalized tribunals were established pursuant to the principles of primacy or complementarity to the ability of the *locus delicti* States to prosecute the relevant international criminal activities. However, the most problematic aspect remains the actual prosecution of international crimes at domestic level, the core element of the *aut dedere aut judicare* mechanism. Although international tribunals may be given as examples for effective responses to international crimes, they are criticized for costs, isolation from the *locus delicti* State, and lengthy proceedings. Nonetheless, the dynamic nature of the system is observed in the ability of the international society to step in when national prosecutions are not plausible for various reasons such as the applicability of immunities and the gravity of the crimes committed is of most serious character. The duality approach of the communitarian aspect of prosecution being triggered when the primary duty of domestic prosecution is not possible is again clearly noticeable. Such complementarity is also observed in the establishment of the International Criminal Court.

⁶⁹ *Prosecutor v. Furundžija* (Trial Chamber Judgment) IT-95-17/1 (10 December 1998) para 156.

⁷⁰ See “Argentina: 12 Given Life Sentences for Crimes During Dictatorship”, *The New York Times*, (28 October 2011) A13. “Alfredo Astiz and 11 other former military and police officers have been sentenced to life in prison for crimes committed during the 1976-83 military dictatorship, a court announced Wednesday. Mr. Astiz, 59, nicknamed the “Blond Angel of Death,” was convicted for his role in executing human rights activists in 1977; they were tortured at the Navy Mechanics School, known as ESMA, and then dropped from navy airplanes into the South Atlantic.”

A glance at the Rome Statute indicates that it might possess high degree of potentiality to contribute to the functioning of a stable international legal society.⁷¹ The ICC is an institution which intervenes to act when national judicial systems fail or are unable to do so through the principle of complementarity⁷²; acting when the default state obligation of Wolff and Vattel is not materialized and bringing a communitarian pull⁷³ to traditional enforcement mechanisms.

Critics claim that States created the ICC as an institution with limited powers and heavily dependent on State co-operation. Even in seemingly unambiguous situations, the State parties have not followed the Rome Statute when they were under an obligation to apprehend and transfer accused individuals present on their territory.⁷⁴ The selective referral of situations also brings a shade of doubt to the strength, independence and transformative capabilities of the Court. The African Union on numerous occasions has voiced its opposition to a number of prosecutions against heads of states which may obstruct possible political solutions⁷⁵ albeit AU member states continue to ratify the Rome Statute and refer situations to the ICC.⁷⁶

⁷¹ Leyla Sadat, 'The International Criminal Court and the Transformation of International Law' in Leyla Sadat and Michael Scharf (eds), *Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff 2008) 313. Sadat states, "[t]he ICC was the last great international institution of the 20th century...a bridge between the past and a yet uncertain future."

⁷² See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 17 (Rome Statute).

⁷³ See Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing 2009) 256, 270.

⁷⁴ See Decision Requesting Observations about Omar Al-Bashir's Recent Visit to Malawi, ICC Pre-Trial Chamber I (19 October 2011) ICC-02/05-01/09.

⁷⁵ See 17th Summit Meeting of the African Union in Malabo, Equatorial Guinea (23 June- 1 July, 2011) accessible at www.au.int/en/summit/17thsummit.

⁷⁶ M Simons and A Nossiter, 'Former Ivory Coast Strongman Appears at Hague Court' *The New York Times* (6 December 2011) A8.

The Security Council evidences that in certain political situations, it has the power to contribute to the timely realization of criminal justice for international crimes. Two recent referrals⁷⁷ to the ICC by the UN Security Council acting under Chapter VII indicate that the ICC has a pivotal role “to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity.”⁷⁸ Even individuals enjoying the highest level of immunity under international law shall not remain unaccountable for grave violations of international criminal law.⁷⁹ However, the UNSC has remained passive in situations such as North Korea and Syria due to the issues of politicization and veto power. Despite the mixed evidence on the role of the UNSC, the framework continues to exist but its scope and function may be impacted. The evidence indicates that the existing legal framework and legal order have not fully realized the aspirations of the legal scholars through the ages. There is still room for improvement in the attempt to institutionally respond to impunity on international level although there has been a significant progress in the recent past.

V. Conclusion

The duty to ‘extradite or prosecute’ is inextricably linked to the nature of the criminal act. In the course of this thesis, it will be examined whether violations of international law such as torture, genocide, hijacking, terrorism, war crimes, crimes against humanities, drug trafficking trigger a duty to extradite or prosecute or resort to international adjudication whenever the domestic legal

⁷⁷ See Rome Statute of the International Criminal Court, art 13(b).

⁷⁸ UNSC Res 1593 (31 March 2005) S/RES/1593 (2005).

⁷⁹ UNSC Res 1970 (26 February 2011) S/RES/1970 (2011), passed by unanimity. For a concise discussion on immunities *ratione materiae* and *ratione personae*, see F Williams, “European Arrest Warrants- Immunities and Amnesties”, in N Keijzer & E van Sleidregt (eds), *The European Arrest Warrant in Practice* (TMC Asser 2009) 158.

system is unwilling or insufficient to prosecute.⁸⁰ The refrain sounds familiar: the more serious the harm, the more pressing the urgency for accountability through prosecution for international crimes.⁸¹ The existence of rights with no avenue for enforceability makes such rights moot. In short, the obligation attempts to restore or protect fundamental rights through effective judicial remedies, ensure minimal decent treatment to restore dignity, and judge and punish transgressors.⁸²

The section above shows that the *aut dedere aut judicare* obligation should be analysed through the lens of the rich intellectual tradition from Vitoria to current times, a rationalization through which legal scholars have attempted to capture the function of the obligation in the fight against impunity for violations of international law. The framework which is supported by the obligation ‘extradite or prosecute’ aims at eradicating “those brutal acts of plunder, torture, rape and murder”, since they appall not only the victims but also humanity as a whole.⁸³ War criminals do not operate in a vacuum and in most cases they are either the powerful elite or enjoy its protection.⁸⁴ The result is an operational ground of impunity, contributing to criminal destruction of whole communities. The greater the likelihood of impunity perceived by the perpetrators, the higher the gravity of core crimes and more probable the commission is.⁸⁵ This broad mechanism

⁸⁰ M Cherif Bassiouni, ‘The Philosophy and Policy of International Criminal Justice’ in LC Vorah and M Bohlander (eds), *Man’s Inhumanity to Man: Essays in International Law in Honor of Antonio Cassese* (Martinus Nijhoff 2003) 69-70. *Jus cogens* is a non-derogable absolute, bearing unconditional correlative or derivative rights and duties.

⁸¹ Bassiouni, ‘The Philosophy and Policy of International Criminal Justice’ (n 81) 89.

See also, A Matwijkiw and B Matwijkiw, ‘A Modern Perspective on International Criminal Law’ in L Sadat and M Scharf (eds), *Theory and Practice of International Criminal Law* (Martinus Nijhoff 2008) 51.

⁸² Capps, *Human Dignity* (n 73) 211.

⁸³ Christopher Joyner, ‘Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability’ (1996) 59 *Law & Contemp. Probs.* 153, 153.

⁸⁴ Joyner (n 83) 162. “War crimes flourish in direct proportion to the dearth of political order and the deficiency of law enforcement.”

⁸⁵ See Joyner (n 83) 162-163.

ascertains individual criminal responsibility, contributes to the elimination of stigmatization of an entire group of people, and minimizes collective guilt.⁸⁶ As domestic law may be constrained to right the wrongs inflicted, all States and the international community have a vested legal interest in punishing offenders of international law.

The role of the universal enforcement mechanisms might be seen as an important element in the effort to minimize impunity on international level.⁸⁷ Accountability, including individual criminal responsibility, serves a role in the process of responding to international crime.⁸⁸ Effective and fair prosecutions contribute to instill a sense of the rule of law in the affected area, bolstering the institutionalization of trust between State authorities and people through the establishment of a functioning and stable juridical system.⁸⁹

It inherently includes a default mechanism for prosecution, or, when such prosecution is not possible, for extradition on parts of the States. As humans pull the trigger, rape or loot, individual criminal responsibility reflects the reality of the perpetration, commission or planning of such crimes. In a legal order where States have legal and moral rights and duties towards other agents, the obligation to ‘extradite or prosecute’ is even more demanding.

⁸⁶ M Scharf, ‘Cherif Bassiouni and the 780 Commission: The Gateway to the Era of Accountability’ in L Sadat and M Scharf (eds), *Theory and Practice of International Criminal Law* (Martinus Nijhoff 2008) 282.

⁸⁷ M Cherif Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’ (1996) 59 *Law&Contemp.Probs.* 5, 23. See also M Cherif Bassiouni, ‘The Philosophy and Policy of International Criminal Justice’ in LC Vorah and M Bohlander (eds), *Man’s Inhumanity to Man: Essays in International Law in Honor of Antonio Cassese* (Martinus Nijhoff 2003) 116-117.

⁸⁸ M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publications 2003) 724.

⁸⁹ M Scharf, ‘Cherif Bassiouni and the 780 Commission: The Gateway to the Era of Accountability’(n 86) 282-283.

The international institutions also play a role as a residual, ultimate mechanism to ascertain that the commission of such crimes does not pose a threat to the peace and security in the international legal order. As shown above, in such manner the mechanisms of prosecution, extradition and complementarity attempt to close the loophole for impunity of the main perpetrators. However, political calculations affect the functioning scope of such legal frameworks on international level.

Several mechanisms aiming at achieving the balance in the international legal order enable a State to fulfill its obligation to prosecute the alleged offender of international crimes. In circumstances of impunity, the obligation *aut dedere aut judicare* offers not only retributive justice but also a deterrent for future criminal behavior. The commission of core crimes rejects a society based on the rule of law and justice.⁹⁰ The hierarchy recognizes the normative imperative, pertinent to the existence of the whole world community as such. Correspondingly, all States have a vested, *erga omnes* legal interest in prosecuting offenders of such norms. Some of the punishable acts are *jus cogens*, which peremptory nature supports the argument that “violations of *erga omnes* and *jus cogens* norms affect all states, whether perpetrated by the governments of states or individuals.”⁹¹ Such crimes, committed often in extraordinary circumstances of widespread violence and no peace, are also international crimes, thus extending an obligation derived from the international society.⁹² International crimes inflict direct damage to the roots of the international society and as such they “are not merely violations against the

⁹⁰ Joyner (n 83) 167.

⁹¹ Joyner (n 83) 169.

⁹² In the language of the IMT at Nuremberg, “international crime is...an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances”, cited in *Trials of War Criminals 11(1946-1949)* US MTN (1948) 1241.

law or criminal codes of any individual state....they reach the level of crimes against the law of nations.”⁹³

⁹³ Joyner (n 83) 171.

CHAPTER 2

THE REGIME OF EXTRADITION AND PROSECUTION IN INTERNATIONAL LAW

As one of the essential mechanisms of the fight against impunity involves the principle ‘extradite-or-prosecute’, it is logical to continue the analysis of the development of the principle in international law through an examination of what is meant by the terms ‘prosecution’ and ‘extradition’ and how the two concepts interact with each other. The following chapter examines the substantive elements of the obligation *aut dedere aut judicare*. The chapter analyses what the obligation ‘extradite-or-prosecute’ is. It begins by outlining the definition and scope of ‘prosecution’, examines how the principle of complementarity might be applied to evaluate whether the prong of prosecution is adequately met, and concludes with a thorough examination of what is understood under the term ‘extradition’ in international law.

The definition and applicability of both terms are heavily influenced by the relevant multilateral conventions which contain the obligation *aut dedere aut judicare* for international crimes such as genocide, torture, war crimes, crimes against humanity, and other serious transnational crimes such as terrorism, hijacking and crimes against civil aviation. The reliance on international conventions is not coincidental because the origin of the obligation ‘extradite-or-prosecute’ has primarily developed through its inclusion in various multilateral treaties. An analysis is provided

as to the possible existence of different modes of the obligation *aut dedere aut judicare*, based on the type of crimes and inclusion in international treaties triggering its applicability. The chapter also provides a succinct definition of the scope and meaning of “extradite” and “prosecute”. An examination of the applicable exceptions to the process of extradition is provided in the subsequent chapter 3.

I. PROSECUTION

The first step in analysing the substance and scope of *aut dedere aut judicare* duty concerns the meaning of the term ‘prosecution’. As shown below, the duty to prosecute constitutes an obligation relating to certain international crimes, while the process of extradition seems to have evolved from a bilateral-based origin of transfer of suspects between States.

From the first extradition treaty between the Pharaoh of Egypt and the King of the Hittites, through the trial of Peter von Hagenbach in 1474¹ to the proliferation of trials against pirates in the 17th and 18th centuries, the power to prosecute what could be labelled ‘international crimes’ in modern terms has been firmly established in international law.² The bilateral manifestation of the duty to prosecute transgressors of international law was gaining prominence and acceptability among nations as early as the 17-18th centuries. Stability, including elimination of criminal

¹ See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. II: *The Law of Armed Conflict* (Stevens 1968) 462-464. See Donald Wells, *War Crimes and Laws of War* (University Press of America 1991) 93-94; and KJ Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013) 13-50.

² See Chapter 1. Also see R Clark, ‘Countering Transnational and International Crime: Defining the Agenda’ in Holly Cullen and William Gilmore (eds), *Crimes Sans Frontieres: International and European Legal Approaches* (Edinburgh University Press 1998) 24-25.

behaviour during wars, was sought through elaborate compilations of treaties.³ For example, the Jay Treaty of 1794 serves as an illustration for judicial cooperation between two States, incorporating the duty to prosecute offenders.⁴ Some States directly empowered their legislative and judicial branches to define and punish “Offenses against the Law of Nations”⁵.

As early as the 17th century, nascent attempts to prosecute crimes committed during conflicts were made, indicating the push away from the barbaric manner of warfare to a more regulated and communitarian approach to control violence. They exemplified the underlying elements of individual criminal responsibility, present throughout the development of international law.

For example, an early manifestation of the framework pertaining to individual responsibility in armed conflicts could be traced back to the 1621 ‘Articles of War of King Gustavus II of Sweden’, a set of humanitarian orders as regards conduct of soldiers, with clear prohibition of rape⁶, setting fire to a town or a village in an ally and occupied territory⁷, pillage of churches or hospitals⁸ and ill-treatment of clergymen, the elderly, women and children in absence of armed resistance⁹. The Articles provided for a judicial hierarchy of two-instance courts martial and final

³ See B Kingsbury and B Straumann (eds), *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP 2010) 24, discussing the works of G.F. von Martens. See also, C Blakesley, ‘The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History’ (1981) 4 BC Int’l & Comp LJ 39, 49.

⁴ See Jay Treaty of 1794 (US-UK) (adopted 19 November 1794), art 27.

⁵ See Art. I Sec. 8 Cl. 10 of the Constitution of the United States. See also *United States v. Ravara* (1793) 2 US (2 Dall.) 297. See also, R Friedlander, ‘The Foundations of International Criminal Law: A Present-day Inquiry’ (1983) 15 Case W Res J Intl L 13, 18. See also Q Wright, ‘The Scope of International Criminal Law: A Conceptual Framework’ (1975) 15 Va J Intl L 561, 565.

⁶ See Article 88 of the King Gustavus II’s Articles of War, cited in K Ögren, ‘Humanitarian Law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden’ (31 August 1996) International Review of the Red Cross No. 313, 438-441, accessed at <<http://www.icrc.org/eng/resources/documents/misc/57jn8d.htm>>

⁷ Articles 90-91 of the King Gustavus II’s Articles of War.

⁸ Article 99 of the King Gustavus II’s Articles of War.

⁹ Article 100 of the King Gustavus II’s Articles of War.

appeal recourse to the King, in which a special military prosecutor brought cases against officers and enlisted men in breach of the Articles.¹⁰

The modern meaning of prosecution could be traced back to the expansion of bilateral extradition treaties as well as to domestic judicial decisions in late 19th century. The expansion of bilateral treaties serves a significant role in the formulation of the scope and substance of the duty to prosecute as its meaning and applicability was codified in relation to a set of crimes. The bilateralism of the period reflects the concept that some States were more interested in repressing criminal behaviour, a foundation for a more communitarian-based approach to responding to criminal activity on international level.

One such area witnessing a rapid development of the duty to prosecute on the international level is the abolitionist movement on slave trade. As early as 1841, Great Britain and Mexico entered into the Slave Trade Treaty which postulated that parties were required to enact “a penal law by which the severest punishment shall be imposed on all citizens...who shall, under whatever pretext take any part in...the traffic of slaves.”¹¹ The bilateral treaty served as a prototype for the subsequent multilateral Treaty for the Suppression of African Slave Trade which obliged the parties to establish proceedings against violators in order such to “be tried and adjudged according to the established forms and laws in force” in the flag State.¹² Additionally, the multilateral treaty spurred the signing of treaties on slavery having similar effect which required

¹⁰ K Ögren, ‘Humanitarian Law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden’ (n 6) 438-441.

¹¹ Great Britain- Mexico Slave Trade Treaty, article III, 91 CTS 255.

¹² Treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade (adopted 20 December 1841) 92 CTS 437, art X.

domestic criminalization and prosecution of the alleged offences. The prohibition of slavery serves as an example of a legal rule with a bilateral origin which achieved a status of *jus cogens*.¹³ In essence, a certain behaviour conflicts with the norms of a few States, and then the prohibition of such individual behaviour materializes in an international crime on international level. The value to the duty to prosecute is irrefutable as the codified obligations clarified the term ‘prosecute’ to be an obligation of means.

State practice also affirms a duty to prosecute of certain international crimes and its complex interplay with the process of extradition. States asserted the extension of extraterritorial jurisdiction and prosecution of criminal acts beyond the crime of piracy. For example, the US Supreme Court categorically affirmed that States have to apply due diligence in preventing wrongdoing to be inflicted on another nation in times of peace, creating the inherent obligation of one nation “to punish those who within its own jurisdiction counterfeit the money of another nation”.¹⁴ The US Supreme Court found that the obligation to prosecute counterfeiting is found in the custom of nations similar to trying pirates. Such custom requires prosecution in the territory of a State where the counterfeiting takes place as “a prudent state will suppress counterfeiting of another state’s currency, in the expectation of reciprocal action”.¹⁵ The case may serve as a precursor of delineating the essential elements as regards prosecution and extradition which were later codified in the 1929 Counterfeiting Currency Convention.¹⁶

¹³ The 1926 Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927), 60 LNTS 253. See also, General Act between the United States of America and Other Powers for the Repression of the African Slave Trade (2 July 1890) 173 CTS 293.

¹⁴ *US v. Arjona* 120 US 479 (1887) 484.

¹⁵ Clark (n 2) 25.

¹⁶ International Convention for the Suppression of Counterfeiting Currency (adopted 20 April 1929, entered into force 22 February 1931) 112 LNTS 371, article 8. For the first time the ‘extradite- or-prosecute’ clause is codified in the obligation on the State party to exercise jurisdiction over own nationals if the State refuses to extradite the

1) The Obligation to Prosecute

Throughout the ages, broad conditions to what is meant by prosecution have evolved. It could be safely asserted that the obligation to prosecute is a duty of means as it requires the submission of the case for the purpose of prosecution. Additionally, there are certain preliminary measures that States are obliged to undertake before prosecution as the conventions reviewed below include specific provisions obliging the State to adopt appropriate measures in order to criminalize the relevant acts on domestic level, establish appropriate jurisdictional basis, investigate in good faith, and secure custody over the alleged perpetrator for the purpose of prosecution or extradition.¹⁷

It can be preliminarily asserted that in the contemporary forms of the obligation ‘extradite-or-prosecute’ relating to core crimes of international law, such as torture, the primary obligation relates to the prosecution prong: “extradition is an option offered to the State by the [Torture] Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.”¹⁸ The role of the prosecution prong of the obligation is crucial because, as established above, actions by States to put perpetrators of certain international crimes to trial by “ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international

person for alleged offences. The 1929 Convention embodies some of the customary elements acknowledged in the decisions of the domestic courts in terms of the conditions for prosecution and the relation to extradition.

¹⁷ ILC, Survey of Multilateral Conventions which May Be of Relevance for the Work of the International Law Commission on the Topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’, A/CN.4/630 (18 June 2010) para 144.

¹⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422, para 95. See also, ILC, Annex A: Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*) A/68/10 (6 May to 7 June and 8 July to 9 August 2013) para 22.

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.”¹⁹ (emphasis added)

Various multilateral conventions include terms for describing the act of prosecution as “to try”, “obligation to take proceedings”, “submit the case to competent authorities for the purpose of prosecution”. The recent ICJ’s *Habre* case also sheds light on the meaning of prosecution as regards the *aut dedere aut judicare* clause of Article 7 of the Convention against Torture. The Court applies a narrow definition: in order to satisfy the obligation to prosecute, the jurisdictional State must submit the case to the competent authorities for the purpose of prosecution. The result of this submission and initiation of prosecutorial action is not essential, i.e. the Court does not apply a result-oriented definition as the obligation *aut dedere aut judicare* is interpreted as primarily a means-oriented, procedural rule. It is evident from the interpretation of the Court that the submission of the case to the relevant domestic authorities “may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.”²⁰

The Court applied a factual approach to determining whether the obligation to prosecute is satisfied: starting with the timely preliminary inquiry and ending with the submission of the case to the relevant judicial authorities, who still retain the power to review the case at pre-trial level;

¹⁹ UNGA Resolution 67/1 (24 September 2012) 67th Session, UN Doc. A/67/L.1, para.22.

²⁰ *Belgium v. Senegal*, Judgment (n 18) para 94. See also, *Chili Komitee Nederland v. Pinochet* (4 January 1995) Court of Appeal of Amsterdam, cited in (1997) 28 Netherlands Yearbook of International Law 363-365.

a definition incorporating and respecting the different penal procedures of each State. Additionally, proceedings connected to fulfilling the obligation to prosecute should be implemented without delay, in due course after the initial complaint is lodged against the suspect, and the prosecution must be executed in a timely manner so as not to lead to injustice or unjustified delays.²¹

There are other issues such as the temporal scope of the obligation to prosecute. For example, in the *Palić* case, the European Court of Human Rights ('ECtHR') dealt with the issue of an alleged violation of the procedural obligation to investigate the disappearance and death of a military commander during the Yugoslav Wars of 1992-1995.²² The procedural obligation arising from the international crime of enforced disappearance remains as long as the whereabouts and fate of the person are unaccounted for.²³ Even a presumption of death does not relieve the forum State from investigating the circumstances of disappearance. Attention needs to be heeded to conditions applicable after judicial proceedings terminate. It seems as if "the precise degree of prosecutorial discretion available to competent authorities would seem to need to be determined on a case-by-case basis, in light of the text of the relevant provision and the preparatory works, taking into account the nature of the crime concerned".²⁴

Whilst the prong of the obligation *aut dedere aut judicare*, concerning the definition, scope and exception of the term "extradition" might be perceived as adequately defined in the practice of

²¹ *Belgium v. Senegal*, Judgment (n 18) paras 115, 117.

²² See *Palić v. Bosnia and Herzegovina* Application no. 4704/04 (ECtHR, 15 February 2011) para 43.

²³ See *Varnava and Others v. Turkey* App nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR Grand Chamber, 18 September 2009) paras 147-49.

²⁴ ILC, Survey of Multilateral Conventions which May Be of Relevance for the Work of the International Law Commission on the Topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)', A/CN.4/630 (18 June 2010) para 147.

States through the ages and in the widely ratified conventions explored in the current chapter, the limb of “prosecution” seems vaguely defined in international law. This ambiguous status of the scope and application of prosecution is due to the nature of the proceeding itself—prosecutorial actions reflect the character of the domestic legal systems and each sovereign State retains the right to define the stages of prosecutorial proceedings.²⁵ Hence, it is not surprising that States apply different meanings of what constitutes and what state organs are involved in investigation and prosecution.²⁶ Nonetheless, as established in the *Habre* case, the duty to prosecute is firmly established in international law and it is crucial to propose a standard to evaluate if the custodial State fulfils or not the duty of the prosecution prong. Hence, the duty is examined through the prism of complementarity in order to reflect on the interaction of both prongs of the *aut dedere aut judicare* principles with the ultimate purpose to establish in what circumstances, if the prosecution obligation fails to be satisfied by the requested State, the same State is obligated to extradite the relator to another State willing and able to prosecute the individual.

2) Complementarity and *Aut Dedere Aut Judicare*

As the definition of ‘prosecution’ is means-oriented, it is essential to introduce a test to evaluate in which the prosecution prong of the obligation *aut dedere aut judicare* is satisfied. Although the complementarity principle is an admissibility issue by which the ICC “could only exercise jurisdiction if domestic courts were unwilling or unable to prosecute” in situations where States

²⁵ For comparison and examination of the Commonwealth judicial systems in terms of prosecuting international crimes, see B Brandon and M du Plessis, *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (Commonwealth Secretariat 2005) Part II, 125-230.

²⁶ See E Greppi, ‘Inability to Investigate and Prosecute under Article 17’ in M Politi and F Gioia (eds), *The International Criminal Court and National Jurisdictions* (Aldershot 2008) 63.

are presumed to be under a duty to prosecute suspects on their territory²⁷, the principle applied to the obligation to prosecute serves as an orienteer of whether States have met the primary duty to prosecute.

The complementarity regime offers a stable framework to discern whether a State is willing or able to submit the case for the purpose of prosecution and whether the State has fulfilled the requirements of prosecution. The similarity between ascertaining whether a State has met the obligation to prosecute and the principle of complementarity is easily noticeable as detailed judicial determination is applied to both principles. Complementarity is applicable to the same set of international crimes which trigger the obligation *aut dedere aut judicare*, as shown below. As complementarity is triggered when the prosecution duty is not satisfied and inherently involves an examination of what constitutes ‘prosecution’, the definition, applicability and scope of the ‘prosecution’ prong is analysed and determined whether it is fulfilled. If the State has not fulfilled its obligation to prosecute or does not plan to do so, the State bears responsibility for the wrongful act.²⁸

The following section proposes a comparative framework for ascertaining whether the State with jurisdiction over the suspect has successfully passed the prosecution standard, namely, through the applicability of the complementarity principle over the actual implementation of the duty to prosecute. In this manner, through the prism of some elements of the complementarity principle directly relating to prosecution, other States are availed the opportunity to evaluate whether the custodial State has fulfilled its obligation or not. Additionally, the complementarity regime

²⁷ W Schabas, *An Introduction to the International Criminal Court* (4th ed, CUP 2011) 16, 24.

²⁸ See Chapter 5.

serves as a good comparative guidance as it includes a framework of treatment of individuals and state obligation, a characteristic observed in the *aut dedere aut judicare* principle.

The journey of the relation between the prosecution duty and complementarity starts with analysing the Rome Statute of the ICC, a widely ratified treaty which incorporates the clearest manifestation and conditions of the complementarity principle. The aim of the analysis is not to seek to establish whether the complementarity principle as a whole applies to non-State parties, but to distil, apply by analogy, and examine the most relevant definitional aspects of what constitutes prosecution and under what conditions the State is able or willing to prosecute. The Statute may serve as a guidance for the criteria under which the scope and threshold for prosecution are satisfied,²⁹ through examining and applying the illustrative analogy of the principle of the complementarity pertaining to prosecution.

The regime of responding to international crimes may be illustrated to resemble a framework where the primary function is reserved for domestic legal orders or custodial States to prosecute individual perpetrators. One of the mechanisms to ensure that the national legal systems and States uphold the international duty of prosecution of international crimes is the *aut dedere aut judicare* obligation. The principle facilitates the goal to make “prosecution of crimes against international law...a matter for national legal systems.”³⁰ As such trials are oftentimes exceptionally complex and/or politically charged, domestic systems might be unable or unwilling

²⁹ Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity’(2003) 7 Max Planck Yearbook of United Nations Law 591, 600 – 601.

³⁰ Colin Warbrick, ‘Crimes Against International Law’ in Holly Cullen and William Gilmore (eds), *Crimes Sans Frontieres: International and European Legal Approaches* (Edinburgh University Press 1998) 19.

to successfully meet the prosecution requirement. The functioning of the framework aims at supporting and developing ‘a criminal justice system’ of coherent and holistic character. Such a concept of a criminal justice framework ensures that no safe haven is available to alleged perpetrators of international crimes.

As the obligation ‘extradite or prosecute’ serves as a guarantor that domestic prosecution takes place, it is necessary to examine under what circumstances States do not satisfy this duty. When the prosecution obligation on domestic level is not met, other mechanisms fulfil the prosecution requirement, namely the involvement of international courts and tribunals or other States willing and able to submit the situation to prosecution for a set of crimes of international law pursuant extradition of the relator. Correspondingly, it is necessary to ascertain whether the State where the relator is located has the capacity, willingness and ability to submit the case for the purpose of prosecution in first place.

Since the State as an international legal subject has the primary duty to investigate and prosecute international crimes³¹, the obligation ‘extradite or prosecute’ shares certain similarities with the principle of complementarity.³² Proceedings encompass both investigations and prosecutions³³:

³¹ See Preamble of the Rome Statute. See also Summary Record of the 5th Plenary Meeting (17 June 1998) UN Doc. A/CONF.183/SR.5, para 15. See also *Gaddafi* Court of Appeal of Paris (2004) Chambre d’accusation 125 ILR 490, 497, where the French Court proclaims “The Convention containing the Statute of the International Criminal Court,...recalls in its Preamble “that it is the duty of every State to exercise its criminal jurisdiction”...It is thereby recognized by this Convention that it is the duty of the States which have ratified it to exercise their jurisdiction over international crimes.” Cited in M El Zeidy, *The Principle of Complementarity in International Criminal Law* (Martinus Nijhoff 2008) 220. See also, Greppi (n 26) 64.

³² Brandon and du Plessis (n 25) 33-34. See also, M El Zeidy, *The Principle of Complementarity in International Criminal Law* (Martinus Nijhoff 2008) 220-221. See Claus Kress, “‘Self-Referrals’ and ‘Waivers of Complementarity’: Some Considerations in Law and Policy’ (2004) 2 JICJ 944, 946.

³³ Update on Communications received by the ICC Prosecutor, Iraq response (9 February 2006); Update on Communications received by the ICC Prosecutor, Venezuela response (9 February 2006).

prosecution includes criminal allegations instituted against an accused, and a trial denotes a test of the prosecution allegations³⁴ or “formal judicial examination”.³⁵ The custodial State must establish jurisdiction, investigate and prosecute the alleged violations of international crimes in accordance with the fundamental requirements of the State being able and willing to initiate criminal proceedings.³⁶ However, if the custodial State does not meet the requirements of good faith prosecution laid down in the tests of willingness or ability to submit the case for the purpose of prosecution, the State has not fulfilled the *aut judicare* prong of the duty. It is proposed that the criteria for determining whether a State has met the ‘prosecution’ requirement are to be guided by the complementarity principle relating to prosecution as there is no strict requirement for the presence of an extradition request by another State to trigger the applicability of the prosecution duty. Nonetheless, the custodial State may opt to extradite the suspect to another State and relieve itself from the prosecution requirement.

The premise is that when the judicial system of the requested State is unwilling or unable to genuinely conduct national proceedings in relation to a case, the requesting State must be allowed to fill the impunity gap and initiate criminal proceedings against the relator following the extradition process.³⁷ Hence, it is essential to establish whether a *bona fide* investigation and prosecution are required and met by the custodial State.³⁸

³⁴ JR Spencer, ‘The English System; in Mireille Delmas-Marty and others (eds), *European Criminal Procedures* (Cambridge University Press 2002) 181.

³⁵ *Black’s Law Dictionary* 1510.

³⁶ J Kleffner, ‘Auto-referrals and the Complementary Nature of the ICC’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (M.Nijhoff 2009) 41-42.

³⁷ William Schabas, *An Introduction to the International Criminal Court* (4th ed, CUP 2011) 20. See Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para 568. See also, Greppi (n 26) 67.

³⁸ Zeidy (n 32) 162. See also, Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, paras 614-616 where it is suggested that

Article 17 of the Rome Statute establishes three relevant grounds of primacy of the national jurisdictions in relation to the ICC jurisdiction based on prosecution criteria: 1) “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless *the State is unwilling or unable genuinely to carry out the investigation or prosecution*; 2) the case has been investigated by a State which has jurisdiction over it, and the *State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute*; 3) the person concerned has already been tried for the conduct, unless *the trial was for the purposes of shielding the person concerned from criminal responsibility or otherwise was not conducted independently or impartially*.” (emphasis added) Precisely because the obligation *aut dedere aut judicare* contains a duty to prosecute, the forum State has a crucial role in performing its duties in suppression of core crimes through investigation and prosecution.³⁹

states proving to be able and willing to genuinely undertake proceedings on the appropriate basis of jurisdiction may seek for extradition of the relator as Sudan has been found to be unable or unwilling to bring the persons to prosecution. See also, Greppi (n 26) 67.

³⁹ See Kleffner (n 36) 45. “Paragraph 6 of the Preamble, which is in principle of equal normative value to other provisions of the [Rome] Statute, provides unmistakably that States are legally required to exercise their criminal jurisdiction over international crimes.” Vienna Convention on the Law of Treaties, chapeau, 1155 UNTS 331 (adopted 22 May 1969, entered into force 27 January 1980), art 31(2). It would be inconsistent with such a premise to categorically reject the possibility that a Preamble can contain legal obligations. Nothing in the law of treaties indicates that provisions have an inferior legal force or no legal force at all, by virtue of the fact alone that they are set forth in the Preamble rather than the *dispositif*. See for instance, G Scelle, *Precis de droit des gens*, Vol. II (Sirey 1934) 464; P You, *Le Preamble des Traités Internationaux* (Fribourg, Librairie de l'Université 1941) 67-70; *Case concerning rights of nationals of the USA in Morocco* [1952] ICJ Reports 176, 184; *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] 37 ILM 162, 151; G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and Other Treaty Points’ (1957) British Yearbook of International Law 229.

3) Genuine Investigation and Prosecution

As illustrated in the current chapter, the meaning of the prosecution requirement in the majority of the treaties containing the *aut dedere aut judicare* clauses is ambiguous. Hence, it is appropriate to provide analogous interpretation of what is meant by prosecution. The first element concerns genuine investigation and prosecution as it clarifies under what circumstances the custodial State can claim to have fulfilled the prosecution part of the obligation. The rationale behind the requirement of genuine prosecution is obvious as if it is not fulfilled, the relator who has been refused to be extradited would enjoy impunity for the alleged crimes.

The test of genuine prosecution illustrates the balance in fulfilling the obligation: if there is no genuine prosecution, “states could...easily circumvent justice by conducting shams”, while if the requesting State is allowed to interfere with the requested State’s criminal system, “sovereignty would have been unduly impaired.”⁴⁰ The normativity of the obligation to investigate and prosecute is strengthened by a willing and able enforcement mechanism in the judicial system of the custodial State.⁴¹ Hence, the definition of genuine⁴² would hinge on the double test of whether the prosecutorial proceedings are objectively what they are claimed to be and subjectively whether they are performed in good faith.

⁴⁰ Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff 2008) 215. See also William Schabas, *An Introduction to the International Criminal Court* (3rd ed, CUP 2007) 192.

⁴¹ See Kleffner (n 36) 46.

⁴² See John Holmes, ‘Complementarity: National Courts *Versus* the ICC’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court* Vol. I (Oxford University Press 2002) 674. See also ECJ approach towards the interchangeable meaning of “genuine” and “good faith” in Case C-499/99 *Commission v Kingdom of Spain* [2002] ECR I-6031, para 24; and Case C-105/02 *Commission v Federal Republic of Germany* [2006], paras 93 – 94. See also, Zeidy (n 32) 165.

In terms of the objective standard⁴³ of prosecution, it is suggested that the custodial State must possess “an adequate legal and institutional framework” from the moment the case commences as the core premise of the prosecution must be to seek the truth for the alleged crime; and substantial and procedural law must be interpreted and applied independently and impartially by competent judges.⁴⁴ For example, the judicial authorities must be able to “obtain the accused or the necessary evidence and testimony” in order to “carry out its proceedings”, thus utilizing all legal means during the investigation, criminal process and punishment phases.⁴⁵

The first step in any genuine prosecutorial effort is the investigation stage. The standard of an effective and meaningful investigation is not met when no such investigation has been instigated or when the investigation has lapsed into inaction or has become ineffective with “no immediate, realistic prospect of an effective investigation being provided in the future.”⁴⁶ A case under investigation is “understood as requiring the taking of ‘concrete and progressive investigative steps’, to ascertain whether the person is responsible for the conduct alleged”.⁴⁷ Such steps include but are not limited to interviewing potential witnesses, collection of documentary and witness evidence, forensic analysis, written orders, intercepts, external sources.⁴⁸ The crux of any

⁴³ Genuineness can be established through objective assessment. See *Nuclear Tests Case (Australia v. France)* (Merits) [1974] ICJ 253, para. 57; *Nuclear Tests Case (New Zealand v. France)* (Merits) [1974] ICJ 457, para 60.

⁴⁴ Zeidy (n 32) 166. Stigen (n 40) 216.

⁴⁵ Rome Statute, article 17(3). See also Stigen (n 40) 218. See also *Paniagua Morales et al. (“Panel Blanca”)*(Judgment) Inter-american Court of Human Rights Series C No 37 (8 March 1998), in particular paras 94, 139, 160, 169, 171, 178. Such requirements are also core to the investigation obligation in the common ‘extradite or prosecute’ articles of the Geneva Conventions explored in this chapter.

⁴⁶ *Varnava* case (n 23) para.165.

⁴⁷ *Situation in Libya in the Case of the Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi* (11 October 2013) ‘Decision on the admissibility of the case against Abdullah Al-Senussi’ ICC Pre-Trial Chamber I, ICC-01/11-01/11, para 66.

⁴⁸ See *Al-Senussi* Decision (n 47) para 161.

investigative effort is to provide “a sufficient degree of specificity and probative value that demonstrates that [the State] is indeed investigating the case”.⁴⁹

In subjective terms, the impetus of the prosecution must be based on the will and intent to bring the accused to a fair trial, albeit “respect for diversity of legal systems, traditions and cultures” must be heeded.⁵⁰ Nonetheless, the bar of genuine prosecution would be met according to the international applicable standard when “the evidence...demonstrates that the...competent authorities are taking concrete and progressive steps directed at ascertaining the criminal responsibility” of the accused.⁵¹ The State must ascertain “the quality of justice in the light of [its] actual intentions”⁵², meaning that its prosecution and investigation organs have the proper intent to carry the criminal proceedings in order to bring the person concerned to justice and not to shield the relator from criminal responsibility. There should be no unjustified delay in the independent and impartial pre-trial or trial proceedings.⁵³ Hence, the incentive for prosecuting core crimes in one State may have a positive spill-over effect on other States through the obligation ‘extradite or prosecute’.

Human rights standards of fair trial may also assist the examination of whether a State has fulfilled its obligation to undertake an effective and genuine prosecution. Human rights protections ensure not only that the State performs its prosecutions in effective and genuine

⁴⁹ *Al-Senussi* Decision (n 47) para 66. Cf fragmented and decontextualized succinct summaries of isolated or limited information provided by witnesses could not suffice to “the existence of concrete and identifiable investigative steps on part of Libya”. See *Al-Senussi* Decision (n 47) para 87.

⁵⁰ Paper on Some Policy Issues Before the Office of the Prosecutor, Office of the Prosecutor of the ICC (September 2003) 5.

⁵¹ *Al-Senussi* Decision (n 47) para 167.

⁵² *Zeidy* (n 32) 168.

⁵³ See Rome Statute, art17(2)(c).

manner but also protect the relator against biased and unjustified judicial proceedings on national level. For example, the principle of due process is present in various international and regional human right treaties.⁵⁴ The due process guarantee ascertains that there would be no unjustified delays and that the proceedings on national level would be conducted independently and impartially.⁵⁵ The due process guarantees apply equally to procedural and substantive rights.⁵⁶ The rights of the accused are also included in the Statute of the Extraordinary African Chambers established for prosecuting Habre. Article 21 of the EAC Statute lists the following rights to which the accused is entitled: prompt and detailed information in a language which the accused fully understands as regards the nature and content of the charge; adequate time and facilities for the preparation of the defence and free communication with counsel of his or her own choosing; a trial without undue delay; presence of the accused at the trial and conduct in person or through legal assistance of the accused's choosing, or an assigned legal assistance in any case where the interests of justice so require for free when the accused lacks sufficient funds; an opportunity to examine the witnesses against the accused and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against the accused; availability of free assistance of an interpreter; and ability to choose not to testify or to confess guilt.⁵⁷

Second, the State obligation to follow and apply basic human rights solidifies relator's right that the prosecuting State would not violate the right to life, the prohibition of torture, the right of

⁵⁴ See International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14; AmCHR, art 8; ECHR, art 6.

⁵⁵ See Zeidy (n 32) 166. See also Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Criminal Law Forum 255.

⁵⁶ *Baena-Ricardo et al (270 Workers v. Panama)* (Judgment) Inter-American Court of Human Rights Series C No. 72 (2 February 2001), para. 137. See Zeidy (n 32) 169.

⁵⁷ See Statute of the Extraordinary African Chambers, art 21(4).

liberty and security, and the prohibition of discrimination on grounds of sex, race, colour, language, religion, political and other affiliation, national, ethnic origin.⁵⁸

Third, the right to an effective remedy, including exhaustion of domestic remedies before recourse to international courts, protects the accused by ensuring that adequate investigation and prosecution are performed. Effective remedy reflects that the national proceedings are effective and available.⁵⁹ The doctrine allows for examination of whether the State has dealt adequately with the alleged crime in its domestic legal system, i.e. if the effective remedy bar is passed, then the prosecution could be claimed to have been effective and adequate. Moreover, the principle of exhaustion of domestic remedies shows that effective remedies at local level are not only of formal existence, but also adequate and effective.⁶⁰

Overall, the standards of genuine investigation and prosecution serve as indicators in the process of determining whether the custodial State has met its obligation under the *prosequi* part. The standards are also crucial for determining whether the State may bear responsibility for breaching the obligation *aut dedere aut judicare* if the prosecution prong is not met and extradition of the relator does not take place.

⁵⁸ Stigen (n 40) 223.

⁵⁹ See *Velasquez Rodriguez v Honduras case* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988) para 174: “a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.

⁶⁰ *Manuel Aguirre Roca et al. v Peru case* (Judgment) Inter-American Court of Human Rights, 11.760 Rep No 35/98 (5 May 1998) para.29.

4) Unwillingness

The term unwillingness denotes a subjective element in determining whether a State is not genuinely investigating or prosecuting the alleged perpetrator. Unwillingness means insufficient proactive behaviour to prosecute with the purpose of shielding the accused in sham proceedings.⁶¹ The essential element is the conscious decision not to prosecute in a genuine and effective manner. In order to understand the subjective element, a careful examination of the objective irregularities in the judicial proceedings is needed⁶² as “State’s ‘willingness’ or ‘ability’ must be conducted in relation to the specific domestic proceedings” in order to infer that “there is no situation of inactivity.”⁶³ The proposed standard is “a reasonable inference of unwillingness.”⁶⁴ It should be also duly noted that same evidence from the domestic legal system in relation to prosecutorial acts may be used to adduce genuineness, willingness and ability to prosecute.⁶⁵

The main factors in determining unwillingness relate to violations of the principles of due process: the national proceedings aim at shielding the accused from criminal responsibility; there has been an unjustified delay in the proceedings; or the proceedings have not been conducted independently or impartially. The test of unwillingness indicates whether the custodial State has fulfilled its obligation to prosecute the accused. It is proposed that if the judicial authorities of

⁶¹ Stigen (n 40) 251. See also, Greppi (n 26) 65.

⁶² Schabas (n 37) 184: unwillingness indicates sham trials after which an accused can raise the double jeopardy exception to extradition or subsequent prosecution.

⁶³ *Al-Senussi* Decision (n 47) para 202.

⁶⁴ First Public Hearing of the Office of the Prosecutor at the ICC (17-18 June 2003) 2.

⁶⁵ *Al-Senussi* Decision (n 47) para 210.

the custodial State show unwillingness to prosecute, then the State has not fulfilled its part of the obligation.

a. Shielding

If the proceeding undertaken or the national decision to prosecute was made for the purpose of shielding the relator from criminal responsibility, such actions amount to unwillingness. The essential element is the purpose of shielding, traditionally inferred from circumstantial evidence. The antipode of unwillingness reflects the doctrine of proceedings carried in good faith and due diligence.⁶⁶ The term shielding must be interpreted according to its regular meaning, namely protecting a person from effective and due criminal responsibility.⁶⁷ Shielding may result in a complete lack of any prosecutorial proceedings, acquittal of the relator or imposition of lesser penalty in comparison to the gravity of the crime perpetrated as illustrated by the various Leipzig war crimes trials following WWI.⁶⁸

A pattern of decisions not to prosecute following investigation may also indicate unwillingness especially when “significant and sufficient portions of the judicial system have remained functional, efficient and robust”.⁶⁹ Refusal to extradite a relator, based on conspicuously broad interpretation of the exceptions to extradition, may demonstrate a factor of unwillingness. Another possibility relates to a non-genuine prosecution of the alleged perpetrator or to a

⁶⁶ Stigen (n 40) 262.

⁶⁷ Stigen (n 40) 260.

⁶⁸ See Zeidy (n 32) 172. See also, *Judgment in the Case of Karl Heynen* (Supreme Court of Leipzig judgment) (26 May 1921) 16 AJIL 674 (1922).

⁶⁹ *Al-Senussi* Decision (n 47) para 214. See Report of the International Commission of Inquiry on Darfur, para 586. See also Stigen (n 40) 263.

deliberate proceedings against a third person as a cover-up process.⁷⁰ Additionally, the perpetrator might be a high official in the custodial State which may necessitate a careful examination of whether the State is politically motivated not to prosecute the relator.⁷¹

Shielding also involves intimidation, threats or abuse of investigators, prosecutors, judges, witnesses or victims. It is paramount for a fair trial that victims and witnesses must not be intimidated and must be allowed to approach the authorities freely and without fear.⁷² Fair trial guarantees must be protected and effectively applied, meaning that where special judiciaries hear the case, due process guarantees like equality of arms and right to cross-examination must be upheld. Special tribunals should not render convictions which are more lenient than the ordinary tribunals as such outcome might constitute shielding.⁷³

Shielding is present when investigations and preliminary inquiries are perfunctory and superficial⁷⁴ and preordained to be ineffective.⁷⁵ Inculpatory and exculpatory evidence must be accessible to the relator. Witnesses must be afforded the opportunity to provide exculpatory evidence, and victims given the opportunity to describe harm suffered.⁷⁶ Destruction and intentional mishandling of evidence may indicate bad faith on part of the judicial and prosecution

⁷⁰ Stigen (n 40) 261.

⁷¹ Stigen (n 40) 264.

⁷² Stigen (n 40) 269. The state has a duty to prevent such intimidations against witnesses and victims. See 'Lora Prison cases Croatia: Victims and witnesses in war crimes trials must be adequately protected' *Amnesty International* (Press Release, 20 June 2002).

⁷³ Stigen (n 40) 273.

⁷⁴ *Timurtas v Turkey* App no 23531/94 (ECtHR, Judgment (Merits and Just Satisfaction) (13 June 2000) paras 88, 110.

⁷⁵ *Villagran Morales et al. v Guatemala case* (Judgment) Inter-American Court of Human Rights Series C No. 63 (19 November 1999) para 226. See also, Zeidy (n 32) 78.

⁷⁶ *Al-Senussi* Decision (n 47) para 211.

organs resulting in sham processes.⁷⁷ Intentional deficiency and negligence, inadequate indictments in terms of omission of crimes, inaccurate classification of liability and general disparity of gravity of crimes perpetrated and crimes charged might also show shielding of the relator on part of the prosecution.⁷⁸ The reverse applies as well: the prosecutorial organs may protect the relator if the indictment cannot be reasonably proven due to inappropriate and more severe charges with a lack of sufficient evidence. However, prosecutors must retain the ability to indict on lesser crimes if they honestly believe that the graver crime would not reasonably lead to conviction, based on available evidence.⁷⁹ Lenient convictions may also indicate that there is an element of protection and abuse of the due process in favour of the relator.⁸⁰

Unwillingness may also be unveiled when the custodial State has not enacted necessary obligatory legislation to prosecute international crimes or has offered blanket amnesties to alleged perpetrators, thus preventing arrests, investigations and prosecutions.⁸¹ In addition, investigating authorities must act effectively and in timely manner⁸² and be provided with unhindered access to the national judicial system. The non-applicability of amnesties for the core crimes of genocide, crimes against humanity, war crimes and torture is also affirmed in the Statute of Extraordinary African Chambers (“EAC”) as “an amnesty granted to any person

⁷⁷ *Myrna Mack Chang v Guatemala case* (Judgment) Inter-American Court of Human Rights Series C No. 101 (25 May 2003) paras 172, 174. Sham cover-ups constitute “an obstruction of justice and an inducement for those responsible of the facts to remain in situation of impunity.”

⁷⁸ Zeidy (n 32) 175. See also, Stigen (n 40) 279.

⁷⁹ Stigen (n 40) 280.

⁸⁰ See KJ Heller, ‘A Sentence-based Theory of Complementarity’ (2011) 53(1) HILJ 202.

⁸¹ See Zeidy (n 32) 175; Stigen (n 40) 266.

⁸² The ECtHR has pronounced, “whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedure.” See *Jordan v UK* App No 24746/94 (ECtHR judgment, 4 May 2001) para 105. See also *McCann and Others v The United Kingdom* App no 18984/91, (ECtHR, 27 September 1995) para 161.

falling within the jurisdiction of the [EAC]...shall not be a bar to prosecution” along with other decisions by regional human rights courts.⁸³ Investigations must be “capable of leading to the identification and punishment of those responsible”.⁸⁴ Suspects must be apprehended in timely and effective manner and afforded applicable human rights protections. Moreover, the investigating and prosecution authorities must take “reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence”,⁸⁵ must perform a thorough and objective analysis, and must eliminate deficiencies undermining appropriate determination of the case.⁸⁶

b. Unjustified Delay

A delay in the judicial proceedings against a relator is tantamount to obstruction of the administration of justice and aids impunity. With the lapse of time, the memories of witnesses change and wane, evidence deteriorates or ceases to exist, and the prospects of an effective investigation diminish significantly, resulting in decreased meaningfulness and effectiveness of the investigation, prosecution and potential judgment.⁸⁷ The underlying element of unjustified delay is the degree of inconsistency with the intent to bring the person to justice. Such

⁸³ Statute of the EAC, art 20. See also, *Chumbipuma Aguirre et al v Peru* IACtHR (Judgment of 14 March 2001) Ser C No 75, para 41.

⁸⁴ See *Tanis and Others v Turkey* App no 65899/01 (ECtHR, 02 August 2005) para 203; *Khashiyev and Akayeva v. Russia* App no 57942/00 and 57945/00, (ECtHR, 24 February 2005) para 121.

⁸⁵ *Jordan v. UK* (n 81) para.107.

⁸⁶ *Nachova and others v Bulgaria* App nos 43577/98 and 43579/98 (ECtHR, 6 July 2005) para 113.

⁸⁷ See *Palić v. Bosna and Herzegovina* (n 22) para 49.

determination of inconsistency of unjustified delay must be made against specific circumstances in the ongoing investigation.⁸⁸

Undue delay would not be applicable if “there is some meaningful contact...concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures”.⁸⁹ The investigation must be independent and effective, leading to the identification and punishment of responsible individuals, along with affording a sufficient element of public scrutiny, and carried out with reasonable promptness and expedition.⁹⁰ The progress in investigation and prosecution could also be discerned from whether the proceedings against the accused match and cover factual allegations, based and measured against the temporal, geographic and material parameters of the alleged crime.⁹¹ Additionally, “a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”⁹²

The State is granted a margin of discretion as the unwillingness covers only unjustified delays in the process; justified, reasonable and proportionate circumstances invoked by the State do not amount to obstruction and abuse of the due process. Unjustified delay connotes a lack of good faith on part of the judicial and enforcement authorities.⁹³

⁸⁸ *Al-Sanussi* Decision (n 47) paras 223-224.

⁸⁹ *Varnava case* (n 23) para 165.

⁹⁰ *ibid* para 191.

⁹¹ *Al-Senussi* (n 47) para 228.

⁹² See *Palić v. Bosna and Herzegovina*, Joint Partly Dissenting Opinion of Judges Bratza and Vehabovic, 25.

⁹³ *Zeidy* (n 32) 182; *Stigen* (n 40) 290.

The right to criminal trials without undue delay and within a reasonable time is enshrined as a principle of human rights law.⁹⁴ Human rights bodies assess the reasonable time test from the moment when the relator is charged⁹⁵, albeit scholars have pushed for broader application, covering the whole investigation period.⁹⁶ In order to establish whether undue delay exists, the following factors should be taken into account: “the individual circumstances of the case, including national legislation, the legal and factual complexity of the case, the availability of evidence and the conduct of the accused, witnesses and other actors involved”, as there is no one-size-fits-all approach.⁹⁷

Due to the complexity of international crimes, delays in the proceedings might be expected.⁹⁸ Core crimes trials usually involve “a large amount of documentary evidence, number of suspects involved, complexity of acts committed, nature of charges, number of witnesses, witness specific

⁹⁴ See article 14(3) of the ICCPR, article 67(1)(c) of the Rome Statute, article 21(4)(c) of the ICTY Statute, article 20(4)(c) of the ICTR Statute, article 7(1)(d) of the AfCHPR, article 8(1) of the ACHR, and article 6(1) of the ECHR.

⁹⁵ *Eckle v Germany* App no 8130/78 (ECtHR, 15 July 1982) para 73; *Deweert v Belgium* App no 6903/75 (ECtHR, 27 February 1980) para 42; *Wemhoff v Germany* App no 2122/64 (ECtHR, 27 June 1968) para 19. The IACtHR considers the starting point for examining domestic proceedings is the arrest of the accused. See *Suarez –Rosero v Ecuador* (Judgment) Inter-American Court of Human Rights Series C No. 35 (12 November 1997) para 70.

⁹⁶ Zeidy (n 32) 183.

⁹⁷ See *Prosecutor v Andre Rwamakuba* (Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute) ICTR-98-44C-PT (3 June 2005) para 26. *Konig v Germany* App no 6232/73 (ECtHR Judgment (Merits), 28 June 1978) para 99. *Ratiani v Georgia* HRC Communication No. 975/2001, UN Doc. CCPR/C/84/D/975/2001 (04 August 2005) para 10.7. The reasonableness test is based on the following factors according to ICTR: “1) The length of the delay; 2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law; 3) The conduct of the parties; 4) The conduct of the relevant authorities; and 5) The prejudice to the accused if any” as decided in *Prosecutor v Prosper Mugiraneza* (Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief) ICTR-99-50-AR73 (27 February 2004). See also, Zeidy (n 32) 184; Stigen (n 40) 292.

⁹⁸ See for example, *Fillastre v Bolivia* HRC Comm No 336/1988 (5 November 1988) para 6.6. For a delay of more than 11 years which was found to be proportionate, see *X v The Federal Republic of Germany* Application No. 6946/75 (ECommHR Decision of 6 July 1976 on the Admissibility of the Application) 114 – 116. *X v The Netherlands* App no 9433/81 (ECommHR Decision of 11 December 1981 on the Admissibility of the Application) 233 – 242.

protections, expert testimony, interstate cooperation in investigations.”⁹⁹ Also, a conduct of the relator in order to abscond justice or to grind to a halt the local proceedings by delaying and disruptive tactics should not be attributable to the State judicial organs.¹⁰⁰ Certain acts or omissions by State judicial organs such as delays in opening formal investigations¹⁰¹ or inactivity in transmission of cases between investigatory and prosecution organs or domestic instances¹⁰² may indicate undue delay. However, had the judicial system been close to collapse, the delay determination should be applied with some flexibility to incorporate the normalizing conditions for proceedings¹⁰³ and the delay duration must be “examined in the light of all the circumstances of a given case.”¹⁰⁴

The ICJ’s *Habre* case examined the issue of the temporal scope of the delays to fulfil the obligation ‘extradite-or-prosecute’. The prolongation of the implementation of the obligation on part of Senegal made Belgium assert that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation to submit the case to the relevant and appropriate authorities for the purpose of prosecution. Such undue delay would lead to violations

⁹⁹ Zeidy (n 32) 187-188. See also *Neumeister v Austria* App no (ECtHR Judgment (Merits) ,27 August 1968); *Wemhoff v Germany* App no 2122/64 (ECtHR Judgment (Merits and Just Satisfaction),27 June 1968); *Hagert v Finland* App no 14724/02 (ECtHR Judgment (Merits and Just Satisfaction),17 January 2006); *Genie- Lacayo v Nicaragua* (Judgment) Inter-American Court of Human Rights Series C No 30 (29 January 1997); *Suarez –Rosero v Ecuador* (Judgment) Inter-American Court of Human Rights Series C No 35 (12 November 1997).

¹⁰⁰ See Zeidy (n 32) 188. See also *Rylski v Poland* App no 24706/02 (ECtHR Judgment (Merits), 4 July 2006) para 76; *Corigliano v Italy* App no 8304/78 (ECtHR Merits and Just Satisfaction, 10 December 1982) paras 40, 42.

¹⁰¹ *Eckle v Germany* App no 8130/78 (ECtHR, 15 July 1982) paras 74, 83-84.

¹⁰² *Pelissier and Sassi v France* App no 25444/94 (ECtHR, 25 March 1999) paras 25-26, 73.

¹⁰³ See Schabas (n 40) 180. See also *Lubanga case* (Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006) ICC-01/04-01/06-8, para 36.

¹⁰⁴ Zeidy (n 32) 191. For example, the following criteria might be taken into consideration when examining the particular circumstances of a case: 1)availability of information; 2) nature and scale of crimes; 3) existence of national responses to alleged crimes; 4) overall security situation. See ‘Prosecution’s Report Pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic’ No.: ICC-01/05-7 (5 December 2006) paras 8-9.

of the rights of the victims as well as the accused.¹⁰⁵ Additionally, Belgium asserted that the referral of the situation to the African Union or other international organizations does not alter the obligation on part of Senegal in any possible manner; to the contrary, it should be noted that the Assembly of Heads of State and Government of the AU mandated Senegal “to prosecute and ensure that...Habre is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial.”¹⁰⁶

The Court clarified that as the obligation to prosecute is intended to fulfil the object and the purpose of the Convention, i.e. “to make more effective the struggle against torture”, such compliance is linked with the necessity to submit the proceedings without delay.¹⁰⁷ The obligation to submit the case for the purpose of prosecution requires the State party to take all necessary measures for its implementation as soon as possible, “in particular once the first complaint had been filed”.¹⁰⁸ The Court concluded that “it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.”¹⁰⁹ If the State party fails to do take all necessary steps as soon as possible, in reasonable time, without delay, the State party breaches and remains in breach of its obligation under Article 7(1).¹¹⁰

Senegal’s failure to adopt until 2007 the legislative measures necessary to institute proceedings based on appropriate jurisdiction have also delayed the implementation and compliance with other obligations under the Convention. Senegal was in breach of the obligation to make a

¹⁰⁵ *Belgium v Senegal*, Judgment (n 18) para 106.

¹⁰⁶ AU, Doc. Assembly/AU/Dec.127, VII Session (July 2006) para 5.

¹⁰⁷ *Belgium v Senegal*, Judgment (n 18) para 115.

¹⁰⁸ *Belgium v Senegal*, Judgment (n 18) para 117.

¹⁰⁹ *ibid* para 114.

¹¹⁰ *ibid* para 117.

preliminary inquiry into the alleged crimes of torture, pursuant to Article 6(2) of CAT as well as the obligation to submit the case to its competent authorities for the purpose of prosecution under Article 7(1).¹¹¹ Such continuing breaches negatively affect the purpose of these obligations, the prevention of the alleged perpetrators of acts of torture to go unpunished, “by ensuring that they cannot find refuge in any State Party.”¹¹² Moreover, the prohibition of torture is *jus cogens* and every State is obliged to investigate and prosecute such criminal acts.

Although the forum State has the option to extradite the relator to a State which has made such a request, “but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.”¹¹³ In this conclusion, no *pro-forma* extraditions are possible with the purpose of shielding the relator from prosecution on the alleged offence of torture. The forum State must abide by the mandatory obligation to submit the case for prosecution if it receives an extradition request from the State which cannot establish the proper jurisdictional base pursuant to Article 5 of CAT.¹¹⁴

Undue delays may also be linked to jurisdictional problems. In terms of temporal scope of the obligation of Article 7(1), the Court states that “the obligation to prosecute the alleged perpetrator of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned.”¹¹⁵ Article 28 of the Vienna Convention on the Law of

¹¹¹ *ibid* para 119.

¹¹² *ibid* para 120.

¹¹³ *ibid* para 120.

¹¹⁴ Article 5 of CAT provides for the following jurisdictional bases: 1) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; 2) when the alleged offender is a national of that State; 3) when the victim was a national of that State if that State considers it appropriate; and when the party may establish its jurisdiction over the offences where the alleged offender is present in any territory under its jurisdiction and the party does not extradite the relator pursuant to Article 8 to any of the States with Article 5(1) jurisdiction.

¹¹⁵ *Belgium v Senegal*, Judgment (n 18) para 100.

Treaties, which reflects customary law, is applied to reach such conclusion: “nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5.”¹¹⁶ Hence, the prosecution of acts of torture as well as the obligation for preliminary inquiry under the Convention regime may be applied, based on the discretion of the custodial State and the legal opinion of whether acts of torture were of customary character before CAT entered into force. Hence, although a State party is not under a conventional obligation to prosecute before the Convention enters into force, nothing in the Convention prevents the State party to institute proceedings against acts which were committed before the entry into force of the Convention.¹¹⁷ In this manner, the Court implies that a State party may initiate proceedings against a suspect even for acts of torture before the Convention has entered into force. This reflects the customary, *jus cogens* nature of torture and the overall goal to eliminate impunity for acts of torture. Hence, the customary nature of the prohibition of torture enables the State with enough substantive and procedural tools to look into the situation, initiate inquiry on the situation and commence proceedings for the purpose of prosecution.¹¹⁸ If the State regards the conduct as criminal before the entry of the force of the treaty, then the State may prosecute the person, although such retroactive application of a norm which is also codified in a statute “does not mean that the Convention *requires* a State party to enact retroactive criminal statutes.”¹¹⁹

¹¹⁶ *ibid* para 100, 104-105.

¹¹⁷ *ibid* para 102.

¹¹⁸ *Belgium v Senegal*, Judge Donoghue declaration, para 19.

¹¹⁹ *Belgium v Senegal* Judge Donoghue declaration, para 19.

c. Lack of Independence or Impartiality

Proceedings that are not conducted independently and impartially indicate unwillingness as such impede the fundamental right of the accused to be tried by an independent and impartial judiciary.¹²⁰ An objection that the court lacks independence is “an objection to the fairness of the trial”.¹²¹ What constitutes independence of the judiciary might be rather problematic as the concept “connotes...a status or relationship to others—particularly to the executive branch of government—that rests on objective conditions or guarantees.”¹²² For example, one may need to explore whether the impartiality and independence of the judiciary branch is constitutionally recognized in the domestic law of the forum State.¹²³

In criminal cases, independence means “the preservation of separate official institutions that investigate, prosecute and adjudicate cases with impartiality.”¹²⁴ International practice indicates that “whether a court is independent and impartial depends...upon its constitution, its judges and the way in which they function.”¹²⁵ Additionally, in post-conflict situations, the forum State may adduce evidence that it has been actively pursuing to apply international standards by “showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct.”¹²⁶

¹²⁰ ICCPR art 14(1), AfCHPR articles 7(1) and 26, ACHR art 8(1), and ECHR art 6(1).

¹²¹ *Prosecutor v Sam Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction and Judicial Independence) Case No. SCSL-2004-14-AR72 (E) (13 March 2004) para 4.

¹²² *Valente v The Queen* [1985] 2 SCR 673, 2. See also, *Ringeisen v Austria* App no 2614/65 (ECtHR, 16 July 1971) para 95; and *Campbell and Fell v The United Kingdom* App no 7819/77; 7878/77 (ECtHR, 28 June 1984) para 78.

¹²³ *Al-Senussi* Decision (n 47) para 248.

¹²⁴ See Stigen (n 40) 301.

¹²⁵ *Prosecutor v Duško Tadić A/K/A “Dule”* (Decision on the Defence Motion on Jurisdiction) IT-94-1-T (10 August 1995) para 32. See also, *Al-Senussi* Decision (n 47) para 250.

¹²⁶ *Al-Senussi* Decision (n 47) para 253.

The non-judiciary branches of government shall refrain from interfering with the administration of justice. Judicial independence is crucial for the fight against impunity because “by tolerating or participating directly in impunity, which concealed the most fundamental violations of human rights, the judiciary became functionally inoperative with respect to its role of protecting the individual from the States, and lost all credibility as guarantor of an effective legal system.”¹²⁷ The core function of the judiciary is precisely to uphold the rule of law and ascertain all fair trial guarantees.

Judicial decisions and convictions must be issued without fear and free of external interference and pressure. Courts must have the power to ensure that their decisions are enforced and abided by. Independent judiciary includes the ability of domestic courts to issue adjournment orders in order for the defence to be availed adequate time to prepare.¹²⁸ Legal representation must also be availed to the accused as the lack of such “holds the potential to become a fatal obstacle to the progress of the case.”¹²⁹

In terms of impartiality, inherent to the concept of judicial independence,¹³⁰ judges must preside and rule on the presented cases with no personal bias or prejudice,¹³¹ with integrity and no discrimination against the parties involved in the legal dispute. Impartiality “implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in

¹²⁷ Stigen (n 40) 302, citing the finding of the Historical Clarification Commission in Guatemala as regards the independence of the judiciary.

¹²⁸ See *Al-Senussi* Decision (n 47) para 255.

¹²⁹ *Al-Senussi* Decision (n 47) para 307.

¹³⁰ Zeidy (n 32) 199.

¹³¹ *Piersack v Belgium* App no 8692/79, (ECtHR, 01 October 1982) para 30.

ways that promote the interests of one of the parties.”¹³² Bias of the judge or any other public official, which may be actual and perceived,¹³³ might be present if the judge has been a party to the case or has some financial or proprietary interests or if a reasonable observer¹³⁴ would apprehend bias.¹³⁵

The general security situation may also adversely affect the ability of the judicial officials to obtain necessary evidence from witnesses and the accused which may negatively affect fair trial guarantees.¹³⁶ Security concerns may result in prejudice of the domestic proceedings against the accused, especially when no properly functioning witness protection programmes are available.¹³⁷ Whether the security challenges may prejudice against the accused is seen in the progressive and investigative steps, such as indications that the collection of evidence and testimony have not ceased or will not cease, and judicial proceedings are taking place.¹³⁸ Conflict of interests must be avoided on part of the judges, investigators or prosecutors if persons among their ranks were involved in the alleged crime in any capacity.¹³⁹ Certain violation of procedural rights of the accused may also be relevant in establishing whether the national proceedings are impartial and independent.¹⁴⁰

¹³² ‘Views of the Human Rights Committee under Article 5, paragraph 4’ (5 November 1992) para 7.2. See also UN Basic Principles of Independence of the Judiciary, principle 2. See also *Piersack v. Belgium* App no 8692/79 (ECtHR, 01 October 1982) para 30; *Warsicka v Poland* App no 2065/03 (ECtHR, 16 January 2007) para 35.

¹³³ *Al-Senussi* Decision (n 47) para 241.

¹³⁴ The definition of reasonable observer is illustrated by “[T]he reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.” See *Prosecutor v Anto Furundžija* (Appeals Chamber Judgment) IT-95-17/1-A (21 July 2000) para 190.

¹³⁵ *Prosecutor v Anto Furundžija*, Appeals Chamber Judgment, para 189.

¹³⁶ *Al-Senussi* Decision (n 47) para 261, 281.

¹³⁷ *Al-Senussi* Decision (n 47) paras 283, 287-288.

¹³⁸ *Al-Senussi* Decision (n 47) paras 298-299.

¹³⁹ See *Velasquez Rodriguez v. Honduras* (n 58) para 180.

¹⁴⁰ *Al-Senussi* Decision (n 47) para 235.

5) Inability

The absence of capacity and power in the judicial system to initiate investigation and prosecution proceedings against the accused usually results in inaction or passive attitude.¹⁴¹ The definition of inability incorporates a sense of management abilities on the part of the prosecuting State. Article 17(3) of the Rome Statute indicates that the determining factors of inability are “a total or substantial collapse” or “unavailability of...national judicial system” in order “to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”¹⁴² For example, inability would cover “a lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes”.¹⁴³ The list of factors is considered exhaustive and one of the two causes must result in one of the effects under which the State is unable to obtain the accused or key evidence.¹⁴⁴

a. Causes: Total or Substantial Collapse or Unavailability

Total collapse denotes that the judicial system must be endemically affected by a wide-spread and prevalent inability to conduct judicial proceedings. An appropriate example is the post-Genocide situation in Rwanda in 1994 as “Rwanda was left after the genocide with few judicial

¹⁴¹ Schabas (n 40) 174.

¹⁴² See also, *Al-Senussi* Decision (n 47) para 303.

¹⁴³ Office of the ICC Prosecutor, ‘ICC Paper on Some Policy Issues’, 4, cited in Stigen (n 40) 325.

¹⁴⁴ Zeidy (n 32) 223. See Stigen (n 40) 314.

officials alive and a substantially destroyed judicial system”.¹⁴⁵ Armed conflicts and repressive regimes might render the judicial system paralyzed or completely eradicated.¹⁴⁶ The preliminary assertion that “the concept of inability...implies dysfunctional or non-existent courts in failed States”¹⁴⁷ merits more analysis.

Substantial collapse denotes that the inability does not necessarily hamper the judicial system to function but affects significantly the legal system in a given area of law such as lack of criminal cases or tort actions.¹⁴⁸ The threshold for inability is met when an essential negative effect on the function of the whole domestic judicial system results in a high degree of intensity to sufficiently paralyze the judicial system in fulfilling its investigatory, prosecutorial, trial or enforcement functions.¹⁴⁹ For example, the impact of the substantial collapse must be long enough and must render the judicial system ineffective and improperly functioning.¹⁵⁰

Total or substantial collapse of the judicial system results in the system being unavailable; proceedings are inadequate, not accessible or not useful.¹⁵¹ Unavailable legal systems might not necessarily experience a complete state of collapse; courts may be hard to access or litigation

¹⁴⁵ High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda Report (19 February 1998) E/CN.4/1998/61, para 26. See also, *Mushikiwabo and others v. Barayagwiza* No 94 CIV (JSM) (Judgment 9 April 1996) 460 where the court concludes, “the Rwandan judicial system is virtually inoperative and will not be able to deal with civil claims in the near future.”

¹⁴⁶ See Concluding Observations of the Human Rights Committee on Cambodia (27 July 1999) para 8a, where it is stated that the Cambodian judiciary “remains weak owing to the killing or expulsion of professionally trained lawyers during the conflict, the lack of training and resources for the new judiciary and their susceptibility to bribery and political pressure.”

¹⁴⁷ Schabas (n 40) 181.

¹⁴⁸ See Thomas Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’ in Louis Henkin (ed), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 72, 80.

¹⁴⁹ Zeidy (n 32) 226.

¹⁵⁰ Stigen (n 40) 316.

¹⁵¹ Stigen (n 40) 318. See also, Greppi (n 26) 66.

might be predetermined or deficient in producing genuine results.¹⁵² Unavailability is seen in lack of competent legal personnel, lack of courtrooms or investigation facilities, absence of competent investigators to inspect crime scenes or interrogate potential witnesses.¹⁵³ A good indicator of whether a domestic system is unavailable is the “futility test” according to which domestic remedies must be “effective and available and sufficient.”¹⁵⁴

Hence, four indicators define unavailability: 1) inadequate legal provisions; 2) legal obstacles to access the judicial system; 3) factual obstacles to use the system; and 4) lack of materialization of desired results.¹⁵⁵ Adequate legal provisions must be in place in order for genuine prosecutions to occur. Alleged violations of core crimes must be possible to be prosecuted in the national judicial system and “the existence of a remedy must be sufficiently certain, not only in theory but also in practice” in order to meet the standard of “the requisite accessibility and effectiveness.”¹⁵⁶ The accused must be prosecuted for serious crimes in the national legal system in order to close the impunity gap albeit in some situations States “will not always proceed against alleged offenders under the international criminal law provisions, if only for reasons of expediency” or complexity of threshold requirements of core crimes.¹⁵⁷

The investigations and prosecutions must reflect the gravity of the alleged crimes in adequate manner. In terms of legal obstacles to access to the system, statutes of limitations, immunities

¹⁵² See *Multiplex v Croatia* App no 58112/00 (ECtHR, 10 July 2003) para 41.

¹⁵³ Stigen (n 40) 330.

¹⁵⁴ See *Van Oosterwijck v Belgium* App no 7654/76 (ECtHR, 06 November 1980) para 27. See also *Champagne et al. v Jamaica* Comm No 445/1991 (HRC decision, 18 July 1994) CCPR/C/51/D/445/1991, para 5.1.

¹⁵⁵ Stigen (n 40) 318.

¹⁵⁶ *Dawda v The Gambia* Comm No 147/95 and 149/96 (AfCmHR decision, 11 May 2000) para 35.

¹⁵⁷ Schabas (n 40) 183. See also, Greppi (n 26) 69.

and amnesties present pertinent problems to effective proceedings.¹⁵⁸ Moreover, inability to challenge decisions of special tribunals also falls under this category. Factual obstacles primarily concern limited abilities to carry out proceedings.¹⁵⁹

External obstacles such as security concerns may also contribute to the factual obstacles. The domestic system should not only avail the necessary legal tools for a genuine and effective prosecution but should also point to successful results of such proceedings. For example, criminal proceedings must not be “preordained to be ineffective”.¹⁶⁰ All of the three causes pertain to the national judicial system in terms of a particular handling of individual cases as “when the issue is impunity it is the availability of the legal system *in casu*.”¹⁶¹

In the *Habre* decision, the ICJ also held that financial difficulties cannot be used as a justification for failing to initiate proceedings against Mr. Habre, as Senegal itself has never used such justification, based on financial incapacity to comply with the incumbent obligation. Additionally, the referral to the AU of the situation cannot be taken into consideration for the unnecessary and undue delay of complying with the duties under CAT. Indeed, the forum State’s authorities must be diligent in their approach in the proceedings in order “to guarantee the suspect fair treatment at all stages of the proceedings”.¹⁶²

¹⁵⁸ The issue of core crimes and immunities is dealt with in Chapters 3 and 4. See also, Schabas, at 185, 176: “The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts.” Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60, para 568.

¹⁵⁹ Stigen (n 40) 323.

¹⁶⁰ *Velasquez Rodriguez v Honduras* case (n 58) para 177.

¹⁶¹ Stigen (n 40) 324.

¹⁶² *Belgium v Senegal*, Judgment (n 18) para 112.

b. Effects

The inability criterion is also measured by whether the State fails to obtain the necessary evidence, a crucial determinant for any successful prosecution. Moreover, the alleged perpetrator must appear before the prosecutorial organs either voluntarily or after being arrested and/or detained by the respective authorities. The necessary evidence and testimony requirement binds the State organs to obtain sufficient evidence in order to initiate and conduct genuine criminal proceedings against the alleged person.¹⁶³ A State would be unable to prosecute if the evidence is not acquired due to the inability causes discussed above. Other inability to carry out proceedings include improper and inadequate or lacking interrogation of the suspect, incorrect and tainted evidence, or lack of genuine prosecution.

In conclusion, all relevant circumstances relating to measuring the unwillingness or inability of the investigation and judicial proceedings must be taken into account in order to conclude whether the State is not able or willing “to obtain the evidence and testimony that is necessary for the proceedings” against the accused.¹⁶⁴ As established above, the unwillingness and inability may be influenced by similar, overlapping and mutually applicable factors. The custodial State is provided with a wide discretion in terms of responding to such negative factors. Such a high margin of discretion also avails the custodial State not only to oblige to its duties but also ensures non-interference in its domestic affairs and structures. However, when the State is unwilling or unable to investigate and prosecute, then the custodial State fails to fulfil its obligation to prosecute.

¹⁶³ Stigen (n 40) 326.

¹⁶⁴ *Al-Senussi* Decision (n 47) para 301.

II. Relation between the Extradition and Prosecution Prongs

The fundamental element of the *aut dedere aut judicare* provision is rooted in the obligation upon States to ensure closing the impunity gap “either by extraditing the individual to a State that will exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute.”¹⁶⁵ As such, the obligation can be perceived as a means-oriented mechanism through which multiple States may share responsibility for its efficient performance.¹⁶⁶ The remainder of the chapter deals with what categories of crimes trigger the applicability of the obligation *aut dedere aut judicare* and how the type of crimes affects its forms. An analysis of the relation between the ‘prosecution’ and ‘extradition’ prongs is also provided.

Before establishing the taxonomy of international crimes, it is necessary to define what an international crime is. International crime is “any offence that requires international cooperation for its prosecution and therefore involves more than one domestic jurisdiction.”¹⁶⁷ In order to evaluate whether a criminal act is an international crime, the criminal act must affect certain protected universal values.¹⁶⁸ The approach to defining international crimes relates to the notion that the term ‘international concern’ is understood to be applicable to criminal acts such as torture and genocide which might not have overt cross-border implications “but the community

¹⁶⁵ ICL Survey 2010, para 126.

¹⁶⁶ See Andre Nollkaemper, ‘Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ’s Judgment in *Belgium v Senegal*’ (2013) SHARES Research Paper 27, 2.

¹⁶⁷ G Boas, J L Bischoff and N Reid, *Elements of Crimes under International Law: Volume II* (CUP 2008) 2.

¹⁶⁸ A Cassese, *International Criminal Law* (OUP 2003) 23-24.

cares because they are so heinous and treats them...as either international or transnational”.¹⁶⁹ International crimes can be narrowed to a set of criminal acts which affect the peace and security on a global level, “whose commission involves more than one state or harms victims from more than one state.”¹⁷⁰ Hence, it could be concluded that various criminal acts could fall under the proposed definitions of an international crime on a primarily normative qualification. It is proposed that certain crimes definitely fall within the definition of international crimes, labelled ‘core crimes’, such as war crimes, torture, genocide, and crimes against humanity.¹⁷¹ Other crimes such as terrorism-related crimes and drug trafficking may also fall within the proposed definition of international crimes but their origin could also be traced back to bilateral character. Such crimes are labelled transnational crimes.

1) Core Crimes

Core crimes, classified for the purpose of the current work as genocide, grave breaches of the Geneva Conventions, and crimes against humanity, including the prohibition of torture, trigger the ‘prosecution by default’ type of the obligation *aut dedere aut judicare*. Such crimes avail all States to have a common, shared interest in prosecuting the perpetrators. Hence, “the purpose of [core crimes] prosecution is not merely to protect juxtaposed state interests but to safeguard

¹⁶⁹ R. Clark proposes that ‘international crime’ refers to “material for which the international community contemplates liability that is sanctioned by international law, evidenced by either a right (or a duty) to exercise...jurisdiction, or an understanding that trial before an international tribunal is acceptable.” See R Clark, ‘Countering Transnational and International Crime: Defining the Agenda’ in H Cullen and W Gilmore (eds), *Crimes Sans Frontieres: International and European Legal Approaches* (Edinburgh University Press 1998) 20.

¹⁷⁰ M Cherif Bassiouni, *Introduction of International Criminal Law* (Transnational 2003) 122.

¹⁷¹ See Jan Wouters, ‘The Obligation to Prosecute International Law Crimes’ Presentation, accessed at <<http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>>.

universal values transcending those interests and related to the international community as a whole.”¹⁷²

Boas, Bischoff and Reid propose that there is another category, namely crimes under international law which encompass punishable conduct that breaches international law, and trigger individual criminal liability. Such crimes under international law can also be labelled as core crimes, namely crimes against humanity, genocide, and war crimes.¹⁷³ The classification of core crimes is primarily based on the jurisdiction of various international courts and tribunals such as the ICTY, ICTR, and ICC. For example, the ICTY defines serious violations of international humanitarian law as breaches of “a rule protecting important values”.¹⁷⁴ The ICTY has also used the term “Universally Condemned Offences” which are “a matter of concern to the international community as a whole.”¹⁷⁵ Such offences “do not affect the interests of one State alone but shock the conscience of mankind.”¹⁷⁶ The Rome Statute uses the terminology “the most serious crimes of concern to the international community” in several places, and it could be deduced that the most serious crimes are genocide, crimes against humanity, war crimes and aggression, based on the subject-matter jurisdiction of the ICC.¹⁷⁷

¹⁷² R van Steenberghe, ‘The Obligation to Extradite or Prosecute: Clarifying its Nature’ (2011) 9 JICJ 1089, 1114.

¹⁷³ Boas, Bischoff, Reid (n167) 2.

¹⁷⁴ *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

¹⁷⁵ *Prosecutor v. Nikolić* 2003 (Case No. IT-94-2- AR 73), paras. 24, 25.

¹⁷⁶ *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 57.

¹⁷⁷ W Schabas, “International Crimes” in D Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, Abingdon 2009) 273.

Schabas proposes that the core crimes of genocide, crimes against humanity, and war crimes are *mala in se*.¹⁷⁸ The ILC has taken a similar position in classifying international crimes as “not every international crime is necessarily an offence against the peace and security of mankind.”¹⁷⁹ What distinguishes core crimes from any other criminal activity is “their especially horrible, cruel, savage and barbarous nature. They are essentially offences which threaten the very foundations of modern civilization and the values it embodies.”¹⁸⁰ Although there were attempts to expand the list of the core crimes in the 1980s and 1990s to include drug trafficking, apartheid, slavery, and international terrorism, ILC’s final 1996 Draft Code contains only five categories: genocide, crimes against humanity, war crimes, the novel addition of crimes against UN and associated personnel, and aggression. Other authors such as Bassiouni also add that crimes under international law affect fundamental norms of international law, including *jus cogens* norms, and are egregious enough to shock the conscience of mankind.¹⁸¹ It should be noted that the inclusion of these crimes “does not affect that status of other crimes of international law” and does not preclude their development.¹⁸² The threatened values are communal on an international level. Although the classification of crimes is problematic and confusing as there is no generally accepted standard, “some categories are beyond debate” and they include “genocide, crimes against humanity, war crimes and aggression”.¹⁸³

Such a conclusion is not unmerited as a world order incorporates more than international order.

Another societal structure may include the society of States which share common norms,

¹⁷⁸ W Schabas, “International Crimes” in D Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, Abingdon 2009) 269.

¹⁷⁹ ILC Draft Code of Crimes against Peace and Security of Mankind 1984, para 63.

¹⁸⁰ ILC Draft Code of Crimes against Peace and Security of Mankind 1984, para 63.

¹⁸¹ M Bassiouni, *International Criminal Law: Crimes* (Transnational Publishers, Ardsley, 2nd ed. 1999) 42.

¹⁸² ILC Draft Code of Crimes against Peace and Security of Mankind 1996 Commentaries, para 46

¹⁸³ Schabas, “International Crimes” (n 177) 277.

expectations and perceptions. A system of States includes States who have relations but not necessarily share common rules and values. Each society may generate and influence the laws and prohibited conducts.¹⁸⁴ Boister correctly analyses that if the conduct “crosses borders or threatens cross-border morality”, it may require action by the more affected States through transnational response. Finally, States may respond to conduct alone.¹⁸⁵

Core crimes directly and inherently afflict most damage on the international society. This type of criminal behaviour threatens the society of humankind responds through international criminal law. The universal character of the obligation to prosecute denotes the interest of all States to close down the impunity for such core crimes, related to the *erga omnes* nature of the obligation *aut dedere aut judicare* as shown below in Chapter 5. In this sense, the primacy of prosecution and the subsidiary role of extradition may reflect the role of the obligation to prosecute core crimes as the “trustee of the fundamental values of the international community.”¹⁸⁶ The nature of the criminal conduct afflicting the international society as a whole is what distinguished such core crimes from the other two types of internationally-related crimes which trigger the obligation *aut dedere aut judicare* in various forms as each State shares an inherent equal interest to prosecute core crimes, as explored in the current work below.¹⁸⁷

In terms of the structure of core crimes, core crimes contain two elements: first, there exists a primary prohibitive rule linked to the conduct in violation of international law, and, second, a

¹⁸⁴ N Boister, “Transnational Criminal Law?” 14(5) EJIL (2003) 953, 969. See also, H Bull, *Anarchical Society: A Study in World Politics* (2nd ed 1995) 39.

¹⁸⁵ Boister, “Transnational Criminal Law?” 970.

¹⁸⁶ Claus Kress, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*’ (2006) 4 JICJ 561, 567.

¹⁸⁷ See UNGA Resolutions 2840 (XXVI) and 3074 (XXVIII) which reflect the primacy of the prosecution obligation pursuant to core crimes.

secondary attributive rule, namely the individual criminal responsibility for the alleged violations, usually of customary status before they are enforced.¹⁸⁸ In this manner, the core crimes do not depend on the existence of domestic prohibition and are directly enforceable before international criminal tribunals or courts.¹⁸⁹ It should also be noted that various international norms such as the prohibition against torture may constitute an underlying offence as a crime against humanity or war crime.

Four additional elements can be discerned. First, the underlying offence is prohibited by international law, and it may be prohibited under domestic law. Second, there is a general requirement which must be satisfied before the underlying offence could be classified as a crime under international law. For example, such general requirements are the existence of an armed conflict for war crimes and the context of widespread or systematic attack for crimes against humanity. Third, there might be a specific requirement for specific crimes such as the discriminatory intent for the crime of persecution. Fourth, the form of responsibility must be established before the accused is subject to criminal penalties.¹⁹⁰

The category denotes a primacy of the duty to prosecute, triggered as soon as the presence of the relator is ascertained in the State's territory, not requiring a prior request for extradition. In this sense, there is no obligation to extradite but a default obligation to submit the case for the purposes of prosecution.¹⁹¹ However, once an extradition request is received, the custodial State

¹⁸⁸ See Boas, Bischoff, Reid (n167) 7. See also, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, paras. 43–46.

¹⁸⁹ Boister, "Transnational Criminal Law?" (n184) 962.

¹⁹⁰ Boas, Bischoff, Reid (n167) 10-11.

¹⁹¹ See Van Steenberghe (n 172) 1108.

has the option to surrender the relator and relieve of the obligation to prosecute. In this sense, “in the absence of a request for extradition, the obligation to prosecute is absolute, but, once such a request is made, the State concerned has the discretion to choose between extradition and prosecution.”¹⁹² If extradition is refused, the prosecution requirement on the requested State remains applicable and in force in order to avoid impunity.¹⁹³ Hence, a more appropriate formulation of the obligation pertaining to core crimes of international law which reflects the interaction between the prosecution and extradition provisions might be *prosequi vel dedere*.¹⁹⁴

a. Grave Breaches of the Geneva Conventions

To what degree are the prosecution obligation and discretionary extradition reflected in the various multilateral conventions on core crimes? As far as grave breaches of the Geneva Conventions are concerned, the threshold for the prosecution test of the *aut dedere aut judicare* obligation is to initiate judicial proceedings before the judicial authorities of the State where the alleged perpetrator is sought for and apprehended. As soon as the person is apprehended by the authorities of the custodial State, the same State is under a duty “to ensure that the person concerned is...prosecuted with dispatch.”¹⁹⁵

The State with *ratione personae* jurisdiction over the relator has an alternative option. It may, if it prefers, extradite the same person for trial to another State under several conditions. First, the State with control over the relator has the discretion to extradite the person to another State.

¹⁹² ILC Survey 2010 para 127.

¹⁹³ ILC Survey 2010 para 135.

¹⁹⁴ See Nollkaemper (n 166) 8.

¹⁹⁵ Commentary to the Geneva Conventions, 623.

Second, such discretion to extradite the relator must be in accordance with the provisions of its own domestic legislation which serves as a guarantee for respecting the human rights of the relator. The Commentary to the Geneva Conventions explicitly addresses the issue of non-extradition of State's own nationals. It categorically concludes that in such cases where extradition of nationals is proscribed by domestic laws of the Contracting Party, "Article 49 clearly demands that the State holding them should bring them before its own courts."¹⁹⁶ Such interpretation clearly indicates that the State with *ratione personae* jurisdiction over the relator is obliged to put to trial the person in case no extradition is possible or takes place.

b. The Prohibition of Torture as a Principle of International Law and Torture as a War Crime and a Crime against Humanity

Torture is a criminal activity with no single definition in international law. Torture is not a specific act but "it is a legal qualification of an event or behaviour, based on the comprehensive assessment of this event or behaviour."¹⁹⁷ Various acts may amount to torture such as detention conditions and solitary confinements¹⁹⁸, unlawful detention¹⁹⁹, or interrogation and detention techniques used in detention centres.²⁰⁰ Other crimes may amount to torture such as rape²⁰¹ or enforced disappearance.²⁰²

¹⁹⁶ Commentary to the Geneva Conventions, 366.

¹⁹⁷ OHCHR, Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies, 2, accessed on 22 April 2015 at

http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

¹⁹⁸ Committee on Civil and Political Rights, General Comment 20, para 6 and *El-Megrisi v. Libya*, Committee on Civil and Political Rights, Communication 449/1990 (23 March 1994) para 5.4.

¹⁹⁹ *Maritza Urrutia v. Guatemala*, Inter-American Court of Human Rights (27 November 2003) Series C No. 103, para 85.

²⁰⁰ *Malawi African Association and Others v. Mauritania*, African Commission of Human Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000) para 20.

Torture has been categorised as a crime as early as 1713.²⁰³ Torture has been prohibited in various multilateral treaties such as Article 7 of the ICCPR, Article 1 of the CAT, Article 5 of the Universal Declaration of Human Rights, Common Article 3 of the Geneva Conventions, and in various regional treaties such as Article 3 of the European Convention on Human Rights, Article 5 of the Inter-American Convention on Human Rights, and Article 5 of the African Charter of Human and People's Rights. Certain acts can also amount to torture as a crime against humanity under Article 7(1)(f) of the Rome Statute or to a war crime under Article 8(2)(ii) of the Rome Statute. The absolute prohibition of torture has been declared in multiple regional human rights decisions and international cases.²⁰⁴ The prohibition of torture has been classified as a principle that "has evolved into a peremptory norm or jus cogens that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."²⁰⁵

The obligation to prosecute acts of torture, which may constitute both war crimes and crimes against humanity, postulates that a State shall bring the case to its competent authorities for the purpose of prosecution if it does not extradite the alleged offender.²⁰⁶ The jurisdiction to trigger the obligation 'extradite-or-prosecute' includes the principle of territoriality, including a ship and

²⁰¹ *The Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, ICTR- 96-4-T (2 September 1998) para 596; see also *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (the AFRC Accused), 20 June 2007, para. 718.

²⁰² *Quinteros v. Uruguay*, Committee on Civil and Political Rights Communications 107/1981 (21 July 1983) para. 14; *Celis Laureano v. Peru* Committee on Civil and Political Rights Communications 540/1993 (25 March 1996) para. 8.5.

²⁰³ See Article XXXIX of the Treaty of 31 March and 11 April 1713 between Great Britain and France.

²⁰⁴ For example, ECHR's Greek case, *Selmouni v. France*, *Dikme v. Turkey*, *Aksoy v. Turkey*.

²⁰⁵ *The Prosecutor v. Furundzija*, ICTY Trial Chamber, para 153.

²⁰⁶ Article 4 of the Convention against Torture establishes that all acts of torture should be criminal offences under domestic law and such offences are punishable through sufficiently severe penalties. Nonetheless, commentators note that each State Party is left the discretion to decide whether torture would be enlisted as a separate offence or such acts of torture would be included under the chapeau of wider categories of serious offences such as grievous bodily harm, assault, unlawful compulsion. See JH Burgers, *The United Nations Convention against Torture: a Handbook on the Convention* (Nijhoff 1988) 129.

aircraft of the State and factual control over occupied or any other territories, nationality of the alleged offender, and passive nationality principle if applicable and appropriate.²⁰⁷ Additionally, Article 5(2) of CAT serves as a save-all clause of particular importance for the *aut dedere aut judicare* duty as it establishes that a State Party shall have jurisdiction over torture offences in all cases where the alleged perpetrator is found on its territory under its jurisdiction and does not extradite the person to a requesting State.

The presence of an extradition request is not significant for establishing jurisdiction over the relator. Therefore, as long as extradition does not take place whether as a result of no extradition request or refusal to grant such request, it can be considered “a sufficient basis for creating the obligation to submit the case to the prosecuting authorities of the State which has jurisdiction”.²⁰⁸

The ICJ clarified the nature and implementation of the obligation *aut dedere aut judicare* pertaining to the crime of torture in the *Habre* case. As the relevant *aut dedere aut judicare* provision is modelled after other substantively similar or identical ‘extradite-or-prosecute’ provisions, the ICJ decision may be used to elucidate the ‘extradite-or-prosecute’ mechanism through analogy. It is contended that the obligation *aut dedere aut judicare* has identical or very similar substance and scope in its customary and conventional form as explored below in Chapter 4. Such relationship between custom and treaty formulation is possible following the *Nicaragua* decision that “even if two norms belonging to two sources of international law appear identical in content, and if the States in question are bound by these rules both on the level of

²⁰⁷ Convention against Torture, article 5(1).

²⁰⁸ Burgers (n 206) 137.

treaty-law and on that of customary international law, these norms retain a separate existence.”²⁰⁹

Hence, the *Habre* decision can be used as a major interpretive source for the customary and conventional scope and definition of the obligation *aut dedere aut judicare*.

The State may not need to submit the case for the purpose of prosecution for torture offences “if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention” as long as the requested State accedes to the extradition request.²¹⁰ In other words, the custodial State has the option to be relieved of the obligation to prosecute if it agrees to extradite the relator to another State which made an extradition request for the alleged offences. The ICJ makes it clear that “the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight.”²¹¹ In this manner, the obligatory nature of the prosecution requirement is preserved, which is triggered once the State knows that a suspect is on its territory. The Court concluded that “extradition 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.”²¹²

Here the Court performed a balancing act: as extradition arrangements involve various exceptions and complex requirements, and oftentimes discretionary decision-making by the State organs, to pronounce an obligation to extradite would be problematic. The extradition element

²⁰⁹ *Military and Paramilitary Activities in Nicaragua (Nicaragua/ United States of America)* (Merits) [1986] ICJ Rep 95.

²¹⁰ *Belgium v Senegal*, Judgment (n 18) para 95.

²¹¹ *ibid* para 95.

²¹² *ibid* para 95.

serves as a supplementary mechanism to ensure that a State where the relator is located does not want to or cannot investigate and submit for prosecution is able to fulfil its obligations by transferring the suspect to the requesting State.²¹³ The requesting State seemingly has no right to insist upon the extradition prong as long as the requested State complies with the prosecution duty; “it is only the violation of the obligation to submit the case for prosecution which engages the responsibility of the State on whose territory the suspect is present. Should such a State, however, prefer to extradite the suspect, instead of prosecuting him or her in its tribunals, it has the choice of doing so.”²¹⁴

However, a situation may occur in which prosecution might be more appropriate in the *locus delicti* State if the suspect is apprehended in another State: “the state where international crimes were committed may have a stronger normative entitlement than a state with jurisdiction under Article 5(2).”²¹⁵ Seemingly, the best fitted jurisdictions to investigate and prosecute the relator would be the States where the alleged act took place or of which the suspect is a national. The proposed preference might be limited by the test of complementarity, as suggested above: if there exists some normative hierarchy in terms of jurisdiction, it must be evaluated through the prism of whether the territorial State is willing and able to investigate and prosecute the relator.²¹⁶

Judge Xue in her dissenting opinion in the *Habre* case criticises the conclusion of the alternative nature of the obligation in Article 7(1). If the State decides not to submit the case to its own

²¹³ *Belgium v Senegal* Judge Donoghue declaration, para 4.

²¹⁴ *Belgium v Senegal*, Yusuf Separate Opinion, para 24.

²¹⁵ Nollkaemper (n 166) 9.

²¹⁶ Nollkaemper (n 166) 9.

competent authorities for prosecution, it is obliged under Article 7(1) to extradite the alleged perpetrator. Hence, an extradition request by a State to the custodial State enables the former to monitor or to push the latter to abide by the obligation to either prosecute or extradite. Xue finds such ‘peer pressure’ problematic as such acts may be perceived as interference in the domestic affairs of the custodial State. She strongly asserts that Article 7(1) does not provide a State with the right to push another State to submit the case for prosecution; “it only allows the requesting State to claim its right to request for extradition if the requested State has failed to implement its obligation to prosecute or extradite.” It is up to the requested State to take the decision to prosecute according to its due process norms, and until such decision is finalized, no breach exists, Xue proclaims.²¹⁷ However, such an interpretation grants a large discretion to the custodial State to postpone the submission of the case to its relevant authorities and delay the decision-making process. As seen above, the primacy of the prosecution obligation is based on the interest of all States and the international community to suppress core crimes of international law such as torture, genocide, war crimes, and crimes against humanity.

In comparison, Judge Donoghue elucidates that the obligation to submit a case to prosecution is not dependent on an extradition request as the obligation arises as a result of the presence of the suspect in the State’s territory. A State where the suspect is located must place the same in custody, make preliminary inquiries into the alleged offences and facts, and duly notify other State parties that would potentially have a jurisdictional basis. Judge Donoghue continues, “the obligation to hold the alleged offender in custody applies ‘only for such time as is necessary to enable any criminal or extradition proceedings to be instituted’” under Article 6(1), proving that

²¹⁷ *Belgium v Senegal* Judge Xue, Dissenting Opinion, para 39.

the obligation to make preliminary inquiry arises before any extradition requests.²¹⁸ The duties under Articles 6 and 7 are a consequence of the presence in the State party of an alleged individual and it is unnecessary to look whether another State party can bring a claim based on the jurisdictional requirement of Article 5(1); the duty to prosecute is established on the presence of the alleged offender and not on external action for extradition and possible jurisdictional base.²¹⁹

In various separate opinions and declarations attached to the judgment, the teleological purpose of the framework to “strike a powerful blow against impunity”²²⁰ is also analysed. For example, Judge Owada does not perceive the Convention as a mere compilation of various separate obligations but as “a comprehensive legal framework for enforcing the principle *aut dedere aut judicare*, so that the culprit of the crime of torture may not get away with impunity.”²²¹ Too formalistic an approach in interpreting the framework is not the correct way to understand the obligation *aut dedere aut judicare*. The framework includes the scope and substance of Article 4 through Article 8 of the Convention. The interconnection and interrelation of the various mechanisms enshrined in the said Articles allow for better understanding of the whole process to eliminate impunity.²²²

²¹⁸ *Belgium v Senegal*, Judge Donoghue declaration, paras 6-7. Judge Donoghue concludes, “if Article 7 required submission of a case for prosecution after any extradition proceedings have commenced, the placement of the individual in custody and the conduct of a preliminary inquiry in the absence of such a request would be without purpose.”

²¹⁹ *Belgium v Senegal*, Judge Donoghue declaration, para 8.

²²⁰ *Belgium v Senegal*, Judge Donoghue declaration, para 2.

²²¹ *Belgium v Senegal*, Judge Owada Sep. Op., para 10.

²²² *Belgium v Senegal*, Judge Owada, Sep.Op., para 13.

Additionally, Belgium requested the ICJ to decide and declare that Senegal was obliged to bring criminal proceedings against Habre, and, if it fails to do so, to extradite the relator to Belgium for the purposes of prosecution. Articles 5(2), 6(2) and 7(1) of CAT should be read and interpreted together, namely in the context of the object and purpose of CAT “to make more effective the struggle against torture”.²²³ This holistic approach could be summed as follows: the requirement to implement the adequate and appropriate legislation into domestic law, pursuant to Article 5(2) enables the State in which territory a suspect is present to initiate immediately a preliminary inquiry into the facts of the case, pursuant to Article 6(2), in order for the same State “with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1).”²²⁴

c. Genocide

The obligation ‘extradite or prosecute’ in the Genocide Convention does not give priority to extradition or a free choice between both options either. However, various scholars propose that the model is based on the *primo prosequi secundo dedere* principle which obliges parties to unconditionally search and bring perpetrators to trial first.²²⁵ Although the concept that extradition is subsidiary to prosecution is absent in the preparatory documents of the Genocide Convention, the primacy of the territoriality principle along with passive and active personality jurisdictional bases is affirmed in the ICJ’s *Genocide Convention* case of 2007. There the ICJ

²²³ See CAT Preamble.

²²⁴ *Belgium v Senegal*, Judgment (n 18) para 72.

²²⁵ R Roth, ‘The Extradition of Genocidaires’ in Paola Gaeta (ed), *The UN Genocide Convention- A Commentary* (OUP 2009) 307.

interprets Article 6 of the Genocide Convention as asserting the primacy of the prosecution obligation:

“Article VI obliges the Contracting Parties ‘which shall have accepted [international tribunal] jurisdiction’ to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory- even if the crime of which they are accused was committed outside it-and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent international tribunal.”²²⁶

The language of the judgment indicates a primacy of domestic prosecution and a duty to surrender or extradite if no such prosecution takes place. Hence, although no extradition obligation is expressly provided for, “it would seem that the State refusing extradition would itself have to prosecute the accused.”²²⁷ Indeed, Article 7 read in conjunction with Article 6 of the Genocide Convention contemplates an obligation on the State in which territory acts of genocide take place to prosecute although nothing in this language affects the right of any State to “bring before its own tribunals any of its national for acts committed outside the State” as well as to prosecute non-nationals for acts against its citizens.²²⁸

²²⁶ *Application of the Genocide Convention (Bosnia-Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 595, para 443. See also, Roth (n 225) 307.

²²⁷ N Robinson, *The Genocide Convention- A Commentary* (Rausen Brothers 1960) 87.

²²⁸ N Robinson (n 227) 85-86. See also A/C.6/SR. 134, 5, for the Swedish interpretation of Article 6 of the Genocide Convention.

2) Transnational Crimes

The second category concerns the *aut dedere aut judicare* obligation pertaining to transnational crimes. International crimes outlawed by international treaties such as drug trafficking, counterfeiting or bribery of foreign officials could be classified as *mala prohibita* as they do not directly threaten human life and dignity *per se*, and “these crimes are outlawed by international treaties essentially because they require international cooperation in order to ensure repression. Often their commission is more transnational than international in nature.”²²⁹ Transnational crimes affect “the social, economic, cultural and other interests of all or a substantial number of states” and inherently involve private individual or group conduct.²³⁰ Transnational crimes are also referred to as treaty crimes because “the legal effects of codification of international crimes are set out in the treaties themselves, and will only bind those states that are parties” in comparison to the customary status of core crimes.²³¹ For example, during the Diplomatic Conference of the Final Act of the Rome Statute, acts of terrorism were put in the category of “serious crimes of concern to the international community” and international drug trafficking was labelled as a very serious crime but not as the most serious crimes.²³²

²²⁹ Schabas, “International Crimes” (n 177) 269.

²³⁰ Boister, “Transnational Criminal Law?” (n 184) 966. See the language of Article 3 of the UN Convention against Transnational Organized Crime, “transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.”

²³¹ Schabas, “International Crimes”, 273.

²³² See , Schabas, “International Crimes” (n 177) 273.

Transnational crimes contain criminal conduct which “has actual or potential trans-boundary effects of national and international concern”.²³³ Transnational crimes are included in various suppression conventions on counterfeiting, corruption, financing of terrorism, drug trafficking prohibition among others, which aim at minimization or elimination of “potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment.”²³⁴ The regime of transnational criminal law is that “although the origin of the norm is international, penal proscription is national.”²³⁵

The rationale behind the transnational regime is to make international cooperation effective through suppression of the conduct on domestic level which may go beyond the state of the origin of the criminal conduct. The goal behind transnational criminalization reflects political, legal, social and economic interests of States, and the harm caused to such interests along with the indisputable harm caused to individuals.²³⁶ Another feature of the transnational suppression crime regime is the ambiguity of the definition of criminal conduct, illustrated by the crime of terrorism. The transnational criminal law does not create individual responsibility in international law, but functions as “an indirect system of interstate obligations generating national penal laws.”²³⁷ Transnational or treaty crimes which may be classified as international criminal activities enable “group of states to respond rapidly to new forms of criminality.”²³⁸

²³³ N Boister, “Transnational Criminal Law?” (n 184) 954.

²³⁴ E Nadelmann, ‘Global Prohibition Regimes: The Evolution of Norms in International Society’, 44 *International Organisation* (1990) 479, 481.

²³⁵ Boister, “Transnational Criminal Law?” (n 184) 955.

²³⁶ *ibid* 957.

²³⁷ *ibid* 962.

²³⁸ *ibid* 963.

For example, analysing the crime of drug trafficking, Boister proposes the following three indicia for a transnational crime: 1) “the offence must find its source and definition in an international convention”; 2) there is a recourse to extraterritorial jurisdiction as “all states are harmed by the problems created by drugs and have a duty to co-operate internationally to control them, all states are under an international obligation to combat drug criminality in compliance with the principle of subsidiary universality (the *aut dedere aut judicare* principle)”; and 3) proscription of the criminal conduct in international convention.²³⁹

In terms of jurisdiction, transnational crimes trigger more limited extra-territorial jurisdiction in comparison to the universal core crimes. The preferred types of jurisdiction for transnational crimes established in the suppression treaties are territorial and active or passive nationality. Boister correctly points that the transnational crime treaties create “subsidiary universality” which is applicable once extradition of the relator does not take place, based on the presence of the accused on the territory of the custodial State. Hence, the jurisdictional bases indicate the preference for extradition or, at least, equal weight of the extradition and prosecution prongs.²⁴⁰

The Hague formula, found in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and replicated in multiple widely ratified conventions dealing with transnational crimes such as the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, the United Nations Convention against Transnational Organized Crime and its Protocols, or the United Nations Convention

²³⁹ N Boister, *Penal Aspects of the UN Drug Conventions* (Kluwer 2001) 18-19. See also, M Cherif Bassiouni, ‘Characteristics of International Criminal Law Conventions’ in M Cherif Bassiouni (ed), *International Criminal Law: Crimes* (Dobbs Ferry 1986) 2-3, 506.

²⁴⁰ Boister, “Transnational Criminal Law?” (n 184) 964.

against Corruption, is not explicit in giving priority to one of the two alternatives of prosecution or extradition as States “in the territory of which the alleged offender is found, if it does not extradite him, be obliged...to submit the case to its competent authorities for the purpose of prosecution.” Some scholars believe that a preference is to be given to extradition which follows the determination of non-forum States with greater interest to request the transfer of the relator for the purpose of prosecution.²⁴¹ Other interpretations suggest that the prosecution and extradition prongs are of equal weight as the obligation on the custodial State to submit the case for the purpose of prosecution is not dependent on prior extradition request.²⁴² Nonetheless, that interpretation does not necessarily mean that the obligation to prosecute is triggered only once the extradition is not executed. For example, there is an obvious overlap between the *aut dedere aut judicare* clauses in the CAT and the Hague Convention which is possibly explained by the proximity of time when the two conventions were drafted, the similar aims of the obligation to limit the availability of safe havens for alleged perpetrators, and the notion of the gravity of the particular crimes affecting the interests of most States of the international community. Hence, cross-emulation is completely possible as regards the evolution of the *aut dedere aut judicare* clause in terms of its substance, wording and scope.

The language of the obligation *aut dedere aut judicare* pertaining to transnational crimes is also facilitated by the obligation on the State parties to establish appropriate jurisdiction over the suspect. Such an interplay between the two obligations indicates that the interest to minimize impunity is based on the potential threat to any State party and “as automatically affecting the

²⁴¹ Van Steenberghe (n 172) 1112.

²⁴² Nollkaemper (n 166) 6.

interests of all state parties and not just the interests of specific states.”²⁴³ The interest of States initiated by the threat of the crime committed is found in the nature and effect of the crimes. Crimes as terrorism or hijacking of civil aviation are correctly labelled as transnational as they may cause significant harm and obstruct the normal communication between States. This type of the obligation may be differentiated from the core crime obligation as the core crimes clearly deal with the protection of universal values.

It is contended that transnational crimes present a mixture of bilateral and communal interests. States aim at creating an institutionalized framework for cooperation in which transnational criminal law “is about the alteration of national penal practice, and international society has a direct interest in monitoring the effective implementation of the resulting national laws.”²⁴⁴ In the transnational criminal law system, although there is a discernible influence of the international society, States remain key players in implementing the framework as they retain “the locus of penal power” which may result in low levels of cooperation and limited responsibility of States. In this manner, “the legal relationship is horizontal (state to state or transordinate) and vertical (the state is superordinate, the individual subordinate).”²⁴⁵

Hence, the primacy of the extradition prong seems appropriate as some States may have a bigger interest in prosecuting the crimes than other States although all States may intervene when the obligation is not correctly and appropriately fulfilled.²⁴⁶ Also, the transnational nature of the crime reflects the more flexible interaction between the prosecution and extradition prongs. In

²⁴³ Van Steenberghe (n 172) 1113.

²⁴⁴ Boister, “Transnational Criminal Law?” (n 184) 972.

²⁴⁵ Boister, “Transnational Criminal Law?” (n 184) 972.

²⁴⁶ Van Steenberghe (n 172) 1113.

any case, the emphasis on the interaction between the two prongs should not be too formalistic. If the obligation is executed correctly and in good faith between two States, the end result would be the prosecution of the relator in one jurisdiction or another, an ultimate mechanism for suppression of crimes on international level.

It is also crucial to note that if some transnational crimes are perceived by the international society as threatening the global communal values, then reclassification is possible and necessary as a result of the broadening of the moral reprehensibility. A mechanism for reclassification is provided in the Rome Statute in Article 111, for example.²⁴⁷ There are certain obstacles in the transformation process as it reflects the will and the interest of the international society. For example, there might be a lack of international consensus of the moral reprehensibility as regards the threat of the conduct as in the uncertainty to the harmfulness of drugs. Additionally, definitional problems of the criminal conduct also impair the internationalization of the criminal conduct. States differ in their sensitivity to criminal activities as “greater sensitivity and vulnerability may result in states pushing for provisions in suppression conventions that serve purely national interests.”²⁴⁸

What are the consequences of the proposed crime classification? Schabas asserts that the customary nature of the *mala in se* core crimes allows for retroactive prosecution, imposition of duties on States for investigation and mutual cooperation, extradition and prosecution of such offences, and relaxation of the applicability of immunities.²⁴⁹ The relevance of the core crime

²⁴⁷ Boister, “Transnational Criminal Law?” (n 184) 972.

²⁴⁸ Boister, “Transnational Criminal Law?” (n 184) 973.

²⁴⁹ Schabas, “International Crimes” (n 177) 274.

triggering the obligation *aut dedere aut judicare* is of particular importance. There is a duty on States to either extradite or prosecute for core crimes, and Schabas provides examples such as the obligation contained in the four Geneva Conventions and CAT, while he is sceptical that there is a free-standing customary status of the obligation.²⁵⁰

The two main categories of the obligation *aut dedere aut judicare* can be preliminarily discerned as a result of how the prosecution and extradition prongs relate: 1) clauses that oblige prosecution *ipso facto* when the relator is present in State's territory which the latter may be relieved from by extraditing pertaining to what is classified as core crimes of international law; 2) clauses which trigger prosecution only when there is a refusal to extradite the offender upon an extradition request pertaining to transnational crimes; although the common trend is the obligation on part of the custodial State to submit the case for the purpose of prosecution to the competent authorities without exception if it does not extradite the suspect.²⁵¹

No matter what type is triggered according to the applicable crime, the obligation does not considerably suffer in terms of functionality or efficiency. Nonetheless, as observed in the following chapters, the customary status of the obligation may be affected by what crimes trigger it as it is logical that the international society has the most interest for the core crimes of international law and the obligation *aut dedere aut judicare*. The linkage, as explored below, is from a bilateral interest in treaty form through a multilateral, transnational character to their universal applicability and interest of all States to prosecute the crime.

²⁵⁰ Schabas, "International Crimes" (n 177) 275.

²⁵¹ Annex A, Working Group on the Obligation to Extradite or Prosecute, para 19.

III. The *Aut Dedere Aut Judicare*, Extradition and Types of Crimes

After the scope and meaning of the prosecution prong were established above, it is necessary to look at what the term ‘extradition’ entails. The structure of the sub-section is structured around an examination and analysis of the two types of international crimes that trigger the obligation *aut dedere aut judicare*, with an emphasis on the ‘*dedere*’ part. It is also suggested that the meaning and applicability of the extradition prong should be analysed by looking at their conventional roots which might have emerged later in the form of custom, as explored in the subsequent chapters.

Extradition is traditionally defined in international law as the surrender of an individual suspected, accused or convicted of a crime by the State within whose territory or effective control the individual is found to the State under whose laws the individual is alleged to have committed or have been convicted of a crime.²⁵² Extradition is an intergovernmental process facilitating the purposes of prosecution and punishment of persons accused or already convicted for the perpetration of crimes in order to fight impunity, eliminate safe havens for criminals, prevent, suppress and punish national and international criminality. As such, extradition serves as a means-oriented process as a result of which the relator is prosecuted in a State where the person was not initially detained. The person subjected to extradition is guaranteed certain rights, as explored in detail in Chapter 3.²⁵³

²⁵² L Damrosch and others, *International Law: Cases and Materials* (4th ed, West Group 2001) 1177.

²⁵³ Geoff Gilbert, *Transnational Fugitive Offenders in International Law* (Kluwer Law International 1998) 2.

The common conditions for extradition in the multilateral treaties analysed below can be classed in three broad sets. First, a common provision providing a legal basis for extradition should exist in the domestic legal order or, otherwise, the multi- or bilateral treaty creates the basis. Second, the substance of what is meant by extradition is usually checked against national legislation of the requested State including but not limited to grounds for possible refusal such as statutes of limitations, lack of criminalization of the purported offence, or applicability of death penalty in the requesting State.²⁵⁴ Third, as explored in chapter 3, human rights norms may serve as a guarantor against frivolous usage of the process of extradition.²⁵⁵ Similar framework would be applied to the analysis of the process of extradition pertaining to core and transnational crimes in the following sub-sections.

1) The Principle *Aut Dedere Aut Judicare* in Widely Ratified Multilateral Conventions

Several widely ratified multilateral conventions dealing with international crimes contain obligatory provisions for ensuring that alleged perpetrators are prosecuted and punished. The conventions are used as indicative manifestations of what is meant by the term *aut dedere aut judicare* pertaining strictly to the offences which trigger the same obligation, a method of analysis which was applied in the section on the relation between prosecution and extradition prongs in this chapter. The obligation *aut dedere aut judicare* appears in different forms and

²⁵⁴ ILC Survey 2010, para.139.

²⁵⁵ *Ahorugeze v Sweden* App no 37075/09 (ECtHR, 27 October 2011), para 18. For example, a cursory examination of the traditional approach of the ECHR States indicates that the relevant judicial or executive authority, such as the Office of the Prosecutor or a court dealing with the extradition request, is vested with the power to check whether there exists a probable cause to believe that the relator is guilty of the alleged charges and to apply to the dual criminality test and the relevant exceptions to extradition such as political offence exemption.

wording in more than 70 international treaties.²⁵⁶ The following thesis analyses a sample of these conventions. The selection is focused on the core crimes and the conventions that pertain to them. In terms of transnational crimes, it is expected that most multilateral conventions would fall in this category. Hence, the selection of transnational crimes and the relevant conventions was primarily based on the number of state parties to the conventions as well as the prominence of the crimes reflected in academic writings. It is inevitable that since one of the aims of the thesis is to reflect upon the customary status of the obligation *aut dedere aut judicare* pertaining to international crimes, one would find a clearer evidence of the status pertaining to certain crimes while other crimes would exclusively fall under treaty law as a source of their obligatory nature. Moreover, the selection has been made to reflect multilateral treaties which could be said to be prototypes for subsequent treaties on similar subjects such as the Hague Convention, for example.

a. Genocide and *Aut Dedere Aut Judicare*

In chronological order, the first post-Nuremberg multilateral treaty aiming at elimination of core crimes, is the Genocide Convention of 1948. The relevant article for extradition is Article 7 which stipulates that genocide and other acts of Article 3 must not be considered as political crimes²⁵⁷ for the purposes of extradition and that the Contracting Parties pledge to grant extradition in accordance with their laws and treaties in force. This approach may illustrate the intention of the drafters to avoid repeating what is already laid down in the Preamble of the

²⁵⁶ See C Bassiouni and E Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff 1995) 73.

²⁵⁷ For more on the political offence exception to extradition, see Chapter 3.

Convention, namely, that “in order to liberate mankind from such an odious scourge, international co-operation is required”.²⁵⁸ It is worth noting that the emphasis is on the elimination of the political offence exception, based on the premise that substantively the commission of the crime of genocide cannot be classified to be political in nature.²⁵⁹ In such manner, the aim is to limit possible defences to extradition.

Article 6 provides for an obligation for the offences to be tried before a *locus delicti* court or before an international tribunal. Article 7 of the Genocide Convention does not contain an express obligation ‘extradite or prosecute’. Nonetheless, the *aut dedere aut judicare* duty could be implicitly read to exist in the purpose of Article 7 by applying a progressive, teleological interpretation of several clauses of the Convention.²⁶⁰ As established in the current chapter, the obligation for co-operation, materialized to the largest possible extent through the process of extradition, serves as the cornerstone of the whole Convention,²⁶¹ and an appropriate interpretation of the Convention indicates that the principle ‘extradite or prosecute’ underlies the purpose of the provision to ensure prosecution for the core crime of genocide.

The reason why the obligation *aut dedere aut judicare* was not expressly included in comparison to latter explicit conventional clauses pertaining to other core crimes stems from the confusion between the principle and universal jurisdiction at the time of the drafting of the Genocide Convention. Some drafting parties were afraid that such clause would open the door for the

²⁵⁸ See Preamble of the Genocide Convention.

²⁵⁹ See R Roth, ‘The Extradition of Genocidaires’ in Paola Gaeta (ed), *The UN Genocide Convention- A Commentary* (OUP 2009) 286. For more on the political offence exception, see Chapter 3.

²⁶⁰ See R Roth, ‘The Extradition of Genocidaires’ in Paola Gaeta (ed), *The UN Genocide Convention- A Commentary* (OUP 2009) 305.

²⁶¹ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Rep 1951, 23.

wide-spread application of “sneaked-in” universal jurisdiction. Such interpretation is problematic as *aut dedere aut judicare* is not synonymous to universal jurisdiction²⁶² although the two concepts are closely related and influence each other’s functionality as explained and analysed below.

State practice indicates that the ‘extradite-or-prosecute’ obligation should be inherently read into the Genocide Convention. For example, the Austrian Supreme Court in the *Cvjetković* case decided that where an extradition to the territorial State was impossible due to lack of a functioning judicial system, Austria was to apply the *aut prosequi* rule in accordance with Article 7 of the Genocide Convention.²⁶³ Essentially, the Austrian court ruled that once the option to extradite is not applicable due to the impossibility of transferring the relator to the *locus delicti* State, the object and purpose of the Genocide Convention availed for prosecution in the custodial State.²⁶⁴

Additionally, the German Federal Court of Justice proclaimed in the *Jorgić* case in 1999 that nothing in Article 6 of the Genocide Convention prohibited persons charged with genocide from being tried by domestic courts other than those of *locus delicti* States. These two cases illustrated

²⁶² Roth (n 225) 306. See also, R Kolb, *Droit international penal* (Helbing 2008) 90. To reiterate in brief, jurisdiction is included in the extradition request from the requesting State as a ground on which the State is able to charge the relator or initiate judicial proceeding, and is materialized as a consequence of the process of extradition once the relator is transferred. More essentially, universal jurisdiction is permissive and discretionary as other bases of jurisdiction might be applicable to the situation. The duty to prosecute, which is facilitated by the subsidiary provision of extradition for core crimes, denotes obligatory nature as analysed above.

²⁶³ See *Cvjetković case* (13 July 1994) Austrian Supreme Court.

²⁶⁴ See J Wouters and S Verhoeven, ‘The Prosecution of Genocide- in Search of a European Perspective’ in R Henham and P Behrens (eds), *The Criminal Law of Genocide* (Ashgate 2007) 198. Interestingly, the Austrian courts applied the dual criminality test in this particular case. As genocide was criminalized in Bosnia-Herzegovina, charges could be brought against Dusko Cvjetković under Austrian criminal law. Namely Article 65(1)(2) of the Strafgesetzbuch.

the well-established *Eichmann* principle that although the duty to prosecute is on the territorial State, other States have jurisdiction to prosecute acts of genocide as well.²⁶⁵

It is suggested that Article 6 must be read in conjunction with the *erga omnes* obligation to prevent and punish, enshrined in Article 1 of the Genocide Convention.²⁶⁶ Such interpretation matches with the overall purpose of the *aut dedere aut judicare* provision in minimizing impunity for international crimes. The claim is sustained as prosecution for the crime of genocide is even stronger when the *locus delicti* State expressly refrains from requesting extradition of the relator as in *Jorgić* case.²⁶⁷ The cases show the complex interplay between extradition and prosecution and they are not isolated instances. Recent French decisions pertaining to Rwandan nationals for acts of genocide indicate that where extradition does not take place or is refused on human rights basis, the custodial State prosecutes the relator on universal jurisdiction grounds.²⁶⁸ The underlying factor remains prosecutability of the accused while the extradition process serves a facilitating function for ensuring proper prosecution of core crimes.

b. War Crimes and the Geneva Conventions

Articles 49 of the Geneva Convention I, 50 of the Geneva Convention II, 129 of the Geneva Convention III, and 146 of the Geneva Convention IV expressly provide for the applicable

²⁶⁵ *Attorney-General of Israel v Eichmann* (1968) 36 ILR 5, para. 12.

²⁶⁶ See *Jorgić v FRG* Application no.74613/01 (ECtHR, 12 July 2007) para.20.

²⁶⁷ *Jorgić* case (n 266) para 25.

²⁶⁸ France established a special prosecution unit dealing with genocide cases, primarily pertaining to Rwanda. The first conviction for participation in genocide on first instance level was reached in the Simbikangwa case in mid-March 2014. See Deutsche Welle, 'French Court Convicts Rwandan Former Spy Chief Simbikangwa of Genocide' (15 March 2014), accessed on 15 April 2014 at < <http://www.dw.de/french-court-convicts-rwandan-former-spy-chief-simbikangwa-of-genocide/a-17498494>>.

‘extradite or prosecute’ regime pertaining to grave breaches of the Geneva Conventions.²⁶⁹ The articles are based on three fundamentals: the obligation to enact special legislation for suppressing breaches of the Conventions, a duty to search for any alleged violator, and an obligation to try such person, or, if the Party prefers, to transfer the person to another State concerned.²⁷⁰ No reservations have been made with regard to these common provisions.²⁷¹

The scope of the obligation ‘extradite or prosecute’ is contained in the second paragraph of the articles. Each High Contracting Party is under an obligation to search for persons alleged to have committed or to have ordered to commit grave breaches of the Geneva Conventions as soon as the State becomes aware that the person on its territory is alleged of having committed such an offence. The engagement of the law enforcement authorities of the State is automatic in this sense. The State must search for the person without waiting for a request from another State. Once the person is apprehended, “it is its duty to see that such person is arrested and prosecuted without delay.”²⁷² The formulation of the principle shows the duty to prosecute as primary and the option to extradite as secondary, based on the status of international crimes affecting universal values and interests of all States.

²⁶⁹ See First Geneva Convention, art 49, Second Geneva Convention, art 50, Third Geneva Convention, art 129, and Fourth Geneva Convention, art 146. The four Geneva Conventions of 1949 contain clauses obliging High Contracting Parties to pass legislation which either allows for jurisdiction or provides the necessary grounds for extradition of the relator to the *locus delicti* state.

²⁷⁰ See Commentary to the Geneva Conventions, 363. The original text of 1946 was “Each Contracting Party shall be under obligation to search for the persons alleged to be guilty of breaches of the present Convention, whatever their nationality, and in accordance with its own laws or with the conventions prohibiting acts that may be considered as war crimes, to indict such persons before its own tribunals, or to hand them over for judgment to another Contracting Party.” See Commentary to the Geneva Conventions, at 619. See also, XVIIth International Conference of the Red Cross, Draft Revised or New Conventions for the Protection of War Victims, 134.

²⁷¹ ILC, Survey of Multilateral Conventions which May Be of Relevance for the Work of the International Law Commission on the Topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’, A/CN.4/630 (18 June 2010) para 58.

²⁷² Commentary to the Geneva Conventions, 365-366.

The obligation is applicable for grave breaches of the Geneva Conventions.²⁷³ In all other circumstances, the Parties shall take measures to suppress “all acts contrary to the provisions of the present Convention other than the grave breaches.”²⁷⁴ Hence, the minimum that the Contracting Parties are assumed to do is to include a general clause in their domestic implementations, providing for other breaches of the Geneva Conventions and “arrange for judicial and disciplinary proceedings to be taken in all cases of failure”.²⁷⁵

Once *ratione personae* jurisdiction is established, the Parties “shall bring such persons, regardless of their nationality, before its own courts.” The nationality of the accused is immaterial as the proceedings before the judicial authorities of the custodial State must be uniform in the sense that “nationals, friends and enemies should all be subject to the same rules of procedure, and should be judged by the same courts.”²⁷⁶ The fourth paragraph of the common ‘extradite-or-prosecute’ articles in the Geneva Conventions stipulates that the accused person against whom judicial proceedings have been initiated benefits from certain categorical safeguards of proper fair trial and defence, guarantees which might be applicable in the extradition process of the relator.²⁷⁷

²⁷³ Article 50 of the First Geneva Convention defines grave breaches as “willful 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” if committed against persons or property protected by the Convention. Article 130 of the Third Geneva Convention adds to the list of grave breaches “compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Article 147 of the Fourth Geneva Convention adds to grave breaches the taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

²⁷⁴ See Commentary to the Geneva Conventions, 627-628.

²⁷⁵ Commentary to the Geneva Conventions, 368.

²⁷⁶ Commentary to the Geneva Conventions, 366.

²⁷⁷ Such fair trial safeguards cannot be less favourable than the ones provided by Article 105 of the Third Geneva Convention. For example, Article 99 of the Third Geneva Convention allows the accused to present defence and to use the assistance of a qualified counsel. The accused person as well as the prisoner of war is entitled to defence by a

Some scholars assert that the *aut dedere aut judicare* provision must be read along with Articles 88 and 89 of the Additional Protocol I to the Geneva Conventions which stipulate that High Contracting Parties must afford the greatest possible level of assistance and cooperation in criminal proceedings of grave breaches.²⁷⁸ Article 88(2) of the Additional Protocol I requires that the High Contracting Parties co-operate in extradition matters. The Parties are obliged to provide due consideration to requesting *locus delicti* Parties. The provision affirms the absolute nature of the *aut dedere aut judicare* principles enshrined in the common Articles of the four Geneva Conventions for “as long as the penal repression of grave breaches is ensured, the right of each Contracting Party to choose between prosecuting a person in its power or to hand him over to another Party interested in prosecuting him therefore remains absolute, subject to the legislation of the Party to which the request is addressed.”²⁷⁹ The provisions also define the application of suppression of breaches of the Conventions and the Additional Protocol with grave breaches falling under universal jurisdiction.²⁸⁰ It could be construed that a mini-regime within the “default prosecution” regime is created to facilitate extradition if the requesting State could justify its legal interest in wanting to prosecute the relator on the basis of *locus delicti*, or of commission of the grave breaches against own nationals.

As the obligation *aut dedere aut judicare* is just one of the available mechanisms in the framework, its role and function are greatly facilitated by provisions ascertaining that no grave

qualified advocate or counsel of own choice. Failing to select counsel, the relator must be availed an advocate or counsel by the Protecting Power. The accused may call witnesses as well as rely on services of a competent interpreter. The charges on which the person is arraigned as well as documents relating to the case must be communicated to the same in a language which he understands and in good time before the trial.

²⁷⁸ See Geoff Gilbert, *Transnational Fugitive Offenders in International Law* (Kluwer Law International 1998) 361.

²⁷⁹ See Commentary to the Additional Protocol I of the Geneva Conventions, para 3577.

²⁸⁰ See Commentary to the Additional Protocol I of the Geneva Conventions, para 3564.

breaches would remain unpunished as each State is obliged to search for the alleged perpetrator who has allegedly committed or has given orders to commit a grave breach with the proviso that each State on which territory or under which jurisdiction the relator is located may hand over the accused to be tried by another State willing to prosecute the relator based on *prima facie* case on part of the requesting State.

c. Torture and the ‘Extradite-or-Prosecute’ Obligation

The Convention against Torture is another widely ratified core-crime treaty that contains an *aut dedere aut judicare* provision. The origin of the extradition clause in CAT dates back to 1979 when extradition was perceived as inconceivable unless the person was provided “a proper trial by a court guaranteeing a fair judgement and...[detention] in humane conditions”²⁸¹, reflecting the non-refoulement principle. Upon suggestions not to indicate any preference for either extradition or prosecution²⁸² and for the proceedings to be instituted without exception or under delay²⁸³, the then draft article 7 offered a three-part formulation. First, the State must have jurisdiction over the person who is alleged to have committed any offence relating to torture in its territory. Second, if the State does not extradite the person, it is under an obligation without exception and no matter whether the offence was committed on its territory or not or under its jurisdiction to submit the case to its competent authorities for the purpose of prosecution, denoting the primary obligation to prosecute. Finally, the decision of the same authorities must

²⁸¹ Burgers (n 206) 49.

²⁸² *ibid* 62.

²⁸³ *ibid* 63.

be taken after strict consideration of the offence through the application of similar approach for similar offences of a serious nature under the laws of that State.

The second part of the obligation establishes that authorities must take their decisions on the particular allegation of offence “in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.” Hence, normal procedures must be followed, applicable to serious crimes along with the corresponding standards of evidence and burden of proof.²⁸⁴ The ICJ in the *Habre* case emphasized that the obligation to prosecute is “normally implemented” after the State has performed the obligations related to the fulfilment of the requirement to adopt adequate legislation to enable the criminalization of torture and the provision to enable domestic courts with universal jurisdiction and to make an inquiry into the facts of the case.²⁸⁵ For example, a State might satisfy Article 7(2) requirements although some States do not apply the principle of proportionality or hierarchy of crimes in their domestic legal systems.²⁸⁶

In terms of the scope and the meaning of the obligation *aut dedere aut judicare*, the Court in *Habre* emphasized that the obligation *aut dedere aut judicare* pertaining to the crime of torture requires that the State where the relator is located to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition

²⁸⁴ *ibid* 138.

²⁸⁵ *Belgium v Senegal*, Judgment (n 18) paras 83, 91. For example, preliminary inquiry may include drawing a case file, collection of facts and evidence, witness statements as regards the situation.

²⁸⁶ Article 7(2) of CAT states, ‘These 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. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.’ See Penal Codes of Poland and Bulgaria.

of the suspect.²⁸⁷ Hence, the obligation to prosecute is not triggered by an extradition request. The Court reached this conclusion for the inherent duty to prosecute by accentuating the purpose of Article 6(2) which obliges the State to make a preliminary inquiry immediately from the time the suspect is present in its territory. In this manner, the trigger for the applicability of the obligation to prosecute is the presence of the suspect on the territory of the State concerned, i.e. a *ratione personae* jurisdictional base is the requirement for the initiation of the preliminary inquiry and subsequent prosecution. It seems that the preliminary inquiry is an imbedded, non-disposable and mandatory requirement within the obligation to prosecute.

d. ICAO Conventions and *Aut Dedere Aut Judicare*

The *aut dedere aut judicare* clause is found in three conventions relating to the transnational crime of hijacking of civil aviation: the International Civil Aviation Organization Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed in Tokyo in 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague in 1970; and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal in 1971. The Hague Convention is traditionally considered as the most common model for the ‘extradite or prosecute’ clause.²⁸⁸ No reservations have been lodged as regards the relevant *aut dedere aut judicare* provisions.

²⁸⁷ *Belgium v Senegal*, Judgment (n 18) para 94.

²⁸⁸ ILC Survey 2010, para 90. The Hague Formula is employed in more than 60 multilateral treaties. See ILC Survey 2010, para 108.

The essential elements of the Hague formula may be summed as follows: 1) criminalization of the relevant offences which makes it punishable on domestic level;²⁸⁹ 2) a provision obliging States parties to take necessary measures to establish jurisdiction over the alleged offences when they have a particular connection with it, when the relator is present in their territory and they do not extradite him; 3) measures to take the offender into custody and to initiate preliminary investigations; 4) an obligation under which the State party where the relator is found shall, if it does not extradite him, submit the case to its competent authorities for prosecution; and 5) provisions making the offences extraditable.²⁹⁰

Article 7 of the Hague Convention contains the ‘extradite-or-prosecute’ obligation. It states that “the Contracting State in the territory of which the alleged offender is found shall, if it does not extradite the relator, 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”. The transnational nature of the crime at hand allows for the existence of more interested States to prosecute, and, hence, as described above, the extradition and prosecution prongs seem to be given more equal weight in comparison to the core crime *aut dedere aut judicare* provision. Nonetheless, the Hague Convention clause is far reaching as it allows for no exceptions in case the relator is not extradited to another Contracting State pursuant to Article 8. This interpretation of the prosecution-extradition relation is supported by the preparatory works on the Convention where it was noted that the adopted formula is based on “the European Convention on Extradition whereby, if there was no extradition, the State which had arrested the

²⁸⁹ The Convention deals with offences of hijacking an aircraft. It attempts to punish any person “who on board an aircraft in flight, unlawfully, by force or threat of force, or by any other form of intimidation, seizes, or exercises control of that aircraft, or attempts to perform any act or is an accomplice to any such offender.”

²⁹⁰ ILC Survey 2010, para 109.

alleged offender must submit the case to its competent authorities for their decision as to whether legal proceedings should be taken against the alleged offender”.²⁹¹

The requirement for prosecution is to “submit the case to its competent authorities for the purpose of prosecution” if it does not extradite. It is not expressly clear whether the State with jurisdiction over the relator has to wait for an extradition request from another Contracting Party pursuant to Article 8 but the obligation must be construed that as long as the relator is not extradited within reasonable time, the State must pass the case to the prosecuting authorities. Once the custodial State submits the case to its relevant authorities for the purpose of prosecution, the same 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.”²⁹²

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973 contains an ‘extradite-or-prosecute’ obligation. Following the Hague Convention of 1970, it mandates the State in which the alleged offender who have committed serious attacks on Heads of State, Heads of Government, Ministers of Foreign Affairs, diplomats and other internationally protected persons and who is located in its territory to either extradite or submit the case to its competent authorities for the purpose of prosecution.²⁹³ The language of the Protected Persons Convention closely follows the formula used in the Hague Convention of 1970 albeit it provides for no exception whatsoever and submission of the case to the competent

²⁹¹ ICAO, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft, Legal Committee, Thirtieth meeting (3 March 1970) Seventeenth Session (9 February-11 March 1970) Doc. 8877-LC/161. para 14, 16-17.

²⁹² The Hague Convention 1970, art 7.

²⁹³ See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973, art 7.

authorities for the purpose of prosecution “without undue delay”. This clause indicates that the Contracting State with jurisdiction *ratione personae* jurisdiction over the alleged relator should not wait for an extradition request to be lodged before submitting the case to its authorities. It is provided as an example how the general scope and language of the Hague formula is cross-emulated and replicated in substantively different treaty although the actual wording may slightly differ. Additionally, the repetition of the same formula pertaining to the obligation would play a significant role in examining whether the duty has attained customary status, as shown in Chapter 4.

e. The International Convention for the Suppression of Terrorist Bombings and *Aut Dedere Aut Judicare*

The International Convention for the Suppression of Terrorist Bombings of 1998 creates an offence if a person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury, or with the intent to cause extensive destruction where such results or is likely to result in major economic loss. Article 8(1) contains the *aut dedere aut judicare* clause which obliges States in which territory the alleged offender is present to submit the case without undue delay, without exception whatsoever and whether or not the offence was committed in its territory to its competent authorities for the purpose of prosecution if the person is not extradited. The model for sufficient discharge of the obligation ‘extradite or prosecute’ is set under the following conditions: when a State is permitted under its domestic law to extradite its own

nationals only upon the explicit condition that the person will be returned to that State to serve the sentence imposed as a result of the trial for which the extradition was sought and if that State and the requesting State agree with this option and other terms may deem appropriate, such conditional extradition if it takes place is deemed to cover the requirement of extradition or prosecution.

Article 6 of the Suppression of Terrorist Bombings requires each State Party to establish jurisdiction over the offences taking place in the territory of that States, when the offences are committed on board a vessel flying the flag of the same State or an aircraft registered under the laws of the same States, or when the offence is committed by a national of that State. Article 6(2) of the Convention places jurisdictional discretion in the State Party to establish jurisdiction over any offence based on the passive personality principle, against governmental or State facilities, over a stateless person who committed the offence and is a habitual resident in the territory of that State or if the offence is committed in an attempt to compel the State to do or abstain from doing any act. Article 6(4) serves as the bridge between the legal basis and the obligation extradite or prosecute. It promulgates that each State Party shall take the necessary measures to establish jurisdiction over the offences in cases where the alleged offender is present in its territory and it does not extradite the person to any other State Party which wants to assert Article 6(1) or (2) jurisdiction.

Another anti-terrorist multilateral treaty which contains the *aut dedere aut judicare* clause is the International Convention for the Suppression of the Financing of Terrorism of 2000. Article 2 makes it an offence “if a person by any means, directly or indirectly, unlawfully and wilfully,

provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of and as defined in one of the nine treaties listed in the annex²⁹⁴ or any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act". The *aut dedere aut judicare* obligation is laid down in Article 10 which follows verbatim the structure of Article 8 of the International Convention for the Suppression of Terrorist Bombings of 1998. The jurisdictional basis is also based on Article 6 of the International Convention for the Suppression of Terrorist Bombings of 1998.

f. Crimes against Humanity

The International Convention for the Protection of All Persons from Enforced Disappearance of 2006 is one of the most recent major multilateral treaties dealing with crimes against humanity and containing an express *aut dedere aut judicare* provision. It offers the most recent model for

²⁹⁴ Convention for the Suppression of Unlawful Seizure of Aircraft (signed on 16 December 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed on 23 September 1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted by the General Assembly of the United Nations on 14 December 1973); International Convention against the Taking of Hostages (adopted by the General Assembly of the United Nations on 17 December 1979); Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979, entered into force 8 February 1987) 1456 UNTS 124; 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 (adopted 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (signed on 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (signed on 10 March 1988); and International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 284.

‘extradite or prosecute’ formulation, combining elements examined above. In the Preamble of the Enforced Disappearance Convention it is categorically established that one of the goals of the document is “to prevent enforced disappearances and to combat impunity for the [same] crime”.

The ‘extradite or prosecute’ clause is found in Article 11(1) which obligates 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.” Article 9 (2) states 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”. As seen from the language of the *aut dedere aut judicare* clause, the duty to prosecute is seemingly primary to the process of extradition or transfer to an international criminal tribunal.

Article 10 attempts to strengthen the case for prosecutorial action against the relator as it requires that State on whose territory a person suspected of having committed an offence of enforced disappearance is present to take the same individual into custody or to ensure the person’s presence for “criminal, surrender or extradition proceedings.” Article 10(2) obliges the State Party with *ratione personae* jurisdiction to “carry out a preliminary inquiry or investigations to

establish the facts” and to notify the State with jurisdiction under Article 9(1) of its intention to exercise jurisdiction.²⁹⁵ Again, the emphasis here is on the notion that another State may have a more appropriate interest in prosecuting the relator than the custodial State.

g. Drug Trafficking and *Aut Dedere Aut Judicare*

Drug Trafficking responses on international level have had a long history due to the complexity of such offences and their transnational externalities. As early as 1909 international action on drug trafficking was coordinated. Such effort led to the International Opium Convention of 1912.²⁹⁶ Several protocols and conventions were passed in the following decades.²⁹⁷ All efforts on international level were consolidated in the Single Convention on Narcotic Drugs of 1961²⁹⁸ and the Psychotropic Substances Convention of 1971. The only penal cooperation provision in the two conventions concerned the obligation to criminalize the possession, supply and transport of drugs as well as making such offences extraditable.²⁹⁹ These conventions contain provisions that conflate the treatment of nationals and non-nationals and limit the obligation to institute proceedings to serious offences. Serious offences “shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found, if extradition is not acceptable in conformity with the law of the Party to which application is

²⁹⁵ Article 9(1) allows the State Party to establish jurisdiction based on the principles of territoriality, including on board a ship or aircraft registered in that State, active and passive personality.

²⁹⁶ Convention relating to the Suppression of the Abuse of Opium and other Drugs (signed on 23 January 1912, entered into force 19 February 1915) 8 LNTS 187.

²⁹⁷ D McClean, *International Cooperation in Civil and Criminal Matters* (OUP 2002) 246-247.

²⁹⁸ Single Convention on Narcotic Drugs of 1961 (entered into force 30 March 1961) 520 UNTS 301.

²⁹⁹ See Single Convention on Narcotic Drugs, article 36.

made”.³⁰⁰ The discretion to refuse extradition is widened in both conventions in comparison to the original model of the 1929 Counterfeiting Convention.³⁰¹

The 1980s witnessed a discernible push for fighting drug trafficking on transnational level. The culmination was the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988.³⁰² Article 6 of the Vienna Convention establishes the condition for extradition procedures. All offences under Article 3(1) of the Convention are extraditable and such are to be included in future extradition treaties of the State Parties. The Vienna Convention can serve as a legal basis for extradition in lack of extradition treaties. Extradition may be refused if there are substantial grounds to believe that the prosecution and punishment by the requesting State against the alleged offender is sought for the race, religion, nationality or political opinions of the relator as well as that the extradition request might cause prejudice against the individual.³⁰³

The drug-trafficking mechanism related to extradition and prosecution is centred on a familiar pattern seen in other multilateral conventions explored above: 1) a requirement for criminalization of the relevant offence which States undertake to make punishable in their respective domestic legal orders; 2) provisions reflecting divergences in States’ attitude towards extradition of nationals or exercise of extraterritorial jurisdiction; 3) precedence for extradition over prosecution; 4) an extradition regime which makes the offence an extraditable one; and 5) a

³⁰⁰ ILC, ‘Survey of Multilateral Conventions which May Be of Relevance for the Work of the International Law Commission on the Topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” (18 June 2010) UN Doc A/CN.4/630, para 37.

³⁰¹ See ILC Survey 2010, paras 10-27.

³⁰² The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 TS 95 (Vienna Convention of 1988).

³⁰³ Vienna Convention of 1988, article 6(6).

non-prejudice clause relating to the uniqueness of each State's criminal legislation.³⁰⁴ This type of the clause is not surprising because, as identified above, the crime that triggers the applicability of the provision could be classified as a serious crime with international nexus. Hence, more emphasis is provided on extradition as the nature of the criminal activity implies that a State or some States would have a higher interest in prosecuting the accused. However, the developments in tackling drug-trafficking must be closely followed because as the crime becomes a global phenomenon, it may be classified as a transnational crime with emphasis on extradition.

The two broad types of the obligation *aut dedere aut judicare* pertaining to the two categories of core and transnational crimes aim at the same goal: elimination of impunity on international level through asserting individual responsibility for the criminal behaviour. As shown above, the types differ as regards the interplay between the provisions on extradition and prosecution but it cannot be claimed that division exists in substantive terms. The scope and applicability of each *aut dedere aut judicare* obligation relates to a certain crime in light of its incorporation in various multilateral treaties. The difference might be one of form but the substance remains fairly cohesive. The essence remains linked to the foundational duty to prosecute the perpetrators of such crimes, which may be facilitated by the requirement for criminalization of offences and preliminary inquiry.

³⁰⁴ ILC, 'Survey of Multilateral Conventions which May Be of Relevance for the Work of the International Law Commission on the Topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)"' (18 June 2010) UN Doc A/CN.4/630, para 26.

IV. Requirement for Criminalization of Offences, Preliminary Inquiry, Criminal Cooperation, Universal Jurisdiction, and the Principle *Aut Dedere Aut Judicare*

The duty for preliminary inquiry plays an assisting role, inherently connected to the effective functioning of the *aut dedere aut judicare* principle. In terms of what a preliminary inquiry means and its scope, the ICJ's *Habre* case may shed some light through illustrative and analogy methods. In its submissions, Belgium asserted that it interpreted the inquiry to require the State where the relator is present to take effective measures to gather evidence and, when necessary, to avail itself of mutual judicial assistance to States able to provide such cooperation. The Court noted that preliminary inquiry "is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question."³⁰⁵ The authorities responsible for carrying out the inquiry are those vested with the task of composing a case file and collecting facts and evidence, including documents or witness statements relating to the events at issue and linked to the suspect's possible involvement in the matter. In situations of a transborder criminal activity or of inquiries in non-*locus delicti* States, the custodial State is tasked to seek cooperation with any other State where complaints against the same suspect have been filed in relation to the case, in order "to enable the State to fulfil its obligation to make a preliminary inquiry."³⁰⁶

In order for preliminary inquiry to be satisfied, the relevant domestic authorities need not only to adopt all the legislative implementation measures, but also to exercise their jurisdiction, "starting

³⁰⁵ *Belgium v Senegal*, Judgment (n 18) para 83.

³⁰⁶ *ibid* para 83.

by establishing the facts.”³⁰⁷ A mere questioning before an investigating judge or informing the suspect of the accusatory acts cannot be classified as a preliminary inquiry without any substantive inquiry into the charges. Additionally, an effective and timely inquiry requires that “while the choice of means for conducting the inquiry in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2, of the Convention requires that *steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case.*”³⁰⁸ (emphasis added) Hence, there should be no undue delay in the inquiry into the alleged acts.

There is a duty to immediately initiate such an inquiry as soon as the local authorities have reason to suspect that the alleged perpetrator on their territory is responsible for the criminal acts. Otherwise, the State would be found in breach of the preliminary inquiry requirement.³⁰⁹ Without a timely, effective and competent inquiry into the facts of the alleged case, the potential prosecution becomes jeopardized or compromised.

Judge Yusuf in the *Habre* case is critical of the definition of preliminary inquiry provided by the Court as it could hardly be assessed that “a general standard for the conduct of such inquiries exists”, supported by the fact that it is up to the States to choose the means of conducting such inquiries.³¹⁰ Moreover, Yusuf stipulates that it would be logical for an indictment to inherently include and satisfy that a preliminary inquiry has been carried out, even though a State may not

³⁰⁷ *ibid* para 85.

³⁰⁸ *ibid* para 86.

³⁰⁹ *ibid* para 88.

³¹⁰ *Belgium v Senegal*, Yusuf Separate Opinion, para 15.

be able to provide adequate material to support such linkage.³¹¹ However, an indictment should not be strictly equated with a sufficient and independent inquiry. A situation might arise in which indictments are issued in *pro forma* or shielding fashion as explored above.

The obligation to criminalize is also ancillary to the obligation *aut dedere aut judicare*. For example, the four identical articles in the Geneva Conventions contain the requirement to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.” The obligation to enact the domestic legislation is imperative and makes States delineate the concrete nature and extent of penalties of each envisaged infraction, “taking into account the principle of due proportion between the severity of the punishment and the gravity of the offence.”³¹² Without the proper level of criminalization, the whole process of prosecution or extradition might be undermined. Inadequate criminalization may lead to potential violations of general principles of criminal law such as *nullum crimen sine lege*. Although introduction in the domestic legal order of the international criminalization is necessary, if a certain conduct is criminalized in international law, the individual is expected and required to know the criminalized conduct, as the State would not violate the *nullum crimen* principle for prosecuting the alleged international criminal conduct before its domestic enactment.³¹³ As regards the problematic level of domestic criminalization of international crimes, the STL has found, “those States which had not already criminalized terrorism at the domestic level have increasingly incorporated the emerging

³¹¹ *Belgium v. Senegal*, Yusuf Separate Opinion, para 16.

³¹² Commentary to the Geneva Conventions, 364.

³¹³ *Prosecutor v. Ayyash* (16 February 2011) Case No STL-11-01/I, Interlocutory Decision on the Applicable Law (Appeals Chamber) para 133. See also article 15 ICCPR. Also, see *Milutinović et al case* (21 May 2003) Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction- JCE, para 41, where the ICTY Appeals Chamber found that international customary law could be used and give an individual ‘reasonable notice’ of criminal conduct entailing criminal liability.

criminal norm into domestic penal legislation and case-law, often acting out of a sense of international obligation.”³¹⁴

Delays in implementing domestic legislation to criminalize or introducing the appropriate legal base can also cause problems in prosecution. For example, Senegal had delayed the submission of the case to the relevant authorities for the purpose of prosecution by not adopting the appropriate legislation until 2007.³¹⁵ The ICJ in *Habre* elaborated that the obligation to establish the correct legal base, including universal jurisdiction, in domestic courts over the crime of torture is a necessary condition for the implementation of Article 6(2) (namely, the initiation and commencement of a preliminary inquiry) and Article 7(1) (namely, the submission of the case to competent judicial authorities for the purpose of prosecution). The same line of reasoning as to the applicability of the appropriate legal base is also seen in the Statute of the Extraordinary African Chambers (“EAC”), a judicial tribunal within the Senegalese legal system designed and launched to respond to the breach of Senegal’s obligation to extradite or prosecute Habre. The Statute of EAC stipulates that the EAC “shall have the power to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990.”³¹⁶ In this manner, the court is availed with extraterritorial jurisdiction outside Senegal.

³¹⁴ *Prosecutor v Ayyash* (16 February 2011) Case No STL-11-01/I, Interlocutory Decision on the Applicable Law (Appeals Chamber) para 104.

³¹⁵ *Belgium v Senegal*, Judgment (n 18) para 76. The Court declined jurisdiction to review the eventual breach of Article 5(2) on part of Senegal as Senegal has introduced the appropriate legislation in its domestic legal order through legislative and constitutional amendments in 2007.

³¹⁶ Statute of the Extraordinary African Chambers, art 2.

A clarification on the temporal and material scope of the obligation to criminalize and to establish jurisdiction is also provided: it commences once the State concerned is bound by the relevant convention, containing such an obligation, in order to achieve a particular preventative and deterrent character with the big picture in mind “since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity.”³¹⁷ Hence, a three-step mechanism is elucidated and confirmed: from the introduction of criminalization and appropriate jurisdiction base through utilizing prosecution of the suspect to a common, universal mission on inter-state level to eliminate impunity, “[t]he purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.”³¹⁸

2) Universal Jurisdiction

Universal jurisdiction is another principles related to the obligation to ‘extradite-or-prosecute’. Universal jurisdiction allows the state authorities to initiate judicial proceedings against individuals suspected of having committed a crime, “regardless of where the offense took place and the nationality of the alleged perpetrator(s) and victim(s).”³¹⁹

³¹⁷ *Belgium v Senegal*, Judgment (n 18) para 75.

³¹⁸ *Belgium v Senegal*, Judgment (n 18) para 74.

³¹⁹ Diane Orentlicher, ‘Universal Jurisdiction: A Pragmatic Strategy in Pursuit of a Moralism’s Vision’ in LN Sadat and M Scharf (eds), *Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff 2008) 127-128. See also M Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 VaJ Int’l L 81, 83.

Universal jurisdiction shares an uneasy relationship with traditional jurisdictional bases as domestic courts traditionally prefer to assert jurisdiction based on the principles of territoriality, active personality, protection of vital state interests³²⁰, and passive personality³²¹ principles.³²² However, many international offences are of transnational or international character, committed and affecting more than one State. The increased international cooperation in criminal matters reflects the attempt to minimize international criminality through modern mechanisms³²³ as “the establishment of safe havens for fugitives would...tend to undermine the foundations of extradition.”³²⁴ The principle of universality interacts with the protection of state sovereignty, especially in international criminal law, since there exist “core values...shared by the international community [which] justify overriding the usual territorial limits on the exercise of jurisdiction.”³²⁵

Applying the correct jurisdiction pursuant to the fulfilment of the *aut dedere aut judicare* duty, as shown below, facilitates the proper functioning of the international community:

“[t]hese crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself...[I]nternational law is...in need of the judicial and legislative organs of every country to give effect...and to bring

³²⁰ The District Court in Eichmann asserted that the State of Israel may assert protective jurisdiction over threat to essential state interests since there exists a special connection between the Jewish people, a target and victim of the said crimes and the State of Israel. *Attorney Gen. of Israel v. Eichmann* 36 ILR 18, para 33.

³²¹ The passive personality principles allows the state to proscribe certain offences committed against its own citizens abroad. *Attorney Gen. of Israel v. Eichmann*, 36 ILR 18, para 36. See also Orentlicher (n 101) 136.

³²² Orentlicher (n 319) 128. See also Geoff Gilbert, *Transnational Fugitive Offenders in International Law* (Kluwer Law International 1998)86-104, 401-409.

³²³ N Keijzer, ‘*Locus Delicti* Exceptions’ (n 68) 91.

³²⁴ See *Soering v. United Kingdom* (1989) Series A no 161, para.89. See also Orentlicher (n 319) 145. The principle allows states “[b]y empowering their courts to exercise universal jurisdiction when perpetrators appear in their territory, states advance this aim by ensuring that their territory does not become a safe haven for world-class criminals.”

³²⁵ M Cherif Bassiouni, ‘The History of Universal Jurisdiction and Its Place in International Law’ (n 9) 44.

the criminals to trial. The jurisdiction to try crimes under international law is *universal*.”³²⁶

It should be recalled that States have the primary responsibility to exercise jurisdiction over crimes of international law.³²⁷ Whenever the harm inflicted by the crimes committed is “so embracing and widespread as to shake the international community to its very foundations”, the State is availed “in the capacity of a guardian of international law and an agent for its enforcement”³²⁸ to prosecute the alleged perpetrator, based on communal values. The issue of proper criminalization and jurisdiction is even more pressing when violation of *jus cogens*, such as torture, aggression, slavery, slave-related practices genocide, crimes against humanity, and war crimes, is at hand.³²⁹

The application of pure universal jurisdiction³³⁰ has been revised to a more nuanced, qualified form³³¹—“for exercising universal jurisdiction only or principally when there is a significant link between an offense and the forum state.”³³² The recourse to universal jurisdiction has attracted

³²⁶ *Attorney Gen. of Israel v. Eichmann*, 36 ILR 18, para 12. The Israeli judicial interpretation builds on the universal jurisdiction approach used by NIMT in *Re List*, Case No.215, US Military Tribunal Nuremberg (1948) 8 UNLRTWC 1, 47.

³²⁷ See Updated Principles to Combat Impunity, Principle 20.

³²⁸ *Attorney Gen. of Israel v. Eichmann* 36 ILR 277 (Isr. Sup.Ct.) (1962), para. 12(f).

³²⁹ Orentlicher (n 319) 148. See also, M Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1996) 59 Law&Contemp Probs 63, 65-66.

³³⁰ M Cherif Bassiouni, ‘The History of Universal Jurisdiction and Its Place in International Law’ in S Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2004) 40. See Orentlicher (n 101) 131.

³³¹ As evidenced in the amendments of domestic provisions in Belgium and the UK.

³³² Orentlicher (n 319) 143. The universality plus principle also denotes the “point of contact” requirement which the Federal Supreme Court of Germany ascertained to postulate that Yugoslav nationals could not be prosecuted in Germany for genocide or war crimes allegedly committed in the former Yugoslavia against non-Germans nationals unless the suspects were present in Germany. Nonetheless, it is unclear how the principle of pure universality is abridging the non-interference principle since in practical terms, the forum state attempts to establish custody over

utmost attention as shown in several headline cases such as the *Pinochet* litigation³³³, Spanish cases on the Guatemalan genocide³³⁴ and the ICJ's *Habre* case.³³⁵ As domestic decisions constitute state practice as well as evidence of legal belief to act in the ascribed legal manner³³⁶, the invocation of universal jurisdiction in various domestic cases may support its customary character. Its applicability coupled with the conventional obligation to prosecute the alleged perpetrators of certain international crimes has been established in various widely ratified multilateral conventions.³³⁷ One does not need to look further than the positive state practice reflected in widespread ratification of the Geneva Conventions³³⁸, the Torture Convention³³⁹, or the Genocide Convention³⁴⁰ in order to recognize the duty to establish universal jurisdiction for a set of international crimes which relates to the obligation *aut dedere aut judicare*.

the alleged perpetrator through extradition proceedings, thus, fulfilling *ratione persona* "point of contact" requirement, barring prosecution *in absentia*.

³³³ See *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.3) [2000] 1 AC 147 (HL 1999). Orentlicher, at 139.

³³⁴ See N Roht-Arriaza, 'Prosecuting Genocide in Guatemala: The Case Before the Spanish Courts and the Limits to Extradition' (2009) Working Paper No.2, Project on Human Rights, Global Justice and Democracy, 11.

³³⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422, paras 74, 91.

³³⁶ Orentlicher (n 319) 139. The decisions themselves are statements of acknowledgement that the state acts believing in the legality of applying the principle of universality. See also ICJ's *Arrest Warrant of 11 April 2000 case (DRC v. Belgium)* (Judgment) [2002] ICJ Rep 3, para. 58. However, note that the recent exercise of universal jurisdiction pertaining to the crime of torture in ICJ's *Habre* case is on treaty obligations in the Torture Convention. See *Belgium v. Senegal*, Judgment, para 74.

³³⁷ M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law&Contemp Probs 63, 66. See also Orentlicher (n 319) 130.

³³⁸ See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 13 art 49; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 art 50; Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 129; and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 146.

³³⁹ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85 (CAT) art 5.

³⁴⁰ Convention of Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) UNGA Res A/RES/260, 3rd Session, (Genocide Convention) art 6.

Here is the place to clarify that universal jurisdiction is just one of potential jurisdictional bases. The requested State may decide to initiate judicial proceedings on its territory against the alleged relators on other jurisdictional grounds.³⁴¹

The relation between the principle of universal jurisdiction and the obligation *aut dedere aut judicare* is complex. On one hand, States should implement effective measures in line with their conventional and/or customary obligations to “enable their courts to exercise universal jurisdiction over serious crimes under international law”.³⁴² The role of jurisdiction for individual criminal responsibility in criminal proceedings if no extradition takes place cannot be underestimated. On the other hand, the obligation ‘extradite-or-prosecute’ should not be taken as strictly making universal jurisdiction mandatory.

Universal jurisdiction simply enables that the domestic judiciaries possess “the legal authority necessary for prosecuting the offenders.”³⁴³ However, the obligation ‘extradite-or-prosecute’ does not completely overlap with universal jurisdiction as while the latter may serve as a precursor or assure the effective implementation of the obligation but is nonetheless a different legal mechanism. In other words, the obligation *aut dedere aut judicare* as a rule of international law does not trigger or involve automatically an obligation to extend or apply universal

³⁴¹See N Roht-Arriaza, ‘Prosecuting Genocide in Guatemala’ (n 334) 11.

³⁴² Updated Principles to Combat Impunity, Principle 21.

³⁴³ Van Steenberghe (n 172) 1104.

jurisdiction.³⁴⁴ The obligation to prosecute if no extradition takes place triggers such applicability of universal jurisdiction.³⁴⁵

The ICTY's *Furundžija* decision discusses the applicability of universal jurisdiction and the separate obligation to prosecute such relators in similar and due manner:

“it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treatymaking power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and *strengthens* the legal foundation for such jurisdiction found by other courts in *the inherently universal character of the crime*.”³⁴⁶ (emphasis added)

The authority vested in each State to try and punish alleged perpetrators of *jus cogens* crimes such as torture is pronounced to create clear obligatory consequences: “torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.”³⁴⁷

It should be also duly noted that the distinction between universal jurisdiction and obligation to prosecute *jus cogens* violation binding on every States of the international community has

³⁴⁴ See *Arrest Warrant Case (Congo v Belgium)* (Dissenting Opinion Van den Wyngaert) (14 February 2002) 3 ICJ Rep (2002) para 60.

³⁴⁵ See van Steenberghe (n 172) 1106. States who are unwilling to use universal jurisdiction for whatever reasons are only compelled to submit the case for the purpose of prosecution pursuant to their ability under national legislation in terms of the appropriate legal base(s).

³⁴⁶ *Prosecutor v Anto Furundžija* (Judgment) IT-95-17/1 (10 December 1998) para 156.

³⁴⁷ *Prosecutor v Anto Furundžija* (Judgment) IT-95-17/1 (10 December 1998) para 157. The second consequence directly relates to an obligation to remove obstacles to extradition. The negative obligation not to exclude torture from extradition under any possibly applicable exceptions along with the vested authority in each State to prosecute or extradite alleged perpetrators of torture culminates in the binding character of the *aut dedere aut judicare* principle.

decreased in the past several decades.³⁴⁸ Universal jurisdiction allows for more effective prosecution of such crimes as it increases the jurisdictional base available to the custodial State. Had it been not so, then the Tribunal's pronouncement on the inability of States to restrict or hamper the prosecution and punishment of *jus cogens* crimes would be just an empty rhetoric. However, it should be duly noted that "the obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other bases... [as] universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation".³⁴⁹ If the States are under an obligation not to restrict the prosecution of *jus cogens* crimes, then the second limb of the principle, namely extradition, serves as a guaranteeing binding mechanism that such restriction would not materialize in reality if the State does not possess the necessary legal mechanism to trigger jurisdiction over the case based on the universality principle. Indeed, the obligation *aut dedere aut judicare* reflects and responds to the universal character of core crimes in the most appropriate manner in order to minimize possibilities for inaction due to other legal constraints on the custodial State.

As observed so far in the current chapter, various means and types might exist in relation to what prosecution, extradition or preliminary inquiry means. Still, the crucial element of these mechanism is their function in the general framework of individual responsibility which translates into closing the impunity gap. The mechanisms may be described as auxiliary but interrelated to each other but their proper functioning in the framework ascertains proper prosecution or extradition.

³⁴⁸ Christopher Joyner, 'Arresting Impunity: The Case of Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59 Law and Contemporary Problems 153, 170. See *Filartiga v. Pena-Irala* (1980) 630 F 2d 876, and *Sosa v. Alvarez-Machain* 542 US 692 (2004).

³⁴⁹ Annex A, Working Group on the Obligation Extradite or Prosecute, para 24.

V. Conclusion

The obligation *aut dedere aut judicare* is applicable for certain crimes of international law. The form and relation in terms of primacy between the prosecution and extradition prongs is based on the nature of the specific triggering crime. Hence, two broad versions or classifications of the duty *aut dedere aut judicare* are identified. First, core crimes such as genocide, crimes against humanity including the prohibition of torture and violations of the Geneva Conventions activate an ‘extradite-or-prosecute’ mechanism in which prosecution enjoys primacy in order to reflect the universal need and interest to suppress such criminal activities. Second, transnational crimes such as crimes against the civil aviation, hijacking, and terrorism-related crimes apply a more nuanced approach to the primacy between extradition and prosecution as both prongs seem to carry comparable obligatory weight. Some transnational crimes rely on a primacy of the extradition duty as some State would be more interested in obtaining custody over the suspect than others. It should be duly noted that such classification refers to the form and legal interplay between prosecution and extradition in terms of sequence of the applicability of the prongs of the obligations as any variant of the obligation aims at minimizing impunity on international level for certain international crimes.

The chapter proposes a detailed analysis of the scope and substance of the *aut dedere aut judicare* obligation for the specific crimes. The analysis is focused on the conventional definition of the obligation in order to examine its applicability, nature and scope. There is a novel proposal for the applicability of the concept of complementarity in terms of ability and willingness of the custodial State in relation to the prosecution prong in order to ascertain whether a State which claims that has submitted the case for the purpose of prosecution has indeed fulfilled the

requirement in good faith. The proposed test checks in reality through the principles of analogy and cross-emulation whether the State has met its obligation to prosecute the accused.

The examined conventions could also be said to share common characteristics although they exhibit differing criteria reflecting the complexity of the practice in the area of extradition and prosecution. For example, the multilateral conventions explored above seem to share the aim of facilitating judicial cooperation, criminalization of the relevant crimes, and preliminary inquiry. The chapter successfully deals with the definitions of extradition and prosecution and their relations in the regime of the *aut dedere aut judicare* obligation. However, the process of extradition is not as straightforward as enshrined in the various conventions. The process is limited by a plethora of factors, which are a subject matter to the following pages.

CHAPTER 3

HUMAN RIGHTS, EXTRADITION AND PROSECUTION

I. Human Rights, Exceptions to Extradition, Obligations Not to Extradite and *Aut Dedere Aut Judicare*

In order to fully evaluate the obligation *aut dedere aut judicare*, a careful examination of various human rights exceptions is necessary. The pertinent issue is how the trifocal balance between surrendering the individual, protecting the human rights of the subject of extradition proceedings, and ensuring that efficient criminal law enforcement against international crimes is achieved. The obligation should function as an inherently humane legal concept, which fully incorporates and respects the rights of the individual, and, as such, the process shall not lead to injustice through irregular or illegal transfers of the relator for the purpose of prosecution.

This chapter explores the conditions that restrict the process of extradition. The bars to extradition directly affect the functioning of the *aut dedere aut judicare* principle. The focus is on the individual's protections for non-transferring to a jurisdiction where human rights guarantees might be compromised. On the one hand, if the exceptions to extradition are widely construed, the alleged perpetrator of an international crime would not be surrendered to a jurisdiction willing and able to prosecute and there is a significant chance that the crime would

go unpunished. Alternatively, there must be a mechanism for the protection of human rights “in cases where there is a well-founded fear of violation of the fundamental human rights in the territory of the requesting State”¹ availing the possibility for bar to extradition. The analysis covers how the obligation *aut dedere aut judicare* may offer solutions to such intricate issues.

The chapter reflects upon the applicability of the most established exceptions to extradition such as the political offence exception, bars to extradition to jurisdictions with issues with fair or *in absentia* trials and torture, and refusal to extradite State’s own nationals. These exceptions and bars are analysed through the prism of the obligation *aut dedere aut judicare*. The section concludes with a short reflection on the interrelated topic of procedural aspects of extradition and prosecution such as dual criminality, inquiry and specialty principles. The exceptions to extradition are primarily developed through domestic decisions, although some, as seen above, are explicitly incorporated in various multilateral agreements which contain the obligation *aut dedere aut judicare*.

1) Origins of the Political Offence Exception

The first exception to extradition is linked with the possibility of the criminal act being politically motivated. The exception is generally triggered when the crime committed is political in nature and purpose, committed not for personal gain, as a close nexus between the offence and

¹ Extradition Resolution no IV, 68-II Ann IDI (1984) Session de Cambridge, 304-305.

political purpose must exist. In essence, the political element must be the purpose behind the perpetration of the crime.²

The exception aims to protect ideologically and politically motivated acts because “a political offense is usually conduct directed against the sovereign or its political subdivisions and constitutes opposition to a political, religious, or racial ideology...without having...the elements of common crime.”³ In many situations, the relevant political offence is accompanied by the commission of a common crime.⁴ In such cases, the determining factor hinges on whether the political element prevails over the intention to commit a common crime.

The exception has evolved through its incorporation in treaties, domestic legislation and national judicial decisions.⁵ First manifestations of the scope and applicability of the exception in domestic decisions are found in the UK *In re Castioni*, which held that a political offence is any offence committed in the course of insurrection, political commotion or revolt, or disturbance where the motive is political rather than private or personal revenge.⁶ A political offence connotes the fugitive’s divergence with the requesting State on issues of political control, committed for political objectives in the name of the advancement of some political cause or

² See Geoff Gilbert, *Transnational Fugitive Offenders in International Law* (Kluwer Law International 1998) 306. See also, UNCHR Handbook on Procedures and Criteria for Determining Refugee Status, para 152, which establishes certain guidelines for defining the offence as political.

³ *ibid* 656, 660.

⁴ *Arambasic v. Aschcroft* 403 FSupp 2d 951, 956 (DSD 2005). An inquiry in the nature of the crime is asked for in order to establish which of the political or common elements is graver.

⁵ “The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts” (*Arrest Warrant of 11 April 2000 case (Democratic Republic of Congo v. Belgium)* [2002] ICJ Rep 3, para 58).

⁶ *In re Castioni* [1891] 1 QB 149, 156, 165-166. The applicable test of political offence indicates that the offense has to be “incidental to and form part of political disturbances”. Belgium was the first State to adopt the political offence exception in extradition treaties in 1833 and most European nations followed suit by the end of the nineteenth century. See V Epps, ‘The Development of the Conceptual Framework Supporting International Extradition’ (2002) 25 Loy LA Intl&Comp L Rev 369, 376.

campaign.⁷ From the mentioned decisions, it is clear to note that in establishing the nexus between the crime and the political goals, the proportionality of the criminal act is measured against the cause or purpose of the perpetration.⁸

The Swiss approach centres on the preponderance test. If the means employed in perpetrating the crime are excessive in relation to the political end sought by the perpetrator, the common crime should not be deemed to fall under the political offence exception.⁹ This test of proportionality measures the political against the common, private motive for the perpetration of the crime and weighs on the violence and injury incurred against the political goal sought.¹⁰ The Swiss court in *In re Kavic* further expanded the application of the political offence exception: “although the political character of the offense must outweigh its common characteristics, it need not to be related to a realization of political objectives or occurring within a fight for political power.”¹¹

Other domestic decisions from various jurisdictions have followed suit in the requirement that there must be a reasonable nexus between the purpose of the political disturbance and the crimes

⁷ Ex parte *Kolczynski* [1955] 1 All E.R. 31. However, certain limits are applied on the exception as extradition was allowed for a bombing since the perpetrator, an anti-governmental anarchist *ipso facto*, was not attempting to impose a government of his own choice. See *In re Meunier* [1894] 2 QB 415.

⁸ See *T v Secretary of State for the Home Department* [1996] 2 All ER 865, 899.

⁹ *In re Pavan* 4 Ann. Dig. 347 (Swiss Federal Court, 1928). Murder committed as a war crime or a crime against humanity can hardly be classified as a political offence as “homicide-assassination and murder-is one of the most heinous crimes. It can only be justified where no other method exists of protecting the final rights of humanity.”

¹⁰ See *In re Nappi* 19 Intl L Rep (1952) 375, 376, where the Swiss proportionality test is explained in the following terms: “the political character of an offence is predominant only if the offence is in direct relation to the end sought. In order that such a relation may exist, this offence must be a really efficacious method of achieving the end, or constitute an integral part of acts leading thereto, or represent an incident in a general political movement.” Cited in Gilbert (n 2) 234.

¹¹ M Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oceana 2007) 704, referring to *In re Kavic* 19 ILR 371 (Swiss Federal Tribunal, 1952). The Dutch courts have adopted the principle of proportionality in the Baader-Meinhof decisions involving extradition requests for perpetrators of terrorist acts. See *Folkerts* (Judgement, 8 May 1978) HR, NJ No.314 (1978); *Wackernagel* (Judgement, 8 May 1978), HR, NJ, No. 315 (1978); and *Schneider* (Judgement, 8 May 1978) HR (not published), cited in Bassiouni 707.

committed in its course.¹² If a perpetrator commits a political and common, non-political offence, extradition should be refused for the underlying offence.¹³ Such an approach underlines the special role of the exception as upholding political expression even through the commission of domestic crimes, a central tenet in scope of the obligation as a humane and protective framework.

The political offence exception to extradition is a flexible legal instrument to ascertain the protection of eventual abuse or political persecution of the relator. As seen, the exception has expanded or diminished based on the interests of the States involved in the extradition proceedings. Most pertinently, how does the political offence exception apply to core or transnational crimes which trigger the *aut dedere aut judicare* obligation?

a. International Crimes and the Political Offences Exception

An international crime does not fall under the political offence exception to extradition since, although its commission may contain a politically motivated element against a government, it is a crime against the international legal order. International crimes such as aggression, genocide, crimes against humanity, war crimes, crimes against the United Nations and its personnel, apartheid, slavery, torture, piracy clearly disapply the political offence exception to extradition as

¹² Gilbert (n 2) 228. *In re Ezeta* 62 F. 972- CCND Cal. (1894), *United States v. Artukovic* 170 F.Supp 383- SD Cal (1959), and *Garcia-Guillern v. United States* 450 F.2d 1189 (5th Cir) (1971) follow the *In re Castioni* principle that political offences must be committed in the course of a civil war, insurrection, or political commotion. In *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.) (1986) 897, political offence is defined as “offenses aimed either at accomplishing political change by violent means or at repressing violent political opposition.” See also *Ornelas v Ruiz* 161 SCOTUS 502, 511 (1912), and *Artukovic v Rison* 628 F.Supp 1370, 1376 (1986).

¹³ *Barapind v. Enomoto* 400 F.3d 744 (9th Cir 2005).

seen below.¹⁴ On the contrary, the duty to extradite perpetrators of international crimes is embodied in conventional and customary international law, as shown in Chapters 2 and 4.

The practice of the majority of States affirms that core crimes of international law do not fall under the scope of the political offence exception.¹⁵ The substantive factor in the inapplicability of the political offence exception to core crimes concerns the context of the crimes and the nexus to the victims.¹⁶ Such restrictive interpretation deserves approval as even if the preponderance test is applied, it could not be reasonably argued that mass deportations, ill treatment of civilians and POWs, or persecutions may be regarded as incidental to political disturbances or satisfying any military or other necessities.¹⁷

State practice excludes the applicability of the political offence exception to crimes defined as “an atrocity, war crime or an act in violation of international law and inconsistent with international standards of civilized conduct.”¹⁸ For example, a political motivation on the part of

¹⁴ See Genocide Convention, art VII; International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243, art XI; Inter-American Convention on the Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) 33 ILM 1429, art V. See also, *Bohne* case, Argentinian Supreme Court (24 August 1966) for inapplicability of political offence exception to war crimes. For terrorism, hijacking and diversion of aircraft, see *Ballestas* case, Supreme Tribunal of Justice of Venezuela (Judgment of 10 December 2001) 5-11. See also, I Bantekas and S Nash, *International Criminal Law* (Routledge 2009) 304-305. See also, ICRC, Practice Relating to Rule 161. International Cooperation in Criminal Proceedings, Section D. Political offence exception to extradition, accessed on 28 July 2014: <http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter44_rule161_sectiond>.

¹⁵ One of the first cases to affirm the non-applicability of the political offence exception is the French decision in *In re Spiessens* 16 ILR 275 (1949) (Court of Appeal of Nancy), cited in Gilbert (n 2) 390. See also the language used by US courts in *Extradition re Atta*, 408: “Offences that transcend the Law of Armed Conflict are beyond the limited scope of the political offences the Treaty excludes as bases for extradition.” See also, *See R and FRG v Rauca* (1983) 88 ILR 277 (Ontario).

¹⁶ This interpretation led to the reversal of the original *Artukovic* decision. The US allowed for the relator to be extradited. See *The Matter of the Extradition of Artukovic* 628 F.Supp 1370 (1985); and *Artukovic v Rison* 784 F.2d 1354 (Ca 9, 1986).

¹⁷ Gilbert (n 2) 251.

¹⁸ See *Doherty*, 274; and *Atta*, 706. Cited in Gilbert (n 2) 231. The executive branch follows suit and the State Department qualifies that “common crimes do not constitute offences of a political character unless they form part

the relator was insufficient to bar extradition to Germany as the political offence must constitute “a last resort in the pursuit of a political objective... The accused was acting at a time when the nationalist socialist regime stood at the pinnacle of its power.”¹⁹ Additionally, reprisals against previous violations of the opposing party in an armed conflict did not pass the muster of the proportionality test and could not be invoked as a bar to extradition.²⁰

France traditionally ties the political exception not to the motives of the relator but to the injury inflicted upon the State.²¹ The French jurisprudence relating to war crimes is influenced by the *In re Spiessens* case where it was found that collaboration with the enemy in occupied territories could not be considered a political offence as cooperation with the occupying power “excludes the idea of a criminal action against the political organisation of the State which characterises the political offence.”²²

The jurisprudence outside of Europe and the US also indicates that the commission of war crimes or crimes against humanity could hardly be placed under the political offence exception. The Ghanaian Supreme Court rejected a plea by a former Nazi official in concentration camps that he was acting in defence against ideological opponents of the State during WWII since the

of a civil war or similar political disturbance... In cases of violent crimes particularly, the offense must have a direct relationship to a well-defined political end and must not be out of proportion with it.” See State Department, ‘Extradition: Hijacking’, 1975 Digest 5, 169.

¹⁹ *Kroeger v The Swiss Federal Prosecutor’s Office* Swiss Fed. Tribunal (1966) 72 Intl L Rep 606, 612-613, cited in Gilbert, *Responding to International Crime* (n 2) 367.

²⁰ Ibid.

²¹ See *Re Giovanni Gatti* [1947] Ann.Dig. 145 (Case No.70) 145.

²² *In re Spiessens* (Court of Appeal Nancy) 16 Intl L Rep 275 (1949). French courts have recently been flexible especially for extradition requests for terrorist activities. See *Lujambio Galdeano, Garcia Ramirez and Martinez Beiztegui* [1985] Rec. 307, 329.

internees were not trying to replace the Nazi state in any conceivable manner.²³ Extradition to Germany was allowed.

Argentinean courts have also reversed their traditional attitude towards refusing extradition of fugitives suspected in the commission of war crimes and applied the *Kroeger* interpretation as “extradition will not be denied on grounds of the political or military character of the charges where we are dealing with cruel or immoral acts which clearly shock the conscience of civilised people.”²⁴ Additionally, the non-applicability of the political offence exception to war crimes is seen in allowing extradition for what may seem to be military offences.²⁵ There is a significant limitation on the military offence exception, namely that the acts are not war crimes.²⁶ Hence, the military offences exception along with the political offence exception is not applicable to the *aut dedere aut judicare* obligations for core crimes.

Terrorism has been traditionally seen as problematic for the applicability of the political offence exception. Several challenging decisions relating to extradition requests for terrorist activities have instilled confusion.²⁷ However, the recent approach indicates that terrorist acts could not

²³ *The State v Schumann* Ghanaian Supreme Court (1966)16 ILR 433.

²⁴ *In re Bohne* Argentinean Supreme Court (1966) 62 AJIL 784.

²⁵ *In re Girardin*, 7 Ann Dig 357 (Arg. C.Fed, 1933). Offences of military character, punishable under the military laws of the requesting State, are generally treated as a ground to refuse extradition. The exception is recognized as a customary law.

²⁶ Bassiouni (n 11) 733.

²⁷ For example, there have been controversial interpretations on the exception such as the *US v. Doherty* case in which the US court refused to extradite the individual for violent crimes associated with terrorist activities. See *US v. Doherty* 786 F.2nd 491 (2nd Cir. 1986). Similar decisions were taken in two other IRA cases in which the perpetrators were not extradited under the political offence exception: *In re McMullen* N.D.Cal. (11 May 1979) and *In re Mackin* 668 F.2d 122 (2d Cir. 1981). For the problematic definition of terrorism, see T Stephens, ‘International Criminal Law and the Reponse to International Terrorism’ Sydney Law School Legal Research Paper No. 07/72 (2007). Guilleme argues that in the absence of a concrete definition, the enforcement against terrorism is based on interstate cooperation through extradition. See G Guilleme, ‘Terrorism and International Law’ (2004) 53 ICLQ 537, 541.

“be regarded as political offences or offences connected with a political offence as they contemplate and involve indiscriminate violence”.²⁸ Additionally, international and regional counter-terrorism conventions obligate a State not to refuse an extradition request on the sole ground that the request relates to a political offence or an offence with a nexus to political motives.²⁹

Various multilateral conventions contain explicit clauses on political offence exceptions. For example, the 1970 Hague Convention contains an express provision on the non-applicability of the political offence exception to extradition.³⁰ The Genocide Convention contains Article III stipulating that the relevant offences must not be considered as political crimes for the purposes of extradition.³¹ Article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988 has a provision stipulating that the offences are not to be considered as political offences for the purposes of extradition.³² Article 13 of the Enforced

²⁸ *Ellis v O’Dea (No.2)* [1991] ILRM 346, 362 (Irish HC & SC).

²⁹ ILC, Survey of Multilateral Conventions which May Be of Relevance for the Work of the International Law Commission on the Topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’, A/CN.4/630 (18 June 2010) para 117. See e.g., the International Convention for the Suppression of Terrorist Bombings, art 11; the International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197, art 14; the International Convention for the Suppression of Acts of Nuclear Terrorism, art 15; the Council of Europe Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 June 2007) CETS 196, art 20(1).

³⁰ ILC Survey 2010 (n 29) para 26.

³¹ See the European Convention on the Suppression of Terrorism adopted 27 January 1977, entered into force 4 August 1978) CETS 90, arts 1 and 2; the SAARC Regional Convention on the Suppression of Terrorism (adopted 4 November 1987), arts I and II; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 3(10); the Inter-American Convention on Forced Disappearance of Persons, art V; the United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2004) 2349 UNTS 41, art 44(4); the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UNGA Res A/RES/61/177, art 13(1).

³² Vienna Convention of 1988, art 3(10).

Disappearance Convention precludes the relator from pleading a political offence exception to extradition.³³

The UN General Assembly has been active in promoting non-applicability of the political offence exception to extradition for war crimes and crimes against humanity.³⁴ While core crimes might be perpetrated during political struggle to overthrow governments, such crimes are more difficult to be justified as falling under the political crime exception as “by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity.”³⁵

The reasons for the existence of the political offence exception to extradition reflect the respect for fundamental human rights, including personal and political freedom and freedom of expression against repressive governments. The custodial State has the duty to offer humane treatment to political fugitives through minimizing extradition to jurisdictions where the person may face persecution. The decision to refuse extradition based on this principle is highly subjective as seen above. However, a situation where a State extends a perpetrator of international crimes a political offence exception could be envisaged. Hence, as suggested below, the obligation to extradite or prosecute might be a useful solution for such improper

³³ The requested State might refuse extradition request if it “has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons” according to art 13(7).

³⁴ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, (adopted 9 December 1968) UNGA Res 2391 (XXIII) with voting record 58-7-36. See also Principles of International Co-operation in the detection, arrest, extradition and punishment of war crimes and crimes against humanity, UNGA Res 3074 (3 December 1973) UNGAOR A/RES/3074.

³⁵ Hirsch Lauterpacht, ‘The Law of Nations and the Punishment of War Crimes’ (1944) 21 BYIL 58, 79.

application of the political offence exception. In particular, when one is declared to be non-extraditable, based on the political nature of the crimes perpetrated, the person may be prosecuted for these crimes in the custodial State.³⁶

As seen above, the ‘extradite-or-prosecute’ duty may be disjunctive, meaning that primary recourse is to extradition or prosecution depending on the applicable crime, or conjunctive, which allows discretion to the requested State to choose between extradition or prosecution. The latter co-existent approach is deemed to be more appropriate for political offences as it offers a more genuine alternative to the requested State.³⁷ In this manner, the relator who is present in the requested State for political reasons would remain protected in terms of not being returned to a State where human rights might be violated while prosecution would take place in the requested State for the alleged crimes.³⁸

Naturally, there are certain drawbacks to non-extradition as evidence would be difficult to be procured and presented in the custodial State.³⁹ Nonetheless, the inapplicability of the exception to core crimes and transnational crimes is based on the scope and damage caused by the criminal

³⁶ See Gilbert (n 2) 288. The Model American Convention on the Prevention and Punishment of Certain Serious Forms of Violence Jeopardizing Fundamental Rights and Freedoms also requires prosecution in the requested State if extradition is denied (Article 8).

³⁷ See Gilbert (n 2) 321-323.

³⁸ In the *Universal Jurisdiction (Austria) Case* 28 ILR 341, 342 (1958), the Austrian Supreme Court proclaimed, “[t]he extraditing State also has the right, in the cases where extradition for whatever reason is not possible, although according to the nature of the offence it would be permissible, to carry out a prosecution and impose punishment, instead of such action being taken by the requesting State.” The same interpretation was applied in the *Hungarian Deserter (Austria) case* 28 ILR 343 (1959). See Gilbert (n 2) 324-325. Additionally, various domestic statutes provide for prosecuting relators in custodial States. See Section 45 of the Austrian Extradition Act 1988, Article 10(2) of the Italian Penal Code, the UK Criminal Jurisdiction Act of 1976, and the Irish Criminal Law Act of 1976. The general change towards establishing jurisdiction over fugitives in order to prosecute them for crimes alleged and protect their procedural and fundamental rights have been observed in the UK prosecution against Tanzanian hijackers in the *R v Moussa Membar et al.* [1983] CLR 618, for example.

³⁹ See Gilbert (n 2) 327.

activities to the international community or some interested States. The obligation *aut dedere aut judicare* may be perceived as offering the custodial State a comfortable opportunity in order to strike the right balance between protecting the fugitive and diminishing the opportunity for a safe haven.

2) Right to a Fair Trial and *In Absentia* Exceptions

The multilateral conventions dealing with core and transnational crimes contain clauses pertaining to bars to extradition in circumstances when the human rights of the relator might be violated in the requesting State. Human rights bars to extradition find their origins in the non-refoulement principle.⁴⁰ If the requested State has substantial grounds to believe that the extradition request is made primarily for the purpose of prosecuting or punishing the relator on various discriminatory grounds or that the relator's standing would be prejudiced for similar persecutorial reasons, the State is obliged not to extradite and is to submit the case to its authorities for prosecution for the original alleged crime.⁴¹

Some conventions oblige States not to surrender the person if the extradition request appears to be unjust, inexpedient, or trivial. States may opt to prosecute the relator if the surrender or return of the fugitive is not made pursuant to a good faith request or if the transfer would affect the

⁴⁰ See the Convention against Torture, art 3.

⁴¹ See the International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205, art 9(1) (a) and (b); the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 6(6); the International Convention for the Suppression of Terrorist Bombings, art 12; the International Convention for the Suppression of the Financing of Terrorism, art 15; the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003), art 16(14); the United Nations Convention against Corruption, art 44(15); the International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) UNGA Res 59/290 UN Doc A/59/766, art 16; the International Convention for the Protection of All Persons from Enforced Disappearance, art 13(7).

interest of justice of the sending State.⁴² Other grounds for refusal to hand the relator over may be the expiration of ‘statute of limitation’ or the crime carrying the death penalty, grant of political asylum or humanitarian reasons relating to age and condition of the relator, discriminatory or trivial grounds for extradition.⁴³ Finally, extraordinary renditions or deportations do not qualify as extradition as no trial may ensue following the transfer of the individual to another State.⁴⁴

In such circumstances, the *aut dedere aut judicare* principle can offer a humane aspect by preserving its core goal to minimize impunity through prosecution of the applicable crimes in the custodial State and upholding the fair trial guarantees of the relator by precluding extradition on human rights grounds. In this manner, a balance is struck as the proposed framework incorporates the obligation on States to establish jurisdiction over the relator in cases of refusal to extradite as all share the “objective to ensure the punishment of certain offences at the international level, and...their use, for that purpose, of a mechanism combining the possibility of prosecution by the custodial State and the possibility of extradition to another State.”⁴⁵

a. Right to a Fair Trial

As explored above, in the analysis of the criteria for willingness to prosecute, fair trial guarantees are central to preserving the rule of law and availing the alleged perpetrator with the opportunity for a fair and unbiased process, adequate defence and respecting the equality of arms principle.

⁴² See SAARC Regional Convention on the Suppression of Terrorism, art VII.

⁴³ ILC Survey 2010 (n 29) paras 141-142.

⁴⁴ See M Zgonc-Rozej and J Foakes, ‘International Criminals: Extradite or Prosecute’ (July 2013) Chatham House Briefing Paper ILBP 2013/01, 10.

⁴⁵ ILC Survey 2010 (n 29) para 150. See The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 4(2).

The right to a fair trial holds such a prominent place in the international order that it cannot be easily sacrificed to expediency, not even in the case of serious crimes such as terrorism⁴⁶ or organized crime.⁴⁷

The primary approach to non-extradition in cases of violations of the right to a fair trial is developed through the decisions of various regional human rights courts. Regional courts have found the existence of customary international law, traditionally in the process of interpreting the relevant regional treaties.⁴⁸ Regional courts have also been active in determining customary international law from or in treaties.⁴⁹ Such decisions serve an illustrative and authoritative interpretation purpose in the development of international human rights law.

The common approach taken by the various human rights courts indicates that there is an obligation on the requested State not to surrender the fugitive if fundamental rights in the requesting State would not be respected.⁵⁰ Moreover, the protection is inherent in a unified system of international criminal law for the alleged core crimes.⁵¹ The issue of bias against the relator in a foreign court should be considered carefully as international law affords rules “which

⁴⁶ *Barbera, Messegue & Jabardo v Spain* App nos 10588/83, 10589/83 and 10590/83 (ECtHR, 6 December 1988).

⁴⁷ *Kostovski v The Netherlands* App no 11454/85 (ECtHR, 20 November 1989).

⁴⁸ Michael Wood, ‘First Report on Formation and Evidence of Customary International Law’ (May-August 2013) ILC A/CN.4/663 para 80.

⁴⁹ See *Van Anraat v The Netherlands* App no 65389/09, Decision on Admissibility (6 July 2010) para 88, where the ECtHR found, “it is possible for a treaty provision to become customary international law. For this it is necessary that the provision concerned should, at all event potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law; that there be corresponding settled State practice; and that there be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*).”

⁵⁰ G Gilbert, *Responding to International Crime* (Martinus Nijhoff 2006) 141.

⁵¹ See Robert Cryer, *Prosecuting International Crimes* (CUP 2005) 99.

guarantee a minimum international standard for the treatment of aliens, so one cannot invoke the possibility for jurisdiction's being abused as a reason for denying jurisdiction altogether."⁵²

In reality, the practice is not as straightforward as imagined. The practice of the ECtHR serves as an influential indication.⁵³ The ECtHR has ruled on several occasions that Article 6 does not apply strictly speaking to extradition hearings⁵⁴ culminating with the *Mamatkulov* decision in which "[t]he Court reiterates that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 §1 of the Convention."⁵⁵ Seemingly, the ECtHR stands by the legal reasoning that extradition hearings do not concern the merits of the criminal charges.⁵⁶ A similar line of reasoning has been applied by domestic courts as various decisions indicate that extraditability is a separate process from determination of guilt.⁵⁷ However, in *Ismailov and others v Russia*, the ECtHR clarified that Article 6(2) may be of relevance for extradition hearings and decisions where close links between the criminal proceedings in the requesting State and the extradition hearing in the requested State exist.

⁵² Michael Akehurst, 'Jurisdiction in International Law' (1973) 46 BYBIL 145, 165.

⁵³ There is an increased inclination for domestic judicial practice to be influenced by decisions of regional courts with regards to scope and definition of human rights. For example, The Indian Supreme Court has looked carefully into the practice of the ECtHR on the subject matter of the right to a speedy trial. See *Hussainara Khatoon and Others v Home Secretary, State of Bihar* (1980) 1 SCC 81. Additional state practice also shows that domestic courts are willing to accept certain clauses of the Universal Declaration of Human Rights, the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR); the European Convention on Human Rights as 'indicative of the customs and usages of civilized nations.' See *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787 (D.Kan. 1980) 797; and *Thompson v. Oklahoma*, 198 S.Ct.2687, 2696.

⁵⁴ See *Kirkwood v the UK* (1984) 6 EHRR 373.

⁵⁵ *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (Judgment Grand Chamber, 4 February 2005).

⁵⁶ Gilbert, *Responding to International Crime* (n 50) 143.

⁵⁷ See *M v Federal Prosecutor* 8 NYIL 275 (1977) where the Dutch Supreme Court ruled that the presumption of innocence does not apply to extradition hearings as such deal primarily with suspicion of guilt.

In contrast to the ECtHR approach to extradition hearings, the Human Rights Committee (HRC) has ruled that the protections of Article 14 of the ICCPR apply to extradition hearings. The Committee pronounced that “in cases where...the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality, as enshrined in article 14, paragraph 1 ...of the Covenant.”⁵⁸ The difference between the interpretations of the ECtHR and the HRC stems from the different texts of the fair trial articles as the language of Article 6(1) ECHR is narrower than the corresponding ICCPR provision.⁵⁹

The ECtHR’s jurisprudence however may be more nuanced its initial stand on examining fair trial guarantees in extradition cases depending on the conditions in the requesting State. The ECtHR’s *Ahorugeze* case serves as a pertinent authority on the applicability of the fair trial exception to extradition to Rwanda as it cross-emulates an international standard to extradition in the ECtHR decision. The case looked at the issue of the conditions of the Rwandan judicial system relating to fair trial guarantees. The claimant was detained in Sweden pursuant to an extradition request by Rwanda for the alleged acts of genocide, complicity in genocide, conspiracy to commit genocide, murder, and extermination.⁶⁰ The ECtHR used the classification of the ICTR in evaluating the independence of the judicial system of Rwanda. According to Article 11 *bis* of the ICTR’s Rules of Procedure and Evidence, extradition is to be granted to a State willing to submit the case for the purpose of prosecution, if the ICTR is satisfied that the

⁵⁸ *Everett v Spain* Communication No 961/2000, UN Doc CCPR/C/81/D/961/2000 (2004). See also *Sholam Weiss v Austria* Communication No 1086/2002, UN Doc. CCPR/C/77/D/1086/2002 (2002) where the same Committee ruled that “the author’s extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was able to appeal, amount to a violation of the author’s right under article 14, paragraph 1.”

⁵⁹ Article 6(1) of the ECHR in comparison to Article 14(1) of the ICCPR.

⁶⁰ *Ahorugeze v. Sweden*, App no 37075/09 (ECtHR, 27 October 2011) para 12.

accused would receive a fair trial in the courts of the receiving State.⁶¹ The ICTR was reluctant to transfer cases to Rwanda in the past for the purpose of prosecution because there were obstacles including a possibility for life imprisonment in isolation, a single judge adjudication panel, and inability of the defendant to adduce own witnesses under the same conditions as the prosecution.⁶²

As core due process guarantees, enshrined in Article 14 of the ICCPR, have attained customary status⁶³ and if the criminal proceedings in the requesting State do not meet the minimum procedural guarantee standards, extradition should be refused. The emphasis in these situations switches from the act to the relator to the preservation of the fundamental rights in the judicial proceedings following extradition.⁶⁴ It is proposed that the most common applicable standard focuses on the right to fair trial. Extradition may be precluded if “a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state.”⁶⁵

The practice of some European states indicates that despite the fact that the extradition request is assumed to be made in good faith, defendants in extradition proceedings are permitted to raise the argument that fair trial rights have been or may be violated in the requesting State. In particular, if the criminal proceedings are initiated for persecutorial reasons against the fugitive,

⁶¹ *Ahorugeze v. Sweden* (n 60) para.44. See also, Rule 11 bis, ICTR’s Rules of Procedure and Evidence. In order to ascertain whether a State meets the fair trial standards, the ICTR looks at whether the State’s legal framework has criminalized the alleged conduct of the accused and whether there are provisions for an adequate penal structure by the existence of an appropriate punishment for the offence and adequate conditions of detention which need to meet the internationally recognized standards along with the non-imposition of the death penalty.

⁶² See *Prosecutor v Munyakazi case* (Judgment) ICTR-97-36A (28 May 2008).

⁶³ See T Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1991) 96.

⁶⁴ Gilbert (n 2) 309.

⁶⁵ *Government of the USA v. Montgomery* [2004] 1 WLR 2241 (Lord Caswell) 2251.

the fair trial exception might justify refusal to surrender.⁶⁶ For example, the UK practice on extraneous considerations indicates that the UK authorities would not transfer the fugitive if the extradition request is issued for the purpose of prosecuting or punishing him or if the fugitive might be prejudiced against or punished, detained or restricted on account of his race, religion, nationality, gender, sexual orientation or political opinions.⁶⁷ The grounds for extraneous protection overlap with the provenance of asylum.⁶⁸ The outer limits of the human rights exception may be seen in the highly restrictive bar of the right to respect for a person's private and family life which has been subjected to a very narrow proportionality test as the muster to pass must constitute "wholly exceptional case".⁶⁹

The general situation as regards the risk of unfair trial in the receiving State should be supported by specific allegations and corroborative evidence.⁷⁰ Seemingly, the Swedish High Court in *Ahorugeze* applied a slightly different test as it ruled that extradition should not continue if the accused would be put at real risk of suffering a flagrant denial of justice, including difficulties to adduce evidence from witnesses and cross-examination along with systematic issues pertaining to the independence and impartiality of the judicial system of the receiving State.⁷¹ The test of flagrant denial of justice is a stringent one as it goes beyond mere irregularities or lack of

⁶⁶ Gilbert (n 2) 313, correctly states that, "[p]rocedures to combat violent political offenders should never go so far as to include the abrogation of human rights." A similar position is observed in the decisions adopted by German and Swiss courts.

⁶⁷ See Extradition Act 2003, s 13.

⁶⁸ J Jones, 'The EAW in Practice in the United Kingdom' in N Keijzer and E van Sliedregt (eds), *The European Arrest Warrant in Practice* (TMC Asser 2009) 327.

⁶⁹ The ECtHR has laid the test as follows: "only in exceptional circumstances...the extradition of a person to face trial on charges of serious offences committed in the requesting State would be held to an unjustified or disproportionate interference with the right to respect for family life." *Launder v UK* (1997) 25 EHRR CD 27, para 118.

⁷⁰ *Mamatkulov and Askarov v. Turkey*, para 73.

⁷¹ See *Ahorugeze v Sweden* (n 60) para 19. See also, para.27 for Sweden's domestic code on extradition.

guarantees in the trial procedures. The flagrant denial of justice must amount to a fundamental nullification or destruction of the very essence of the principle of fair trial.⁷² The burden of proof is on the accused or the applicant to adduce evidence proving that there are substantial grounds for believing that the person would be exposed to a real risk of flagrant denial of justice during the extradition hearing.⁷³

Several States have refused to extradite to Rwanda suspects of various counts of genocide, crimes against humanity, murder or rape. For example, the Court of Appeal in Toulouse, France, declined to grant extradition in the *Bivugarabago* case as the Rwandan courts were deemed to be insufficiently independent and impartial and the fair trial principle could not be guaranteed due to defence witness intimidation.⁷⁴ The UK has applied a similar approach to refusal to extradite Rwandan suspects. The most famous example is the *Brown and others v. The Government of Rwanda* case in which the High Court accepted that there existed a *prima facie* case to answer against the four accused but pronounced that the accused would suffer a real risk of a flagrant denial of justice if they were to be extradite to Rwanda.⁷⁵ The High Court elucidated that the fair trial guarantee would be violated in Rwanda because there were no specific provisions for witness testimony via video links, the accused would not be able to call their witnesses due to

⁷² *Ahorugeze v Sweden* (n 60) para 115.

⁷³ See *Ahorugeze v Sweden* (n 60) para 116. See also *Saadi v Italy* App no 37201/06 (Judgment, 28 February 2008) para 129.

⁷⁴ See also, the Court of Appeal of Mamoudzou (in the French overseas department of Mayotte) on 14 November 2008 in the case of *Senyamuhara*, by the Court of Appeal of Paris on 10 December 2008 in *Kamali* and by the Court of Appeal of Lyons on 9 January 2009 in *Kamana*.

⁷⁵ The High Court clarified that the term ‘real risk’ means ‘a risk which is substantial and not merely fanciful; and it may be established less than proof of a 51 % probability.’ Compare with *Lohdi* [2001] EWHC Admin 178, para 105, where the Divisional Court carefully looked at the risk of flagrant denial of fair trial through the prism of the ECHR standard and it reached a conclusion that certain aspects of the UAE judicial system do not meet the Convention standard. Nonetheless, the person was extradited as the English court applied the standard of danger of flagrant denial.

fear of reprisal against the witnesses, and the judiciary lacked on the expected impartiality and independence.⁷⁶ The suspects were released from detention and not tried in the UK.

Rwanda was recently pronounced to have significantly improved the fair trial conditions and such findings on the necessary improvements may serve as illustration under what conditions the right to a fair trial may be adequately protected in the requesting State.⁷⁷ In the Norwegian case of *Bandora* of 11 July 2011 the Oslo District Court found that prison conditions in Rwanda meet the international standards along with significant improvements in the fairness of the trials in Rwanda.⁷⁸ Some aspects of the improved conditions relating to the fair trial guarantees included the introduction of witness protection programme. Such positive developments in the fair trial standards in the requesting State show how extradition may be used as a mechanism for the custodial State to initiate positive change in the requesting State: unless the requesting State does not improve the fair trial standards, the relator would not be transferred by the custodial State.

The accused is to be guaranteed the following fundamental rights: a fair and public hearing; presumption of innocence; prompt informing of the nature and cause of charges in a language which the relator understands; adequate time and facilities to prepare defence; a speedy trial without undue delay; an entitlement to counsel including free legal representation in cases of inability to pay; the right to remain silent and not to be compelled to self-incriminate; the right to be tried in his/her presence; examination of witnesses of prosecution and defence; equality of

⁷⁶ *Brown and others v Rwanda* [2009] EWHC 770 (Admin) paras 64-66 and 119-121.

⁷⁷ *Ahorugeze v Sweden* (n 60) para 125.

⁷⁸ See *Ahorugeze v Sweden* (n 60) paras 72-73.

arms as to availability of witnesses of prosecution and defence, amongst others.⁷⁹ In general, it is important to note that the custodial State bears the obligation to ascertain that the fair trial guarantees would be upheld following the extradition to the requesting State. The custodial State possesses a wide range of mechanisms to evaluate the human rights situation in the requesting State, as shown above, as the practices in the receiving State may change over time.

Constitutional guarantees are also grounds for the fair trial exception. Ireland refuses extradition if the standards of justice in the requesting State do not pass the muster of the human rights guarantees in the Irish constitution.⁸⁰ Courts have refused to extradite where there was a probable risk that the fugitive would be illegally assaulted by prison staff in the requesting State⁸¹ or denied a fair trial on the grounds that these outcomes would violate rights guaranteed by the Irish constitution.⁸²

In absentia judicial proceedings are also pertinent to whether extradition would be allowed by the custodial State. As the accused should be availed international human rights protections pertaining to the fair trial process in order to defend adequately against the charges, *in absentia* trials cause an inherent conflict. Primarily European states approve extradition subject to the conditions that a new trial replace the previous trial *in absentia*, in which the minimum

⁷⁹ See Organic Law no. 11/2007 of 16 March 2007 concerning the Transfer of Cases to the Republic of Rwanda from the ICTR and from Other States, Article 13. See also, *Ahorugeze v Sweden* (n 60) para 34. Additionally, UN Security Council Resolutions were used as evidence as they call for the appropriate cases to be transferred to States willing and able to prosecute in competent national jurisdictions.

⁸⁰ G Conway, 'The Council of Europe as a Normative Backdrop to Potential European Integration in the Sphere of Criminal Law' (2007) 19 *DennLJ* 123, 136.

⁸¹ *Finucane v. McMahon* (1990) 1 I.R. 165 (H.Ct & S.C.).

⁸² *Magee v. O'Dea* (1994) I.R. 500 (H.Ct).

procedural guarantees are respected and applied.⁸³ The *in absentia* exception to extradition is traditionally upheld in States that do not allow for such trials.⁸⁴

The fugitive's right to a fair trial is clearly violated where the requesting State has conducted a trial incompatible with international human rights standards, such as a request for transfer based on *in absentia* judgments of last instance with no recourse to appeal. Custodial States often grant extradition only on the condition of a possibility for a new trial in the requesting State.⁸⁵ Hence, an accusation case is to be instituted *de novo* through proper notice of the case the relator is facing, "as a person facing trial for the first time."⁸⁶

Other jurisdictions apply a nuanced approach to the due process exception by recognizing that extradition is "generally refused if the requested state has reason to believe that extradition is requested for purposes of persecution...or if there is substantial ground for believing that the person sought will not receive a fair trial in the requesting state."⁸⁷ In a controversial decision, the US refused to extradite to the USSR a Lithuanian national, who was sentenced *in absentia* by a Soviet court for the mass murder of more than 50 000 civilians in 1941. The reasoning behind the refusal was that the eventual surrender would not result in a new fair trial in the USSR. However, the US approach is rather ambiguous since the *in absentia* exception is traditionally

⁸³ John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 AJIL 187, 207.

⁸⁴ Judgment of 15 May 1979, Cour d'Appel de Limoges, No.37. The French court in *Bonanzo* ruled that the exception applied whenever the first instance court of a requesting state acquits the relator, and on appeal, the second instance reverses the verdict and finds the relator guilty.

⁸⁵ Dugard and Van den Wyngaert (n 83) 205. See also *P. v. Office Federal de la Police* (ATF 1991) and *Dharmarajah v. Ministere Public Federal* (ATF, 1981).

⁸⁶ Jones (n 68) 336.

⁸⁷ US Department of State, Restatement 3rd, para 476, comment H (1987).

not applied.⁸⁸ The Supreme Court has ruled that the surrender of a relator for trial in another State which does not share the same level of judicial procedures compared to the US does not violate the doctrine of due process since the US is limited by the rule of non-inquiry in its extradition decisions, as explored below.⁸⁹

3) Torture and Death Penalty as Bars to Extradition

Article 3 of the UN Convention against Torture prohibits extradition if there are substantial grounds for believing that the alleged fugitive would be subjected to torture in the requesting State. The principle of non-refoulement has attained a customary status in international law.⁹⁰ Moreover, extradition shall not be granted whenever the general standards of fairness, decency and humane treatment as embodied in the principle of due process are violated, constituting in itself a much lower threshold compared to the infliction of torture.⁹¹

A short perusal through the practice of various international judicial bodies indicates that the prohibition to hand over relators in danger of torture is absolute. In *Prosecutor v. Furundžija*, the ICTY examines the customary obligation not to extradite in cases where there is a risk of torture:

“It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of

⁸⁸ See *Gallina v. Fraser* 177 F.Supp. 856, 867-8 (D.Conn. 1959).

⁸⁹ *Wilson v. Girard* 354 SCOTUS 524 (1957).

⁹⁰ See UNGA Resolution 37/195 (18 December 1982), UNGA Resolution 44/137 (15 December 1989), UNGA Resolution 45/140 (14 December 1990), and UNGA Resolution 48/116 (21 December 1993), affirming the fundamental principle of non-refoulement. See also, Guy S Goodwin-Gill, *The Refugee in International Law* (Clarendon Press 1996) 167.

⁹¹ *Rochin v. California* 342 US 165 (1952). See also E Klimovicz, ‘Article 15 of the Torture Convention: Enforcement in US Extradition Proceedings’ (2000) 15 Geo Immigr LJ 183.

emergency ... This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or *jus cogens*. ... This prohibition is so extensive that States are even barred by international law from expelling, returning or *extraditing a person* to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.”⁹²

The ECtHR also defines and applies the guarantees against torture as absolute.⁹³ A State would incur responsibility for surrendering a fugitive to a jurisdiction where it is foreseeable that torture takes place. The leading authority is the *Soering* case where the ECtHR ruled that the UK would violate the human rights of a young man by extraditing him to face capital murder charges in the US. The ECtHR acknowledged that international law does not prohibit the death penalty as such, but it found a serious risk that Soering would be subjected to inhuman or degrading treatment by virtue of the “death row phenomenon”, a prolonged incarceration prior to execution of a death sentence. The requested State incurs responsibility because it has reasonable grounds to anticipate that a violation of human rights would occur in the requesting State, and, despite this, extradites the fugitive.⁹⁴ The applicable standard has been set at “whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state,” the responsibility of the extraditing State is engaged regardless of whether the requesting State is a party or not to the ECHR.⁹⁵

⁹² *Prosecutor v. Furundzija case* (Judgment) IT-95-17/I-T, para 144.

⁹³ *Chahal v United Kingdom* 23 EHR Rep 413 (1997).

⁹⁴ *Soering v. UK* (1989) Series A no 161, paras 89 and 91. See Dugard and Van den Wyngaert (n 83) 191. See also Gilbert (n 2) 148.

⁹⁵ *Chahal v UK* (n 93) paras 80-81. The established standard for engaging state responsibility on the ECHR extraditing state is “whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State...”

The exposure to ill-treatment must attain a minimum level of severity to bar extradition and the assessment of this minimum level is based on the nature and context of the applicable treatment or punishment in detention and prison, duration and other physical or mental effects.⁹⁶ For example, humanitarian grounds for not extraditing a person suffering from a serious mental or physical illness to a State where the conditions for treatment are inferior in comparison to the custodial State are to be applied only in very exceptional circumstances.⁹⁷

The HRC has also been active on bars to extradition on human rights grounds. In General Comment 31 there is a general obligation on States under Article 2 of the ICCPR to “ensure the Covenant rights for all persons in their territory and all persons under their control entail[ing] an obligation not to extradite...a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant” either in the requesting State or to any State to which the relator might be subsequently removed.⁹⁸

Domestic courts have applied the same test in situations where there is “a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.”⁹⁹ As the prohibition against torture is a non-derogable, *jus cogens* norm of international law¹⁰⁰, even where the alleged risk of treatment comes from non-state actors in the requesting State, the requested State

⁹⁶ See *Vilvarajah and Others v the UK* App nos 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87 (ECtHR, 30 October 1991) para 107, and *Mamatkulov and Askarov v Turkey*, para 70.

⁹⁷ See *D. v the United Kingdom* (1997) ECHR 1997-III.

⁹⁸ General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, HRC, UN Doc CCPR/C/21/Rev1/Add13 (2004).

⁹⁹ *R (Ullah) v. Special Adjudicator* (2004) 2 AC 323, 3 WLR 23, 352 (Lord Bingham).

¹⁰⁰ See UN Convention against Torture, article 2(2). See also ICTY’s *Celebici* (Trial Judgment) IT-96-21, para 454.

may refuse to transfer the relator if the requesting State is unwilling or unable to offer sufficient level of protection.¹⁰¹

The absolute prohibition of extraditing a person in risk of being subjected to cruel, inhuman or degrading treatment in the requesting State, linked to the death penalty, is also applicable. In *Ng v. Canada*, the HRC found that extradition to the US where the petitioner was to be executed by asphyxiation in a gas chamber violated the prohibition of cruel, inhuman or degrading treatment or punishment.¹⁰² As general international law does not prohibit the death penalty, the fact that the fugitive would be executed if returned to the requesting State cannot *per se* obstruct extradition. The manner of execution, however, may constitute cruel or inhuman punishment and extradition should be refused.¹⁰³ The ruling that execution by gas asphyxiation failed to satisfy the requirement that capital punishment “must be carried out in such a way as to cause the least possible physical and mental suffering”¹⁰⁴ does not foreclose the possibility that other methods of executions—hanging, electrocution, and firing squads—may also fall short of this requirement, as there is evidence that these methods of execution fail to achieve the desired result without inflicting considerable suffering. Essentially, extradition might lead to violation of

¹⁰¹ See *R v. Secretary of State for the Home Department ex parte Bagdavičius (FC) and another* [2006] UKHL 38. See also, Jones (n 68) 332.

¹⁰² *Ng v Canada* UN Human Rights Committee, UN Doc CCPR/C/49/D/496/1991, para 16.4. Canada had failed to comply with its obligations under the Covenant by extraditing Ng to the US since it could reasonably have foreseen that the method of execution failed the standard established in Article 7 and for not seeking assurances that the relator would not be executed before the extradition was granted.

¹⁰³ Dugard and Van den Wyngaert (n 83) 197.

¹⁰⁴ *Ng v Canada* (n 102) para 16.2: “The Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant; on the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. None the less, the Committee reaffirms, as it did in its general comment 20(44) on article 7 of the Covenant that, when imposing capital punishment, the execution of the sentence “must be carried out in such a way as to cause the least possible physical and mental suffering”. See also UNHRC’s *Reid v Jamaica* and *Wright v Jamaica* for due process violations and denial of effective representation in appellate proceedings on death penalty sentences as breaches of ICCPR.

the relator's human rights.¹⁰⁵ The test is case-by-case based with emphasis on the "imputability of delays in the administration of justice...the specific conditions of imprisonment...and their psychological impact on the person concerned."¹⁰⁶

A more assertive statement as regards non-extradition to death penalty jurisdictions was delivered in *Judge v. Canada* where the Committee established that abolitionist States have the obligation to refuse extradition to a death penalty jurisdiction.¹⁰⁷ As a result of these three decisions, the duty to seek assurances for the non-implementation of a death penalty from the requesting State's authorities has been established.¹⁰⁸

Another approach to barring extradition to death penalty jurisdictions stems from the abolition of the capital punishment on national constitutional grounds, concerning humanitarian and public policy considerations.¹⁰⁹ Accordingly, it would be unconstitutional and abhorrent to the public policy of an abolitionist State to extradite to a death penalty jurisdiction.¹¹⁰ No assurances can

¹⁰⁵ *Kindler v Canada* Comm No 470/1991 (1993) UN Doc CCPR/C/48/D/470/1991, para 13.2.

¹⁰⁶ *Kindler v Canada*, para 14.6. The imposition of a death penalty in cases where the provisions of the Covenant have not been respected may also be considered a breach of Article 6 of the ICCPR, such as procedural guarantees, the right to a fair hearing by an independent tribunal, the presumption of innocence, minimum guarantees of the defence, the right to review the conviction and sentence by higher tribunal. See *Wright v Jamaica* UNHRC (1995) UN Doc. CCPR/C/54/D/606/1994, para 9.1.

¹⁰⁷ *Judge v Canada* UNHRC, UN Doc. CCPR/C/78/D/829/1998, para 10.4.

¹⁰⁸ *US v. Burns* 1 Can SCR 283 (2001) 360. See also D Givelber, 'Innocence Abroad: The Extradition Cases and the Future of Capital Litigation' (2002) 81 Or LRev 161, and T Rose, 'A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada' (2002) 27 Yale J Intl L 193, 206.

¹⁰⁹ M Kelly, 'Chasing Justice by Cheating Death' (2003) 20 Ariz J Intl&Comp Law 491, 512.

¹¹⁰ M Topiel, 'The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There a Room for Reconciliation' (2001) 9 Cardozo J Intl&Comp L 389, 416. The *Venezia* case is illustrative: the Italian Constitutional Court held that no matter what assurances are provided by the requesting State for the non-imposition of a death penalty on the relator, the mere fact that extradition is requested by a death penalty jurisdiction indicates that extradition must be categorically refused.

eliminate the risk of the imposition of the death penalty, an irrevocable and irreparable act once executed.¹¹¹

European courts have taken a more active position in refusing to surrender to death penalty jurisdictions through the prism of ECHR obligations.¹¹² French courts have ruled that extradition to death penalty jurisdictions would be contrary to the *ordre public*.¹¹³ In general, domestic courts have been reluctant to pronounce on the prohibition of the death penalty in international law. Domestic courts have attempted to strike a balance between human rights obligations they are required to uphold and extradition duties through seeking more stringent assurances from the requesting State that the death penalty would not be imposed and carried out.¹¹⁴

The returning State must seek diplomatic assurances from the requesting State that the relator will not be subjected to torture. Such assurances may not be mere pronouncements on part of the requesting State but real arrangements with effective implementation must be provided.¹¹⁵ If the assurances are provided by the appropriate authorities of the requesting State, the surrendering

¹¹¹ Kelly (n 109) 519. See also R Gregg, 'The European Tendency Towards Non-Extradition to the United States in Capital Cases' (2002) 10 U. Miami Intl&Comp L Rev 113.

¹¹² Gilbert (n 2) 167, especially in regards to arts. 1 and 6 of the Protocol 6 of the ECHR. See *CDS v The Netherlands* 96 ILR 383, 387 (1990). See also, D Sharfstein, 'European Courts, American Rights: Extradition and Prison Conditions' (2002) 67 Brooklyn L Rev 719, 737. See also J Finstein, 'Extradition or Execution?' (2004) 77 S Cal L Rev 833.

¹¹³ See *Fidan* case 100 ILR 662 (1987), cited in Gilbert (n 2) 167.

¹¹⁴ See *CDS v The Netherlands* 96 ILR 383 (1990) 387; *Viaux-Peccate v The Netherlands* (Dist. Ct. Den Haag) 74 ILR 456, 457 (1978). See also *Re Cuillier, Ciamborrani and Vallon* (Const. Ct. Italy) 78 ILR 93. See also *Fidan*, Conseil d'Etat. See also Gilbert, *Responding to International Crime* (n 50) 148.

¹¹⁵ See *Alzery v Sweden*, HRC Comm. No.1416/2005 (2006). The ECtHR has also dealt with the issue of diplomatic assurances: "diplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention." See *Klein v. Russia*, para 55. See also *Saadi*, paras 147-148.

State is not seen as breaching its human rights and extradition obligations.¹¹⁶ Even in cases when the relator consents to extradition to a death penalty jurisdiction, some States require constitutional check on obtaining assurances.¹¹⁷

However, diplomatic assurances pose certain problems as regards their reliability and enforcement. The Committee against Torture summed up the problematic nature of assurances: “the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”¹¹⁸ The obvious tension arises when States with extensive record of torture and other human rights violations issue such assurances. The lack of monitoring and enforcement procedures against possible negation of the assurances undermines their value.¹¹⁹ The requested State possesses the ultimate discretion to refuse to accept the assurance for protection of the human rights of the relator in the requesting State.¹²⁰

An argument could be raised that the State, participating in extradition bears responsibility for its acts or omissions by its officials, agencies, or any person acting in legal capacity as explored in details in Chapter 5. As a consequence of the fundamental principle of international law *par in parem non habet imperium*, the principle of sovereign equality among UN member states laid down in Article 2(1) of the UN Charter, no State can force another State to violate international law and that no State can interfere in the domestic affairs of another State. Correspondingly,

¹¹⁶ See *United States v. Burns* [2001] 1 SCR 28, para 134.

¹¹⁷ See *Mohamed v President of the RSA* [2001] BCLR 685 (CC), paras 60-63.

¹¹⁸ *Agiza v Sweden*, Comm. No.233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), para 13.4.

¹¹⁹ Gilbert, *Responding to International Crime* (n 50) 163.

¹²⁰ See *Dhamarajah* case in which the Swiss authorities refused to accept the guarantees provided by the Sri Lankan authorities.

when a State considers that there is a reasonable probability of a violation of its conventional and customary obligations, as a sovereign entity, the State possesses wide discretion under international law¹²¹ to adjudge the particular circumstances of an extradition request and to refuse an extradition in cases which may result in human rights violations. If a State through its judicial organs perpetrates an act that is wrongful under international law, the State bears international responsibility for this wrongful act, as shown below in Chapter 5.¹²² Hence, if a requested State delivers a fugitive to the requesting State, the requested State would be voluntarily aiding and assisting the requesting State in the commission of an internationally wrongful act, pending human rights violations occur as a result of the surrender.¹²³ The surrendering State would be internationally responsible for perpetrating the wrongful act with clear knowledge of its circumstances and consequences.¹²⁴

In such circumstances, the obligation *aut dedere aut judicare* might provide an answer to the inability for the custodial State to extradite the relator to a jurisdiction where there is a high and substantial risk that irreparable or irreversible harm would ensue. The custodial State can submit the case for the purpose of prosecution for the alleged international crimes. The pertinent issue is that the human rights of the relator who is accused of having committed grave crimes must be fully respected and appropriately applied. In such manner, the humane aspect of the obligation *aut dedere aut judicare* would be preserved as the core tenet of the concept is found on the principle of accountability for certain violations of international law through the strict

¹²¹ *Arrest Warrant Case (DRC v. Belgium)*, para 17.

¹²² Articles on the Responsibility of States for Internationally Wrongful Acts, article 16.

¹²³ See Chapter 5. See also, D Weissbrodt and A Bergquist, 'Extraordinary Rendition and the Torture Convention' (2006) 46 Va J Intl L 585, 615-617.

¹²⁴ Kelly (n 109) 508.

applicability of highest human rights standards. The duty not to surrender where there is a real risk of torture is particularly important for the humane nature of the framework as the individual is most vulnerable and prone to abuse.

4) The *Ne bis in Idem* Limitation

The rule *ne bis in idem debet vexari* stipulates that no one shall be tried twice for the same offence or act, and a single penalty or punishment should be ruled for a single crime. The double jeopardy principle is widely incorporated in bilateral and regional extradition treaty regimes.¹²⁵ The principle is also enshrined in various human rights conventions such as the Universal Declaration of Human Rights, Article 14(7) of the ICCPR and Article 8(4) of the Inter-American Convention on Human Rights. *Ne bis in idem* can be classified as a general rule of international law.¹²⁶ Domestic judicial decision also indicate the acceptance that the *ne bis in idem* clause in international law “justify in any case the conclusion that...the principle *ne bis in idem* is a general rule of international law which prohibits a second conviction of a defendant in the same state based on the same facts.”¹²⁷

The definition of what constitutes same offence and same conduct is essential in defining the applicability of the *ne bis in idem* requirement. ‘Same offence’ means an identical charge, an

¹²⁵ See article V of the Arab States Convention on Extradition (adopted on 22 March 1945, entered into force 28 August 1954) 159 BFSP 606; article 8 of the Benelux Convention on Extradition and Mutual Legal Assistance Benelux Convention on Extradition and Mutual Legal Assistance (adopted 27 June 1962, entered into force 11 December 1967); article 9 of the European Convention on Extradition, article 9 of the European Convention on the International Validity of Criminal Judgments (adopted 28 May 1970, entered into force 26 July 1974) CETS 70, article 13 of the Inter-American Convention on Extradition (adopted 25 February 1981, entered into force 28 March 1992) OAS TS 60, article 54 of the Convention Implementing the Schengen Agreement (adopted 19 June 1990, entered into force 1 September 1993) 239 OJL 19.

¹²⁶ A Colangelo, ‘Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory’ (2009) 86 Wash U L Rev 769, 815.

¹²⁷ 1987 Neue juristische Wochenschrift 2155, 2158, cited in Meron, *Human Rights and Humanitarian Norms*, 132.

offence of lesser character, or a closely related offence. ‘Same conduct or act’ incorporates identical acts, related acts, based on the plan and intent of the actor, or various acts committed at different place and time but related to the relator’s criminal enterprise. Same facts offer broader application of the principle by including all relevant facts to the charge for which the accused was prosecuted.¹²⁸ The preferred approach gives “precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which...vary as between...States concerned.”¹²⁹ As far as the *in idem* limb is concerned, what matters is the nature of the material acts of concrete circumstances, connected together in time, space and subject-matter.¹³⁰ The specific unlawful conduct must be reviewed in substance, not in strict legal qualification.

An intricate legal regime of double jeopardy is structured between international, regional and national criminal tribunals and States.¹³¹ The two famous examples concern the ICTY and ICTR, and the ICC.¹³² The *ad hoc* tribunals, established pursuant to Security Council resolutions, offer an indicative, albeit problematic and confusing, international approach to the principle *ne bis in idem*. In *Tadić*, the ICTY dealt with the accused’s *ne bis in idem* claim, in which the defendant asserted that once he had been indicted by another judicial body, then the legal proceedings against him before the Tribunal violated the principle. The ICTY ruled that it was not a double

¹²⁸ Bassiouni (n 11) 752.

¹²⁹ Case C-187/01 and C-385/01 *Gözütok & Brügge* case [2003] ECR I-1345, para 32. See also, See S Cimamonti, ‘European Arrest Warrant in Practice and *Ne Bis In Idem*’ in N Keijzeer and E van Sliedregt, *The European Arrest Warrant in Practice*, 118-119. While criminal proceedings might be ongoing in another State against the same defendant, a decision by the requesting prosecutor not to pursue a prosecution on criminal proceedings in respect to the same acts, does not constitute disposing of the case against the defendant. See ECJ’s Case C-469/03 *Criminal Proceedings v Miraglia* case [2005] ECR I-2009 paras 30-35.

¹³⁰ See ECJ’s Case C-436/09 *Criminal Proceedings against Van Esbroeck* case [2009] ECR I-2006 paras.36-42.

¹³¹ For the European approach, see J Vervaele, ‘The Transnational *ne bis in idem* Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights’ (2005) 1(2) Utrecht Law Review 100. See also Colangelo for the US jurisprudence.

¹³² Colangelo (n 126) 824.

jeopardy violation since the accused has not been tried, but simply indicted in a domestic court. The definitive trigger for a *ne bis in idem* exception is the finality of a trial and a corresponding judgment.¹³³

A problem arises when *ne bis in idem* applies in bilateral relations since no State is bound to accept the judicial decisions of another State.¹³⁴ Problems may also occur when the perpetrator has been prosecuted in a third State besides the requesting and requested States.¹³⁵ The tri-party application of the rule causes significant complications for the *aut dedere aut judicare* obligation as a custodial State which prosecutes the relator may continue to be requested extradition from other State(s). In such circumstances, a possible solution may be found in the complementarity framework applied to the custodial State's prosecution proceedings. As observed above in Chapter 2, the custodial State would be able to prove or not whether it has fulfilled its *aut dedere aut judicare* obligation. Such an approach was also implemented in the Statute of the Extraordinary African Chambers, a judicial institution within the Senegalese legal order especially created as a response to the ICJ's *Habre* finding that Senegal had breached the obligation *aut dedere aut judicare*. The Statute contains a clause that no person who has been tried by another court for the core crimes of genocide, crimes against humanity, war crimes and torture with respect to the same conduct should be tried again under two conditions. First, the *ne bis in idem* protection is not applicable if the proceedings in the other court "were for the purpose

¹³³ *Prosecutor v. Tadić* (Judgment) ICTY-IT-94-1-T (7 May 1997) para 18.

¹³⁴ J Vervaele, 'The Transnational *ne bis in idem* Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights' (2005) 1(2) Utrecht Law Review 100, 102.

¹³⁵ E Guild, 'Future in an Area of Freedom, Security and Justice' (2004) 10(2) ELJ 218, 230. See also ECJ's decision on good faith judicial decisions and implementation in Case C-187/01 and C-385/01 *Gözütok (& Brügge)* [2003] ECR I-1345.

of shielding the person concerned from criminal responsibility” for the four core crimes.¹³⁶ Second, the principle of double jeopardy is not applicable if the previous proceedings “were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which...was inconsistent with an intent to bring the person concerned to justice.”¹³⁷

If the initial prosecution has passed the muster of effective, good will, able and willing proceedings as indicated in Chapter 2, the substantive part of the double jeopardy exception should specify that the requested State should not surrender the relator for identical or substantially similar criminal conduct or acts for which s/he was prosecuted, acquitted or convicted, regardless of the jurisdiction wherein this occurred.¹³⁸ State practice indicates that the principle of double jeopardy applies to “(1) an acquittal or conviction for an offence which is the same in fact and law- *autrefois* acquit or convict; (2)...for any offence which was founded on ‘the same or substantially the same facts’ where the court would normally consider it right to stay the prosecution as an abuse of process.”¹³⁹ The goal of the *aut dedere aut judicare* mechanism is to ensure that the alleged perpetrator is held individually responsible for the alleged international crimes while being provided the highest standards of human rights protection in the process. Hence, the principle cannot be used as an *ad infinitum* tool to seek a potential guilty verdict for the same criminal acts if a court has already pronounced on the issue, applying international fair trial standards in the proceedings.

¹³⁶ Statute of the Extraordinary African Chambers, art 19(3)(a).

¹³⁷ Statute of the Extraordinary African Chambers, art 19(3)(b).

¹³⁸ Bassiouni (n 11) 751.

¹³⁹ *Fofana and Belise v. Deputy Prosecutor of Thubin, France* [2006] EWHC 744 (Admin. Ctr). See also of the 2003 Extradition Act, s 12.

5) Exception to Extradition of State's Own Nationals

The analysed bars to extradition so far primarily dealt with ensuring human rights protections. There exists an exception which may hinder the functioning of the *aut dedere aut judicare* principle by linking the interest of States to protect their own nationals. This exception to extradition underlines the special relationship between a national and the State, including the right of the subject to remain in the State, the duty of the State to protect its nationals, and access to a trial by natural judges.¹⁴⁰ It indicates a presumption that the relator would get an unfair treatment in another jurisdiction.¹⁴¹

The traditional formulation of the exception to extradition of own nationals is rooted in the reciprocal nature of the exception.¹⁴² For example, the UK follows a policy that the executive has the discretion not to extradite a national if extradition arises from multilateral treaties.¹⁴³ The executive reserves the right to hand over a fugitive, based on comity and reciprocity relations with the requesting State.¹⁴⁴

The applicability of the nationality exception can be minimized through the applicability of the *aut dedere aut judicare* obligation. For example, a possible arrangement may avail the national State to ask for any sentence imposed in the requesting State to be served in the requested

¹⁴⁰ Gilbert, *Responding to International Crime* (n 50) 168. The exception is also closely linked to the protected notion of national sovereignty as the State is required to offer its nationals the protection under its laws.

¹⁴¹ D Artz, 'The Lockerbie 'Extradition by Analogy Agreement'' (2002) 18 Am U Intl L Rev 163, 175.

¹⁴² Bassiouni (n 11) 739. The issue of reciprocity might obstruct the extradition process as if one state does not allow for surrender of nationals, the other state may reciprocate by refusing to extradite one of its nationals too.

¹⁴³ See Gilbert (n 2) 177. See also Extradition (Aviation Security) Order 1991, SI 1991, No. 1699, Sch 3, Part II, para 3(2)(b).

¹⁴⁴ *Valentine v. US ex rel. Neidecker* 299 US 5, 10 (1936).

State.¹⁴⁵ Moreover, States that allow extradition of nationals would surrender the relators to the requesting State, while States that cannot surrender nationals would prosecute the perpetrator in their own domestic legal systems.¹⁴⁶

Various multilateral conventions such as the Convention on Psychotropic Substances and the Single Convention on Narcotic Drugs follow a similar model by including provisions taking into account divergent views on non-extradition of nationals as they allow for extra-territorial jurisdiction.¹⁴⁷ In this manner, the obligation to institute proceedings against the offender due to nationality is triggered when extradition does not take place pursuant to a prior extradition request.¹⁴⁸ It should be also noted that the right not to extradite own nationals is inapplicable once the national has been surrendered in the past.¹⁴⁹ It should be duly noted that the mentioned conventions fall in the category of imposing an obligation to prosecute only when extradition has been requested and not granted as there are number of exceptions to extradition such as

¹⁴⁵ The Netherlands is an avid supporter of such prisoner transfer arrangements as the rationale indicates that the national state would know the best strategy to provide rehabilitation to the convicted person. The first extradition treaty to include a repatriating clause is the Franco-Basle Treaty of 1780 (France-Prince Bishop of Based) (20 June 1780) 47 CTS 1778. See Gilbert (n 2) 180.

¹⁴⁶ ILC Survey 2010, para 17. The 1929 Currency Counterfeiting Convention offers one of the first multilateral attempts to find a solution to the non-extradition of nationals in Article 8, requiring the State of the national to punish the relator “in the same manner as if the offence had been committed in their own territory, even in a case where the offender has acquired his nationality after the commission of the offence.”

¹⁴⁷ See e.g., The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, art 7, and the 1937 Convention for the Prevention and Punishment of Terrorism (signed on 16 November 1937, never entered into force) art. 9.

¹⁴⁸ ILC Survey 2010 (n 29) para 32.

¹⁴⁹ The Convention for the Suppression of the Traffic in Persons signed on 25 July 1951, entered into force 25 July 1951) 96 UNTS 271 offers such mechanism in Article 10 which stipulates that non-extradition of national is rescinded as a ground to bar extradition “when the person charged with the offence has been tried in a foreign State and, if convicted, has served his sentence or had it remitted or reduced in conformity with the laws of that foreign State.”

nationality of the relator. Hence, the alternative obligation to prosecute fills the gap when extradition is refused on the grounds of nationality in order to avoid impunity.¹⁵⁰

Approximately 60 multilateral conventions which follow the 1970 Hague formula diminish the possibility for non-extradition of nationals. The non-extradition provisions are simplified in terms of requiring the custodial State on whose territory the relator is found, if extradition does not take place, to submit the case to its relevant authorities for prosecution.¹⁵¹ In particular, some regional arrangements oblige to establish jurisdiction when non-extradition of nationals is applicable.¹⁵²

Such a switch from the traditional approach to non-extradition of nationals reflects the growing trend to diminish such grounds to bar extradition in light of the effect of certain international crimes on the international community.¹⁵³ The non-extradition of nationals pursuant to core crimes is even more inapplicable in comparison to the transnational crimes regime. Even if States practice non-extradition of nationals, the same States could fulfil the *aut dedere aut judicare* obligation by instituting good faith prosecution proceedings in their own judicial systems against the alleged perpetrators of core international crimes. Hence, the principle *aut dedere aut judicare* offers a solution to the politically-charged issue of the bar to extradition based on nationality without compromising the exception itself.

¹⁵⁰ ILC Survey 2010 (n 29) para 134.

¹⁵¹ ILC Survey 2010 (n 29) para 109.

¹⁵² See the Inter-American Convention against Corruption (adopted 29 March 1996, entered into force 6 March 1997) 35 ILM 724, art. 5(3); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (adopted 14 November 1997, entered into force 1 July 1998) OAS AG/RES.1 (XXIV), art 5(3); the Council of Europe Criminal Law Convention on Corruption (adopted 27 January 1999, entered into force 1 July 2002) CETS 173, art 17(3).

¹⁵³ See the European Arrest Warrant as an example for the push for elimination of the national exception.

6) Human Rights and Alternatives to the *Aut Dedere Aut Judicare* Obligation

The existing legal order incorporating human rights protections turns out to be more durable even in tackling such controversial, challenging and poignant issues like the “War on Terror”. The policy of extraordinarily renditions and related inconsistencies with international law could be seen as a repudiation of the existing mechanisms such as the *aut dedere aut judicare* principle and human rights exceptions to extradition proceedings. These alternative, legally questionable mechanisms were in direct contravention of the established international regime to fight terrorism, including “twelve antiterrorism treaties that the United States relies on to apprehend and prosecute international terrorists”.¹⁵⁴ Renditions have been traditionally carried out in secret, typically resulting in detainee’s abuse, cruel treatment and sometimes death¹⁵⁵ and these extra-legal practices might be perceived as a dangerous alternative to the extradite or prosecute principle. Unconventional legal approaches to extradition such as deportation¹⁵⁶, expulsion¹⁵⁷ and border-line abductions¹⁵⁸ eventually leading to prosecution cannot be applied in the rendition paradigm as the latter aims at extra-legal goals of primarily obtaining intelligence information and detention. The results and manner of the fractious counter-terrorist response might have

¹⁵⁴ L. Sadat, “Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror”, 75(5/6) GW Law Rev (2007) 1200, 1208. See also J. Paust, “Terrorism as an International Crime”, in G. Nesi, *International Cooperation in Counter-terrorism* (Ashgate, 2006) at 25-33.

¹⁵⁵ Sadat, “Extraordinary Rendition” (n 154) 1205.

¹⁵⁶ See G. Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (The Hague: Martinus Nijhoff, 1998) 399.

¹⁵⁷ See *Federation Nationale des Deportés et Internes Résistants et Patriotes et al. v Barbie*, 78 Int’l L Rep. 125 (1985) Cour de Cassation.

¹⁵⁸ See Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (n 156) 400. See also Cardozo, “When Extradition Fails is Abduction the Solution”, 55 AJIL 127 (1960).

violated the Nuremberg principles¹⁵⁹, codified in various widely ratified conventions such as the four Geneva Conventions and the Convention against Torture¹⁶⁰, thus undermining the approach of seeking accountability through the established sufficient legal framework. Although the secret detention centers were ordered to be closed in 2009, renditions as an alternative to prosecution continue to third states pending diplomatic assurance that detainees would not be tortured.¹⁶¹ Lawsuits for alleged renditions are still difficult to pursue because of the applicability of the state secrets privilege doctrine and national security grounds.¹⁶² Prosecutions for possible violations during the rendition process have not occurred yet.

The alternative mechanism of rendition cannot be put in the same category as exceptions to extraditions as the former threatens the legal construction of judicial cooperation. However, the system managed to absorb this alternative, legally dubious, politically and ideologically charged approach.¹⁶³ Regional organizations such as the Council of Europe, in an attempt to uphold established universal values, reacted strongly against the network of “disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture”, condemned the systematic exclusion of judicial protection of the detained, castigated its member states which have willfully or recklessly contributed to these egregious violations of international law and called for “any person responsible for human rights violations in connection with renditions or secret detentions, including those who have aided or abetted

¹⁵⁹ Sadat, “Extraordinary Rendition” (n 154) 1207.

¹⁶⁰ See Sadat, “Extraordinary Rendition” (n 154) 1228-1235.

¹⁶¹ “US Says Rendition to Continue, but with More Oversight”, *The New York Times*, 24 August 2009.

¹⁶² See *Mohamed v. Jeppesen Dataplan*, 579 F.3d 943 (9th Cir.) (2009).

¹⁶³ See President Obama’s Executive Order: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009, accessed at http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/

these crimes, are brought to justice.”¹⁶⁴ The push has moved in direction of abiding by the established law of nations as the fibre of the international legal order is robust and resilient enough to absorb such a strong challenge.

II. Procedural Extradition Requirements

The main procedural requirements of extradition are dual criminality, specialty, and non-inquiry. The requirements are necessary to be examined as they have a direct effect on the function of the extradition part of the *aut dedere aut judicare* duty. The underlying principle behind these elements is reciprocity, formulated as treatment originating in the mutuality and comity of legal obligations.¹⁶⁵ Extradition requirements ensure an efficient extradition regime “to expedite the prosecution of fugitives, given certain protections which are necessary when a person is threatened with being removed from the safety of a State where he has committed no crime”.¹⁶⁶ The procedure of extradition is exceptional as it puts the burden of proof on the requesting State for the purpose of meeting the necessary procedural requirements.¹⁶⁷

¹⁶⁴ Parliamentary Assembly of the Council of Europe, *Resolution 1507* (17th sitting) (27 June 2006). See also PACE Doc. 10957, *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States* (“Marty Report”), (12 June 2006).

¹⁶⁵ M Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oceana 2007) 490.

¹⁶⁶ Gilbert (n 2) 6.

¹⁶⁷ J Spencer, ‘The European Arrest Warrant’ in *The Cambridge Yearbook of European Legal Studies 2003-2004*, vol.6, 202. In comparison, common law states oftentimes use “backing of warrants”, a judicial cooperation mechanism under which “the authorities of the jurisdiction where the person is wanted issue their normal warrant of arrest, which is sent directly to the authorities of the jurisdiction where he is, who endorse it if it appears to be in order, and give it to their policemen to execute it as if it were their own.”

1) Dual Criminality

Dual criminality is an extradition requirement, defining that the relator's criminal acts or alleged offence must constitute offence both in the requesting and requested States.¹⁶⁸ In short, a crime charged in the surrendering State must be a crime in the requesting State and *vice versa*. The rationale of dual criminality is grounded in the principles of foreseeability and legal certainty. It assures that fugitives rely on similar legal treatment in both States and that no State shall be bound to hand over a person for non-criminal acts.¹⁶⁹ The value and effect of dual criminality on the efficient functioning of the obligation *aut dedere aut judicare* is obvious as problems with the procedural requirement may lead to delays in the extradition or prosecution of the alleged perpetrator.

There are three accepted approaches to determine if the criminal act falls under dual criminality: 1) if the act is charged in both States as a criminal offence; 2) if the act is chargeable and also prosecutable in both States; and 3) if the act is chargeable, prosecutable and convictable in both States.¹⁷⁰ The margins of the requirement are broad since the determining factor for meeting the dual criminality is based on the facts and conduct and whether they are criminalized in both

¹⁶⁸ Double criminality is applicable in extradition arrangement utilizing the eliminative method. cf. the enumerative method requires extradition treaties and domestic legislation to list all the offences for which extradition might be granted. If the offence is not listed, then the relator would not be surrendered. Enumerative listing is exhaustive and requires time-consuming amendments; hence, it has diminished in application. A middle arrangement is the "municipal-treaty list". In such cases, the offence must be either enshrined in domestic legislation, thus triggering the double criminality test, or it should be listed in the applicable treaty. See Gilbert (n 2) 85.

¹⁶⁹ "No person if to be extradited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition." See *Riley v. The Commonwealth of Australia* [1985] 159 CLR 1, 11-12.

¹⁷⁰ Bassiouni (n 11) 495. *R v. Governor of Pentonville Prison, ex p. Budlong* [1980] 1 WLR 1110, 1118-1123. See *US v. Saccoccia* 18 F.3d 795, 800 n.6 (9th Cir. 1994): "Dual criminality requires that an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations."

States. The crime charged or the title of the crime are seemingly immaterial.¹⁷¹ There has been a noticeable recourse to ascertaining the substance of the crime instead of formalistic interpretation of the legal elements.¹⁷² The correspondence of criminalized conduct test is perceived as a “general principle of international law...that in all cases of extradition the *act* done on account of which extradition is demanded must be considered a crime by both parties.”¹⁷³ Obviously, this approach leads to some inquiry in the requesting State’s criminal system.¹⁷⁴

Listing of extraditable offences in the applicable treaty, provisions for the content of offences as stipulated in national law, recognition of mutually extraditable conduct if the extradition is based on reciprocity, and delineation of the appropriate national extradition law may solve the problematic applicability of the dual criminality test.¹⁷⁵ Such requirements may seem cumbersome and irrelevant since the dual criminality condition espouses the *nullum crimen sine lege* doctrine, albeit the condition introduces a degree of certainty, clarity and legitimacy in the extradition process.¹⁷⁶ These conditions remain subject to the conditions of law of the requested State.¹⁷⁷

¹⁷¹ *In re Extradition of Molnar* 202 F. Supp. 2d 782, 785-786 (2002). In *Freedman v. US* [1967] 437 F.Supp 1252, The District Court affirmed that “[t]he scope of liability need not be coextensive and the elements of the crime do not have to perfectly match.”

¹⁷² Absolute identity of the crime is not a requirement as what matters is that the crimes in both states share common elements or overlap in substance, for the crime must be “substantially similar in both countries.” *Wright v. Henkel* 190 US 40, 58 (1902). See also, *In re Arton (No.2)* [1896] 1 QB 509, 517.

¹⁷³ *Wright v Henkel*, 60-61. See also *In the Matter of the Extradition of Prushinowski* 574 F.Supp 1439 (1983). The precursor of criminalized conduct is found in *Collins v Loisel* 259 US 309, 311 (1922) where it was held, “it is true that an offense is extraditable if the *acts* charged are criminal by the laws of both countries.” For the inclusion of acts and omissions, see *M v. Federal Department of Justice and Police* 75 ILR 107 (Swiss Federal Tribunal, 1979).

¹⁷⁴ See *Gallina v Fraser* 177 F.Supp 856 (1959).

¹⁷⁵ C Blakesley and O Lagodny, ‘Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, the Role of Human Rights Under International Law’ (1991) 24 Van J Transntl L 4, 48.

¹⁷⁶ ILC Survey 2010 (n 29) para 117. See Convention for the Suppression of Unlawful Seizure of Aircraft (signed on 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (The Hague Convention) is sometimes omitted (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected

The issue of whether the act must have constituted a crime at the time of its commission or at the time of the extradition request is also pertinent. The *Pinochet* case brought some clarity on the temporal scope of the criminal activity. As the double criminality rule stipulates that “the conduct must constitute a crime” under both jurisdictions involved in the extradition process, the majority decided that the double criminality requires that “the conduct must be criminal...at the conduct date and not only at the request date.”¹⁷⁸ This conduct-based approach, “requiring that the conduct must have been punishable...when it took place” in the requested State ensures legal certainty and elimination of retrospective application of a procedural rule.¹⁷⁹ However, one is left pondering whether such interpretation rests on the merits of the applicability of such general principles of criminal law as the extradition process is not universally perceived as a criminal process but rather as a process involving various administrative and governmental organs.

The case could also be criticized for imposing a triple criminality test on the three jurisdictions involved in the situation—the UK, Chile and Spain. The extradition hearing should have concentrated on the relevant conduct in the States participating in the extradition proceeding, namely the UK and Spain. The triple criminality test falls outside of the ambit of the dual criminality requirement, as it substantively looks at the conduct of the accused, resembling a judicial process before the actual case is heard in the requesting State. Courts also tend to

Persons, including Diplomatic Agents, art 8(2); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art 8(2).

¹⁷⁷ See e.g., the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 6(5); the International Convention for the Protection of All Persons from Enforced Disappearance, art 13(6); The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 6(5).

¹⁷⁸ *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No.3) [2000] 1 AC 147, 194 (Lord Browne-Wilkinson).

¹⁷⁹ See *Pinochet* (No.3) (n 165) 230 (Lord Hope).

examine the issue of extraterritorial jurisdiction and territoriality principle as judiciaries are reluctant to extend jurisdiction to States applying other grounds for jurisdiction.¹⁸⁰ However, it might not be appropriate to include jurisdiction as part of the double criminality test, as the principle only deals with whether the conduct is criminalized in both States.¹⁸¹

The dual criminality requirement should not seemingly pose a problem when dealing with the *aut dedere aut judicare* clauses for the applicable international crimes. Various multilateral, widely-ratified conventions contain relevant provisions obliging the States to introduce and criminalize the relevant offences in their domestic orders.¹⁸² Similar aspects of The Hague formula pertaining to criminalization have been replicated in more than 60 multilateral conventions, making the relevant acts criminal offences punishable under domestic laws.¹⁸³ Additionally, most of the conventions in this group require States “to ensure that their legislation and administration are in conformity with the obligations stipulated in the respective conventions

¹⁸⁰ Gilbert (n 2) 114. Under international law, jurisdiction has three elements: 1) prescriptive jurisdiction, as in the power of States to make law and determine the scope and applicability of the same law; 2) adjudicatory jurisdiction, as in the ability to subject a person for a deed to proceedings before a court of law, which has the power to adjudicate upon issues brought before it by parties that enjoy standing to do so; and 3) enforcement jurisdiction, as in the power of a State to compel compliance with its laws and to correct non-compliance. See B Brandon and M du Plessis, ‘The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States’ (Commonwealth Secretariat 2005) 17.

¹⁸¹ See *Melia v United States* 667 F.2d 300 (1981) 303.

¹⁸² See ILC Survey 2010, para 29. For example, the prototype 1929 International for the Suppression of Counterfeiting Currency criminalizes certain offences relating to counterfeiting of currencies under Article 3. Other multilateral treaties including the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, the Convention for the Prevention and Punishment of Terrorism, the Single Convention on Narcotic Drugs include express clauses that oblige States parties to criminalize the relevant offence in order to make it punishable on domestic level.

¹⁸³ See ILC Survey 2010 (n 29) para 108-111.

or that such obligations can be carried out.”¹⁸⁴ However, in reality the implementation degree is incomplete and incohesive as illustrated by the *Habre* case.

Hence, although widely ratified conventions such as the 1949 Geneva Conventions may contain an obligation to enact domestic legislation, the reality on the ground is different. In such circumstances, the role of the dual criminality test remains relevant. Moreover, extradition requests and the obligation *aut dedere aut judicare* itself may serve as the catalyst in ensuring that the particular act is punishable under the law of the requesting State as was the case with Senegal’s change of legislation pertaining to torture allegations and applicable jurisdictional base. The process might be incremental and slow but culminates with the appropriate implementation in order to fulfil the obligation *aut dedere aut judicare*.¹⁸⁵

2) Specialty

The principle of specialty is a core requirement to extradition, defined as the proposition that the requesting State, upon delivery of the fugitive, prosecutes the person for the offences for which

¹⁸⁴ ILC Survey 2010 (n 29) para 31. See the 1929 Counterfeiting Convention, art. 23; the 1937 Convention for the Prevention and Punishment of Terrorism, art 24; the 1950 Convention for the Suppression of the Traffic in Persons, art 27; and the 1961 Single Convention on Narcotic Drugs, art 4.

¹⁸⁵ Four days after the ICJ decision in the *Habre* case in July 2012, Senegal and the African Union agreed to establish a special court within the Senegalese judiciary, The Extraordinary African Chambers (EAC), with the participation of African judges appointed by the AU to preside over the case. On 19 December 2012, the Senegalese National Assembly adopted the law establishing the EAC within the Senegalese court system. The EAC was inaugurated on 8 February 2013 and on 2 July 2013 Hissene Habre was charged with crimes against humanity, torture and war crimes by the EAC’s investigating judges and placed in pre-trial detention. As of the current moment, several investigation missions have been conducted by EAC’s investigative judges and prosecutors in Chad. See, ‘Chronology of the Habre Case’, HRW, accessed 18 April 2014, <<http://www.hrw.org/news/2012/03/09/chronology-habr-case>>.

the requested State granted extradition.¹⁸⁶ Specialty, similar to dual criminality, is a fact-driven doctrine.¹⁸⁷ In substantive terms, the requesting State can prosecute for lesser offences contained in the main offence, if the offences meet the dual criminality condition and if the surrendering State has not explicitly limited the prosecution of lesser offences during the extradition proceedings. The principle also takes into consideration any limitation on the length and type of sentencing, if agreed with the requested State during the pre-extradition deliberations. Domestic courts have taken the position the principle of specialty applies to extradition requests for international crimes.¹⁸⁸

If the requesting State decides to prosecute the relator for crimes which did not represent the grounds for extradition, it must obtain the consent of the surrendering State in order to continue with the envisaged prosecution or sentencing. If the rule of specialty is abrogated, the requesting State is required to return the alleged offender to the custody of the surrendering State. In case of a breach, the wrongful act is against the requested State and not against the relator, since the participants in the extradition are the two States and the person is a subject in the proceeding, although recent jurisprudence is more receptive towards individual challenges without prior rendering of a State complaint.¹⁸⁹ Although specialty is a safeguard on the rights of the requested State, the same State has the option to waive specialty. If the accused is acquitted, the specialty rule requires the custodial State to allow the relator to leave its territory and not charge the relator with additional crimes.

¹⁸⁶ “The defender shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall a reasonable time to leave the country.” *US v. Rauscher* 199 SCOTUS 407 (1886).

¹⁸⁷ *US v. Sensi* 879 F.2d 888 (DC Cir. 1989).

¹⁸⁸ *In re Issel* 18 ILR 331 (1950), Eastern Provincial Court, Denmark.

¹⁸⁹ See *US v. Rivieri* 924 F.2d 1289 (3d Cir. 1991) 1292.

As a customary law rule, specialty ascertains that the trust between the sending and receiving States would not be abused, real reasons are used in the extradition request, and no abuse of the fair trial rights of the relator would take place in the prosecuting State after the extradition is completed.¹⁹⁰

3) Non-inquiry

The rule of non-inquiry is defined as the disinclination of the custodial State to question the probable cause and evidence provided by the requesting State in the extradition request, to look into the penal treatment a relator may get as a result of the extradition, and to consider the criminal proceeding by which a conviction might be obtained in the requesting State.¹⁹¹ The main rationale of the non-inquiry rule is that no State has the right to interfere in the internal affairs of another State, including the functions of the judiciary and administration, and that all States are equal and cannot judge each other.

Some States would not investigate the standards of justice if the specific treaty or customary provision does not indicate otherwise.¹⁹² The rule of non-inquiry is, however, limited when there are reasonable grounds to believe that human rights would be violated in the requesting State

¹⁹⁰ *Kuhn v. StAnW. Kantons Zurich* 34 ILR 132, 133 (Fed. Tribunal 1961). For customary status of the principle, see *Fiocconi v. Atty. Gen. of the US* 462 F.2d 475 (2d Cir. 1972).

¹⁹¹ M Topiel, 'The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There a Room for Reconciliation' (2001) 9 Cardozo J Intl&Comp L 389, 389-390.

¹⁹² See *Neely v. Henkel* [1901] 180 US 109. See also Gilbert (n 2) 80. For more details, see R Wilson, 'Toward the Enforcement of Universal Human Rights Through Abrogation of the Rule of Non-Inquiry in Extradition' (1997) 3 ILSA J Intl & Comp L 741. An example of a treaty clause removing non-inquiry is the Anglo-US Supplementary Extradition Treaty of 1986, 294 UKTS 6 (1988), article 3(a). The inquiry must be based on individual principles, not general political conditions. See *In re Extradition of Howard* 996 F.2d 1320 (1993).

upon extradition.¹⁹³ Traditionally, non-inquiry is not applicable, in terms of allowing extradition, in cases of *in absentia* trials¹⁹⁴, serious violation of due process and *jus cogens*, such as evidence obtained by torture¹⁹⁵, human rights violation, persecution¹⁹⁶, and the death penalty, including the death row syndrome¹⁹⁷ as established above.

Re-examination of the requesting State's human rights record is permissible "where the relator is likely to encounter such treatment in the requesting state that is significantly offensive to the minimum standards of justice, treatment of individuals and preservation of basic human rights, as perceived by the requested state"¹⁹⁸ and the initial decision is "tainted with illegality, irrationality or procedural impropriety."¹⁹⁹ Since the rule of non-inquiry primarily concerns the offender's treatment as a consequence of extradition, if the rule is not applied and extradition is refused, two alternatives remain with the obligation *aut dedere aut judicare* providing a reasonable solution to a delicate situation. First, the requested State may prosecute the person in its own courts, or, second, the relator may be prosecuted and convicted in the requesting State but transferred back to the surrendering place for serving the sentence.²⁰⁰

¹⁹³ *ibid* 398-400.

¹⁹⁴ See US case law: *Ex parte Fudera*, *Ex parte La Mantia*, *In re Mylonas*.

¹⁹⁵ See *Escobedo v. US* 623 F.2d 1098 (5th Cir. 1980).

¹⁹⁶ Convention Against Torture, article 3; Universal Declaration of Human Rights, article 5; International Convention on Civil and Political Rights, article 7; European Convention on Human Rights and Fundamental Freedoms as amended by Protocols 11 and 14(adopted 4 November 1950, entered into force 3 September 1953) CETS 194, article 3 (ECHR); American Convention on Human Rights, article 5.

¹⁹⁷ *Venezia v. Min. di Giustizia*, Corte cost., sent. 223/96, n.223.

¹⁹⁸ Bassiouni (n 11) 607.

¹⁹⁹ See *R v. Secretary of State for the Home Department, ex p. Launder* 1 WLR 839, 848, (reversed on other grounds of appeal by the House of Lords). Similar approach is demonstrated by the French judiciary; see *L'Affaire Gouvernement Suisse* [1995] AJDA 56.

²⁰⁰ V Epps, 'The Development of the Conceptual Framework Supporting International Extradition' (2002) 25 Loy LA Intl&Comp L Rev 369, 381.

Connected to the non-inquiry requirement is the existence of a *prima facie* case against the accused. For example, the common Articles in the 1949 Geneva Conventions specify that the requesting High Contracting Party is obliged to try the alleged perpetrator as a result of the extradition if the same Party has made out a *prima facie* case.²⁰¹ The *prima facie* requirement serves as protection to the accused against excessive, frivolous and unjustified requests as well as ensures that “the penal proceedings as envisaged will not be frustrated or reduced in scope as a result of the transfer to another Contracting Party.”²⁰² Common law States are more prone to resorting to the *prima facie* test which means “if the evidence adduced stood alone at the trial, a reasonable jury, properly directed, could accept it and find a verdict of guilty.”²⁰³ This caveat in the non-inquiry principle protects the fugitive from being surrendered and causing unnecessary disturbance to the person’s life and liberty when there is no case to answer at the time of the extradition request.

III. Conclusion

International law has a well-developed mechanism to ensure that the rights of the accused would be respected and protected by the States involved in the extradition proceedings. In this manner, the international society preserves its core as a humane concept, structured around the rule of law and protection of human rights in ensuring the proper functioning of individual accountability for

²⁰¹ Commentary to the Geneva Conventions, 366.

²⁰² Commentary to Additional Protocol I, para 3567. The *prima facie* requirement serves as a guarantee that the requesting State has enough evidence to initiate judicial proceedings, or, simply put, to be able to put to trial the relator in its own judicial system

²⁰³ *Schtraks v Israel* [1964] AC 556, 580. The US has traditionally used the standard of probable cause to execute extradition requests which necessitates “reasonable grounds to suppose [the relator] guilty as to make it proper he should be tried.” See *Glucksman v Henkel* 221 US 508, 512 (1922), cited in *Artukovic v INS* 628 F Supp 1370, 1378 (1980). See Gilbert (n 2) 123.

criminal acts. The mechanisms described in this chapter aim at protecting the individual against frivolity and abuse in extradition proceedings. Guarantees such as the political offence exception, the fair trial in the requesting jurisdiction, the applicability of the non-refoulement principle and various procedural requirements serve to remind the participants involved in the extradition process that it should be limited when it might jeopardize fundamental rights of the relator. The fight against impunity is based on the strict applicability of international human rights protections and the process of accountability does not sacrifice the centrality of the individual, no matter whether guilty or not of the alleged crimes.

The chapter also alludes that extradition is a complex process which involves taking into consideration various factors of legal and sometimes political nature. Inherently bilateral in nature and applicability, the extradition process should not be used as an “outsourcing” mechanism in which the surrendering State simply washes its hands through transferring the relator. As such, various exceptions to extradition must be applied in proportionate manner in order not to be abused or used improperly. Hence, as the analysis suggests, in certain delicate situations, the obligation *aut dedere aut judicare* may provide the appropriate answer to the inability or unwillingness of the custodial State to extradite the relator to another jurisdiction. Extradition does not and cannot serve as a panacea mechanism to solve all problems inflicted as a result of the criminal behaviour as such a solution may be more appropriately found in the obligation to prosecute such crimes. Hence, the next chapter offers an exploration of whether the obligation *aut dedere aut judicare* has attained a customary status, independent of its conventional nature described above, pertaining to the triggering crime at issue.

CHAPTER 4

CUSTOMARY LAW AND THE *AUT DEDERE AUT JUDICARE* OBLIGATION

I. Introduction

Article 38(1)(b) of the Statute of the ICJ defines international custom “as evidence of a general practice accepted as law.”¹ This practice of States must be performed from a sense of legal obligation. International custom generates legal consequences for States as a norm of customary character is binding on States and is governed by international law. In essence, custom “allows not only the treaty non-parties, but also the parties to have recourse to international law remedies not provided for in the treaties.”² This is the main reason why this chapter bears such a significance in the overall exploration and analysis of the obligation *aut dedere aut judicare*. Without a proper exploration of the evidence of state practice and *opinio juris* for the obligation *aut dedere aut judicare*, the scope and nature of the duty would not be analysed in a complete manner. As explained below, custom is a separate source of international law, and the main accent of the following pages is to explore and establish whether the obligation pertaining to

¹ Villiger asserts that the Article reverses the logical order of events as “it is general practice accepted as law which constitutes evidence of a customary rule.” See M Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer Law International 1997) 15. Source means a formal source, “which gives to the content of rules of international law their character as law.” See I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press 1984) 2. See also, Michael Wood, ‘First Report on Formation and Evidence of Customary International Law’ (May-August 2013) ILC A/CN.4/663, para 28.

² O Schachter, ‘International Law in Theory and Practice’ (1982-V) 178 *Recueil des cours* 334.

certain crimes of international law has attained customary status, based on examining state practice and *opinio juris sive necessitatis* as constitutive elements of customary international law along with the relevance of various multilateral, widely-ratified conventions containing the obligation.³ The structure of the study follows the framework, established in the previous chapters, as regards whether the *aut dedere aut judicare* duty for core crimes and transnational crimes has achieved a customary status in international law.

The aim of the chapter is not to fall in the “fashionable tendency to jump from the language in existing treaties to the assertion that an obligation to extradite or prosecute presently exists in respect of all international crimes.”⁴ It is asserted that there is no free standing version of the ‘extradite or prosecute’ obligation applicable to all crimes in international law. The customary *aut dedere aut judicare* duty is explored for offences against the safety of civil aviation and hijacking, crimes related to terrorist bombing and financing of terrorism, torture and other *jus cogens* violations, genocide, grave breaches of international humanitarian law, including grave breaches of the Geneva Conventions and crimes against humanity, international drug trafficking, and crimes against UN personnel. The crimes are selected pursuant to their classification as core and transnational crimes in addition to falling in the category of offences triggering the obligation as seen in Chapter 2. The chapter also looks at whether *jus cogens* violations impose a special standard of non-derogability of the *aut dedere aut judicare* principle, in light of the recent ICJ’s *Habre* case.⁵

³ See Geoff Gilbert, *Transnational Fugitive Offenders in International Law* (Kluwer Law International 1998) 332.

⁴ E Wise, ‘Extradition: The Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare’ (1991) 62 *Revue Internationale de Droit Penal* 123.

⁵ Goodwin-Gill argues that “International crimes, ‘by their very nature’, produce an obligation *erga omnes* to extradite to another competent state, prosecute locally, or surrender the person concerned to the jurisdiction of a

The customary character of the ‘extradite or prosecute’ duty for the specific crimes is established through methodological and substantive examination of state practice and *opinio juris* in terms of ratifications of multi-lateral, widely-ratified treaties, containing the relevant crimes and the *aut dedere aut judicare* clause, negotiation history of the various conventions, General Assembly resolutions on the relevant subject matter, and subsequent state practice through various domestic judicial decisions in order to evaluate the formation of customary international law. The chapter is divided in two parts: Part I lays down the methodology behind the interaction of the two relevant sources of international law on the particular issue, namely custom and treaties, and Part II offers a thorough examination of whether the *aut dedere aut judicare* duty has attained a customary status as regards the relevant international crimes, based on the available evidence for state practice and *opinio juris*. Part II also offers an analysis of the evidence of custom and its impact on the international system.

The formation of custom occurs in several stages. During the first stage, some States act in a certain way for a variety of reasons such as political advantage or pressure, comity, courtesy, self-interest, etc. The second stage denotes the reaction of the community of States in the form of following the initial practice, counter-practice and objection, claims and verbal positions as regards the initial practice or simply silent acquiescence. At this stage, States may start relying on the initial conduct which creates legitimate expectations. As the expectations solidify, the

competent international tribunal; it is the *jus cogens/erga omnes* combination that makes prosecution (somewhere) unavoidable as a matter of duty.” G Goodwin-Gill, ‘Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute’ in G Goodwin-Gill and S Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press 1999) 220. See also, M Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1996) 59 *Law and Contemporary Problems* 63, 66.

initial practice hardens into a general rule. In this third stage States may develop the conviction that they are following the practice due to a legal obligation and “as more States become aware of the conduct and acquiesce, or engage in practice, and as practice becomes more uniform, the conviction will gradually grow that a given type of conduct is generally regarded as obligatory.”⁶

The ICJ’s *Asylum* case provides one of the first glimpses of the constitutive elements of custom, general state practice and *opinio juris*, by concluding that the State “must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right”.⁷ The Court has also pronounced that “not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁸ The requirement for such a belief to exist is implicit in the meaning of *opinio juris*. In the *Nicaragua* case, the ICJ affirmed that “the existence of the rule in the *opinio juris* of States is confirmed by practice.”⁹ The following chapter explores whether the community of States believes that the *aut dedere aut judicare* exists as an obligation pertaining to certain core crimes and transnational crimes as confirmed by the practice of States.

⁶ A Verdross, ‘Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts’ (1969) 29 *ZaoeRV* 635, 640-642. See also Villiger (n 1) para 76.

⁷ *Columbian-Peruvian Asylum case* (Judgment) [1950] ICJ Rep 266, 276.

⁸ *North Sea Continental Shelf case* (Judgment) [1969] ICJ Rep 3, 44.

⁹ *Military and Paramilitary Activities in and against Nicaragua case* (Merits Judgment) [1986] ICJ Rep 14, 98.

PART I: RELATIONSHIP BETWEEN TREATY AND CUSTOM

1) Codification, Crystallization, and Generation

The relationship between treaties and custom can be classified under three categories: declaratory or codifying, crystallizing, and generating.¹⁰ A declaratory treaty embodies custom and serves as excellent evidence of the customary status of the relevant provision. For example, a treaty may contain clauses or declarations that are already a customary rule.¹¹ Treaties have also been used as an authority for customary law in various judgments although often-times courts do not spend much time deliberating and outlining why custom is ‘declared’ in the relevant treaty.¹² In such manner, “the conventional text may merely restate a pre-existing rule of custom.”¹³ The relation between codifying treaty and custom can be explained as “customary law itself, operating alongside the codifying convention, has its role to play in filling in the gaps which any exercise in codification and progressive development inevitably leaves.”¹⁴ Codification also “in the strict sense, signifies re-statement simply of the *lex lata*”.¹⁵

¹⁰ See also article 13(1)(a) of the UN Charter which uses a binary classification of treaties representing “codification” of customary law and treaties capable of “progressive development of international law”.

¹¹ See e.g. the Genocide Convention.

¹² See ICJ’s *Barcelona Traction and Fisheries Jurisdiction* cases. For domestic cases, see early examples of the *Attilio Regio* case (1945) 12 RIIA 8 for customary provisions of the Hague Convention 1907.

¹³ Jimenez de Arechaga, ‘The Work and the Jurisprudence of the International Court of Justice 1947-1986’ (1987) 58 BYBIL 1, 32. Indeed, Article 15 of the Statute of the ILC defines that “the expression ‘codification of international law’ is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.” ¹³ See Briery’s definition of codification before The Committee on the Progressive Development of International law and its Codification (1946/47), UN Doc. A/AC 10/16 SR2: “Codification is primarily a task of ascertaining and declaring the law which already exists, and which is binding on states, whether they approve its contents in every detail or not.” Villiger describes codification as “the act, and the result, of the recasting into the written form of a rule which exists qua customary law.” See Villiger (n 1) para.150

¹⁴ Sinclair (n 1) 258. See also T Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1991) 90.

¹⁵ H Thirlway, ‘Reflections on *Lex Ferenda*’ (2001) 32 Netherlands Yearbook of International Law 3, 10.

It is difficult to envisage that the codification treaty would not alter the pre-existing custom as it is inherent in the nature of custom that it “develops continuously, and that development is not arrested by the conclusion of a codification treaty.”¹⁶ It should be recalled that “the customary law process is a continuing one: it does not stop when a rule has emerged.”¹⁷ Customary law formation may be characterized as “informal, haphazard, not deliberate...unstructured and slow”.¹⁸ Such development reflects the nature of codification as not a strict process of restating what custom is into *jus scriptum* but as a tool through which the new written form “may cure omissions, eliminate anachronisms, introduce recent doctrinal findings, or even consider the eventual enforcement.”¹⁹ Hence, codification is not stripped of its creative element. As shown below, this flexible interaction between treaty and custom would prove crucial for examining whether *aut dedere aut judicare* exists as a customary duty attached to and triggered by certain crimes.

Conventions can also crystallize an emerging customary rule *in statu nascendi*. This process can be linked to the concept of progressive development which roughly means “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.”²⁰ Progressive development creates new law which has not yet come in existence “but where early patterns of State practice, for instance in the context of a diplomatic conference, indicate a crystallizing

¹⁶ Y Dinstein, ‘The Interaction between Customary International law and Treaties’ (2006) 322 Recueil des cours 243, 366.

¹⁷ MH Mendelson, ‘The Formation of Customary International Law’ (1998) 272 Recueil des Cours 188.

¹⁸ L Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press 1979) 34.

¹⁹ Villiger (n 1) para 153. See also, R Baxter, ‘Treaties and Custom’ (1970) 129 Recueil des cours 25, 39-42.

²⁰ Article 15 of the Statute of the ILC. For the functions of the ILC in terms of codification and crystallization, see Villiger (n 1) para 165.

customary rule.”²¹ The custom might be *in statu nascendi* once the codification exercise commences, but it should have ripened, reached maturity as custom before the conclusion of the treaty, i.e. “‘emerging customary law’ that becomes ‘crystallized’ by the time of the adoption of the instrument”.²² Crystallization may also include a level of reform of existing law in order to clarify its meaning, scope, definition, applicability among many things or to fill lacuna in the existing international law.²³ Constitutive treaties allow for “those rules as *lex ferenda*, with the intention that, through a multilateral convention or otherwise, they shall be transformed into *lex lata*.”²⁴

The third category covers treaty provisions that attract the focus of a subsequent State practice and convert into custom.²⁵ The process of treaties contributing to the generation of new custom was initially acknowledged as “law-making or norm-enunciating treaties, in the nature of general multilateral conventions...establishing new rules by way of progressive development of international law, and in so far as they...embody legal rules or legal regimes which...eventually become, recognized as being of universal validity and application, constitute vehicles whereby such rules or regimes...bind States not actually parties to the treaty as such.”²⁶ Norms may become declaratory of custom after the conclusion of the treaty, as “a treaty provision—originally constitutive—may become ‘the focal point’ for the future growth of a new custom that it generates.”²⁷

²¹ Villeger (n 1) para 157.

²² Dinstein, RdC (n 16) 358. See also, *North Sea Continental Shelf* case (n 8) 38.

²³ See Dinstein, RdC (n 16) 348.

²⁴ H Thirlway, ‘Reflections on *Lex Ferenda*’ (2001) 32 *Netherlands Yearbook of International Law* 3, 10.

²⁵ See also de Arechaga (n 13) 33.

²⁶ See G Fitzmaurice, ICL Report 1960, YBILC 1960 II, 80.

²⁷ Dinstein, RdC (n 16) 371. See also, de Arechaga (n 13) 15. See also, *North Sea* case, 41.

The relationship between treaty and custom reflects a dynamic and flexible approach as “treaties can only seldom be categorized as either codifying, existing law, crystallizing the emergent law, generating new rules of customary law, or merely creating conventional obligations”²⁸, a relevant qualification especially to transnational crimes, as seen below. The relation between these two sources of international law can be characterized as “entangled”.²⁹ The distinction between development and codification of customary law has seemingly been abandoned in the practice of the ILC.³⁰ Hence, “in a great majority of treaties...[are] partly constitutive and partly declaratory.”³¹ The essential element of the treaty-custom relationship stems from the possibility for a conventional norm recognized by states parties to become generally accepted by other States as custom. It should be remembered that one of the inherent qualities of customary law is precisely rooted in “its flexibility and dynamic nature”.³²

Ideally, there would be a few non-Contracting Parties whose practice would indicate whether the emerging custom has matured as “the emergence of a new custom identical to the provisions of a treaty can only be deduced either from the practice of non-Contracting Parties to the treaty among themselves or from the practice of Contracting Parties vis-à-vis non-Contracting Parties (and vice versa).”³³ If a treaty is closely accepted on a universal basis, the number of the legislating Contracting Parties may indicate the ability for the treaty text to become binding *erga omnes* and gain enough momentum to transform into custom mainly because it would be difficult

²⁸ Meron (n 14) 90.

²⁹ M Wood, First Report on Customary International Law (n 1) para 34. See also, T Treves, ‘Customary International Law’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2012), para. 2 who claims that “contemporary customary international law, although unwritten, is increasingly characterized by the strict relationship between it and written texts”.

³⁰ See Villiger (n 1) paras 147-148.

³¹ Dinstein, RdC (n 16) 356.

³² Villiger (n 1) para 91.

³³ Dinstein, RdC (n 16) 378.

or impossible to discern between the State practice required by the treaty and custom.³⁴ This is the paradigm explored below as regards the obligation *aut dedere aut judicare* for core crimes. Under such universal participation, “the number of States not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty.”³⁵

ICJ judgments, including separate and dissenting opinions, authoritatively illuminate “the formation and evidence of customary international law”.³⁶ ICJ cases may not provide clear answers as to the formation and evidence of custom, but “they offer valuable guidance”.³⁷ Oftentimes, the Court would make a pronouncement as regards the existence of custom, resembling “implicit recognition...without making an explicit pronouncement about its character”.³⁸

The most prominent analysis of the custom creation capability of conventions is undoubtedly the ICJ’s *North Sea* decision. In paragraph 71 of the judgment, the Court declares that the process of custom generation is “a perfectly possible...it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.” The ICJ also outlines in the same section the process of custom generation: “a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in origin,

³⁴ Cf. see Dinstein who states, “post-treaty practice by the Contracting Parties, in compliance with the instrument, does not as such substantiate the assertion that a new custom has ripened along the lines of the text.” Dinstein (n 16) 376.

³⁵ See Baxter (n 19) 73.

³⁶ Wood, First Report on Customary Law (n 1) para 54.

³⁷ Wood, First Report on Customary Law (n 1) para 63.

³⁸ A Alvarez-Jimenez, ‘Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000-2009’ (2011) 60 ICLQ 681,698-703.

has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.”³⁹ The second part of the preceding sentence also elucidates why custom is important as a separate source in international law, namely its binding character on all States, except persistent objectors.

Affirmation of the custom generation capability of treaties was provided in the *Continental Shelf (Tunisia/Libya)* case where the Court upheld that “multilateral conventions may have an important role to play in recording...rules deriving from custom, or indeed in developing them.”⁴⁰ The *Nicaragua* case also presented a perfect opportunity for the ICJ to reflect upon the relationship between conventional and customary norms. The Court stated,

“even if two norms belonging to two sources of international law appear identical in content, and if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence...if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule.”⁴¹

Such co-existence and relation between custom and treaty norms reflect the autonomous nature of sources of international law, meaning that the conditions of the formation, existence and

³⁹ *North Sea* case (n 8) para 71.

⁴⁰ See *Continental Shelf (Tunisia/Libya)* case (Judgement) [1985] ICJ Rep 29, para 27.

⁴¹ *Military and Paramilitary Activities in Nicaragua (Nicaragua/ United States of America)* (Merits) [1986] ICJ Rep 95.

termination of the two sources are broadly independent while sources may influence, abrogate or modify each other.⁴² For example, a treaty which adds precision to a customary rule may be accepted as evidence of practice without delving into details as regards non-treaty practice of other States.⁴³ Additionally, if there is evidence for non-prosecution as regards the *aut dedere aut judicare* obligation, the act must be context-related. If the non-prosecution is related to a conventional obligation, it may be considered a breach of the obligation as shown by the *Habre* case. Although conventional breaches may occur, they may have little impact on the customary duty to prosecute, as shown below.

Hence, two tangible conclusions can be drawn: first, the binding force of customary and conventional international law is autonomous; and, second, such equivalence in terms of non-hierarchy facilitates the alteration or change in one of the sources.⁴⁴ The formation of customary law is an evolutionary process which reflects and embodies developments in the number of ratifying States and the range of concordant, consistent practice in upholding the norm.⁴⁵ Finally, the co-existence of custom has been affirmed in other decisions of the ICJ which indicate that custom might play a supplementary function to a treaty in order to fill the loopholes of a too

⁴² Villiger (n 1) para 85.

⁴³ See *New Jersey v. Delaware* (1933) 291 SCOTUS 361, 381-384 on the application of the *Thalweg* principle.

⁴⁴ Villiger (n 1) para 86. Villiger concludes that based on the lack of hierarchy between the sources of international law, except for *jus cogens* norms, “States may abrogate a customary rule simply by concluding a treaty; the latter may again be modified by new customary law.” The dual applicability principle is also supported by Article 43 of the Vienna Convention on the Law of Treaties which qualifies that treaty denunciations “shall not in any way impair the duty of any State to fulfil any obligation in the treaty to which it would be subject under international law independently of the treaty.”

⁴⁵ Meron (n 14) 78.

general conventional clause.⁴⁶ Hence, custom as a source of international law is not void in its meaning and scope.

2) Methodology on Treaties, Custom and the *Aut Dedere Aut Judicare* Clause

The inclusion and repetition of the *aut dedere aut judicare* clause in multilateral, widely-ratified conventions dealing with specific international crimes articulate state practice and *opinio juris* and evince of customary law. The development of the scope and meaning of the clause, examined in detail in Chapter 2 above, clearly follows a pattern of accretion as “the passage...into customary international law might...be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule...is nothing more than an implementation of a more general standard already laid down in an earlier convention.”⁴⁷ A careful examination of the degree of repetition and re-incorporation of the *aut dedere aut judicare* principle in other multilateral conventions is necessary, as well as affirmation and confirmation of state practice through implementation and application of the principle in national legal orders as regards core crimes and transnational crimes.⁴⁸ Such a process accentuates “accretion, in which the repetition of the articulation and the assertion of certain norms in various resolutions and declarations and treaties plays an important role, elements of state practice and *opinio juris* form new customary norms”.⁴⁹ The reiteration of the

⁴⁶ See *Military and Paramilitary Activities in Nicaragua (Nicaragua/ United States of America)* (Merits) [1986] ICJ Rep 95, para 176; see also *The Continental Shelf Arbitration (UK v. France)* (Judgment) [1979] 75 ILR 54, para 75. See Villiger (n 1) para 421. Custom may change the meaning of the conventional rules or it may provide the treaty clause with flexibility. Customary international law continues to regulate issues not covered by the conventions and apply in relations with and between non-parties, while custom may also serve as an interpretation tool of treaty clauses. See Wood, First Report on Customary Law (n 1) para 35.

⁴⁷ R Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’ (1965) 41 BYBIL 275, 286.

⁴⁸ See T Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1991) 94.

⁴⁹ Meron (n 14) 99.

same or similar conventional rules in different widely ratified, multilateral treaties facilitates the process of identification of the rule through “accumulation, and concentration, of consistent State practice upon these rules over a longer period of time.”⁵⁰

The repetition of the extradite-or-prosecute obligation in various treaties of similar character, such as the hijacking of civil aviation, a precursor to various widely-ratified counter-terrorism conventions, further solidifies the claim of custom accretion around what I label “specific crime clustering” process. The more repetitive in substance one norm is and the more overlap in the application in the various conventions pertaining to criminalization of similar offences in international law, the more accumulative and consistent its binding force is.⁵¹

A similar approach to the clustering formation of customary law was applied by the Special Tribunal for Lebanon. It has found that in order to establish a customary rule, various types of evidence must be considered such as “the behaviour of States, as [crystallization] takes shape through agreement upon international treaties that have an import going beyond their conventional scope or the adoption of resolutions by important intergovernmental bodies such as the United Nations, as well as the enactments by States of specific domestic laws and decisions by national courts.”⁵² The STL pronounced that the punishment, criminalization and prosecution of acts of terrorism in time of peace match “a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the

⁵⁰ Villiger (n 1) para 375.

⁵¹ More than 60 multilateral conventions include the obligation *aut dedere aut judicare* in one form or another. See ILC Secretariat, ‘Survey of Multilateral Conventions that May Be of Relevance for the Work of the International Law Commission on the Topic ‘The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)’ (18 June 2010) UN Doc. A/CN.4/630, para 4. See also, Colleen Enache-Brown and Ari Fried, ‘Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law’ (1998) 43 McGill LJ 613, 629-630.

⁵² *Prosecutor v Ayyash* Interlocutory Decision on the Applicable Law (Appeals Chamber) Case No STL-11-01/I (16 February 2011) para 87.

existence of a rule requiring it (*opinio juris*).”⁵³ The STL examined the clustering effect in binding obligations created by Security Council Resolution 1373 along with various multilateral, near-universal treaties such as the Convention for the Suppression of the Financing of Terrorism, requiring States to cooperate in investigations and extraditions, making such rules “plausibly nascent in the international community.”⁵⁴ Correspondingly, the STL concludes that “terrorism is an international crime classified as such by international law, including customary international law”.⁵⁵

The Special Court for Sierra Leone took a similar approach as regards custom ‘cluster’ formation and treaties. In declaring that the prohibition on child recruitment in armed forces is customary, the SCSL heavily relied on the number of parties to the Geneva Conventions and Additional Protocol II along with the Convention on the Rights of the Child, concluding that “when considering the formation of customary international law, the number of states taking part in a practice is a more important criterion...than the duration of the practice.”⁵⁶

The rest of the chapter provides evidence for the emergence of the *aut dedere aut judicare* duty as international custom pertaining to several categories of core crimes and transnational crimes. The purpose of the examination of the customary nature of the obligation is to link it to particular criminal acts which trigger the applicability of the duty. As shown below, grave criminal acts of international concern must be established first, and then the ‘extradite or prosecute’ provision is

⁵³ *Ayyash Decision* (n 52) para 102.

⁵⁴ *ibid* para 102.

⁵⁵ *ibid* para 104.

⁵⁶ *Prosecutor v. Norman* (31 May 2004) SCSL-2004-14-AR72(E), para 49. ITLOS has also found “a growing number of international treaties and other instruments” containing the same principle indicates a “trend towards making the approach part of customary international law”. See *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion (of the Seabed Disputes Chamber)* International Tribunal for the Law of the Sea (1 February 2011) para 57.

analysed as regards its customary form and applicability. The evidence of the customary nature of the duty might not seem as clear as wished for, but, as established above, a congruence of factors must be taken into account in order to discern state practice and *opinio juris* such as the number of state parties to multilateral conventions, voting records on UN resolutions, domestic decisions, international cases, pronouncements of governments. For example, domestic decisions of at least eight States in eleven cases have established that the obligation *aut dedere aut judicare* exists as a customary rule for war crimes, genocide, crimes against humanity, torture and enforced disappearance.⁵⁷ Such national decisions are considered “sufficiently convincing and extensive” to conclude that the obligation pertaining to core crimes “has crystallized or at least is in the process of crystallizing into a rule of customary international law”.⁵⁸

State practice from the process of ratification of treaties containing the *aut dedere aut judicare* clause could be evinced in three major ways: (1) the number and nature of treaties dealing with specific crimes that include the principle; (2) the number of state parties to a treaty that contains the principle; and (3) the number of treaties with similar scope as regards serious international crimes that a state has ratified which contain the principle.⁵⁹ As the majority of states are parties to treaties explored below such as the Montreal Convention, the Hague Convention, the International Convention on Suppression of Terrorist Bombing, the four Geneva Conventions,

⁵⁷ See M Zgonc-Rozej and J Foakes, ‘International Criminals: Extradite or Prosecute’ (July 2013) Chatham House Briefing Paper ILBP 2013/01, 4.

⁵⁸ See K Kittichaisaree, Informal Working Paper, Working Group on the Obligation to Extradite or Prosecute (5 April 2013) paras 33-34, 189.

⁵⁹ Enache-Brown and Fried, ‘Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law’ 43 McGill Law Journal 613, 628-629. See also, M Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oceana 2002) 39. See also, M Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspective and Contemporary Practice’ (2001) 42 Va JIL 81, 81-150.

the Convention against Torture, scant evidence is available as regards practice of non-parties, if any at all. Such a situation is known as the Baxter paradox:

“as the number of the parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty...As the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminished. There will be less scope for the development of international law dehors the treaty.”⁶⁰

Hence, in widely ratified treaties such as the Geneva Conventions, Baxter asserts, since little state practice of non-parties is generated, “it becomes virtually impossible to determine whether certain clauses of the treaty had indeed passed into customary international law.”⁶¹ In the same line of reasoning, Baxter also offers the possibility for an overbearing, almost-universal ratification of treaties which directly contributes to the custom creation: “a treaty becomes binding upon all nations when a great majority of the world has expressly accepted...that a certain point is reached at which the will of non-parties to the treaty is overborne by the expression of a standard or an obligation to which the majority of States subscribe.”⁶² It should be noted that the overbearing effect on non-parties as regards to the obligatory nature of legal principles enshrined in widely ratified treaties is reached when the “majority of States” subscribe to it in terms of ratifications.

⁶⁰ Baxter, *Recueil* (n 19) 64, 73.

⁶¹ Baxter, *Recueil* (n 19) 96. Baxter continues, “now that an extremely large number of States have become parties to the Geneva Conventions...who can say what the legal obligations of combatants would be in the absence of treaties? And if little or no customary international practice is generated by the non-parties, it becomes virtually impossible to determine whether the treaty has indeed passed into customary international law.”

⁶² R Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’ (1966) 41 BYIL 275, 285-286.

In order to resolve the Baxter paradox, as shown below, the proof of the customary status of the obligation *aut dedere aut judicare* is not exclusively based on the treaty-to-custom pathway but also supported by state practice such as votes in the General Assembly, pronouncements of domestic courts⁶³, statements of state officials, etc.⁶⁴ As shown from the STL's *Ayyash* decision above, the puzzle of whether a norm has attained customary status in international law must be pieced together by fitting various complementing parts.

The actual practice of States and *opinio juris* are the primary material of customary international law “even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”⁶⁵ *Opinio juris* would also be difficult to isolate in the presence of widely ratified agreements, but “support for new rules of customary law will have to be found in the agreement and in the secondary evidence derived from writers, and ...self-serving official state policy statements”⁶⁶ including voting records in international organizations. Additionally, the interpretation of the ICJ in the *North Sea* case indicates that although the Baxter paradox poses an obstacle in delineating the custom-creating capacity of treaties, a multilateral convention is capable under certain conditions of generating international custom.⁶⁷ The Court has affirmed in its more recent decisions that “it is of course axiomatic that material of customary international law is to be looked for primarily in the actual

⁶³ For the role of domestic courts as evidence of state practice, see *Germany v Italy (Greece intervening) case*, para 55.

⁶⁴ Wood, First Report on Customary Law (n 1) paras 48, 51. The approach of States to custom formation may be seen in their statements, including positions before international or regional organizations or smaller groups, along with pleadings before international, regional and domestic courts.

⁶⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta) case* (Judgment) ICJ Rep 1985, para 27.

⁶⁶ J Charney, ‘International Agreements and the Development of Treaties as a Source of Customary International Law’ (1986) 61 Wash L Rev 971, 990.

⁶⁷ I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press 1984) 23.

practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed developing them.”⁶⁸ Hence, it is necessary to look at the interaction between custom and conventional norms in the relevant treaty and attempt to establish the binding nature of the norms.⁶⁹ Such delineation of custom may be seen in state declarations or UN resolution votes which constitute material practice in addition to the processes of extradition or prosecution which may be rooted on state reciprocity or conventional grounds.⁷⁰

It is also asserted that there exists a category of binding principles which directly restrain human rights and humanitarian law violations. Simply put, the formation of customary rules which directly affect the existence of the international legal order along with the protection of human rights and humanitarian norms must be placed in a separate, lower-threshold category. Consideration of different weight of formation and evidence of custom “may be given to different materials depending on the field”.⁷¹ Some suggest that custom in international criminal law “means something different in the context of traditional international law”⁷² with less practice-oriented and more humanitarian interpretation emphasis of the custom formation. For example, the ICTY has recognized a customary rule where the two elements were not strictly established as “principles of international humanitarian law may emerge through a customary

⁶⁸ *Continental Shelf case (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13, 29.

⁶⁹ *ibid* 30.

⁷⁰ R van Steenberghe, ‘The Obligation to Extradite or Prosecute: Clarifying its Nature’ (2011) 9 JICJ 1089, 1095.

⁷¹ Wood, First Report on Customary Law (n 1) para 19. See also, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Judgment) [2012] ICJ Rep 99, para 73.

⁷² W Schabas, “Customary Law or ‘Judge-Made’ Law: Judicial Creativity at the UN Criminal Tribunals”, in J Doria and others (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers 2009), 101. See also, G Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press 2006) 18, cited in Wood, First Report on Customary International Law (n 1) para 68.

process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent”, thus emphasizing the role of *opinio juris* as the decisive element of custom formation.⁷³ Such crimes may pertain to their universal character. The principle *aut dedere aut judicare* pertaining to particular core crimes also belongs in such category as it is the legal mechanism to ascertain the protection or redress of such violations of human rights and humanitarian law, as evidenced below.⁷⁴

Another tool in examining the custom generation capability of treaties is the subsequent practice of state parties which modifies or complements the original conventional provision. The modification through state practice might indicate a generation of a new customary rule albeit the process is rather difficult to separate from the general modification of treaties. Schachter offers an explanation to the phenomenon of widely ratified treaty clauses in the following manner:

“the consequences over time are two-fold: (1) the instrument generally accumulates more authority as declaratory of customary law, and (2) in cases where the declaratory nature of a particular provision is shown to be contrary to the understanding of the drafters...the tendency to apply that provision will in time result in custom ‘grafted’ upon the treaty.”⁷⁵

⁷³ *Prosecutor v Kupreskić* (Judgement) IT-95-16-T (14 January 2000) para 527. Wood concludes, “in other cases Chambers did not always carry out an extensive analysis of State practice and *opinio juris* (not differentiated between them), or merely cited previous decisions of the Tribunal.” See Wood, First Report on Customary International Law (n 1) para 70. See also, *Prosecutor v Kordić and Čerkez* (Judgment) Case No. IT-95-14/2-A (17 December 2004) paras 52-54.

⁷⁴ See C Enoche-Brown and A Fried, ‘Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law’ (1998) 43 McGill LJ 613, 630.

⁷⁵ O Schachter, ‘International Law in Theory and Practice’ (1982-V) 178 *Recueil des cours* 11, 97-98.

Hence, the wide ratification of a multilateral treaty generates support for a certain clause which influences the perception on States as regards the binding nature of the clause. The more included one norm is in various treaties, the more binding and autonomous character it acquires as is the case of the *aut dedere aut judicare* principle in multiple widely-ratified treaties dealing with core international crimes as explored below.

The number of parties to a convention reflects whether the international community regards the incorporated clauses as desirable or binding. The authority of the convention increases in positive proportionality to its signatories. In this manner, more binding force is fostered through increased political and quantifiable authority. The more authority, the more stable the overlap, the more reinforcing the sources are. As concretely pinpointing the moment of customary formation is an arduous task, it is difficult to determine when the critical mass of sufficient practice and belief is reached in light of the State actively or passively engaging or abstaining from implementing the norm.⁷⁶

Custom may be also embodied in various UN resolutions.⁷⁷ States are actively involved in the drafting and voting stages of UN resolutions, which constitute state practice.⁷⁸ A UN resolution may serve a dual function: “it evidences the customary rule at the time of the adoption of the resolution, and that preparation and adoption constitute additional elements of State practice

⁷⁶ ILC, ‘Review of the Commission’s Programme of Work’ (1973) YBILC II 230, para 169. It comes to no surprise that similar approach is taken by the ILC as “the codification convention will continue to be...the most effective means...Its preciseness, its binding character, the fact that it has gone through the negotiating stages of collective diplomacy at an international conference, the publication and wide dissemination of the conventions are all assets that will not lightly be abandoned.”

⁷⁷ See *Ayyash* Decision (n 52) para 86, citing *Bouyahia Maher Ben Abdelaziz* case, Italian Supreme Court, sez. 1 (17 January 2007) para 2.1.

⁷⁸ For heavy reliance of voting patterns, see *Texaco v Libyan Arab Republic Arbitration* (1979) 53 ILR 491, para.87.

confirming a pre-existing customary rule.”⁷⁹ It is inherent that UN resolutions contribute to the progressive development of international law as they reflect political inclinations of States within the General Assembly. The Security Council participates in the law-making process through Chapter VII resolutions when such embody common definitions shown in “international conventions, regional treaties, UN Security Council and General Assembly resolutions, as well as national legislation and case law”.⁸⁰ Hence, the preparatory statements and drafts, lack of reservation, or almost unanimous voting records may indicate first practice instances for custom creation.⁸¹

General Assembly resolutions “may sometimes have normative value. They can...provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption...[A] series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”⁸² As long as the resolution affirms or expressly invokes the existing custom, it might have a general solidifying effect on the original norm. As shown below, UN resolutions are examined in detail as regards their affirmation of the existence of *aut dedere aut judicare* as a customary obligation.

⁷⁹ Villiger (n 1) para 185.

⁸⁰ *Ayyash Decision* (n 1) para 110.

⁸¹ See *Western Sahara Advisory Opinion* (Advisory Opinion) [1975] ICJ Rep 32. States may take certain actions by invoking the resolution, implicitly acknowledging the rules enshrined, or expressly following it by declaring its binding force which contribute to the emergence of new custom.

⁸² *Nuclear Weapons Advisory Opinion* (Advisory Opinion) [1996] ICJ Rep 226, para 70. See also, *Nicaragua case*, para 100: “when examining the *opinio juris*, the Court referred to resolutions of the UNGA and the Inter-American context, as well as to the attitudes of States thereto.”

Votes for draft texts, resolution, agreements and conventions denote the legal conviction of each State vis-à-vis certain norms too. A large majority in favour of a rule indicates a general level of approval and may help discern the existence of *communis opinio juris*.⁸³ The ICJ pronounced in the *Gulf of Maine* case that customary international law “comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice”.⁸⁴ The STL has also examined custom formation to conclude that “a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*”.⁸⁵ The origin of international custom may enshrine “universal values such as peace, human rights, self-determination and justice, but also rules hinging on reciprocity and establishing bilateral relationships...rules where therefore the interest of other States- and the international community as a whole- in strict compliance is very strong.”⁸⁶ This interplay between bilateralism and universalism is particularly pertinent to examining the development of the will of the international community relating to the obligation ‘extradite or prosecute’, as explored in Chapters 2 and 3.

⁸³ Villiger (n 1) para 26.

⁸⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA) case* (Judgment) [1984] ICJ Rep 246, 299. Induction may mean “the operation that consists in gathering evidence to prove the social effect of the rules in question” as proposed in L Condorelli, “Customary International Law: The Yesterday, Today, and Tomorrow of General International Law”, in A Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 148. In comparison, the deductive method of evidence of customary international law attempts to make custom more rapid and flexible, attaching greater value to what the law should be. See H Charlesworth, ‘The Unbearable Lightness of Customary International Law’ (1998), 92 American Society of International Law Proceedings 44.

⁸⁵ *Ayyash* Decision (n 52) para 85.

⁸⁶ *ibid* para 118.

The chapter continues with an exploration of whether certain core crimes and transnational crimes can trigger the customary obligation *aut dedere aut judicare*. The acceptance by the international community of the obligation pertaining to certain international crimes, “those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules,”⁸⁷ is directly linked to suppression of international criminality, rule of law and the goal of availing no safe haven and no impunity for the perpetrators of offences against international order.

PART II: THE CUSTOMARY *AUT DEDERE AUT JUDICARE* OBLIGATION

1) International Minimum Standard: Early Vestiges Of The Obligation *Aut Dedere Aut Judicare*

The exploration of the complex interaction between specific crimes, treaties and custom as regards the *aut dedere aut judicare* principle may be traced back to the late 19th-early 20th century. The origins of the customary obligation to apprehend or punish alleged perpetrators of crimes against non-nationals was founded on the notion of the international minimum standard in international law. This nascent regime resembled the substance of the ‘extradite or prosecute’ principle as the primary obligation on the custodial States was to initiate proceedings against the alleged perpetrator of criminal acts against non-nationals. The international minimum standard also alludes that the obligation to prosecute and punish offenders is not exclusively based in a bilateral relation between the custodial State and the State of the victim but as a community interest.

⁸⁷ *ibid* para 134.

The quintessential definition of the focus on the standard for prosecution, found in the international minimum standard, was elaborated in the *Neer* claim of 1926. The case concerned the murder of an American national in Mexico and the alleged “unwarranted lack of diligence or an unwarranted lack of intelligent investigation in prosecuting the culprits”.⁸⁸ The Arbitral Commission had to deal with the difficult situation of devising a general test “for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty” as regards diligent investigation on part of the Mexican authorities. The scope of the alleged denial of justice was immaterial, in the opinion of the Commission, as what was essential pertained to the existence of an internationally-based standard:

“the propriety of governmental acts should be put to the test of international standards, and...that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”⁸⁹

The international minimum standard was applied to the ability of Mexico to properly fulfil its existing duties and tasks to apprehend and punish the alleged perpetrators of Mr. Neer’s murder. It should be duly noted that the crime is classified as a regular crime, not as a crime of international concern. Hence, even for regular criminal activities there is an applicable international standard which further solidifies the claim that the standard of extradition or

⁸⁸ *L.F.H. Neer and Pauline Neer (USA) v. United Mexican States* (1926) IV Reports of International Arbitral Awards, para 2.

⁸⁹ *Neer Claim* (n 88), para 4. See also other US-Mexican General Claims Commission cases such as *Chevreau* case, *Pope* case, *Roberts* claim, *Janes* Claim, *Quantilla* Claim, *Turner* Claim.

prosecution for core international crimes must be even easier to establish. The Commission found in favour of Mexico as Mexico had not shown “lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable”.⁹⁰

In a separate opinion, Commissioner Nielsen goes even further to link the customary obligation to apprehend and punish with “the requirements of the supreme law of members of the family of nations which is international law, and that any failure to meet those requirements is a failure to perform a legal duty”.⁹¹ It is interesting to note that as early as 1885, in the US-Venezuela *Amelia de Brissot* arbitration, the obligation to apprehend and prosecute/punish was elucidated: “a state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavour made for his arrest and punishment.”⁹² This is one of the earliest affirmations of an existing duty on part of the State to minimize impunity for criminal acts performed by individuals against individuals, a core corrective mechanism of the modern *aut dedere aut judicare* obligation. This example is also pertinent for showing what would have happened if there was no customary obligation to prosecute and the impact on the international system, namely that if there was no treaty in force, the relator would go unpunished or would become a bargaining chip in the hands of the interested governments.

As shown above, domestic decisions are taken into consideration when establishing evidence of state practice and *opinio juris*. In that regards, it is helpful to review some cases in which States’

⁹⁰ *Neer Claim* (n 88) para 5.

⁹¹ *Neer Claim*, Separate Opinion Nielsen, 64.

⁹² *Amelia de Brissot case (US v. Venezuela)* (1885) cited in *Neer Claim*, Sep. Op. Nielsen, 66, and Moore, *International Arbitrations*, vol.3, 2969.

national judicial organs have acted pursuant to the location of the relator in their territories in the presence of an extradition request of the relator, bringing the applicability of the *Neer* Claim to prosecution of non-nationals in a third State even for regular, common domestic crimes like murder.

One such case dealing with the principle *aut dedere aut judicare* concerns the fleeing of a Yugoslav national from Yugoslavia to Austria. The Yugoslav authorities requested the extradition of the relator for fraud charges. Austria could not return the relator back to Yugoslavia, based on the non-refoulement principle. Instead the Austrian judicial authorities initiated proceedings against the relator pursuant to the Austrian criminal code.⁹³ The Austrian Supreme Court proclaimed as regards the applicability of the duty to ‘extradite or prosecute’ in the following manner:

“It is a requirement of the proper administration of justice of a State which, the greater its generosity in granting asylum to political refugees..., the less must be its inclination to waive its subsidiary right to institute criminal proceedings in respect of common crimes committed by such refugees in the territory of a foreign State. This subsidiary right to institute criminal proceedings must be exercised in particular where the extradition of an offender might violate the internationally recognized rights of the refugees.”⁹⁴

The *Milan T.* case illustrates the state practice of invoking a subsidiary right to prosecute offenders whose non-refoulement rights would be violated if transferred to the requesting State. The crucial element for the purposes of the *aut dedere aut judicare* principle is the finding in striking the right balance between human rights protections on one side, and prosecutability of

⁹³ *Public Prosecutor v. Milan T.*, Oberste Gerichtshof (29 May 1958), English Translation available in 28 ILR 341 (1963).

⁹⁴ *Public Prosecutor v. Milan T.*, cited in L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003) 98.

even common crimes on another. The language mentions waiver of rights but it sounds more authoritative in terms of imposing an obligation rather than a mere discretion on the custodial State. The phrase “the subsidiary right...must be exercised” denotes an obligation to exercise the right to prosecute the offender, i.e. an obligation to prosecute the offender based on the extra-territorial principle. The subsidiary right in the particular case does not deal with the actual duty to prosecute but concerns the jurisdictional base to institute criminal proceedings against the offender. Additionally, the Austrian Supreme Court correctly denotes and applied the underlying principle of suppressing criminality as otherwise the crime would go unpunished and the perpetrators of even common crimes would enjoy impunity and safe havens. The undertone of the necessity for the obligation *aut dedere aut judicare* is clearly discernible in the *Milan T.*’s decision and in the origins of the international minimum standard as the obligation aims at protecting the community interests of all States as evinced in Chapter 1 and 5.

2) Core Crimes and *Aut Dedere Aut Judicare*

a. The Prohibition of Torture

The examination of the proposed customary status of the *aut dedere aut judicare* obligation begins with core crimes which trigger such a duty. The framework and methodology used in exploring the customary nature are similar to what was applied in this and previous chapters.

The Convention against Torture with its 153 State Parties is a widely ratified treaty containing an *aut dedere aut judicare* provision pertaining to the *jus cogens* prohibition of torture.⁹⁵ As proven below, the customary obligation of the *aut dedere aut judicare* clause is incorporated in Article 7(1) which obliges a State Party to bring the case to its competent authorities for the purpose of prosecution for commission, attempt to commit or complicity or participation in torture if no extradition takes place.⁹⁶ The obligation is satisfied once the situation is referred to the relevant authorities for the purpose of prosecution.⁹⁷ The discussion on the CAT here is illustrative and evidentiary of the *aut dedere aut judicare* clause as Chapter 2 provided detailed opportunity for discussion on the substantive elements of the obligation.

States are obliged to bring the case to its competent authorities for the purpose of prosecution if no extradition of the alleged offender for conventional or customary acts of torture occurs.⁹⁸ The specific grounds of jurisdiction include the principle of territoriality, including a ship and aircraft of the State and factual control over occupied or any other territories, nationality of the alleged

⁹⁵ For *jus cogens* status of torture, see *Prosecutor v Anto Furundzija* (Judgment) IT-95-17/1 (10 December 1998) para 144. See also, Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33, E/CN.4/1986/ 15 (19 February 1986) para 50, where it is stated that “States should adopt appropriate measures to consider torture as an ‘international crime’.”

⁹⁶ Article 4 of the Convention against Torture establishes that all acts of torture should be criminal offences under domestic law and such offences are punishable through sufficiently severe penalties. Nonetheless, commentators note that each State Party is left the discretion to decide whether torture would be enlisted as a separate offence or such acts of torture would be included under the chapeau of wider categories of serious offences such as grievous bodily harm, assault, unlawful compulsion. See JH Burgers, *The United Nations Convention against Torture: a handbook on the Convention* (Nijhoff 1988) 129.

⁹⁷ The ICJ in the *Habre* case pronounced that the domestic authorities retain a certain level of prosecutorial discretion as “the competent authorities involved remain responsible for deciding whether or not to initiate prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.” See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422, para 90.

⁹⁸ Article 4 of the Convention against Torture establishes that all acts of torture should be criminal offences under domestic law and such offences are punishable through sufficiently severe penalties. Nonetheless, commentators note that each State Party is left the discretion to decide whether torture would be enlisted as a separate offence or such acts of torture would be included under the chapeau of wider categories of serious offences such as grievous bodily harm, assault, unlawful compulsion. See Burgers (n 96) 129.

offender, and passive nationality principle in cases the State considers it appropriate.⁹⁹ There is also as a save-all clause of particular importance for the *aut dedere aut judicare* duty as it establishes that a State shall have jurisdiction over torture offences in all cases where the alleged perpetrator is found on its territory under its jurisdiction and does not extradite the person to a requesting State.

The origin of the extradition clause dates back to the preparatory documents of 1979 when upon a Swiss proposal, extradition of the relator was perceived as inconceivable unless the person was provided “a proper trial by a court guaranteeing a fair judgement and...[detention] in humane conditions.”¹⁰⁰ In 1980 the ‘extradite or prosecute’ principle was roughly formulated as “if a State which otherwise would be obliged to extradite did not do so...it shall take the necessary measures to bring the person, whose extradition it refuses to grant, to trial.”¹⁰¹ At the same session, upon a Swedish proposal, the obligation of a State on whose territory a suspected relator was present to either extradite to another State with jurisdiction over the offence or to submit the case to its own judicial authorities for prosecution was drafted. Such an interpretation may imply that the obligation *aut dedere aut judicare* predated the Convention itself.¹⁰²

⁹⁹ Convention against Torture, art 5(1).

¹⁰⁰ JH Burgers, *The United Nations Convention against Torture: a handbook on the Convention* (Nijhoff 1988) 49. Although the clause was tightly connected to the non-refoulement principle, the general standard of prosecution resulting from the extradition process helps elucidate its meaning.

¹⁰¹ See Working Group on the UN Convention against Torture (1980) HR (XXXVI)/WG.10/WP.8/Add.1, cited in Burgers (n 100) 55.

¹⁰² See 1986 Special Rapporteur Kooijmans Report (n 95) para 87. See also, Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, E/CN.4/1987/13 (9 January 1987) para 38.

It should be noted that the framework of the original tri-partite obligation, accentuated in the travaux préparatoires, has been preserved in substantive terms. First, the State must have jurisdiction over the person who is alleged to have committed any offence in its territory. Second, if the State does not extradite him, it is under an obligation without exception and no matter whether the offence was committed on its territory or not, to submit the case to its competent authorities for the purpose of prosecution. Finally, the decision of the same authorities must be taken after strict consideration of the offence through the application of a similar approach to similar offences of a serious nature under the laws of that State.

In order to satisfy the obligation to prosecute, the jurisdictional State must submit the case to the competent authorities for the purpose of prosecution. The result of the submission and initiation of prosecutorial action is not essential. It was affirmed in the ICJ's *Habre* decision that the submission of the case to the relevant domestic authorities "may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect."¹⁰³ The State may not need to submit the case for the purpose of prosecution "if the State in whose territory the suspect is present has received a request for extradition" as long as the requested State accedes to the extradition request.¹⁰⁴ In other words, the custodial State has the option to be relieved of the obligation to prosecute if it concurs to extradite the relator to another State.

The ICJ made it clear that "the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same

¹⁰³ *Belgium v Senegal*, Judgment (n 97) para 94.

¹⁰⁴ *ibid* para 95.

weight.”¹⁰⁵ In this manner, the obligatory nature of the prosecution requirement is preserved, which is triggered once the State knows that a suspect is within its territory. The customary primacy of prosecution is affirmed as “extradition is an option offered to the State... whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.”¹⁰⁶ Hence, the extradition part of the *aut dedere aut judicare* principle is interpreted to be of a discretionary, permissive character, which allows a State concerned to be relieved of the absolute obligation to prosecute. The extradition element serves as a supplementary mechanism to ensure that a State where the relator is located does not want to or cannot investigate and submit for prosecution is able to fulfil its obligations by transferring the suspect to the requesting State.

Such an interpretation is in conformity with the preparatory documents of CAT as shown above. The presence of an extradition request is not significant as the deciding factor of establishing jurisdiction over the relator for the purposes of the prosecution obligation is whether the person is present on the territory or under the control of the custodial State and whether the person is extradited or not. Therefore, as long as the actual extradition does not take place, either as a result of no extradition request being received or refusal to grant the request, it can be considered “a sufficient basis for creating the obligation to submit the case to the prosecuting authorities of the State”.¹⁰⁷ Indeed, the Committee has pronounced that,

“the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State

¹⁰⁵ *ibid* para 95.

¹⁰⁶ *ibid* para 95. See also, *Belgium v Senegal*, Donoghue declaration, para 4.

¹⁰⁷ *Burgers* (n 96) 137.

party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished.”¹⁰⁸

As the CAT formula is one of the most popular exemplifications of the *aut dedere aut judicare* principle, the ICJ’s *Habre* case serves as appropriate interpretive guidance to the inseparable connection between criminalization, preliminary inquiry and the obligation of prosecution or extradition as the judgment dealt narrowly only with the conventional obligations. Belgium requested the ICJ to decide and declare that Senegal is obliged to bring criminal proceedings against Habre, and, if it fails to do so, to extradite the relator to Belgium for the purposes of prosecution.

The holistic approach as regards the underlying norms could be summed up as follows: the requirement to implement the adequate and appropriate legislation into domestic law enables the State in which territory a suspect is present to initiate immediately a preliminary inquiry into the facts of the case in order for the same State “with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution”.¹⁰⁹ The Court affirmed that “[t]he purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.”¹¹⁰ Hence, a three-step process is elucidated: from the introduction of criminalization and

¹⁰⁸ *Suleymane Guengueng et al. v Habre* Comm No 181/2001 (18 April 2001) CAT/C/36/D/181/2001, para 9.7.

¹⁰⁹ *Belgium v Senegal*, Judgment (n 97) para 72.

¹¹⁰ *Belgium v Senegal*, Judgment (n 97) para 74. The Court elaborated that the obligation to establish universal jurisdiction and implement the offences in the domestic legal orders as regards the crime of torture is a necessary

appropriate jurisdiction bases through utilizing prosecution of the suspect to a common mission on an inter-state level to eliminate impunity as “these obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven.”¹¹¹

In various separate opinions and declarations attached to the *Habre* judgment, the teleological purpose behind the obligation was elucidated as its aim is to “strike a powerful blow against impunity.”¹¹² Judge Owada’s declaration is pertinent to the customary status of the obligation ‘extradite-or-prosecute’ as he reflects on the customary status as well as on the conventional nature of the obligation, *inter alia*.¹¹³ Judge Owada does not perceive the Convention as a mere compilation of various newly-minted obligations but as “a comprehensive legal framework for enforcing the principle *aut dedere aut judicare*, so that the culprit of the crime of torture may not get away with impunity.”¹¹⁴ The obligations are not just conventional but substantive and customary. Hence, it is a mistake if too formalistic an approach is applied in interpreting the framework as the more appropriate manner is to examine the subject-matter dispute between the parties as one incorporating the whole process of implementation by the State party of the ‘extradite or prosecute’ principle.¹¹⁵ Owada claims correctly that “nothing substantive would change in terms of the main course of the reasoning part of the Judgment” as the obligations

condition for the implementation of Article 6(2) (namely, the initiation and commencement of a preliminary inquiry) and Article 7(1) (namely, the submission of the case to competent judicial authorities for the purpose of prosecution).

¹¹¹ *Belgium v Senegal*, Judgment (n 97) para 91.

¹¹² *Belgium v Senegal*, Donoghue declaration, para 2.

¹¹³ *Belgium v Senegal*, Owada Declaration, para 5. “It is thus the totality of the conduct of Senegal with respect to Mr. Habré in the years from 2000 up to 2009, when the case was filed by Application, in which Belgium charges Senegal with breach of its international obligations, *inter alia*, under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”.

¹¹⁴ *Belgium v Senegal*, Owada Declaration, para 10.

¹¹⁵ *Belgium v Senegal*, Owada Declaration, para 13.

underlying Article 5(2) and 7(1) pertaining to jurisdiction and the duty “extradite-or-prosecute” are of customary character and were already binding on Senegal.¹¹⁶

It is also interesting to note that neither Belgium nor Senegal disputed the possibility for the Court to rule on the customary status of the obligation. To the contrary, Belgium clearly stated that the dispute is about “Senegal’s failure to act in its obligations to punish crimes under international humanitarian law”¹¹⁷ and in its Final Submissions that “Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and *under other rules of international law* by failing to bring criminal proceedings against Hissène Habré for acts characterized in particular as crimes of torture, war crimes, crimes against humanity and the crime of genocide alleged against him as perpetrator, co-perpetrator or accomplice, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings.”¹¹⁸ Senegal did not dispute the nature of the obligation; it simply asserted that there is no dispute between the parties.¹¹⁹ Both parties to the case did not dispute the possibility for the Court to look at evidence relating to the customary nature of the obligation. Such a stand by both parties could be evidence of state practice as Belgium and Senegal did not deny the customary status of the obligation in their submissions. Finally, the analysis of the Court in the *Habre* case is extremely valuable as the ILC referred to the case on multiple occasions as the obligation *aut dedere aut judicare* pertaining to the *jus cogens* crime of torture

¹¹⁶ *Belgium v Senegal*, Owada Declaration, para 14.

¹¹⁷ *Belgium v Senegal* (Application instituting proceedings) [2009] Gen List 144, 3. See also, *Belgium v. Senegal*, Owada Declaration, para 13.

¹¹⁸ *Belgium v Senegal*, Judgment (n 97) para 13, summarizing the position of Belgium.

¹¹⁹ *Belgium v Senegal* (Counter-Memorial of the Republic of Senegal, 23 August 2011) para 162, accessible at <<http://www.icj-cij.org/docket/files/144/16931.pdf>>.

“could serve as a model for new prosecute-or-extradite regimes governing prohibitions covered by peremptory norms (*jus cogens*), such as genocide, crimes against humanity, and serious war crimes.”¹²⁰

As a response to the ICJ judgment, Senegal entered into an agreement with the African Union in 2012 for the creation of the Extraordinary African Chambers within the Senegalese judicial system. The EAC could be classified as an internationalized court as the Presidents of the Trial and Appeals Chambers are non-Senegalese nationals. The 2013 Statute of the EAC stipulates that it has jurisdiction “to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad”.¹²¹ More importantly, the four crimes within the jurisdiction of the EAC are the crime of genocide, crimes against humanity, war crimes, and torture.¹²² As the EAC was specifically created as a response to the breach by Senegal to uphold its obligation to extradite or prosecute Habre as decided by the ICJ in 2012, it could be asserted that the Statute of the EAC reflects the four core crimes which trigger the obligation *aut dedere aut judicare*. Habre’s trial commenced before the EAC in July 2015¹²³ with charges for murder, summary executions, enforced disappearance and torture amounting to crimes against humanity, war crimes of murder, torture, unlawful transfer, and violence to life and physical well-being.¹²⁴

¹²⁰ ILC, Annex A, Working Group on the Obligation Extradite or Prosecute, para 21.

¹²¹ See the Statute of the Extraordinary African Chambers, art 3(1).

¹²² The Statute of the Extraordinary African Chambers, art 4.

¹²³ The Guardian, “Former Chad Dictator’s War Crimes Trial Opens in Senegal” (20 July 2015), accessed on 26 September 2015 at <<http://www.theguardian.com/world/2015/jul/20/former-chad-dictator-hissene-habre-war-crimes-trial>>.

¹²⁴ See Extraordinary African Chambers, “Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la Chambre Africaine Extraordinaire d’Assises” (13 February 2015), accessed on 26 September 2015 at <http://www.chambresafricaines.org/pdf/OrdonnanceRenvoi_CAE_13022015.pdf>.

Case law of international and internationalized criminal tribunals “may prove valuable” for formation and evidence of custom.¹²⁵ The ICTY has dealt with the obligation to extradite or prosecute of *jus cogens* crimes such as torture. In the famous pronouncement from the *Furundžija* decision, the ICTY states:

“at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”¹²⁶

Although the ICTY talks about an entitlement to investigate, prosecute and punish or extradite the suspected perpetrators of torture, it should be duly noted that the decision refers to what creates the ability of a State in terms of legal base and universal jurisdiction. The language of the 1998 judgment reflects a permissive rule to prosecute. In order to clarify the significance of the pronouncement on the obligation ‘extradite-or-prosecute’, it is necessary to distinguish between the legal concepts of universal jurisdiction and *aut dedere aut judicare*. The former deals with whether jurisdiction exists in the domestic legal system to submit the case for the purpose of prosecution, and whether there is an internal law on universal jurisdiction to permit such prosecution, while the obligation ‘extradite-or-prosecute’ does not necessarily embody the applicability of extra-territorial jurisdiction. Universal jurisdiction is just one of the legal bases which triggers the obligation among territoriality, passive and active nationality jurisdictions, as established above in Chapter 2. It should be recalled that the obligation *aut dedere aut judicare* as a rule in international law only obliges the State to submit the case for the purpose of

¹²⁵ Wood, First Report on Customary International Law (n 1) para 66.

¹²⁶ *Prosecutor v Anto Furundžija* (Judgment) IT-95-17/1 (10 December 1998) para 156.

prosecution or extradite the relator. The appropriate legal base may make the obligation more effective but it would be a far stretch to equate jurisdiction with the obligation.¹²⁷ Alternatively, the jurisdiction provisions in the widely ratified conventions discussed in this chapter may be seen as “pooling the jurisdiction of different States and supplementing them by extended co-operation in extradition”, thus, extending the traditional perceptions and applicability of jurisdiction.¹²⁸

National decisions can evince the existence of a customary rule. Such decisions that are not reached for “considerations of convenience or simple political expediency”¹²⁹ but are taken “in combination with national legislation and the international attitude of States as taken in international fora, evince that...those decisions reflect a legal opinion (*opinio juris*)”.¹³⁰ If there exists evidence of consistent practice, such might be used as a presumption of the existence of *opinio juris*, falling outside decisions made for expediency, comity or political convenience.¹³¹

The Pinochet trilogy in the late 1990s shed light on the applicability of the extradition regime pertaining to acts of torture. For the purpose of the present chapter, it should be emphasized that the issues of immunities, universal jurisdiction and what constitutes the crime of torture are not relevant. More importantly, the discussion would focus on the meaning of extradition and the obligations on the part of the UK authorities.

¹²⁷ See Van Steenberghe (n 70) 1106 where it is correctly concluded, “although being one of the most important elements of such an implementation system, the obligation to assert extraterritorial jurisdiction nevertheless remains conceptually distinct from the obligation to extradite or prosecute itself.”

¹²⁸ See Louis Henkin, ‘International Law, Politics, Values and Functions’ (1989-IV) 216 RdC 9, 301.

¹²⁹ See *Asylum (Colombia v Peru) case* (Judgment) 266 ICJ Rep (1950) 286.

¹³⁰ *Ayyash Decision* (n 52) para 100.

¹³¹ *Ayyash Decision* (n 52) para 101, citing M Sorensen, ‘Principles de droit international public’ (1976) Recueil des Cours 51.

Lord Hutton sums up in the best possible manner the duty to submit cases of core crimes against international order for the purposes of prosecution which predates the CAT:

“Therefore since the end of the Second World War there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that *the international community is under a duty to bring to justice a person who commits such crimes*. Torture has been recognised as such a crime.”¹³² (emphasis added)

As the prohibition of torture constitutes *jus cogens*¹³³, domestic courts are vested with the obligation to ensure that “the torturer was not safe wherever he went.”¹³⁴ The crime is against the public order of the community of States. The undertone of the interests of the international community is materialized in a very coherent and powerful manner through the binding rule to extradite or prosecute for alleged perpetrators of *jus cogens* crimes. Moreover, the *jus cogens* nature of the prohibition against torture imposes an obligation *erga omnes* on all States to punish the perpetrators of such criminal acts.¹³⁵ Hence, the obligation *aut dedere aut judicare* allows for the state where the alleged offender is found to be held to the absolute obligation to prosecute

¹³² *Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.3) [2000] 1 AC 147 (HL 1999) 260 (Lord Hutton).

¹³³ *Prosecutor v Furundzija*, para 153: “Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.” See also, *Siderman de Blake v. Republic of Argentina* (1992) 965 F.2d, 699, 714-717.

¹³⁴ *Pinochet* (No.3) (n 132) per Lord Wilkinson-Browne 198.

¹³⁵ *Pinochet* (No.3) (n 132) per Lord Hope 242. See also, 1987 Kooijmans Report, Questions (n 95) para 44: “There is no doubt that the right not to be tortured belongs to this category of basic human rights and that, consequently, all States have a legal interest in compliance with the prohibition of torture, in other words the transgressor of this prohibition is responsible to the international community as a whole and, in principle, other States may bring a claim as representatives of the that community.”

torture if no extradition takes place.¹³⁶ In this manner, the ‘extradite or prosecute’ principle ensures “that torturers do not escape by going to another country.”¹³⁷

Lord Hope correctly outlines that “once the machinery which it provides was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state, it was no longer open to any state which was a signatory to the Convention to invoke the immunity *ratione materiae* in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity.” The non-applicability of immunity has also attained customary status as pertaining to *jus cogens* violations in criminal cases¹³⁸, another mechanism to ensure the effective functioning of prosecution of core international crimes.

The recent ECtHR’s *Jones* decision might be construed as undermining the “no safe haven” argument. The ECtHR found that “State’s right to immunity may not be circumvented by suing its servant or agents instead” in civil cases relating to *jus cogens* violations.¹³⁹ At closer reading, however, when individual criminal responsibility is invoked in a criminal context, the criminal liability for acts of torture seem not to trigger the applicability of *ratione materiae* immunity.¹⁴⁰ In brief, the principles of law of immunity pertaining to civil claims are not the same as those pertaining to criminal cases and prosecution. The ECtHR looked at several domestic cases

¹³⁶ See *Burgers* (n 96) 131.

¹³⁷ *Pinochet (No.3)* (n 132) per Lord Goff 212.

¹³⁸ *Pinochet (No.3)* (n 132) per Lord Hope 248.

¹³⁹ *Case of Jones and others v UK* App nos. 34356/06 and 40528/06 (ECtHR, 14 January 2014) paras 210, 213.

¹⁴⁰ *Jones v UK*, para 207. The ECtHR reviews the case law of various states as regards the applicability of *ratione materiae* immunity to civil claims in paras.119-149. Immunity *ratione personae* for acting heads of state may not be violated even if they are summoned to give testimony as indicated in the ICJ’s *Mutual Assistance* case. See *Certain Matters of Mutual Assistance in Criminal Matters (Djibouti v France)* case (Judgment) ICJ Rep 2008.

indicating that criminal cases are not identical to civil claims when the issue of immunities is raised. For example, the French Assize Court in the criminal case of *Ould Dah* for acts of torture committed in Mauritania by a Mauritanian State official upheld the conviction of the defendant and rejected the applicability of immunity.¹⁴¹ In the *Bouterse* case for pre-CAT acts of torture, the plea of immunity by the former Surinamese head of state was rejected by the Amsterdam Court of Appeal.¹⁴² Additionally, the Dutch court established jurisdiction as it found that the Surinamese judicial system would not follow the obligation to prosecute the suspect.¹⁴³ Finally, in the Swiss *A v Attorney General and Others* case, the Swiss Federal Criminal Court refused to grant immunity to an Algerian national, a former defence minister, for war crimes and torture by referring to the *Pinochet* decision which was used as first evidence of the exception of the applicability of *ratione materiae* immunity for serious violations of human rights and *jus cogens* character.¹⁴⁴ Furthermore, it could be concluded that core crimes of international law such as torture, war crimes and genocide do not extend functional immunity, supported by more domestic decisions such as the *Eichmann* case in Israel, *Kappler* and *Priebke* in Italy¹⁴⁵, *Rauter* and *Albrecht* in the Netherlands¹⁴⁶, *von Lewinski* in a British Military Court¹⁴⁷, the *Yamashita* case in the US, *Buhler* case in Poland, among others.¹⁴⁸ Hence, the *Jones* case and, namely, the applicability of immunities does not affect the functioning of the *aut dedere aut judicare*

¹⁴¹ See *Jones v UK* (n 140) para 150.

¹⁴² See *Jones v UK* (n 140) para 151. See also, *Desi Bouterse* case, Court of Appeal of Amsterdam (3 March 2000) para 5.4.

¹⁴³ *Desi Bouterse* case, para 3.1. See also, Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005) 94.

¹⁴⁴ See *Jones v UK* (n 140) paras 152-153.

¹⁴⁵ *Kappler* case (25 October 1952) Judgment by Tribunale Supremo Militare, cited in Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium Case*' (2002) 13(4) EJIL 853, 870.

¹⁴⁶ *Rauter* case, Special Court of Cassation (12 January 1949), and *Albrecht* case, Special Court of Cassation (11 April 1949), cited in Cassese, 'Comments on the *Congo v. Belgium Case*' (n 145) 870.

¹⁴⁷ See Cassese, 'Comments on the *Congo v. Belgium Case*' (n 145) 871.

¹⁴⁸ Cassese, 'Comments on the *Congo v. Belgium Case*' (n 145) 870-871. See also, *Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin) paras 99 and 101.

principle as it concerns not civil, but criminal proceedings. Most of these cases also concern extra-territorial prosecution for acts of torture and serve as evidence of state practice relating to the duty to prosecute acts of torture.

The obligation to prosecute alleged perpetrators of torture may also be found in other domestic decisions such as the *Demjanjuk* case, in which the US judiciary strongly pronounced that such individuals are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”¹⁴⁹ As shown above, the discussion of the applicability of the *aut dedere aut judicare* principle is not strictly limited to the Torture Convention but pertains to the general link between the customary *erga omnes* obligation to prosecute *jus cogens* crimes in criminal cases. Hence, the *Pinochet* cases categorically assert the extra-conventional applicability of the ‘extradite or prosecute’ duty as the duty itself could not be anchored in just one treaty for, as shown above, it serves as a linking mechanism between jurisdiction, prosecution, and minimization of impunity.

The *Pinochet* case is also helpful in delineating the link between an ability to establish jurisdiction and the principle *aut dedere aut judicare*. Lord Millett correctly asserts that there is a customary obligation, crystallized in the CAT, to establish jurisdiction for the crime of torture: “whereas previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were not placed under an obligation to do so. Any state in whose territory a person alleged to have committed the offence was found was bound to offer to extradite him or

¹⁴⁹ *Demjanjuk v. Petrovsky* (1985) 603 F.Supp. 1468.

to initiate proceedings to prosecute him.”¹⁵⁰ It is correctly concluded that “if it does not seek his extradition...then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself.”¹⁵¹

General Pinochet was returned to Chile without being extradited to Spain pursuant to a decision by Jack Straw, UK Home Secretary on health reasons. It should be duly noted that Jack Straw used the medical report which indicated that Pinochet was not fit to stand trial. The Home Secretary did not dispute the obligation on part of the UK authorities to extradite the relator but invoked humanitarian grounds as a defence not to comply with the duty to extradite or prosecute. In this manner, pursuant to the *Nicaragua* principle, the UK may be perceived as solidifying the notion that the obligation exists in international law; the UK authorities did not deny the existence and applicability of the obligation for a single moment.¹⁵² Such a conclusion can be reached as consistent national legislation can indicate the emergence of a customary rule, even if the domestic law incorporates international treaties in the domestic legal order.¹⁵³

In another UK decision, the *Zardad* case, the UK court found that the accused Afghani was guilty of conspiring to torture and take hostages through the criminalization of the crimes of

¹⁵⁰ *Pinochet (No.3)* (n 132) per Lord Millett 277.

¹⁵¹ *Pinochet (No.3)* (n 132) per Lord Millett 278.

¹⁵² See Letter from the Home Office to the Spanish Ambassador of 2 March 2000, reproduced in R Brody and M Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer International Law 2000) 471-472.

¹⁵³ *Ayyash* Decision (n 52) para 91.

torture and hostage taking in the legislation which also implemented the *aut dedere aut judicare* principle.¹⁵⁴ It is the first UK case under the ‘extradite or prosecute’ provision.

When there is no existing possibility for submitting the case for the purpose of prosecution in the *locus delicti* judicial system, the duty to prosecute without waiting for any extradition requests has been applied for the crime of torture. For example, after the end of the Nepal’s civil war in 2006, the Maoist factions and the Nepalese government reached a Comprehensive Peace Agreement, which called for the establishment of a Truth and Reconciliation Commission (TRC), vested with powers “to probe about those involved in serious violations of human rights and crime against humanity in course of the armed conflict and develop an atmosphere for reconciliation in the society.”¹⁵⁵ The push for a TRC has been compromised as there are serious grounds to conclude that the TRC process would be used as a tool to grant amnesty while civil society groups and victims are pushing for prosecution of the most responsible perpetrators.¹⁵⁶ The UN Office of the High Commissioner for Human Rights has also expressed a negative opinion of the creation of the TRC as it would be a mechanism to instil impunity and discourage accountability. The OHCHR reminds that the Nepalese authorities are under an obligation “by international law, [to] provide an effective remedy to victims by prosecuting suspected perpetrators wherever suspicion exists that they have directly participated in violations, or are

¹⁵⁴ *R v. Zardad* Old Bailey (18 July 2005). See also C Mitchell, ‘Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law’ Collections électronique de l’Institut de hautes études internationales et du développement, Geneva (2011) para.41.

¹⁵⁵ Comprehensive Peace Agreement held between Government of Nepal and Communist Party of Nepal (Maoist), (signed 21 November 2006), art 5.2.5.

¹⁵⁶ ‘UK Exercises Universal Jurisdiction to Prosecute Nepalese Colonel for Torture’ International Justice Resource Center (9 January 2013).

responsible due to their command responsibility at the time.”¹⁵⁷ In December 2012, the Nepalese government decided to terminate the agreement with the OHCHR, a further evidence that prosecution of alleged perpetrators of torture would be impossible as the Nepalese government is unwilling or unable to submit such cases for the purposes of prosecution. No criminal prosecutions have been taken related to the conflict in Nepal.¹⁵⁸ The attitude of the Nepalese authorities resembles the controversial position taken by South Africa in the post-apartheid period relating to the establishment of the TRC and its constitutionality.¹⁵⁹ In such circumstances, Colonel Lama, a Nepalese national, was charged in the UK with two counts of torture allegedly perpetrated in the course of the Nepal’s civil war in 2005. The physical presence of Col. Lama in the UK was sufficient for his arrest to be executed under the relevant provision as it allows for prosecution of torture committed “in the United Kingdom or elsewhere”.¹⁶⁰

In conclusion, there is strong evidence that the obligation *aut dedere aut judicare* pertaining to the *jus cogens* prohibition of torture has attained customary character and could be triggered without the presence of a treaty clause. As shown in the Chapter 5 below, the ‘extradite or

¹⁵⁷ UN OHCHR, ‘Nepal Conflict Report’ (October 2012), ch 11. See also, OHCHR, ‘Nepal: Truth-seeking legislation risks further entrenching impunity, alert UN rights experts’ (4 July 2014) accessed at <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14824&LangID=E>>.

¹⁵⁸ R Booth, ‘UK Defends Decision to Prosecute Nepalese Colonel Accused of Torture’, *The Guardian* (6 January 2013), accessed at <http://www.guardian.co.uk/law/2013/jan/06/uk-defends-prosecute-nepalese-colonel>.

¹⁵⁹ See *AZAPO et al v The President of the Republic of South Africa* case CCT 17/96, Constitutional Court of South Africa (25 July 1996) paras 25, 26, 31, where the Constitutional Court of South Africa did not directly address the obligations to prosecute violations of the Geneva Conventions but reflected upon the role of international law as regards constitutional interpretation of the TRC Act. Additionally, the Court discussed the applicability of Article 6(5) of Protocol II to the Geneva Conventions of 1949 as a justification for amnesty provisions. However, the Court did not address the issue of whether core crimes disapply amnesties.

¹⁶⁰ Criminal Justice Act 1988, s 134.

prosecute' duty is also of *erga omnes* character which further solidifies its status as customary law pertaining to specific crimes of international law.

b. Genocide

The Genocide Convention of 1948 with its 142 State Parties includes a qualified extradite or prosecute formula. The obligation is triggered for acts of genocide, conspiracy to commit genocide, direct or public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. Additionally, Article 6 provides an obligation for the offences to be tried before a *locus delicti* court or before an international tribunal, a provision that has expanded in the practice of States as shown below.

After several suggestions to include an explicit obligation to extradite relators, the drafters opted for a broader formulation.¹⁶¹ It is undisputed that the obligation to criminalize acts set out in Articles 2 and 3 of the Genocide Convention has reached a *jus cogens* character. The Conventional extradition regime has been expanded to include the applicability of the customary 'extradite or prosecute' clause. Although there is a *prima facie* obligation to assert territorial jurisdiction, "the *travaux préparatoires* do reveal an understanding that this obligation was not intended to affect the right of a State to exercise criminal jurisdiction over its own nationals for acts committed outside the State."¹⁶² Correspondingly, in extradition pursuant to a domestic law

¹⁶¹ See UNGA Sixth Committee (3rd Session) 'Report on Genocide: Draft Convention and Report of the Economic and Social Council' (3 December 1948) UN Doc a/760, para 14.

¹⁶² See *Arrest Warrant case* (Joint Sep Op Higgins, Kooijmans and Buergenthal) [2000] ICJ Rep, para 27.

or a treaty, no State may refuse extradition based on the premise that its domestic law does not provide a specific legal basis.¹⁶³

Article 7 of the Genocide Convention does not contain an express obligation to ‘extradite or prosecute’.¹⁶⁴ Nonetheless, the *aut dedere aut judicare* duty could be discerned from an extensive purposive interpretation of Article 7 and as evident in subsequent state practice and *opinio juris*.¹⁶⁵ As already established, the obligation for co-operation, materializing to the largest possible extent through the process of extradition, serves as the cornerstone of the whole Convention regime.¹⁶⁶ A modern interpretation of the obligation indicates that the principle ‘extradite or prosecute’ is inherent in the mechanism of closing the impunity gap for core international crimes, including the *jus cogens* crime of genocide. Such reading is in line with one of the main purposes of the Genocide Convention to expand the scope of core crimes under international law by specifically including the crime of genocide, triggering individual criminal responsibility as well as the obligation to prosecute.¹⁶⁷

The reason why the obligation was not expressly included stems from the confusion between the ‘extradite or prosecute’ duty and universal jurisdiction, similar to the confusion on the exact

¹⁶³ R Roth, ‘The Extradition of Genocidaires’ in P Gaeta (ed), *The UN Genocide Convention- A Commentary* (OUP 2009) 287.

¹⁶⁴ See R Roth, ‘The Extradition of Genocidaires’ in P Gaeta (ed), *The UN Genocide Convention- A Commentary* (OUP 2009) 286. The strict language of Article 7 of the Genocide Convention offers a peculiar formulation for extradition proceedings as seemingly the first goal of the drafters was to eliminate or neutralize the applicability of the political offence exception to extradition of suspected perpetrators. In essence, the elimination of the political offence exception is based on the premise that substantively the commission of the crime of genocide cannot be classified as political. For more on the political offence exception, see Chapter 3.1.

¹⁶⁵ Roth (n 163) 305.

¹⁶⁶ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep, 23.

¹⁶⁷ C Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer 2008) 110.

same issue described above in respect of torture.¹⁶⁸ As the aim of the Convention is to prevent impunity and commission of genocide, extradition serves as a means to achieve this goal. The lack of objections to the two ‘non-extradition of own national’ reservations could be explained precisely through the applicability of the *aut dedere aut judicare/prosequi* principle. If the reserving State refuses to extradite, then it must initiate proceedings against the relator in its own legal system.¹⁶⁹

In circumstances where the chance of trials in the custodial State are low or non-existent, the only credible mechanism when there was no international tribunal vested with jurisdiction over the crime of genocide is to prosecute in a willing and able foreign court pursuant to the obligation *aut dedere aut judicare*.¹⁷⁰ Especially in the case of a *jus cogens* crime such as genocide, an *erga omnes* obligation on all States to prosecute the alleged perpetrators is inherently denoted in the mechanism of acting against the violators of *jus cogens* norms. The role of the *aut dedere aut prosequi* obligation fits perfectly in such an overall goal that concerns the interests of all States, especially for the crime of genocide, as it is a mechanism, “a common endeavour in the face of atrocities...[and] a determination...that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished.”¹⁷¹

The regime of ‘extradite or prosecute’ is correctly labelled as a mechanism in which national courts play significant and important roles in terms of enforcing and shaping international law. Hence, domestic courts complement and interact actively with other international and domestic

¹⁶⁸ Roth (n 163) 306. See also, R Kolb, *Droit international penal* (Helbing 2008) 90.

¹⁶⁹ Roth (n 163) 289-290.

¹⁷⁰ See *Arrest Warrant case*, Sep.Op. Higgins and others (n 162) para 78.

¹⁷¹ *ibid* para 51.

courts as “a trend is discernible that...the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited.”¹⁷² Correspondingly, the ICTR has sweepingly pronounced in the *Akayesu* case that “the Genocide Convention is undeniably considered part of customary international law” after a reference to previous ICJ decisions and pronouncements of the UN Secretary-General.¹⁷³

The customary obligation ‘extradite or prosecute’ for genocide offences does not explicitly give priority to extradition or a free choice between both options. Various scholars propose that the model is based on the *primo prosequi secundo dedere* principle which obliges parties to unconditionally search and bring perpetrators to trial first, similar to the *jus cogens* torture regime.¹⁷⁴ Although the concept that extradition is subsidiary to prosecution is absent in the preparatory documents of the Genocide Convention, the primacy of the territoriality principle along with passive and active personality jurisdictional bases is affirmed in the ICJ’s *Genocide Convention* case of 2007. There the ICJ interprets Article 6 of the Genocide Convention as asserting the primacy of the prosecution obligation:

“Article VI obliges the Contracting Parties ‘which shall have accepted [international tribunal] jurisdiction’ to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory- even if the crime of which they are accused was committed outside it and, *failing prosecution of them in the parties’ own courts*, that they will hand them over for trial by the competent international tribunal.”¹⁷⁵

¹⁷² *ibid* para 75.

¹⁷³ See *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) para 495.

¹⁷⁴ Roth (n 163) 307.

¹⁷⁵ *Application of the Genocide Convention (Bosnia-Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 233, para 443. See also, Roth (n 162) 307.

The language of the judgment indicates a primacy of domestic prosecution and a recourse to surrender to an international tribunal or to extradite to another State in case that no such prosecution takes place. Hence, although no extradition obligation is expressly provided, “it would seem that the State refusing extradition would itself have to prosecute the accused.”¹⁷⁶ Indeed, the custom enshrined in Article 7 read in conjunction with Article 6 of the Genocide Convention contemplates an obligation on the State in which territory acts of genocide take place to prosecute, although nothing in this language affects the right of any State to “bring before its own tribunals any of its national for acts committed outside the State” as well as to prosecute non-nationals for acts against its citizens.¹⁷⁷

The described legal mechanism aims at “trial and punishment under international law of certain crimes”.¹⁷⁸ The ICJ has stated that “the obligation that each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”¹⁷⁹ Hence, the conventional and customary obligation “is really an obligatory territorial jurisdiction over persons” as the primary obligation is to submit the case for the purpose of prosecution.¹⁸⁰ Moreover, it is permissible to establish universal jurisdiction for these international core crimes as “the duty to prosecute...opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality.”¹⁸¹ Moreover, the interest of the

¹⁷⁶ N Robinson, *The Genocide Convention- A Commentary* (Rausen Brothers 1960) 87.

¹⁷⁷ N Robinson (n 176) 85-86. See also UNGA Sixth Committee (134th meeting) ‘Conclusion of the consideration of the draft convention on genocide: report of the Economic and Social Council’ (2 December 1948) A/C.6/SR. 134, 5, for the Swedish interpretation of Article 6 of the Genocide Convention.

¹⁷⁸ *Arrest Warrant case*, Sep.Op. Higgins and others (n 162) para 21.

¹⁷⁹ *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia-Herzegovina v. Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 616, para 31.

¹⁸⁰ *Arrest Warrant case*, Sep.Op. Higgins et al (n 162) para 41.

¹⁸¹ See *Arrest Warrant case*, Sep.Op. Higgins et al (n 162) paras 46, 58. See also, T Meron, ‘International Criminalization of Internal Atrocities’ (1995) 89 AJIL 576.

international community is vested in the prosecution of acts of genocide because “their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations”.¹⁸² Finally, the ICTR has also encouraged “all States...to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law.”¹⁸³

The *Arrest Warrant* Joint Opinion correctly identifies the delicate connection between jurisdiction and the obligation ‘extradite-or-prosecute’: “there cannot be an obligation to extradite someone you choose not to try unless that person is within your reach” as the obligation to prosecute or extradite is based on the premise of *in personam* jurisdiction, a crucial condition for the obligatory exercise of the *aut dedere aut judicare* duty.¹⁸⁴ Additionally, universal jurisdiction may be exercised when the national State of the accused does not take the offer to prosecute the person.¹⁸⁵ Such an approach was reiterated in the *Guatemalan Generals* case in Spain.¹⁸⁶ Hence, “if the underlying purpose of designating certain acts as international crimes is to authorise a wide jurisdiction to be asserted over persons committing them, there is no rule of international law which makes illegal co-operative acts designed to secure the presence within a State wishing to exercise jurisdiction.”¹⁸⁷

¹⁸² *Attorney-General of Israel v Eichmann* (Israel Supreme Court 1962) 36 ILR 277, 304.

¹⁸³ *Prosecutor v Ntuyahaga* (Decision on the Prosecutor’s Motion to Withdraw the Indictment) ICTR-90-40-T (18 March 1999) pt 1.

¹⁸⁴ *Arrest Warrant case*, Sep.Op. Higgins and others (n 162) para 57.

¹⁸⁵ See *Arrest Warrant case*, Sep.Op. Higgins and others (n 162) para 57.

¹⁸⁶ See R Cryer, *Prosecuting International Crimes* (CUP 2005) 90.

¹⁸⁷ See *Arrest Warrant case*, Sep.Op. Higgins and others (n 162) para 58.

The crime of genocide is also within the jurisdiction of the recently-created Extraordinary African Chambers in Senegal.¹⁸⁸ As the EAC was specifically created as a response to the breach by Senegal to uphold its obligation to extradite or prosecute Habre as decided by the ICJ in 2012, it could be asserted that the Statute of the EAC reflects the four core crimes including genocide which trigger the obligation *aut dedere aut judicare*.

Additionally, the International Law Commission posits in Articles 9 and 17 of the Draft Code of Crimes against the Peace and Security of Mankind that “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 is found shall extradite or prosecute that individual” for the crime of genocide.¹⁸⁹

State practice also indicates that the ‘extradite or prosecute’ obligation is inherent to the Genocide Convention. For example, the Austrian Supreme Court in the *Cvjetković* case decided that where an extradition to the *locus delicti* State was impossible due to lack of a functioning judicial system, Austria was to apply the *aut prosequi* rule in accordance with its treaty and *customary obligations* to prevent and punish acts of genocide.¹⁹⁰ Essentially, the Austrian court ruled that once the duty to extradite ceases to be effectively applicable due to impossibility to extradite or lack of a functioning *locus delicti* judicial system, the object and purpose of the

¹⁸⁸ The Statute of the Extraordinary African Chambers, art 4.

¹⁸⁹ ILC, Draft Code of Crimes against the Peace and Security of Mankind, art 9 (1996) YBILC. See also, Guy Goodwin-Gill, ‘Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute’ in Guy Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press 1999) 220.

¹⁹⁰ See *Cvjetković case*, Beschluss des Obersten Gerichtshofs Os99/96-4, Judgment of 13 July 1994.

mechanism availed and required prosecution.¹⁹¹ Moreover, in the joint separate opinion of Judges Higgins, Kooijmans, and Bruegenthal, the *Cvjetković* case is given as an example of the applicability of the obligation to prosecute genocide when the legal system of the *locus delicti* State is not functioning and there is no international tribunal where the accused could be transferred to.¹⁹²

Finland provides another clear example of how the obligation *aut dedere aut judicare* provides solutions for inability to extradite to the requesting State. Finland's authorities refused to extradite Francois Bazaramba in February 2009 to Rwanda for genocide and murder. Finland used the ICTR conclusions at that time as regards the problems with the right to fair trial in Rwanda. On 1 June 2009 Bazaramba was charged with genocide and murder before Finnish courts on the basis of universal jurisdiction. The trial concluded on 11 June 2011 after hearing witnesses in Finland, Rwanda and Tanzania. The Porvoo District Court found Bazaramba guilty of genocide, murder and incitement to murder.¹⁹³

Another pertinent example of how the customary obligation to extradite or prosecute has evolved since the entering into force of the Genocide Convention is the Australian *Nulyarimma v. Thompson* decision. The case concerned a group of indigenous Australians who brought a case accusing Australia of genocide. Justice Wilcox of the Federal Court of Australia pronounced on

¹⁹¹ See J Wouters and S Verhoeven, 'The Prosecution of Genocide- in Search of a European Perspective' in R Henham and P Behrens (eds), *The Criminal Law of Genocide* (Ashgate 2007) 198. Interestingly, the Austrian courts applied the dual criminality test in this particular case. As genocide was criminalized in Bosnia-Herzegovina, charges could be brought against Dusko Cvjetkovic under Austrian criminal law. Namely Article 65(1)(2) of the Strafgesetzbuch.

¹⁹² See *Arrest Warrant case*, Sep.Op. Higgins and others (n 162) para 22.

¹⁹³ See *Ahorugeze v Sweden* App no 37075/09 (ECtHR, 27 October 2011) para 66.

the connection between the crime of genocide, its peremptory character, and the obligation *aut dedere aut judicare*:

“The prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogable obligation by each nation state to the entire international community. This is an obligation independent of the *Convention on the Prevention and Punishment of the Crime of Genocide*. It existed before the commencement of that Convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946. I accept, also, that *the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention.*”¹⁹⁴ (emphasis added)

Justice Wilcox correctly links the duty to extradite or prosecute to the nature of the criminal act, i.e. the alleged perpetration of genocide. Note that the Convention is used for enshrining and defining the acts which already have attained a *jus cogens* character. Hence, it could be concluded that *jus cogens* crimes such as the commission of genocide trigger a customary duty to extradite or prosecute. In this manner, another core crime according to the classification established in Chapter 2 triggers a customary obligation to extradite or prosecute, strengthening the argument that when the interests of the international society are concerned such as the minimization of impunity for core crimes, the mechanisms to suppress such criminal activities find their sources not only in widely-ratified conventions but also in customary international law. Additionally, Justice Wilcox correctly noted that the *aut dedere aut judicare* principle is not a substitution for a universal jurisdiction legal base in the internal system of the forum State.¹⁹⁵

The commission of the crime of genocide directly affects the interests of all States in a most blatant manner due to the elements and consequences of the crime for every nation and the

¹⁹⁴ *Nulyarimma v Thompson* [1999] FCA 1192, para 20; published in (2000) 39 ILM 20.

¹⁹⁵ *ibid.* See also, Mitchell (n 154) para 40.

global community. Based on the evidence of state practice and *opinio juris* explored above, there exists a customary *aut dedere aut judicare* obligation triggered by the *jus cogens* prohibition of the international core crime of genocide.

c. Grave Breaches Of The Customs Of War and The Geneva Conventions

Articles 49 of the Geneva Convention I, 50 of the Geneva Convention II, 129 of the Geneva Convention III, and 146 of the Geneva Convention IV expressly provide for the applicable ‘extradite or prosecute’ regime in the Geneva Conventions.¹⁹⁶ No reservations have been made with regard to the common provisions.¹⁹⁷ The originally proposed text for the language of these common articles was based on the *aut dedere aut punire* principle, used as a basis for extradition.¹⁹⁸

The articles have supported the customary status in international law of the duty to search for any alleged violator of grave breaches and an obligation to try such person, or, if the State prefers, to transfer the person to another State concerned.¹⁹⁹ The obligation to search for the alleged

¹⁹⁶ See Geneva Convention I, art 49; Geneva Convention II, art 50; Geneva Convention III, art 129; and Geneva Convention IV, art 146. The same articles also contain clauses obliging High Contracting Parties to pass legislation which either allows for jurisdiction or provides the necessary grounds for extradition of the relator to the *locus delicti* state.

¹⁹⁷ ILC, ‘Survey of Multilateral Conventions which May Be of Relevance for the Work of the International Law Commission on the Topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”’ (18 June 2010) A/CN.4/630, para 58.

¹⁹⁸ The original text of 1946 was “Each Contracting Party shall be under obligation to search for the persons alleged to be guilty of breaches of the present Convention, whatever their nationality, and in accordance with its own laws or with the conventions prohibiting acts that may be considered as war crimes, to indict such persons before its own tribunals, or to hand them over for judgment to another Contracting Party.” See Commentary to the Geneva Conventions, 619. See also, XVIIth International Conference of the Red Cross, ‘Draft Revised or New Conventions for the Protection of War Victims’ 134.

¹⁹⁹ See Commentary to the Geneva Conventions, 363.

perpetrators of grave breaches²⁰⁰ is triggered as soon as the State becomes aware that the alleged perpetrator is on its territory. The engagement of the law enforcement authorities of the State is automatic. The State must search for the person without waiting for a request from another State. Once the person is apprehended, “it is its duty to see that such person is arrested and prosecuted without delay.”²⁰¹

The four identical articles have most importantly been pronounced by States to represent customary law: “the principles...are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent’s own armed forces.”²⁰²

Once *ratione personae* jurisdiction over such persons is established, the State “shall bring such persons, regardless of their nationality, before its own courts.” The nationality of the accused is immaterial as the proceedings before the judicial authorities of the prosecuting State must be uniform in the sense that “nationals, friends and enemies should all be subject to the same rules of procedure, and should be judged by the same courts.”²⁰³

The threshold for the prosecution prong of the obligation is to initiate judicial proceedings before the judicial authorities of the custodial State where the alleged perpetrator is apprehended. As

²⁰⁰ Cryer, *Prosecuting International Crimes* (n 186) 83. See also, *Prosecutor v. Tadic* (Trial Judgment), IT-94-1-T (7 May 1997) para 577.

²⁰¹ Commentary to the Geneva Conventions, 365-366.

²⁰² United States of America Army Field Manual No.27-10, ‘The Law of Land Warfare’ (1956) para 506. The four identical articles enshrining custom begin with a requirement for the High Contracting Parties to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”

²⁰³ Commentary to the Geneva Conventions, 366.

soon as the person is apprehended by the authorities of the detaining State, the same State is under a duty “to ensure that the person concerned is...prosecuted with dispatch.”²⁰⁴ There is no requirement that the prosecution must be successful in terms of obtaining a conviction. The custodial State has an alternative option; it may, if it prefers, hand or extradite the same person over for trial to another State under several conditions.²⁰⁵

The customary obligation for prosecution or extradition is for grave breaches of the Geneva Conventions. Article 50 of the Geneva Convention I defines grave breaches as “willful 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” if committed against persons or property protected by the Convention.²⁰⁶ Some scholars assert that the customary *aut dedere aut judicare* provisions must be read along with the assistance and cooperation clause in criminal proceedings for grave breaches.²⁰⁷

The ‘extradite or prosecute’ provisions ascertain that no grave breaches would remain unpunished as each State is obliged to search for the alleged perpetrator who has committed or has given orders to commit a grave breach with the proviso that each State on which territory or

²⁰⁴ Commentary to the Geneva Convention III, 623.

²⁰⁵ First, the State with control over the relator has the discretion to extradite the person to another State. Second, such discretion to extradite the relator must be with accordance with the provisions of its own domestic legislation which serves as a guarantee for respecting the human rights of the relator. The Commentary explicitly addresses the issue of non-extradition of own nationals.

²⁰⁶ Article 130 of the Geneva Convention III adds to the list of grave breaches “compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Article 147 of the Geneva Convention IV includes as grave breaches the taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

²⁰⁷ See G Gilbert, *Responding to International Crimes* (Martinus Nijhoff 2006) 361.

under which jurisdiction the relator is located may hand over the accused to be tried by another State willing to prosecute the relator based on a *prima facie* case made by the requesting State. The absolute nature of the *aut dedere aut judicare* principles enshrined in the common Articles of the four Geneva Conventions is affirmed for “as long as the penal repression of grave breaches is ensured, the right of each Contracting Party to choose between prosecuting a person in its power or to hand him over to another Party interested in prosecuting him therefore remains absolute, subject to the legislation of the Party to which the request is addressed.”²⁰⁸ Hence, it could be construed that there is an inherent mechanism to facilitate extradition to an interested State if the requesting State could justify its legal interest in wanting to prosecute the relator on the basis of *locus delicti*, or of commission of the grave breaches against own nationals.

The ICJ’s *Arrest Warrant* case clarifies the evidence of state practice for the obligation ‘extradite-or-prosecute’ as regards the violations of customs of war, war crimes and crimes against humanity. Belgium identified during the hearings before the ICJ that it attempted to “entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution.”²⁰⁹ The Congolese authorities did not deny their incumbent obligation to submit the case for the purpose of prosecution but stated that the Belgian “proposals appear to have been made very belated, namely *after* an arrest warrant against Mr. Yerodia had been issued.”²¹⁰ The DRC admitted that the State is under an obligation to prosecute if the relator is present on its territory and that other States have the right to seek extradition if the custodial State does not

²⁰⁸ See Commentary to the Additional Protocol I of the Geneva Conventions, para 3577.

²⁰⁹ *Arrest Warrant of 11 April 2000 case (Democratic Republic of Congo v Belgium)* [2002] ICR Rep 3, para 16.

²¹⁰ *ibid.*

submit the case for the purpose of prosecution.²¹¹ Belgium firmly asserted that there was an obligation under international law to prosecute serious international crimes such as violations of the Geneva Conventions and customs of war and crimes against humanity.²¹²

The ICJ also shed some light on the contentious issues of jurisdiction and the obligation to prosecute violations of the laws and customs of war and crimes against humanity and possible applicability of immunities: “it is only where a State had jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regards to the exercise of that jurisdiction.”²¹³ In the words of the Court, “jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.”²¹⁴ The conventional and customary obligations to prosecute remain intact and binding on the States as long as the States are able to extend criminal jurisdiction over the alleged perpetrator. The Court concludes that “immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts” as the former is procedural while the latter is a matter of substantive law, incorporating the obligation to prosecute serious international crimes.²¹⁵ The important factor is that the substantive duty to prosecute is affirmed in all these cases.

²¹¹ See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Democratic Republic of the Congo Memorial) CR 2001/6 (15 May 2001) 33.

²¹² See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Belgium Counter-Memorial) (28 September 2001) para 3.3.25-26.

²¹³ *Arrest Warrant case* (n 209) para 46. The Court strongly affirmed that “The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.” See *Arrest Warrant case* (n 209) para 48.

²¹⁴ *Arrest Warrant case* (n 209) para 59.

²¹⁵ *Arrest Warrant case* (n 209) para 57, 60. “Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.” The Court also provided evidence that such interpretation has been affirmed by various domestic courts which have expressed willingness and ability to prosecute the alleged perpetrator of serious international crimes, such as terrorism, once that immunity is no longer applicable.

Additionally, the war crimes of murder, torture or inhuman treatment, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or other protected person to serve in the armed forces, depriving a prisoner of war or other protected person of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement, taking of hostages along with serious violations of Common Article 3 are within the jurisdiction of the recently-created Extraordinary African Chambers in Senegal.²¹⁶ As the EAC was specifically created as a response to the breach by Senegal to uphold its obligation to extradite or prosecute Habre as decided by the ICJ in 2012, it could be asserted that the Statute of the EAC reflects the four core crimes including war crimes which trigger the obligation *aut dedere aut judicare*.

The UN General Assembly has been active in affirming the obligatory customary nature to prosecute war criminals.²¹⁷ Such state declarations are perceived as a flexible instrument “capable of meeting the needs of the constantly evolving international community and contemporary international relations”.²¹⁸ The resolutions indicate that universal repression of most grievous international crimes such as war crimes and crimes against humanity has been perceived as being a duty to the international community. Various resolutions “make it difficult to deny a worldwide trend towards recognizing a customary nature to the obligation to extradite

²¹⁶ The Statute of the Extraordinary African Chambers, art 4 and art 7.

²¹⁷ See, e.g. Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, UNGA Res 3074(XXVIII) (3 December 1973) UN Doc. A/RES/3074(XXVIII). See also, Ward Ferdinandusse, ‘Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty’ (2014) 18(15) ASIL Insight 3.

²¹⁸ Van Steenberghe (n 70) 1093.

or prosecute.”²¹⁹ The resolutions stipulate an international criminal law regime based on investigation and prosecution of core crimes as war crimes, crimes against humanity and genocide with the ultimate goal of “detention, arrest, extradition and punishment of all war criminals who have not yet been brought to trial or punished.”²²⁰ Particular emphasis is drawn to the legal aspect that there exists “a special need for international action in order to ensure the prosecution and punishment of persons guilty of war crimes and crimes against humanity.”²²¹

Principles of international co-operation in the detection, detention and arrest, extradition, and punishment of perpetrators of war crimes and crimes against humanity are established with emphasis on the obligation for States to assist each other in “detecting, arresting and bringing to trial persons suspected of having committed such crimes” through implementation of “domestic and international measures necessary for that purpose.”²²² Moreover, refusal to act in such cases is perceived as contrary to the purposes of the UN Charter and “generally recognized norms of international law”²²³ as such omissions breach “recognized principles of international law, to arrest such persons and extradite them.”²²⁴ The concern behind these resolutions indicates that many alleged perpetrators of WWII crimes had managed to take refuge and enjoy protection by

²¹⁹ Van Steenberghe (n 70) 1099.

²²⁰ Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, UNGA Res 2583(XXIV) (15 December 1969) UN Doc. A/RES/2583(XXIV). See Question of the Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity, UNGA Res 2712(XXV) (15 December 1970) UN Doc. A/RES/2712(XXV); Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, UNGA Res 3074(XXVIII) (3 December 1973) UN Doc. A/RES/3074(XXVIII).

²²¹ ‘Question of the Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity’, UNGA Res 2583 (XXIV).

²²² ‘Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity’, UNGA Res 3074 (XXVIII).

²²³ ‘Question of the Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity’, UNGA Res 2840 (XXVI) (18 December 1971) UN Doc. A/RES/2840(XXVI).

²²⁴ ‘Question of the Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity’, UNGA Res 2712 (XXV).

States, albeit their effective punishment directly affects “peace and international security.”²²⁵ Additionally, the General Assembly also passed the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity which aim at prosecuting such crimes committed anywhere at any time.²²⁶

The language of UNGA Resolution 2712 of 1970 affirms the *aut dedere aut judicare* principle as regards the fight against impunity in case of war crimes as it “urges all States to implement the relevant resolutions of the General Assembly and to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes.” General Assembly Resolution 2840 of 1971 also “affirms that the refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.” These two resolutions, passed with few or no “no votes”, evince state practice and *opinio juris* as regards the duty to prosecute. The fight against impunity for perpetration of war crimes and crimes against humanity is facilitated through close judicial cooperation including investigation, prosecution and, if need be, extradition of suspected offenders. General Assembly Resolution 60/147 of 2006 also obliges States to investigate, submit to prosecution and punish persons found guilty of violations of international human rights and humanitarian law.

²²⁵ ‘Question of the Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity’, UNGA Res 2840 (XXVI).

²²⁶ See UNGA Res 3074 (n 222).

The customary character of the obligation *aut dedere aut judicare* pertaining to war crimes and crimes against humanity is also found in the Resolution on Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.²²⁷ The Resolution categorically affirms that States need to assist each other in “detecting, arresting and bringing to trial persons suspected of having committed [war crimes and crimes against humanity] and, if they are found guilty, in punishing them.” The Resolution also provides that no haven must be availed to alleged perpetrators of war crimes and crimes against humanity and that extradition plays an essential role in minimizing impunity and ensuring prosecution. In general, it is noticeable that all material acts of States reflected in the Resolution pertaining to the obligation *aut dedere aut judicare* follow the universality status of core crimes as affecting the international community as a whole along with the state practice discussed below.

The voting record of the resolutions²²⁸ evinces that the majority of the States firmly stand behind the obligation to prosecute.²²⁹ No State voted against and the abstention votes were not concerned with the obligation *aut dedere aut judicare*.²³⁰ The voting is crucial in delineating

²²⁷ See UNGA Res 3074 (n 222) 78.

²²⁸ GA Res 2583 (XXIV) is passed with 74 votes for, 5 against and 32 abstentions. GA Res 2712 (XXV) is passed with a voting record of 55-4-33 with 35 non-voting member states. UNGA Res 3074 (XXVIII) is passed with 94-0-29, 12 states not casting their vote. UNGA Res 2840 (XXVI) is passed with 71-0-42, with 19 non-voting states.

²²⁹ See ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, UNGA Res 60/147, UN Doc. A/RES/60/147 (16 December 2005). See also P Akhvan, ‘Whither National Courts? The Rome Statute’s Missing Half’ (2005) *Journal of International Criminal Justice* 1245, 1260-1261. See also, J Paust and others, *International Criminal Law: Cases and Materials* (Carolina Academic Press 2000) 138.

²³⁰ See Van Steenberghe (n 70) 1100. Van Steenberghe asserts that the abstention votes primarily concerned the lack of clarity on the definition of the crimes. See, concerning UNGA Res 2840 (XXVI), statements from the UK (UN Doc. A/C.3/SR.1902, 9 December 1971, para. 70); France (*ibid.*, para 76) and Norway (*ibid.*, para 80). See,

opinio juris in order to overcome the Baxter paradox in widely ratified treaty *aut dedere aut judicare* clauses. The voting record also indicates the will of the significant majority of States to perceive the obligation as binding and rooted in conventional and customary law, thus directly affirming the crucial role it plays for the proper functioning of the international society.

The Security Council has also contributed through the adoption of various resolutions on war crimes, crimes against humanity and core crimes. The resolutions remind States not to leave perpetrators of core crimes unpunished.²³¹ Other UN bodies such as the Economic and Social Council have also passed resolutions with inclusion of the *aut dedere aut judicare* obligation for arbitrary and summary execution crimes.²³²

The ILC has also commented extensively on the customary obligatory nature of the ‘extradite or prosecute’ principle. In the commentary to the Draft Code of Crimes against the Peace and Security of Mankind in 1996²³³, the ILC proposes Article 9, enshrining customary law, which establishes the *aut dedere aut judicare* regime as regards the crimes of genocide, crimes against humanity, crimes against the UN and associated personnel and war crimes. The ILC correctly identifies the purpose of the obligation as “the fundamental purpose...is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent

concerning UNGA Res 3074 (XXVIII), statements from Kuwait (UN Doc. A/C.3/SR.2021, 9 November 1973, para 33), Oman (ibid., para 13); Cameroon (ibid., para 14) and Spain (ibid., para 21).

²³¹ See UNSC Res 1318 (2000); UNSC Res 1325 (2000) para 11; UNSC Res 1612 (2005), preambular section; UNSC Res 1674 (2006) para 8. See also Van Steenberghe (n 70) 1101.

²³² See ECOSOC Res 1989/65 (24 May 1989) para 18.

²³³ The Draft Code culminated into the establishment of the ICC pursuant to the passing and entering into force of the Rome Statute with 121 State Parties at the current moment.

jurisdiction.”²³⁴ The custodial State is vested with the responsibility to uphold its existing obligation to prosecute core crimes under international law but the principle *aut dedere aut judicare* ensures that “the custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial State may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other State or by prosecuting that individual in its national courts.”²³⁵ In terms of establishing the correct legal base for submission of the case for the purposes of prosecution, “the physical presence of the alleged offender provides a sufficient basis for the exercise of jurisdiction”.²³⁶ Finally, the absence of a request for extradition in no manner releases the custodial State from the obligation to prosecute the alleged perpetrator.

International tribunals have also looked at the customary obligation to extradite or prosecute perpetrators of grave breaches of the Geneva Conventions and customs of war. The ICTY has categorically pronounced in the *Blaskić* case that,

“National courts of the States of the former Yugoslavia, like the courts of any State, are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law.”²³⁷

The language of the customary obligatory nature of the *aut dedere aut judicare* principle pertaining to grave breaches of international humanitarian law is more than categorical and unambiguous. The newly independent States of the former Yugoslavia could not use excuses for

²³⁴ Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 31.

²³⁵ *ibid* 31.

²³⁶ *ibid* 32.

²³⁷ *Prosecutor v Tihomir Blaskić* (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14-AR (29 October 1997), para 29.

being non-parties to the Geneva Conventions in order to delay prosecution or extradition of grave breaches of international humanitarian law. In such circumstances, the value and function of the customary obligation *aut dedere aut judicare* serve as closing legal loopholes.

The Appeals Chamber of the ICTY in the same judgement under Judge Cassese also affirmed that States have the primary duty to uphold the principle *aut dedere aut judicare* in relations to grave breaches of international humanitarian law:

“It is with regard to national courts generally that the International Tribunal may exercise its primacy under Article 9, paragraph 2, or, if those courts fail to fulfil that customary obligation, may intervene and adjudicate. The fact that the crimes falling within its primary jurisdiction were committed in the former Yugoslavia does not in any way confine the identity of the States subject to Article 29; all States must cooperate with the International Tribunal.”²³⁸

The ICJ has also alluded to the notion of how some of the clauses of the Geneva Conventions have attained a customary status in international law. In the *Threat or Use of Nuclear Weapons* Advisory Opinion, the Court categorically concludes,

“the extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of *treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles*. These rules indicate the normal conduct and behaviour expected of States.”²³⁹ (emphasis added)

²³⁸ *ibid* para 29.

²³⁹ *Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 84.

One such clause that has not been denounced or reserved against, containing a universally recognized principle, is the ‘extradite or prosecute’ principle for grave breaches of international humanitarian law as seen above and below.

Domestic decisions dealing with the obligation *aut dedere aut judicare* relating to grave breaches of international humanitarian law could also be used as evidence of state practice and *opinio juris*. The *Dinko Sakić* case is probably the most appropriate illustrative example pertaining to the customary duty *aut dedere aut judicare* in regards to grave breaches of international humanitarian law. In 1998 Dinko Sakić, a naturalized Argentine national of Croatian origin, was indicted on charges of crimes against humanity and war crimes against civilian population, including torture, inhuman treatment, killing of civilians, intimidation to forced labour and starvation and collective punishment for his role as a commander at the Jasenovac Concentration Camp in 1944.²⁴⁰ Dinko Sakić was in Argentina at the time of the indictment and there was no extradition treaty in force between Croatia and Argentina at the time of the extradition request issued by Croatia in 1998. Argentina authorized the immediate extradition to Croatia of Sakić despite the lack of extradition treaty.²⁴¹ Following his extradition to Croatia and trial for war crimes and crimes against humanity perpetrated *before* the entry into force of the Four Geneva Conventions, Sakić was found guilty of all counts and sentenced to 20 years in prison.²⁴² The *Sakić* case is particularly important for the purposes of this section as it pertains to an extradition

²⁴⁰ Indictment against Dinko Ljubomir Sakić, Office of the Country Prosecutor in Zagreb, No DO-K-141/98, Zagreb (14 December 1998).

²⁴¹ See Decree No.583/98 (PEN) granting a request for extradition and authorizing immediate transfer to the Republic of Croatia of a naturalized Argentine citizen Dinko Sakic, 15 May 1998 (entered into force on 27 May 1998), accessible at <<http://www.icrc.org/ihlnat.nsf/6fa4d35e5e3025394125673e00508143/2c9ec73e0286b5364125694a0033d6ce!OpenDocument>>.

²⁴² ‘Dinko Sakic: Concentration Camp Commander’, *The Independent*, 24 July 2004.

from a custody State based on no international or bilateral treaty as the alleged offences were perpetrated before the Geneva Conventions entered into force, a powerful evidence of the customary status of the obligation to prosecute grave violations of international humanitarian law following extradition.

In the Swiss case of *Niyontenze*, the alleged offender was in Switzerland and subsequently convicted of war crimes for his participation in the internal armed conflict in Rwanda in 1994. The ICTR did not exercise jurisdiction over the case while the Swiss authorities refused to extradite the relator to Rwanda for the purposes of prosecution. The first conviction was obtained in a municipal court under the premise that the person must be prosecuted if there is refusal to extradite the alleged offender.²⁴³ However, the conviction was problematic as the universal jurisdiction was exercised pursuant to Common Article 3 of the Geneva Conventions as the Additional Protocol II does not contain the obligation ‘extradite or prosecute’. A second case was lodged with a military tribunal pursuant to the Swiss Military Penal Code which allows for universal jurisdiction for the violations of the laws or customs of war.²⁴⁴

A similar line was taken in the ‘Butare four’ case in Belgium.²⁴⁵ As there was a request by Rwanda for the extradition of the relator, Switzerland decided to prosecute the relator after such request was denied on humanitarian grounds. The essential element as regards the obligation to prosecute or extradite is the fact that the Swiss authorities initiated prosecution of Niyontenze

²⁴³ *Military Prosecutor v Niyontenze*, Tribunal Militaire Division 2, Lausanne, Judgment of 30 April 1999. See Reydam (n 94) 99.

²⁴⁴ See *Military Prosecutor v Niyontenze*, Tribunal Militaire, Div. 2, Lausanne (30 April 1999), upheld by Tribunal Militaire d’appel IA, Geneva (26 May 2000), and Tribunal militaire de cassation (27 April 2001). See also, Mitchell (n 154) para 41.

²⁴⁵ See Cryer, *Prosecuting International Crimes* (n 186) 93.

pursuant to the refusal to extradite him to Rwanda for war crimes. Findings of domestic courts as regards customary law should be considered carefully as domestic courts traditionally operate within their own constitutional limits²⁴⁶, meaning that courts apply domestic laws oftentimes without clearly distinguishing between international custom and treaty obligations. Nonetheless, domestic decisions serve as evidence of state practice as established above in Part I.

In the *Polyukhovitch v. The Commonwealth* case, the High Court of Australia adjudicated as regards the obligatory or permissive jurisdiction to prosecute non-nationals for war crimes committed abroad.²⁴⁷ In light of the War Crimes Amendment Act of 1988, Australia possesses the right, if not an obligation, to prosecute and punish offenders who have committed customary war crimes outside of the territory of Australia. The High Court pronounced that there is a right on part of Australia to prosecute an alleged offender for war crimes and crimes against humanity. Justice Brennan based his argument for the non-existence of a customary duty to prosecute war crimes and crimes against humanity as regards a period pre-dating the Geneva Conventions since the case dealt with crimes committed during World War II. In this narrow finding, Justice Brennan simply asserted that the obligation to prosecute or extradite war crimes as custom did not exist before the entry into force of the Geneva Conventions; Brennan did not look into the subsequent practice of states and *opinio juris* in the period after the end of World War II which this section does.²⁴⁸ It is also problematic that the decision did not look into the pertinent issue of whether the principle was subsidiary to the customary crime at hand. Hence, the decision seemingly banded together the notion of universal jurisdiction as the correct base for prosecuting

²⁴⁶ Wood, First Report on Customary International Law (n 1) para 84.

²⁴⁷ *Polyukhovitch v. The Commonwealth* [1991] 172 CLR 501.

²⁴⁸ *ibid* (Justice Brennan), para 28.

the alleged offender and the obligation of the forum State to initiate prosecution against the relator if the same is refused to be extradited.

The evolution of individual criminal responsibility and prosecutability of war crimes is considered to be the most firmly established in international law in comparison to other core crimes. From ancient examples of provisions prohibiting certain behaviour in times of war such as 6th-Century Roman Emperor Maurice's *Strategica* and the Byzantine *Ecloga of the Laws* through prosecutions of Conradine von Hofenstafen, Henry Bourges and von Hagenbach between 13th and 15th centuries to the 1893 Lieber Code and post-WWI attempts in the Treaty of Versailles, the recognition of the principle of prosecution of crimes in armed conflicts is demonstrable.²⁴⁹

Nonetheless, prosecution of grave breaches of international humanitarian law has been problematic at domestic levels. Instances of non-prosecutability should be mentioned and taken into account. For example, extradition requests have been neglected and prosecution has not taken place for alleged perpetrators of crimes against humanity and war crimes such as Mengitsu and Idi Amin.²⁵⁰ Nonetheless, the international community has reacted to such violations of conventional and customary obligations by various UN General Assembly resolutions, prosecution in non-*locus delicti* States, and even recent calls for codification of existing custom

²⁴⁹ Damgaard (n 167) 88-98.

²⁵⁰ See Ferdinandusse (n 217) 3.

on international mutual legal assistance for genocide, crimes against humanity and war crimes in the form of a multilateral treaty.²⁵¹

d. Crimes against Humanity and Customary *Aut Dedere Aut Judicare*

The purpose of the *aut dedere aut judicare* obligation as regards crimes against humanity is to ensure that “the offences would not be left unpunished (the extradition provisions playing their role in this objective)...[b]ut the obligation to prosecute is primary, making it even stronger.”²⁵²

The authoritative interpretation in a Separate opinion in the *Arrest Warrant* case also supported the claim that the prosecution of crimes against humanity is of customary character.²⁵³

Additionally, the issue of the obligation *aut dedere aut judicare* pertaining to crimes against humanity is not easily ascertainable because, as seen above, the General Assembly resolutions usually cluster together crimes against humanity obligations with war crimes and the prohibition of torture. Such clustering is not surprising as the elements of the crimes classed under war crimes or crimes against humanity are similar, with the difference in terms of the existence of an armed conflict and the systematic and/or widespread nature of perpetration. Additionally, the

²⁵¹ See Ferdinandusse (n 217) 3-4. See also Commission on Crime Prevention and Criminal Justice, 22nd Sess. (22-26 April 2013) U.N. Doc. E/CN.15/2013/L.5, available at <http://daccess-ddsny.un.org/doc/UNDOC/LTD/V13/821/90/PDF/V1382190.pdf?OpenElement>

²⁵² See *Arrest Warrant case*, Sep.Op. Higgins and others (n162) para 30.

²⁵³ See *Arrest Warrant case*, Sep.Op. Higgins and others (n 162) para 62. The scope of the crimes against humanity triggering the customary obligation *aut dedere aut judicare* is as follows: murder, extermination, torture, enslavement, persecution on political, racial, religious or ethnic grounds, institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms, arbitrary deportation or forcible transfer of population, arbitrary imprisonment, forced disappearance of persons, rape, enforced prostitution and other forms of sexual abuse, other inhumane acts which severely damage physical or mental integrity, health and human dignity, such as mutilation and severe bodily harm. See also ILC, Draft Code of Crimes against the Peace and Security of Mankind (1996) YBILC.

recognition of the prosecutability on international level of crimes against humanity can be traced back to the IMT and IMTFE judgments.²⁵⁴ The universal push for prosecution of crimes against humanity is as strong as the obligation to prosecute grave breaches of international humanitarian law.

Crimes against humanity including murder, extermination, deportation, the crime of apartheid, the enslavement or massive and systematic practice of summary executions, kidnapping of persons followed by their enforced disappearance, and torture or inhuman acts are within the jurisdiction of the recently-created Extraordinary African Chambers in Senegal.²⁵⁵ As the EAC was specifically created as a response to the breach by Senegal to uphold its obligation to extradite or prosecute Habre as decided by the ICJ in 2012, it could be asserted that the Statute of the EAC reflects the four core crimes including a list of crimes against humanity which trigger the obligation *aut dedere aut judicare*.

One particular convention dealing with crimes against humanity is the International Convention for the Protection of All Persons from Enforced Disappearance of 2006, the most recent major multilateral treaty containing a customary *aut dedere aut judicare* provision. The Convention incorporates the most advanced and elaborate model for the ‘extradite or prosecute’ duty, building on and combining elements of custom and treaties examined above. In the Preamble of the Enforced Disappearance Convention, it is categorically established that one of the goals of the document is “to prevent enforced disappearances and to combat impunity for the [same] crime”.

²⁵⁴ Damgaard (n 167) 98, 103.

²⁵⁵ The Statute of the Extraordinary African Chambers, art 4.

The crime of enforced disappearance would also fall under the duty to prosecute crimes against humanity. The ‘extradite or prosecute’ clause is incorporated in Article 9(2) which reads 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”.²⁵⁶ Article 11, codifying custom, obligates 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.” The criminal acts which triggers the customary obligation to extradite or prosecute is enforced disappearance.²⁵⁷

Evidence of state practice and *opinio juris* as regards the *aut dedere aut judicare* provision pertaining to the crime against humanity of enforced disappearance could be traced back to the

²⁵⁶ UN Commission on Human Rights, Civil and Political Rights, UN ESCOR 58th session ‘Including Questions of: Disappearances and Summary Executions’ (8 January 2002) UN Doc E/CN.4/2002/71, 10. See also, K Anderson, ‘How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?’ (2006) 7(2) Melbourne Journal of International Law 245. The UN Commission on Human Rights has concluded that “universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future”.

²⁵⁷ “Enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. See, Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. See also, *Jegatheeswara Smara v Sri Lanka* HRC Comm. No. 950/2000 (July 16, 2003) para 9.6 for the duty to investigate and prosecute enforced disappearance.

1992 General Assembly Declaration on the Protection of All Persons from Enforced Disappearance which proclaimed the said Declaration, adopted without a vote, as “a body of principles for all States” including the obligation to bring “before the competent civil authorities...for the purpose of prosecution and trial” a person alleged to have perpetrated an act of enforced disappearance, unless the person has been extradited to another State. Additionally, all States are obliged to take any lawful and appropriate action “to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control.”²⁵⁸ The 1992 Declaration clearly evinces of customary duty on all States, which is furthered by the International Convention for the Protection of All Persons from Enforced Disappearance, adopted as General Assembly Resolution 61/177 without a vote, codifying and reaffirming the already existing customary obligation *aut dedere aut judicare* as pertaining the acts of enforced disappearance.

Several recent Argentinian and Spanish cases serve as a mixed evidence of the state practice as regards the customary nature of the obligation ‘extradite or prosecute’ pertaining to enforced disappearance before the entry into force of the Enforced Disappearance Convention. The cases concerned the cases of General Jorge Videla and Emilio Massera for the participation in the Junta period of 1975-1981. Both Videla and Massera were sentenced to life imprisonment in 1985 for crimes of assassination, illegal imprisonment and torture. In 1990 they were pardoned. In 1998 new proceedings were initiated for enforced disappearance, a crime which fell outside the Amnesty Law. In 2003 Spain requested the extradition of Massera along with other 45 former Argentinian army officers. Germany also requested an extradition of Massera and Videla

²⁵⁸ UNGA Declaration on the Protection of All Persons from Enforced Disappearance (18 February 1992) A/RES/47/133, art 14.

for the participation in the enforced disappearance of German citizens during the Junta period. The Argentinian authorities did not grant the extradition requests but pursuant to a decision of the Federal Court of Appeal allowed the cases to be submitted for the purpose of prosecution in Argentina anew. It should be duly noted that the Spanish and German extradition requests were made prior to the entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance and as such it might be an indicative of a state practice pertaining to the crime against humanity of enforced disappearance. In December 2003, Massera was proclaimed unfit to stand trial due to a severe stroke.²⁵⁹ After a protracted legal battle, Videla was sentenced to life imprisonment for crimes of torture and enforced disappearances committed during the Dirty War.²⁶⁰

The prosecution of Adolfo Scilingo and Miguel Cavallo in Spain for the crimes of enforced disappearance among other crimes such as genocide and torture during the Argentinian Dirty War also evinces state practice and *opinio juris* as regards the *aut dedere aut judicare* duty prior to entry into force of the Convention and strengthens the claim of the duty to prosecute under the ambit of crimes against humanity. Adolfo Scilingo publicly surrendered to the Spanish authorities in 1997 on an arrest warrant for his participation in the ESMA structures as he was directly involved in organizing the “flights of death”. Miguel Cavallo was apprehended in Mexico and extradited to Spain in 1997.²⁶¹ Scilingo was sentenced to 1084 years of imprisonment for his participation in the commission of the crimes of enforced disappearance

²⁵⁹ File of Emilio Eduardo Massera, Trial International Switzerland, accessible at <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/173/action/show/controller/Profile/tab/legal-procedure.html>

²⁶⁰ Varela was additionally sentenced to 50 years in prison for his participation in the systematic abduction, detention and hiding of minors under the age of 10. See ‘Argentina’s Videla and Bignone guilty of baby theft’, *BBC News*, 6 July 2012.

²⁶¹ R Wilson, ‘Argentine Military Officers Face Trial in Spanish Courts’ (December 2003) ASIL Insights.

among other offences such as torture, which were admitted by the Spanish court to constitute customary crimes against humanity as they were not included in the Spanish Penal Code when the acts were perpetrated.²⁶² Most importantly, the Spanish judiciary has also been active in promulgating that the *aut dedere aut judicare* obligation pertaining to core crimes is of *erga omnes* nature, “incorporated into both customary and conventional International Law and International Criminal Law.”²⁶³

Another pertinent example is the German request for extradition of the Argentinian General Guillermo Suarez-Mason. Germany requested the extradition of Suarez-Mason in 2000 on counts of his participation in the enforced disappearance of a German national during Operation Condor. Argentina refused the extradition request as the Argentinian authorities had already submitted the case for the purposes of prosecution for the alleged acts.²⁶⁴ It should be duly noted that Suarez-Mason along with another Argentinian army officer had already been sentenced *in absentia* to life imprisonment by an Italian court after a sixteen-year investigation in 1999.²⁶⁵

The Dirty War prosecutions still continue as in March 2013, 25 Argentinian and Uruguayan army officers were indicted before an Argentinian court for the crimes of enforced disappearance

²⁶² Adolfo Scilingo File, TMC Asser Institute, accessible at http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39691

²⁶³ See Response of Spanish National Court Judge Pedraz to the Constitutional Court of Guatemala, *Guatemala Genocide case* (Decision of 12 December 2007) available at www.cja.org/downloads/Guatemala_Judge_Pedraz_Resolution_in_Response_to_Court_Decision_English.pdf (visited 2 December 2013).

²⁶⁴ ‘General Guillermo Suarez Mason implicated in Argentina’s ‘Dirty War’’, *LA Times*, 22 July 2005.

²⁶⁵ R Latore, ‘Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes’ 25(2) BCICLR 419, 438.

during Operation Condor.²⁶⁶ Additionally, domestic legislation also constitutes material acts of the State. Several States have explicitly incorporated the obligation ‘extradite-or-prosecute’ pertaining to core crimes of genocide, crimes against humanity and war crimes in domestic laws.²⁶⁷

The work of the ILC as regards a proposed Convention on Crimes against Humanity also sheds light on whether the obligation ‘extradite or prosecute’ is triggered by crimes against humanity. In the proposed Convention, the ILC clearly incorporated in Article 7 a requirement for ‘robust inter-State cooperation by the Parties for investigation, prosecution, and punishment of the offence, including through mutual legal assistance and extradition.’ Such incorporation is supported by multiple state declarations as “effective prevention and prosecution of such crimes is necessary through the active cooperation among enforcement by national jurisdictions.”²⁶⁸ Most importantly, the text imposes “an *aut dedere aut judicare* obligation when an alleged offender is present in a Party’s territory.”²⁶⁹ The clause is proposed as codifying already existing customary obligation in the proposed Crimes against Humanity Convention.

In conclusion, the evidence for the customary status of the obligation *aut dedere aut judicare* pertaining to war crimes and crimes against humanity is categorical and based on several sources such as treaty-to-custom crystallization, unanimous votes of UN General Assembly resolutions, decisions of various international tribunals including the ICJ and ICTY, and multiple domestic

²⁶⁶ ‘Operation Condor on Trial: Legal Proceedings on Latin American Rendition and Assassination Program Open in Buenos Aires’, National Security Archive Electronic Briefing No. 416 (08 March 2013), accessible at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB416/>.

²⁶⁷ See Van Steenberghe (n 70) 1097, for examples for such legislation in Argentina, Uruguay, Panama, Peru and Portugal.

²⁶⁸ See Annex B, Crimes against Humanity, A/68/10, para 11.

²⁶⁹ See Annex B, Crimes against Humanity, A/68/10, para 8.

cases. The repetition and affirmation of the obligation *aut dedere aut judicare* in various UN resolutions diminish the possibility for States to have made such only on political expediency grounds as “all states have explicitly expressed their preference for such an obligation and that this common position has been maintained over time.”²⁷⁰

3) Transnational Crimes

a. The Hague Formula and Safety of Civil Aviation

The examination of whether the obligation *aut dedere aut judicare* has attained customary status for a group of transnational crimes begins with the crimes of hijacking and safety of the civil aviation. Before state practice and *opinio juris* are evaluated, it should be noted that transnational crimes are offences which have developed through their explicit incorporation in widely ratified treaties, and they are also known as treaty crimes. Hence, the custom formation for such treaty-based crimes may differ in comparison to the core crimes as the accretion and repetition of the same ‘extradite-or-prosecute’ clause in similar subject-matter treaties would play a significant role in delineating the custom formation in order to overcome the Baxter paradox.

The *aut dedere aut judicare* clause is found in three widely-ratified multilateral conventions of the International Civil Aviation Organization: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo in 1963 with its 185 State Parties; the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague in 1970

²⁷⁰ Van Steenberghe (n 70) 1102.

with its 185 State Parties; and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal in 1971 with its 188 State Parties²⁷¹. The Hague Convention is traditionally considered as the model for the modern formulation of the ‘extradite or prosecute’ obligation.²⁷² No reservations have been lodged as regards the relevant *aut dedere aut judicare* provisions in the three conventions and the following section looks at whether it is possible to extrapolate the existence of a customary ‘extradite-or-prosecute’ obligation related to the crimes of hijacking and threats to civil aviation.

The essential elements of the Hague formula are as follows: 1) criminalization of the relevant offence, making it punishable on domestic level; 2) a provision to take necessary measures to establish jurisdiction over the alleged offence when States have a particular connection with it, when the relator is present in State’s territory and States do not extradite him/her; 3) measures to take the offender into custody and to initiate preliminary investigations; 4) an obligation under which the State where the relator is found shall, if it does not extradite, submit the case to its competent authorities for prosecution; and 5) implementing provisions making the offence extraditable.²⁷³

²⁷¹ See 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed on 23 September 1971, entered into force 26 January 1973) 974 UNTS 178 (The Montreal Convention), for a list of the parties: <<http://cil.nus.edu.sg/1971/1971-convention-for-the-suppression-of-unlawful-acts-against-the-safety-of-civil-aviation/>>, accessed on 11 November 2012.

²⁷² ILC Survey 2010, para 90. The Hague Formula is employed in more than 60 multilateral treaties. See ILC Survey 2010, para 108.

²⁷³ ILC Survey 2010, para 109. The relevant international crimes which trigger the ‘extradite or prosecute’ principle are the perpetration, attempt or acting as an accomplice to the unlawful intimidation, seizure, or control of an aircraft or the commission, attempt to commit or accomplice to the commission of an unlawful and intentional act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft, an act resulting in destruction of an aircraft in service or damage which renders an aircraft incapable of flight or endangerment of the safety of an aircraft in flight, an act of placement of a device or substance which is likely to destroy that aircraft, an act of destruction of damage to an air navigational facility or interference with its operation which is likely to endanger the safety of an aircraft in flight or an act of providing false information which endangers the safety of an aircraft in flight. See the Hague Convention, art 1, and the Montreal Convention, art 1(1).

The relevant *aut dedere aut judicare* principle establishes that the State in the territory of which the alleged offender is found shall, if it does not extradite, 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.²⁷⁴ The obligation is construed that as long as the relator is not extradited within reasonable time, the custodial State must submit the case to its prosecuting authorities. This interpretation is supported by the preparatory works of the Convention where it was noted that the adopted formula is based on “the European Convention on Extradition whereby, if there was no extradition, the State which had arrested the alleged offender must submit the case to its competent authorities for their decision as to whether legal proceedings should be taken against the alleged offender”.²⁷⁵ Once the custodial State submits the case to its relevant authorities for the purpose of prosecution, the same 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.”²⁷⁶

In terms of evidence of the customary character of the *aut dedere aut judicare* duty to prosecute the relevant criminal offences as ascribed in the three ICAO Conventions, it was evident from the preparatory stages of the Hague Convention that States wanted to create a regime in which a relator would not be able to abscond and enjoy the protection of safe havens without recourse to prosecution for the commission, attempt to commit or assistance to commission of the

²⁷⁴ The Hague Convention, art 7.

²⁷⁵ ICAO, Legal Committee, Thirtieth meeting (3 March 1970), para 14 in ‘Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft’ Seventeenth Session (9 February-11 March 1970) Doc 8877-LC/161, 16-17.

²⁷⁶ The Hague Convention 1970, art 7.

criminalized acts.²⁷⁷ Additionally, some States such as the US pushed for a mandatory obligation to extradite or an absolute mandate to prosecute.²⁷⁸ Such suggestions reflect a belief by some States that the crimes were more of a universal character than transnational offences. Nonetheless, the formulation in the Hague Convention was a compromise in order to allow custodial States some discretion in terms of evaluating all evidence against the relator. Finally, The Hague formula in the part of the obligation of submission for the purpose of prosecution has been the most widely replicated formula in subsequent treaties and domestic decisions, which further strengthens the evidence of the customary character of the obligation through the process of treaty-repetition accretion pertaining to similar transnational crimes, as explored below.

Decisions of various UN bodies show the process of adopting treaties and declarations on international law²⁷⁹ and provide useful evidence for formation and identification of custom.²⁸⁰ The UN Security Council has been particularly active in the areas involving threats of violence such as terrorism and safety of civil aviation. Pursuant to Article 24(1) of the Charter, the Council acts on behalf of all UN Members with a primary responsibility for the maintenance of international peace and security, and correspondingly Member States are obligated to follow its decisions.²⁸¹ Hence, “the Council has primary responsibility for a specific task, the maintenance of international peace and security, and Members have agreed that the Council acts on their

²⁷⁷ See H Mankiewicz, ‘The 1970 Hague Convention’ (1971) 37 *Journal of Air Law and Commerce* 195, 199.

²⁷⁸ See Lee, ‘International Suppression of Hijacking’ in M Cherif Bassiouni (ed), *International Terrorism and Political Crimes* (C.C.Thomas 1975) 250. See also, B Cheng, ‘Aviation, Criminal Jurisdiction and Terrorism’ in Bin Cheng and B Brown (eds), *Contemporary Problems of International Law: Essays in Honour of George Schwarzenberger of His Eightieth Birthday* (Stevens and Sons 1988) 36-37.

²⁷⁹ Oscar Schachter, ‘The UN Legal Order: An Overview’ in Christopher Joyner (ed), *The United Nations and International Law* (CUP 1998) 3.

²⁸⁰ Wood, First Report on Customary Law (n 1) para 53.

²⁸¹ S Bailey and S Daws, *The Procedure of the UN Security Council* (Clarendon Press 1998) 4, 19.

behalf, while the Assembly has broad responsibilities”.²⁸² Moreover, the ambit of action by the UN General Assembly when the Council is seized with a situation or dispute is restricted pursuant to Articles 11(2) and 12(1) of the Charter. Additionally, pursuant to Article 28(1) of the Charter, the Council is to be able to function at any time, especially when threat to peace and security arises.²⁸³ The Council utilizes its traditional function of enforcement and compliance through mechanisms such as the application of Article 41 sanctions against States that are in breach of significant international law obligations or acts against a UN Charter duty.²⁸⁴

What is the role of the Security Council in custom creation? Voting may provide indication of *opinio juris* although such is only limited to the 15 members sitting on the Council. Still, unanimous voting has increased through the years, an indication of universal consensus on various contentious topics.²⁸⁵ Additionally, the custom contributing power may be seen in the power of the Security Council to pass decisions which are binding on non- Member States pursuant to Chapters VI and VII.²⁸⁶ The Council has exercised its binding powers on multiple occasions, especially in the area of “peace and security law”.²⁸⁷ Nonetheless, the contributing effect on custom formation through Security Council decisions should be diligently considered due to the limited States sitting on it and should be taken in the context of the maintenance of international peace and security.

²⁸² Bailey and Daws (n 281) 281.

²⁸³ Bailey and Daws (n 281) 5.

²⁸⁴ Schachter (n 269) 15.

²⁸⁵ See Bailey and Daws (n 271) 264-265.

²⁸⁶ Bailey and Daws (n 271) 267. On the powers of the UN Security Council to take mandatory decisions under Chapter VII powers, see the interpretation of the ICJ in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 26: “Article 25 is not confined to decisions in regard to enforcement action but applies to ‘the decisions of the Security Council’ adopted in accordance with the Charter.”

²⁸⁷ Schachter (n 279) 21.

As early as 1970, the Security Council has been active in calling upon States to take all possible urgent legal steps to prevent hijackings and interference with civil aviation.²⁸⁸ Decisions of the Security Council have also reminded and demonstrated the duty on States “to take all appropriate measures within their jurisdictions to deter and prevent such acts and to take effective measures to deal with those who commit such acts.”²⁸⁹ In Resolution 286 of 9 September 1970, adopted without a vote, the Security Council expressed grave concern as regards civilian lives as a result of hijacking of aircraft and called “on States to take all possible legal steps to prevent further hijackings or any other interference with international civil air travel.”²⁹⁰ In Resolution 635 of 14 June 1989, adopted unanimously, the Council “condemns all acts of unlawful interference against the security of civil aviation” and “calls upon all States to co-operate in devising and implementing measures to prevent all acts of terrorism” which fall within the work of the ICAO aiming “at preventing and eliminating all acts of terrorism, in particular in the field of aviation security”.²⁹¹ Even in very recent events, the UN Security Council has been active to reaffirm “the importance of holding those responsible for violations...to account” for the downing of the MH17 civilian aircraft in July 2014.²⁹² Such resolutions may be used as influential evidence in demonstrating an overall, universal position towards the pressing need for prevention and elimination of such crimes. Although the crimes at issue might be classified as transnational, the effect of such criminal activities is seen as affecting the peace and security on global level.

²⁸⁸ See UNSC Res 286 (20 June 1970) UN Doc S/RES/286.

²⁸⁹ UNSC Statement of the President of the Security Council, adopted as UNSC Decision (20 June 1972), cited in Karel Wellens (ed) *Resolutions and Statements of the United Nations Security Council (1946-1989)* (Martinus Nijhoff Publishers 1990) 659-660.

²⁹⁰ UNSC Res 286 (9 September 1970) UN Doc S/RES/286.

²⁹¹ UNSC Res 635 (14 June 1989) UN Doc S/RES/635.

²⁹² UNSC Res 2166 (21 July 2014) UN Doc S/RES/2166.

Hence, the obligation *aut dedere aut judicare* serves as the appropriate mechanism to assist in responding to such crimes.

Evidence for state practice and *opinio juris* of States pertaining to the customary character of the ‘extradite or prosecute’ duty to the crimes of hijacking and terrorist bombing of civil aviation could also be discerned in the *Lockerbie* situation. It deals with conventional and customary obligations and their effect on other UN Member States as regards the criminalized acts in the Montreal Convention. The Security Council was seized with the matter of the airplane explosion of a bomb over Lockerbie in Resolution 731 after the US and the UK requested the extradition of the alleged perpetrators for the purpose of prosecution. Resolution 731 reaffirms the duty on States “to take all possible legal steps to prevent any interference with international civil air travel” and condemns “all acts of unlawful interference against the security of civil aviation and calls upon all States to cooperate in devising and implementing measures to prevent all acts of terrorism, including those involving explosives.”²⁹³ The Resolution urged Libya to cooperate fully in its obligation to establish responsibility for the terrorist act by responding to the request for surrender of the perpetrators.²⁹⁴

The Libyan authorities did not intend to surrender the relators which prompted the Security Council to pass Resolution 748 of March 1992 in which acting under Chapter VII the Security Council proclaimed that Libya must comply with the requests for surrender or otherwise a lack of demonstration of renunciation of terrorism would be considered “a threat to international peace and security.” In particular, the Security Council decided that “the Libyan Government

²⁹³ UNSC Res 731 (21 January 1992) 31 ILM 750.

²⁹⁴ UNSC Res 731, 750-751.

must...comply without any further delay...regarding requests...by France, the United Kingdom, and the United States of America” for extradition of the main suspects for the Lockerbie bombing.²⁹⁵

The language of the Security Council acting under Chapter VII strongly affirms the obligation ‘extradite or prosecute’ when the custodial State seems unable or unwilling to submit the case for the purpose of prosecution. The undertone of the no-safe-haven approach is also noticeable as the obligation to extradite or prosecute alleged perpetrators of international terrorism and crimes against the safety of civil aviation is directly linked to the community’s interest to suppress such offences against the international order. The Resolution clearly determined that “the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism” constituted sufficient grounds for imposition of sanctions on Libya, indicating a prior breach on part of Libya to submit the case for the purpose of prosecution or extradite the suspects.²⁹⁶ It is worth noting that it was the first time when the Security Council obliged a State to surrender its nationals for the purposes of prosecution to another State.²⁹⁷

In March 1992 Libya instituted proceedings against the US and the UK before the ICJ with the claim that under the 1971 Montreal Convention it was vested with the powers to prosecute the relators instead of transferring them to the US and UK.²⁹⁸ The US and UK argued that the Security Council Resolutions 731 and 748 categorically established an obligation to prosecute in

²⁹⁵ See UNSC Res 748 (31 March 1992) S/RES/748, para 1.

²⁹⁶ See UNSC Res 748, para 4.

²⁹⁷ E Artz, ‘The Lockerbie ‘Extradition by Analogy’ Agreement: ‘Exceptional Measure’ or Template for Transnational Criminal Justice’ (2002) 18(1) *AUILR* 163, 168.

²⁹⁸ The US and UK were sceptical that the Libyan authorities would submit the case for the purpose of prosecution in good faith and whether Libya was willing and able to do so instead of running a sham process.

international law, which Libya was trying to assert, was impossible to be satisfied by the Libyan government.

At face value, the Libyan authorities followed the Montreal Convention but the Security Council approach may be seen as affirming that there is an extra-conventional obligation to prosecute which would also apply on Libya as the conventional obligations would not be followed in good faith but would be used to circumvent the obligation. In essence, the Security Council attempted to create an alternative regime to the already existing conventional scheme as regards the obligation 'extradite-or-prosecute'. Precisely because of this extra-conventional structure, the example might be used as evidence of custom and as not falling under the ambit of the Baxter paradox. It should be also duly noted that the Security Council interpreted the obligation as not merely a bilateral matter, which would have been the most obvious path to take, but alluded to a more broadly applicable duty of communitarian interest, linked to the transnational nature of the criminal activity at hand.

The ICJ asserted the binding effect of Resolution 748 towards any rights claimed by Libya under the 1971 Montreal Convention pursuant to Articles 25 and 103 of the UN Charter.²⁹⁹ The Security Council indirectly influenced the Libyan decision to submit the relators to the proceedings in the Netherlands under Scottish *locus delicti* jurisdiction, thus, affirming and satisfying the conditions of the customary principle 'extradite or prosecute', resulting in two

²⁹⁹ See *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Request for the Indication of Provisional Measures) (Libya v. United Kingdom)* [1992] ICJ Rep 3, 15; (*Libya v. United States of America*), ICJ Reports 1992, 114, 127. See also, Dinstein (n 16) 422-423. Regarding the issue whether the ICJ had the power to review the decision of the UN Security Council as to whether the legal dispute fell under the category of "serious threat to international peace and security", see Bailey and Daws (n 271) 318-319, and V Lowe, 'Lockerbie- Changing the Rules during the Game' (1992) 51(3) Cambridge Law Journal 410.

convictions.³⁰⁰ Libya surrendered the relators to the Netherlands, which agreed to establish a Scottish court in a military base in the Netherlands for the purpose of the trial.³⁰¹ The case is also relevant as there was no extradition treaty in force between Libya and the UK or the US.³⁰²

Other domestic decisions also delineate an emerging custom for the transnational crime of hijacking. A case from the early 1980s in South Africa may illustrate how States perceive their obligation to prosecute alleged offenders on counts of hijacking. The case concerned a group of South African mercenaries who attempted a failed coup in the Seychelles in 1981. South Africa refused to prosecute the alleged offenders who had managed to hijack an airplane in order to return to South Africa. However, the refusal to prosecute provoked adverse reaction by various States who expressed their dismay at South Africa's unwillingness to follow its obligations under international law. As a result of the pressure, the South African authorities decided to prosecute the alleged offenders.³⁰³

Another incident shows the reaction of States against similar breaches. A hijacked PIA airplane landed in Afghanistan in 1981 and the hijackers were offered refuge. Despite numerous complaints by many States that Afghanistan had to prosecute the relators pursuant to its obligations under The Hague Convention to which it had been a party since 1979, Afghanistan

³⁰⁰ *Her Majesty's Advocate v. Al Megrahi et al.* (2001) (Scottish High Court of Justiciary at Camp Zeist, the Netherlands) 40 ILM 582, 612-613.

³⁰¹ See Agreement concerning a Scottish Trial in the Netherlands 1998 (The Netherlands-United Kingdom) (1999) 38 ILM 926, 927, arts. 2-3 (1).

³⁰² E Artz, 'The Lockerbie 'Extradition by Analogy' Agreement: 'Exceptional Measure' or Template for Transnational Criminal Justice' (2002) 18(1) AUJLR 163, 167. The fact that the trial was held in Camp Zeist is rather immaterial as the UK position has always been that the prosecution and applicable procedural and substantive elements were to be applied in exactly the same manner as any other prosecution in Scotland. See also, *Abdelbaset Ali Mohamed Al Megrahi v. Her Majesty's Advocate*, No.CI04/01 (Appeal Court, High Court of Justiciary).

³⁰³ See C Mitchell (n 154) para 41. See also, J Lelyveld, 'South Africa to try mercenaries in hijacking', *NYT*, 6 January 1982.

refused to submit the case for prosecution. As a result, several States revoked their airline agreements with the Afghan national aircarrier as a countermeasure against the initial wrongful act, the flagrant breach on part of the Afghan state relating to the decision not to prosecute the alleged hijackers. The sole fact that several States invoked responsibility for the wrongful act on part of Afghanistan and subsequent countermeasures illustrates state practice that plurality of injured or specially affected States perceive the breach of the international obligation ‘extradite-or-prosecute’ as not merely a bilateral matter but broadly applicable in international customary law. The imposition of countermeasures could be used as evidence of state practice against the initial breach of the obligation *aut dedere aut judicare*, thus solidifying its applicability and weight.³⁰⁴

In conclusion, the obligation *aut dedere aut judicare* may be in the process of attaining customary character for the crimes of hijacking and threats to the safety of civil aviation as evidenced in the widely-ratified Hague, Montreal and Tokyo conventions. As analysed in Part I of the Chapter, the process of custom formation is fluid. It might be difficult to pinpoint the exact custom formation moment as the Baxter paradox is strongly applicable to the said crimes due to the high number of State ratifications. As observed above, it is problematic to distinguish between state practice based on *opinio juris sive necessitatis* and *opinio juris conventionalis*. Nonetheless, it is noticeable that the transnational element of the crime seems to be reaching a level of universal standard, thus, strengthening the claim for a customary *aut dedere aut judicare* as the clause has been replicated on various occasions in widely-ratified treaties and UN resolutions dealing with similar transnational crimes. Additionally, the universalisation of the

³⁰⁴ See Mitchell (n 154) para 41. More details are provided in Chapter 5 on State Responsibility and the customary character of *aut dedere aut judicare* pertaining to the crime of hijacking.

clause has been evident in recent UN Security Council decisions pertaining to international investigations and demands to hold the responsible for acts against the safety of civil aviation to account by ensuring all States to “cooperate fully with efforts to establish accountability.”³⁰⁵

b. Suppression of Terrorist Bombings and Suppression of Financing of Terrorism

The International Convention for the Suppression of Terrorist Bombings with its 165 State Parties makes it an offence if a person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury, or with the intent to cause extensive destruction where such results or is likely to result in major economic loss. Each State is under an obligation to establish jurisdiction over the offence when the offence takes place in the territory of that States, when the offence is committed on board a vessel flying the flag of the same State or an aircraft registered under the laws of the same States, or when the offence is committed by a national of that State.³⁰⁶

The bridge between the legal basis and the obligation ‘extradite or prosecute’ is structured around the mechanism that each State shall take the necessary measures to establish jurisdiction over the offences in cases the alleged offender is present in its territory and it does not extradite

³⁰⁵ UNSC Res 2166 (21 July 2014) UN Doc S/RES/2166, para 11.

³⁰⁶ International Convention for the Suppression of Terrorist Bombings of 1998, art 6. The State enjoys jurisdictional discretion over any offence based on the passive personality principle, against governmental or State facilities, over a stateless person who committed the offence and is a habitual resident in the territory of that State or if the offence is committed in an attempt to compel the State to do or abstain from doing any act.

the person to any other State which wants to assert jurisdiction.³⁰⁷ The relevant *aut dedere aut judicare* clause obliges the State on which territory the alleged offender is present to submit the case without undue delay, without exception whatsoever and whether or not the offence was committed in its territory to its competent authorities for the purpose of prosecution if the person is not extradited.³⁰⁸ The standard of gravity in the prosecutorial discretion is the same as in the case of any other offence of a grave nature under the law of that State.

Another anti-terrorist multilateral treaty which contains an identical *aut dedere aut judicare* clause is the International Convention for the Suppression of the Financing of Terrorism of 2000 with its 180 State Parties. The Convention makes it an offence if a person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of and as defined in one of the nine treaties listed in the annex³⁰⁹ or any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to

³⁰⁷ See International Convention for the Suppression of Terrorist Bombings of 1998, art 6(4).

³⁰⁸ International Convention for the Suppression of Terrorist Bombings of 1998, art 8(1).

³⁰⁹ Convention for the Suppression of Unlawful Seizure of Aircraft (done at The Hague on 16 December 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (done at Montreal on 23 September 1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167; International Convention against the Taking of Hostages (adopted by the General Assembly of the United Nations on 17 December 1979); Convention on the Physical Protection of Nuclear Material (adopted at Vienna on 3 March 1980); 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 (done at Montreal on 24 February 1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (done at Rome on 10 March 1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304; and International Convention for the Suppression of Terrorist Bombings (adopted by the General Assembly of the United Nations on 15 December 1997).

compel a Government or an international organization to do or to abstain from doing any act. The *aut dedere aut judicare* obligation is embodied in Article 10 which follows verbatim the structure and substance of Article 8 of the International Convention for the Suppression of Terrorist Bombings of 1998. It should be duly noted that the obligation *aut dedere aut judicare* pertains to the criminalized acts in the two relevant conventions. It is not the purpose of this work to establish the definition of terrorism or international terrorism. This approach has been followed by the UN Security Council in recent Resolutions such as Resolution 2178 of 24 September 2014 where the term ‘terrorism’ is used without providing definition. In the following subsection, the term ‘terrorism’ overlaps with the proscribed criminal activities in both Terrorism Suppression conventions.

In order to examine the customary status of the ‘extradite or prosecute’ clause relating to the two offences beyond the pure number of State Parties and repetition of the clause in the two universal conventions, General Assembly Resolution could also provide evidence of state practice and *opinio juris*. A stronger manifestation and evidence of state practice and *opinio juris* on international level as regards the *aut dedere aut judicare* duty pertaining to terrorism could hardly be asked for as Resolution 60/288 was adopted without a vote at the 99th plenary meeting of the 60th session of the General Assembly. In Resolution 60/288 of 2006, setting out the United Nations Global Counter-Terrorism Strategy, the Member States of the UN resolve to take urgent actions to prevent and combat terrorism in all forms through “becoming parties without delay to the existing international conventions and protocols against terrorism”, implementing all General Assembly resolutions on measures to eliminate terrorism along with the obligation to fully cooperate with the Security Council in the fight against terrorism. In particular, all States resolve

“to cooperate fully in the fight against terrorism, *in accordance with our obligations under international law*, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens.”³¹⁰ (emphasis added) The language used in the Resolution evinces a belief that the obligation is not only conventional, but is also based on other sources of international law such as custom. Additionally, all Member States of the UN are under an obligation to “ensure the apprehension and prosecution or extradition of terrorist acts, in accordance with...human rights law, refugee law and international humanitarian law.”³¹¹ It is evident from a simple numerical check that not all UN Member States are parties to the two relevant conventions albeit the General Assembly categorically ascertains the existence of such an obligation to extradite or prosecute, directly linked to and crucial for the effective denial of safe haven of alleged international terrorists in international law in the form of custom.

States resolve with tacit reference to Article 2(4) of the UN Charter to “uphold an effective and rule of law-based national criminal justice system that can ensure, in accordance with *our obligations under international law*, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute.”³¹² (emphasis added) The language of the Resolution on at least three occasions clearly established existing, extra-conventional obligations

³¹⁰ See also, UNGA, ‘Declaration on Measures to Eliminate International Terrorism’ UNGA Res 49/60 (9 December 1994). See also, UNGA Resolution 46/51 (9 December 1991).

³¹¹ UNGA, ‘The United Nations Global Counter-Terrorism Strategy’ UNGA Res 60/288 (20 September 2006) pts II (2-3).

³¹² UNGA, ‘The United Nations Global Counter-Terrorism Strategy’ UNGA Res 60/288, (20 September 2006) pt IV(4).

to submit cases for the purposes of prosecution, pursuant to the list of criminal acts of terrorism, based on the principle *aut dedere aut judicare*. Such categorical affirmation clearly indicates *communis opinio juris* and state practice as regards the customary character of the obligation pertaining to the act of terrorism. Additionally, the effective fulfilment of such obligations to counter acts of terrorism in international law are based, founded on the principle to extradite or prosecute; without the obligatory principle, the customary and conventional obligations outlined in the two counter-terrorist treaties and multiple General Assembly Resolutions would be impossible to uphold.

Security Council resolutions have effect on custom as declaratory or crystallizing treaty provisions may be clarified by subsequent Security Council resolutions.³¹³ A normative distinction must be provided as regards the contribution of Security Council resolutions on custom and obligations of Member States pursuant to Article 25 of the UN Charter. It is difficult to ascertain where one obligation ends and the other begins but, as stated above, the Security Council is empowered to impose duties on non-Member States under Article 2(6) of the Charter which is the most appropriate example to illustrate influence on custom formation in Security Council decision. For example, the resolutions such as 1373 and 1333 pertaining to terrorist activities were passed before Switzerland became a member of the UN in September 2002. The Swiss authorities did not have to follow the obligations pursuant to those resolutions but they did nonetheless of a sense of legal obligation. Activities such as freezing of assets by Switzerland are a good example. In such circumstances, the acts requested fall outside the ambit of the UN Treaty obligations.

³¹³ Security Council resolutions may also provide clarification on rules of international law as well as push for certain applicability of conventional and customary obligations. See The UN Charter, arts 25 and 103.

As an illustration, on at least two occasions relating to the fight against terrorism, the Security Council, acting under Chapter VII powers, has included a direct reference to the obligation to extradite or prosecute in the preambles of the Resolution 1267 of 15 October 1999 and Resolution 1333 of 19 December 2000. The customary duty under the *aut dedere aut judicare* principle is affirmed in particular in Security Council Resolution 1267 of 1999, passed with a unanimous 15-0 vote in favour.³¹⁴ The Resolution recalled in particular the obligations of Afghanistan as regards extradition or prosecution of terrorists pursuant to international law along with the continuing use of Afghan territory for sheltering, training of terrorists and planning of terrorist acts, especially as regards the continuing provision of safe haven to Usama bin Laden in Afghanistan. Specifically, the Security Council noted the pending indictment against terrorists for the 7 August 1998 bombings of the US embassies in Kenya and Tanzania and the subsequent request for their surrender to the US for the purposes of trial. Acting under Chapter VII powers, the Security Council categorically demanded from Afghanistan to “cooperate with efforts to bring indicted terrorists to justice”, and, more pertinently, demanded Afghanistan to “turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.” The language of the resolutions implies the complicity role of Afghanistan as regards offering safe haven to terrorists in direct contravention to the principles of no impunity and accountability.

³¹⁴ UNSC Res 1267 (1999) UN Doc No S/RES/1267.

Additionally, the same Resolution imposed sanctions on the Taliban regime as regards aircraft carriers and freezing of funds and other financial assets which could be interpreted as a countermeasure against a prior violation of the obligation to prosecute acts of terrorism. The Resolution categorically imposes an obligation on Afghanistan to extradite the indicted person to jurisdiction(s) willing and able to submit the case for prosecution. The fact that sanctions in form of countermeasures evinces that the Afghani regime could not effectively uphold an international duty to prosecute the alleged terrorists. Hence, the principle *aut dedere aut judicare* is strengthened.

Security Council Resolution 1373 also serves as a good example as it promulgates customary international law duties, enshrined in various multilateral, widely ratified counter-terrorist conventions. It obligates all States to prevent and suppress the financing of terrorist acts, to criminalize the provision of such funds and prosecute alleged perpetrators or entities who commit, facilitate or participate in the commission of terrorist acts. This Chapter VII Resolution clearly obligates States to deny safe havens to terrorists.³¹⁵ The denial of safe haven to those who finance, plan, support, or commit terrorist acts as well as to those who provide safe havens clearly incorporates the application of the *aut dedere aut judicare* principle. The Counter Terrorism Committee considers the denial of safe haven to alleged perpetrators as a duty on UN Member States to “prosecute and try all those responsible for acts of terrorism.”³¹⁶ Without the appropriate functioning of the ‘extradite or prosecute’ clause, the denial of safe haven would be severely compromised and just a *pro forma* toothless exhortation.

³¹⁵ See UNSC Res 1373 (2001) UN Doc S/RES/1373, art 2(c).

³¹⁶ Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001) S/2004/70 of 26 January 2004, 6.

In Resolution 1566 of 8 October 2004, the Security Council, pursuant to Chapter VII, calls upon States to cooperate in the fight against terrorism in lieu of the States' obligation under international law to extradite or prosecute alleged perpetrators. The Resolution also calls on States to deny safe haven and bring terrorists to justice, recalls the definition of terrorism, calls on States to become parties to applicable international conventions, and seeks cooperation with relevant international and regional bodies so as to fully implement UNSC Resolution 1373. Thus, the language and the Chapter VII ground additionally evince of the mandatory nature of the obligation *aut dedere aut judicare* in relation to terrorism.³¹⁷

Supporting evidence for the customary applicability of the *aut dedere aut judicare* duty is also exemplified by the Henry Okah case. The case provides evidence of extradition for the crime of terrorism without applicable treaty obligation. Okah, the Nigerian leader of the MEND, was arrested in Angola in 2007 and extradited to Nigeria in February 2008 on charges on terrorist activities and hostage taking activities against oil installations and oil personnel in the Niger Delta. There was no extradition treaty between Angola and Nigeria when Okah was extradited to Nigeria in 2008.³¹⁸ The Nigerian authorities submitted the *Okah* case for the purposes of prosecution on charges of terrorism but later in 2009 the proceedings were discontinued as an amnesty deal was reached in 2009 between the Nigerian government and MEND.³¹⁹

³¹⁷ See *Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, 53.

³¹⁸ See 'Angola extradites Nigerian suspect', *USA Today* (15 February 2008).

³¹⁹ 'Nigerian rebel accepts amnesty', *BBC News* (10 July 2009).

The legal saga around Okah does not cease with his release from Nigerian custody in 2009. Okah was apprehended in South Africa in 2010 on charges of participating in acts of international terrorism pertaining to the terrorist act in Abuja on Nigeria's Independence Day in 2010. Okah was convicted of 13 terrorist-related charges by a South African Court in March 2013.³²⁰ The South African authorities correctly fulfilled its customary obligations to prosecute acts of international terrorism as Okah requested Nigeria to seek his extradition.³²¹ Nigeria did not breach the *aut dedere aut judicare* clause as South Africa had already commenced prosecution against the acts of terrorism in Abuja of 2010. The South African authorities stated that had an extradition request been received by Nigeria, South Africa would have continued with its prosecution and refused extradition to the *locus delicti* State as there are substantial risks of fair trial violations and possible acts of violence by MEND.³²² It should be duly noted that there is no extradition treaty in force between South Africa and Nigeria. The Okah situation clearly indicates how the *aut dedere aut judicare* obligation effectively functions and supports the primary purpose of all relevant counter-terrorist conventions and custom, namely to prosecute, punish and suppress instances of terrorism and to deny safe havens of international terrorists.

The evidence for a customary obligation *aut dedere aut judicare* for the transnational crimes of the suppression of terrorist bombings and financing of terrorism seems to be more concrete in comparison to the crime of hijacking described above. This is primarily so because the evidence of state practice and *opinio juris* is based on UNGA and UNSC resolutions as well as domestic decisions pertaining to acts of terrorism. In this sense, the evidence provided is more complete

³²⁰ 'Henry Okah: Nigerian oil militant jailed for 24 years', *BBC News* (27 March 2013).

³²¹ 'Nigerian Rebel Leader Okah Condemns Refusal to Extradite Him over Bombings', *Bloomberg News* (09 March 2011).

³²² 'Henry Okah: Nigerian oil militant jailed for 24 years', *BBC News* (27 March 2013).

and coherent. It is not surprising that the evidence is primarily focused on recent proceedings as terrorism has attracted attention and relevant state practice since 1997 and especially since 9/11. It might be argued that the crime belongs in the group of universal core crimes which makes the claim for the customary status of the obligation easier to establish. However, the ambiguity about the legal term ‘terrorism’ brings questions about the customary duty to extradite or prosecute as the obligation is triggered by the crime at hand. Moreover, the Baxter paradox is strongly applicable since extra-conventional practice pertaining to extradition and prosecution of acts of terrorism is limited. Nonetheless, the interest of the international community to suppress the crimes associated with the acts of terrorism may strongly facilitate and provide evidence of the customary status of the obligation *aut dedere aut judicare* in short period of time.

c. Drug Trafficking

Drug trafficking responses on international level have a long history reflecting the complexity of such offences and their transnational externalities. The repetition of similar *aut dedere aut judicare* duty in widely ratified treaties on the subject-matter of drug trafficking could evince an accretion of customary duty or, at least, an evolving custom. A total of 14 conventions on the international level were drafted in the 20th century with the aim of preventing and regulating “the non-scientific and non-medical production, supply and use of drugs.”³²³ As early as 1908 international action on drug trafficking necessitated international coordination.³²⁴ Several similar protocols and conventions were passed in the following decades.³²⁵ The first vestiges of criminal

³²³ N Boister, *Penal Aspects of the UN Drug Conventions* (Kluwer 2001) 1. For the early history of drug trafficking regime, see Boister, 27-29.

³²⁴ Convention relating to the Suppression of the Abuse of Opium and other Drugs (signed on 23 January 1912) 8 LNTS 187.

³²⁵ D McClean, *International Cooperation in Civil and Criminal Matters* (OUP 2002) 246-247.

enforcement on an international level could be traced back to the 1925 International Opium Convention which promulgated in Article 28 that “breaches of [party’s] laws or regulations by which the provisions of the present conventions are enforced shall be punishable by adequate penalties”.³²⁶

The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs introduced a criminal dimension in response to international drug trafficking. The 1936 Convention specifically called for punishment of offenders regardless of the offender’s nationality or the *locus delicti*. Such an enforcement mechanism was based around the clear intention of the state parties to minimize impunity and to put drug trafficking in the category of transnational crimes.³²⁷ The 1936 Convention also introduced specific clauses relating to prosecute-or-extradite duties. Pursuant to Article 7, if a person was a national of the Party where s/he was found and the custodial State did not extradite its national, then the same State was under an obligation to submit the case for prosecution. If the person was a foreign national, then s/he would be prosecuted as if s/he was a national of the State of apprehension, and extradition had to be requested and refused for a reason not connected with the commission of the offence.³²⁸

Between 1961 and 1988, the regime of drug trafficking enforcement was bolstered by the adoption at UN level of three major conventions, each containing an *aut dedere aut judicare* clause: the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotic

³²⁶ 1925 Opium Convention (adopted 19 February 1925, entered into force 25 September 1928) 81 LNTS 317.

³²⁷ S Murphy, ‘International Crimes’ in C Joyner (ed), *The United Nations and International Law* (CUP 1998) 369.

³²⁸ 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, article 8. See also, Boister (n 323) 35.

Substances, and the all-encompassing 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The 1961 Convention partly urges, partly obliges parties to establish jurisdiction and prosecute or extradite the alleged offenders. The convention contains provisions that conflate the treatment of nationals and foreigners and strictly imposes the obligation to institute proceedings against serious offences if no extradition takes place: serious offences “*shall be prosecuted* by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found, *if extradition is not acceptable in conformity with the law of the Party to which application is made.*”³²⁹ The primary obligation is to prosecute the offender under territoriality jurisdiction and, in the alternative, to prosecute in case of a refusal to extradite based on the *aut dedere aut judicare* duty.³³⁰ The prosecution prong seems to be given primacy as evidenced by the statements of the drafting parties in the 1961 Commentary which indicate that States cannot hide behind domestic law to avoid prosecution or extradition as there is a general obligation in the Convention to collaborate in suppressing illegal trafficking and parties are bound not to allow their territories to be used as safe havens for drug traffickers.³³¹

State practice indicates that some States have utilised universal jurisdiction as “the 1961 Convention’s provisions generally support application of universality to drug offences.”³³² For example, the Austrian Supreme Court upheld prosecution of an offender for a drug trafficking

³²⁹ ILC Survey 2010, para 37.

³³⁰ Article 36 (2) (a) (iv) of the 1961 Single Convention on Narcotic Drugs. See also, Boister (n 313) 216-217.

³³¹ Commentary to the 1961 Single Convention on Narcotic Drugs (prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914 D XXXIV of 3 August 1962) (1973) 436. See Boister (n 323) 218.

³³² Boister (n 323) 220. See *Thailand Drug Offences (Jurisdiction) Case* (1991) 86 ILR 587. See also, *Universal Jurisdiction over Drug Offences Case* (1979) German Federal Supreme Court 74 ILR 166, 168-170.

offence in Switzerland as Austria was obliged to prosecute and an extradition request for the offender was rejected as the offender was an Austrian national.³³³ The jurisdictional and extradition clauses in the 1971 Convention follow almost verbatim Article 36(2) of the 1961 Convention. The 1972 Protocol to the 1961 Convention bolstered the extradition regime by making drug offences automatically extraditable between the parties.

The 1970s and 1980s witnessed another push for an international convention on judicial assistance and improved extradition mechanisms on international level, seen in the work of the 5th UN Congress on the Prevention of Crime and Treatment of Offenders.³³⁴ The culmination was the adoption of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988. The cornerstone of the 1988 regime was the “co-ordinated actions within the framework of international cooperation”. The drafting process concentrated on extradition proceedings and confiscation efficiency.³³⁵

The 1988 Convention introduced improved obligations in the areas of extradition and jurisdiction.³³⁶ Parties were obliged to establish jurisdiction over the alleged offenders who are found on their territory if extradition is refused or would have been if extradition request had been made.³³⁷ The ‘extradite or prosecute’ clause is codified in Article 6(9) of the 1988 Vienna Convention which stipulates that a State in whose territory an alleged perpetrator is found shall

³³³ *Drug Offences Jurisdiction Case* (1991) 86 ILR 550, 551-552.

³³⁴ Boister (n 323) 51. See also, A Noll, ‘International treaties and the control of drug use and abuse’ (1977) 6 Contemporary Drug Problems 17, 19.

³³⁵ Boister (n 323) 52.

³³⁶ Boister (n 323) 59. During the 1988 Conference some Nordic states pushed for extension of jurisdiction as they believed that extradition was not an effective tool in combating drug trafficking. See UN Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records, Vol. II (NY 1991), UN Doc. E/CONF.82/16/Add.1.

³³⁷ See Article 4 (2) (a) of the 1988 Convention.

“if it does not extradite him in respect of an offence...submit the case to its competent authorities for the purpose of prosecution”.³³⁸ Extradition may be refused if there are substantial grounds to believe that the prosecution and punishment by the requesting State against the alleged offender is sought for the race, religion, nationality or political opinions of the relator as well as that the extradition request might cause prejudice against the individual.³³⁹

The mechanism adopted in the drug trafficking conventions consists of five major elements: 1) criminalization of the relevant offence which States undertake to make punishable in their respective domestic legal orders; 2) provisions reflecting divergences in States’ attitude towards extradition of nationals or exercise of extraterritorial jurisdiction; 3) precedence for extradition over prosecution; 4) an extradition regime which makes the offence an extraditable one; and 5) a non-prejudice clause relating to the uniqueness of each State’s criminal legislation.³⁴⁰ Boister suggests that the regime of prosecution or extradition in the Convention is based on a three-prong approach: “refusal to extradite, establishment of jurisdiction (mandatory or optional) and then prosecution (mandatory).”³⁴¹ This regime constitutes “an attempt to eliminate all safe havens for drug traffickers created by legal limitations on their extradition”.³⁴²

In all four major drug conventions, there is a common approach to combating drug trafficking and eliminating safe havens through the application and repetition of the *aut dedere aut judicare*

³³⁸ The offences that trigger the *aut dedere aut judicare* clause are related to international drug trafficking and include the production, manufacture and extraction of any narcotic drug or psychotropic substance, the possession and purchase of any such drugs, the transportation or distribution of such drugs along with the conversion and transfer of property if such has been derived from any drug-related offences, among others.

³³⁹ Vienna Convention of 1988, art 6(6).

³⁴⁰ ILC Survey 2010, para 26.

³⁴¹ Boister (n 323) 265.

³⁴² Boister (n 323) 264.

obligation. The commonality reflects the obligation on part of the custodial State to prosecute if extradition is refused or would have been refused, to eliminate any possible obstacles to prosecution or extradition such as non-extradition of own nationals, and to introduce and make possible the applicability of what Boister labels the subsidiary universality, a nuanced transnational law enforcement mechanism. Nonetheless, it should be noted that the *aut dedere aut judicare* obligation in the 1988 Convention is based on the primacy of prosecution as there is no obligation to request extradition or to having received such a request in order to submit the case for the purpose of prosecution.³⁴³

Boister promulgates that subsidiary universality jurisdiction, based on the duty *aut dedere aut judicare*, is the appropriate legal approach to drug offences as “where an extradition request is rejected for whatever reasons, the requested state is under a duty to assume jurisdiction itself and prosecute the alleged offender.”³⁴⁴ The duty ‘extradite-or-prosecute’ is particularly based as custom on its multiple repetitive inclusion in various drug conventions.³⁴⁵ A crucial element in the enforcement mechanism on international level against drug offences laid down and affirmed in all drug conventions since 1931 is the effectiveness of the correct implementation of national jurisdiction over drug offences and “on the extradition of drug offenders to ensure that they do not escape prosecution.”³⁴⁶

³⁴³ See Vienna Convention of 1988, art 6(9).

³⁴⁴ Boister (n 323) 200.

³⁴⁵ See A Abramovsky, ‘Extraterritorial abductions: America’s ‘Catch and Snatch’ policy run amok’ (1991) 31 VJIL 151, 180. See also, C Blakesley and O Lagodny, ‘Finding harmony amidst disagreement over extradition, jurisdiction, the role of human rights, and issues of extraterritoriality under international criminal law’ 24 VandJTL 1, 35.

³⁴⁶ Boister (n 323) 21.

The customary status of the ‘extradite or prosecute’ duty as regards criminal acts of drug trafficking has also been supported and affirmed in UN General Assembly Resolution 64/182, adopted without a vote.³⁴⁷ The Plan of Action asserts that much progress has been made through conventional regimes as regards the minimization of refusals of extradition in drug trafficking. It also calls upon States to “ensure...when, on grounds of nationality, they do not extradite a person, they submit, in conformity with their domestic legislation, as appropriate, the case to their competent national authorities for prosecution.”³⁴⁸ The purported customary obligation to prosecute if no extradition takes place is also affirmed in the reminder that States should “advance cooperation in the areas of extradition...consistent with relevant and applicable international human rights obligations”.³⁴⁹ UNGA Resolution 66/183 on International Cooperation against the World Drug Problem of 3 April 2012, adopted without a vote, further illustrates the existing obligation to prosecute certain criminal activities related to drug trafficking on international level. The Resolution reminds and

“reiterates the urgent need for Member States to strengthen international and regional cooperation in order to respond to the serious challenges posed by the increasing links between drug trafficking, money-laundering, corruption and other forms of organized crime, including trafficking in persons, smuggling of migrants, trafficking in firearms, cybercrime and, in some cases, terrorism and the financing of terrorism, and to the significant challenges faced by law enforcement and judicial authorities in responding to the ever-changing means used by transnational criminal organizations to avoid detection and prosecution.”³⁵⁰

³⁴⁷ UNGA Resolution 64/182 (30 March 2010) A/RES/64/182. The Resolution is also known as the Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the Drug Problem.

³⁴⁸ Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the Drug Problem, Commission on Narcotic Drugs (11-12 March 2009) pt 54 (d).

³⁴⁹ *ibid* pt 54(e).

³⁵⁰ UNGA Resolution 66/183 (3 April 2012) A/RES/66/183, pt 18.

One such mechanism to ascertain prosecution of international drug trafficking offences is the customary obligation to prosecute such acts if no extradition takes place. The crime of international drug trafficking might be solidifying into a triggering mechanism for a customary obligation *aut dedere aut judicare*.

d. Prevention And Punishment Of Crimes Against Internationally Protected Persons

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973 with its 175 State Parties³⁵¹ also contains an ‘extradite or prosecute’ obligation. Similar to the Hague Convention formula of 1970 it mandates a Contracting State in which the alleged offender who have committed serious attacks on Heads of State, Heads of Government, Ministers of Foreign Affairs, diplomats and other internationally protected persons and who is located in its territory to either extradite or submit the case to its competent authorities for the purpose of prosecution.³⁵² The language of the Protected Persons Convention closely follows the formula used in the Hague Convention of 1970 albeit it provides for no exception whatsoever and submission of the case to the competent authorities for the purpose of prosecution “without undue delay”. Article 7 of the Convention clearly establishes the obligation on the custodial State “in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for

³⁵¹ See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (entered into force on 20 February 1977) 1035 UNTS 167, record of participants accessible at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=XVIII-7&chapter=18&lang=en#Participants

³⁵² See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973, art 7.

the purpose of prosecution, through proceedings in accordance with the laws of that State.” States must ensure that the alleged offenders, found on their territory, are available for prosecution or extradition.³⁵³

On at least two occasions, the Security Council has acted to affirm the obligation to extradite or prosecute, found in the Convention. In Resolution 1054 of 1996, adopted by a vote of 13 in favour and 2 abstentions, the Security Council demanded from the Government of Sudan to take “immediate action to ensure extradition to Ethiopia for prosecution of the three suspects sheltered in Sudan” who were wanted for “the terrorist assassination attempt on the life of the President of Egypt in Addis Ababa, Ethiopia”.³⁵⁴ Although Sudan was a party to the said Convention, the Security Council clearly demanded the trigger for the obligatory extradition to Ethiopia, willing and able to submit the case for prosecution, precisely because Sudan was not desisting “from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuary to terrorist elements.” The Resolution further strengthens the claim that if there is a substantial risk for bad faith or inadequate prosecution in the custodial State, as explored in detail in Chapter 2, then the obligation to extradite is automatically triggered. Additionally, the obligation to prosecute crimes against the UN personnel is included in the 1996 Draft Code of Crimes against Peace and Security of Mankind.³⁵⁵

However, state practice is scant at the current moment to draw the conclusion that there exists a customary obligation *aut dedere aut judicare* for the crimes against internationally protected

³⁵³ See M Wood, ‘The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents’ (1974) 23 ICLQ 791-817.

³⁵⁴ UNSC Res 1054 (26 April 1996) S/RES/1054.

³⁵⁵ See 1996 Draft Code, art 8.

persons. As shown above, the evidence for the custom needs to be diverse and substantial, and such seems to lack as regards the crime at hand. It might be due to the fact that such crime does not occur on regular or systematic basis. Nonetheless, it is more appropriate to ascertain that the obligation *aut dedere aut judicare* pertaining to the internationally protected persons is of *status nascendi* type.

IV. Conclusion

Practice of states indicating custom can be revealed in multilateral conventions on specific crimes that contain norms and values pertaining to fight against impunity through the *aut dedere aut judicare* principle. Such approach is often prone to criticism in its custom-creating capacity as actual state practice and the ascribed norms do not overlap.³⁵⁶ Such reality should come as no surprise as the role of the obligation is to regulate behaviour of States, persons and groups in extradition and prosecution of core international crimes. It would be erroneous to assert that custom creation is a process which merely takes a snapshot or pinpoints the exact status of state practice. Meron claims that “the law-making process attempts to articulate and emphasize norms and values that...deserve promotion and acceptance by all states, in order to establish a code for the better conduct of nations.”³⁵⁷

As the ‘extradite or prosecute’ principle touches upon fundamental sovereign issues as established in the previous chapters, the gap between the value of such duty on international level and its actual application might be rather obvious. Nonetheless, the customary obligation

³⁵⁶ The model is based on Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States, para 701.

³⁵⁷ Meron (n 14) 44.

aut dedere aut judicare seems to follow the nature of the crime that triggers it. Hence, the universal need to suppress core crimes such as torture, genocide, war crimes, and crimes against humanity influences the customary status of the obligation also evidenced in state practice and *opinio juris* in various UN resolutions, international and domestic decisions and other state pronouncements. The presence of the *aut dedere aut judicare* clause to particular offences of international law such as financing of terrorism, terrorist bombing, hijacking, safety of civil aviation, and drug trafficking and the nature of such crimes as transnational makes it more difficult to ascertain categorically the existence of a customary *aut dedere aut judicare* obligation pertaining to them as seen in Chapter 2. It should be duly noted that even within the group of transnational crimes, the obligation *aut dedere aut judicare* for terrorism might have attained customary status in light of recent state practice. Overall, the findings as regards the customary obligation follow the outline of the principle of no impunity: the most serious, core crimes carry the customary obligation *aut dedere aut judicare* while other transnational crimes are able to form such customary nature as they are or become more universally recognized.

CHAPTER 5

STATE RESPONSIBILITY AND THE *AUT DEDERE AUT JUDICARE* OBLIGATION

I. Introduction

In order to complete the examination of the scope and nature of the obligation *aut dedere aut judicare* and to fully understand its function, the following chapter examines the applicability of the State responsibility regime to the obligation *aut dedere aut judicare* pertaining to certain international crimes such as genocide, torture, terrorism, war crimes, and crimes against humanity. The importance of the regime of state responsibility for potential violations of the principle *aut dedere aut judicare* fits with the overall purpose of the thesis, namely the analysis of the scope, content and function of the duty. The chapter serves as a logical conclusion of the thesis.

The chapter follows the structure of the definition and material scope of wrongful acts, breaches, exceptions and defences to State responsibility, invocation of State responsibility, *erga omnes* obligations and State responsibility, available countermeasures, all applied to the customary obligation *aut dedere aut judicare*.

II. Internationally Wrongful Acts and *Aut Dedere Aut Judicare*

The regime of State responsibility “is at the heart of international law”.¹ State responsibility includes a complex, multi-faceted regime in which a simple breach of an obligation is sufficient

¹ See A Pellet, ‘The Definition of Responsibility in International Law’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 3, citing P Reuter, ‘Trois observations sur la codification de la

to trigger its applicability.² The State responsibility paradigm also incorporates an enforcement aspect through the adoption of countermeasures and reparations for injury caused.³ States continue to rely on what Schachter labels appropriately “self-help”, a term broadly meaning “a range of nonforceful actions that may be taken by a state injured by a violation of legal obligations owed to it.”⁴

The aim of the current chapter is to explore and analyse the regime of State responsibility pertaining to States who violate the customary or conventional obligation *aut dedere aut judicare* and the legal consequences for such internationally wrongful acts. Without looking at the regime of state responsibility, the analysis of the ‘extradite or prosecute’ principle would be incomplete. The chapter does not attempt to examine what has already been defined in the previous chapters in terms of the substance and content of the duty to ‘extradite-or-prosecute’ but focuses on the secondary rules of international law relating to state responsibility, wrongful acts, breaches, precluding circumstances, countermeasures, affected states and reparations regime.⁵ Roughly, the primary rules refer to “obligations whose breach can be a source of responsibility”, while the secondary rules “are aimed at determining the legal consequences of failure to fulfill obligations

responsibilite internationale de Etats pour fait illicite’ in *Le droit international au service de la paix, de la justice et du developement* (Pedone 1991) 390.

² See Pellet (n 1) 9.

³ See G Arangio-Ruiz, 5th Report on State Responsibility, 2(1) ICL Yearbook 1993, para 256.

⁴ O Schachter, ‘The UN Legal Order: An Overview’ in C Joyner (ed), *The United Nations and International Law* (CUP 1998) 18.

⁵ See James Crawford, *The ILC’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2007) 75.

established by the ‘primary’ rules...and fall within the actual sphere of responsibility for internationally wrongful acts.”⁶

The analysis of State responsibility for breaches of the obligation *aut dedere aut judicare* comes within the framework of the Articles of Responsibility of States for Internationally Wrongful Acts (‘ARSIWA’). Article 1 ARSIWA states, “[e]very internationally wrongful act of a State entails the international responsibility of a State”. The first element of State responsibility is the action or omission or combination of both which results in an internationally wrongful act.⁷ It is crucial to delineate that the qualifying clause “every” indicates that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility.”⁸ Hence, any violation of a duty finding its source in customary or conventional law or under general principles would give rise to the applicability of the regime of State responsibility. In essence, any dispute between two or more States or legal actors in international law on conventional or customary obligations and rights⁹ inherently involves international responsibility “whether the remedy sought is reparation for a past breach, or cessation of the internationally wrongful conduct for the future.”¹⁰

⁶ ILC, ‘Report of the ILC’ 32nd Session, 2(2) ICL Yearbook 1980, para 23. The origin of the differentiation between ‘primary’ and ‘secondary’ rules could be found in HLA Hart, *The Concept of Law* (2nd ed, OUP 1994) ch 5. In essence, the primary rules of international law concern the expected behavior in the international legal order, while the secondary rules aim at delineating “the consequences of non-performance of these [primary] rules.” See, David, ‘Primary and Secondary Rules’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 29.

⁷ ARSIWA Commentaries (n 5) 77. See also, *Case concerning the Acquisition of Polish Nationality (Germany v. Poland)* (Merits, 24 July 1924) 2 RIAA 401, 425, where it is stated that States must “refrain from all illegal acts, where by the positive actions of its authorities, or by omission or by a refusal to lend assistance or to do justice.” Omission usually refers to the abstention of action which ought to have been performed, Latty, ‘Acts and Omissions’, in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 358.

⁸ *Rainbow Warrior (New Zealand/France)* (1990) RIAA, vol. XX, 217. See also, B Stern, ‘The Elements of an Internationally Wrongful Act’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 212.

⁹ For definition of legal dispute, see *Mavrommatis Palestine Concessions (Greece v. U.K.)* [1924] PCIJ Series B No 3, 16.

¹⁰ J Crawford, *The System of International Responsibility*, in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 20.

The constitutive elements of an internationally wrongful act are an action or omission, attributable to the State under international law, which constitutes a breach of an international legal obligation of whatever source in force for that State at the time of the breach.¹¹ The responsibility for wrongful acts or omission is triggered not only in the territory of the responsible State but also as a consequence of lawful or unlawful exercise of “effective control of an area outside national territory... from the fact that such control [is] exercised directly...or through a subordinate local administration.”¹²

There are only two conditions for an internationally wrongful act as examined above. Whether there is an additional element of State responsibility, such as damage or an intention to harm, depends on the substantive nature of the primary norm. As regards the *aut dedere aut judicare* obligation, no additional element exists as evidenced in the ICJ’s *Habre* decision.¹³ The decision clearly stated that there are no additional elements such as fault or intention to act, reflected in ARSIWA as “it is only the act of the State that matters.”¹⁴ Finally, as the obligation ‘extradite or prosecute’ is substantively based on a positive duty to take steps to either launch a preliminary inquiry and submit the case for the purpose of prosecution or extradite the suspect, the act in the form of omission, i.e. of not fulfilling the necessary substantive requirement of the obligations, would be primarily essential.

¹¹ Articles on Responsibility of States for Internationally Wrongful Acts (adopted on 12 December 2001) UNGA 56/83 A/56/49 (I)/Corr 4, art 2 (ARSIWA). See also, *Phosphates in Morocco* (Preliminary Objections) 1938 PCIJ Ser. A/B, No. 74, 10. See also, *United States Diplomatic and Consular Staff in Tehran* (Judgment) ICJ Rep 1980, 3: “it must be determined how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.” (emphasis added)

¹² See *Loizidou v Turkey* (1995) (Preliminary Objections, GC) Ser A No 310, para 62. See also, *Lopez Burgos v Uruguay* Communication No. 52 (1979) HRC, A/36/40, 176 and HRC General Comment 31, para 10.

¹³ See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422, paras 95, 122.

¹⁴ ARSIWA Commentaries (n 5) 84. See also, *US Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep 3, 29. Stern labels the absence of intention or fault as “the objective idea of non-conformity”, Stern (n 8) 209.

As regards the first element of the internationally wrongful act, that the act or omission should be attributable to the State under international law, inaction is particularly pertinent to the breach of the obligation *aut dedere aut judicare* in terms of the violation by the judicial, legislative or executive branches of the custodial State. An act of State inherently involves an act or omission by a state official or a group of state officials as “States can act only by and through their agents and representatives.”¹⁵ The State is treated as a unitary actor for the purpose of attribution of wrongful acts and the act or omission pertaining to the substance and fulfillment of the obligation ‘extradite-or-prosecute’ is directly linked to all branches of government involved in the extradition or prosecution and criminal processes in general, like the judiciary, executive branch, investigative and police authorities, prosecutorial services. Finally, the test is fairly straightforward to satisfy as to whether the substantive conditions of the obligation are met or not, without need to delve into fault, culpability, negligence or want.¹⁶

The second element of the internationally wrongful act pertains to the existence of a breach of a treaty and/or customary international obligation at the time of the act or omission.¹⁷ The idea behind the breach of an obligation has been traditionally associated with a corresponding right by the State invoking state responsibility as “there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole).”¹⁸ As regards the obligation *aut dedere aut judicare*, it has been established above in Chapter 2 that States have the right to establish jurisdiction over the relator who is a subject to an extradition

¹⁵ *German Settlers in Poland* (1923) PCIJ Series B No 6, 22.

¹⁶ ARSIWA Commentaries (n 5) 82.

¹⁷ See *Factory at Chorzow* (Jurisdiction) 1927 PCIJ Series A No 9, 21. See also, *Reparation for Injuries Suffered in the Service of the United Nations* (Judgment) [1949] ICJ Rep 174, 184.

¹⁸ ARSIWA Commentaries (n 5) 83.

request and have the right to request extradition of such a person for submitting the case for the purpose of prosecution.

In terms of the framework to comply with the obligation to ‘extradite-or-prosecute’ and subsequent wrongful acts or omissions relating to the obligation, the ICJ’s *Habre* decision serves as an illustration in terms of wrongful acts pertaining to the obligation *aut dedere aut judicare* for torture. The wrongful act commences from the moment when the State does not appropriately and in a timely manner implement the necessary rules to minimize impunity for torture: “it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.”¹⁹ The Court clarified that the obligation to submit the case for the purpose of prosecution requires the State party to take all necessary measures for its implementation as soon as possible, “in particular once the first complaint had been filed”.²⁰ If the State party fails to do so or to take all necessary steps as soon as possible, in reasonable time, without delay, the State breaches and remains in breach of its obligation through the act of omission.²¹ Such continuing wrongful acts negatively affect the purpose of these obligations, namely the prevention of the alleged perpetrators of similar acts going unpunished, “by ensuring that they cannot find refuge in any State Party.”²² The Court also clarified that although the custodial State has the option to extradite the relator to a State which has made such a request, this is “on the condition that it is to a State which has jurisdiction in some capacity...to prosecute and try him.”²³ In that line of reasoning, the requesting State needs to meet certain conditions before the extradition request is issued. One of the reasons for such an

¹⁹ *Belgium v Senegal*, Judgment (n 13) para 114.

²⁰ *ibid* para 117.

²¹ *ibid* para 117.

²² *ibid* para 120.

²³ *ibid* para 120.

approach towards extradition is to prevent the possibility for *pro-forma* extraditions with the purpose of shielding the relator from prosecution for the alleged offence as examined in details in Chapter 2 above.

The international responsibility of the State is also engaged whenever there is a failure to comply with the obligations to make a preliminary inquiry and to submit the case to the relevant authorities for the purpose of prosecution. A State is required to cease the continuing wrongful act(s) and it “must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite” the suspect.²⁴ The material breach of the obligations ceases once the relator is extradited to another State party with proper jurisdiction to investigate and/or prosecute the relator. Hence, the obligation and corresponding responsibility on the custodial State remain in force until the moment in which the relator is physically extradited to another State. In this line, an eventual initial extradition request which is withdrawn at a later moment does not alleviate the custodial State from its obligation.

Finally, “the characterization of an act of a State as internationally wrongful is governed by international law.”²⁵ There are two significant consequences: 1) a possible violation of a domestic law as a consequence of a non-fulfilment or a breach of an international obligation could not be used as a defence²⁶, and 2) “a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by

²⁴ *ibid* para 121.

²⁵ ARSIWA, art 3.

²⁶ See *Electronica Sicula S.p.A. (ELSI)* (Judgment) ICJ Rep 1989, 15: “what is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.”

international law.”²⁷ The characterization element is crucial for the proper applicability and functioning of the *aut dedere aut judicare* regime as shown above in Chapters 2 and 3 as the regime is quite complex as regard definitions of what constitutes extradition and prosecution in international law, the possible exceptions to extradition, the requirements for preliminary inquiry, the elements of willing and able prosecution, among others. In this manner, the requested State may not escape its obligations under the *aut dedere aut judicare* obligation by invoking domestic law provisions as “a State cannot rely, as against another State, on the provisions the latter’s Constitution, but only on international law and international obligations duly accepted.”²⁸ Hence, a State cannot rely on its domestic laws²⁹ in not fulfilling its obligation to extradite or prosecute.³⁰ The ICJ also affirmed that under Article 27 of VCLT, which reflects customary law, a State cannot justify its breach of obligation to prosecute under international law by invoking provisions of its internal law, “in particular by invoking the decisions as to lack of jurisdiction...or the fact that it did not adopt the necessary legislation”.³¹

III. Attribution of the Internationally Wrongful Act

The conduct which triggers State responsibility is generally accepted to be imputable to the State’s government, or “of others who have acted under the direction, instigation or control of

²⁷ ARSIWA Commentaries (n 5) 86. See J Crawford, ‘The System of International Responsibility’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 20.

²⁸ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* 1932 PCIJ Series A/B No 44, 24.

²⁹ See *Greco-Bulgarian “Communities”* 1930 PCIJ, Series B No 17, 32. See also, *Free Zones of Upper Savoy and the District of Gex* 1932 PCIJ Series A/B No 46, 167.

³⁰ See also *Belgium v Senegal*, Judgment (n 13) para 111.

³¹ *Belgium v Senegal*, Judgment (n 13) para 113.

those organs, i.e. agents of the State.”³² The criteria to determine whether the conduct is attributable to the State organs are based on international law, although the political and administrative arrangements of each State are a significant determinant as regards what organs are vested with various responsibilities based primarily on the domestic legal structure of each State.

The conduct of the State is attributable as an act of the same State under international law whenever the organ exercises legislative, executive, judicial or any other function no matter the position it holds in the overall political or administrative structure or hierarchy of the State and “whatever its character as an organ of the central government or of a territorial unit of the State.”³³ State organs include “all the individual or collective entities which make up the organization of the State and act on its behalf.”³⁴ Additionally, as the State is perceived as a unitary actor as regards the responsibility for internationally wrongful acts since “according to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of the State”.³⁵ States are liable for conduct of State organs which “exceeded their conduct authority or contravened instructions.”³⁶

In substantive terms, the conventional and customary obligation *aut dedere aut judicare* requires State organs to take positive steps in the apprehension of the relevant person, conduct of a

³² ARSIWA Commentaries (n 5) 91. See also, Ian Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Clarendon Press 1983) 132-165.

³³ ARSIWA, art 4(1).

³⁴ ARSIWA Commentaries (n 5) 94. See also, *Questions relating to German Settlers in Poland* 1923 PCIJ Series B No 6, 22.

³⁵ *Differences Relating to Immunities from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, para 62. See also, *Salvador Commercial Company case* (1902) RIAA vol. XV, 455, 477, and *LaGrand (Germany v. USA)* (Provisional Measures) [1999] ICJ Rep 9, para 28. See also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) para 384.

³⁶ S Marks and F Azizi, ‘Responsibility and Human Rights: International Mechanisms’, in J Crawford and others (eds), *The Law of State Responsibility* (OUP 2010) 727.

preliminary inquiry as to the alleged offences, establishment of an appropriate legal base for the purpose of prosecution, and either submission of the case for the purpose of prosecution or extradition of the relator to a willing and able jurisdiction pursuant an extradition request. Again, the *Habre* case sheds light on the inseparable link between wrongful acts or omissions and attribution. The ICJ noted that Senegal had delayed the submission of the case to its relevant authorities, including legislative and judicial branches, for the purpose of prosecution by not adopting the appropriate legislation, i.e. by omitting to take positive steps until 2007. The Court elaborated that the obligation to establish the appropriate jurisdictional base in domestic courts over the alleged criminal offence of a grave type such as torture is a necessary condition for the implementation of the obligation for initiation and commencement of a preliminary inquiry and the submission of the case to competent judicial authorities for the purpose of prosecution.³⁷

A clarification on the temporal and material scope of the obligation to criminalize is also provided as it commences once the State concerned is bound by the relevant customary or conventional obligation to achieve a particular preventative and deterrent objective with the big picture in mind “since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity.”³⁸ Hence, a three-step process is elucidated in terms of attribution in the *aut dedere aut judicare* obligatory regime: from the introduction of criminalization and proper jurisdiction by the relevant State legislative or executive organs, through utilizing prosecution of the suspect by the investigative

³⁷ *Belgium v Senegal*, Judgment (n 13) para 74. The Court also affirmed the positive obligation paradigm that “[t]he purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.”

³⁸ *Belgium v Senegal*, Judgment (n 13) para 75.

and judicial organs, to a common mission on inter-state level to eliminate impunity, involving the cooperation of all State organs.³⁹

There might arise a situation in which an organ of one State might be placed at the disposal of another State. In such rare circumstances, the conduct of an organ at the disposal of a State by another State shall be considered an act of the former State “if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.”⁴⁰ In order to correctly place what organ is responsible for the acts or omissions in such cases, one needs to establish “a functional link between the organ in questions and the structure or authority of the receiving State.”⁴¹

An appropriate example of State responsibility attributable to the receiving State for acts or omission of another State’s organ is the Judicial Committee of the Privy Council where the decisions of the Privy Council are attributable to the Commonwealth State which brings the appeal, not the UK.⁴² In such circumstances the receiving State would bear the State responsibility for the decision of the judicial organs of another State as the latter are not under control or direction of the sending State. As regards the *aut dedere aut judicare* obligation, a situation may arise in which the custodial State may want for whatever reasons to ‘outsource’ fulfilling its obligation pertaining to submitting the case for the purpose of prosecution or extraditing the relator but such highly unlikely outsourcing is still covered by ARSIWA. A

³⁹ Regimes are to be defined in broad terms as “a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states.” See J Ruggie, ‘International Response to Technology: Concepts and Trends’ (1970) 29 *International Organizations* 570. See also, Anthony Arend, *Legal Rules and International Society* (OUP 1999) 120-121.

⁴⁰ ARSIWA, art 6. Examples include judges placed on particular cases to executive functions as judicial organs of another State.

⁴¹ ARSIWA Commentaries (n 5) 104.

⁴² ARSIWA Commentaries (n 5) 105.

similar approach is seen in the Statute of the Extraordinary African Chambers (“EAC”) in Senegal, where it is noted that the purpose of the Statute and the EAC is to make possible “the Republic of Senegal’s prosecution of international crimes committed in Chad between 7 June 1982 and 1 December 1990, in accordance with *Senegal’s international commitments*.”⁴³ The fact that the EAC has a non-Senegalese judge acting as a President of the Trial Chamber or the Appeals Chamber does not in any manner transfer the State responsibility away from Senegal’s obligation to prosecute the crimes of genocide, crimes against humanity, war crimes, and torture.⁴⁴

The regime of Article 6 ARSIWA ensures that such formalistic outsourcing would not be possible as even though a State may utilize the organs of another State, the former would incur State responsibility. Such an interpretation is in line with the origins of the obligation to minimize impunity on an international level for the international crimes which can be traced back to the sources of diplomatic protection. In the *Tellini* case, the notion of the applicability of the international minimum standard pertaining to criminal acts was affirmed as “[t]he responsibility of a State is...involved...if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.”⁴⁵ Such interpretations as to obligation to minimize impunity on an international level have also been illustrated above in Chapter 4 pertaining to the origins of diplomatic protection and international minimum standard. The use of cases like *Tellini* should indicate the ‘ground floor’ of the attempt to eliminate impunity for the commission of international crimes as the *Tellini*,

⁴³ See Statute of the Extraordinary African Chambers, art 1, accessed on 25 September 2015 at <<http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>>.

⁴⁴ See Statute of the Extraordinary African Chambers, art 11.

⁴⁵ *Tellini case* (1924) LNOJ 5 year, No 4, 524.

Jonas, and *Neer* cases serve as contextual evidence or as an analogy as the cases illustrate early manifestations in international jurisprudence of the emergence of a community interest in suppression of international crimes or delinquencies.

Additionally, the obligation on the part of the State to prevent and punish criminal acts of individuals may be connected to the principle of ‘due diligence’ as the breach of the principle would subsequently invoke State responsibility of the State that does not prevent or punish the criminal activities at hand.⁴⁶ Even private acts might lead to State responsibility based on the principle of due diligence as “the lack of due diligence to prevent the violation or to respond to it” might constitute a wrongful act.⁴⁷ In essence, the principle of due diligence, the legal duty “to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment”⁴⁸ is very similar to the positive duty to launch preliminary inquiries into alleged violations of core crimes.⁴⁹

The duty to prosecute violations of international law can be seen as part of the right to remedy as well.⁵⁰ The preliminary inquiry duty “is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question.”⁵¹ The authorities responsible for carrying out the inquiry are those vested with the task of composing a case file and collecting facts and evidence, including documents or witness statements relating to the events at issue and linked to the suspect’s possible involvement in the matter. In situations of

⁴⁶ Stern (n 8) 208.

⁴⁷ See *Velasquez Rodriguez v Honduras case* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988) para 148.

⁴⁸ *ibid* paras 174-177.

⁴⁹ For positive obligations in human rights law, see *Z and Others v UK* App No 29392/95, ECHR Rep 2001-V, para 72. See also, Marks and Azizi (n 36) 731.

⁵⁰ See R Cryer, *Prosecuting International Crimes* (CUP 2005) 105.

⁵¹ *Belgium v Senegal*, Judgment (n 13) para 83.

transborder criminal activity or of inquiries in a non- *locus delicti* State, the custodial State is asked to seek cooperation with any other State where complaints against the same suspect have been filed in relation to the case, in order “to enable the State to fulfil its obligation to make a preliminary inquiry.”⁵²

IV. Breach of the International Obligation ‘Extradite-or-Prosecute’

The essence of the regime of State responsibility is structured around the concept of a breach of an international obligation which results in an internationally wrongful act, a manifestation of “the non-conformity of the State’s actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation.”⁵³ The breach of international duties does not appear in the abstract; actual acts or omissions are necessary elements in order to establish responsibility of States for the wrongdoing. The following section follows the paradigm of breaches established in ARSIWA and applied to the obligation *aut dedere aut judicare* pertaining to what constitutes a breach of an international duty, whether the obligation was in force at the time of the breach, whether the breach is continuous, and whether the breach consists of single or composite acts.

A breach of an international obligation such as ‘extradite-or-prosecute’ occurs when an act of the State is not in conformity with what is required of it by the conventional, customary, or general principle obligation, as established above.⁵⁴ It is also essential to note that the breach of an international obligation also occurs when there is a partial conduct or behaviour to what is

⁵² *ibid* para 83.

⁵³ ARSIWA Commentaries (n 5) 124.

⁵⁴ ARSIWA, art 12. ARSIWA Commentaries (n 5) 125. See also, *Dickson Car Wheel Company claim* (1931) 4 RIAA 669, 678.

required by international law, evidenced in the phrase “not in conformity with what is required ...by that obligation.”

In terms of the sources of the international obligation, all recognized sources by international law are included such as custom, treaty, and general principles of international law.⁵⁵ Hence, it was significant to establish in Chapter 4 above that the existence of the customary *aut dedere aut judicare* obligation is applicable at the current moment for a set of international crimes. Breaches can also be classified as arising from bilateral, multilateral or communal obligations, and they can “involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law.”⁵⁶ Additionally, the breach of the international obligation does not strictly depend on the subject matter of the duty itself as what matters is the commission of the internationally wrongful act as a non-conforming conduct.⁵⁷

The international obligation must exist and be in force on the State at the time of the alleged breach. State responsibility is only triggered and applicable when the State is bound by the obligation which is breached by the wrongful act or omission. Moreover, the breach is ascertained and interpreted against the moment when the obligation is violated as “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”⁵⁸

⁵⁵ *Gabcikovo-Nagymaros Project case* (Judgment) [1997] ICJ Rep 9, para 47: “it is well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved *whatever the nature of the obligation* it has failed to respect.” (emphasis added)

⁵⁶ ARSIWA Commentaries (n 5) 127.

⁵⁷ ARSIWA Commentaries (n 5) 129. See also, *Oil Platforms (Iran v. USA)* (Preliminary Objections) [1996] ICJ Rep 803, para 21.

⁵⁸ *Island of Palmas case* (1949) RIAA, vol. II, 829, 845. See also, “*James Hamilton Lewis*” claim (1902) RIAA vol. IX, 66.

The *aut dedere aut judicare* obligation is “normally implemented” after the State has performed the obligations of the fulfilment of the requirement to adopt adequate legislation to enable the criminalization of the crime triggering the conventional or customary obligation *aut dedere aut judicare* and the provision to enable the domestic courts with universal jurisdiction and to make an inquiry into the facts of the case.⁵⁹ The trigger for the applicability of the obligation to prosecute is the presence of the suspect on the territory of the State concerned, i.e. a *ratione personae* jurisdiction is required for the initiation of the preliminary inquiry and subsequent prosecution. It seems that the preliminary inquiry is an embedded, mandatory requirement within the obligation to prosecute. A similar broad approach to the value and importance of the preliminary inquiry and investigation has been taken by the EAC, an institution designed in 2013 as a corrective mechanism for Senegal to fulfil its obligation to extradite or prosecute after the ICJ’s decision in the *Belgium v. Senegal* case of 2012. The preliminary inquiry should be as broad as possible, making “all arrangements for judicial cooperation” possible and even when necessary, receiving and using results of investigations carried out by the judicial authorities of other States for international crimes. In order to satisfy the obligation to prosecute and not be in breach of the obligation, the custodial State must submit the case to the competent authorities.⁶⁰ The result of this submission and initiation of prosecutorial action is not essential, i.e. a result-oriented definition is not relevant.

It is evident that the submission of the case to the relevant domestic authorities “may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the

⁵⁹ See *Belgium v Senegal*, Judgment (n 13) para 91.

⁶⁰ *Belgium v Senegal* Donoghue Declaration, para 3.

charges against the suspect.”⁶¹ A factual approach to determining whether the obligation to prosecute is satisfied is applied: starting with the timely preliminary inquiry and ending with the submission of the case to the relevant authorities, who still retain discretion to review the case before proceedings are instituted.

A State may not need to submit the case for the purpose of prosecution “if the State in whose territory the suspect is present has received a request for extradition” as long as the requested State accedes to the extradition request.⁶² In this manner, the extradition must take place in order for the requested State to be alleviated from the obligation to submit the case for the purpose of prosecution. If the extradition is not acceded to for whatever reason, the custodial State cannot claim to have fulfilled the obligation. As seen above, for core crimes prosecution takes precedence as “extradition 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.”⁶³ Here a balancing act is struck: as extradition arrangements involve various exceptions and complex requirements, and oftentimes discretionary decision-making by the State organs, to pronounce an obligation to extradite would be problematic, to say the least. Hence, the breach of the *aut dedere aut judicare* obligation occurs when the custodial State does not submit the case for the purpose of prosecution or extradite the relator due to lack of an effective inquiry or lack of appropriate domestic laws to prosecute the relator and continues until the act or legal relationship within the regime or among States is once again in conformity with the international obligation as established in Chapters 2 and 4.

⁶¹ *Belgium v Senegal*, Judgment (n 13) para 94.

⁶² *ibid* para 95.

⁶³ *ibid* para 95.

The extradition part of the *aut dedere aut judicare* principle is interpreted to be of a discretionary character, which allows a State concerned to be relieved of the absolute obligation to prosecute for whatever reasons there might be. The extradition element serves as a supplementary mechanism to ensure that a custodial State which does not want to, or cannot investigate and submit the case for the purpose of prosecution, is able to fulfil its obligations by transferring the suspect to the requesting State. The primary effect of the obligation to submit the case for the purpose of prosecution in the custodial State remains applicable until the actual extradition of the relator takes place as the initial request for extradition might be withdrawn by the requesting State for whatever reasons. In such a manner, it is ascertained that there would be no loophole in which the custodial State would attempt to transfer responsibility to the requesting State although an actual extradition has not taken place. The requesting State may use the extradition request as a leverage against an unwilling custodial State but must do so in good faith in order not to compromise the function of the obligation. If the requesting State issues an extradition request in bad faith, such an act would be performed in violation of the good faith principle which clearly stipulates that “every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law”.⁶⁴ Article 26 of the VCLT also obliges States that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

The issue of when the wrongful act or omission occurs is important for the regime of State responsibility as it is directly linked with one of the goals behind the regime—the cessation of the wrongful conduct. Article 14 of ARSIWA identifies two major categories of the extension in

⁶⁴ UNGA Resolution 375(IV) 6 December 1949, annex. See also, art 13 of the Declaration on Rights and Duties of States. Good faith is “directly related to honesty, fairness and reasonableness”, JF O’Connor, *Good Faith in International Law* (Dartmouth 1991) 121.

time of the breach: first, a breach of a non-continuing character of the act, and, second, a breach of an obligation of a continuing character.⁶⁵ The breach of the *aut dedere aut judicare* obligation falls under the latter category as the wrongful act of not submitting the case for the purpose of prosecution or not extraditing the alleged perpetrator “occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligations during that period.”⁶⁶ A continuing wrongful act is an act which commences but does not cease at the relevant time of the breach as the consequences of the wrongful act or omission might be prolonged in time. The applicability of the exact time and continuing effect of the wrongful act or omission must be analysed in light of the continued duty of performance as each State, including the breaching one, is under an obligation to perform the obligation.⁶⁷ Whatever the consequences for the breaching State, examined below, the continued duty to perform the obligation is not affected in any manner as the whole purpose of the regime is to re-establish the *status quo ante* applicability of the obligation and to preserve the content of the same duty.⁶⁸

Moreover, the State responsible for the wrongful act is under an obligation to cease the act if it is continuing and to offer the necessary assurances that the wrongful act or omission will not be repeated.⁶⁹ The reason behind the cessation and assurance of non-repetition is directly linked to the broad purpose of State responsibility, namely “the restoration and repair of the legal

⁶⁵ Whether the act is continuing would depend on the primary obligation.

⁶⁶ ARSIWA Commentaries (n 5) 136. Article 14(2) ARSIWA states, “the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”

⁶⁷ ARSIWA, art 29.

⁶⁸ See ARSIWA Commentaries (n 5) 194.

⁶⁹ ARSIWA, art 30. See also, *Rainbow Warrior (New Zealand v. France)* (1990) 20 RIAA 215, para 113.

relationship affected by the breach.”⁷⁰ Cessation primarily affects the immediate performance and restoration of the obligation as it ought to function in the international legal order, while the assurance prong ensures a preventative and deterrent element of non-repetition of the wrongful act in the future. The cessation duty exists as “the wrongful act has a continuing character and...the violated rule is still in force at the time in which the order is issued.”⁷¹ Moreover, the termination of the wrongful act serves as the most initial elimination of the consequences of the wrongful act by assuring that the effectiveness and applicability of the primary rule are preserved and restored.⁷² The duty to perform and the duty of cessation are essential for the effectiveness of the *aut dedere aut judicare* principle.

1) Assistance and Commission of the Breach

The breach of the international obligation *aut dedere aut judicare* may occur as a series of acts or omissions. In such composite acts, “the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”⁷³ The particular content of the obligation *aut dedere aut judicare* indicates that the initial wrongful act might be traced to the lack of sufficient preliminary inquiries and subsequent lack of submission of the case for the purpose of prosecution or lack of extradition of the relator.

Although the obligation seems inherently designed to apply in bilateral or multilateral contexts, there might arise a situation in which the obligation may be compromised by two or more States by abusing the function and purpose of the duty. The issue of aid or assistance in the commission

⁷⁰ ARSIWA Commentaries (n 5) 196.

⁷¹ *Rainbow Warrior* (n 69) para 114.

⁷² ARSIWA Commentaries (n 5) 197.

⁷³ ARSIWA, art 15.

of an internationally wrongful act for the obligation *aut dedere aut judicare* arises when a third State intervenes in the legal dispute between the requesting and requested States. Hence, it is pertinent to reflect upon situations in which the obligation may be compromised. A State which aids or assists another State in the commission of an internationally wrongful act is internationally responsible under two conditions: 1) the assisting State does so with the knowledge of the circumstances of the internationally wrongful act; and 2) the act would be internationally wrongful if committed by that State.⁷⁴ The assisting State is only responsible to the extent “that its own conduct has caused or contributed to the internationally wrongful act.”⁷⁵ The assistance must be significant with a view to facilitate the commission of the internationally wrongful act. In situations in which the assistance is a necessary element in the commission of the wrongful act without which it could not have occurred, the injury suffered may be jointly attributable. However, the assisting State would be liable to indemnify victims or offer restitution or compensation only for acts flowing from its own conduct.⁷⁶

For example, a third State may offer assistance to the requesting State which is unwilling or unable to submit the case for the purpose of prosecution or to extradite the relator to the requesting State by offering to admit the relator on its territory but not with the intention to prosecute the same person. In such circumstances, the offering third State would be violating the principle enshrined in Article 16 of ARSIWA as it would be aiding and assisting another State in the commission of the internationally wrongful act of not submitting the case for the purposes of prosecution and acting not in good faith. The offering State would facilitate the continuing

⁷⁴ ARSIWA, art 16.

⁷⁵ ARSIWA Commentaries (n 5) 66.

⁷⁶ ARSIWA Commentaries (n 5) 67.

breach with clear knowledge of the wrongful act and the same act would be wrongful as committed by the offering State, creating a safe haven for the alleged perpetrator.⁷⁷

The offering State would knowingly contribute to the non-fulfillment of the obligation ‘extradite or prosecute’ by extending impunity through creating a legal loophole of a safe haven for perpetrators of international crimes. Hence, the applicability and effective functioning of the obligation *aut dedere aut judicare* would be severely compromised through such *pro forma* ‘extradition’. The offering, assisting State would have an auxiliary, supporting function of creating a safe haven for the relator, and, thus, superficially alleviating the custodial State from its obligation under the ‘extradite-or-prosecute’ rule. However, it should be duly noted that third States have a duty to co-operate to cease the violation of international law and as such if a third State fails to prosecute the relator, it cannot be perceived as if the alleged violation is lawful.⁷⁸

A parallel may be drawn between the complicity of States in perpetration of internationally wrongful acts such as extraordinary rendition⁷⁹ and the complicity for the non-fulfillment of the *aut dedere aut judicare* obligation. In both circumstances, the handling of either the victim of an extraordinary rendition or the alleged perpetrator is at hand and may trigger State responsibility of several States participating in the commission of the wrongful conduct such as illegal and arbitrary detention, enforced disappearance, torture or cruel, inhuman or degrading treatment.

⁷⁷ See ARSIWA Commentaries (n 5) 149: “Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.”

⁷⁸ See Cryer, *Prosecuting International Crimes* (n 50) 113-114. See also, the discussion on the *Kiobel* case in the current Chapter below.

⁷⁹ For the purpose of the present work, extraordinary rendition is meant “an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.” See *Babar Ahmad and Others* App No 24027/07 (ECtHR, 10 April 2012) para 113.

The accessory responsibility, where the accomplice State offers aid or assistance to another State in the commission of an internationally wrongful act, is most flagrant “where the State had given its consent” to the commission of the internationally wrongful act in addition to acquiescence and connivance trigger for accomplice State responsibility.⁸⁰

The imputability standard as regards complicity responsibility could also be deduced from the extraordinary rendition cases.⁸¹ The invocation of State responsibility for assistance is based on a *prima facie* case of misconduct or an internationally wrongful act. A mere presence of the officials of the aiding State or the commission of the act or one element of the wrongful conduct within its jurisdiction is enough to trigger complicity liability along with acquiescence and connivance of the same State.⁸² Active facilitation of the alleged breach or failure to prevent the breach from occurring also falls under the ambit of the complicity responsibility.⁸³ The standard of proof seems to be awareness that the conduct through acquiescence, connivance or complicity amounts to a violation of an international obligation or aids and assists such wrongful act.⁸⁴

The paradigm of the complicity responsibility of a State pertaining to extradition may be traced back to the non-refoulement principle. According to the principle, all States have to “ensure that in all appropriate circumstances the persons they intend to extradite... will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in

⁸⁰ *El-Masri v FYROM* App No 39360/09 (ECtHR, 13 December 2012) para 176.

⁸¹ See *Agiza v Sweden*, Communication No 233/2003, CAT/C/34/D/233/2003 (2005), and *Alzery v Sweden*, UN Doc. CCPR/C/88/D/1416/2005 (2006).

⁸² *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) para 318.

⁸³ *El-Masri v FYROM* (n 80) para 211.

⁸⁴ See *El-Masri v FYROM* (n 80) para 239.

question has been put into place with a view to ensuring that they are treated with full respect for their human dignity”.⁸⁵ The principle of complicity of States would be invoked if the transfer of the individual pursuant to an extradition request is outside of the legal ways to transfer a person, namely extradition, transit, and transfer of sentenced persons. The complicity issue as regards extraordinary rendition is directly linked to the reluctance of various State organs to fulfill their obligations to investigate and prosecute the perpetrators of such acts.⁸⁶ It is an established principle that “if the actions of the State agents involved have been illegal and arbitrary, it is for the prosecuting authorities of the respondent State to identify and punish the perpetrators.”⁸⁷

The assistance clause in ARSIWA attempts to eliminate precisely alternative situations, inherent in the *aut dedere aut judicare* obligation, as such facets allow for creating of safe havens or harbors by seemingly alleviating one State of its international obligations by another State. In reality, such easing may be *pro forma* and aims to aid the continuous effect of the initial wrongful act, committed by the custodial State as seen above.

The circumstance in which several States may be responsible for the commission of the wrongful conduct is also reflected in the language of Article 47 ARWISA which stipulates that “where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.” The responsibility would be separable in such circumstances of a commission of a wrongful act through joint activities. The applicability of the joint and severable responsibility aims at ensuring that the injured State(s) would obtain effective

⁸⁵ UNGA, ‘Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment’ A/57/173 (2 July 2002) para 35.

⁸⁶ Council of Europe member States: Second Report (11 June 2005) Doc. 11302 rev. (‘The 2007 Marty Report’) para 5. See also, UNHRC, ‘Concluding Observations on the Former Yugoslav Republic of Macedonia’ (3 April 2008) UN Doc CCPR/C/MKD/CO/2, para 14.

⁸⁷ See *El-Masri v FYROM* (n 80) para 140.

redress for the wrongdoing, as shown below.⁸⁸ The relevance of the joint and severable responsibility is particularly pertinent when compensation is determined based on the involvement of each State to the commission of the wrongful act as the principle ascertains that in practice aiding and assisting States would not enjoy immunity from responsibility for the wrongful conduct.⁸⁹

V. Preclusion of Wrongfulness and the *Aut Dedere Aut Judicare* Obligation

The following section examines whether any of the circumstances precluding wrongfulness of conduct are applicable to the customary obligation *aut dedere aut judicare*. The classic and pertinent circumstances of consent, *force majeure*, and necessity are analysed.⁹⁰ Preclusion circumstances do not annul or terminate the international obligation but provide for “a justification or excuse for non-performance while the circumstances in question subsist.”⁹¹ The circumstances precluding wrongfulness are also to be distinguished from the substance and content of the primary obligation as the former function as defences to the already existing elements of wrongfulness to arise initially.

1) Consent

Consent precluding wrongfulness is defined as “valid consent by a State to the commission of a given act by another State precludes wrongfulness as regards the former State to the extent that the act remains within the limits of that consent.”⁹² Without the valid and limited consent by the

⁸⁸ A Orakhelashvili, ‘Division of Reparation between Responsible Entities’, in J Crawford and others (eds), *Law of State Responsibility* (OUP 2010) 647.

⁸⁹ See Orakhelashvili, ‘Division of Reparation’ (n 88) 652.

⁹⁰ The preclusion circumstances of self-defence, distress and countermeasures are deemed to be inapplicable per definitio to the obligation ‘extradite-or-prosecute’ due to their nature and function.

⁹¹ See ARSIWA Commentaries (n 5) 160. See e.g., *Gabcikovo-Nagymaros Project* case (judgment) [1997] ICJ Rep 7, para 48.

⁹² ARSIWA, art 20.

State which would otherwise be breached, the conduct of the breaching State would constitute a wrongful act. Examples of consent obviating wrongfulness include transit through airspace or internal waters.⁹³

Consent would be inapplicable to the *aut dedere aut judicare* obligation and the ‘extradite-or-prosecute’ regime in general for the following reasons. Had consent been applicable, then the requesting and requested States may enter in a bad faith extradition request- safe haven ploy. For example, if State A is the custodial State of the relator who is alleged to have committed the crime of torture and refuses to submit the case for the purpose of prosecution, and State B requests the extradition of the relator and State A refuses to oblige the extradition request of State B, then State B can invoke the international responsibility of State A as established above. However, if State B uses the ‘extradite-or-prosecute’ regime in bad faith, then the extradition request by State B would be seen as a ruse to alleviate both States A and B of their international responsibility relating to the customary *aut dedere aut judicare* obligation. In essence, the applicability of the precluding circumstance of consent goes against the whole purpose and function of the ‘extradite-or-prosecute’ principle.

As shown in Chapter 3, the obligation attempts to solve the conundrum of various applicable exceptions to extradition as it offers the custodial State the option of either prosecuting or extraditing the relator to a willing and able jurisdiction where all international standards of human rights would be protected and adequately applied. If consent is applicable to the obligation, then two States may abuse the regime by creating a faux play of extradition requests. Such a scenario would actually fall under complicity and aiding on part of State B in the

⁹³ See ARSIWA Commentaries (n 5) 163.

continuing commission of the initial wrongful act of State A as examined above in the current chapter. Hence, consent is inapplicable to the customary obligation of *aut dedere aut judicare* pertaining to certain crimes of international law as established in Chapter 4 as two States may create a safe haven if the preclusion circumstance is abused and they can easily create a bilateral shielding space for the alleged offender.

Under any circumstances, as shown in the *erga omnes* section of the current chapter, the duty *aut dedere aut judicare* is owed not only to the requesting State but also the international community as such. If the obligation is owed to the community of States, only the *omnes* as such would be capable of waiving the applicability of the duty. Hence, it would be difficult to square the apparent conflict of the applicability of the inherently bilateral consent preclusion and the content and substance of the obligation as owed to the international community in order to eliminate safe havens for certain international crimes.

2) *Force majeure*

Force majeure is defined as “occurrence of an irresistible force or of an unforeseen event beyond the control of the State, making it materially impossible...to perform the obligation”.⁹⁴ *Force majeure* is invoked as a precluding circumstance against fulfilment of international obligations when the otherwise internationally wrongful act is outside the control of the breaching State as in an involuntary act, and the invoking State has no free choice as regards the wrongful act. Hence, the classic three elements of *force majeure* must be cumulatively met: “a) the act in question must be brought by an irresistible force or an unforeseen event, b) which is beyond the control of the State concerned, and c) which makes it materially impossible in the circumstances to perform

⁹⁴ ARSIWA, art 23.

the obligation.”⁹⁵ The crucial element of *force majeure* is the material impossibility to perform international obligations such as natural or physical events or uncontrolled loss of sovereignty over territory due to an act of aggression or insurrection or devastation.⁹⁶

It may be envisaged that the judicial or executive branches of the custodial State may be affected by such circumstance and the prosecution of the relator may become materially impossible due to complete collapse of the judicial system, as shown in Chapter 2. However, it is hardly plausible for the custodial State to be unable to extradite the relator to a willing and able jurisdiction pursuant an extradition request. Still, extradition requests may require the involvement of the judicial organs of the custodial State as shown in Chapter 3 and only in very limited circumstances and in cases of complete collapse of the judicial system of the custodial State could invoke the *force majeure* defence against the obligation *aut dedere aut judicare*. In practice, the obligation seeks to make it easier for the State struggling with the prosecution for whatever reasons by extraditing the relator to another jurisdiction.

Force majeure is not applicable if the precluding circumstance is “due, either alone or in combination with other factors, to the conduct of the State invoking it” or if “the State has assumed the risk of that situation occurring.”⁹⁷ Moreover, *force majeure* does not cover circumstances which make the performance of a given obligation more difficult such as “political or economic crisis.”⁹⁸

⁹⁵ ARSIWA Commentaries (n 5) 170.

⁹⁶ ARSIWA Commentaries (n 5) 170-171.

⁹⁷ ARSIWA, art 23(2)(b).

⁹⁸ ARSIWA Commentaries (n 5) 171. See also, *Libyan Arab Foreign Investment Company v. Republic of Burundi* 1994 ILR 279, para 55.

The ICJ in the *Habre* case concluded that the financial difficulties which Senegal was facing in terms of submitting the case for the purpose of prosecution could not be used as a defence precluding wrongfulness on part of the Senegalese state. Financial difficulties cannot be used as a justification for failing to initiate proceedings against Mr. Habre, as Senegal itself has never used such justification, based on financial incapacity to comply with the incumbent obligation.⁹⁹ Even Senegal contended that financial difficulties could not be used as a justification for the non-performance of the obligation ‘extradite or prosecute’.¹⁰⁰ The necessary level of diligence “with which the authorities of the forum State must conduct the proceedings” could not be jeopardized by financial difficulties or other similar justifications.¹⁰¹

3) Necessity

The preclusion circumstance of necessity can be invoked only if the wrongful act is “the only means to safeguard an essential interest of the State against a grave and imminent peril and does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”.¹⁰² The plea of necessity is applicable whenever there exists “an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking the necessity on the other.”¹⁰³ Henceforth, the invocation of necessity must be limited by strict exceptions as necessity could not be invoked under any

⁹⁹ *Belgium v Senegal*, Judgment (n 13) para 112.

¹⁰⁰ *ibid* para 109.

¹⁰¹ *ibid* para 112.

¹⁰² ARSIWA, art 25.

¹⁰³ ARSIWA Commentaries (n 5) 178.

circumstances if the international obligation does not allow for invocation of necessity as a ground for defence or if the State has contributed to the situation of necessity.¹⁰⁴

The first element of necessity relates to the grave and imminent peril as the only means to safeguard an essential interest of the invoking State.¹⁰⁵ The invocation of necessity is applicable to customary and conventional obligations. The extent of essential interest depends on all circumstances around the particular situation which result in the wrongful act. As regards the customary or conventional obligation *aut dedere aut judicare*, it is very difficult to fathom a situation in which either prosecution or extradition of a relator would contradict the essential interests of the custodial State. Even when the alleged person might be a high political figure, the whole regime of ‘extradite-or-prosecute’ would be categorically and irreversibly compromised if custodial States could claim that non-prosecution or non-extradition is an option to defend an essential interest of the State. Such interpretation would be tantamount to a *de facto* immunity extended for international crimes. The Statute of the EAC also confirms that “the official position of the accused, whether as Head of State or Government, or as a responsible government official, shall not relieve him or her of criminal responsibility” for the core crimes of genocide, crimes against humanity, war crimes, and torture.¹⁰⁶

Additionally, it is hardly believable that fulfilling the obligation *aut dedere aut judicare* could be described to create a grave and imminent peril for the custodial State. Precisely, the flexible nature of the obligation *aut dedere aut judicare* allows the custodial State to choose extradition

¹⁰⁴ See ARSIWA, art 25(2). See also, *Gabcikovo-Nagymaros* case, paras 51-52 for the customary nature of the conditions laid down in Article 25 ARSIWA.

¹⁰⁵ See the usage of early language describing necessity as “imminent and urgent” in The Anglo-Portuguese Dispute of 1832 correspondence, cited in AD McNair (ed), *International Law Opinions* (CUP 1956) 232. See also, Caroline incident of 1837 in British and Foreign State Papers, vol XXIX, 1129.

¹⁰⁶ Statute of the EAC (n 43) art 10(3).

over prosecution and be relieved of highly politically charged judicial processes if there is a requesting State which intends to submit the case for the purpose of prosecution in good faith.¹⁰⁷

The proposed complementarity paradigm applicable to the duty ‘extradite-or-prosecute’ ensures that necessity could be very rarely invoked, if at all, as the most likely reason behind such preclusion from the obligation would be to shield the relator.¹⁰⁸

The second condition of the necessity defence stipulates that the otherwise wrongful conduct must not seriously affect or impair essential interests of other States or of the international community as a whole. Hence, as the content of the obligation *aut dedere aut judicare* is not primarily bilateral but closely relates to the interests of the international community, the invocation of the necessity defence becomes even more limited if not impossible at all.

Two general limits are laid down on the applicability of the necessity defence. First, the international obligation may explicitly or implicitly exclude the defence of necessity. As shown in the preceding paragraphs, a strong argument can be made as to the implicit exclusion of necessity as regards the obligation *aut dedere aut judicare*. The ICJ has affirmed the language and scope of Article 25 ARSIWA as the applicability of necessity precluding wrongfulness “can only be accepted on an exception basis.”¹⁰⁹

Second, necessity may not be relied if the invoking State contributes to the state of necessity.¹¹⁰

Again, it is not clear how the custodial State would be able to pass the high bar of not

¹⁰⁷ See Chapter 2.

¹⁰⁸ See Chapter 2 for complementarity and *aut dedere aut judicare* obligation.

¹⁰⁹ *Gabcikovo-Nagymaros* case (n 91) paras 51-52.

¹¹⁰ See *Gabcikovo-Nagymaros* case (n 91) para 57.

contributing to the state of necessity as under the obligation *aut dedere aut judicare* the custodial State has the option to extradite the relator for the purpose of prosecution in the requesting State. Hence, the custodial State has every opportunity to eliminate or diminish the applicability of the necessity defence. Additionally, the strict conditions for invocation must be cumulatively satisfied as well as the invoking State could not be the sole judge of the necessity applicability.

Finally, even if the custodial State managed to invoke the necessity preclusion against the wrongful act of breaching the customary obligation *aut dedere aut judicare*, as clearly indicated above, the obligation is also contained in various multilateral treaties to which there is a high probability that the custodial State is a party. The applicability of the customary and conventional obligation ‘extradite-or-prosecute’ would continue to co-exist¹¹¹ and the custodial State must try to avail itself from the *erga omnes partes* wrongful act as clearly established in the *Habre* case, the conventional as well as the customary obligation is directly linked to the objective obligations such as torture, genocide, war crimes, to mention a few.

VI. Invocation of State Responsibility

The invocation of State responsibility is a crucial aspect of the regime of State responsibility for internationally wrongful acts. There are two broad categories of States being able to invoke State responsibility: injured States and all States having an interest in the breach of the international obligation. The former category includes States “whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act.”¹¹² The latter group contains all States of the international community which have a legal interest in the commission of the wrongful act as the obligation itself is of *erga omnes*

¹¹¹ See ICJ’s *Nicaragua* case discussion above in Chapter 4.

¹¹² ARSIWA Commentaries (n 5) 254.

character although none of the States may be directly affected or injured by the act or omission.¹¹³ The two categories of invocation are not mutually exclusive and injured and non-injured or a group of injured and/or non-injured States may invoke State responsibility in respect of a single or a group of breaching States.

For a State to be injured, the breached obligation must be owed to that State individually or a group of States including the same State or the international community as a whole, and the breach of the obligation must specifically affect that State or is of such a character as to radically change the position of the States to which the obligation is owed with respect to the performance of the obligation.¹¹⁴ The definition provided as regards an injured State is rather formalistic in nature and primarily serves the function of raising a claim against the breaching State, applying countermeasures or bringing the case before international courts. The invocation of State responsibility is based on the paradigm that “if an international obligation binds a State, usually there will also be a certain legal relationship in respect of another legal subject.”¹¹⁵

A situation may arise in which a State may show an individual right to the performance of the obligation *aut dedere aut judicare*, based on a strict bilateral relation with the breaching State. The most pertinent example would include a State requesting extradition for the purpose of submitting the case for prosecution and a refusal of the requested custodial State to either prosecute or extradite the relator. In this circumstance, especially pertinent to the ‘extradite-or-prosecute’ obligation with equal weight of prongs of prosecution and extradition, the requesting State would fall under the category of an injured State as the breach would specifically affect the

¹¹³ See *Barcelona Traction* case (Judgment) [1970] ICJ Rep 3, para 33.

¹¹⁴ ARSIWA, art 42. See also, Crawford, ‘The System of International Responsibility’ (n 10) 23.

¹¹⁵ See G Gaja, ‘The Concept of an Injured State’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 941.

requesting State's right to ask for extradition of the relator pursuant to the content of the obligation. Whether the obligation is conventional or customary does not matter as to the classification of the injured State. What matters is for the performance of the obligation owed at some moment in time to a single State.¹¹⁶

The origin of the obligation may be traced to a multilateral convention which does not necessarily mean that the obligation is to be owed to all parties and exclude the possibility for a State to consider itself specifically affected and, thus, an injured one.¹¹⁷ Although the obligation *aut dedere aut judicare* may be considered as *erga omnes*, at the moment of the performance of the duty, two States, namely the requesting and custodial States, may be identified as specifically entering into a narrow, bilateral relation.¹¹⁸ Gaja also supports such flexible applicability around extradition regimes as an extradition arrangement usually "contains rules which appear of general application. Nevertheless, in regard to a specific request for extradition, these rules only apply to the relations between the requesting State and the requested State."¹¹⁹

The issue of whether the *aut dedere aut judicare* duty could change the position of all States to which the obligation is owed with respect to fulfilling the obligation is problematic. Article 42(2)(b)(ii) of ARSIWA is reserved for the so-called 'integral' or 'interdependent' obligations.¹²⁰ The obligation 'extradite-or-prosecute' could not be easily placed as an interdependent obligation as it is strictly connected with the object of the primary obligation such as the

¹¹⁶ ARSIWA Commentaries (n 5) 258.

¹¹⁷ Multilateral treaties of such type are oftentimes referred to as creating "bundles of bilateral relations". See e.g. B Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Y Dinstein (ed), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff 1989) 823.

¹¹⁸ See *US Diplomatic and Consular Staff in Tehran* case (judgment) [1980] ICJ Rep 3, para 92.

¹¹⁹ Gaja, 'The Concept of an Injured State' (n 115) 943.

¹²⁰ See Fitzmaurice, Special Rapporteur on the Law of Treaties, Yearbook 1957, vol.II, 54. See also, Gaja (n 111) 945. See also, Huesa Vinaixa, 'Plurality of Injured States' in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 950.

prohibition of the commission of the limited groups of crimes which trigger it. The non-performance of the *aut dedere aut judicare* obligation could not be said to change radically the position of each State that the obligation is owed to. Even in case of a breach by a custodial State, another State besides the initially requesting State may request the extradition of the relator. Moreover, the breach of the obligation would not affect in any manner the functioning of the States involved in the regime. Additionally, the obligation aims at minimizing impunity on the international level for certain international crimes. Hence, it is more appropriate to consider the obligation *aut dedere aut judicare* as an *erga omnes* or *erga omnes partes* duty¹²¹, as shown below. In her separate opinion in the *Habre* case, Judge Donoghue discards the interpretation that the obligation to submit the prosecution is owed only to States with jurisdiction pursuant to Article 5 of CAT as such “parsimonious approach would greatly reduce the potency of the related obligations in Articles 4 to 7”.¹²² If the limited jurisdictional interpretation is applied, then the States with Article 5 jurisdiction might accord impunity if the custodial State owes duty only to them. Hence, this is precisely the reason for upholding that the obligation is *erga omnes partes*.

If the obligation *aut dedere aut judicare* is owed to the State individually, pursuant to an extradition request, or the international community as a whole, as shown below, and the breach of the obligation specifically affects the invoking State, it is a tautological exercise to a certain degree for as long as the obligation falls within any of these categories, State responsibility may be invoked against the breaching State. Hence, it is easy to comprehend and apply in practice

¹²¹ See J Sachariew, ‘State Responsibility for Multilateral Treaty Violations: Identifying the ‘Injured Stated’ and Its Legal Status’ (1988) NILR 273, 282, who claims that invocation by one of the affected States has an *inter omnes partes* effect of all parties or interested States.

¹²² *Belgium v Senegal*, Donoghue declaration, para 11.

that “even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States”¹²³ such as on the requesting State(s). However, one should ponder whether there is not always an injured State affected by the wrongful act as per definition the breach in international law occurs for a non-compliance with prior and existing obligations towards at least one State.¹²⁴

VII. *Erga Omnes* Obligations and *Aut Dedere Aut Judicare*

The origin of the definition of *erga omnes* obligations¹²⁵, enshrined in Article 48 ARSIWA, could be found in one of the most widely cited excerpts of an ICJ decision, the *Barcelona Traction* case:

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”¹²⁶

In practice, any State other than the injured State is entitled to invoke State responsibility if “the obligation breached is owed to the international community as a whole” or if “the obligation

¹²³ See ARSIWA Commentaries (n 5) 259.

¹²⁴ See Stern, ‘The Elements of an Internationally Wrongful Act’ (n 8) 199.

¹²⁵ See *South West Africa* case (Second Phase), Diss. Op. Jessup, [1966] ICJ Rep 6, 373: “States may have a general interest—cognizable in the International Court—in the maintenance of an international regime adopted for the common benefit of the international society.” See also, M Ragazzi, *The Concept of International Obligations Erga Omnes* (Claredon 1997) 32.

¹²⁶ *Barcelona Traction, Light and Power Company, Limited, Second Phase* [1970] ICJ Rep 3, para 33.

breached is owed to a group of States...and is established for the protection of a collective interest of a group.”¹²⁷ The function of the *erga omnes* invocation is to complement the ability of the injured State to invoke State responsibility for internationally wrongful acts or omissions as “the duty is thus owed to the international community; it is a duty of every State towards every other State”.¹²⁸ It is apparent in the regime of State responsibility that responsibility arises independently and separately from the legal concept of invocation and injury.¹²⁹ A State invoking a breach of an *erga omnes* obligation does not act in an individual capacity but in a capacity and on behalf of the international community to which the obligation is owed and the State is deemed to be affected by the breach at hand.¹³⁰

“Any State” indicates that all States have equal standing to invoke the State responsibility for *erga omnes* obligations. In this manner, the classic assumption of a bilateral right-obligation paradigm is rejected and replaced with “a new formulation...to act in the collective public interest”.¹³¹

Erga omnes obligations are particularly pertinent for the enforcement regime for violations of human rights obligations. Judge Simma in the *Armed Activities on the Territory of the Congo* case outlines the necessity and reason behind *erga omnes* invocations: “the obligations deriving from the human rights treaties...are instances par excellence of obligations that are owed to a group of States...and are established for the protection of a collective interest of the States

¹²⁷ ARSIWA, art 48(1).

¹²⁸ See *Nuclear Tests case (Australia v. France)* (Memorial on Jurisdiction and Admissibility by the Government of Australia) (22 November 1973) para 448.

¹²⁹ See the language of Article 1 ARSIWA as well as J Crawford, ‘Overview of Part Three of the Articles on State Responsibility’ in J Crawford and others (eds), *The Law of State Responsibility* (OUP 2010) 931.

¹³⁰ See ARSIWA Commentaries (n 5) 276. See also, G Gaja, ‘States Having an Interest in Compliance with the Obligation Breached’, in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 957. See also, M Ragazzi, *The Concept of International Obligations Erga Omnes* (Claredon 1997) 17, 25.

¹³¹ See Crawford, ‘Overview’ (n 129) 934. See also, Chapter 1.

parties”.¹³² A brief review of the definition of international community indicates that the international community consists at least of a community of States.¹³³ It is a legal fiction which for the purpose of the State responsibility regime consists of at least all States as the international community holds the interest in the preservation and correct applicability of the obligation at issue through the interest of all States for “the collective goods and values”.¹³⁴ The concept of community also inherently carries “an affirmation of rights that, due to their being held by each, do not belong to anybody.”¹³⁵

A differentiation should be made between the obligations owed to a group of States and the collective interest of the same group¹³⁶, and the obligations owed to the international community as a whole. The former obligations are also known as *erga omnes partes* and may derive from multilateral treaties or customary international law.¹³⁷ As established in the *Habre* case, the conventional obligation *aut dedere aut judicare* pertaining to torture is of *erga omnes partes* character as it protects the collective interest of all parties to the Torture Convention to minimize impunity for the acts of torture.¹³⁸ Moreover, as established above, the customary obligation ‘extradite-or-prosecute’ could be seen as protecting the collective interests of all States pertaining to a closed set of international crimes.¹³⁹ The latter category of obligations allow States other than the injured State to invoke responsibility if the obligation is owed to the international community as a whole.

¹³² *Armed Activities on the Territory of the Congo (DRC v. Uganda)* (Sep.Op. Simma) [2005] ICJ Rep 168, para 35.

¹³³ See Vienna Convention on the Law of Treaties, art 53. As far as the definition of the international community is concerned, Chapter 1 provided ample examination of the meaning along with the definition of what constitutes *civitas maxima*.

¹³⁴ See Vauris Chaumette, ‘The International Community as a Whole’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 1024-1025.

¹³⁵ PM Dupuy, *Humanite et droit international: Melanges RJ Dupuy* (Pedone 1991) 138.

¹³⁶ See Gaja (n 115) 959.

¹³⁷ ARSIWA Commentaries (n 5) 277.

¹³⁸ *Belgium v Senegal*, Judgment (n 13) para 69.

¹³⁹ See Chapter 5.

The essential distinction of whether the obligation is *erga omnes* is based on the assessment of whether “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection”.¹⁴⁰ Indeed, “States other than a State affected by the wrongful act can invoke the international responsibility of the author State if the norm violated breaches their legal interest, either due to its importance for the international community or because it constitutes an essential norm for all parties under a multilateral treaty.”¹⁴¹ In this manner the responsibility exists on its own terms, separate from the concept of injury to a given actor of international law.¹⁴² In essence, the *erga omnes* possibility for bringing a claim for the cessation of the wrongful act is also associated with “a real right based on primary legality: a right to demand that all States respect those [*erga omnes*] obligations.”¹⁴³ All States are members of the international community and any State can invoke State responsibility for a breach of an *erga omnes* obligation. The question of whether States invoking Article 48 ARSIWA grounds of State responsibility could apply countermeasures against the breaching State is questionable.¹⁴⁴

1) Is the Customary Obligation *Aut Dedere Aut Judicare Erga Omnes*?

The customary obligation *aut dedere aut judicare* could be put in the category of *erga omnes* obligation. A brief overview pertaining to the set list of international crimes which triggers the obligation illustrates its *erga omnes* character. For example, in the *Bosnia Genocide* case, the ICJ categorically pronounced, “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to

¹⁴⁰ *Barcelona Traction* case (n 126) para 33.

¹⁴¹ A Kolliopoulos, *Le Commoission d'indemnisation des Nations Unies et le droit de la resposibilite internationale* (LGDJ 2001) 287.

¹⁴² See B Stern, ‘The Elements of an Internationally Wrongful Act’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 197.

¹⁴³ Kolliopoulos (n 141) 333.

¹⁴⁴ See ARSIWA, art 54. See also, Gaja, ‘The Concept of an Injured State’ (n 115) 942.

punish the crime of genocide”.¹⁴⁵ Hence, the character of the *erga omnes* obligation would not be strictly restricted to the strict prohibition of genocide, but also to the “rights and obligations” pertaining to the whole regime of minimizing impunity of perpetration of acts of genocide, especially relating to prevention and punishment of the said grave act.¹⁴⁶ Moreover, Judge Oda in his declaration persuasively identifies that the obligation to prevent and punish, which is inherently related and dependent to the customary obligation *aut dedere aut judicare*, is “borne in a general manner *erga omnes* by the Contracting Parties in their relations with all the other Contracting Parties to the Convention—or even, with the international community as a whole—but are not obligations in relation to any specific and particular signatory Contracting Party.”¹⁴⁷ Additionally, the “principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligations.”¹⁴⁸

State practice also indicates certain customary rules entail *erga omnes* obligations in terms of State responsibility. Pertinent for the purposes of this work is the *erga omnes* obligation to extradite or prosecute such offences as the murder or causing the disappearance of individuals, torture, arbitrary detention and “a consistent pattern of gross violations of internationally recognized human rights”.¹⁴⁹ Hence, Ragazzi concludes that “the obligations *erga omnes* that protect fundamental human rights are indivisible and cannot be regarded as a sum of bilateral obligations.”¹⁵⁰

¹⁴⁵ *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide Bosnia and Herzegovina v. Serbia and Montenegro* (Preliminary Objections) [1996] ICJ Rep 595, para 31.

¹⁴⁶ See Ragazzi (n 126) 96. See also, Chapter 2.

¹⁴⁷ *Bosnia Genocide case*, Oda Declaration, para 4.

¹⁴⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

¹⁴⁹ See US Department of State, Third Restatement (1987), s 702. See also, Ragazzi (n 126) 41.

¹⁵⁰ Ragazzi (n 126) 213. See also, ICTY’s *Furundzija* case, para 155.

Such an interpretation is supported by the *Habre* decision which accentuates the presence of the common interest of States to “ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy immunity.”¹⁵¹ The common interest also extends to compliance with the obligations to investigate, prosecute or extradite the relator, and as such, all States could be claimed to “have a legal interest”.¹⁵² As such, the relevant provisions to conduct a preliminary inquiry and to submit the case to its competent authorities for the purpose of prosecution for the crime of torture closely resemble to the mechanisms enshrined in the Genocide Convention, as “State do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes”.¹⁵³

Judge Owada finds the exclusive *erga omnes partes* approach to admissibility rather problematic.¹⁵⁴ Judge Owada asserts that the Court ducked the issue of answering one of main claims by Belgium that it has special interest with respect to Senegal’s compliance as regards *erga omnes* obligations to extradite or prosecute.¹⁵⁵ The legal consequence of applying the non-specific, non-injured interest approach is seen in the pronouncement of the merits of the Belgium’s claims, namely that Belgium, as any other State party, is entitled “only to insist on compliance by Senegal with the obligation arising under the Convention. It can go no further.”¹⁵⁶

¹⁵¹ *Belgium v Senegal*, Judgment (n 13) para 68.

¹⁵² See *Belgium v Senegal*, Judgment (n 13) para 68, citing *Barcelona Traction* case (n 122) para 33.

¹⁵³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1953] ICJ Rep 23.

¹⁵⁴ See *Belgium v Senegal* Judgment (n 13) para 68: “The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present.”

¹⁵⁵ *Belgium v Senegal*, Judgment (n 13) para 70.

¹⁵⁶ *Belgium v Senegal*, Owada Sep. Op., paras 22, 23.

The same conclusion is reached by Judge Skotnikov who states, “one inevitable implication of this decision is that the issue of the validity of Belgium’s request for extradition remains unresolved.”¹⁵⁷ He ponders whether the object and purpose of the no- impunity regime, namely the common interest to ensure that acts of torture are prevented and punished through prosecution of alleged perpetrators and elimination of impunity means that all State parties have a legal interest in the protection of the rights involved.¹⁵⁸ Does it mean that the State parties “do not have any interests of their own” but the achievement of the object and purpose of the said treaty?¹⁵⁹ The answer is found in the common interest overlapping with the right of any State party to invoke the responsibility of a breaching State party in cases of obligations *erga omnes partes*.¹⁶⁰ Skotnikov is sceptical that the *erga omnes partes* invocation, ruled by the Court, is appropriate as he carefully analyses Article 48 ARSIWA which allows a State other than the injured State to invoke responsibility if “for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty, or it must be considered an injured State.”¹⁶¹ However, the finding of the Court on this admissibility issue does not conflict with the *erga omnes* nature of the obligation as the common interest of all States is enough and seemingly discharges of the need to find a special interest as the common interest makes a finding on the special interest redundant.¹⁶² The *jus cogens* nature of the

¹⁵⁷ *Belgium v Senegal*, Skotnikov Sep.Op., para 8.

¹⁵⁸ See *Barcelona Traction, Light and Power Company* (Judgment) ICJ Rep 1970, para 33.

¹⁵⁹ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Rep 1951, 23. See also *Belgium v Senegal*, Skotnikov Sep. Op., para 11.

¹⁶⁰ See *Belgium v. Senegal*, Judgment (n 13) para 69.

¹⁶¹ *Belgium v Senegal*, Skotnikov Sep. Op. para 21.

¹⁶² See *Belgium v Senegal*, Judgment (n 13) para 70 where the Court states, “there is no need for the Court to pronounce in whether Belgium also has a special interest with respect to Senegal’s compliance” after finding that each State Party has a common interest in the compliance.

criminal activity¹⁶³ coupled with the common interest of States to prevent and close the impunity gap through inquiry and prosecution create the entitlement “to make a claim concerning the cessation of an alleged breach”.¹⁶⁴ In addition, the response of Senegal to the 2012 ICJ *Habre* judgment was to enter in an agreement with the African Union with the sole purpose of creating the Extraordinary African Chamber in 2013 in order to prosecute Habre.¹⁶⁵ Such a behaviour by Senegal indicates that the response to the finding in the ICJ decision that Senegal is in breach of the obligation ‘extradite-or-prosecute’ is based on the notion that the obligation is vested with more than one or two States, as shown with the agreement with a regional organization.

It should be duly noted that not every *erga omnes* duty is of *jus cogens* character but what matters is the nature of the particular obligation, as in the essential qualities or properties of the obligation.¹⁶⁶ While *jus cogens* norms are elevated in their status in terms of hierarchy, “obligations *erga omnes* can well operate on an ‘ordinary’ hierarchical level.”¹⁶⁷ It seems more appropriate to teleologically label *erga omnes* obligations as an enforcement mechanism because they aim at bringing an infringement of an international duty to an end, which fits the scope of the enforcement function of the *aut dedere aut judicare* obligation, as shown above. Moreover, *erga omnes* obligations are defined “by the legal indivisibility of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every addressee State with respect to all the others. This legal structure is typical not

¹⁶³ *Belgium v Senegal*, Judgment (n 13) para 99.

¹⁶⁴ See *Belgium v Senegal*, Judgment (n 13) paras 68, 69.

¹⁶⁵ R Adjovi, “Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers” 52 ILM 1020 (2013).

¹⁶⁶ See Ragazzi (n 126) 182.

¹⁶⁷ C Tams and A Asteriti, *Erga Omnes, Jus Cogens and Their Impact on the Law of Responsibility* (Hart 2013) 6.

only for peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations).”¹⁶⁸

2) *Kiobel*: From Bilateral Breaches to Communal Interests

As shown above, the obligation *aut dedere aut judicare* is an obligation of means, not results.¹⁶⁹ Although Article 12 of ARSIWA stipulates that there is no classification of international obligations, in practice, various classifications have been adopted. For example, the two most prominent categories are duties of conduct or means and of results.¹⁷⁰ The distinction may assist the delineation of whether a breach has occurred but it cannot be conclusive as to the actual State responsibility.¹⁷¹

Recent state practice also indicates the inseparable linkage between community interests and the *aut dedere aut judicare* regime, which initially found its origin in primarily bilateral, state-to-state relations in the area of diplomatic protection and emerged as a responsibility to an international community interest. One pertinent decision shedding light on the completeness of the ‘extradite-or-prosecute’ regime on international and domestic levels is the US Supreme Court’s *Kiobel* case. The case illustrates how the international aspect of fighting impunity is incorporated in the domestic legal order. In essence, the whole *aut dedere aut judicare* mechanism is correctly traced from its bilateral origin in the international minimum standard through incorporation of the duty in various treaties, to custom, to what is labelled as the

¹⁶⁸ Fourth Report on State Responsibility (Addendum) Doc. A/CN.4/444/Add.1, para 92.

¹⁶⁹ *Belgium v Senegal*, Judgment, para 94

¹⁷⁰ ARSIWA Commentaries (n 5) 129. See also, *Gabcikovo-Nagymaros* case, para 135 where the ICJ broadly defines three categories of obligations: “obligations of conduct, obligations of performance, and obligations of result”.

¹⁷¹ See *Colozza and Rubinat v Italy* (1985) Series A, No 89, para 30.

nationalization of the international obligation to provide no safe haven to perpetrators of gravest crimes in *Kiobel*. As such, the duty ‘extradite-or-prosecute’ brings the community interest of *Kiobel* to another, stricter, albeit different level of enforcement.

It should be duly noted that the obligation *aut dedere aut judicare* pertains strictly to criminal responsibility while the *Kiobel* case deals with civil liability for the commission of international crimes. However, extensive evidence in support of universal criminal jurisdiction has been used in the case.¹⁷² The tort liability in the *Kiobel* case has been approximated to the civil claims to criminal proceedings (*partie civile*) in civil law jurisdictions.¹⁷³ Hence, the proximity of the *partie civile* procedure in criminal cases to the tort act under the Alien Tort Statute can be used as a valuable interpretive and persuasive source as “criminal trials in civil law countries is similar to tort litigation in the United States, inasmuch as the *partie civile* mechanism enables victims to obtain compensation from perpetrators” and deter future crimes.¹⁷⁴

The *Kiobel* case dealt with an action in the US domestic courts against plaintiffs for alleged violations in Nigeria, based on the ATS which provides that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁷⁵ The main issue of the case pertained as to whether the court had the authority to recognize a cause of action under US law to enforce

¹⁷² *Kiobel* (Breyer concurring op.) 1675-1676. See also, Ingrid Wuerth, ‘*Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute’ (2013) 107(3) AJIL 601, 619. For the applicability of universal civil jurisdiction for universal crimes, see *Kadic v. Karadzic*, 70 F. 3^d 232, 240.

¹⁷³ Robert McCoquodale, ‘Waving Not Drowning: *Kiobel* Outside the United States’ (2013) 107(4) AJIL 846, 849. See also, Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), available at <http://harvardhumanrights.files.wordpress.com/2012/10/european-commission-on-behalf-of-the-european-unionrevised.Pdf>.

¹⁷⁴ Vivian Grosswald Curran and David Sloss, ‘Reviving Human Rights Litigation after *Kiobel*’ (2013) 107(4) AJIL 858, 859, 862. See Caroline Kaeb and David Scheffer, ‘The Paradox of *Kiobel* in Europe’ (2013) 107(4) AJIL 852, 855-856, for the comparison between private party litigation and criminal litigation in the US and Europe.

¹⁷⁵ *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, 569 SCOTUS 1 (2013). See also, ATS, 26 USC, s 1350.

international law on the domestic level for extraterritorial torts.¹⁷⁶ The majority opinion delivered by Chief Justice Roberts found that the ATS provides the US district courts with jurisdiction to hear the claims “but does not expressly provide any causes of action.”¹⁷⁷ The ATS allows federal courts to recognize certain causes which are linked to “sufficiently definite norms of international law...that are ‘specific, universal, and obligatory.’”¹⁷⁸ Indeed, the state practice of US courts indicates that the ATS ensures that the domestic legal system could “provide a forum for adjudicating” sufficiently serious violations of international law.¹⁷⁹ The main issue in the majority opinion was whether the ATS provides for an extraterritorial enforcement reach for violations of international law which affect non-nationals within or outside of the US. The majority could not establish that such extraterritorial reach existed even though the decision carefully looks at examples such as causes of action against piracy, for example.¹⁸⁰ The majority upheld that there is a strong presumption against the applicability of the extraterritorial reach of the ATS.

The most relevant part of the *Kiobel* decision is Justice Breyer’s analysis of the applicability of the ATS as regards the tort allegations. The concurring opinion begins with the premise that the presumption against extraterritoriality is hardly applicable especially when “the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbour (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”¹⁸¹ The

¹⁷⁶ See Wuerth (n 172) 607.

¹⁷⁷ *Kiobel* (n 175) 3.

¹⁷⁸ *Kiobel* (n 175) 5-6.

¹⁷⁹ See *Sosa v. Alvarez-Machain* 542 US 692, 732 (2004), 715-718. See also, *Kiobel* (Kennedy, concurring op) 1669.

¹⁸⁰ *Kiobel* (n 175) 10.

¹⁸¹ *Kiobel* (Breyer concurring op) 1-2. See also, *Sosa v. Alvarez-Machain*, 542 US 692, 732 (2004).

main premise of Justice Breyer's approach is based on the gravity of the offence against international law as "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."¹⁸² Hence, the main premise is that "international law imposed a duty on states" not to provide safe havens for "today's pirates".¹⁸³ In *Sosa*, the cause of action and the applicability of extraterritorial jurisdiction were established to be possible for only a limited set of gravest crimes of international law.¹⁸⁴

The whole premise behind enacting the ATS was to avail the judicial enforcement of the law of nations in US courts, to 'nationalize' the international obligation to minimize impunity and eliminate safe havens for the most serious violations of international law. Hence, Justice Breyer launches a definite attack on the limited application of extraterritoriality and tries to discern who the modern pirates are. Breyer asserts that "certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are 'fair game' where they are found."¹⁸⁵ Hence, the modern *hostis humani* are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment."¹⁸⁶ Such a strong affirmation of the obligation of all nations to prosecute grave violations of international law as an *erga omnes* duty is one of the best examples of state practice as regards the customary status of the obligation.

Justice Breyer's concurring opinion is also indicative of the link between extraterritorial jurisdiction and compensation for the victims of gross violations of international law. The

¹⁸² *Filartiga v. Pena-Irala* 630 F.2d 876, 890 (CA2 1980).

¹⁸³ See Wuerth (n 172) 610. See also, *Kiobel* (Breyer concurring op) 1674-1675.

¹⁸⁴ *Sosa* (n 179) 724-725.

¹⁸⁵ *Kiobel*, (Breyer concurring op) 5.

¹⁸⁶ *Kiobel*, (Breyer concurring op) 5. See also, *In re Demjanjuk* 612 F.Supp. 544, 556 (ND Ohio 1985). Breyer concludes, "and just as a nation that harbored pirates provoked the concern of other nations in past centuries...so harboring 'common enemies of all mankind' provokes similar concerns today."

jurisdictional reach of a certain norm is underlined by the effect and result to be achieved, what is aptly labelled the “substantive grasp”.¹⁸⁷ Compensation serves a logical and effective consequence of the breach of international law in order to minimize the damage caused on victims. Hence, as the breach is of international character, the jurisdictional reach of the statute must be interpreted through the prism of the underlying international jurisdictional norm.¹⁸⁸

Justice Breyer seems to equate or merge the universal jurisdiction applicability with the national interest jurisdiction base provided in the ATS and Breyer extensively relies on precedents relating to universal *criminal* jurisdiction, thus serving as an authority for criminal jurisdiction for international crimes.¹⁸⁹ As a result, nothing prevents the US courts from offering *locus standi* to victims who seek redress and compensate for gravest international crimes. Quite the opposite, the US and its domestic courts are under an international law obligation “not to permit a nation to become a safe harbor for pirates (or their equivalent).”¹⁹⁰

Justice Breyer provides pertinent support for such claims by examining the obligation not to provide safe havens for own nationals for commission of serious crimes abroad, dating back to Vattel through bilateral treaties in 18th and 19th centuries to multilateral conventions and current state practices of states allowing extraterritorial jurisdiction. In particular, Breyer cites the most widely ratified conventions which contain the customary obligation to “extradite-or-prosecute” as the manifestation of Senate’s consent to bind the US “to find and punish foreign perpetrators

¹⁸⁷ *Kiobel*, (Breyer concurring op) 6.

¹⁸⁸ *Kiobel*, (Breyer concurring op) 7.

¹⁸⁹ See Wuerth (n 172) 619.

¹⁹⁰ *Kiobel*, (Breyer concurring op) 8. Justice Breyer cites as an early example of the duty to prosecute the 1794 Treaty between the United States and Great Britain: “Harboring pirates forbidden. No nation can receive pirates into its territory, or permit any person within the same to receive, protect, conceal or assist them in any manner, but must punish all persons guilty of such acts.”

of serious crimes”.¹⁹¹ The example provided by Justice Breyer of modern-day *hostis humani* include the torture-related *Filartiga* and *Marcos* cases.¹⁹²

Evidence of state practice in domestic legislation in the US allowing for domestic courts to fulfil the international obligation to prosecute persons who commit international crimes abroad and at home such as torture, genocide and other heinous acts is also provided.¹⁹³ Hence it could be asserted that the obligation *aut dedere aut judicare* is crucial for the correct applicability and functioning of the *erga omnes* obligation to suppress acts of torture, international terrorism, war crimes, crimes against humanity, and genocide, as proved above.¹⁹⁴

The paradigm of criminal law enforcement for international crimes at a domestic level is based on the two-fold interaction between the gravity of the criminal act as an international crime and the status of the perpetrator as an “enemy of mankind”. In such circumstance, the community interest is applicable as the mankind in general, the *omnes* is affected. Hence, the community interest allows for the applicability of criminal law enforcement when States fail to protect or

¹⁹¹ See *Kiobel*, (Breyer concurring op) 11-12. Justice Breyer cites the following conventions as exemplifying the limited group of gravest crimes: See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U. S. T. 1975, T. I. A. S. No. 8532; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U. S. T. 565, T. I. A. S. No. 7570; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U. S. T. 1641, T. I. A. S. No. 7192; Restatement §404 Reporters’ Note 1, at 257 (“These agreements include an obligation on the parties to punish or extradite offenders, even when the offense was not committed within their territory or by a national”). See also International Convention for the Protection of All Persons from Enforced Disappearance, Art. 9(2) (2006) (state parties must take measures to establish jurisdiction “when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her”); <http://www.unhcr.org/refworld/docid/47fdfaeb0.pdf> (as visited Apr. 1, 2013, and available in Clerk of Court’s case file); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U. N. T. S. 85, Arts. 5(2), 7(1) (similar); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Art. 129, Aug. 12, 1949, [1955] 6 U. S. T. 3316, T. I. A. S. No. 3364 (signatories must “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts” or “hand such persons over for trial”).

¹⁹² See *In re Estate of Marcos, Human Rights Litigation*, 25 F. 3d 1467, 1469, 1475 (CA9 1994); *In re Estate of Marcos Human Rights Litigation*, 978 F. 2d 493, 495–496, 500 (CA9 1992).

¹⁹³ For torture, see 18 USC, s 2340A (b) (2); for genocide, see 18 USC, s 1091 (e) (2) (D).

¹⁹⁴ See Chapter 4. See also, Grosswalk Curran and Sloss (n 174) 862-863.

prevent or act against certain grave international crimes. Precisely at this junction, the obligation *aut dedere aut judicare* plays a crucial role in ascertaining and ensuring a functioning and effective international law enforcement paradigm through cooperation among various States. The failing State seems to yield its sovereign power to enforce criminal law to other willing and able States or to international judicial institutions as the underlying effort is linked to the interest of all international actors to close all impunity gaps for the perpetrators of grave international harm.

The *Kiobel* case indicates under what circumstances the breach is no more to be considered bilateral but rather to fall in the State responsibility paradigm based on international community interest approach. In this manner, what Breyer labels nationalization of the international obligation is established in order to provide no safe harbour to perpetrators of international crimes. The regime or ‘circle of no impunity’ of *aut dedere aut judicare* is complete in this manner.

3) Effects of the *Erga Omnes* Obligations in Terms of State Responsibility

Any State invoking a breach of *erga omnes partes* or *erga omnes* obligations may request the cessation of the wrongful act along with assurances for non-repetition of the wrongful act or omission.¹⁹⁵ Additionally, any State invoking such responsibility may claim reparation for the wrongful act in the interest of the injured State or of the beneficiaries of the breached obligation.¹⁹⁶ In such circumstances, practice indicates that any State invoking reparation may be requested to establish that it is acting on behalf of the injured State, if any, or on the part of the beneficiaries of the breached obligation. In practice, *erga omnes* invocation may result in

¹⁹⁵ See ARSIWA, art 42(2)(a). See also, *SS Wimbledon case* (1928) PCIJ Series A No 1, 30.

¹⁹⁶ ARSIWA, art 42(2)(b).

cessation of the internationally wrongful act if the extradition of the alleged offender to a State willing and able to submit the case for the purpose of prosecution is executed or if the custodial State submits the case for the purpose of prosecution in its own judicial system. The *erga omnes* invocation serves as a pressing mechanism to underline the urgency and necessity for the custodial State to fulfill its customary or conventional obligation under the ‘extradite-or-prosecute’ duty. In a continuing breach of the obligation, resort to countermeasures and/or reparation may be applied.

VIII. Effects of State Responsibility

The legal consequences for the responsible State for an internationally wrongful act or omission are primarily contained in the duty to cease the wrongful act along with the consequent applicability of reparations.

The responsible State is under an obligation to make full reparation for the injury caused by the wrongful act according to Article 31 ARSIWA. Additionally, the injury includes any damage, material or moral, caused by the internationally wrongful act. The origins of the obligation to make reparations for the commission of the internationally wrongful act are found in the PCIJ’s *Factory at Chorzow* case where it was stated, “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”¹⁹⁷ The function of reparation is indispensable for the regime of State responsible as it aims to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all

¹⁹⁷ *Factory at Chorzow case* (Jurisdiction) 1927 PCIJ Series A No 9, 21.

probability, have existed if that act had not been committed.”¹⁹⁸ The obligation is on the responsible State to make good reparation for the injury caused by the internationally wrongful act.

Injury includes any damage caused by the wrongful act or omission, be it moral or material.¹⁹⁹ The injury caused by the *aut dedere aut judicare* obligation breach is to be classed under the moral damage as it directly pertains to the purpose of the obligation to minimize the effects of certain international crimes, all of which directly affect human dignity, the commission of which causes insufferable serious physical and mental pain. The three traditional forms of reparation, namely restitution, compensation and satisfaction/rehabilitation was also recognized in the Statute of the EAC, an institution created to respond to the finding of the breach by Senegal in the ICJ’s *Habre* case.²⁰⁰ There is no requirement for the State to have suffered material damage in order to request reparations as “unlawful action against non-material interests, such acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss”.²⁰¹

The injury element also ensures that reparation is made only for the damage caused by the wrongful act and not by any consequence of the commission of the breach. The determination whether damage has been caused to the claimant State is based on a legal test which takes into consideration whether the purpose of the primary rule has been harmed by the breach.²⁰² In the particular case of the obligation *aut dedere aut judicare* it is beyond doubt that the injury of the

¹⁹⁸ *Factory at Chorzow case* (Merits) 1928 PCIJ Series A No 17, 47.

¹⁹⁹ See ARSIWA Commentaries (n 5) 202. Material damage refers to damage to property or other interests of the States and its nationals assessable in financial terms. Moral damage means individual pain and suffering, loss of personal character, etc.

²⁰⁰ Statute of the EAC, art 27.

²⁰¹ *Rainbow Warrior (New Zealand/France)* (n 8), para 109.

²⁰² See *Islamic Republic of Iran v. US, Cases A15 and A24* (1996) 32 Iran-USCTR 115.

breach would result in the damage of the overall applicability and function of the obligation and to the interests of the international community as established above. The manner in which all consequences of breaching the obligation ‘extradite-or-prosecute’ would be wiped out and the *status quo ante* would be re-established is primarily through the reparation form of restitution.

1) Restitution

The responsible State for the wrongful act is under an obligation to “re-establish the situation which existed before the wrongful act was committed”.²⁰³ Restitution is naturally the primary form of reparation as it attempts materially to wipe out all negative consequences of the breached obligation and restore the initial situation. Its primacy is also confirmed in the decisions of international courts.²⁰⁴

Restitution for the purpose of the customary or conventional obligation *aut dedere aut judicare* would involve the reestablishment of the duty to extradite the relator or submit the case for the purpose of prosecution. Restitution is accepted to take form of extraditing the relator or of reversing a domestic judicial decision which violates the customary obligation ‘extradite-or-prosecute’.²⁰⁵ The transfer of the person to a willing and able jurisdiction for the purpose of prosecution pursuant to extradition would constitute a form of restitution for the wrongful act. Through the principle of analogy, the transfer of the individual is considered a proper restitution in extraordinary rendition cases as well.

In the alternative, the submission for the purpose of prosecution of the relator in the custodial State would also be considered a form of restitution as indicated in the *Habre* case. Prosecution

²⁰³ ARSIWA, art 35. See also, Yann Kerbrat, ‘Interaction between the Forms of Reparations’ in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 573.

²⁰⁴ See *Factory Chorzow*, Merits, 48.

²⁰⁵ For arrests of persons and material reparation, see the Trent incident of 1861.

as a form of restitution has been traditionally accepted in international law as evidenced in the US-Mexico Claims Tribunal cases. For example, the *Neer* claim is one of the first occasions in which it was established that damages in the form of compensation for the victim or his family would only follow if “lack of diligence and of intelligent investigation” would have to be proven to constitute an international wrongful act. Precisely because the Mexican authorities proceeded with the examination of the crime scene and launched an investigation, the Tribunal could not find that lack of diligence was present.²⁰⁶

A more pertinent example of prosecution as a form of restitution separate from the compensation for private persons is the *Janes* claim.²⁰⁷ The Tribunal reached a conclusion that “there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as *to warrant an award of indemnity*.”²⁰⁸ (emphasis added) The *Janes* claim correctly delineates the mode of liability on the part of the State for serious lack of diligence as “finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.”²⁰⁹ As analysed in Chapter 2, blanket pardons and amnesties should be considered as acts of shielding and unwillingness by the custodial State to prosecute the relator(s). The non-applicability of amnesties for the core crimes of genocide, crimes against humanity, war crimes and torture is

²⁰⁶ *Neer Claim*, paras 5-6.

²⁰⁷ *Janes et al v United Mexican States* (1925) RIAA, Vol. IV, 82-98.

²⁰⁸ *ibid* para 10.

²⁰⁹ *ibid* para 19.

also affirmed in the Statute of EAC as “an amnesty granted to any person falling within the jurisdiction of the [EAC]...shall not be a bar to prosecution.”²¹⁰

The liability on the part of the State is for not executing appropriately and efficiently the due diligence duty to prosecute and punish the offender, a separate responsibility from the individual criminal responsibility of the perpetrator. As a result, the State is liable to resume its obligation to prevent or punish the offending act as “if the Government had not committed its delinquency...Janes’ family would have been spared indignant neglect and would have had an opportunity of subjecting the murdered to civil suit.”²¹¹ There is a separate form of satisfaction derived from the State’s “international duty of providing justice” which may facilitate further private redress by means of a civil suit for the inflicted material damage.²¹² The Tribunal correctly concludes, “apart from reparation or compensation for material losses, claimants always have been given substantial satisfaction for serious dereliction of duty on part of a Government.”²¹³ The indignity, grief and moral dissatisfaction are indeed directly linked with the non-performance of a duty to investigate and prosecute on part of the State and could be satisfied by resumption to perform such duty.²¹⁴ Moreover, an effective remedy for the non-fulfillment of the *aut dedere aut judicare* principle also includes a thorough and effective investigation of those

²¹⁰ Statute of the EAC, art 20.

²¹¹ *Janes* (n 207) para 20.

²¹² *ibid* para 20.

²¹³ *ibid* para 23.

²¹⁴ *ibid* paras 24-25: “If the nonprosecution and nonpunishment of crimes (or of specific crimes) in a certain period and place occurs with regularity such nonrepression may even assume the character of a nonprevention and be treated as such. One among the advantages of severing the Government's dereliction of duty from the individual's crime is in that it grants an opportunity to take into account several shades of denial of justice, more serious ones and lighter ones (no prosecution at all ; prosecution and release; prosecution and light punishment; prosecution, punishment and pardon), whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation.”

who are responsible for the alleged breach. Investigation and effective prosecution for commission of gravest international crimes is also seen as an effective remedy.²¹⁵

The applicability of the restitution reparation is limited by two conditions. Restitution is not possible if it is materially impossible, or if it involves a burden out of all proportion to the benefit of the restitution in comparison to other forms of reparation. None of these limitations would apply as regards the customary obligation *aut dedere aut judicare* as it is hardly possible for the custodial State not to extradite due to material impossibility, as shown above, and the whole regime of ‘extradite-or-prosecute’ would be compromised if compensation is paid instead of prosecuting the alleged violations of international law. If such an opt-out is allowed, the whole system would be prone to abuse as the notion of individual criminal responsibility would be molded into some sort of a tort liability with the possibility for compensation for material

²¹⁵ See the following ECHR cases: *Anguelova*, para 161-162; *Assenov and Others*, para 114; *Süheyla Aydın v Turkey* App no 25660/94 (ECtHR, 24 May 2005), para 208; and *Aksoy*, paras 95 and 98. Such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others v Bulgaria* (ECtHR, 28 October 1998) para 102; *Corsacov v Moldova* App no 18944/02 (ECtHR, 4 April 2006) para 68). The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions (see *Assenov and Others*, para 103 and *Batı and Others v Turkey* App nos 33097/96 and 57834/00, ECHR 2004-IV, para 136). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrikulu v Turkey* App no 23763/94 ECHR 1999-IV para 104, and *Gül v Turkey* App no 22676/93 (ECtHR, 14 December 2000) para 89). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see *Boicenco v Moldova* App no 41088/05 (ECtHR, 11 July 2006) para 123). Furthermore, the investigation should be independent from the executive (see *Oğur v Turkey* App no 21594/93 ECHR 1999-III para 91-92, and *Mehmet Emin Yüksel v Turkey* App no 40154/98, (ECtHR, 20 July 2004) para 37). Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms (see *Ergi v Turkey* App no 23818/94 (ECHR judgment, 28 July 1998) paras 83-84). Lastly, the victim should be able to participate effectively in the investigation in one form or another (see *Ognyanova and Choban v Bulgaria* App no 46317/99, (ECtHR, 23 February 2006) para 107; *Khadzhaliyev and Others v Russia* App no 3013/04 (ECtHR, 6 November 2008) para 106; *Denis Vasilyev v Russia* App no 32704/04 (ECtHR, 17 December 2009) para 157,; and *Dedovskiy and Others v Russia* App no 7178/03 (ECtHR, 15 May 2008) para 92).

damaged caused to the victims. Such ‘either-or’ regime of liability for individual responsibility does not exist in international law at the current moment.²¹⁶

2) Compensation and Satisfaction

Compensation is residual to the primary form of restitution as it covers any financially assessable damage and is applicable “in so far as such damage is not made good by restitution”.²¹⁷ Compensation is for moral, non-material²¹⁸ or material damage and is often considered to be the most sought form of reparation.²¹⁹ The underlying principle of compensations attempts to offer commensurate reparation for the loss suffered and damage incurred by the injured State or party.²²⁰ The wrongful conduct must be sufficiently direct and have a certain causal nexus to the injury suffered²²¹ and there is no requirement for non-material injury to be based exclusively on specific evidence as it may be established on “an inevitable consequence of the wrongful acts” such as an unlawful deprivation of liberty, unjustifiably long period of detention, or degrading and humiliating treatment.²²² Non-material damage is also financially assessable in international law²²³ and the injury is assessed on equitable considerations.²²⁴ In the *Lusitania*

²¹⁶ See also, ECHR decisions re: deprivation of liberty and the obligation of the responsible State to release detained individuals as a restitution measure in *Assanidze v Georgia* App no 71503/01 (ECtHR, 08 April 2004), and *Ilascu v Moldova* App No 48787/99 (n 79).

²¹⁷ ARSIWA, art 36. Cf. *Passage through the Great Belt (Finland v. Denmark)* (Provisional Measures) [1991] ICJ Rep 12, 348.

²¹⁸ Non-material injury may take various forms, including ‘mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to his credit or his reputation’. See *Lusitania case* (1 November 1923) VII RIAA 40,

²¹⁹ See *Gabcikovo-Nagymaros case* (n 91) para 152.

²²⁰ *Lusitania case* RIAA vol. VII, 32 (1923) 39.

²²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 233, para 462. See also, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation, Judgment) [2012] ICJ Rep 324, para 14.

²²² *Diallo* (Compensation) (n 221) para 21.

²²³ See *Chevreau (France v. UK)* (1923) RIAA vol. II, 1113.

decision, it was proclaimed that compensation is applicable for mental suffering, humiliation, degradation, all negative consequences of the commission of the gravest crimes which trigger the obligation *aut dedere aut judicare*.²²⁵

Compensation for personal injury is a well-developed part of the regime of injuries to aliens. However, one should be careful to delineate the compensation for the breach of the customary obligation *aut dedere aut judicare* and possible compensation for the underlying crimes on a personal level. The former compensation refers to a situation in which a requesting State may not be able to either receive the relator or the custodial State does not submit the case for the purpose of prosecution. For example, the relator may die in the course of the extradition proceedings and if a breach of the obligation is found prior to the death of the relator on part of the custodial State, a restitution would be impossible. However, the requesting State may invoke a claim for compensation or satisfaction. If the victim is a national of the requesting State, then just satisfaction may be invoked in the context of diplomatic protection.²²⁶ Additionally, the injured State may ask for just satisfaction only for the benefit of the victim in human rights violations which may be linked to the non-applicability of the obligation *aut dedere aut judicare*.²²⁷ The groups of victims must be “precise and objectively identifiable”.²²⁸ Additionally, if the relator is not prosecuted, the role of victims’ compensation is also a pertinent issue as they would be unable to seek damages for the loss sustained as a result of the commission of the international

²²⁴ *Diallo* (Compensation) (n 221) para 24. See also, *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011) para 114.

²²⁵ *Lusitania* case (n 220) 40.

²²⁶ *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo) case* (Preliminary Objections) [2007] ICJ Rep 599, para 39. See also, *Case of Cyprus v Turkey* App no 25781/94 (ECtHR, Just Satisfaction Judgment, 12 May 2014) para 45.

²²⁷ The ECtHR pronounces that ‘if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims.’ *Case of Cyprus v Turkey* App no 25781/94 (ECtHR, Just Satisfaction Judgment, 12 May 2014) para 46.

²²⁸ *Case of Cyprus v Turkey* App no 25781/94 (ECtHR, Just Satisfaction Judgment, 12 May 2014) para 47.

crime as the right to reparation including compensation, individually or collectively, is recognized for the crimes of genocide, crimes against humanity, war crimes and torture.²²⁹

The final residual category of the reparation regime is satisfaction. The responsible State for the internationally wrongful act is under an obligation to provide satisfaction caused by the act if it cannot be made good by restitution or compensation.²³⁰ Satisfaction may include an acknowledgement of the breach, or an expression of regret for the commission of the breach or a formal apology. As with any other form of reparation, satisfaction shall be proportionate to the injury suffered. Additionally, compensation and satisfaction are complementary as “whatever form of reparation generally entails satisfaction for the injured party.”²³¹ One modality of satisfaction includes a pronouncement by a court or a tribunal²³² as in the ICJ’s *Habre* case pertaining to the *aut dedere aut judicare* obligation. Satisfaction is applicable to moral and material damages caused by the injury and as shown above, once the restitution element is satisfied as regards the *aut dedere aut judicare* obligation, the satisfaction is inapplicable or inherently embedded in the restitution process.

IX. Countermeasures against the Breaching State

Countermeasures aim at responding to the initial wrongful act, reestablishing the disturbed legal relationship between the States or between the States and the international community to its previous normal status, and obtaining redress or reparation for the wrongful act.²³³ Countermeasures must be proportionate to the wrongful act. The concept of the enforcement mechanism

²²⁹ See *Lusitania* case (n 220) 35 for the conditions for calculating the sum of compensation for personal injury. See also the Statute of the EAC, art 28(2).

²³⁰ See ARSIWA, art 37.

²³¹ Kerbrat (n 203) 581.

²³² See *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35.

²³³ Schachter (n 4) 18. See also, Pellet (n 1) 15.

of countermeasures has taken a significant expansion through the notion of *erga omnes* obligations, duties in which the international community has a vested legal interest and any State could apply countermeasures against the alleged breaching State.²³⁴

Countermeasures by the injured State can be taken against the responsible State under strict conditions if cessation and reparation are not provided by the responsible State. The countermeasures are to be of non-forcible character, and directed solely at the responsible State(s). They are temporary and reversible in character as they seek cessation and reparation for the internationally wrongful act or omission and do not intend to inflict punishment on the breaching State. Countermeasures must be proportionately applied to the damage suffered, and cannot involve *jus cogens* violations.²³⁵ Such conditions are strictly applicable and would be binding whenever the injured State invokes countermeasures against a breach of the obligation *aut dedere aut judicare*.

An injured State may apply countermeasures against the responsible State for the wrongful act of not fulfilling the obligation *aut dedere aut judicare* in order to ensure the latter complies with its obligation. The crucial element of allowing an otherwise illegal act by the invoking State against the breaching State is to ensure the compliance of the latter. Countermeasures are triggered only when the initial wrongful act is established as “it must be taken in response to a previous international wrongful act of another State and must be directed against that State.”²³⁶

Additionally, countermeasures must be limited to the non-performance for the period of the

²³⁴ Schachter (n 4) 18. Schachter states, “it may be a duty of all states to take counter-measures when the offending state has violated a Security Council decision or breached a fundamental legal obligation.”

²³⁵ ARSIWA Commentaries (n 5) 283. See ARSIWA, art 50. Countermeasures may not affect the obligation to refrain from the threat or use of force, may not contravene the obligations for the protection of fundamental human rights, may not constitute a reprisal prohibited by humanitarian law, and may not violate peremptory norms.

²³⁶ *Gabcikovo-Nagymaros* case (n 91) para 83.

applicability of the international obligation as their primary purpose is the inducement of the responsible State to resume its obligations. Countermeasures should be discontinued once legality is restored upon cessation and reparation of the wrongful act. Finally, countermeasures are to be applied in a manner which allows for the breaching State to resume the performance of its obligations.²³⁷ Hence, the nature of the countermeasure must be reversible *per definitio*.²³⁸

The final element of countermeasures is the applicability of the proportionality principle. Countermeasures must be proportionate to the injury suffered with special consideration of the gravity of the internationally wrongful act and the associated rights.²³⁹ It is a well-established principle of international law that “all countermeasures must...have some degree of equivalence with the alleged breach”.²⁴⁰

Finally, the rights of States other than the injured State are not precluded from invoking the responsibility of a breaching State in order “to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation”.²⁴¹ The provision must be read with Article 48 ARSIWA as the invoking State may trigger State responsibility for an obligation owed to the international community or to a group of States, as is the case of the duty *aut dedere aut judicare*. As indicated, practice for applying lawful measures for breaches of *erga omnes* obligations is rather limited.²⁴²

²³⁷ ARSIWA, art 49(3).

²³⁸ *Gabcikovo-Nagymaros* case (n 91) para 87.

²³⁹ ARSIWA, art 51.

²⁴⁰ *Air Services Agreement of 27 March 1946 (US v. France)* case (1978) 28 RIAA 417, para 83. See also, *Gabcikovo-Nagymaros* case, para 85, and *Territorial Jurisdiction of the International Commission of the River Oder* (1929) PCIJ, Series A No 23, 27.

²⁴¹ ARSIWA, art 54.

²⁴² See Uganda Embargo Act (1978) 22 USC, s 2151. See also, collective measures against Argentina of 1982 and imposition of sanctions against South Africa in 1986, UNSC Res 569 (26 July 1985) UN Doc S/RES/569.

Countermeasures must be terminated by the invoking State as soon as the responsible State complies with the obligation at issue, according to Article 53 ARSIWA.

X. Conclusion

The chapter attempts to examine the applicability of State responsibility to the customary and conventional obligation *aut dedere aut judicare*. The analysis is necessary as it completes the examination of the nature, scope and applicability of the principle. The State responsibility applicability to the obligation is straightforward. It shall be duly noted that the exceptions to State responsibility such as consent, necessity and *force majeure* are very limited if not applicable at all to the customary duty to extradite or prosecute due to its content. Finally, the obligation *aut dedere aut judicare* is proven to be of *erga omnes* character as any State may invoke its breach since the obligation aims at protecting the essential interests of all State of no impunity for grave commission of core international crimes and no safe haven for alleged perpetrators of the list of grave international crimes.

CONCLUSION

War crimes, crimes against humanity, torture, terrorism-related crimes, drug trafficking and genocide are traditionally perpetrated in States where such complex international criminal acts would not be prevented or punished easily. In such circumstances and eventualities of reigning impunity, the obligation *aut dedere aut judicare* offers not only retributive justice but also a deterrent mechanism for grave criminal behaviour not to be repeated in the future. The perpetration of international crimes rejects a society based on the rule of law and justice. The normative imperative to apprehend and prosecute perpetrators of such crimes is pertinent to the stable existence of the international community.

The main goal of the thesis is to examine to what extent the positive law relating to the *aut dedere aut judicare* principle defines the scope, nature and applicability of the principle. The introductory part of the work examines the notion of accountability and no impunity as a legal concepts, reflected in the legal framework of individual criminal responsibility and various supporting mechanisms such as the obligation ‘extradite-or-prosecute’. The section also explores to what degree the interest of States may be reflected by one of the mechanisms to ensure its effectiveness, namely the obligation ‘extradite or prosecute’ as a rational and practical framework.

The main part of the thesis analyses the substance, scope and nature of the processes of extradition and prosecution. Through an elaborate examination, it is shown how the two prongs

relate to each other, and, most significantly, how such relation is directly linked to the nature and gravity of the crimes that trigger the applicability of the *aut dedere aut judicare* obligation. It is proposed that two main types of the obligation exist pertaining to the triggering crimes: an obligation ‘extradite or prosecute’ with primacy of the duty to prosecute pertaining to core crimes; and an obligation of equal weight in terms of extradition and prosecution as regards transnational crimes such as terrorism and hijacking. In this manner, it is proven that the obligation *aut dedere aut judicare* does not enjoy a free-standing status but is inherently linked with the crime that triggers its applicability, a clear manifestation of the role of the duty in the suppression of grave criminal activity on the international level. Additionally, the primacy of prosecution corresponds to the harm inflicted on the international society by the criminal act, and core crimes of international law carry a primary duty to prosecute.

An analysis of how the processes of extradition and prosecution emerged in international law is also provided with a proposal for the applicability of the complementarity principles to ascertain in what circumstances the obligation to prosecute would be met by the custodial State. It is a crucial element of delineating under what conditions the custodial State could be considered to have fulfilled one of the prongs of the principle in good faith by submitting the case for the purpose of prosecution. Additionally, a detailed examination of the exceptions to extradition is also included in order to evaluate whether such bars to extradition might be seen as impeding the effective functioning of the obligation. It is concluded that the exceptions to extradition play a significant role in upholding the rule of law and respecting the human rights of the alleged perpetrator such as the right to a fair trial and the non-refoulement principle. Hence, the obligation *aut dedere aut judicare* incorporates a humane approach to criminal justice with strict

applicability of the highest standards of international human rights law where the individual is availed every opportunity to participate in fair and equitable judicial proceedings. Finally, it is suggested that the possibility for applicability of the extradition exceptions is counterbalanced by the duty to prosecute the relator in the judicial system of the custodial State in order to close the impunity gap.

The obligation *aut dedere aut judicare* serves as a mechanism which aims to close the impunity gap for a set list of international crimes. The obligation has two essential characteristics, namely, its goal to ensure prosecution of certain serious offences of international law, and its function as a mechanism to prosecute a relator in a custodial State and the possibility for extradition to another State.

The second main section of the thesis concerns the customary nature of the obligation *aut dedere aut judicare* pertaining to certain international crimes. Practice of States indicating custom can be revealed in multilateral conventions on specific crimes that contain norms and values pertaining to the fight against impunity through the *aut dedere aut judicare* principle although they are often prone to criticism in their custom-creating capacity due to the Baxter paradox. This should come as no surprise as the role of the obligation is to regulate behaviour of States, persons and groups in extradition and prosecution of core international crimes. It would be erroneous to assert that custom creation is a process which merely takes a snapshot or pinpoints the exact status of state practice. As the ‘extradite or prosecute’ principle touches upon fundamental sovereign issues as established in the previous chapters, the gap between the value of such a duty to be applicable on international level and its actual application might be rather obvious.

The framework of examining whether the *aut dedere aut judicare* obligation has attained customary status in international law is again premised on the triggering crime. It is found that certain core crimes carry such customary obligation due to the universal need to respond to such crimes of genocide, torture, grave breaches of international humanitarian law, crimes against humanity, reflected in the state practice and *opinio juris*. It is evident that the customary status of the obligation is easier to establish where the primary duty to prosecute core crimes exists.

For the transnational crimes of financing of terrorism and terrorist bombing, hijacking, safety of civil aviation, and drug trafficking the picture is not so clear. While terrorism-related crimes might be considered as having attained a status of a core crime recently, other transnational crimes seem to trigger an emerging custom of the obligation ‘extradite-or-prosecute’. It should also be duly noted that the clause pertaining to transnational crimes has been incorporated and repeated in many widely ratified multilateral conventions affirmed in various UN resolutions which indicates that States might be getting closer to accepting the duty as binding in the form of international custom. The conclusion about the customary nature of the obligation *aut dedere aut judicare* does not bring any surprises: core crimes which have the capacity to directly affect the functioning of the international society carry a customary obligation to extradite or prosecute. The list of core crimes is not exhaustive as the evidence of custom is examined against each separate criminalized activity.

The thesis concludes with an examination of the applicability of State responsibility to the customary obligation *aut dedere aut judicare* pertaining to the relevant international law crimes.

The applicability of State responsibility to the obligation is straightforward. It shall be duly noted that the exceptions to State responsibility such as consent, necessity and *force majeure* are very limited, if not applicable at all, to the customary duty 'extradite or prosecute' due to its content. Finally, the obligation *aut dedere aut judicare* is proven to be of *erga omnes* character as any State may invoke its breach since the obligation aims at protecting the essential interests of the community of States, aiming at minimizing the commission of core international crimes and ensuring no safe haven for alleged perpetrators.

All States have a vested legal interest and an *erga omnes* obligation in prosecuting offenders of such norms. Thenceforth, offenders of humanity would know no boundaries of impunity. Such criminal activities, committed in extraordinary circumstances of widespread violence and lack of peace, are also international crimes, thus extending an obligation derived from and to the international society. International crimes inflict direct damage to the roots of the international society and as they are not merely violations against a single State but they blatantly breach the law of nations. If such criminal acts remain unpunished and undeterred, the whole legal order is corrupted and misbalanced as impunity destroys the legal and moral foundations of any society.

Bibliography

Books

- Anghie A, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004)
- Arend A, *Legal Rules and International Society* (OUP 1999)
- Armstrong D (ed.), *Routledge Handbook of International Law* (Routledge 2009)
- Asteriti A and Tams C, *Erga Omnes, Jus Cogens and Their Impact on the Law of Responsibility* (Hart 2013)
- Bailey S and S Daws, *The Procedure of the UN Security Council* (Claredon Press 1998)
- Bantekas I and Nash S, *International Criminal Law* (Routledge 2009)
- Bassiouni MC (ed), *International Terrorism and Political Crimes* (C.C.Thomas 1975)
- —, *International Criminal Law: Crimes* (Dobbs Ferry 1986)
- —, *International Criminal Law: Crimes* (Transnational Publishers 1992)
- —, *Introduction to International Criminal Law* (Transnational Publications 2003)
- —, *International Extradition: United States Law and Practice* (Oceana 2007)
- Bassiouni MC and Wise EM, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute In International Law* (Martinus Nijhoff Publishers 1995)
- Black's Law Dictionary*
- Boas G, J L Bischoff and N Reid, *Elements of Crimes under International Law: Volume II* (CUP 2008)
- Bodin J, *The Six Bookes of a Commonweale* (Kenneth McRae tr.ed., Cambridge 1962)
- Boister N, *Penal Aspects of the UN Drug Conventions* (Kluwer 2001)
- Brandon B and du Plessis M, *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (Commonwealth Secretariat 2005)
- Brierly JL, *The Law of Nations* (6th ed, Claredon Press 1963)
- Brody R and Ratner M, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer International Law 2000)
- Brownlie I, *System of the Law of Nations: State Responsibility* (OUP 1983)
- Bull H, *The Anarchical Society: A Study of Order in World Politics* (Palgrave 1977)
- Bull H, Kingsbury B and Roberts A (eds), *Hugo Grotius and International Relations* (OUP 1990)

Burgers JH, *The United Nations Convention against Torture: a Handbook on the Convention* (Nijhoff 1988)

Capps P, *Human Dignity and the Foundations of International Law* (Hart Publishing 2009)

Cassese A, *International Criminal Law* (OUP 2003)

Cassese A (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012)

Cassese A and others (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press 2002)

Cheng B and B Brown (eds), *Contemporary Problems of International Law: Essays in Honour of George Schwarzenberger of His Eightieth Birthday* (Stevens and Sons 1988)

Crawford J, *The ILC's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2007)

Crawford J and others (eds), *The Law of International Responsibility* (OUP 2010)

Cryer R, *Prosecuting International Crimes* (CUP 2005)

Cullen H and Gilmore W (eds), *Crimes Sans Frontieres: International and European Legal Approaches* (Edinburgh University Press 1998)

Damrosch L and others, *International Law: Cases and Materials* (4th ed, West Group 2001)

Delmas-Marty M and others (eds), *European Criminal Procedures* (Cambridge University Press 2002)

Dinstein Y (ed), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff 1989)

Doria J and others (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers 2009)

Dupuy PM, *Humanite et droit international: Melanges RJ Dupuy* (Pedone 1991)

El Zeidy M, *The Principle of Complementarity in International Criminal Law* (Martinus Nijhoff 2008)

Evans M (ed), *International Law* (Oxford 2006)

Fenwick C (ed), *Classics of International Law* (1916)

Freestone D, Subedi S and Davidson S (eds), *Contemporary Issues in International Law* (Kluwer 2002)

Gaeta P (ed), *The UN Genocide Convention- A Commentary* (OUP 2009)

- Gilbert G, *Responding to International Crimes* (Martinus Nijhoff 2006)
- —, *Transnational Fugitive Offenders in International Law* (Kluwer Law International 1998)
- Goodwin-Gill G, *The Refugee in International Law* (Claredon Press 1996)
- Grotius H, *De Jure Belli ac Pacis*, (F.W. Kelsey tr, Claredon Press 1925)
- Hart HLA, *The Concept of Law* (2nd ed, OUP 1994)
- Heller KJ and Simpson G (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013)
- Henham R and Behrens P (eds), *The Criminal Law of Genocide* (Ashgate 2007)
- Henkin L, *How Nations Behave: Law and Foreign Policy* (Columbia University Press 1979)
- Henkin L (ed), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981)
- Inazumi M, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005)
- Joyner C (ed), *The United Nations and International Law* (CUP 1998)
- Keijzer N and van Sliedregt E (eds), *The European Arrest Warrant in Practice* (TMC Asser 2009)
- Kingsbury B and Straumann B (eds), *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP 2010)
- Kolb R, *Droit international penal* (Helbing 2008)
- Kolliopoulos A, *Le Commoission d'indemnisation des Nations Unies et le droit de la resposibilite internationale* (LGDJ 2001)
- Macedo S (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2004)
- McClearn D, *International Cooperation in Civil and Criminal Matters* (OUP 2002)
- McNair AD (ed), *International Law Opinions* (CUP 1956)
- Meron T, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1991)
- Mettraux G, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press 2006)
- O'Connor JF, *Good Faith in International Law* (Dartmouth 1991)
- Orakhelashvili A (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011)
- Pagden A and Lawrence J (eds), *Vitoria: Political Writings* (CUP 1991)

Paust J and others, *International Criminal Law: Cases and Materials* (Carolina Academic Press 2000)

Politi M and Gioia F (eds), *The International Criminal Court and National Jurisdictions* (Aldershot 2008)

Ragazzi M, *The Concept of International Obligations Erga Omnes* (Claredon 1997)

Raley P (ed), *Leibniz: Political Writings* (CUP 1972)

Reuter P, *Le droit international au service de la paix, de la justice et du développement* (Pedone 1991)

Reydams L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003)

Robinson N, *The Genocide Convention- A Commentary* (Rausen Brothers 1960)

Sadat LN and Scharf M (eds), *Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff 2008)

Scelle G, *Precis de droit des gens*, Vol. II (Sirey 1934)

Schabas W, *An Introduction to the International Criminal Court* (3rd ed, CUP 2007)

— —, *An Introduction to the International Criminal Court* (4th ed, CUP 2011)

Schwarzenberger G, *International Law as Applied by International Courts and Tribunals, vol. II: The Law of Armed Conflict* (Stevens 1968)

Scott JB (ed), *Classics of International Law* (J Rolfe tr. Claredon 1933)

— — (ed), *Classics of International Law* (Carnegie 1934)

— — (ed), *The Spanish Origin of International Law* (G Williams tr, Humphrey Milford 1934)

Sikkink K, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton & Co. 2011)

Sinclair I, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press 1984)

Stahn C and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (M.Nijhoff 2009)

Stigen J, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff 2008) Suarez F, *Tractatus de Legibus ac Deo Legislatore* (Carnegie Translation trs ed)

The Cambridge Yearbook of European Legal Studies 2003-2004 (CUP 2004)

Trials of War Criminals 11(1946-1949) US MTN (1948) 1241

van den Wyngaert C, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Kluwer Academic 1980)

Vattel E, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and Affairs of Nations and of Sovereigns*, (Carnegie ed, 1916)

Villiger M, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer Law International 1997)

Vorah LC and Bohlander M (eds), *Man's Inhumanity to Man: Essays in International Law in Honor of Antonio Cassese* (Martinus Nijhoff 2003)

Weiler J, Cassese A and Spinedi M (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter 1989)

Wellens K (ed) *Resolutions and Statements of the United Nations Security Council (1946-1989)* (Martinus Nijhoff Publishers 1990)

Wells D, *War Crimes and Laws of War* (University Press of America 1991)

Wolfrum R, (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2012)

You P, *Le Preamble des Traites Internationaux* (Fribourg, Librairie de l'Université 1941)

Articles

Abramovsky A, 'Extraterritorial abductions: America's 'Catch and Snatch' policy run amok' (1991) 31 VJIL 151

Adjovi R, 'Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers' (2013) 52 ILM 1020

Akehurst M, 'Jurisdiction in International Law' (1973) 46 BYBIL 145

Akhvan P, 'Whither National Courts? The Rome Statute's Missing Half' (2005) Journal of International Criminal Justice 1245

Alvarez-Jimenez A, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000-2009' (2011) 60 ICLQ 681

- Anderson K, 'How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?' (2006) 7(2) Melbourne Journal of International Law 245
- Artz E, 'The Lockerbie 'Extradition by Analogy Agreement'' (2002) 18 Am U Intl L Rev 163
- Bassiouni MC, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law&Contemp Probs 63
- —, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 Law&Contemp.Probs. 5
- —, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 VaJ Int'l L 81
- Baxter R, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 BYBIL 275
- —, 'Treaties and Custom' (1970) 129 Recueil des cours 25
- Benzing M, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity' (2003) 7 Max Planck Yearbook of United Nations Law 591
- Blakesley C, 'The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History' (1981) 4 BC Int'l&Comp LJ 39
- Blakesley C and Lagodny O, 'Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, the Role of Human Rights Under International Law' (1991) 24 Van J Transntl L 4
- Boister N, "Transnational Criminal Law?" (2003) 14(5) EJIL 953
- Cassese A, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13(4) EJIL 853
- Charlesworth H, 'The Unbearable Lightness of Customary International Law; (1998), 92 American Society of International Law Proceedings 44
- Charney J, 'International Agreements and the Development of Treaties as a Source of Customary International Law' (1986) 61 Wash L Rev 971
- Colangelo A, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory' (2009) 86 Wash U L Rev 769
- Conway G, 'The Council of Europe as a Normative Backdrop to Potential European Integration in the Sphere of Criminal Law' (2007) 19 DennLJ 123
- de Arechaga J, 'The Work and the Jurisprudence of the International Court of Justice 1947-1986' (1987) 58 BYBIL 1

- Dinstein Y, 'The Interaction between Customary International law and Treaties' (2006) 322 *Recueil des cours* 243
- Dugard J and van den Wyngaert C, 'Reconciling Extradition with Human Rights' (1998) 92 *AJIL* 187
- Enoch-Brown C and Fried A, 'Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law' (1998) 43 *MGill LJ* 613
- Epps V 'The Development of the Conceptual Framework Supporting International Extradition' (2002) 25 *Loy LA Intl&Comp L Rev* 369
- Ferdinandusse W, 'Improving Inter-State Cooperation for the National Prosecution of International Crimes: Towards a New Treaty' (2014) 18(15) *ASIL Insight* 3
- Finstein J, 'Extradition or Execution?' (2004) 77 *S Cal L Rev* 833
- Fitzmaurice G, 'The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and Other Treaty Points' (1957) *British Yearbook of International Law* 229
- Friedlander R, 'The Foundations of International Criminal Law: A Present-day Inquiry' (1983) 15 *Case W Res J Intl L* 13
- Givelber D, 'Innocence Abroad: The Extradition Cases and the Future of Capital Litigation' (2002) 81 *Or LRev* 161
- Gregg R, 'The European Tendency Towards Non-Extradition to the United States in Capital Cases' (2002) 10 *U Miami Intl&Comp L Rev* 113
- Grosswald Curran V and Sloss D, 'Reviving Human Rights Litigation after *Kiobel*' (2013) 107(4) *AJIL* 858,859
- Guild E, 'Future in an Area of Freedom, Security and Justice' (2004) 10(2) *ELJ* 218
- Guillame G, 'Terrorism and International Law' (2004) 53 *ICLQ* 537
- Heller KJ, 'A Sentence-based Theory of Complementarity' (2011) 53(1) *HILJ* 202
- Heller KJ, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 255
- Henkin L, 'International Law, Politics, Values and Functions' (1989-IV) 216 *RdC* 9
- Joyner C, 'Arresting Impunity: The Case of Universal Jurisdiction in Bringing War Criminals to Accountability' (1996) 59 *Law and Contemporary Problems* 153
- Kaeb C and Scheffer D, 'The Paradox of *Kiobel* in Europe' (2013) 107(4) *AJIL* 852
- Kelly M, 'Chasing Justice by Cheating Death' (2003) 20 *Ariz J Intl&Comp Law* 491
- Kennedy D, 'Primitive Legal Scholarship' (1986) 27(1) *Harv ILJ* 1

Kingsbury B and Straumann B, 'The State of Nature and Commercial Sociability in Early Modern International Legal Thought' (2005) NUY School of Law, Public Law & Legal Theory Research Working Paper No. 11-04

Kittichaisaree K, Informal Working Paper, Working Group on the Obligation to Extradite or Prosecute (5 April 2013)

Klimovicz E, 'Article 15 of the Torture Convention: Enforcement in US Extradition Proceedings' (2000) 15 Geo Immigr LJ 183

Kress C, 'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy' (2004) 2 JICJ 944

Kress C, 'Universal Jurisdiction over International Crimes and the *Institut de Droit International*' (2006) 4 JICJ 561

Latore R, 'Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes' 25(2) BCICLR 419

Lauterpacht H, 'The Grotian Tradition in International Law' (1946) 23 BYIL 1

Lowe V, 'Lockerbie- Changing the Rules during the Game' (1992) 51(3) Cambridge Law Journal 410

Mankiewicz H, 'The 1970 Hague Convention' (1971) 37 Journal of Air Law and Commerce 195

Mendelson MH, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 188

Meron T, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 576

Nadelmann E, 'Global Prohibition Regimes: The Evolution of Norms in International Society' (1990) 44 International Organisation 479

Noll A, 'International treaties and the control of drug use and abuse' (1977) 6 Contemporary Drug Problems 17

Nollkaemper A, 'Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in Belgium v Senegal' (2013) SHARES Research Paper 27

Ögren K, 'Humanitarian Law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden' (31 August 1996) International Review of the Red Cross No. 313

Onuf N, '*Civitas Maxima*: Wolff, Vattel and the Fate of Republicanism' (1994) 88 AJIL 280

Pellet A, 'The New Draft Articles of the International Law Commission... A Requiem for States' Crimes', (2001) 32 Netherlands YBIL

Roht-Arriaza N, 'Prosecuting Genocide in Guatemala: The Case Before the Spanish Courts and the Limits to Extradition' (2009) Working Paper No.2, Project on Human Rights, Global Justice and Democracy

Rose T, 'A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada' (2002) 27 Yale J Intl L 193

Sachariew J, 'State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured Stated' and Its Legal Status' (1988) NILR 273

Sadat L, 'Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror' (2007) 75(5/6) GW Law Rev 1200

Schachter O, 'International Law in Theory and Practice' (1982-V) 178 Recueil des cours 334

Sharfstein D, 'European Courts, American Rights: Extradition and Prison Conditions' (2002) 67 Brooklyn L Rev 719

Sorensen M, 'Principles de droit international public' (1976) Recueil des Cours 51

Stephens T, 'International Criminal Law and the Reponse to International Terrorism' Sydney Law School Legal Research Paper No. 07/72 (2007)

Thirlway H, 'Reflections on *Lex Ferenda*' (2001) 32 Netherlands Yearbook of International Law 3

Tomuschat C, 'The Legacy of Nuremberg' (2006) 4 J Intl Crim Justice 830

Topiel M, 'The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There a Room for Reconciliation' (2001) 9 Cardozo J Intl&Comp L 389

van Steenberghe R, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9 JICJ 1089

Verdross, 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts' (1969) 29 ZaoeRV 635

Vervaele J, 'The Transnational *ne bis in idem* Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights' (2005) 1(2) Utrecht Law Review 100

Wagner A, 'Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth' 31(3) OJLS 565

Weissbrodt D and Bergquist A, 'Extraordinary Rendition and the Torture Convention' (2006) 46 Va J Intl L 585

Wilson R, 'Argentine Military Officers Face Trial in Spanish Courts' (December 2003) ASIL Insights

Wilson R, 'Toward the Enforcement of Universal Human Rights Through Abrogation of the Rule of Non-Inquiry in Extradition' (1997) 3 ILSA J Intl & Comp L 741

Wise E, 'Extradition: The Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare' (1991) 62 Revue Internationale de Droit Penal 123

— —, 'The Obligation to Extradite or Prosecute' (1993) 27 Isr LR 268

Wood M, 'The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents' (1974) 23 ICLQ 791

Wright Q, 'The Scope of International Criminal Law: A Conceptual Framework' (1975) 15 Va J Intl L 561

Wuerth I, '*Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute' (2013) 107(3) AJIL 601

Zgones-Rozej M and Foakes J, 'International Criminals: Extradite or Prosecute' (July 2013) Chatham House Briefing Paper ILBP 2013/01

International Treaties

Agreement concerning a Scottish Trial in the Netherlands 1998 (The Netherlands-United Kingdom) (1999) 38 ILM 926

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR)

Anglo-US Supplementary Extradition Treaty of 1986 (1988) 294 UKTS 6

Arab States Convention on Extradition (adopted on 22 March 1945, entered into force 28 August 1954) 159 BFSP 606

Articles on Responsibility of States for Internationally Wrongful Acts (adopted on 12 December 2001) UNGA 56/83 A56/49 (I)/Corr 4 (ARSIWA)

Benelux Convention on Extradition and Mutual Legal Assistance (adopted 27 June 1962, entered into force 11 December 1967)

Comprehensive Peace Agreement held between Government of Nepal and Communist Party of Nepal (Maoist) (signed 21 November 2006)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85

Convention for the Prevention and Punishment of Terrorism (signed on 16 November 1937, never entered into force)

Convention for the Suppression of the Traffic in Persons (signed on 25 July 1951, entered into force 25 July 1951) 96 UNTS 271

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed on 23 September 1971, entered into force 26 January 1973) 974 UNTS 178 (The Montreal Convention)

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221

Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (The Hague Convention)

Convention Implementing the Schengen Agreement (adopted 19 June 1990, entered into force 1 September 1993) 239 OJL 19

Convention of Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) UNGA Res A/RES/260 (III) (Genocide Convention)

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted 9 December 1968) UNGA Res 2391 (XXIII)

Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979, entered into force 8 February 1987) 1456 UNTS 124

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167

Convention relating to the Suppression of the Abuse of Opium and other Drugs (signed on 23 January 1912, entered into force 19 February 1915) 8 LNTS 187

Council of Europe Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 June 2007) CETS 196

Council of Europe Criminal Law Convention on Corruption (adopted 27 January 1999, entered into force 1 July 2002) CETS 173

European Convention on Human Rights and Fundamental Freedoms as amended by Protocols 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) CETS 194

European Convention on the International Validity of Criminal Judgments (adopted 28 May 1970, entered into force 26 July 1974) CETS 70

European Convention on the Suppression of Terrorism (adopted 27 January 1977, entered into force 4 August 1978) CETS 90

Franco-Basle Treaty of 1780 (France-Prince Bishop of Based) (20 June 1780) 47 CTS 1778

General Act between the United States of America and Other Powers for the Repression of the African Slave Trade (2 July 1890) 173 CTS 293

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 13

Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85

Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

Great Britain- Mexico Slave Trade Treaty 91 CTS 255

Inter-American Convention against Corruption (adopted 29 March 1996, entered into force 6 March 1997) 35 ILM 724

Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (adopted 14 November 1997, entered into force 1 July 1998) OAS AG/RES.1 (XXIV)

Inter-American Convention on Extradition (adopted 25 February 1981, entered into force 28 March 1992) OAS TS 60

Inter-American Convention on the Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) 33 ILM 1429

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UNGA Res A/RES/61/177

International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205

International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) UNGA Res 59/290 UN Doc A/59/766

International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197

International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243

International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 284

International Convention for the Suppression of Counterfeiting Currency (adopted 20 April 1929, entered into force 22 February 1931) 112 LNTS 371

Jay Treaty of 1794 (US-UK) (adopted 19 November 1794)

Opium Convention (adopted 19 February 1925, entered into force 25 September 1928) 81 LNTS 317

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 (adopted 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

SAARC Regional Convention on the Suppression of Terrorism (adopted 4 November 1987)

Single Convention on Narcotic Drugs of 1961 (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 301

Statute of the Extraordinary African Chambers (adopted January 2013, entered into force February 2013)

The 1926 Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253

Treaty between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade (adopted 20 December 1841) 92 CTS 437

United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2004) 2349 UNTS 41

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95

United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209

Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331

UN Documents and decisions

Agiza v Sweden, Comm. No.233/2003, UN Doc. CAT/C/34/D/233/2003 (2005)

Alzery v Sweden, HRC Comm. No.1416/2005, UN Doc. CCPR/C/88/D/1416/2005 (2006). (2006)

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly, (21 March 2006) UN Doc A/RES/60/147

Champagnie et al. v Jamaica Comm No 445/1991 (HRC decision, 18 July 1994) CCPR/C/51/D/445/1991

Commission on Crime Prevention and Criminal Justice, 22nd Sess. (22-26 April 2013) U.N. Doc. E/CN.15/2013/L.5

Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, E/CN.4/1987/13 (9 January 1987)

Economic and Social Council 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1

ECOSOC Res 1989/65 (24 May 1989)

Everett v Spain Communication No 961/2000, UN Doc CCPR/C/81/D/961/2000 (2004)

Fillastre v Bolivia HRC Comm No 336/1988 (5 November 1988)

'First Report on Formation and Evidence of Customary International Law' (May-August 2013) ILC A/CN.4/663

General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, HRC, UN Doc CCPR/C/21/Rev1/Add13 (2004)

High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda Report (19 February 1998) E/CN.4/1998/61

ILC, Fourth Report on State Responsibility (Addendum) Doc. A/CN.4/444/Add.1

ILC, 'Report of the ILC' 32nd Session, 2(2) ICL Yearbook 1980

ILC, 5th Report on State Responsibility, 2(1) ICL Yearbook 1993

ILC, Annex A: Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*) A/68/10 (6 May to 7 June and 8 July to 9 August 2013)

ILC, Draft Code of Crimes against the Peace and Security of Mankind (1996) YBILC

ICL Report 1960, YBILC 1960 II

ILC, 'Review of the Commission's Programme of Work' (1973) YBILC II 230

ILC, Survey of Multilateral Conventions which May Be of Relevance for the Work of the International Law Commission on the Topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)', A/CN.4/630 (18 June 2010)

El-Megrisi v. Libya Committee on Civil and Political Rights Communication 449/1990 (23 March 1994)

Jegatheeswara Smara v Sri Lanka HRC Comm. No. 950/2000 (16 July 2003)

Judge v Canada UNHRC, UN Doc. CCPR/C/78/D/829/1998

Kindler v Canada UNHRC Comm No 470/1991 (1993) UN Doc CCPR/C/48/D/470/1991

Lopez Burgos . Uruguay Communication No. 52 (1979) HRC, A/36/40

Ng v Canada UNHRC, UN Doc CCPR/C/49/D/496/1991

OHCHR, 'Nepal: Truth-seeking legislation risks further entrenching impunity, alert UN rights experts' (4 July 2014)

Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the Drug Problem, Commission on Narcotic Drugs (11-12 March 2009)

Ratiani v Georgia HRC Communication No. 975/2001, UN Doc. CCPR/C/84/ D/975/2001

Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001) S/2004/70

Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33, E/CN.4/1986/ 15 (19 February 1986)

Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur, UN Doc. S/2005/60

Sholam Weiss v Austria Communication No 1086/2002, UN Doc. CCPR/C/77/D/1086/2002 (2002)

Summary Record of the 5th Plenary Meeting (17 June 1998) UN Doc. A/CONF.183/SR.5

The Committee on the Progressive Development of International law and its Codification (1946/47), UN Doc. A/AC 10/16 SR2

The Rule of Law at the National and International Levels, UNGA Res 63/128 (11 December 2008) 63rd Session (A/Res/63-128)

UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005)

UN Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Records, Vol. II (NY 1991), UN Doc. E/CONF.82/16/Add.1

UNGA Declaration on the Protection of All Persons from Enforced Disappearance (18 February 1992) A/RES/47/133

UNGA, 'Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment' A/57/173 (2 July 2002)

UNGA Resolution 44/137 (15 December 1989) A/RES/44/137

UNGA Resolution 45/140 (14 December 1990) A/RES/45/140

UNGA Resolution 48/116 (21 December 1993) A/RES/48/116

UNGA Resolution 37/195 (18 December 1982) A/RES/37/195

UNGA Res 49/60 (9 December 1994) 'Declaration on Measures to Eliminate International Terrorism'

UNGA Resolution 66/183 (3 April 2012) A/RES/66/183

UNGA Resolution 67/1 (24 September 2012) 67th Session, UN Doc. A/67/L.1

UNGA Res 60/288 (20 September 2006) 'The United Nations Global Counter-Terrorism Strategy'

UNGA Resolution 64/182 (30 March 2010) A/RES/64/182

UNGA Res 2583(XXIV) (15 December 1969) UN Doc. A/RES/2583(XXIV)

UNGA Res 2712(XXV) (15 December 1970) UN Doc. A/RES/2712(XXV)

UNGA Res 2840 (XXVI) (18 December 1971) UN Doc. A/RES/2840(XXVI)

UNGA Res 3074(XXVIII) (3 December 1973) UN Doc. A/RES/3074(XXVIII)

UNGA Sixth Committee (134th meeting) 'Conclusion of the consideration of the draft convention on genocide: report of the Economic and Social Council' (2 December 1948) A/C.6/SR. 134

UNGA Sixth Committee (3rd Session) 'Report on Genocide: Draft Convention and Report of the Economic and Social Council' (3 December 1948) UN Doc a/760

UNHRC, 'Concluding Observations on the Former Yugoslav Republic of Macedonia' (3 April 2008) UN Doc CCPR/C/MKD/CO/2

UNSC Res 286 (1970) UN Doc S/RES/286

UNSC Res 569 (26 July 1985) UN Doc S/RES/569

UNSC Res 635 (14 June 1989) UN Doc S/RES/635

UNSC Res 731 (21 January 1992) 31 ILM 750

UNSC Res 748 (31 March 1992) S/RES/748

UNSC Res 1054 (26 April 1996) S/RES/1054

UNSC Res 1267 (15 October 1999) UN Doc No S/RES/1267

UNSC Res 1318 (7 September 2000) S/RES/1318

UNSC Res 1325 (31 October 2000) S/RES/1325

UNSC Res 1373 (28 September 2001) S/RES/1373

UNSC Res 1593 (31 March 2005) S/RES/1593

UNSC Res 1612 (26 July 2005) S/RES/1612

UNSC Res 1674 (28 April 2006) S/RES/1674

UNSC Res 1970 (26 February 2011) S/RES/1970

UNSC Res 2166 (21 July 2014) UN Doc S/RES/2166

UN Commission on Human Rights, Civil and Political Rights, UN ESCOR 58th session 'Including Questions of: Disappearances and Summary Executions' (8 January 2002) UN Doc E/CN.4/2002/71

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

Working Group on the UN Convention against Torture (1980) HR (XXXVI)/WG.10/WP.8/Add.1

Wright v Jamaica UNHRC (1995) UN Doc. CCPR/C/54/D/606/1994

Table of cases

PCIJ and ICJ cases

Advisory Opinion on the Genocide Convention (Advisory Opinion) ICJ Rep 1951

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)
(Compensation, Judgment) [2012] ICJ Rep 324

Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo) case (Preliminary
Objections) [2007] ICJ Rep 599

Application of the Genocide Convention (Bosnia-Herzegovina v Serbia and Montenegro)
(Merits) [2007] ICJ Rep 595

Armed Activities on the Territory of the Congo (DRC v. Uganda) (Sep.Op. Simma) [2005] ICJ
Rep 168

Arrest Warrant of 11 April 2000 case (DRC v. Belgium) (Judgment) [2002] ICJ Rep 3

Barcelona Traction, Light and Power Company Case (Belgium v Spain) (Merits) [1970] ICJ Rep
3

Case concerning rights of nationals of the USA in Morocco [1952] ICJ Reports 176

Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention
Arising from the Aerial Incident at Lockerbie (Request for the Indication of Provisional
Measures) (Libya v. United Kingdom) [1992] ICJ Rep 3

Case concerning the Acquisition of Polish Nationality (Germany v. Poland) (Merits, 24 July
1924) 2 RIAA 401

Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) [1997] 37 ILM 162

Certain Matters of Mutual Assistance in Criminal Matters (Djibouti v France) case (Judgment)
ICJ Rep 2008

Columbian-Peruvian Asylum case (Judgment) [1950] ICJ Rep 266

Continental Shelf (Tunisia/Libya) case (Judgement) [1985] ICJ Rep 29

Corfu Channel (UK v Albania) (Merits) [1949] ICJ Rep 4

Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA) case
(Judgment) [1984] ICJ Rep 246

Differences Relating to Immunities from Legal Process of a Special Rapporteur of the
Commission on Human Rights (Advisory Opinion) [1999] ICJ Rep 62

Electronica Sicula S.p.A. (*ELSI*) (Judgment) ICJ Rep 1989

Factory at Chorzow (Jurisdiction) 1927 PCIJ Series A No 9

Free Zones of Upper Savoy and the District of Gex 1932 PCIJ Series A/B No 46

German Settlers in Poland (1923) PCIJ Series B No 6

Greco-Bulgarian “Communities” 1930 PCIJ, Series B No 17

Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Judgment) [2012] ICJ Rep 99

LaGrand (Germany v. USA) (Provisional Measures) [1999] ICJ Rep 9

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 26

Mavrommatis Palestine Concessions (Greece v. U.K.) [1924] PCIJ series B No 3

Military and Paramilitary Activities in Nicaragua (Nicaragua/ United States of America) (Merits) [1986] ICJ Rep 14

North Sea Continental Shelf case (Judgment) [1969] ICJ Rep 3

Nuclear Tests Case (Australia v. France) (Merits) [1974] ICJ 253

Nuclear Tests Case (New Zealand v. France) (Merits) [1974] ICJ 457

Nuclear Weapons Advisory Opinion (Advisory Opinion) [1996] ICJ Rep 226

Oil Platforms (Iran v. USA) (Preliminary Objections) [1996] ICJ Rep 803

Passage through the Great Belt (Finland v. Denmark) (Provisional Measures) [1991] ICJ Rep 12

Phosphates in Morocco (Preliminary Objections) 1938 PCIJ Ser. A/B, No. 74

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Judgment) [2012] ICJ Rep 422

Reparation for Injuries Suffered in the Service of the United Nations (Judgment) [1949] ICJ Rep 174

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15

South West Africa case (Second Phase), Diss. Op. Jessup, [1966] ICJ Rep 1966 6

SS Wimbledon case (1928) PCIJ Series A No 1, 30

Territorial Jurisdiction of the International Commission of the River Oder (1929) PCIJ, Series A No 23

Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory 1932 PCIJ Series A/B No 44

United States Diplomatic and Consular Staff in Tehran (Judgment) [1980] ICJ Rep 3

Western Sahara Advisory Opinion (Advisory Opinion) [1975] ICJ Rep 32

Other International cases

Air Services Agreement of 27 March 1946 (US v. France) case (1978) 28 RIAA 417

Amelia de Brissot case (US v. Venezuela) (1885) 3 Intl Arb 2969

Chevreau (France v. UK) (1923) RIAA vol. II, 1113

Decision Requesting Observations about Omar Al-Bashir's Recent Visit to Malawi, ICC Pre-Trial Chamber I (19 October 2011) ICC-02/05-01/09

Dickson Car Wheel Company claim (1931) 4 RIAA 669

Islamic Republic of Iran v. US, Cases A15 and A24 (1996) 32 Iran-USCTR 115

Island of Palmas case (1949) RIAA, vol. II, 829

"James Hamilton Lewis" claim (1902) RIAA vol. IX, 66

Janes et al v United Mexican States (1925) RIAA, Vol. IV

L.F.H. Neer and Pauline Neer (USA) v. United Mexican States (1926) IV Reports of International Arbitral Awards

Libyan Arab Foreign Investment Company v. Republic of Burundi 1994 ILR 279

List, Re Case No.215, US Military Tribunal Nuremberg (1948) 8 UNLRTWC 1

Lubanga case (Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006) ICC-01/04-01/06-8

Lusitania case RIAA vol. VII, 32 (1923) 39

Milutinović et al case (21 May 2003) Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction- JCE

'Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic' No.: ICC-01/05-7 (5 December 2006)

Prosecutor v Akayesu (Judgment) ICTR-96-4-T (2 September 1998)

Prosecutor v Andre Rwamakuba (Decision on Defence Motion for Stay of Proceedings Article 20 of the Statute) ICTR-98-44C-PT (3 June 2005)

Prosecutor v Anto Furundžija (Judgment) IT-95-17/1 (10 December 1998)

Prosecutor v Anto Furundžija (Appeals Chamber Judgment) IT-95-17/1-A (21 July 2000)

Prosecutor v Ayyash (16 February 2011) Case No STL-11-01/I, Interlocutory Decision on the Applicable Law (Appeals Chamber)

Prosecutor v Duško Tadić A/K/A “Dule” (Decision on the Defence Motion on Jurisdiction) IT-94-1-T (10 August 1995)

Prosecutor v Duško Tadić (Decision on Defence Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995)

Prosecutor v Kordić and Čerkez (Judgment) Case No. IT-95-14/2-A (17 December 2004)

Prosecutor v Kupreskić (Judgement) IT-95-16-T (14 January 2000)

Prosecutor v Munyakazi case (Judgment) ICTR-97-36A (28 May 2008)

Prosecutor v Ntuyahaga (Decision on the Prosecutor’s Motion to Withdraw the Indictment) ICTR-90-40-T (18 March 1999)

Prosecutor v Prosper Mugiraneza (Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief) ICTR-99-50-AR73 (27 February 2004)

Prosecutor v Sam Hinga Norman (Decision on Preliminary Motion Based on Lack of Jurisdiction and Judicial Independence) Case No. SCSL-2004-14-AR72 (E) (13 March 2004)

Prosecutor v Tihomir Blaskić (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14-AR (29 October 1997)

Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion (of the Seabed Disputes Chamber) International Tribunal for the Law of the Sea (1 February 2011)

Salvador Commercial Company case (1902) RIAA vol. XV, 455

Situation in Libya in the Case of the Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi (11 October 2013) ‘Decision on the admissibility of the case against Abdullah Al-Senussi’ ICC Pre-Trial Chamber I, ICC-01/11-01/11

Suleymane Guengueng et al. v Habre Comm No 181/2001 (18 April 2001)
CAT/C/36/D/181/2001

Tellini case (1924) LNOJ 5 year, No 4

Texaco v Libyan Arab Republic Arbitration (1979) 53 ILR 491

The Continental Shelf Arbitration (UK v. France) (Judgment) [1979] 75 ILR 54

ECHR cases and reports

Ahorugeze v Sweden App no 37075/09 (ECtHR, 27 October 2011)

Al-Jedda v United Kingdom App no 27021/08 (ECtHR, 7 July 2011)

Assanidze v Georgia App no 71503/01 (ECtHR, 08 April 2004)

Assenov and Others v Bulgaria (ECtHR, 28 October 1998)

Babar Ahmad and Others App No 24027/07 (ECtHR, 10 April 2012)

Barbera, Messegue & Jabardo v Spain App nos 10588/83, 10589/83 and 10590/83 (ECtHR, 6 December 1988)

Batı and Others v Turkey App nos 33097/96 and 57834/00, ECHR 2004-IV

Boicenco v Moldova App no 41088/05 (ECtHR, 11 July 2006)

Campbell and Fell v The United Kingdom App no 7819/77; 7878/77 (ECtHR, 28 June 1984)

Case of Jones and others v UK App nos. 34356/06 and 40528/06 (ECtHR, 14 January 2014)

Chahal v United Kingdom 23 EHR Rep 413 (1997)

Colozza and Rubinat v Italy (1985) Series A, No 89

Corigliano v Italy App no 8304/78 (ECtHR Merits and Just Satisfaction, 10 December 1982)

Corsacov v Moldova App no 18944/02 (ECtHR, 4 April 2006)

Council of Europe member States: Second Report (11 June 2005) Doc. 11302 rev. ('The 2007 Marty Report')

Cyprus v Turkey App no 25781/94 (ECtHR, Just Satisfaction Judgment, 12 May 2014)

D. v the United Kingdom (1997) ECHR 1997-III

Dedovskiy and Others v Russia App no 7178/03 (ECtHR, 15 May 2008)

Denis Vasilyev v Russia App no 32704/04 (ECtHR, 17 December 2009)

Deweert v Belgium App no 6903/75 (ECtHR, 27 February 1980)

Eckle v Germany App no 8130/78 (ECtHR, 15 July 1982)

El-Masri v FYROM App No 39360/09 (ECtHR, 13 December 2012)

Ergi v Turkey App no 23818/94 (ECHR judgment, 28 July 1998)

Gül v Turkey App no 22676/93 (ECtHR, 14 December 2000)

Hager v Finland App no 14724/02 (ECtHR Judgment (Merits and Just Satisfaction), 17 January 2006)

Ilascu and Others v Moldova and Russia App no 48787/99 (ECtHR, 8 July 2004)

Jordan v UK App No 24746/94 (ECtHR judgment, 4 May 2001)

Khadzhaliyev and Others v Russia App no 3013/04 (ECtHR t, 6 November 2008)

Khashiyev and Akayeva v Russia App no 57942/00 and 57945/00, (ECtHR, 24 February 2005)

Kirkwood v the UK (1984) 6 EHRR 373

Konig v Germany App no 6232/73 (ECtHR Judgment (Merits), 28 June 1978)

Kostovski v The Netherlands App no 11454/85 (ECtHR, 20 November 1989)

Launder v UK (1997) 25 EHRR CD 27

Loizidou v Turkey (1995) (Preliminary Objections, GC) Ser A No 310

M v Federal Prosecutor 8 NYIL 275 (1977)

Mamatkulov and Askarov v Turkey App nos 46827/99 and 46951/99 (Judgment Grand Chamber, 4 February 2005)

McCann and Others v The United Kingdom App no 18984/91, (ECtHR, 27 September 1995)

Mehmet Emin Yüksel v Turkey App no 40154/98 , (ECtHR, 20 July 2004)

Multiplex v Croatia App no 58112/00 (ECtHR, 10 July 2003)

Nachova and others v Bulgaria App nos 43577/98 and 43579/98 (ECtHR, 6 July 2005)

Neumeister v Austria App no (ECtHR Judgment (Merits) ,27 August 1968)

Ognyanova and Choban v Bulgaria App no 46317/99 ,(ECtHR, 23 February 2006)

Oğur v Turkey App no 21594/93 ECHR 1999-III

Palic v Bosnia and Herzegovina Application no. 4704/04 (ECtHR, 15 February 2011)

Piersack v Belgium App no 8692/79, (ECtHR, 01 October 1982)

Pelissier and Sassi v France App no 25444/94 (ECtHR, 25 March 1999)

Ringeisen v Austria App no 2614/65 (ECtHR, 16 July 1971)

Rylski v Poland App no 24706/02 (ECtHR Judgment (Merits), 4 July 2006)

Saadi v Italy App no 37201/06 (Judgment, 28 February 2008)

Soering v United Kingdom (1989) Series A no 161

Süheyla Aydın v Turkey App no 25660/94 (ECtHR, 24 May 2005)

Tanis and Others v Turkey App no 65899/01 (ECtHR, 02 August 2005)

Tanrikulu v Turkey App no 23763/94 ECHR 1999-IV

Timurtas v Turkey App no 23531/94 (ECtHR, Judgment (Merits and Just Satisfaction) 13 June 2000)

Van Anraat v The Netherlands App no 65389/09, Decision on Admissibility (6 July 2010)

Van Oosterwijck v Belgium App no 7654/76 (ECtHR, 06 November 1980)

Varnava and Others v. Turkey App nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR Grand Chamber, 18 September 2009)

Vilvarajah and Others v the UK App nos 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87 (ECtHR, 30 October 1991)

Warsicka v Poland App no 2065/03 (ECtHR, 16 January 2007)

Wemhoff v Germany App no 2122/64 (ECtHR, 27 June 1968)

X v The Netherlands App no 9433/81 (ECommHR Decision of 11 December 1981 on the Admissibility of the Application)

X v The Federal Republic of Germany Application No. 6946/75 (ECommHR Decision of 6 July 1976 on the Admissibility of the Application)

Z and Others v UK App No 29392/95, ECHR Rep 2001-V

ECJ cases

Commission v Federal Republic of Germany (Case C-105/02) [2006]

Commission v Kingdom of Spain (C-499/99) [2002] ECR I-6031

Criminal Proceedings against Van Esbroeck case (Case C-436/09) [2009] ECR I-2006

Criminal Proceedings v Miraglia case (C-469/03) [2005] ECR I-2009

Gözütok & Brügge case (C-187/01 and C-385/01) [2003] ECR I-1345

Other regional cases

Baena-Ricardo et al (270 Workers v. Panama) (Judgment) Inter-American Court of Human Rights Series C No. 72 (2 February 2001)

Chumbipuma Aguirre et al v Peru (Judgment) Inter-American Court of Human Rights Ser C No 75 (14 March 2001)

Dawda v The Gambia Comm No 147/95 and 149/96 (AfCmHR decision, 11 May 2000)

Genie- Lacayo v Nicaragua (Judgment) Inter-American Court of Human Rights Series C No 30 (29 January 1997)

Manuel Aguirre Roca et al. v Peru case (Judgment) Inter-American Court of Human Rights, 11.760 Rep No 35/98 (5 May 1998)

Malawi African Association and Others v. Mauritania African Commission of Human Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000)

Maritza Urrutia v. Guatemala Inter-American Court of Human Rights, Series C No. 103 (27 November 2003)

Myrna Mack Chang v Guatemala case (Judgment) Inter-American Court of Human Rights Series C No. 101 (25 May 2003)

Paniagua Morales et al. (“Panel Blanca”) (Judgment) Inter-american Court of Human Rights Series C No 37 (8 March 1998)

Suarez –Rosero v Ecuador (Judgment) Inter-American Court of Human Rights Series C No. 35 (12 November 1997)

Velasquez Rodriguez v Honduras case (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988)

Villagran Morales et al. v Guatemala case (Judgment) Inter-American Court of Human Rights Series C No. 63 (19 November 1999)

Domestic cases

Abdelbaset Ali Mohamed Al Megrahi v. Her Majesty's Advocate, No.CI04/01 (Appeal Court, High Court of Justiciary).

Arambasic v. Aschcroft 403 FSupp 2d 951, 956 (DSD 2005)

Arton, In re (*No.2*) [1896] 1 QB 509

Artukovic v INS 628 F Supp 1370 (1980)

Artukovic v Rison 628 F.Supp 1370 (1986)

Attilio Regio case (1945) 12 RIIA 8

Attorney Gen. of Israel v. Eichmann 36 ILR 18

Attorney Gen. of Israel v. Eichmann 36 ILR 277 (Isr. Sup.Ct.)

AZAPO et al v The President of the Republic of South Africa case CCT 17/96, Constitutional Court of South Africa (25 July 1996)

Ballestas, Supreme Tribunal of Justice of Venezuela (Judgment of 10 December 2001)

Bat v Investigating Judge of the German Federal Court [2011] EWHC 2029

Bohne, In re Argentinian Supreme Court (24 August 1966) 62 AJIL 784

Brown and others v Rwanda [2009] EWHC 770 (Admin)

Castioni, in Re [1891] 1 QB 149

CDS v The Netherlands 96 ILR 383, 387 (1990)

Chili Komitee Nederland v. Pinochet (4 January 1995) Court of Appeal of Amsterdam, (1997) 28 Netherlands Yearbook of International Law 363

Collins v Loisel 259 US 309, 311 (1922)

Cuillier, Ciamborrani and Vallon, Re (Const. Ct. Italy) 78 ILR 93

Cvjetković case (13 July 1994) Beschluss des Oberstern Gerichtshofs Os99/96-4

Demjanjuk v Petrovsky (1985) 603 F.Supp. 1468

Demjanjuk, In re 612 F.Supp. 544, 556 (ND Ohio 1985)

Desi Bouterse case, Court of Appeal of Amsterdam (3 March 2000)

Dharmarajah v. Ministere Public Federal (ATF,1981)

Drug Offences Jurisdiction Case (1991) 86 ILR 550

Ellis v O'Dea (*No.2*) [1991] ILRM 346, 362 (Irish HC & SC)

Escobedo v.US 623 F.2d 1098 (5th Cir. 1980)

Estate of Marcos Human Rights Litigation, In re 978 F. 2d 493 (CA9 1992)

Estate of Marcos, Human Rights Litigation, In re 25 F. 3d 1467, 1469, 1475 (CA9 1994)

Ezeta, In re 62 F. 972- CCND Cal . (1894)

Fidan case 100 ILR 662 (1987)

Filartiga v. Pena-Irala (1980) 630 F 2d 876

Finucane v. McMahon (1990) 1 I.R. 165 (H.Ct & S.C.)

Fiocconi v. Atty.Gen. of the US 462 F.2d 475 (2d Cir. 1972)

Fofana and Belise v. Deputy Prosecutor of Thubin, France [2006] EWHC 744

Folkerts (Judgement, 8May 1978) HR, NJ No.314

Freedman v. US [1967] 437 F.Supp 1252

Gaddafi, Court of Appeal of Paris (2004) Chambre d'accusation 125 ILR 490

Gallina v. Fraser 177 F.Supp. 856, 867-8 (D.Conn. 1959)

Garcia-Guillern v. United States 450 F.2d 1189 (5th Cir) (1971)

Giovanni Gatti, In re [1947] Ann.Dig. 145 (Case No.70)

Girardin, In re 7 Ann Dig 357 (Arg. C.Fed, 1933)

Glucksman v Henkel 221 US 508 (1922)

Government of the USA v. Montgomery [2004] 1 WLR 2241

Her Majesty's Advocate v. Al Megrahi et al. (2001) (Scottish High Court of Justiciary at Camp Zeist, the Netherlands) 40 ILM 582

Hungarian Deserter (Austria) case 28 ILR 343 (1959)

Hussainara Khatoon and Others v Home Secretary, State of Bihar (1980) 1 SCC 81

In re Extradition of Howard 996 F.2d 1320 (1993)

In re Extradition of Molnar 202 F. Supp. 2d 782, 785-786 (2002)

Issel, In re 18 ILR 331 (1950), Eastern Provincial Court, Denmark

Judgment in the Case of Karl Heynen (Supreme Court of Leipzig judgment) (26 May 1921) 16 AJIL 674 (1922)

Judgment of 15 May 1979, Cour d'Appel de Limoges, No.37

Kamali Court of Appeal of Paris on 10 December 2008

Kamana Court of Appeal of Lyons on 9 January 2009

Kavic, In re 19 ILR 371 (Swiss Federal Tribunal, 1952)

Kiobel et al. v. Royal Dutch Petroleum Co. et al., 569 SCOTUS 1 (2013)

Kolczynski, Ex parte [1955] 1 All E.R. 31

Kroeger v The Swiss Federal Prosecutor's Office Swiss Fed. Tribunal (1966) 72 Intl L Rep 606

Kuhn v. StAnW. Kantons Zurich 34 ILR 132, 133 (Fed. Tribunal 1961)

L'Affaire Gouvernement Suisse [1995] AJDA 56

Lohdi [2001] EWHC Admin 178

Lujambio Galdeano, Garcia Ramirez and Martinez Beiztegui [1985] Rec. 307
 M v. Federal Department of Justice and Police 75 ILR 107 (Swiss Federal Tribunal, 1979)
 Mackin, In re 668 F.2d 122 (2d Cir. 1981)
 Magee v. O'Dea (1994) I.R. 500 (H.Ct)
 McMullen, In re N.D.Cal. (11 May 1979)
 Melia v United States 667 F.2d 300 (1981)
 Meunier, In re [1894] 2 QB 415
 Military Prosecutor v Niyotenze Tribunal Militaire, Div. 2, Lausanne (30 April 1999)
 Mohamed v. Jeppesen Dataplan (2009) 579 F.3d 943 (9th Cir.)
 Mohamed v President of the RSA [2001] BCLR 685 (CC)
 Mushikiwabo and others v Barayagwiza No 94 CIV (JSM) (Judgment 9 April 1996) 460
 Nappi, In re 19 Intl L Rep (1952) 375
 Neely v. Henkel [1901] 180 US 109
 Nulyarimma v Thompson [1999] FCA 1192
 Ornelas v Ruiz 161 SCOTUS 502
 P. v. Office Federal de la Police (ATF 1991)
 Pavan, In re 4 Ann. Dig. 347 (Swiss Federal Court, 1928)
 Public Prosecutor v. Milan T., Oberste Gerichtshof 28 ILR 341 (1963)
 Quinn v. Robinson 783 F.2d 776 (9th Cir.) (1986)
 R and FRG v Rauca (1983) 88 ILR 277
 R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3) [2000] 1 AC 147 (HL 1999)
 R v. Governor of Pentonville Prison, ex p. Budlong [1980] 1 WLR 1110
 R v Moussa Membar et al. [1983] CLR 618
 R v. Secretary of State for the Home Department ex parte Bagdavičius (FC) and another [2006] UKHL 38
 R v. Secretary of State for the Home Department, ex parte Launder 1 WLR 839
 R (Ullah) v. Special Adjudicator (2004) 2 AC 323, 3 WLR 23

Riley v. The Commonwealth of Australia [1985] 159 CLR 1
 Rochin v. California 342 US 165 (1952)
 Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D.Kan. 1980) 797
 Schneider (Judgement, 8 May 1978) HR (not published)
 Schtraks v Israel [1964] AC 556, 580
 Senyamuhara Court of Appeal of Mamoudzou (in the French overseas department of Mayotte)
 on 14 November 2008
 Sosa v. Alvarez-Machain 542 US 692 (2004)
 Spiesens, In re 16 ILR 275 (1949) (Court of Appeal of Nancy)
 T v Secretary of State for the Home Department [1996] 2 All ER 865
 Thailand Drug Offences (Jurisdiction) *Case* (1991) 86 ILR 587
 The Matter of the Extradition of Artukovic 628 F.Supp 1370 (1985)
 The State v Schumann Ghanaian Supreme Court (1966) 16 ILR 433
 Thompson v. Oklahoma, 198 S.Ct. 2687
 United States v. Artukovic 170 FSupp 383- SD Cal (1959)
 United States v. Burns [2001] 1 SCR 28
 United States v. Ravara (1793) 2 US (2 Dall.) 297
 Universal Jurisdiction (Austria) Case 28 ILR 341 (1958)
 Universal Jurisdiction over Drug Offences Case (1979) German Federal Supreme Court 74 ILR
 166
 US v. Arjona 120 US 479 (1887) 484
 US v. Burns 1 Can SCR 283 (2001) 360
 US v. Doherty 786 F.2nd 491 (2nd Cir. 1986)
 US v. Rauscher 199 SCOTUS 407 (1886)
 US v. Rivieri 924 F.2d 1289 (3d Cir. 1991) 1292
 US v. Saccoccia 18 F.3d 795, 800 n.6 (9th Cir. 1994)
 US v. Sensi 879 F.2d 888 (DC Cir. 1989)
 Valente v The Queen [1985] 2 SCR 673

Valentine v. US ex rel. Neidecker 299 US 5, 10 (1936)

Venezia v. Min. di Giustizia Corte cost., sent. 223/96, n.223

Viaux-Peccate v The Netherlands (Dist. Ct. Den Haag) 74 ILR 456 (1978)

Wackernagel (Judgement, 8 May 1978), HR, NJ, No. 315

Wilson v. Girard 354 SCOTUS 524 (1957)

Wright v. Henkel 190 US 40, 58 (1902)

Domestic Legislation

Austrian Extradition Act 1988

Decree No.583/98 (PEN) granting a request for extradition and authorizing immediate transfer to the Republic of Croatia of a naturalized Argentine citizen Dinko Sakic, 15 May 1998

Irish Criminal Law Act of 1976

Italian Penal Code

Organic Law no. 11/2007 of 16 March 2007 concerning the Transfer of Cases to the Republic of Rwanda from the ICTR and from Other States

UK Criminal Jurisdiction Act of 1976

UK Criminal Justice Act of 1988

UK Extradition Act 2003

UK Extradition (Aviation Security) Order 1991, SI 1991, No. 1699

US Army Field Manual No.27-10, 'The Law of Land Warfare' (1956)

US Uganda Embargo Act (1978) 22 USC

Miscellaneous

Adolfo Scilingo File, TMC Asser Institute

'Angola extradites Nigerian suspect', *USA Today* (15 February 2008)

'Argentina: 12 Given Life Sentences for Crimes During Dictatorship', *The New York Times*, (28 October 2011)

'Argentina's Videla and Bignone guilty of baby theft', *BBC News*, 6 July 2012

Booth R, 'UK Defends Decision to Prosecute Nepalese Colonel Accused of Torture', *The Guardian* (6 January 2013)

Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491)

'Chronology of the Habre Case', HRW

Deutsche Welle, 'French Court Convicts Rwandan Former Spy Chief Simbikangwa of Genocide' (15 March 2014)

'Dinko Sakic: Concentration Camp Commander', *The Independent*, 24 July 2004

Extradition Resolution no IV, 68-II Ann IDI (1984) Session de Cambridge

File of Emilio Eduardo Massera, Trial International Switzerland

First Public Hearing of the Office of the Prosecutor at the ICC (17-18 June 2003)

'General Guillermo Suarez Mason implicated in Argentina's 'Dirty War'', *LA Times*, 22 July 2005

'Henry Okah: Nigerian oil militant jailed for 24 years', *BBC News* (27 March 2013)

ICAO, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft, Legal Committee, Thirtieth meeting (3 March 1970) Seventeenth Session (9 February-11 March 1970) Doc. 8877-LC/161

ICRC, Practice Relating to Rule 161. International Cooperation in Criminal Proceedings, Section D. Political offence exception to extradition

Lelyveld J, 'South Africa to try mercenaries in hijacking', *NYT*, 6 January 1982

'Lora Prison cases Croatia: Victims and witnesses in war crimes trials must be adequately protected' *Amnesty International* (Press Release, 20 June 2002)

'Nigerian rebel accepts amnesty', *BBC News* (10 July 2009)

'Nigerian Rebel Leader Okah Condemns Refusal to Extradite Him over Bombings', *Bloomberg News* (09 March 2011)

'Operation Condor on Trial: Legal Proceedings on Latin American Rendition and Assassination Program Open in Buenos Aires', National Security Archive Electronic Briefing No. 416 (08 March 2013)

Paper on Some Policy Issues Before the Office of the Prosecutor, Office of the Prosecutor of the ICC (September 2003)

Report of the International Commission of Inquiry on Darfur

Simons M and Nossiter A, 'Former Ivory Coast Strongman Appears at Hague Court' *The New York Times* (6 December 2011)

The Model American Convention on the Prevention and Punishment of Certain Serious Forms of Violence Jeopardizing Fundamental Rights and Freedoms

'UK Exercises Universal Jurisdiction to Prosecute Nepalese Colonel for Torture' International Justice Resource Center (9 January 2013)

Update on Communications received by the ICC Prosecutor, Iraq response (9 February 2006)

Update on Communications received by the ICC Prosecutor, Venezuela response (9 February 2006)

US Department of State (1987) Restatement 3rd

XVIIth International Conference of the Red Cross, Draft Revised or New Conventions for the Protection of War Victims