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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*)”

Study by the Secretariat

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I. Introduction

1. The International Law Commission identified the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” for inclusion in its long-term programme of work at its fifty-sixth session, in 2004.¹ A brief syllabus describing the possible overall approach to the topic was annexed to that year’s report of the Commission.² The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission’s report concerning its long-term programme of work. At its fifty-seventh session (2005), the Commission decided to include the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” in its current programme of work and to appoint Zdzisław Galicki as Special Rapporteur for the topic.³ The General Assembly, in paragraph 5 of its resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work.

2. From its fifty-eighth session (2006) to its sixty-first session (2009), the Commission received and considered three reports by the Special Rapporteur.⁴ It also received comments and information from Governments.⁵ At its sixtieth session, the Commission decided to establish a working group on the topic under the chairmanship of Alain Pellet, the mandate and membership of which would be determined at the sixty-first session.⁶ Pursuant to that decision, at its sixty-first session, the Commission established an open-ended working group⁷ which held three meetings.⁸ The Working Group agreed that its mandate would be to draw up a general framework for consideration of the topic, with the aim of specifying the issues to be addressed and establishing an order of priority. At the same session, the Commission took note of the oral report presented by the Chairman of the Working Group⁹ and reproduced the proposed general framework for the consideration of the topic, prepared by the Working Group, in its annual report.¹⁰

3. The present study, prepared by the Secretariat, aims at assisting the Commission by providing information on multilateral conventions which may be of relevance to its future work on the present topic. It should be recalled, in this respect, that the Working Group highlighted this issue in section (a) (ii) of the proposed general framework, which refers to “The obligation to extradite or prosecute in existing treaties”.

¹ See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, paras. 362 and 363.

² *Ibid.*, annex.

³ At its 2865th meeting, on 4 August 2005 (*ibid.*, *Sixtieth Session, Supplement No. 10 (A/60/10)*, para. 500).

⁴ Respectively, his preliminary report (A/CN.4/571) in 2006, his second report (A/CN.4/585 and Corr.1) in 2007 and his third report (A/CN.4/603) in 2008.

⁵ See A/CN.4/579 and Add.1-4; A/CN.4/599; and A/CN.4/612.

⁶ At its 2988th meeting, on 31 July 2008 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10)*, para. 315).

⁷ At its 3011th meeting, on 27 May 2009 (*ibid.*, *Sixty-fourth Session, Supplement No. 10 (A/64/10)*, para. 198).

⁸ The Working Group met on 28 May and on 29 and 30 July 2009 (*ibid.*, para. 200).

⁹ At its 3029th meeting, on 31 July 2009 (*ibid.*, para. 199).

¹⁰ *Ibid.*, para. 204.

4. The Secretariat has conducted an extensive survey of multilateral conventions, both at the universal and regional levels, which has resulted in the identification of 61 multilateral instruments that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. Section II of the present study proposes a description and typology of the relevant instruments in light of these provisions, and examines the preparatory works of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also points out the differences and similarities between the reviewed provisions in different conventions and their evolution.

5. Section III proposes some overall conclusions, on the basis of the survey contained in section II, as regards (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions.

6. The annex contains a chronological list of the conventions found by the Secretariat to contain provisions combining extradition and prosecution, as described in the present study, and reproduces the text of those provisions.

II. Typology and comparative analysis of multilateral conventions which may be of relevance for the Commission's work on the topic

7. The present section proposes a description and typology of provisions contained in multilateral instruments which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", with a view to providing a comparative overview of the content and evolution of such provisions in conventional practice. For this purpose, conventions including such provisions have been classified into the following four categories:

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

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

while revealing some general tendencies in the field, should not be understood as reflecting a separation of the relevant provisions into rigid categories: conventions pertaining to the same category are often very different in their content, and drafting techniques adopted by certain conventions have sometimes been followed by conventions belonging to a different category.

9. Each subsection below identifies one or more key conventions that have served as models in the field and provides a description of the mechanism for the punishment of offenders provided therein, the relevant preparatory works and reservations affecting the legal effect of the provisions that combine the options of extradition and prosecution. Each subsection further lists other conventions that belong to the same category and describes how these conventions have followed, or have departed from, the original model, with information about the relevant aspects of preparatory works and reservations.

A. The 1929 International Convention for the Suppression of Counterfeiting Currency and other conventions following the same model

1. International Convention for the Suppression of Counterfeiting Currency¹¹

(a) Relevant provisions

10. The International Convention for the Suppression of Counterfeiting Currency contains two provisions combining extradition and prosecution which have served as a prototype for a group of subsequently concluded treaties relating to the suppression of international offences.¹² The mechanism adopted in the Counterfeiting Convention was considered to be an indispensable application of the underlying principle “that the counterfeiting of currency should nowhere go unpunished”.¹³ The same notion is also reflected in the first article of the Convention, in which the parties recognize the rules laid down in part I of the Convention “as the most effective means in present circumstances for ensuring the prevention and punishment of the offence of counterfeiting currency”. Under article 3, the parties undertake to make the offences concerned punishable as ordinary crimes.

11. The mechanism in the Counterfeiting Convention makes a distinction between nationals and non-nationals of the State concerned. It further recognizes that States employ different practices with regard to the exercise of extraterritorial jurisdiction and therefore does not oblige States to assert jurisdiction in every case in which extradition is refused.¹⁴

12. Article 8 of the Convention deals with the issue of nationals who have committed an offence abroad:

¹¹ Geneva, 20 April 1929. League of Nations, *Treaty Series*, vol. 112, No. 2623.

¹² Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936; Convention for the Prevention and Punishment of Terrorism, 1937; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950; Single Convention on Narcotic Drugs, 1961; and Convention on Psychotropic Substances, 1971.

¹³ *Proceedings of the International Conference for the Adoption of a Convention for the Suppression of Counterfeiting Currency, Geneva, 9th April to 20th April 1929* (C.328.M.114.1929.II), annex III, p. 234.

¹⁴ *Ibid.*

“In countries where the principle of the extradition of nationals is not recognized, nationals who have returned to the territory of their own country after the commission abroad of an offence referred to in Article 3 should be punishable 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.

This provision does not apply if, in a similar case, the extradition of a foreigner could not be granted.”

It is understood that extradition would be applied in all cases by those States which allow their nationals to be extradited.¹⁵

13. Article 9 regulates the situation of foreigners who are in the territory of a third State:

“Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

“The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.”

14. Article 10 provides for the extradition regime applicable to the offences referred to in article 3. A distinction is made between those States that make extradition conditional upon a treaty and those that do not.¹⁶ The first paragraph deals with the former category of States and stipulates that the relevant offences “shall be deemed to be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the High Contracting Parties”. Pursuant to the second paragraph, those States that do not make extradition conditional on a treaty or reciprocity undertake to recognize the offences as cases of extradition between themselves. The third paragraph specifies that “[e]xtradition shall be granted in conformity with the law of the country to which application is made”.

15. The Counterfeiting Convention also contains two provisions that safeguard the participating States’ internal criminal legislation and administration in the context of its application. Article 17 provides that a State’s attitude on the general issue of criminal jurisdiction as a question of international law is not affected by its participation in the Convention. Article 18 specifies that, without allowing impunity, the Convention does not affect the principle that the offences should in each country be “defined, prosecuted and punished in conformity with the general rules of its domestic law”.¹⁷

¹⁵ Ibid.

¹⁶ See comment by Great Britain during the plenary debate, *Proceedings*, note 13 above, p. 74.

¹⁷ A protocol to the Counterfeiting Convention further clarifies this situation by stipulating that “the Convention does not affect the right of the High Contracting Parties freely to regulate, according to their domestic law, the principles on which a lighter sentence may be imposed, the prerogative of pardon or mercy and the right to amnesty”. League of Nations, *Treaty Series*, vol. 112, No. 2623, protocol, sect. I, para. 2.

(b) Preparatory works

16. The Counterfeiting Convention was adopted at an international conference held in Geneva from 9 to 20 April 1929 under the auspices of the League of Nations. The Conference worked on the basis of a text of a draft convention¹⁸ prepared by a Mixed Committee that had been established by the Council of the League of Nations.¹⁹ The Conference also had before it observations on the report of the Mixed Committee by Governments.²⁰ The draft text proposed by the Mixed Committee was reviewed by a Legal Committee of the Conference,²¹ which presented an amended draft convention to the plenary.

17. In the explanatory part of its report,²² the Mixed Committee emphasized that, in preparing the draft convention, it had sought to propose the most effective rules for dealing with the offence of counterfeiting, while avoiding infringing on fundamental principles of the States' internal legal systems. It had thus recognized the different practices among States with regard to the extradition of nationals and extraterritorial jurisdiction. The draft convention provided that those States that allowed their own nationals to be extradited would surrender the offenders in all cases, and that the obligation to prosecute would only apply to other States (and for these, the obligation would not be absolute, since prosecution would not be compulsory when the extradition request had been refused for reasons directly connected with the charge (e.g., period of limitation)).²³

18. In the same spirit, in the Mixed Committee's draft text, the obligation of a third State to prosecute an offender would depend on whether or not that State's criminal system was based on the principle of territoriality. If the State did not apply extraterritorial jurisdiction, it would extradite. This non-encroachment upon States' criminal jurisdiction was further reinforced by a draft provision (which later became article 17) reserving the "principle of the territorial character of criminal law".²⁴

19. Besides the jurisdictional aspect, the obligation of a third State to prosecute was made subject to the condition that extradition had not been made, or could not be granted, and to a complaint made, or notice given, by the injured party. This latter condition had been added in view of the fact that it was the injured State or the State *loci delicti* that were deemed to be in the best position to judge on the advisability to prosecute.²⁵

¹⁸ *Proceedings*, note 13 above, annex III.B.

¹⁹ The Committee, whose members were appointed by the Council, was established on the recommendation of the Financial Committee, which had initially been tasked to study the question of concluding a convention on the matter. The report of the Financial Committee (submitted in December 1926) already contained, inter alia, the recommendation that a State must punish its nationals who have committed counterfeiting abroad "as if the crime had been committed in the territory", except when the State accepted to extradite them (*ibid.*, annex II, pp. 225-226).

²⁰ *Ibid.*, annex V.

²¹ In addition, the provisions concerning the option of extradition and prosecution were submitted to a subcommittee of the Legal Committee for further study.

²² *Proceedings*, note 13 above, annex III, p. 230.

²³ *Ibid.*, annex III, p. 234.

²⁴ *Ibid.*, annex III, p. 242.

²⁵ *Ibid.*

20. The Legal Committee maintained, with some amendments, the main thrust of the proposed text of the Mixed Committee, and in particular the underlying principle of not prejudicing States' criminal legislation and administration.

21. Nevertheless, during the debate of the Legal Committee, an attempt was made to fill a lacuna in the Mixed Committee's text through a proposed provision that would render the extradition of nationals obligatory for those countries that allowed it in principle, whether or not applicable extradition treaties contained a reservation to that effect.²⁶ While acknowledging the lacuna, countries to which this provision would have applied²⁷ strongly objected to the idea of making the extradition of their nationals an absolute obligation, and the proposed provision was eventually not included in the final text of the convention.

22. The issue of the scope of the obligation to prosecute was also raised in conjunction with the debate on the words "as a general rule" in article 9.²⁸ In response to a concern expressed by some delegations, the Rapporteur of the Legal Committee clarified that, under the said provision, only those States that applied the territoriality principle were exempted from the obligation to prosecute. He explained that the provision (which he qualified as "a first step towards admitting in the future, without reservations, the principle of universality of justice in the pursuit of criminals") was to be applied by those countries that allowed proceedings for offences committed abroad, "such proceedings being justified either by the nature of the offence or the interest injured, or on account of the offender's nationality etc".²⁹

23. Still in the context of article 9, the Legal Committee decided to subject the obligation to take proceedings against an alleged offender to the condition that extradition had been requested, but could not be granted for reasons not connected to the offence. It was considered that the country directly affected by the offence would be in a better position to institute proceedings and that the country of refuge would only prosecute when extradition could not be granted, to ensure that the underlying principle of the Convention was upheld, namely "that no counterfeiter should go unpunished".³⁰ The Legal Committee, however, decided against making the obligation to take proceedings subject to a complaint or official notice by a foreign authority requesting such proceedings.³¹

24. The preparatory works also evidence a substantial debate with regard to the impact that the relevant provisions would have on certain principles of international penal law or on States' internal criminal law systems. In that context, with regard to article 8, it was clarified that the wording "in the same manner as if the offence had been committed in their own territory" did not affect the application of certain principles, such as *non bis in idem* or *lex mitior*, and that prosecution and punishment would be carried out in accordance with the principles contained in the

²⁶ Ibid., pp. 154-155 (see proposal by Germany).

²⁷ Ibid. (see remarks by the United States and Great Britain).

²⁸ This issue was raised in both the Legal Committee and the plenary. Ibid., pp. 88 and 155-156. It should also be noted that the corresponding wording "as a general rule" in draft article 1, paragraph X (final art. 8) had been omitted "as useless" (ibid., p. 162).

²⁹ Ibid., p. 88. Delegate of Romania (Mr. Pella), Rapporteur of the Legal Committee.

³⁰ Ibid., pp. 162-163.

³¹ Nevertheless, it was noted that Governments could include this condition in their own legislation, pursuant to article 18 (ibid., p. 162. Delegate of Belgium (Mr. Servais), Chairman of the Legal Committee).

penal codes of each State.³² Similarly, referring to article 9, it was explained that the principle of discretionary powers of the prosecutor would not be affected by the Convention, as long as it was executed in good faith.³³ Furthermore, in order to make it perfectly clear that “nothing was being done to prejudice the general criminal legislation and administration of each country within its domestic sphere”, the Legal Committee added the text of article 18.³⁴

25. The draft text of the Mixed Committee also proposed an extradition regime to the effect that the offences referred to in the Convention would be recognized as “extradition crimes” and that extradition would be granted in conformity with the internal law of the requested State.³⁵ While the Legal Committee maintained the underlying logic of this provision, it was observed that “the new Convention should not upset the whole system of extradition”: the provision (which then became article 10³⁶) was thus amended to submit the offences to the existing extradition procedures applicable among States, whether or not based on extradition treaties or reciprocity.³⁷

26. The text of the draft convention proposed by the Mixed Committee further contained an article which stipulated that the crime of counterfeiting was generally not to be considered a political offence.³⁸ While this issue was extensively discussed during the Conference,³⁹ it was finally decided to omit any language regarding political offences, leaving every country free to decide its own position in this respect.⁴⁰ The issue of political offence was also raised in the context of article 3 of the Convention and resulted in the inclusion therein of a reference to “ordinary crimes”, to avoid the establishment of any favourable treatment for the crime of counterfeiting.⁴¹ In addition, an Optional Protocol Regarding the Suppression of Counterfeiting Currency⁴² was prepared, whereby the High Contracting Parties

³² Ibid., p. 150. Nevertheless, it was suggested that where the law in the country where the crime was committed provided for lighter penalties than the country in which the offender was being prosecuted, the latter State would be prevented from applying such lighter sentences (ibid., comment by the delegate of Romania (Mr. Pella), Rapporteur of the Legal Committee).

³³ Ibid., p. 153.

³⁴ Ibid., pp. 158-159 and 163.

³⁵ Draft article 2 (final art. 10). Ibid., annex III, p. 234.

³⁶ See para. 14 above.

³⁷ *Proceedings*, note 13 above, p. 158.

³⁸ “The political motive of an offender is not enough to make an offence coming under the present Convention a political offence.” (Draft art. 1, para. IX). Ibid., annex III, p. 240.

³⁹ For the debate in the Legal Committee, see *Proceedings*, note 13 above, pp. 139-147. For the debate in Plenary, see pp. 53-70 and 84-85. During the debate on this draft provision, several delegates specified that they could not accept a formula which would affect political asylum (see Great Britain (p. 58) and Germany (p. 144)) and that the question of defining a political offence would be too vast an undertaking for the Conference.

⁴⁰ It was, however, stressed that the implementation in good faith of the Convention implied that, save in exceptional circumstances, the counterfeiting of currency was not in principle to be regarded as a political offence (Ibid., pp. 84-85. Comment by the delegate of Belgium (Mr. Servais), Chairman of the Legal Committee).

⁴¹ Ibid., p. 158. See the statement by the delegate of Great Britain (Sir John Fischer Williams), Vice-Chairman of the Legal Committee.

⁴² League of Nations, *Treaty Series*, vol. 112, No. 2624.

undertook “in their mutual relations, to consider, as regards extradition, the acts referred to in Article 3 of the said Convention as ordinary offences.”⁴³

(c) Reservations

27. Upon becoming parties to the Counterfeiting Convention, some States made reservations relating to the provisions concerning prosecution and extradition. Referring to their respective internal criminal law and legislation regarding extradition, Andorra and Norway made reservations with regard to the implementation of article 10.

2. Other conventions

(a) Relevant provisions

28. The conventions listed below (in chronological order) contain a mechanism for the punishment of offenders for which the Counterfeiting Convention seems to have served as a prototype:⁴⁴

- (a) The Convention for the Suppression of the Illicit Traffic in Dangerous Drugs;⁴⁵
- (b) The Convention for the Prevention and Punishment of Terrorism;⁴⁶
- (c) The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;⁴⁷
- (d) The Single Convention on Narcotic Drugs;⁴⁸
- (e) The Convention on Psychotropic Substances.⁴⁹

⁴³ Although not officially discussed during the Conference, the Optional Protocol was read to the delegates for information (*Proceedings*, note 13 above, p. 97).

⁴⁴ The preparatory works of the three earlier conventions make explicit references to the Counterfeiting Convention.

⁴⁵ Geneva, 26 June 1936. League of Nations, *Treaty Series*, vol. 198, No. 4648.

⁴⁶ Geneva, 16 November 1937. League of Nations, 19 *Official Journal* 1938, p. 23 (*Official No.: C.546.M.383.1937.V*). (The Convention never entered into force.) It should be noted that explicit references are made to the principle *aut dedere aut judicare* or *aut dedere aut punire* during the debate of the Conference adopting the 1937 Convention on Terrorism. See, for example, *Proceedings of the International Conference on the Repression of Terrorism, Geneva, November 1st to 16th, 1937* (C.94.M.47.1938.V.3), pp. 57, 67, 100 and 104 (comments by the delegates of Poland and Romania). During the debate, the Rapporteur of the Conference, Mr. Pella (Romania), noted that “[i]f it was at all possible in all cases to make a precise definition between a political offence and an act of terrorism, the principle of *aut dedere aut punire* should obviously be taken as the sole and unvarying basis of international cooperation in regard to extradition”. He further observed that “certain Governments were in favour of that principle [*aut dedere aut punire*] and that he personally regarded it as the only one which could in every case ensure the effective repression of acts of terrorism. Unfortunately, its adoption would involve such considerable changes in the criminal law and practice of various countries that, while affirming the desirability and moral value of such a principle, they would have to be satisfied for the present [...] with a more modest solution commanding more general acceptance”. *Ibid.*, p. 67.

⁴⁷ New York, 21 March 1950. United Nations, *Treaty Series*, vol. 96, No. 1342.

⁴⁸ New York, 30 March 1961. United Nations, *Treaty Series*, vol. 520, No. 7515.

⁴⁹ Vienna, 21 February 1971. United Nations, *Treaty Series*, vol. 1019, No. 14956.

29. The constitutive elements of the mechanism adopted in these conventions are the following: (a) the criminalization of the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) provisions on prosecution and extradition which take into account the divergent views of States with regard to the extradition of nationals and the exercise of extraterritorial jurisdiction, the latter being permissive rather than compulsory; (c) precedence for extradition over prosecution; (d) an extradition regime under which States undertake, under certain conditions, to consider the offence as an extraditable one; (e) a provision limiting the infringement of the convention upon the States' approach to the question of criminal jurisdiction as a question of international law; and (f) a non-prejudice clause with regard to each State's criminal legislation and administration.

30. While some of these conventions follow the Counterfeiting Convention's provisions very closely, they all contain some terminological differences, some appearing to be more of an editorial nature and others modifying the substance of the obligations undertaken by States parties. The most significant aspects of their mechanisms are described hereinafter.

31. All of the above conventions oblige States parties to make the various offences punishable under their domestic legislation. Most of the conventions further contain explicit provisions concerning the requirement of States parties to ensure that their legislation and administration are in conformity with the obligations stipulated in the respective conventions or that such obligations can be carried out.⁵⁰

32. All of the conventions make the relevant provisions subject to the different practices of States with regard to the extradition of nationals and to the application of extraterritorial jurisdiction, with the result that the obligation to prosecute if extradition is not granted is not absolute. They are also based on the understanding that the obligation to institute proceedings against an offender occurs if extradition is not possible.

33. The three earlier conventions follow closely the model of the Counterfeiting Convention in respect of the various provisions related to extradition or prosecution. Nevertheless, there are some differences. In particular, the Convention for the Suppression of the Traffic in Persons does not contain any provision for the prosecution of foreigners.⁵¹

⁵⁰ 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).

⁵¹ The initial draft text of the Convention included a provision for offences committed by foreigners abroad (draft article 10). This draft article, and in particular its jurisdictional implications, was extensively discussed during the negotiations in the Third Committee of the General Assembly. Eventually, "taking into account the aims of article 10 and similar articles in other international conventions", the Third Committee requested the Sixth Committee to consider the legal questions surrounding such a provision and to submit its recommendation thereon (Memorandum from the Chairman of the Third Committee to the Chairman of the Sixth Committee (A/C.3/526). See also *Official Records of the General Assembly, Fourth Session, Third Committee*, 242nd and 243rd meetings (A/C.3/SR.242 and 243). The Sixth Committee, after having considered the legal difficulties that arose with respect to extraterritorial jurisdiction, including practical difficulties of asserting such jurisdiction, recommended the deletion of draft article 10 (Memorandum from the Chairman of the Sixth Committee to the Chairman of the Third Committee on questions referred to the Sixth Committee (A/C.6/L.102), pp. 8 and 26).

34. The provisions concerning nationals in these three conventions mirror article 8 of the Counterfeiting Convention and only minor changes have been introduced.⁵² It should be noted, however, that in respect of the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, yet another attempt was made to fill the lacuna that exists when a State, albeit recognizing the principle of extradition of nationals, does not extradite the individual and apply the territoriality principle in criminal law, thus being unable to institute proceedings against the alleged offender. As a compromise solution, the Conference recommended, in the Final Act, that countries recognizing the principle of extradition of nationals grant the extradition of their nationals who are guilty of committing an offence abroad, even if the applicable extradition treaty contains a reservation thereto.⁵³

35. Furthermore, the Convention for the Suppression of the Traffic in Persons contains an additional provision specifying that the article dealing with the prosecution and extradition of nationals is not applicable “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” (article 10).

36. Regarding the provisions on foreigners who have committed an offence in a third State, both the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs and the Convention for the Prevention and Punishment of Terrorism have adopted very similar language to that found in article 9 of the

⁵² 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 (art. 9) use the more imperative language “shall prosecute and punish” instead of “should be punishable”. Upon a proposal to use the word “punishable” during the negotiations of the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, the President of the Conference observed that full discretion was left to national courts and, thus, such an amendment would be unnecessary. (*Records of the Conference for the Suppression of the Illicit Traffic in Dangerous Drugs, Geneva, June 8th to 26th, 1936. Text of the Debates. Series of League of Nations Publications XI. Opium and Other Dangerous Drugs. 1936. XI.20, p. 159.*) The article on nationals in the 1950 Convention for the Suppression of the Traffic in Persons (art. 9) contains further modifications that were introduced on the recommendation of the Sixth Committee of the General Assembly (see A/C.6/L.102). In particular, the wording “where the extradition of nationals is not permitted by law” is used instead of “where the principle of the extradition of nationals is not recognized”. This change was a result of a request by the Third Committee to the Sixth Committee to “inform it what would be the legal effects of deleting or retaining the clause ‘subject to the requirements of domestic law’ in all the articles of the [draft convention] in which this clause appears” (A/C.3/526). The Sixth Committee proposed its replacement in all instances by either “to the extent permitted by domestic law”, if it was desired to grant States discretion in carrying out the obligation, or “in accordance with the conditions laid down by domestic law”, if it was merely desired to grant States discretion as to the procedural and administrative means of implementation of the relevant obligation (A/C.6/L.102, pp. 6 and 7). Furthermore, the 1950 Convention for the Suppression of the Traffic in Persons replaced the wording “should be punishable in the same manner as if the offence had been committed in their own territory” with “shall be prosecuted in and punished by the courts of their own State” to accommodate different principles of deciding the applicable law. (*Official Records of the General Assembly, Fourth Session, Sixth Committee, 199th meeting (A/C.6/SR.199)*, statements by Brazil, Egypt and Yugoslavia.) The reference to the situation where the offender has acquired his nationality after the commission of the offence was also deleted due to, inter alia, the exceptional nature of the situation (*ibid.*, 199th and 200th meetings (A/C.6/SR.199 and 200)).

⁵³ Recommendation No. 2. *Records of the Conference*, note 52 above, annex VIII.

Counterfeiting Convention.⁵⁴ However, the Convention for the Prevention and Punishment of Terrorism has introduced yet another condition which significantly limits its application, namely an element of jurisdictional reciprocity.⁵⁵

37. Turning to the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances, these two conventions set forth all provisions relating to extradition and prosecution in a sole article. In addition, these provisions conflate the treatment of nationals and foreigners into a single paragraph and limit the obligation to institute proceedings to serious offences. They specify that 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”. However, both conventions adhere to the underlying principle established in the Counterfeiting Convention regarding jurisdictional limitations, by subjecting the application of the article “to the constitutional limitations of a Party, its legal system and domestic law”,⁵⁶ as well as to a State’s criminal law on questions of jurisdiction.⁵⁷

38. Furthermore, similarly to the Convention for the Suppression of the Traffic in Persons,⁵⁸ both conventions specifically subject the institution of proceedings to the condition that the offender “has not already been prosecuted and judgement given”.⁵⁹

39. All of the five conventions mentioned above contain an extradition mechanism similar to the one set forth in the Counterfeiting Convention. The main differences can be summarized as follows:

⁵⁴ 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 (art. 9) use the more imperative language “shall prosecute and punish” instead of “should be punishable”. In addition, to provide clarity, the words “could not be granted” in relation to extradition requests are used instead of referring to the fact that the requested State “cannot hand over” the person accused (*Records of the Conference*, note 52 above, p. 96).

⁵⁵ Under this provision, a State party is only obliged to institute proceedings against a foreigner when a request for extradition has been made but cannot be granted, if it recognizes extraterritorial jurisdiction and if “the foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners”. During the Conference, it was explained that this provision had been inserted to accommodate the views of those States that considered that principles of international law did not permit the application of extraterritorial jurisdiction (*Proceedings*, note 46 above, pp. 105-106). It should be noted that during the debate on the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, a proposal to introduce a similar condition was rejected (*Records of the Conference*, note 52 above, p. 99).

⁵⁶ Single Convention on Narcotic Drugs (art. 36, para. 2) and Convention on Psychotropic Substances (art. 22, para. 2).

⁵⁷ Single Convention on Narcotic Drugs (art. 36, para. 4) and Convention on Psychotropic Substances (art. 22, para. 3). The latter Convention has substituted “criminal law” for “domestic law” to concord with other provisions of the article (*Conference des Nations Unies pour l’adoption d’un Protocole sur les Substances Psychotropes, Rapport du Comité de Rédaction* (see E/CONF.58/L.4/Add.2)).

⁵⁸ See paragraph 35 above.

⁵⁹ 1961 Single Convention on Narcotic Drugs (art. 36, para. 2 (a) (iv)) and 1971 Convention on Psychotropic Substances (art. 22, para. 2 (a) (iv)).

(a) The Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances contain a provision allowing the requested party to refuse to effect the arrest of an offender or grant extradition in cases where the competent authorities consider that the offence is not sufficiently serious;⁶⁰

(b) Whereas all these conventions adopt the same approach as the Counterfeiting Convention by specifying that extradition shall be granted in conformity with the law of the requested State, the Convention for the Prevention and Punishment of Terrorism, the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances seem to widen the discretion of the requested States to refuse extradition. The Convention for the Prevention and Punishment of Terrorism subjects the obligation to grant extradition to “any conditions and limitations recognized by the law or practice of the country to which the application is made”.⁶¹ The Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances subject the relevant provision to the “constitutional limitations of a Party, its legal system and domestic law”.⁶² In addition, the two conventions last mentioned have adopted a more permissive approach to the extradition mechanism and provide that “[i]t is desirable that the offences [...] be included as extradition crimes ...”.⁶³ Nevertheless, the Single Convention on Narcotic Drugs was subsequently amended to substitute this

⁶⁰ 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (art. 10, para. 4), 1961 Single Convention on Narcotic Drugs (art. 36, para. 2 (b)) and 1971 Convention on Psychotropic Substances (art. 22, para. 2 (b)). During the debate on the 1936 Convention, it was argued that narcotic offences, as opposed to the crime of counterfeiting, were susceptible to greater variation concerning seriousness and that States therefore should be left with some discretion as to the extraditability of such offences. *Records of the Conference*, note 52 above. See in particular the observation by Austria on the First Consultation, reproduced in annex 2, p. 192, and the comments by the Netherlands at the 16th meeting.

⁶¹ Article 8, paragraph 4. The redrafting of the provision was due to the concern of several States not to encroach on the right of asylum, the discretion regarding political offences and the wide scope of the offences referred to in the article. (See, for example, *Proceedings*, note 46 above, p. 102 (Belgium and the Netherlands) and annex 3 (Report of the Committee for the International Repression of Terrorism), p. 186; and *Draft Convention for the Prevention and Punishment of Terrorism, Observations by Governments, Series I, Geneva, September 7th, 1936* (A.24.1936.V.), pp. 10-11 (Norway and the Netherlands.)) Furthermore, it was explained that the addition of the word “conditions” did not affect the substance of the clause, but was done to indicate that not only limitations in the domestic law applied. (*Proceedings*, note 46 above, p. 152 (statement by the delegate of Romania (Mr. Pella), Rapporteur.)) The wording “or by the practice” was inserted to accommodate States whose extradition law was regulated by case law and political practice in addition to written legislation (*ibid.*, pp. 102-103).

⁶² 1961 Single Convention on Narcotic Drugs (art. 36, para. 2), and 1971 Convention on Psychotropic Substances (art. 22, para. 2).

⁶³ The use of the formula “it is desirable” was motivated by the concern of certain States regarding their discretion to make certain offences extraditable and the reciprocal nature of extradition agreements (see in particular statements by Canada, Pakistan, Poland and Yugoslavia. *Summary records of the Ad Hoc Committee on Articles 44-46 of the Third Draft, Second Meeting, 13 March 1961*, pp. 241-244 of vol. II of the *Official Records of the Conference*).

permissive approach for the formula “shall be deemed to be included” used in the earlier conventions;⁶⁴

(c) The Convention for the Prevention and Punishment of Terrorism and the Convention for the Suppression of the Traffic in Persons have omitted a reference to States making extradition conditional on “reciprocity”, but refer to those States that condition extradition on the existence of a treaty;⁶⁵

(d) The Convention for the Prevention and Punishment of Terrorism contains an additional paragraph extending the extradition regime to include any offence committed in the territory of the party against whom it is directed.⁶⁶

40. In conjunction with the adoption of the Convention for the Prevention and Punishment of Terrorism, it was envisaged that an international criminal court be established for the purpose of trying persons accused of offences under the Convention. Consequently, a Convention for the Creation of an International Criminal Court⁶⁷ was concluded together with the Convention for the Prevention and Punishment of Terrorism and thus provided States parties with a so-called “third option” in relation to its mechanism for the punishment of offenders. Pursuant to this third option, States parties had the alternative of committing a person (national or foreigner) accused of an offence under the Convention for the Prevention and Punishment of Terrorism for trial to the Court instead of prosecuting before its own courts. Similarly, in situations where a requested State was able to grant extradition, it was entitled to commit the accused for trial to the Court if the requesting State was also a party to the Convention. The Convention further specified that States parties to the Convention for the Prevention and Punishment of Terrorism that took advantage of this option were deemed to have discharged their obligations thereunder.⁶⁸

41. As mentioned above, during the debate on the Counterfeiting Convention, the question of extraterritorial jurisdiction was subject to lengthy debates and resulted in the adoption of article 17 (which provides that participation in the Convention “shall not be interpreted as affecting that Party’s attitude on the general question of criminal jurisdiction as a question of international law”). The Convention for the Suppression of the Illicit Traffic in Dangerous Drugs,⁶⁹ the Convention for the

⁶⁴ Article 36, paragraph 2 (b) (i) of the Protocol amending the Single Convention on Narcotic Drugs, 1961, Geneva, 25 March 1972, United Nations, *Treaty Series*, vol. 976, No. 14151. In addition, the Protocol inserts a new article 36, paragraph 2 (b) (ii) stating that “If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences” covered by the Convention, and that “[e]xtradition shall be subject to the other conditions provided by the law of the requested Party”. The provision regulating extraditable offences for Parties which do not make extradition conditional on the existence of a treaty was similarly amended, subjecting the obligation “to the conditions provided by the law of the requested Party” (art. 36, para. 2 (b) (iii)). The provision concerning the discretion of States with particular reference to the seriousness of the offence was also amended by the insertion of the qualification that the provision applies “notwithstanding subparagraphs (b) (i), (ii) and (iii) of this paragraph” (art. 36, para. 2 (b) (iv)).

⁶⁵ See article 8, paragraph 2.

⁶⁶ See article 8, paragraph 3.

⁶⁷ Geneva, 16 November 1937. League of Nations, 19 *Official Journal* 1938, p. 37 (*Official No.*: C.547.M.384.1937.V). (The Convention never entered into force.)

⁶⁸ Article 2 of the Convention for the Creation of an International Criminal Court.

⁶⁹ Article 14.

Prevention and Punishment of Terrorism⁷⁰ and the Convention for the Suppression of the Traffic in Persons⁷¹ contain articles that closely follow the terms of this provision. The two later conventions, namely the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances, contain provisions that, while using a somewhat different wording, are intended to have the same effect.⁷²

42. Another topic that was widely discussed during the negotiations of the Counterfeiting Convention concerned the safeguarding of participating States' internal criminal legislation and administration in the context of its implementation (article 18).⁷³ All subsequent conventions⁷⁴ have adopted provisions similar to article 18 of the Counterfeiting Convention, which provide that they do not prejudice States' discretion to define, prosecute and punish the relevant offences in conformity with domestic law.⁷⁵

(b) Reservations

43. Upon becoming party to the conventions mentioned above, some States made declarations and reservations relating to the provisions on the punishment of offenders.⁷⁶ Most of these declarations and reservations concern the non-extradition of nationals⁷⁷ and the provisions regarding the extradition regime, in particular the recognition of the various offences as extradition crimes.⁷⁸ In one instance, it has also been clarified that extradition is conditional on the existence of bilateral

⁷⁰ Article 18. The language in this article has been slightly modified to make it more specific. The words "the limits of" have been inserted between "the general question of" and "criminal jurisdiction".

⁷¹ Article 11. This article has been modified in the same manner as the 1937 Convention on Terrorism (see above).

⁷² The relevant paragraphs state that the penal provisions of the Conventions shall be subject to the provisions of the domestic or criminal law of the party concerned on questions of jurisdiction (1961 Single Convention on Narcotic Drugs (art. 36, para. 3) and 1971 Convention on Psychotropic Substances (art. 22, para. 4). See also *Commentary of the Single Convention on Narcotic Drugs* issued in pursuance of paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962, paragraph 3 of the commentary to article 36, paragraph 3.

⁷³ See paragraph 24 above.

⁷⁴ 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (art. 15), 1937 Convention for the Prevention and Punishment of Terrorism (art. 19), 1950 Convention for the Suppression of the Traffic in Persons (art. 12), 1961 Single Convention on Narcotic Drugs (art. 36, para. 4), 1971 Convention on Psychotropic Substances (art. 22, para. 5). The phrase "without ever being allowed impunity" which is found in article 18 of the Counterfeiting Convention was considered superfluous and has been omitted in all the subsequent conventions (*Records of the Conference*, note 52 above, p. 205).

⁷⁵ The 1937 Convention on Terrorism contains a modified version of this provision (article 19) which, in addition to the characterization of the offences, imposition of sentences and the methods of prosecution, also emphasizes that rules on mitigating circumstances, pardon and amnesty are determined by domestic law (*Proceedings*, note 46 above, pp. 156-157).

⁷⁶ Some reservations were made in light of jurisdictional restrictions that existed at the time. See in particular the reservation made by China to article 9 of the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, containing the extradition regime (Protocol of Signature to the Convention, League of Nations, *Treaty Series*, vol. 198, No. 4648).

⁷⁷ Declarations and reservations by Brazil, Myanmar and Panama with respect to article 14 of the 1972 Protocol amending the Single Convention on Narcotic Drugs.

⁷⁸ Reservations by India with respect to article 14, paragraph 2 (b), of the Protocol amending the Single Convention on Narcotic Drugs, and by Myanmar and Viet Nam with respect to article 22, paragraph 2, of the 1971 Convention on Psychotropic Substances.

treaties.⁷⁹ In addition, a reservation has been made ensuring the State's discretion as to whether or not its citizens will be prosecuted for crimes committed abroad.⁸⁰

B. The 1949 Geneva Conventions and the 1977 Additional Protocol I

1. The 1949 Geneva Conventions⁸¹

(a) Relevant provisions

44. The four Geneva Conventions of 1949 contain in a common article an identical mechanism for the prosecution of persons accused of having committed grave breaches of the Conventions.⁸² The underlying principle for this mechanism is the establishment of universal jurisdiction over grave breaches of the Conventions: thus, the obligation to undertake measures against an alleged offender is not conditioned by any jurisdictional considerations of States. Another feature is that the mechanism provides an obligation of prosecution, with the possibility to extradite an accused person as an alternative. The obligation to search for and prosecute an alleged offender seems to exist irrespective of any request for extradition by another party.⁸³

45. Pursuant to the first paragraph of the common article, the parties “undertake to enact any legislation necessary to provide effective penal sanctions for persons

⁷⁹ Declaration by Cuba with respect to article 14, paragraph 2 (b) (ii) of the Protocol amending the Single Convention on Narcotic Drugs.

⁸⁰ Reservation by Finland with respect to article 9 of the 1950 Convention on the Traffic in Persons.

⁸¹ Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Geneva Convention for the amelioration of the shipwrecked members of armed forces at sea, Geneva Convention relative to the treatment of prisoners of war, and Geneva Convention relative to the protection of civilian persons in time of war. United Nations, *Treaty Series*, vol. 75, Nos. 970-973, respectively.

⁸² Articles 49, 50, 129 and 146, respectively, of the conventions listed in the preceding note.

⁸³ See Jean Pictet, ed., *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV (Geneva, ICRC, 1958), p. 593.

committing, or ordering to be committed, any of the grave breaches” of the Conventions.⁸⁴

46. In its second paragraph, the common article specifies that:

“Each High Contracting Party shall be under the obligation to 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. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”

47. While the obligation described above is limited to grave breaches, the common article further provides, in its third paragraph, that the High Contracting Parties shall take measures to suppress all acts contrary to the Conventions other than the grave breaches.

48. Finally, under its fourth paragraph, the common article stipulates that the accused “shall benefit by safeguards of proper trial and defence” in all circumstances, and that those safeguards “shall not be less favourable than those provided by Article 105 and those following” of the Geneva Convention relative to the Treatment of Prisoners of War.

(b) Preparatory works

49. The four Geneva Conventions were adopted at the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, held in Geneva from 21 April to 12 August 1949 and convened by the Swiss Federal Council.⁸⁵ The Diplomatic Conference worked on the basis of draft texts adopted by

⁸⁴ Each Convention contains an article describing what acts constitute grave breaches that follows immediately after the extradite-or-prosecute provision. For the first and second Geneva Conventions, this article is identical (arts. 50 and 51, respectively): “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Article 130 of the third Geneva Convention reads as follows: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Article 147 of the fourth Geneva Convention reads as follows: “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

⁸⁵ *Final Record of the Diplomatic Conference of Geneva of 1949*, available at www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec-Dipl-Conf-1949.html.

the Seventeenth International Red Cross Conference, in Stockholm.⁸⁶ To deal with the articles common to all four Conventions, the Conference established a Joint Committee, which assigned the task of preparing the texts to a Special Committee.⁸⁷

50. At the outset of the deliberations on the common article in the Joint Committee, discussions centred mainly on the text adopted by the Seventeenth International Red Cross Conference⁸⁸ and a text prepared by the International Committee of the Red Cross (ICRC).⁸⁹

51. The regime contained in the text of the International Red Cross Conference was quite modest compared to that prepared by ICRC. It provided that the parties to the Conventions should, in case existing laws were inadequate, propose to their legislatures the necessary measures to repress during wartime any act contrary to the provisions of the Conventions. This provision was based on the 1906 Convention for the Amelioration of the Condition of the Sick and Wounded of Armies in the Field and the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.⁹⁰ Nevertheless, the proposed text also introduced some novel clauses aimed at strengthening the provisions concerning the repression of breaches, namely, an active obligation for the parties to search for alleged offenders of breaches of the Conventions, irrespective of their nationality, and to indict such persons or, if they preferred, to hand them over to another party for judgement.⁹¹

52. The ICRC text set forth, in the first article, a firm obligation for States parties to incorporate the Conventions into national law and to enact provisions necessary for the repression and prosecution of any breaches of the Conventions. States parties further had to communicate to the Swiss Federal Council measures adopted to give effect to the article within a period of two years after ratification. A second article detailed the grave breaches of the Conventions and provided that they should be punished “as crimes against the law of nations”, either by the tribunals of any State

⁸⁶ Report of the Seventeenth International Red Cross Conference, Stockholm, August 1948, available at www.loc.gov/rr/frd/Military_Law/pdf/RC_XVIIth-RC-Conference.pdf. For the text of the relevant draft article, see *Final Record*, note 85 above, vol. III, annex No. 50.

⁸⁷ Report drawn up by the Joint Committee and presented to the Plenary Assembly, *ibid.*, vol. II-B, p. 128.

⁸⁸ *Ibid.*, vol. III, annex No. 50.

⁸⁹ For the texts of these articles, see *Remarks and Proposals submitted by the International Committee of the Red Cross. Revised and New Draft Conventions for the Protection of War Victims. Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference at Geneva* (21 April 1949). The Seventeenth International Red Cross Conference had recommended to ICRC that it continue studying the question of repression of breaches of the Conventions and submit proposals on this topic to a conference (Report of the Seventeenth International Red Cross Conference, note 86 above, resolution XXIII). Accordingly, four new common articles on the repression of violations of the Conventions were presented to the Conference. In light of the fact that several delegations objected to the late introduction of these new articles, the text adopted at the Stockholm Conference was re-established as the basis for discussion. Nevertheless, the delegate of the Netherlands adopted the ICRC draft articles and submitted them to the Conference as an amendment, to be formally considered (see summary record of the sixth meeting of the Joint Committee, *Final Record*, note 85 above, vol. II-B).

⁹⁰ For the texts of the 1906 and the 1929 Conventions, see British and Foreign State Papers, vol. 99, p. 968 and League of Nations, *Treaty Series*, vol. 118, No. 2733, respectively.

⁹¹ See summary records of the Special Committee. *Final Record*, note 85 above, vol. II, section B, p. 85.

party or by any international jurisdiction which competence had been recognized; thus incorporating the principle of universal jurisdiction. The second paragraph provided an obligation for States parties to enact “suitable provisions for the extradition” of alleged offenders of grave breaches “whom the said [Party] does not bring before its own tribunals”.⁹²

53. During the deliberations in the Special Committee, it became clear that the ICRC text was considered to contain somewhat “far-reaching innovations, which impinged on the domain of international penal law”. A more cautious approach was thus advocated.⁹³ A joint amendment was introduced with the aim of bridging the two texts,⁹⁴ which became the basis for the Committee’s negotiations. This amendment followed the structure of the ICRC text in that it devoted a special article to grave breaches, but omitted any reference to an international jurisdiction.⁹⁵ Instead, the joint amendment imposed a firm obligation on the parties to enact legislation providing effective penalties, which was based on article V of the Convention on the Prevention and Punishment of the Crime of Genocide.⁹⁶ The amendment further provided for criminal responsibility not only of the offender but also of whoever ordered the breach to be committed, thus addressing the question of command. In order to avoid resistance from legislators, the obligation to enact legislation was limited to grave breaches, which was intended to guarantee a certain amount of uniformity in national legislations. This was especially desirable since the tribunals were also supposed to hear charges against alleged offenders of other nationalities.⁹⁷ Furthermore, the question of handing over the accused person to another party for trial was made subject to the establishment of a *prima facie* case by such party.⁹⁸ It was further explained that if the requested party decided not to hand over an alleged offender, it would be obliged to “bring him to trial before its own courts”.⁹⁹

54. During the discussions on the joint amendment, it was proposed to reintroduce the time limit of two years within which the parties to the Conventions were obliged to enact the necessary penal legislation.¹⁰⁰ Referring to the different national

⁹² The ICRC commentary describes this provision as enshrining the principle *aut dedere aut punire* (see Pictet, note 83 above, p. 585).

⁹³ It was recalled that “it is not the duty of this Conference to frame rules of international penal law”. See Report of the Joint Committee to the Plenary Assembly. *Final Record*, note 85 above, vol. II, section B, p. 132.

⁹⁴ *Ibid.*, vol. III, annex No. 49. The joint amendment was submitted on behalf of Australia, Belgium, Brazil, the United States, France, Italy, Norway, the Netherlands, the United Kingdom and Switzerland. For other amendments and texts presented during the deliberations, see annexes Nos. 49 to 53 A.

⁹⁵ Report of the Joint Committee to the Plenary Assembly. *Ibid.*, vol. II.

⁹⁶ United Nations, *Treaty Series*, vol. 78, No. 1021.

⁹⁷ Fourth report drawn up by the Special Committee of the Joint Committee. *Final Record*, note 85 above, vol. II, section B, p. 115.

⁹⁸ During the deliberations in the Special Committee, it was explained that the requirement of having established a *prima facie* case originated from the practice of the United Nations War Crime Commission and signified that “a finding of guilt to the charges against the accused was highly probable”. The requesting party was obliged to provide the requested State a satisfactory statement to this effect. *Ibid.*, p. 117.

⁹⁹ *Ibid.*, p. 117.

¹⁰⁰ *Ibid.*, p. 116. See also the summary records of the twenty-ninth meeting of the Special Committee and of the tenth meeting of the Joint Committee (statement by the Union of Soviet Socialist Republics), pp. 86 and 31, respectively.

legislative procedures, the proposal was rejected.¹⁰¹ A proposal to limit the obligation to search for and bring to trial an accused person to the parties of the conflict was withdrawn after it was explained that the principle of universality applied and that such an obligation did not violate a State's neutrality.¹⁰² It was further suggested to use the term "extradition" instead of "handing over". Nevertheless, the term "extradition" was considered less practicable in view of the wide range of extradition laws and treaties that existed. It was also observed that "'handing over' was a notion of customary international law in so far as it was extensively practiced by States after the last war in connection with the activities of the United Nations War Crimes Commission".¹⁰³ Furthermore, a proposal to subject the duty of the handing over of an accused person to another party to States' national legislation was accepted. Consequently, the phrase "and in accordance with the provisions of its own legislation" was inserted after the words "if it prefers".¹⁰⁴

55. Throughout the negotiations on these provisions, a proposal was made to replace the words "grave breaches" with "crimes".¹⁰⁵ Nevertheless, the proposed amendment was consistently rejected with the rationale that it was the prerogative of each State to classify the breaches detailed in the Conventions and that it would be inappropriate to attempt to create new penal codes in the relevant provisions.¹⁰⁶

56. During the debate of the Conference, the question of the establishment of jurisdiction was raised in the context of a proposed amendment to the second paragraph of the relevant provision. It was suggested to insert the words "in conformity with its own laws or with the Conventions prohibiting acts that may be defined as breaches" in connection with the obligation to bring an accused person to trial before its own courts.¹⁰⁷ The aim was to specify the obligation of parties to establish jurisdiction over the breaches enumerated in the Conventions.¹⁰⁸ The proposed amendment was rejected both in the Joint Committee and in plenary as being unnecessary, with the justification that jurisdiction would follow from the obligation to enact the necessary legislation to provide penal sanctions. It was explained that if a particular act was a penal offence under the law of a State —

¹⁰¹ Ibid., Summary record of the eleventh meeting of the Joint Committee, pp. 32-33 and Report of the Joint Committee to the Plenary Assembly, p. 132.

¹⁰² Ibid., Fourth report drawn up by the Special Committee of the Joint Committee, p. 116.

¹⁰³ Ibid., p. 117 (statement by the delegate of the Netherlands, Rapporteur of the Joint Committee).

¹⁰⁴ Ibid., p. 117. See also the summary records of the thirtieth and thirty-first meetings of the Special Committee (statement made by Italy), pp. 87-88.

¹⁰⁵ Ibid., Fourth report drawn up by the Special Committee of the Joint Committee, pp. 116-117. See also the summary records of the twenty-ninth and thirtieth meetings of the Special Committee and of the tenth meeting of the Joint Committee (proposal made by the Union of Soviet Socialist Republics), as well as the summary records of the twenty-first and twenty-second plenary meetings.

¹⁰⁶ Ibid., Fourth report drawn up by the Special Committee of the Joint Committee, pp. 116-117. See also the summary records of the twenty-ninth and thirtieth meetings of the Special Committee and of the eleventh meeting of the Joint Committee, as well as the summary records of the twenty-first and twenty-second plenary meetings.

¹⁰⁷ Ibid., summary records of the tenth meeting of the Joint Committee (proposal made by the Union of Soviet Socialist Republics), as well as the summary records of the twenty-first and twenty-second plenary meetings. The amendment was introduced with some variations, including "in obedience to its own legislation or to the Conventions repressing such acts as may be defined as breaches". Ibid., vol. III, annex No. 53.

¹⁰⁸ Ibid., vol. II, section B, summary records of the twenty-first and twenty-second plenary meetings (observations by the Union of Soviet Socialist Republics).

which it would be if that State had implemented its obligation specified in the first paragraph of the provision — it was clear that its courts would have jurisdiction to try a person committing the offence.¹⁰⁹

57. Whereas the joint amendment had omitted any language regarding judicial guarantees for accused persons,¹¹⁰ the question was again raised during the deliberations on the amendment. Accordingly, a proposal was made to add a fourth paragraph on this subject, which provided for the safeguards of a proper trial and defence.¹¹¹ The proposed amendment was subsequently adopted without any modification.

(c) Reservations

58. No relevant reservations have been made with regard to this provision.

2. Additional Protocol I

59. The provision concerning the punishment of offenders contained in the common article to the Geneva Conventions seems to be unique and no other international instruments have been found containing a similar clause, with the exception of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).¹¹² In this case, however, the common article has been made applicable to Protocol I by *renvoi*. Article 85, paragraph 1, of the Protocol specifies that “[t]he provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol”.

60. Article 85, paragraph 1, has been supplemented by other provisions relating to the repression of breaches which are not found in the Geneva Conventions. Paragraph 3 of article 85 explicitly provides that the grave breaches enumerated in the Conventions and the Additional Protocol shall be considered war crimes. Also of interest in this context is article 88 on mutual assistance in criminal matters in connection with proceedings brought in respect of grave breaches. Paragraph 2 of article 88 specifies that the parties to Additional Protocol I shall, when the circumstances allow, cooperate in extradition matters. In this regard, due consideration shall be offered to the request of the State in whose territory the offence has occurred. Nevertheless, this duty is subject to the rights and obligations established in the Conventions and in article 85, paragraph 1, of the Additional Protocol. Yet another qualification is introduced in the third paragraph, which provides that the law of the requested party shall apply in all cases and that the paragraphs shall not “affect the obligations arising from the provisions of any other

¹⁰⁹ Ibid., summary records of the eleventh meeting of the Joint Committee and of the twenty-first and twenty-second plenary meetings.

¹¹⁰ It should be recalled that ICRC had advocated the inclusion of a provision on this subject. See draft article 40 (b) of the ICRC text.

¹¹¹ *Final Record*, note 85 above, vol. II, section B, summary records of the eleventh meeting of the Joint Committee (proposal by France). It was explained that whereas the majority of cases were already covered by the Conventions, the amendment intended to “cover those persons who in virtue of armistice agreements or peace treaties might be handed over by a vanquished Power to its victors as presumed was criminals”. For the text of the amendment, see *Final Record*, note 85 above, vol. III, annex No. 52.

¹¹² United Nations, *Treaty Series*, vol. 1125, No. 17512.

treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters”.

C. Regional conventions on extradition

61. Several regional conventions on extradition contain provisions that combine the options of extradition and prosecution. While conventions concluded in the inter-American and European contexts appear to be the most influential, provisions of this kind may also be found in other regional conventions.

1. Inter-American conventions on extradition

(a) Relevant provisions

62. Conventions relating to extradition concluded in the inter-American context appear to be the first ones to have contained provisions combining the options of extradition and prosecution.¹¹³ The Convention on Private International Law,¹¹⁴ also known as the “Bustamante Code”, under Book IV (International Law of Procedure), Title III (Extradition), contains two provisions which read as follows:

“Article 344

In order to render effective the international judicial competence in penal matters, each of the contracting States shall accede to the request of any of the others for the delivery of persons convicted or accused of crime, if in conformity with the provisions of this title, subject to the dispositions of the international treaties and conventions containing a list of penal infractions which authorize the extradition.

Article 345

The contracting States are not obliged to hand over their own nationals. The nation which refuses to give up one of its citizens shall try him.”

63. Similarly, under the 1933 Convention on Extradition adopted by the Seventh International Conference of American States,¹¹⁵ States parties undertook the obligation, under certain conditions, of surrendering to any of the States which may make the requisition the persons who may be in their territory and who are accused or under sentence (article 1). Pursuant to article 2,

“When the person whose extradition is sought is a citizen of the country to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgment of the surrendering State, determine. If the accused is not surrendered, the latter State is obliged to bring action against him for the crime with which he is accused,

¹¹³ It should be mentioned, however, that the Treaty on International Penal Law, signed at Montevideo on 23 January 1889, and the revised Treaty on International Penal Law, signed at Montevideo on 19 March 1940, contain an absolute obligation to extradite, subject to the conditions set forth in the respective treaties (see, respectively, art. 19 and art. 18), and therefore do not include a provision contemplating the alternative of prosecution. The former treaty explicitly provided that “[e]xtradition shall in no case be barred by the nationality of the offender” (art. 20).

¹¹⁴ Havana, 20 February 1928. League of Nations, *Treaty Series*, vol. 86, No. 1950.

¹¹⁵ Montevideo, 26 December 1933. League of Nations, *Treaty Series*, vol. 165, No. 3803.

if such crime meets the conditions established in subarticle (b) of the previous article [i.e., if the act for which extradition was sought constitutes a crime and is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year]. The sentence pronounced shall be communicated to the demanding State.”

In this respect, it should be noted that States signing an “optional clause” accompanying the Convention, “notwithstanding Article 2 ..., agree[d] among themselves that in no case [would] the nationality of the criminal be permitted to impede his extradition”. The Convention further contained provisions relating to cases in which extradition will not be granted (including when the accused must appear before an extraordinary tribunal or court, or when the offence is of a political nature (article 3)), requirements for the request for extradition (article 5) and other substantive and procedural questions relating to extradition proceedings.

64. Similarly, the 1981 Inter-American Convention on Extradition¹¹⁶ imposes the obligation on States parties “to surrender to other States Parties that request their extradition persons who are judicially required for prosecution, are being tried, have been convicted or have been sentenced to a penalty involving deprivation of liberty” (article 1). Article 2 indicates that, for extradition to be granted, the relevant offence must have been committed in the territory of the requesting State and that, when committed elsewhere, extradition shall be granted provided the requesting State has jurisdiction to try the offence. Paragraph 3 of that provision further specifies:

“The requested State may deny extradition when it is competent, according to its own legislation, to prosecute the person whose extradition is sought for the offence on which the request is based. If it denies extradition for this reason, the requested State shall submit the case to its competent authorities and inform the requesting State of the result.”

65. The subsequent articles contain provisions relating to extraditable offences (article 3), grounds for denying extradition (article 4, which refers, inter alia, to cases in which the person is to be tried before an extraordinary or ad hoc tribunal of the requesting State, when the relevant offence is a political offence or when it can be inferred that persecution for reasons of race, religion or nationality is involved or that the position of the person sought may be prejudiced for any of these reasons), and the preservation of the right of asylum (article 6). Pursuant to article 7, paragraph 1, “[t]he nationality of the person sought may not be invoked as a ground for denying extradition, except when the law of the requested State otherwise provides”. Under the title “Prosecution by the Requested State”, article 8 reads as follows:

“If, when extradition is applicable, a State does not deliver the person sought, the requested State shall, when its laws or other treaties so permit, be obligated to prosecute him for the offense with which he is charged, just as if it had been committed within its territory, and shall inform the requesting State of the judgment handed down.”

66. Article 9 specifies that States parties shall not grant extradition when the offence in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requesting State gives

¹¹⁶ Caracas, 25 February 1981. United Nations, *Treaty Series*, vol. 1752, No. 30597.

sufficient assurances that these penalties will not be imposed. Further articles of the Convention relate to the substantive and procedural conditions relating to extradition proceedings.

(b) Preparatory works¹¹⁷

67. The Bustamante Code was adopted at the 1928 Sixth International Conference of American States, from a draft prepared by the Rio de Janeiro International Commission of Jurists in 1927,¹¹⁸ which itself relied on the preparatory work conducted by Antonio Sánchez de Bustamante y Sirven.¹¹⁹

68. Already in 1912, the International Commission of Jurists had adopted a draft convention on extradition, which aimed at making extradition binding for States parties, except in the case of individuals who were under trial or had already been prosecuted or convicted and in the case of political offences. The draft further provided that the nationality of the individual should not be a bar to extradition, but also that a State would not be under an obligation to surrender its nationals. If they decided not to grant extradition of one of their nationals, States parties would be obliged to prosecute and try the individual in their territory, in conformity with their own laws and with the evidence submitted by the requesting State.¹²⁰

69. The 1927 draft Code was based on the principle of territoriality in the exercise of criminal jurisdiction. Extradition was conceived as a means to ensure the effectiveness of criminal jurisdiction and the draft Code therefore imposed upon States parties a general duty to grant it. However, the drafters took note of the “duties of protection” that a State had with regard to its own nationals, and recognized that a State might hesitate to grant their extradition because of the possible irregularity of the proceedings undertaken against them in the requesting State or of the risk of the individuals being submitted to inhumane or cruel treatment abroad. For this reason, under the draft Code, States parties remained free to decide whether to grant extradition of their nationals, but, if they chose not to extradite, they were under an obligation to prosecute and try the individual in their territory, according to their laws and on the basis of the evidence submitted by the requesting State. Although this implied the exercise of extraterritorial jurisdiction, which the drafters considered as posing certain problems (notably with respect to the availability of evidence to conduct the trial), the provision was introduced to reflect the fact that some national constitutions forbade the surrender of nationals and could not be modified by an international treaty.¹²¹ The draft Code further contained

¹¹⁷ The preparatory works of the 1981 Inter-American Convention on Extradition could not be made available to the Secretariat and are therefore not described in this section.

¹¹⁸ International Commission of Jurists, *Sessions held at Rio de Janeiro, Brazil, April 18-May 20, 1927, Private International Law, Project to be submitted for the consideration of the 6th International Conference of American States*, Pan American Union, Washington, D.C., 1927.

¹¹⁹ The draft code prepared by Mr. Bustamante was published for the first time at Havana in March 1925. It was accepted by the Pan American Union in Washington, D.C., on 3 February 1926. In 1927, the International Commission of Jurists held a four-week session to consider the draft, which was adopted on 20 May 1927 and submitted to the Sixth International Conference of American States for final approval the following year.

¹²⁰ Antonio Sánchez de Bustamante y Sirven, *La Comisión de jurisconsultos de Río de Janeiro y el derecho internacional*, Havana, 1927, pp. 19-21. See also article 5 of the draft on extradition in *Comissão Internacional de Jurisconsults. Actas, Resoluções e Documentos, Primeira Reunião Rio de Janeiro (26 de Junho a 19 de Julho 1912)*, p. 89.

¹²¹ *Ibid.*, pp. 142-143.

provisions relating, inter alia, to the order of priorities in case of multiple requests for extradition and the prohibition of extradition for political offences.¹²² These provisions of the draft Code were adopted without substantive amendment by the International Conference in 1928.

70. The 1933 Inter-American Convention on Extradition was adopted at the Seventh International Conference of American States. The Conference worked on the basis of a draft convention prepared by the Fourth Sub-Commission of its Commission II. As explained in the report to the plenary, the extradition of nationals was considered as one of the most delicate issues regarding extradition and the Sub-Commission had decided not to attempt to resolve the matter.¹²³ The draft convention therefore imposed upon States a general obligation to grant extradition, but contained a provision whereby the requested State could choose not to extradite one of its nationals, as provided for under its legislation, but would in that case have the obligation to try him and communicate the results of the prosecution to the requesting State.¹²⁴ The draft convention further allowed States that had already accepted to surrender their nationals in their reciprocal relations under the 1889 Treaty of Montevideo to continue to do so, and left this option open for other States parties wishing to follow such practice.¹²⁵ The relevant provision was accepted by the Conference and included in the final text of the Convention.

(c) Reservations

71. At the time of signing the 1933 Convention, the delegation of the United States of America reserved, inter alia, article 2 (second sentence), declaring that that article “shall not be binding upon the United States of America, unless and until subsequently ratified in accordance with the Constitution and laws of the United States of America”.¹²⁶ With respect to article 18 of the Convention (on transit through the territory of the State of extradited persons), El Salvador made a reservation to the effect that it could not cooperate in the surrender of its own nationals, prohibited by its Political Constitution, by permitting the transit through its territory of said nationals when one foreign State surrenders them to another.

72. In a declaration made at the time of signature, Guatemala stated that it had signed the 1933 Inter-American Convention on Extradition “with the understanding that the interpretation of articles 7 and 8 when applicable will be subject to the provisions of article 61 of our Constitution, particularly in that ‘no Guatemalan shall be handed over to a foreign government for trial or punishment except for crimes covered by international treaties in force in Guatemala’”.

¹²² Ibid., pp. 143-145.

¹²³ “Informe del ponente, doctor L.A. Podestá Costa”, *Diario de la VII Conferencia Internacional Americana*, Montevideo, 17 December 1933, p. 29.

¹²⁴ “Tratado Interamericano de Extradición. Proyecto de la Cuarta Sub Comisión de la Comisión II”, doc. C II, No. 2, *ibid.*, p. 26.

¹²⁵ “Informe del ponente”, note 123 above, p. 29.

¹²⁶ The Convention was subsequently proclaimed by the President of the United States on 25 January 1935.

2. European Convention on Extradition

73. The European Convention on Extradition,¹²⁷ adopted in the context of the Council of Europe, contains a provision combining the options of extradition and prosecution which, as described below,¹²⁸ partially served as a model for the corresponding provision included in the Convention for the Suppression of Unlawful Seizure of Aircraft.

(a) Relevant provisions

74. Under article 1 of the European Convention, entitled “Obligation to extradite”,

“The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.”

75. Under article 2, paragraph 1, “[e]xtradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty”. The subsequent provisions of the European Convention spell out exceptions to these rules, as well as the conditions for extradition. These include the non-granting of extradition for political offences or when the request for extradition is made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or when the person’s position may be prejudiced for any of these reasons (article 3), the possibility of refusing extradition when the offence was committed in whole or in part in the territory of the requested State (article 7) or when the competent authorities of such State are proceeding against the person or a final judgment has been passed for the offence for which extradition is requested (articles 8 and 9), the possibility to refuse extradition when the relevant offence is punishable by death under the law of the requesting party and the death penalty is not provided for in respect of such offence by the law of the requested party or is not normally carried out, unless the requesting party gives sufficient assurance that the death penalty will not be carried out (article 11), etc.

76. Under article 6, paragraph 1(a), a Contracting Party shall have the right to refuse extradition of its nationals. Subparagraph (b) specifies that each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term “nationals” within the meaning of the Convention. Paragraph 2 of the same article reads as follows:

“If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted

¹²⁷ Paris, 13 December 1957. United Nations, *Treaty Series*, vol. 359, No. 5146.

¹²⁸ See paragraph 99 below.

without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.”¹²⁹

77. The Convention further contains provisions relating to other aspects of the extradition proceedings, including conditions for the request and supporting documents (article 12), provisional arrest (article 16), surrender of the person to be extradited (article 18), etc.

(b) Preparatory works

78. The European Convention on Extradition is the result of a draft prepared by a Committee of Governmental Experts on Extradition, convened by the Secretary-General of the Council of Europe on the instructions of the Committee of Ministers, following a recommendation by the Consultative Assembly.¹³⁰

79. During the proceedings of the Committee of Governmental Experts, delegations discussed at length whether they preferred a model bilateral convention or a multilateral European convention on extradition. As pointed out in the explanatory report on the European Convention, it then became apparent that “two different attitudes were being taken to certain principles which should govern extradition”, which “it proved impossible to reconcile”, namely one following the traditional view that the chief aim is to repress crime and that therefore extradition should be facilitated, and the other introducing humanitarian considerations and so tending to restrict the application of extradition laws.¹³¹ An expert from the Scandinavian countries, in particular, explained that the current attitude of countries in his region, which resulted from the preparatory works on new extradition regulations among them, was that, “while they agree on certain general regulations governing extradition procedure, the requested State should retain the right in the last resort to decide, according to the circumstances, whether extradition should be granted or whether, on the other hand, the person claimed should be proceeded against in its own territory”. As a consequence, the orthodox extradition convention between these countries would be replaced by “a uniform law in each of them defining the conditions in which extradition would normally occur and giving special consideration to the need to protect the rights of the individual”. His proposal that the Council of Europe introduce a similar system, however, did not receive the approval of the majority of experts and the Scandinavian experts thus

¹²⁹ It should be noted that, on 23 October 1996, the member States of the European Union adopted a Convention, drawn up on the basis of article K.3 of the Treaty on European Union, relating to extradition between them (*Official Journal of the European Communities*, No. C 313/12), which supplements the 1957 European Convention on Extradition and notably provides that “[e]xtradition may not be refused on the ground that the person claimed is a national of the requested Member State” (art. 7).

¹³⁰ On 8 December 1951, the Consultative Assembly of the Council of Europe adopted recommendation 16 (1951), “on the preparatory measures to be taken to achieve the conclusion of a European Convention on Extradition”. After studying this recommendation and the Governments’ replies on the desirability of the convention, the Committee of Ministers instructed the Secretary-General, in its resolution (53) 4, to convene the Committee of Governmental Experts, which held three sessions in Strasbourg (5-9 October 1953, 31 January-9 February 1955 and 15-25 February 1956), during which it based its work on a draft prepared by the Committee on Legal and Administrative Questions and approved by the Assembly (see recommendation 66 (1954)).

¹³¹ Explanatory report on the European Convention on Extradition (available at <http://conventions.coe.int/treaty/en/Reports/Html/024.htm>), para. 9.

expressed their willingness to consider the conclusion of extradition conventions of the traditional type (i.e. those entailing an obligation to extradite in specific cases) on condition that such conventions allow certain exceptional circumstances to be taken into consideration, so that in a given case extradition might be refused for imperative reasons of a humanitarian nature.¹³²

80. Article 1 of the European Convention was inspired by the Bilateral Convention concluded between France and the Federal Republic of Germany on 23 November 1951.¹³³ The explanatory report emphasizes that the term “competent authorities” in the English text corresponds to “*autorités judiciaires*” in the French text and covers the judiciary and the Office of the Public Prosecutor, but excludes the police authorities.¹³⁴

81. Article 2, paragraph 1, is described in the explanatory report as laying down the principle of compulsory extradition, since “[t]he requested Party has no discretionary power to grant or refuse extradition”, except in certain cases spelled out in subsequent provisions.¹³⁵ As regards article 3 on political offences, the report further explains that this provision allows the requested party to decide whether the offence is political or not: as the provision was not accepted by all the delegations, owing to its mandatory character, the Committee decided that reservations could be made to it.¹³⁶

82. With respect to article 6, it appears that the Committee of Experts found inspiration in the corresponding provisions of the 1933 Inter-American Convention on Extradition. The majority of experts had considered it desirable, in view of the close links between the member States, to modify to some extent the established principle of non-extradition of nationals, on which legislation on extradition in many member States was still based. The Committee therefore recommended that the rule of non-extradition of nationals should in future be considered optional

¹³² Ibid., para. 13.

¹³³ Bundesgesetzblatt 1953 II, S. 152. Article 1 of the Bilateral Convention reads as follows: “The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting State are proceeding or who are wanted by the said authorities for the carrying out of a sentence or detention order.”

¹³⁴ Explanatory report, note 131 above, commentary to article 1.

¹³⁵ Ibid., commentary to article 2.

¹³⁶ Ibid., commentary to article 3.

rather than compulsory and that the provision be drafted following the model of the Inter-American Convention.¹³⁷

83. The explanatory report indicates that article 6, paragraph 1, allows the extradition of nationals if this is not contrary to the laws of the requested State, but that even in this case the requested country is not obliged to extradite its nationals, thus having the option of granting or refusing their extradition.¹³⁸ As for paragraph 2, the report specifies that this provision imposes an obligation for the requested State, at the demand of the requesting party, to submit the matter to the competent authority, “in order that the person concerned may not go unpunished”. The report points out, however, that legal proceedings need not necessarily be taken, unless the competent authorities consider that they are appropriate.¹³⁹ Taking into account the desirability in the interests of justice of proceeding against unextradited nationals, an expert had proposed an alternative drafting for this paragraph, which would have read as follows: “If the extradition of those persons is so refused, the requested Party shall proceed against them in accordance with the procedure which would be followed if the offence had been committed on its own territory.” This proposal was supported by two other experts, but was not adopted by the Committee.¹⁴⁰ It was also suggested in the Committee that the principle laid down in paragraph 2 should be extended to cover other cases in which extradition was not granted. The report states, however, that

“... several experts thought this unnecessary because if one State informs another State that a person on its territory has committed certain offences, the latter State will ipso facto make enquiries to discover whether there are grounds for proceeding against that person”.¹⁴¹

Finally, a proposal was made to include a provision that would allow the requested State to refuse extradition “if the arrest and surrender of the person claimed are likely to cause him consequences of an exceptional gravity and thereby cause concern on humanitarian grounds particularly by reason of his age or state of

¹³⁷ See Council of Europe, *Report of the Committee of Experts on Extradition to the Committee of Ministers*, Committee of Experts, 13th session, CM (53) 129 (Confidential), 10 October 1953, para. 21. The Committee also considered the possibility of supplementing this provision by an optional clause making extradition of nationals contingent upon a formal declaration of reciprocity, in order to avoid a situation where one State may surrender its nationals to another State but the latter declines to extradite its own nationals (*ibid.*, para. 22; see in this respect the optional clause contained in the 1933 Inter-American Convention described above). The United Kingdom expert had explained that the law and criminal procedure of his country very rarely permitted the prosecution of nationals for offences committed abroad, and he accordingly reserved his position as regards the relevant part of the proposed provision (*ibid.*, para. 24). It should also be noted that the draft prepared by the Committee on Legal and Administrative Questions, annexed to recommendation 66 (1954) of the Consultative Assembly, contained another variant of the relevant provision: “Where the person claimed is a national of a requested High Contracting Party, and for that reason cannot be extradited, the requested High Contracting Party shall, within one year of the notification to the requesting High Contracting Party of its refusal to extradite, prosecute the person concerned as if the act had been committed on its own territory.”

¹³⁸ Explanatory report, note 131 above, commentary to article 6.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

health”. This proposal was not adopted by the Committee, on the understanding that a reservation to article 1 of the Convention could be made on this subject.¹⁴²

84. In the preparatory works, the question was also raised whether extradition should be refused (a) if an amnesty had been declared in the requesting country; or (b) if an amnesty had been declared in the requested country for offences of the type of that for which extradition is requested. The experts were of the opinion that the first possibility did not need to be considered as it seemed very unlikely. With regard to the second possibility, the experts thought that an amnesty generally took local or national considerations into account and should not be extended to persons whom it was not originally intended to cover, and that extradition should therefore be granted.¹⁴³ It should be noted, however, that under article 4 of its Second Additional Protocol,¹⁴⁴ the European Convention was supplemented by a provision (“Amnesty”) whereby

“Extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested State and which that State had competence to prosecute under its own criminal law.”

(c) Reservations

85. Numerous declarations and reservations have been made in respect of the European Convention, which specify the scope of the obligations accepted by each Contracting Party with regard to extradition. Thus, for example, reservations have been made to article 1 to the effect that extradition may be refused on humanitarian grounds (e.g., by reason of the person’s health, age or other personal circumstances, or if the person could be subjected to torture in the requesting State) or when the person will be tried in the requesting State by a special court or a tribunal that does not assure fundamental procedural guarantees.¹⁴⁵ Some States have also indicated that they would refuse extradition on the grounds of public morality, public order, State security or other essential interests.¹⁴⁶ States have also reserved their right to decide in each particular case whether acts for which extradition is requested are to be regarded as political offences¹⁴⁷ or to refuse extradition when the person could be subject to the death penalty in the requesting State, unless sufficient assurance is

¹⁴² Ibid. For a more detailed description of the different positions in the Committee of Experts, see Council of Europe, Committee of Ministers, *Report of the Committee of Experts on Extradition to the Committee of Ministers*, CM (56) 83 (Confidential), 2 July 1956, pp. 73-76 (commentary to article 6).

¹⁴³ Explanatory report, note 131 above, “Summary of questions which were not dealt with in the Multilateral European Convention but were discussed”.

¹⁴⁴ Strasbourg, 17 March 1978.

¹⁴⁵ See declarations by Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Denmark, Finland, France, Georgia, Hungary, Iceland, Lithuania, Luxembourg, Moldova, the Netherlands, Norway, Portugal, the Russian Federation, San Marino, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Ukraine and the United Kingdom.

¹⁴⁶ See declarations by Georgia and the Russian Federation.

¹⁴⁷ See declarations by Armenia, Finland, Italy, Lithuania, the Russian Federation, Spain and Sweden.

given that it will not be executed.¹⁴⁸ Some States have also reserved their right to refuse extradition of persons to whom they have granted political asylum.¹⁴⁹

86. As regards article 6, various States have made a declaration defining how they interpret the term “nationals” within the meaning of the Convention, sometimes also clarifying that, under their domestic legislation, they will refuse extradition of nationals so defined.¹⁵⁰ Some of these States have explicitly specified that domestic authorities would proceed to prosecution of their own nationals, even for crimes committed abroad.¹⁵¹

3. Other regional conventions on extradition

87. The General Convention on Judicial Cooperation (*Convention générale de coopération en matière de justice*), signed in the context of the Afro-Malagasy

¹⁴⁸ See declarations by Andorra, Austria, Hungary, Portugal and Spain. See also the declaration by Turkey. Portugal has further made a reservation to the effect that it would not grant extradition of persons who are being demanded in connection with an offence punishable by a lifelong sentence or detention order. Germany, Austria, Belgium, the Russian Federation and Switzerland have stated that such a reservation would be compatible with the object and purpose of the Convention only if refusal to grant extradition for offences punishable by a lifelong sentence or detention order is not absolute and that they took the reservation to mean that the only circumstance in which extradition would not be granted was where there is no possibility under the law of the requesting State for the person sentenced to life imprisonment having completed a certain proportion of the sentence or period of detention, to obtain a judicial review of his case with a view to having the remainder of the sentence commuted to probation.

¹⁴⁹ See reservation by Armenia, as well as the declaration by Poland whereby persons granted asylum in Poland will be treated as Polish nationals (whose extradition is excluded). Austria, Germany and Turkey have interpreted these declarations as meaning that persons having been granted asylum in those countries will be placed on an equal footing with their nationals only in the event of a request for extradition by the persecuting State and that, in that case, such persons will not be extradited.

¹⁵⁰ See the declarations by Albania (specifying that it also applies to double nationals), Andorra, Armenia, Austria, Azerbaijan, Bulgaria, Croatia, Cyprus, Denmark (also including persons domiciled therein, as well as nationals of, and residents having their domicile in, Finland, Iceland, Norway or Sweden), Estonia (unless the national has consented to extradition), Finland (also including persons domiciled therein, as well as nationals of, and persons having their domicile in, Denmark, Iceland, Norway and Sweden, as well as aliens domiciled in these States), France, Georgia, Germany, Greece, Hungary (also reserving the right to refuse extradition of persons settled definitively in the country), Iceland (also including persons domiciled therein, as well as nationals of, and residents having their domicile in, Denmark, Finland, Norway or Sweden), Estonia (unless the national has consented to extradition), Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg (including in the definition foreigners integrated into the Luxembourg community insofar as they can be prosecuted in Luxembourg for the relevant crimes), Moldova, Monaco, Montenegro, the Netherlands (including foreigners integrated into the Netherlands community insofar as they can be prosecuted in the Netherlands for the relevant crimes; extradition of nationals is allowed if the requesting State provides a guarantee that the person claimed may be returned to the Netherlands to serve his sentence there), Norway (including residents, as well as nationals and residents of Denmark, Finland, Iceland and Sweden), Poland, Portugal, Romania, the Russian Federation, San Marino, Serbia, South Africa, Spain, Sweden (also including aliens domiciled therein, as well as nationals of, and aliens domiciled in, Denmark, Finland, Iceland and Norway), the former Yugoslav Republic of Macedonia and Ukraine.

¹⁵¹ See the declarations by Cyprus and Liechtenstein.

Common Organization (*Organisation Commune Africaine et Malgache*),¹⁵² provides that the States parties shall surrender to each other, following the rules and conditions under the Convention, individuals who are in their territory and are prosecuted or have been condemned by the judicial authorities of another party (article 41). Article 42 of the Convention reads as follows:

“The High Contracting Parties shall not extradite their respective nationals; the status of national shall be determined at the time of the offence in respect of which extradition is requested.

Nevertheless, the requested State undertakes to initiate proceedings against its own nationals who have committed infractions in the territory of another State which are punishable as crimes or offences under its own legislation, insofar as it is competent to try such persons, if the other State transmits a request for prosecution along with files, documents, objects and information in its possession. The requesting State shall be kept informed of the action taken on its request.”

88. Under the London Scheme for Extradition within the Commonwealth,¹⁵³ extradition is granted among Commonwealth countries for extradition offences and subject to the dual criminality rule (section 2). The Scheme provides that extradition will be precluded by law if the competent authority is satisfied that the offence is of a political character (section 12) and foresees discretionary grounds of refusal (section 15). Under the title “Alternative Measures in the Case of Refusal”, section 16 further provides that “[f]or the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice”, each country which reserves the right to refuse to extradite nationals or permanent residents “will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground” (paragraph 1), which may include the submission of the case to the competent authorities of the requested State for prosecution (paragraph 2 (a)).

89. Under the Economic Community of West African States (ECOWAS) Convention on Extradition,¹⁵⁴ States parties undertake to surrender to each other, subject to the provisions and conditions laid down in the Convention, all persons within their territory who are wanted for prosecution for an offence or who are wanted by the legal authorities of the requesting State for the carrying out of a sentence (article 2, paragraph 1). Pursuant to the Convention, extradition shall not be granted for political offences (article 3), if the person may be submitted to torture or other inhuman or degrading treatment or punishment (article 4), when extradition would be incompatible with humanitarian considerations in view of age or health (article 5) or when an amnesty was granted (article 16). It may also be refused if the person has been sentenced or would be tried by an extraordinary or ad hoc tribunal (article 8), when the offence is regarded by the law of the requested State as having

¹⁵² Antananarivo, 12 September 1961. *Journal Officiel de la République Malgache*, 23 December 1961, p. 2242.

¹⁵³ Available at www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf.

¹⁵⁴ Abuja, 6 August 1994. ECOWAS Convention A/P1/8/94, reproduced in *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, vol. 3, June 2007, p. 1085.

been committed in whole or in part in its territory or in a place treated as its territory (article 11) or when the offence is punishable by the death penalty in the requesting State and is not provided for by the law of the requested State (article 17). Under article 10, extradition of a national shall be a matter of discretion of the requested State; however:

“The Requested State which does not extradite its nationals shall at the request of the Requesting State submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits related to the offence shall be transmitted, without charge, through the diplomatic channel or by such other means as shall be agreed upon by the States concerned. The requesting State shall be informed of the result of its request.” (paragraph 2)

D. The Convention for the Suppression of Unlawful Seizure of Aircraft (1970 Hague Convention) and other conventions following the same model

90. The particular kind of provision known as the “Hague formula” appears to be the most common contemporary version of conventional provisions that combine the options of extradition and prosecution. This type of clause is present in conventions aimed at the suppression of specific offences, principally in the field of the fight against terrorism, but also in many other areas (including torture, mercenaries, safety of United Nations personnel, transnational crime, corruption, forced disappearance, etc.).

1. Convention for the Suppression of Unlawful Seizure of Aircraft¹⁵⁵

91. The mechanism for the punishment of offenders provided for by the Convention for the Suppression of Unlawful Seizure of Aircraft is unanimously acknowledged as having served as a model for most of the contemporary conventions for the suppression of specific offences. Its relevant provisions and corresponding preparatory works will therefore be studied in some detail.

(a) Relevant provisions

92. The provision in the Convention that combines extradition and prosecution (article 7) is part of an articulated mechanism for the punishment of offenders, the main elements of which are the following.

93. Article 1 defines the relevant offence under the Convention. Under article 2, each Contracting State further undertakes to make the offence punishable by severe penalties.

94. Article 4 specifies the obligations incumbent upon Contracting States with regard to the establishment of their jurisdiction over the offence.¹⁵⁶ Under

¹⁵⁵ The Hague, 16 December 1970. United Nations, *Treaty Series*, vol. 860, No. 12325.

¹⁵⁶ It should be noted that this provision “does not require any State to exercise jurisdiction, merely to establish it” (Gillian M. E. White, “The Hague Convention for the Suppression of Unlawful Seizure of Aircraft”, *The Review of the International Commission of Jurists*, vol. 6, 1971, pp. 41-42). The question of prosecution is dealt with in the subsequent article 7.

paragraph 1, each Contracting State “shall take such measures as may be necessary to establish its jurisdiction” in three cases in which it has a special link with the offence.¹⁵⁷ Paragraph 2 provides that each Contracting State “shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1”. This provision therefore establishes a case of universal jurisdiction with regard to the relevant offences.¹⁵⁸ Paragraph 3 of this article indicates that the Convention “does not exclude any criminal jurisdiction exercised in accordance with national law”.

95. Article 6 imposes upon the Contracting State in whose territory the alleged offender is present, upon being satisfied that the circumstances so warrant, to take him into custody or take other measures to ensure his presence and to proceed immediately to a preliminary inquiry into the facts. It further details the conditions applicable to such custody and the obligations of notification to other interested States.

96. Under article 7,

“The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”

97. Article 8 spells out the regime of extradition of the relevant offence. Under paragraph 1, the offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States, and Contracting States undertake to include it as an extraditable offence in every extradition treaty to be concluded between them. Pursuant to paragraph 2, if a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider the Convention as the legal basis for extradition in respect of the offence, subject to the other conditions provided by its law. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State (paragraph 3). Under paragraph 4, the offence shall be treated, for the purpose of extradition, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 4, paragraph 1.

¹⁵⁷ Namely (a) when the offence is committed on board an aircraft registered in that State; (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; and (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

¹⁵⁸ See, for instance, Austria, Eighth meeting of the Commission of the Whole, para. 11, *International Civil Aviation Organization, International Conference of Air Law, The Hague, December 1970, Volume I: Minutes* (Doc. 8979-LC/165-1), p. 7, and SA Doc. No. 42, *International Civil Aviation Organization, International Conference of Air Law, The Hague, December 1970, Volume II: Documents* (Doc. 8979-LC/165-2), p. 94.

(b) Preparatory works

98. The Convention was adopted at the International Conference on Air Law, held in The Hague from 1 to 16 December 1970 under the auspices of the International Civil Aviation Organization (ICAO).¹⁵⁹ The Conference worked on the basis of a draft convention submitted by the Legal Committee of ICAO, which was itself based on a draft prepared by a subcommittee on the subject matter.¹⁶⁰

99. In his description of the subcommittee's draft during the proceedings of the Legal Committee, the Chairman of the subcommittee explained that that draft, which aimed at making it obligatory to prosecute acts of unlawful seizure of aircraft, was based on a system of multiple jurisdictions. Accordingly, the obligation to prosecute was placed on the State of registration of the aircraft and the State of landing if the alleged offender left the aircraft in the latter State.¹⁶¹ The draft provided that the offence would be an extraditable one, but did not impose an obligation of extradition.¹⁶² Moreover, the subcommittee had reckoned that it would not be possible to oblige the State of landing, which did not extradite the alleged offender, to prosecute him because, in many States, it was for the public prosecutor to decide whether or not to prosecute. It had thus adopted "a formula from the European Convention on Extradition whereby, if there was no extradition, the State

¹⁵⁹ By resolution A16-37, adopted at its sixteenth session in September 1968, the Assembly of ICAO had urged States to become parties to the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, and had requested the Council "to institute a study of other measures to cope with the problem of unlawful seizure". While certain proposals had been made in the preparatory works of the Tokyo Convention which combined the options of prosecution and extradition (see, for example, the proposal of Venezuela and the United States submitted to the Legal Committee of ICAO at its fourteenth session, held in Rome from 28 August to 15 September 1962 (Doc. 8302-LA/150-2), p. 102), the final text of the Convention only provided that the State of registration of the aircraft was competent to exercise jurisdiction over the relevant offences and that nothing in the Convention should be deemed to create an obligation to grant extradition (see, respectively, arts. 3 and 16, para. 2).

¹⁶⁰ In December 1968, the Council of ICAO decided to refer the legal aspects of the question to the Legal Committee, with a request to the Chairman of the Committee to establish a subcommittee on the subject. The subcommittee held two sessions (from 10 to 21 February 1969 and from 23 September to 3 October 1969), following which the Legal Committee, at its seventeenth session in February-March 1970, prepared a draft convention which it considered, by unanimous vote, ready for presentation to States as a final draft. In March 1970, the Council circulated this draft and decided to convene the conference at The Hague (see *International Conference*, vol. I, note 158 above, Introduction, p. ix).

¹⁶¹ The Chairman (Gilbert Guillaume, the delegate from France) indicated that the subcommittee had started its work with a proposal from the United States to establish priority jurisdiction for the State of registration of the aircraft in the case of unlawful seizure and to provide for extradition of the alleged offender to the State of registration of the aircraft even in exceptional cases, but that the majority of the States considered that, while this proposal presented the advantage of efficiency, it would probably not be accepted universally because of the traditional law of extradition (ICAO, Legal Committee, Thirtieth meeting (3 March 1970), para. 12, in *Seventeenth Session (Montreal, 9 February-11 March 1970, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft)* (Doc. 8877-LC/161)), pp. 16-17. As will be described below, a similar proposal was later put forward by the United States at the Conference.

¹⁶² ICAO, Legal Committee, Thirtieth meeting (3 March 1970), paras. 12-14 in *Seventeenth Session*, note 161 above, pp. 16-17. At a later meeting, the Chairman of the subcommittee explained that the original version of the corresponding provision on extradition (draft art. 8) had been borrowed from the 1929 Convention on Counterfeiting (Thirty-fourth meeting (5 March 1970), para. 17, in *Seventeenth Session*, note 161 above, p. 55).

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”.¹⁶³ The Chairman of the subcommittee therefore summed up the system of the draft convention as containing “the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution”.¹⁶⁴

100. The overall logic of this system was maintained, with minor amendments, by the Legal Committee, which explained in its report that “for the purpose of deterring acts of unlawful seizure of aircraft there is an urgent need to make them punishable as an offence and to provide appropriate measures to facilitate prosecution and extradition of the offenders”.¹⁶⁵ With regard to extradition, it was agreed that, under the draft convention, the Contracting States would accept an obligation to include the offence of unlawful seizure of aircraft in their future extradition treaties.¹⁶⁶ However, it was also pointed out that the draft should safeguard the conditions imposed on extradition by domestic laws.¹⁶⁷

101. The draft submitted to the Conference by the Legal Committee thus contained the main elements of the mechanism that was later to be enshrined in the Convention, including a provision that imposed upon States parties, if they did not

¹⁶³ ICAO, Legal Committee, Thirtieth meeting (3 March 1970), para. 14, in *Seventeenth Session*, note 161 above, p. 17. At a later meeting, the Chairman of the Subcommittee provided more details on this approach: “The idea on which [draft article 7] was based was that the State must submit the case to competent authorities for their decision whether legal proceedings should be initiated against the offender. The subcommittee had already encountered difficulty in that, although one could imagine an automatic system whereby the State which did not grant extradition was obliged to prosecute, it was impossible for the subcommittee to express such a thought in absolute form since there was a great number of States in which there was a principle of opportunity of prosecution which left it to the public prosecutor to decide whether or not prosecution should be started and, consequently, it was not considered possible to trespass upon the jurisdiction of the authorities in this regard. Therefore, the Committee had taken this draft from the European Convention on Extradition according to which if the States did not extradite the alleged offender they were bound at least to submit this question to the authorities for their decision as to whether prosecution should be undertaken.” Thirty-sixth meeting (6 March 1970), para. 33, in *Seventeenth Session*, note 161 above, p. 69. Gilbert Guillaume later confirmed that the “Hague formula”, which he qualified as *aut dedere aut persequi*, was inspired by the European Convention on Extradition (G. Guillaume, “Terrorisme et droit international”, *Recueil des cours de l’Académie de droit international*, vol. 215, 1990, pp. 354 and 368).

¹⁶⁴ ICAO, Legal Committee, Thirtieth meeting (3 March 1970), para. 15, in *Seventeenth Session*, note 161 above, p. 17. As for draft article 6 (on procedures for arrest, detention and preliminary enquiry), the Chairman also noted that it was, as draft article 9, borrowed from the Tokyo Convention (*ibid.*, para. 16, p. 17).

¹⁶⁵ Report of the Legal Committee on the Subject of Unlawful Seizure of Aircraft, para. 5, reproduced in *ibid.*, p. 2.

¹⁶⁶ ICAO, Legal Committee, Thirty-fourth meeting (5 March 1970), para. 16, in *Seventeenth Session*, note 161 above, p. 55 (following a vote of the Committee).

¹⁶⁷ Several statements in this regard were made in reaction to a Polish proposal whereby Contracting States would have had the obligation to extradite offenders to the State of registration of the aircraft, without prejudice to the right of the State to grant territorial asylum and the principle of non-extradition of nationals: see the statements of Spain, France, Sweden, the United Kingdom, Italy and Belgium in ICAO, Legal Committee, Thirty-fourth and Thirty-fifth meetings (5 March 1970), in *Seventeenth Session*, note 161 above, pp. 56-59. The Polish proposal was rejected by the Committee (*ibid.*, p. 59).

extradite, an obligation to submit the case to their competent authorities for prosecution.¹⁶⁸

102. In the general debate at the Conference, several delegations pointed out that the unlawful seizure of aircraft was a matter of international concern, and welcomed the negotiation of a convention that would avoid impunity of those responsible of such acts.¹⁶⁹ Some delegations called for a further strengthening of the mechanism to ensure that offenders be brought to justice.¹⁷⁰

103. As mentioned above, the Legal Committee's draft, under article 4, imposed an obligation to establish jurisdiction over the offence only on the State of registration and the State of landing of the aircraft.¹⁷¹ The insertion of paragraph 2 was the result of an amendment justified as follows:

"The reason behind [this] proposal was that Article 7, which obliged States that did not concede extradition to submit the case to their competent authorities for their decision whether to prosecute, would be a dead letter provision if the States did not have jurisdiction under Article 4, paragraphs 1 or 2. Since no mandatory extradition existed under the Convention, it was essential in its absence for the offender to be punished by the courts of the State in which he was held."¹⁷²

104. This proposal was criticized by some delegations, who considered that the original text was designed to provide for jurisdiction in those States most vitally

¹⁶⁸ See "Draft Convention" (SA Doc. No. 4), reproduced in *International Conference*, vol. II, note 158 above, pp. 15-23. Draft article 7 read as follows: "The Contracting State which has taken measures pursuant to Article 6, paragraph 1 [to take the alleged offender into custody or ensure his presence] shall, if it does not extradite the alleged offender, be obliged to submit the case to its competent authorities for their decision whether to prosecute him. These authorities shall take their decision in the same manner as in the case of other offences."

¹⁶⁹ See *International Conference*, vol. I, note 158 above, Second plenary meeting, United States (para. 18, p. 9); Greece (para. 24, p. 10: the hijacker "scorned the international community by undermining confidence in the safety of air travel"); Japan (para. 27, p. 11); Union of Soviet Socialist Republics (para. 32, p. 11: hijacking endangered world security); International Transport Worker's Federation Observer (para. 36, p. 12); Third plenary meeting, Malaysia (para. 1, p. 15: the unlawful seizure of aircraft should be recognized as an "international crime"); Costa Rica (para. 7, p. 15: "hijacking was a grave danger to peace"); Israel (paras. 26 and 28, p. 18); Thailand (para. 32, p. 19: "hijackers should be regarded as enemies of the human kind and consequently be punishable by all"); Tunisia (para. 33, p. 19).

¹⁷⁰ See *International Conference*, vol. I, note 158 above, Second plenary meeting, United States (paras. 20-23, pp. 9-10); Greece (para. 24, p. 10); Japan (para. 26, p. 10); Bulgaria (para. 43, p. 13); Third plenary meeting, Poland (para. 5, p. 15); Canada (para. 20, p. 17); Israel (para. 26, p. 18); the United Kingdom (para. 29, p. 18); Cambodia (para. 30, p. 18); International Air Transport Association Observer (para. 37, p. 19); Czechoslovakia (para. 38, p. 19).

¹⁷¹ Subparagraph 1 (c) was added following the adoption of a joint amendment submitted at the Conference (SA Doc. No. 46): see Ninth meeting of the Commission of the Whole, paras. 12-49, *International Conference*, vol. I, note 158 above, pp. 82-87.

¹⁷² Spain (Eighth meeting of the Commission of the Whole, para. 17, *ibid.*, p. 75), explaining its proposed amendment contained in SA Doc. No. 61 (*ibid.*, vol. II, p. 118). Other amendments similarly aimed at extending the establishment of jurisdiction under article 4 were proposed by the United Arab Republic (SA Doc. No. 11), Switzerland (SA Doc. No. 58), Austria (SA Doc. No. 42) and the United Kingdom (SA Doc. No. 62), but were either superseded by the Spanish proposal or withdrawn in the course of the debate. It should be noted that the amendment proposed by Switzerland provided for permissive (and not compulsory) extraterritorial jurisdiction when the State did not extradite the offender to another Contracting State.

connected with the offence and that the new paragraph would artificially bind together the establishment of jurisdiction and the machinery of extradition.¹⁷³ Nevertheless, the amendment was supported by a majority of delegations, who were of the view that it filled a loophole in the convention,¹⁷⁴ and was adopted by the Conference.¹⁷⁵

105. The text of article 7, as finally adopted, finds its origin in a joint amendment to the Legal Committee's draft that was also proposed at the Conference.¹⁷⁶ The original proposed amendment suggested, in particular, the inclusion of the phrase "whatever the motive for the offence and whether or not the offence was committed in its territory" and the provision by which the competent authorities should take their decision whether to prosecute "in the same manner as in the case of any other ordinary offence [in French: "*infraction de droit commun*"] of a serious nature under the law of that State". While some delegations supported the proposal on the basis that it ensured that prosecution of hijackers would not be inhibited by any political aspects of their offence,¹⁷⁷ other delegations expressed their strong opposition to the revised text.¹⁷⁸ At the consideration of the final draft in plenary, a compromise

¹⁷³ See *International Conference*, vol. I, note 158 above, Eighth meeting of the Commission of the Whole, Jamaica (para. 22, p. 76) and France (para. 37, p. 78). Other delegations held similar views: Zambia (para. 27, p. 76, expressing its preference for jurisdiction of a permissive character); People's Republic of the Congo (para. 28, p. 77); Australia (para. 31, p. 77); Indonesia (para. 40, p. 78); India (para. 42, p. 78).

¹⁷⁴ See *International Conference*, vol. I, note 158 above, Eighth meeting of the Commission of the Whole, Costa Rica (para. 20, p. 75); Mexico (para. 21, p. 75); Venezuela (para. 25, p. 76); International Law Association Observer (para. 26, p. 76); Austria (para. 32, p. 77); Norway (para. 34, p. 77); United States (para. 35, p. 77); Netherlands (para. 36, pp. 77-78); Panama (para. 39, p. 78); Italy (para. 41, p. 78); International Federation of Air Line Pilots' Associations Observer (para. 43, pp. 78-79).

¹⁷⁵ The Commission of the Whole adopted the proposal by 34 votes to 17, with 17 abstentions (*International Conference*, vol. I, note 158 above, Eighth meeting of the Commission of the Whole, para. 53, p. 80). The plenary later adopted article 4, paragraph 2, by 73 votes to none, with one abstention (Ninth plenary meeting, 14 December 1970, para. 54, p. 172).

¹⁷⁶ See SA Doc No. 72 Revised, proposed by 26 delegations, *International Conference*, vol. II, note 158 above, p. 131. The proposal read as follows: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, whatever the motive for the offence and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. These authorities shall take their decision in the same manner as in the case of any other ordinary offence of a serious nature under the law of that State."

¹⁷⁷ See *International Conference*, vol. I, note 158 above, Fifteenth meeting of the Commission of the Whole, Italy (para. 44, p. 130); Argentina (para. 49, p. 130); the United Kingdom (para. 50, p. 131); Sixteenth meeting of the Commission of the Whole, Uganda (para. 10, p. 134); Yugoslavia (para. 11, p. 134); Canada (paras. 13-15, p. 135). See also the amended proposal by Spain (SA Doc. 61) (*International Conference*, vol. II, note 158 above, p. 117: "It appears that the effect of a political motivation should be to create an exception only for the granting of extradition but not for prosecution by the State which holds the offender).

¹⁷⁸ See *International Conference*, vol. I, note 158 above, Fifteenth meeting of the Commission of the Whole, Kenya (para. 45, p. 130); United Arab Republic (para. 46, p. 130 and para. 53, p. 131); United Republic of Tanzania (para. 47, p. 130); Zambia (para. 51, p. 131); Sixteenth meeting of the Commission of the Whole, People's Republic of the Congo (para. 2, p. 133); Malaysia (para. 3, p. 133, arguing that the Convention should not impose an obligation to prosecute, since the legal systems of States provided for varying degrees of discretion with regard to prosecution); Ceylon (para. 7, p. 134); Kuwait (para. 8, p. 134); United Arab Republic (para. 26, p. 136).

text was submitted which replaced the phrase “whatever the motive for the offence” with “without exception whatsoever”,¹⁷⁹ and this amendment was adopted by the Conference.¹⁸⁰

106. In the course of the debate on article 8, it was clarified that this provision obliged Contracting States to include the offence as an extraditable one in extradition treaties, but did not make extradition itself mandatory or automatic.¹⁸¹ Paragraph 2 was added following a proposal whereby, inter alia, “the Contracting States which make extradition conditional on the existence of a treaty *shall* recognize the present Convention as the legal basis for extradition” (emphasis added).¹⁸² While this proposal was justified as filling a loophole in the Legal Committee’s draft with respect to States which make extradition conditional on the existence of a treaty, and thus received some support,¹⁸³ it was opposed by several delegations who did not want the Convention to constitute the basis for extradition.¹⁸⁴ Such concerns were repeated in plenary in the final debate on the draft convention and, following a heated discussion, the proposal was amended to provide that the State concerned “*may at its option* consider this Convention as the

¹⁷⁹ The original proposal from Kenya suggested the phrase “without exception”, but was modified to add the word “whatsoever”, as proposed by the Union of Soviet Socialist Republics, to reflect the wording of General Assembly resolution 2645 (XXV) of 25 November 1970, by which the Assembly condemned, “without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel, whether originally national or international, through the threat of use of force, and all acts of violence which may be directed against passengers”. See *International Conference*, vol. I, note 158 above, Tenth plenary meeting, paras. 8 and 21, pp. 177 and 178.

¹⁸⁰ For the debate, see *International Conference*, vol. I, note 158 above, paras. 7-64, pp. 177-182.

¹⁸¹ Ibid., Twelfth meeting of the Commission of the Whole, International Air Transport Association Observer (para. 26, p. 106); see also United States (para. 16, p. 104) and India (para. 20, p. 105). This point was also made in response to two amendments (SA Doc. No. 6 by Senegal and SA Doc. No. 64 by the United Republic of Tanzania) aimed at modifying the text of the provision to ensure that the Convention did not replace national laws governing extradition, notably on the granting of asylum in cases of political hijackings (see United Republic of Tanzania, para. 11, p. 104). While the amendments were supported by delegations who insisted on the need to respect the sovereignty of States (United Arab Republic (para. 10, p. 104); Tunisia (paras. 17-18, p. 105); Rwanda (para. 19, p. 105); Venezuela (para. 22, p. 105); Ceylon (paras. 23-24, pp. 105-106); Kuwait (para. 25, p. 106)), they were rejected by the Commission of the Whole (paras. 30-31, p. 106). Another proposal by the United Republic of Tanzania to avoid the implication that extradition should be resorted to automatically and to safeguard the validity of existing treaties was also rejected (see Thirteenth meeting of the Commission of the Whole, paras. 39-42, pp. 113-114).

¹⁸² SA Doc. No. 26 Revised, proposed by the Netherlands, *International Conference*, vol. II, note 158 above, p. 66.

¹⁸³ See the Netherlands (*International Conference*, vol. I, note 158 above, Fifteenth meeting of the Commission of the Whole, para. 3, p. 125), pointing out that if the Convention went no further than providing for the situation of States which did not make extradition conditional on the existence of a treaty, the States which needed an extradition treaty could not extradite to countries with which they had no treaty even if they so wished; the Convention would as a consequence “become a kind of extradition treaty”; Canada (paras. 13-14, pp. 126-127); Romania (para. 21, p. 127); the United Kingdom (para. 25, p. 128); Greece (para. 30, p. 129).

¹⁸⁴ See Uganda (para. 7, p. 126 and para. 36, p. 129); Kenya (para. 15, p. 127); Tunisia (para. 18, p. 127); Zambia (para. 19, p. 127); India (para. 23, p. 128); United Republic of Tanzania (para. 28, p. 128).

legal basis for extradition in respect of the offence” (emphasis added).¹⁸⁵ Two further amendments, aimed at giving priority to a request for extradition submitted by the State of registration of the aircraft¹⁸⁶ and at making the offenders subject to extradition to the State of registration regardless of any specific agreement between the States concerned,¹⁸⁷ posed difficulties for several delegations and were set aside. While some delegations also proposed that the Convention contain a provision prohibiting the granting of political asylum to the offender or the refusal of extradition on the ground that the offence was a political act,¹⁸⁸ no corresponding amendment was adopted by the Conference.

(c) Reservations

107. No reservations have been made which affect the relevant provisions of the Convention for the Suppression of Unlawful Seizure of Aircraft.¹⁸⁹

2. Other conventions

(a) Relevant provisions

108. The following conventions, listed in chronological order, contain a provision employing the so-called “Hague formula”: the Organization of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance;¹⁹⁰ the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;¹⁹¹ the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;¹⁹² the European Convention on the Suppression of Terrorism;¹⁹³ the International Convention against the Taking of Hostages;¹⁹⁴ the Convention on the Physical Protection of Nuclear Material;¹⁹⁵ the Inter-American Convention to Prevent and

¹⁸⁵ See *International Conference*, vol. I, note 158 above, tenth and eleventh plenary meetings (14 and 15 December 1970), pp. 182-191. The compromise proposal, submitted by Zambia, was adopted by a roll-call vote of 63 votes to none, with 13 abstentions.

¹⁸⁶ SA Doc. No. 28, proposed by the United States. For the debate on this proposal, see Thirteenth meeting of the Commission of the Whole (paras. 29-38, pp. 112-113). The proposed amendment was withdrawn.

¹⁸⁷ SA Doc. No. 33 Rev. 2, proposed by Poland. For the corresponding debate, in the course of which reference was notably made to the need to preserve other reasons for refusal of extradition, see *International Conference*, vol. I, note 158 above, paras. 10-34, pp. 126-129. The proposed amendment was rejected.

¹⁸⁸ The Polish amendment referred to in the previous footnote specified that none of the parties was obliged to extradite its nationals, but did not provide for any exception for granting political asylum (the Polish delegation indicated that, “in reply to the argument that the principle would encroach upon the right of States to grant political asylum, we said that anyone engaged in truly political activities would hardly commit the crime of hijacking” (Fifteenth meeting of the Commission of the Whole, para. 12, p. 126)). See also second plenary meeting, United States (paras. 20-23, pp. 9-10) and Greece (paras. 24-25, p. 10).

¹⁸⁹ See official website of ICAO, www.icao.int/icao/en/leb/Hague.pdf (as of 1 February 2010).

¹⁹⁰ Washington, D.C., 2 February 1971. United Nations, *Treaty Series*, vol. 1438, No. 24381.

¹⁹¹ Montreal, 23 September 1971. United Nations, *Treaty Series*, vol. 974, No. 14118.

¹⁹² New York, 14 December 1973. United Nations, *Treaty Series*, vol. 1035, No. 15410.

¹⁹³ Strasbourg, 27 January 1977. United Nations, *Treaty Series*, vol. 1137, No. 17828.

¹⁹⁴ New York, 17 December 1979. United Nations, *Treaty Series*, vol. 1316, No. 21931.

¹⁹⁵ Vienna and New York, 3 March 1980. United Nations, *Treaty Series*, vol. 1456, No. 24631.

Punish Torture;¹⁹⁶ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁹⁷ the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism;¹⁹⁸ the 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;¹⁹⁹ the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;²⁰⁰ the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;²⁰¹ the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries;²⁰² the Inter-American Convention on the Forced Disappearance of Persons;²⁰³ the Convention on the Safety of United Nations and Associated Personnel;²⁰⁴ the Inter-American Convention against Corruption;²⁰⁵ the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials;²⁰⁶ the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;²⁰⁷ the International Convention for the Suppression of Terrorist Bombings;²⁰⁸ the Convention on the Protection of the Environment through Criminal Law;²⁰⁹ the Criminal Law Convention on Corruption;²¹⁰ the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict;²¹¹ the International Convention for the Suppression of the Financing of Terrorism;²¹² the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;²¹³ the United Nations Convention against Transnational

¹⁹⁶ Cartagena de Indias, Colombia, 9 December 1985. OAS Treaty Series, No. 67.

¹⁹⁷ New York, 10 December 1984. United Nations, *Treaty Series*, vol. 1465, No. 24841.

¹⁹⁸ Kathmandu, 4 November 1987, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.03.V.9, p. 153.

¹⁹⁹ Montreal, 24 February 1988. United Nations, *Treaty Series*, vol. 1589, No. 14118.

²⁰⁰ Rome, 10 March 1988. United Nations, *Treaty Series*, vol. 1678, No. 29004.

²⁰¹ Vienna, 20 December 1988. United Nations, *Treaty Series*, vol. 1582, No. 27627.

²⁰² New York, 4 December 1989. United Nations, *Treaty Series*, vol. 2163, No. 37789.

²⁰³ Belém do Pará, Brazil, 9 June 1994. *International Legal Materials*, vol. XXV, 1994, p. 1529.

²⁰⁴ New York, 9 December 1994. United Nations, *Treaty Series*, vol. 2051, No. 34547.

²⁰⁵ Caracas, 29 March 1996. See E/1996/99.

²⁰⁶ Washington, D.C., 14 November 1997. United Nations, *Treaty Series*, vol. 2029, No. 35005.

²⁰⁷ Paris, 21 November 1997. S. Treaty Doc. No. 105-43, *International Legal Materials*, vol. XXXVII, 1998, p. 1.

²⁰⁸ New York, 15 December 1997. United Nations, *Treaty Series*, vol. 2149, No. 37517.

²⁰⁹ Strasbourg, 4 November 1998. Council of Europe, *Treaty Series*, No. 172.

²¹⁰ Strasbourg, 27 January 1999. United Nations, *Treaty Series*, vol. 2216, No. 39391.

²¹¹ The Hague, 26 March 1999. United Nations, *Treaty Series*, vol. 2253, No. 3511.

²¹² New York, 9 December 1999. General Assembly resolution 54/109, annex (United Nations, *Treaty Series*, vol. 2178, No. 38349).

²¹³ New York, 25 May 2000. General Assembly resolution 54/263, annex II (United Nations, *Treaty Series*, vol. 2171, No. 27531).

Organized Crime²¹⁴ and its Protocols;²¹⁵ the Council of Europe Convention on Cybercrime;²¹⁶ the African Union Convention on Preventing and Combating Corruption;²¹⁷ the United Nations Convention against Corruption;²¹⁸ the International Convention for the Suppression of Acts of Nuclear Terrorism;²¹⁹ the Council of Europe Convention on the Prevention of Terrorism;²²⁰ the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel;²²¹ the International Convention for the Protection of All Persons from Enforced Disappearance;²²² and the Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism.²²³

109. Most of the conventions listed above also contain a mechanism for the punishment of offenders which appears to be based on that of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the constitutive elements of which are (a) the criminalization of the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) a provision by which States parties undertake to take such measures as may be necessary to establish their jurisdiction over the offence when they have a particular link with it, as well as when the alleged offender is present in their territory and they do not extradite him; (c) provisions regarding measures to take the offender into custody and to proceed to a preliminary inquiry into the facts; (d) a provision under which the State party in whose territory the alleged offender is found shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution; and (d) provisions under which States undertake, under certain conditions, to consider the offence as an extraditable one.

110. While in most of the cases it is apparent that the Convention for the Suppression of Unlawful Seizure of Aircraft has served as a model for the drafting of the relevant provisions, many of these conventions have modified the original terminology, thus sometimes affecting the substance of the obligations undertaken by States parties. In addition, some conventions have provided for a different, or

²¹⁴ New York, 15 November 2000. General Assembly resolution 55/25, annex I (United Nations, *Treaty Series*, vol. 2225, No. 39574).

²¹⁵ Namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, New York, 15 November 2000; the Protocol against the Smuggling of Migrants by Land, Sea and Air, New York, 15 November 2000; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, New York, 8 June 2001. United Nations, *Treaty Series*, vols. 2237, 2241 and 2326, No. 39574.

²¹⁶ Budapest, 23 November 2001. United Nations, *Treaty Series*, vol. 2296, No. 40916.

²¹⁷ Maputo, 11 July 2003. *International Legal Materials*, vol. XLIII, 2004, p. 5.

²¹⁸ New York, 31 October 2003. General Assembly resolution 58/4, annex (United Nations, *Treaty Series*, vol. 2349, No. 42146).

²¹⁹ New York, 13 April 2005. General Assembly resolution 59/290, annex.

²²⁰ Warsaw, 16 May 2005. Council of Europe, *Treaty Series*, No. 196.

²²¹ New York, 8 December 2005. General Assembly resolution 60/42, annex. This Protocol extends the application of the Convention to "all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of: (a) Delivering humanitarian, political or development assistance in peacebuilding, or (b) Delivering emergency humanitarian assistance".

²²² New York, 20 December 2006. General Assembly resolution 61/177, annex.

²²³ Cebu, Philippines, 13 January 2007, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2, p. 336.

sometimes more detailed, regime for the various elements of this mechanism. The most significant variations to the mechanism are described below.

111. All the conventions listed above contain provisions by which the relevant acts are qualified as criminal offences and States undertake to make them punishable under their domestic laws. Most of these conventions further establish that the relevant penalties should take into account the grave nature of the offence concerned.²²⁴ Some conventions explicitly provide that the relevant offence should not be justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.²²⁵

112. Nearly all of the above-mentioned conventions provide that States parties “shall take such measures as may be necessary to establish their jurisdiction” over the offence when they have a special link with that offence (e.g., when the offence

²²⁴ While some conventions (for example, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) adopt the same formula as the Convention for the Suppression of Unlawful Seizure of Aircraft (“make the offence punishable by severe penalties”), most conventions have followed the model of the International Convention against the Taking of Hostages, by which the offence shall be made punishable by “appropriate penalties which take into account the grave nature of these offences” (for example, the Convention on the Physical Protection of Nuclear Material; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; the Convention on the Safety of United Nations and Associated Personnel; the International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; and in similar terms, the Inter-American Convention on Forced Disappearance of Persons; the Council of Europe Convention on the Protection of the Environment through Criminal Law; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; the United Nations Convention against Transnational Organized Crime; the United Nations Convention against Corruption). The International Convention for the Protection of All Persons from Enforced Disappearance refers to the “extreme seriousness” of the offence, which it qualifies, when widespread or systematic, as a crime against humanity. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Criminal Law Convention on Corruption, the Council of Europe Convention on the Prevention of Terrorism and the Council of Europe Convention on Cybercrime refer to “effective, proportionate and dissuasive” penalties. Under the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, States parties are only bound to impose “appropriate penalties” for the offence.

²²⁵ See, for example, the International Convention for the Suppression of Terrorist Bombings (art. 5); the International Convention for the Suppression of the Financing of Terrorism (art. 6); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 6). The OAS Convention to Prevent and Punish Acts of Terrorism states that the relevant crimes “shall be considered common crimes of international significance, regardless of motive” (art. 2).

was committed in their territory or against one of their nationals):²²⁶ these obligatory bases of jurisdiction vary depending on the characteristics of the offence concerned. In addition, some conventions indicate that States parties “may also” establish their jurisdiction over the offence in other cases, thus providing for further voluntary bases of jurisdiction.²²⁷

113. A widespread feature is the additional obligation, based on the Convention for the Suppression of Unlawful Seizure of Aircraft, by which States parties shall take such measures as may be necessary to establish their jurisdiction over the offence in the case where the alleged offender is in their territory and they do not extradite

²²⁶ See the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 5, para. 1); the International Convention against the Taking of Hostages (art. 5, para. 1); the Convention on the Physical Protection of Nuclear Material (art. 8, para. 1); the Inter-American Convention to Prevent and Punish Torture (art. 12, para. 1); the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (art. 9, para. 1); the Inter-American Convention on Forced Disappearance of Persons (art. IV, para. 1); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 1); the Inter-American Convention against Corruption (art. V, para. 1); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. V, para. 1); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 4, para. 1); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 1); the Council of Europe Convention on the Protection of the Environment through Criminal Law (art. 5, para. 1); the Council of Europe Criminal Law Convention on Corruption (art. 17, para. 1); the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (art. 16, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 1); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 1); the United Nations Convention against Transnational Organized Crime (art. 15, para. 1); the African Union Convention on Preventing and Combating Corruption (art. 13); the United Nations Convention against Corruption (art. 42, para. 1); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 9, para. 1); the Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 1); the ASEAN Convention on Counter-Terrorism (art. VII, para. 1). The International Convention for the Protection of All Persons from Enforced Disappearance uses a different expression which appears to have the same scope (“Each State Party shall take the necessary measures *to establish its competence to exercise jurisdiction* over the offence of enforced disappearance ...” (emphasis added) (art. 9, para. 1). While also imposing such an obligation on States parties in certain cases, the Council of Europe Convention on Cybercrime provides that each party may reserve the right not to apply or to apply only in specific cases or conditions the relevant rules in all cases, except that of a crime committed on its territory (art. 22, paras. 1 and 2).

²²⁷ See the Convention on the Physical Protection of Nuclear Material (art. 8, para. 4); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 2); the Inter-American Convention against Corruption (art. V, para. 2); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. V, para. 2); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 2); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 2); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 2); the United Nations Convention against Transnational Organized Crime (art. 15, para. 2); the United Nations Convention against Corruption (art. 42, para. 2); the Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 2); the ASEAN Convention on Counter-Terrorism (art. VII, para. 2).

him.²²⁸ There are several variants to the latter provision, which in some cases appear to be purely terminological²²⁹ and in others seem to affect the content of the

²²⁸ See the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 5, para. 2) and its Supplementary Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (art. III); the European Convention on the Suppression of Terrorism (art. 6, para. 1); the International Convention against the Taking of Hostages (art. 5, para. 2); the Convention on the Physical Protection of Nuclear Material (art. 8, para. 2); the Inter-American Convention to Prevent and Punish Torture (art. 12, para. 2); the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (art. 9, para. 1); the Inter-American Convention on Forced Disappearance of Persons (art. IV, para. 2); the Convention on the Safety of United Nations and Associated Personnel (art. 10, para. 4); the Inter-American Convention against Corruption (art. V, para. 3); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. V, para. 3); the International Convention for the Suppression of Terrorist Bombings (art. 6, para. 4); the Council of Europe Convention on the Protection of the Environment through Criminal Law (art. 5, para. 2); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 4); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 3); the United Nations Convention against Transnational Organized Crime (art. 15, para. 3); the Council of Europe Convention on Cybercrime (art. 22, para. 3); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 9, para. 4); the Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 3); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 2); the ASEAN Convention on Counter-Terrorism (art. VII, para. 3). A notable exception is the SAARC Regional Convention on the Suppression of Terrorism, which does not establish an obligatory basis of jurisdiction when the alleged offender is present in the territory of a Contracting State and it does not extradite him or her, providing only that each Contracting State “may take such measures as it deems appropriate, consistent with its national laws, subject to reciprocity, to exercise its jurisdiction” for the relevant offences (art. V).

²²⁹ Some conventions only omit the term “likewise” in the provision (for example, the Convention on the Safety of United Nations and Associated Personnel; the Inter-American Convention against Corruption; the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; the Council of Europe Convention on Cybercrime) or replace it with “also” (the Inter-American Convention to Prevent and Punish Torture (art. 12, para. 2) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 3)). Although worded differently, the relevant provisions in the Inter-American Convention on Forced Disappearance of Persons (art. IV) and the Inter-American Convention to Prevent and Punish Torture (art. 12, para. 2) seem to imply the same obligation. Under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 5, para. 2) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 2), each State party is under this obligation when the alleged offender is present “in any territory under its jurisdiction” (in the preparatory works of the Convention against Torture, it was explained that this wording would cover acts inflicted “aboard ships or aircrafts registered in the State concerned as well as occupied territories (report of the Working Group (E/CN.4/L.1470), reproduced in *Report of the Commission on Human Rights on its Thirty-fifth Session (12 February-16 March 1979)*, *Economic and Social Council, Official Records, 1979, Supplement No. 6*, p. 39). The Inter-American Convention to Prevent and Punish Torture uses the terms “within the area under its jurisdiction” (art. 12, para. 2). The European Convention on the Suppression of Terrorism, the Council of Europe Convention on the Protection of the Environment through Criminal Law, the Criminal Law Convention on Corruption and the Council of Europe Convention on Cybercrime specify that this basis of jurisdiction is triggered when the State Party does not extradite the alleged offender “after a request for extradition” (it appears that the corresponding provision in the Convention for the Suppression of Unlawful Seizure of Aircraft was also included on the assumption that such a request would have been made (see the Spanish original proposal for this provision in *International Conference*, vol. II, note 158 above, p. 117).

obligation.²³⁰ In particular, some conventions impose such an obligation to establish jurisdiction only when extradition is denied on the ground that the offender is one of the nationals of the State concerned;²³¹ some conventions combine a regime of obligatory jurisdiction in some cases of refusal to extradite (particularly in the case of non-extradition of nationals) and of voluntary jurisdiction in others.²³² On one occasion, the “third alternative” is contemplated in this context, by it being provided that this basis of universal jurisdiction shall apply unless the State “extradites or surrenders [the alleged offender] to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized” (emphasis added).²³³ In addition, some conventions contain a provision calling on States parties to coordinate their actions whenever more than one of them claims jurisdiction over the relevant offences.²³⁴

114. Almost all the conventions concerned further clarify, in a similar manner to that of the Convention for the Suppression of Unlawful Seizure of Aircraft, that they

²³⁰ The Council of Europe Convention on the Prevention of Terrorism and the European Convention on the Suppression of Terrorism seem to limit the scope of the provision, in that they impose such an obligation only when the State Party in whose territory the alleged offender is present does not extradite him or her to a Party “whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party”. For certain offences, the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict imposes upon States parties an obligation to take the necessary legislative measures to establish their jurisdiction when the alleged offender is present in their territory (without any reference to a refusal to extradite) (art. 16, para. 1).

²³¹ See the Inter-American Convention against Corruption (art. V, para. 3); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. V, para. 3); the Council of Europe Criminal Law Convention on Corruption (art. 17, para. 3); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 4, para. 3); the Council of Europe Convention on Cybercrime (art. 22, para. 3).

²³² The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 4, para. 2) imposes an obligation to establish jurisdiction on the State that does not extradite the alleged offender on the grounds that the offence was committed in its territory or on board one of its vessels or aircrafts or that it was committed by one of its nationals, and provides that States “may also” establish jurisdiction in other cases of refusal. In the preparatory works, it was observed that the Convention did not intend to create universal jurisdiction for the relevant offences (see report of the open-ended intergovernmental expert group, *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Vienna, 25 November-20 December 1988), *Official Records*, vol. I, p. 38). The United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption contain split provisions for the case in which the State does not extradite the person on the ground that he or she is one of its nationals (for which there is an obligation to establish jurisdiction) and for the other cases of refusal to extradite (for which States parties only have the option to establish jurisdiction).

²³³ See the International Convention for the Protection of All Persons from Enforced Disappearance (art. 9, para. 2).

²³⁴ See the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 4, para. 3); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 5); the United Nations Convention against Transnational Organized Crime (art. 15, para. 5); the Council of Europe Convention on Cybercrime (art. 22, para. 5); the United Nations Convention against Corruption (art. 42, para. 5); the Council of Europe Convention on the Prevention of Terrorism (art. 14, para. 5).

do not exclude any criminal jurisdiction exercised in accordance with national law.²³⁵

115. Most of the conventions listed above contain provisions relating to the taking into custody of the offender for the purposes of extradition or prosecution, preliminary inquiry into the facts and other mechanisms of cooperation in criminal matters²³⁶

116. While many conventions have followed the formulation of the provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft whereby the State shall, if it does not extradite the alleged offender, submit the case to its competent authorities for the purpose of prosecution,²³⁷ several variants have appeared over time. In some cases, the alterations to the original model seem to be of a purely terminological nature.²³⁸ In other instances, they either affect the scope of the obligation or provide more details on the applicable regime. The main variants are the following:

²³⁵ Some conventions also safeguard any applicable rule of international law which may affect the establishment of jurisdiction; see the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (art. 16, para. 2 (a)); the International Convention for the Suppression of the Financing of Terrorism (art. 7, para. 6); the United Nations Convention against Transnational Organized Crime (art. 15, para. 6); the United Nations Convention against Corruption (art. 42, para. 6).

²³⁶ These mechanisms will not be examined in detail in the present study.

²³⁷ Only one convention appears to have adopted the same wording as article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft, namely the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 7). On the other hand, conventions in the Inter-American context, while containing provisions which seem to follow substantively the same regime, appear to have been formulated without following the model of the Convention for the Suppression of Unlawful Seizure of Aircraft (see the Inter-American Convention to Prevent and Punish Torture (art. 14); the Inter-American Convention on Forced Disappearance of Persons (art. VI); the Inter-American Convention against Corruption (art. XIII); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX, para. 6)). A peculiar case is that of the Council of Europe Convention on the Protection of the Environment through Criminal Law, which, while obliging States parties to establish their jurisdiction over the relevant offences in cases where an alleged offender is present in their territory and they do not extradite him to another party after a request for extradition (see above), does not contain a provision requiring States parties, if they do not extradite, to submit the case to their competent authorities for prosecution.

²³⁸ Some conventions replace the word “found” with “present” (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 7); the Convention on the Physical Protection of Nuclear Material (art. 10); the International Convention for the Suppression of Terrorist Bombings (art. 8, para. 1); the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 10, para. 1); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 11, para. 1); the ASEAN Convention on Counter-Terrorism (art. XIII, para. 1)). Some conventions simplify the expression “shall ... be obliged ... to submit” to “shall submit” (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 7); the Convention on the Physical Protection of Nuclear Material (art. 10); the Council of Europe Criminal Law Convention on Corruption (art. 27, para. 5); the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 1)).

(a) Preliminarily, it should be noted that not all the conventions place the said provision in the same position in the overall structure of the treaty²³⁹ and that, when the relevant provisions include a title, this title varies;²⁴⁰

(b) As regards the State subject to the obligation, some conventions provide that the provision shall apply to States “in the territory under whose jurisdiction” the alleged offender is found;²⁴¹

(c) With regard to the triggering of the obligation, all the relevant conventions refer to the hypothesis of a State that “does not extradite” the alleged offender. Some conventions specify that a prior request for extradition is needed;²⁴² other conventions provide that the obligation is only applicable when extradition is

²³⁹ Most of the conventions follow the same structure as the Convention for the Suppression of Unlawful Seizure of Aircraft, placing the article imposing the obligation to prosecute failing extradition before that on extradition. Some conventions, however, adopt the inverse order (for example, the European Convention on the Suppression of Terrorism; the Inter-American Convention to Prevent and Punish Torture; the SAARC Regional Convention on the Suppression of Terrorism; the Inter-American Convention on Forced Disappearance of Persons). Some other conventions provide for the alternative of prosecution when extradition is not granted as a paragraph of the article on extradition (for example, the Inter-American Convention against Corruption (art. XIII, para. 6); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX, para. 6); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 3); the Council of Europe Criminal Law Convention on Corruption (art. 27, para. 5); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, para. 5); the United Nations Convention against Transnational Organized Crime (art. 16, para. 10); the Council of Europe Convention on Cybercrime (art. 24, para. 6); the African Union Convention on Preventing and Combating Corruption (art. 15, para. 6); the United Nations Convention against Corruption (art. 44, para. 11); the ASEAN Convention on Counter-Terrorism (art. XIII, para. 1)).

²⁴⁰ Titles to this provision include: “Prosecution of alleged offenders” (Convention on the Safety of United Nations and Associated Personnel (art. 14)), “Prosecution” (Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (art. 17)), “Extradite or prosecute” (Council of Europe Convention on the Prevention of Terrorism (art. 18)). In addition, as mentioned in the previous note, the provision is sometimes a paragraph of the article entitled “extradition”.

²⁴¹ See the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 1) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 11, para. 1).

²⁴² See the European Convention on the Suppression of Terrorism (art. 7); the SAARC Regional Convention on the Suppression of Terrorism (art. IV); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, para. 5).

refused for specific reasons (notably, the nationality of the offender);²⁴³ in one instance, explicit reference is additionally made to the refusal of the State to surrender the alleged offender to an international criminal tribunal (the so-called “third alternative”);²⁴⁴

(d) With regard to the submission of the case to competent authorities, some conventions require that a request to this effect be made by the State seeking extradition.²⁴⁵ While the condition that such a submission be made “without exception whatsoever and whether or not the offence was committed in its territory” has been included in some conventions,²⁴⁶ it has sometimes been omitted, modified

²⁴³ See the OAS Convention to Prevent and Punish Acts of Terrorism (art. 5, which applies when extradition “is not in order because the person sought is a national of the requested State, or because of some other legal or constitutional impediment”); the Inter-American Convention against Corruption (art. XIII, which applies when extradition “is refused solely on the basis of the nationality of the person sought, or because the Requested State deems that it has jurisdiction over the offence”); the submission to the competent authorities for prosecution is however subject to the agreement of the requesting State, who should also be informed of the final outcome of the proceedings); the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX, para. 6, which applies if extradition “is refused solely on the basis of the nationality of the person sought”); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 3: the provision applies to a “Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national”); the Council of Europe Criminal Law Convention on Corruption (art. 27, para. 5: the obligation is triggered either if extradition is refused “solely on the basis of the nationality of the person sought” or “because the requested Party deems that it has jurisdiction over the offence”); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, para. 5: provides that the obligation applies if the “requested State Party does not or will not extradite on the basis of the nationality of the offender”); the United Nations Convention against Transnational Organized Crime (art. 16, para. 10: “if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals”); the Council of Europe Convention on Cybercrime (art. 24, para. 6, which applies if extradition “is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence”); the submission to the competent authorities for prosecution is made at the request of the requesting Party, who should be informed of the final outcome); the African Union Convention on Preventing and Combating Corruption (art. 15, para. 6: when the State Party “has refused to extradite that person on the basis that it has jurisdiction over offences”); the United Nations Convention against Corruption (art. 44, para. 11: “solely on the ground that [the alleged offender] is one of its nationals”). A particular case is that of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 9), which establishes a different regime for the cases of refusal of extradition on the ground that the offence was committed in the State’s territory or on board one of its vessels or aircrafts, and on other grounds (see the applicable regime on the establishment of jurisdiction in this convention, as described in note 232 above).

²⁴⁴ International Convention for the Protection of All Persons from Enforced Disappearance (art. 11, para. 1).

²⁴⁵ See the United Nations Convention against Transnational Organized Crime (art. 16, para. 10); the Council of Europe Convention on Cybercrime (art. 24, para. 6); the United Nations Convention against Corruption (art. 44, para. 11).

²⁴⁶ See the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 7); the International Convention against the Taking of Hostages (art. 8, para. 1); the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (art. 12). Interestingly, by employing the expression “without exception whatsoever”, these conventions include in their respective regimes a condition that was originally adopted in the Convention for the Suppression of Unlawful Seizure of Aircraft with reference to a General Assembly resolution condemning the unlawful seizure of aircraft (see note 179 above).

or supplemented with the further condition that the submission shall be made “without undue delay”;²⁴⁷

(e) Most conventions provide, as does the Convention for the Suppression of Unlawful Seizure of Aircraft, that the submission to the competent authorities shall be made “for the purpose of prosecution”.²⁴⁸ Some conventions also mention the conditions that such submission be made “through proceedings in accordance with

²⁴⁷ In the preparatory works of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the omission of the phrase “without exception whatsoever and whether or not the offence was committed in its territory” was justified by its being superfluous in view of the previous provision in the same convention on extraterritorial jurisdiction (*Yearbook of the International Law Commission* 1972, vol. II, p. 318). In the same convention, the insertion of the phrase “without undue delay” was based on an idea present in the OAS Convention to Prevent and Punish Acts of Terrorism, and aimed at ensuring that “the actual implementation of the obligation may not be frustrated by unjustifiably allowing the passing of time” and that “the alleged offender will not be kept in preventive custody beyond what is reasonable and fair” (ibid.).

The expression “without exception whatsoever and whether or not the offence was committed in its territory” is omitted, for example, from the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 1); the Inter-American Convention on Forced Disappearance of Persons (art. VI); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX, para. 6).

The expression is maintained, but supplemented with the condition that the submission shall be “without delay” or “without undue delay”, in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 10, para. 1); the International Convention for the Suppression of Terrorist Bombings (art. 8, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 10, para. 1); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 11, para. 1); the Council of Europe Convention on the Prevention of Terrorism (art. 18, para. 1); the ASEAN Convention on Counter-Terrorism (art. XIII, para. 1).

The phrase “whether or not the offence was committed in its territory” is replaced with “without undue delay” in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 7); the European Convention on the Suppression of Terrorism (art. 7); the Convention on the Physical Protection of Nuclear Material (art. 10); the Convention on the Safety of United Nations and Associated Personnel (art. 14); the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 1).

The United Nations Convention against Transnational Organized Crime (art. 16, para. 10), the African Union Convention on Preventing and Combating Corruption (art. 15, para. 6) and the United Nations Convention against Corruption (art. 44, para. 11) only impose the condition of “without undue delay”. The SAARC Regional Convention on the Suppression of Terrorism (art. IV) uses the expression “without exception and without delay”.

²⁴⁸ Some conventions are more specific: the Inter-American Convention to Prevent and Punish Torture (art. 14) and the Inter-American Convention on Forced Disappearance of Persons (art. VI) refer to submission “for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law”; the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX, para. 6) refers to submission “for the purpose of prosecution under the criteria, laws, and procedures applied by the Requested State to those offenses when they are committed in its own territory”.

the laws of” the State concerned²⁴⁹ and/or “as if the offense had been committed within its jurisdiction”;²⁵⁰

(f) With respect to the proceedings initiated against the alleged offender, almost all the conventions examined contain a provision, similar to the one in the Convention for the Suppression of Unlawful Seizure of Aircraft, by which the competent authorities shall take their decision on whether to prosecute as in the case of any ordinary offence of a grave nature under domestic law. Certain conventions spell out conditions that shall be respected during the proceedings, for instance as regards the standards of evidence required for prosecution,²⁵¹ cooperation among States on evidentiary and procedural matters,²⁵² or guarantees of fair treatment of

²⁴⁹ The first convention that includes this phrase is the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 7), which also omits the second sentence of the paragraph. This was indeed justified by the fact that the said phrase covered “all the desirable effect” of the second sentence, namely to provide a necessary degree of tolerance to the officials charged with making the decision to prosecute or not to prosecute (*Yearbook of the International Law Commission 1972*, vol. II, pp. 318-319). It should be noted, however, that with the exception of the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (article 17, paragraph 1, of which uses the slightly different wording “through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law”, but also omits the second sentence), all subsequent conventions containing this phrase also include the second sentence: the International Convention against the Taking of Hostages (art. 8, para. 1); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 10, para. 1); the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (art. 12); the Convention on the Safety of United Nations and Associated Personnel (art. 14); the International Convention for the Suppression of Terrorist Bombings (art. 8, para. 1); the International Convention for the Suppression of the Financing of Terrorism (art. 10, para. 1); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 11, para. 1); the Council of Europe Convention on the Prevention of Terrorism (art. 18, para. 1); the ASEAN Convention on Counter-Terrorism (art. XIII, para. 1).

²⁵⁰ The Inter-American Convention to Prevent and Punish Torture (art. 14); the Inter-American Convention on Forced Disappearance of Persons (art. VI); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX, para. 6).

²⁵¹ See the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 2) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 11, para. 2). This provision was included in the Convention against Torture to alleviate some of the concerns expressed by delegations with respect to the exercise of universal jurisdiction, in particular regarding the risk of discrepancies as to the standards of evidence (see report of the open-ended working group on a draft convention against torture and other cruel, inhuman or degrading treatment or punishment (A/CN.4/1982/L.40, 5 March 1982), para. 28).

²⁵² The United Nations Convention against Transnational Organized Crime (art. 16, para. 10, included on a proposal by China at the fourth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (A/AC.254/L.64, 8 July 1999)) and the United Nations Convention against Corruption (art. 44, para. 11) provide that “[t]he States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution”.

the alleged offender at all stages of the proceedings.²⁵³ Some conventions provide for general conditions for the prosecution of the relevant offences (e.g., non-applicability of, or conditions on, statutes of limitations, inadmissibility of the defence of superior orders, exclusion of trial by special jurisdictions), which would also apply in the case of prosecution under the provision which imposes the obligation to prosecute, unless extradition occurs;²⁵⁴

(g) Some conventions indicate that an extradition granted upon the condition that the person be returned to the State to serve the sentence is sufficient to discharge the obligations under the convention;²⁵⁵

²⁵³ See the International Convention against the Taking of Hostages (art. 8, para. 2: this provision was included on an original proposal by the Federal Republic of Germany (A/AC.188/L.3, 22 July 1977)); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 7, para. 3); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 10, para. 2); the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (art. 11); the Convention on the Safety of United Nations and Associated Personnel (art. 17); the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (art. 17, para. 2, which also contains a reference to the applicable guarantees under international law); the United Nations Convention against Transnational Organized Crime (art. 16, para. 13); the United Nations Convention against Corruption (art. 44, para. 14); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 12, also with a reference to the standards of the international law of human rights); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 11, para. 3). See also the OAS Convention to Prevent and Punish Acts of Terrorism (art. 4, then referred to in art. 5), under which “any person deprived of his freedom through the application of the convention shall enjoy the legal guarantees of due process”.

²⁵⁴ See the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3, para. 8); the Inter-American Convention on Forced Disappearance of Persons (arts. VII-IX); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 8).

²⁵⁵ Under these conventions, whenever a State party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in the article. See the International Convention for the Suppression of Terrorist Bombings (art. 8, para. 2: the provision was included on a proposal by Canada and China (A/AC.252/1997/WP.29) and, while not intended to substitute for the general obligation to extradite or prosecute, was aimed at making it possible for States whose national laws prohibited extradition of their nationals to comply with the provisions of the convention (informal summary of the discussions in the plenary and in the working group, prepared by the Rapporteur, report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 37* (A/52/37), annex IV, para. 78); the International Convention for the Suppression of the Financing of Terrorism (art. 10, para. 2); the United Nations Convention against Transnational Organized Crime (art. 16, para. 11); the United Nations Convention against Corruption (art. 44, para. 12); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 11, para. 2); the Council of Europe Convention on the Prevention of Terrorism (art. 18, para. 2)).

(h) Some conventions provide that prosecution under this provision is subject to the possibility for the State requesting extradition and the requested State to agree otherwise;²⁵⁶

(i) Finally, some conventions impose upon the requested State the obligation to report the final outcome of the proceedings to the requesting State.²⁵⁷

117. Most of the above-mentioned conventions contain a provision on extradition modelled on the Convention for the Suppression of Unlawful Seizure of Aircraft and including the same constitutive elements of the regime of extradition spelled out therein.²⁵⁸ Some conventions, however, adopt a different approach, in which the various provisions on extradition are spread out in the text of the treaty.²⁵⁹ The main variants of the regime of extradition are the following:²⁶⁰

²⁵⁶ The Inter-American Convention against Corruption (art. XIII); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX, para. 6); the Council of Europe Criminal Law Convention on Corruption (art. 27, para. 5); the African Union Convention on Preventing and Combating Corruption (art. 15, para. 6). See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 9), which conditions the submission to the competent authorities either to the agreement of the requesting State (in cases in which extradition was refused on the ground that the offence was committed on the requested State's territory or on board one of its vessels or aircrafts) or to its contrary request to preserve its legitimate jurisdiction (in other cases).

²⁵⁷ See the Inter-American Convention to Prevent and Punish Torture (art. 14); the Council of Europe Criminal Law Convention on Corruption (art. 27, para. 5); the African Union Convention on Preventing and Combating Corruption (art. 15, para. 6).

²⁵⁸ See the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 8); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 8); the International Convention against the Taking of Hostages (art. 10); the Convention on the Physical Protection of Nuclear Material (art. 11); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 8); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 11); the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (art. 15); the Convention on the Safety of United Nations and Associated Personnel (art. 15); the Inter-American Convention against Corruption (art. XIII); the International Convention for the Suppression of Terrorist Bombings (art. 9); the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (art. 18); the International Convention for the Suppression of the Financing of Terrorism (art. 11); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, paras. 1 to 4); the United Nations Convention against Transnational Organized Crime (art. 16); the Council of Europe Convention on Cybercrime (art. 24); the United Nations Convention against Corruption (art. 44); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 13); the Council of Europe Convention on the Prevention of Terrorism (art. 19); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13).

²⁵⁹ See the European Convention on the Suppression of Terrorism and the SAARC Regional Convention on the Suppression of Terrorism (which adopts a structure similar to that of the European Convention). See also the other regional conventions against terrorism described at the end of this section.

²⁶⁰ References in the footnotes hereinafter are limited to those conventions that contain substantive changes to the regime provided for under the Convention for the Suppression of Unlawful Seizure of Aircraft.

(a) Some conventions determine that their rules on extradition apply provided that the relevant offence is punishable in both the requesting and the requested States;²⁶¹

(b) Most conventions specify, as does the Convention for the Suppression of Unlawful Seizure of Aircraft, that the relevant offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between States parties and that such States undertake to include the offence as an extraditable offence in every extradition treaty to be concluded among them;

(c) Similarly to the Convention for the Suppression of Unlawful Seizure of Aircraft, many conventions contain distinct provisions by which (a) States parties which make extradition conditional on the existence of a treaty, if they receive a request for extradition, may consider the convention as the legal basis for extradition in respect of the offence;²⁶² and (b) States parties which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves.²⁶³ The relevant conventions further specify, as does the 1970 Convention for the Suppression of Unlawful Seizure of

²⁶¹ See the United Nations Convention against Transnational Organized Crime (art. 16, para. 1); the Council of Europe Convention on Cybercrime (art. 24, para. 1); the United Nations Convention against Corruption (art. 44, para. 1; see however para. 2: a State may also grant extradition when the offence is not punishable under its domestic law). See, however, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 4), according to which the condition of dual criminality “shall be deemed to be fulfilled” for the purpose of extradition for the relevant offence.

²⁶² The expression “at its option”, contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, is sometimes omitted (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 8, para. 2); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art. 8, para. 2); the Inter-American Convention to Prevent and Punish Torture (art. 13, para. 2); the Inter-American Convention on Forced Disappearance of Persons (art. V); the Inter-American Convention against Corruption (art. XIII); the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 2); the Council of Europe Criminal Law Convention on Corruption (art. 27, para. 2); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (art. 5, para. 2); the United Nations Convention against Transnational Organized Crime (art. 16, para. 4)). Under the United Nations Convention against Transnational Organized Crime (art. 16, para. 5) and the United Nations Convention against Corruption (art. 44, para. 6), such States shall, at the time of deposit of their instrument of ratification, acceptance, approval of or accession to the convention, inform the Secretary-General of the United Nations whether they will take the convention as the legal basis for cooperation on extradition with other States parties to the convention, and, if they do not, seek, where appropriate, to conclude treaties on extradition with other States parties to the convention in order to implement the provision on extradition.

²⁶³ The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10) and the ASEAN Convention on Counter-Terrorism (art. XIII) do not refer to this hypothesis.

Aircraft, that these provisions remain subject to the conditions provided by the law of the requested State;²⁶⁴

(d) Most conventions also provide, as does the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, that the relevant offence shall be treated, for the purpose of extradition, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction over the offence in accordance with the relevant convention;²⁶⁵

(e) Some conventions provide that, for the purpose of extradition, the relevant offences shall not be regarded as political offences;²⁶⁶ some conventions further add that, accordingly, a request for extradition may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.²⁶⁷ Under certain conventions, States parties may not refuse a request for extradition on the sole

²⁶⁴ Reference is sometimes made in particular to the procedural provisions of the domestic law (for example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents). In some conventions, the reference to domestic law is made in a separate paragraph (for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 5); the Inter-American Convention on Forced Disappearance of Persons (art. V); the United Nations Convention against Transnational Organized Crime (art. 16, para. 7); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 6)). The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 5), the Inter-American Convention against Corruption (art. XIII), the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX), the Council of Europe Criminal Law Convention on Corruption (art. 27, para. 4) and the Council of Europe Convention on Cybercrime (art. 24, para. 5) provide that extradition shall be subject to the conditions provided for by the law of the requested State or “by applicable extradition treaties, including the grounds on which the requested State may refuse extradition” (see also the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 10, para. 4)). The United Nations Convention against Transnational Organized Crime (art. 16, para. 7), the United Nations Convention against Corruption (art. 44, para. 8) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 6) state that extradition shall be subject “to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition”.

²⁶⁵ This provision is not included in some conventions adopting the model of the Convention for the Suppression of Unlawful Seizure of Aircraft (for example, the Inter-American Convention against Corruption (art. XIII) and the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (art. XIX)).

²⁶⁶ See the European Convention on the Suppression of Terrorism (arts. 1 and 2); the SAARC Regional Convention on the Suppression of Terrorism (arts. I and II); the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3, para. 10); the Inter-American Convention on Forced Disappearance of Persons (art. V); the United Nations Convention against Corruption (art. 44, para. 4); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 1).

²⁶⁷ See the International Convention for the Suppression of Terrorist Bombings (art. 11); the International Convention for the Suppression of the Financing of Terrorism (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 (art. 20, para. 1).

ground that the offence is also considered to involve fiscal matters.²⁶⁸ Certain conventions specify that their provisions shall not be interpreted so as to impair the right of asylum;²⁶⁹

(f) Some conventions provide that a request for extradition shall not be granted in certain circumstances, which include: (i) if the requested State Party has substantial grounds for believing that the request is made for the purpose of prosecuting or punishing a person on discriminatory grounds and/or that the person's position may be prejudiced for that reason;²⁷⁰ (ii) where there are substantial grounds for believing that the person would be in danger of being subjected to torture;²⁷¹ (iii) if the requested Party has substantial grounds for believing that the person's position may be prejudiced because communication with the appropriate authorities of the State entitled to exercise rights of protection cannot be effected;²⁷² or (iv) if it appears to the requested State that it is unjust or inexpedient to surrender or return the fugitive offender by reason of the trivial nature of the case, by reason of the request for the surrender or return of a fugitive offender not being made in good faith or in the interests of justice, or for any other reason.²⁷³ Some other conventions require the requested State, in considering a request for extradition, to pay due regard to whether the alleged offender's rights

²⁶⁸ See the United Nations Convention against Transnational Organized Crime (art. 16, para. 15); the United Nations Convention against Corruption (art. 44, para. 16); the ASEAN Convention on Counter-Terrorism (art. XIV). See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3, para. 10).

²⁶⁹ See the OAS Convention to Prevent and Punish Acts of Terrorism (art. 6); the International Convention on the Taking of Hostages (art. 15); the Inter-American Convention to Prevent and Punish Torture (art. 15).

²⁷⁰ See the European Convention on the Suppression of Terrorism (art. 5: this clause was justified by the need to comply with the requirements of the protection of human rights and fundamental freedoms as enshrined in the European Convention on Human Rights and was modelled on article 3, paragraph 2, of the European Convention on Extradition (see explanatory report on the Convention on the Suppression of Terrorism, available at <http://conventions.coe.int/Treaty/en/Reports/Html/090.htm>)); the International Convention against the Taking of Hostages (art. 9, paras. 1 (a) and (b)); the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 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 (art. 16, para. 14); the United Nations Convention against Corruption (art. 44, para. 15); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 16); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 13, para. 7). The possible grounds of discrimination are generally explicitly listed and vary depending on the convention.

²⁷¹ See the Convention against Torture (art. 3) and the Inter-American Convention to Prevent and Punish Torture (art. 13, para. 4, also referring to the case in which the person will be tried by special or ad hoc courts in the requesting State).

²⁷² See the International Convention against the Taking of Hostages (art. 9, para. 1 (b)). This provision was included on a proposal by Jordan (A/AC.188/WG.II/CPR.9, submitted at the 1979 session of the Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages) which aimed at incorporating into the Convention safeguards to prevent potential abuse in the context of extradition proceedings. It was felt that the exercise of legal and diplomatic protection would ensure a fair trial and avoid miscarriage of justice (see the statement by Mr. Al-Khasawneh (Jordan) in the debate in the Sixth Committee, *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee, 12th meeting* (A/C.6/34/SR.12)).

²⁷³ See the SAARC Regional Convention on the Suppression of Terrorism (art. VII).

(including that of communication with representatives of his State of nationality) can be effected in the requesting State;²⁷⁴

(g) Three conventions impose further obligations enhancing cooperation and effectiveness in extradition proceedings. Under these conventions: (i) the States parties, subject to their domestic law, shall endeavour to expedite the relevant extradition procedures and to simplify evidentiary requirements relating thereto;²⁷⁵ (ii) before refusing extradition, the requested party shall, where appropriate, consult with the requesting State party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation;²⁷⁶ and/or (iii) States parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition;²⁷⁷

(h) Some conventions specify that, with respect to the relevant offences, the provisions of all extradition treaties and arrangements applicable between States parties are modified as between States parties to the extent that they are incompatible with the convention.²⁷⁸

118. A separate mention should be made of certain regional conventions against crimes of international concern, particularly terrorism. In the African region, the Organization of African Unity (OAU) Convention for the elimination of mercenarism in Africa²⁷⁹ uses a wording similar to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, whereby “[e]ach contracting State shall undertake such measures as may be necessary to punish ... any person who commits an offence ... and who is found on its territory if it does not extradite him to the State against which the offence has been committed” (article 8); it then provides that “[a] request for extradition shall not be refused unless the requested State undertakes to exercise jurisdiction over the offender” in accordance with that article (article 9, paragraph 2) and that “[w]here a national is involved in the request for extradition, the requested State shall take proceedings against him for the offence committed if extradition is refused” (article 9, paragraph 2). The OAU

²⁷⁴ See the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 11, para. 6).

²⁷⁵ See the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 7); the United Nations Convention against Transnational Organized Crime (art. 16, para. 8); the United Nations Convention against Corruption (art. 44, para. 9).

²⁷⁶ See the United Nations Convention against Transnational Organized Crime (art. 16, para. 16) and the United Nations Convention against Corruption (art. 44, para. 17).

²⁷⁷ See the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 11); the United Nations Convention against Transnational Organized Crime (art. 16, para. 17) and the United Nations Convention against Corruption (art. 44, para. 18).

²⁷⁸ See the European Convention on the Suppression of Terrorism (art. 3, which had the purported effect of modifying article 3, paragraph 1, of the European Convention on Extradition (see explanatory report on the European Convention on the Suppression of Terrorism, note 270 above); the International Convention against the Taking of Hostages (art. 9, para. 2); the SAARC Regional Convention on the Suppression of Terrorism (art. III, para. 1); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 11, para. 7); the International Convention for the Suppression of Terrorist Bombings (art. 9); the International Convention for the Suppression of the Financing of Terrorism (art. 11); the International Convention for the Suppression of Acts of Nuclear Terrorism (art. 13, para. 5); the Council of Europe Convention on the Prevention of Terrorism (art. 19, para. 5).

²⁷⁹ Libreville, 3 July 1977. United Nations, *Treaty Series*, vol. 1490, No. 25573.

Convention on the Prevention and Combating of Terrorism,²⁸⁰ while adopting a general mechanism for the punishment of offenders similar to that of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft,²⁸¹ appears to impose an obligation on States parties to extradite any alleged offender whose extradition is requested by one of the States parties. This obligation, however, is subject to various conditions²⁸² and is complemented by the provision that, if it does not extradite the person, the State is obliged to submit the case to its competent authorities.²⁸³

119. Conventions adopted in the Arab world and in the context of the Organization of the Islamic Conference appear to follow a very different model. Under their provisions, Contracting States “shall undertake to extradite” persons accused or convicted of terrorist offences in a Contracting State and whose extradition is sought by that State in accordance with the provisions of the convention. These conventions, however, establish a list of circumstances in which extradition “shall not be permissible”, including a provision whereby, if the legal system of the requested State does not allow it to extradite its nationals, the requested State shall prosecute any such persons who commit in any of the other Contracting States a

²⁸⁰ Algiers, 14 July 1999. United Nations, *Treaty Series*, vol. 2219, No. 39464.

²⁸¹ The Convention requires that States parties make the relevant offences “punishable by appropriate penalties that take into account the grave nature of such offences” (art. 2 (a)). It further provides that each State party “has jurisdiction” of the relevant offences when having certain special links with those offences, and that it may also establish its jurisdiction in other cases (art. 6, paras. 1 and 2). Similarly to the model established by the Convention for the Suppression of Unlawful Seizure of Aircraft, each State party “shall likewise take such measures as may be necessary to establish its jurisdiction” over the offences “in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 or 2” (art. 6, para. 3). Under article 9, the relevant offences shall be included as extraditable offences in extradition treaties between the States parties.

²⁸² Under article 8 of the Convention, the obligation to extradite is subject to the following conditions: (a) it applies “in conformity with the rules and conditions provided for in this Convention or under extradition agreements between the States Parties and within the limits of their national laws” (art. 8, para. 1); (b) at the time of the deposit of its instrument of ratification or accession, any State party may transmit to the Secretary-General of OAU the grounds on which extradition may not be granted, as well as the legal basis in its national legislation or international conventions to which it is a party which excludes such extradition (art. 8, para. 2); and (c) extradition shall not be granted if final judgement has been passed by a competent authority of the requested State upon the person in respect of the terrorist act or acts for which extradition is requested, and may also be refused if the competent authority of the requested State has decided either not to institute or terminate proceedings in respect of the same act or acts (art. 8, para. 3). In addition, the Convention contains various provisions detailing the necessary elements of a request for extradition (art. 11) and the procedures to be followed in those cases where such a request is made (arts. 12 and 13).

²⁸³ The provision is included as the final paragraph of the article on extradition (art. 8, para. 4) and establishes that “a State Party in whose territory an alleged offender is present shall be obliged, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution if it does not extradite that person”.

terrorist offence that is punishable in both States by deprivation of liberty for a period of at least one year or more.²⁸⁴

(b) Reservations

120. Several States have made reservations or interpretative declarations in respect of the above-mentioned conventions, which sometimes affect the legal effect of the provisions for the punishment of offenders.

121. Some reservations or declarations specify, in general terms, the scope of the relevant provisions. Thus, for example, it has been declared that the provisions on the punishment of offenders under a certain convention should not be interpreted in such a way that the said offenders are neither tried nor prosecuted, and that mutual legal assistance and extradition are two different concepts and that the conditions for rejecting a request for extradition should not be valid for mutual legal assistance.²⁸⁵ Similarly, in certain conventions, declarations have been made to the effect that, in the application of the provision requiring States, if they do not extradite, to submit the case for prosecution, any person committing the relevant offence shall be either prosecuted or extradited without any exception whatsoever.²⁸⁶ Certain States have further pointed out that the wording “alleged offender”, used in some conventions, was in contradiction with the presumption of innocence, which was considered a fundamental principle under their domestic criminal law, and therefore stated that these terms should be interpreted as referring to the “accused”.²⁸⁷ It has also been clarified that the condition “through proceedings in accordance with the laws of the State” shall be considered as referring to the provision on extradition and prosecution as a whole.²⁸⁸

122. Reservations have been made stating that the provisions imposing upon States parties, if they do not extradite, an obligation to submit the case to their competent authorities for the purpose of prosecution should be understood to include “the right of the competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws”.²⁸⁹ Such reservations have been

²⁸⁴ See the Arab Convention on the Suppression of Terrorism, Cairo, 22 April 1998 (*International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.03.V.9, p. 158), arts. 5 and 6; the Convention of the Organization of the Islamic Conference on Combating International Terrorism, Ouagadougou, 1 July 1999, annex to resolution No. 59/26-P (ibid., p. 188), arts. 5 and 6; the Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism, Kuwait, 4 May 2004 (ibid., p. 259), arts. 19 and 20.

²⁸⁵ Reservation by Turkey to the International Convention for the Suppression of Terrorist Bombings. See, in a similar vein, declarations by Montenegro, Serbia and Germany in respect of the International Convention against the Taking of Hostages.

²⁸⁶ Declaration by Israel in respect of the International Convention against the Taking of Hostages (also referring to the relevant provisions of the Geneva Conventions of 1949 and their Additional Protocols).

²⁸⁷ Reservations by Colombia and Malaysia in respect of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

²⁸⁸ Reservation by Italy in respect of the Convention on the Physical Protection of Nuclear Material.

²⁸⁹ Reservations by Malaysia (para. 3) and Singapore in respect of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention for the Suppression of Terrorist Bombings.

objected to as being “general and indefinite” and therefore contrary to the object and purpose of the relevant conventions, given that they made it impossible to identify in which way the reserving Government intended to change the obligations arising from those conventions.²⁹⁰ According to another reservation to provisions of this kind, some States have accepted the obligation to prosecute subject to the condition that they have received and rejected a request for extradition from another State party to the relevant convention.²⁹¹ Yet another reservation contains the understanding that the relevant clause includes the right of the competent judicial authorities to decide not to prosecute a person if, in their opinion, grave considerations of procedural law indicate that effective prosecution would be impossible.²⁹²

123. Several reservations or declarations concern the limitations to granting extradition under the domestic legislation of the State. Some of these reservations clarify, in general terms, that the relevant conventions shall be applied, in matters relating to extradition, subject to the modalities and procedures laid down under the national laws of the requested State.²⁹³ On many occasions, however, reservations are more precise. Some States have indicated that they would refuse the extradition of their nationals;²⁹⁴ on some occasions, these reservations further clarify that

²⁹⁰ Objections by Germany and the Netherlands to the reservations by Malaysia (para. 3) to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and the International Convention for the Suppression of Terrorist Bombings.

²⁹¹ Reservations by the Netherlands to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention against the Taking of Hostages and the Convention on the Physical Protection of Nuclear Material.

²⁹² Reservations by the Netherlands to the Convention on the Safety of United Nations and Associated Personnel, the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism.

²⁹³ Reservation by Mexico to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; reservation by Pakistan to the International Convention for the Suppression of the Financing of Terrorism; reservation by El Salvador to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

²⁹⁴ See reservation by Colombia to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (withdrawn on 1 March 2002); reservation by France to the International Convention against the Taking of Hostages; reservations by Mozambique to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the International Convention for the Suppression of Terrorist Bombings; reservations by Belgium and Moldova to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; reservation by Myanmar to the International Convention for the Suppression of the Financing of Terrorism. A different reservation concerning nationals was made by Portugal to the International Convention for the Suppression of Terrorist Bombings, whereby it declared that the extradition of its nationals would only be authorized “(a) in case of terrorism and organized criminality; and (b) for purposes of criminal proceedings and, being so, subject to a guarantee given by the State seeking the extradition that the concerned person will be surrendered to Portugal to serve the sentence or measure imposed on him or her, unless such person does not consent thereto by means of expressed declaration”.

nationals would be tried and sentenced under national laws.²⁹⁵ Under some other reservations, requests for extradition would be refused for persons granted to whom political asylum has been,²⁹⁶ or for persons accused of political crimes or for their opinions.²⁹⁷ In the same vein, some reservations aim at excluding the application of those provisions in a convention that state that a request for extradition could not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives;²⁹⁸ these reservations have been objected to on the ground that they would be incompatible with the object and purpose of the relevant convention, since they are intended to exclude the application of fundamental provisions of the convention.²⁹⁹ Some States have further declared that the provisions under which conventions shall not be interpreted as imposing an obligation to extradite (if the requested State Party has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on discriminatory accounts or that compliance with the request would cause prejudice to that person's position for any of these reasons) must be applied in such a way as to ensure the inevitability of responsibility for the relevant crimes.³⁰⁰ In yet other cases, the reservation excludes the handing over of the suspect in the event that the crime ascribed entails the death sentence in the requesting State.³⁰¹ Furthermore, some reservations are made to the

²⁹⁵ See reservation by Colombia to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (withdrawn on 1 March 2002); reservations by Mozambique to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the International Convention for the Suppression of Terrorist Bombings; declaration by the Bolivarian Republic of Venezuela regarding the United Nations Convention against Corruption.

²⁹⁶ Reservations by Moldova to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and the United Nations Convention against Transnational Organized Crime. See also the reservation by France to the European Convention on the Suppression of Terrorism.

²⁹⁷ See reservation by Colombia to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (withdrawn on 1 March 2002).

²⁹⁸ Reservation by the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism; reservation by Denmark to the Council of Europe Convention on the Prevention of Terrorism.

²⁹⁹ Objections by Moldova, Germany and Argentina to the reservation by the Democratic People's Republic of Korea to the International Convention for the Suppression of the Financing of Terrorism.

³⁰⁰ Declarations by Belarus, Bulgaria and Ukraine in respect of the International Convention against the Taking of Hostages; declarations by Moldova and the Russian Federation in respect of the International Convention for the Suppression of Terrorist Bombings; declarations by the Russian Federation in respect of the International Convention for the Suppression of the Financing of Terrorism; declarations by the Russian Federation and Uzbekistan in respect of the International Convention for the Suppression of Acts of Nuclear Terrorism; declaration by the Russian Federation in respect of the United Nations Convention against Transnational Organized Crime.

³⁰¹ Reservation by France to the International Convention against the Taking of Hostages (with respect to aliens, extradition will not be granted "if the offence is punishable by the death penalty under the laws of the requesting State, unless that State gives what are deemed to be adequate assurances that the death penalty will not be imposed or, if a death sentence is passed, that it will not be carried out"); reservation by Portugal to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. See also the reservation by Portugal to the European Convention on the Suppression of Terrorism (which states that "Portugal shall not grant extradition for offences punishable in the requesting State with either the death penalty, life imprisonment or a detention order involving deprivation of liberty for life") and the objections made thereto by Belgium and Germany.

effect that extradition is restricted to offences that, under the domestic law of the requested State, are punishable with a penalty more severe than a stated minimum, or that it is subject to the fulfilment of other conditions under domestic law.³⁰² Under a different reservation, the handing over of a person could only be based on “strong suspicions” that he committed the crimes he is accused of, and would depend on a court decision.³⁰³

124. A reservation made by Belgium to some of the above-mentioned conventions, whereby “in exceptional circumstances” it reserved “the right to refuse extradition or mutual legal assistance in respect of any [relevant] offence ... which it considers to be a political offence or as an offence connected with a political offence or as an offence inspired by political motives”,³⁰⁴ has proven particularly contentious. Objections were made to the reservation, stating that it seeks to limit the scope of application of a critical provision that should be applied in all circumstances and, by referring to subjective criteria, introduces uncertainty into conventional relations, and that it was therefore incompatible with the object and purpose of the relevant conventions.³⁰⁵ In light of these criticisms, Belgium has withdrawn its reservation with respect to these conventions.³⁰⁶

III. Conclusions

125. The present section aims at recapitulating the main variations of clauses which may be of relevance to the study of the topic “The obligation to extradite or

³⁰² Reservations by Finland and Thailand to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. See also the declaration by Panama in respect of the United Nations Convention against Transnational Organized Crime (by which Panama shall not be obliged to carry out extraditions where the event giving rise to the request are not offences under the criminal legislation of Panama).

³⁰³ Reservation by Portugal to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

³⁰⁴ Reservations by Belgium to the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism. These reservations further clarify that, in the cases where the reservation applies, Belgium remains bound by the general legal principle to prosecute or extradite, pursuant to the rules governing the competence of its organs. It should be recalled that these conventions provide that extradition may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives (see note 267 above). See also the similar reservation by Belgium to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (whereby no provision under the relevant convention “should be interpreted as implying an obligation of extradition if the requested State party has reason to believe that the request for extradition based on the offences set forth in the Convention has been submitted for the purposes of prosecuting or punishing a certain person on the grounds of ethnic origin, religion, nationality or political views, or if acceding to the request would prejudice the situation of that person on any of those grounds”), which did not give rise to any objection.

³⁰⁵ Objections by Germany, Spain, the United Kingdom and the United States to the reservation by Belgium to the International Convention for the Suppression of Terrorist Bombings; objections by the Russian Federation, Argentina, the Netherlands, Germany, the United Kingdom and the United States to the reservation by Belgium to the International Convention for the Suppression of the Financing of Terrorism.

³⁰⁶ See withdrawal of the reservation by Belgium to the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism (28 January 2008).

prosecute (*aut dedere aut judicare*)” as found in the various instruments examined in the present study, following three thematic issues: (a) the relationship between extradition and prosecution resulting from the clause (which reveals the overall structure and logic of that clause); (b) the conditions applicable to extradition; and (c) the conditions applicable to prosecution. It then proposes some general conclusions arising from the examination of the previous work of the Commission on related topics and the conventional practice with respect to the obligation to extradite or prosecute.

A. Relationship between extradition and prosecution in the relevant clauses

126. The fundamental common feature of the above-mentioned clauses resides in the fact that they impose upon States an obligation to ensure the prosecution of the offender either by extraditing the individual to a State that will exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute. The relationship between these two alternative courses of action (to extradite or to prosecute), however, is not identical in all the examined clauses. Under this aspect, the relevant provisions contained in multilateral conventions may be classified into two main categories: (a) those clauses that impose an obligation to prosecute *ipso facto* when the alleged offender is present in the territory of the State, which the latter may be liberated from by granting extradition; and (b) those clauses for which the obligation to prosecute is only triggered by the refusal to surrender the alleged offender following a request for extradition.

1. Clauses imposing an obligation to prosecute *ipso facto*, with the possible alternative of extradition

127. The first category includes all those clauses that impose an obligation upon States parties to prosecute any person present in their territory who is alleged to have committed a certain crime. This obligation to prosecute may be said to exist *ipso facto* in that it arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained,³⁰⁷ regardless of any request for

³⁰⁷ On the need for the accused to be present in the territory of the State concerned as a precondition of the assertion of universal jurisdiction, see the separate opinion by Judges Higgins, Kooijmans and Buergenthal appended to the judgment of the International Court of Justice in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case: “The great treaties on aerial offences, hijacking, narcotics and torture are built around the concept of *aut dedere aut prosequi*. Definitionally, this envisages presence on the territory. There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction ...” (*I.C.J. Reports* 2002, p. 80, para. 57; see also President Guillaume’s separate opinion, *ibid.*, pp. 39-40, para. 9). See also Gilbert Guillaume, “Terrorisme et droit international”, *Recueil des cours de l’Académie de droit international*, vol. 215, 1990, pp. 368-369. For a view according to which the presence of the alleged offender in the territory of the State is not required for prosecution under the relevant provision of the 1949 Geneva Conventions, see Marc Henzelin, *Le principe de l’universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et de juger selon le principe de l’universalité* (Basel/Geneva/Munich/Brussels, Helbing & Lichtenhahn/Faculté de droit de Genève/Bruylant, 2000), p. 354.

extradition. It is only when such a request is made that an alternative course of action becomes available to the State, namely the surrender of the alleged offender to another State for prosecution. In other words, 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.

128. The clearest example of this first category of clauses is to be found in the relevant common article of the Geneva Conventions which provides that each State party “shall bring” persons alleged to have committed, or to have ordered to be committed, grave breaches to those Conventions, regardless of their nationality, before its own courts,³⁰⁸ but “may also, if it prefers”, hand such persons over for trial to another State party concerned. While this provision appears to give a certain priority to prosecution by the custodial State, it does also recognize that this State has the discretion to opt for extradition,³⁰⁹ provided that the requesting State has made out a *prima facie* case.³¹⁰

129. Article 9 of the draft Code of Offences against the Peace and Security of Mankind, adopted by the Commission in 1996, appears to respond to the same logic. Under that article, the State party in whose territory an individual alleged to have committed certain crimes under the draft Code is found “shall extradite or prosecute that individual”. While the wording of the article seems to place the two alternative courses of action on the same level, it is clear from the commentary that the obligation to prosecute arises independently from any request for extradition. The commentary specifies that the custodial State has an obligation “to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by

³⁰⁸ Although the text of the provision is not unequivocal in this regard, the commentary to the Geneva Conventions explains that the obligation to search for the alleged offender (which, as shall be described hereinafter, constitutes a preamble to prosecution) arises “[a]s soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach” (Pictet, note 83 above, p. 593).

³⁰⁹ See, for example, Declan Costello, “International Terrorism and the Development of the Principle *Aut Dedere Aut Judicare*”, *The Journal of International Law and Economics*, vol. 10, 1975, p. 486; M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht/Boston/London, Martinus Nijhoff, 1995, p. 15; Christian Maierhöfer, “*Aut dedere — aut iudicare*”. *Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung*, Berlin, Duncker & Humblot, 2006, pp. 349-350; Claire Mitchell, *Aut Dedere Aut Judicare: The Extradite or Prosecute Clause in International Law*, Graduate Institute ePapers, Geneva, 2009, No. 2, pp. 75-76. For authors who emphasize the priority attributed to prosecution in the Geneva Conventions, see Luigi Condorelli, “Il sistema della repressione dei crimini di Guerra nelle Convenzioni di Ginevra del 1949 e nel primo protocollo addizionale del 1977”, in P. Lamberti Zanardi & G. Venturini, eds., *Crimini di guerra e competenza delle giurisdizioni nazionali: Atti del Convegno, Milano, 15-17 maggio 1997*, Milan, Giuffrè, 1998, pp. 35-36; Henzelin, note 307 above, p. 353 (who qualifies the model of the Geneva Conventions as *primo prosequi secundo dedere*).

³¹⁰ It should be noted that article 88, paragraph 2, of Additional Protocol I to the Geneva Conventions calls on States parties to “give due consideration to the request of the State in whose territory the alleged offence has occurred”, thus hinting at the idea that prosecution by the latter State would be preferable.

requesting extradition”.³¹¹ According to the commentary, article 9 “does not give priority to either alternative course of action”³¹² and the requested State is not required to grant a request for extradition if it prefers to entrust its own authorities with the prosecution of the case.³¹³

130. The terms of the relevant provision contained in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft appear to be ambiguous in this respect: as described above, they provide that “[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged [...] to submit the case to its competent authorities for the purpose of prosecution”.³¹⁴ Even when read in its context and taking into account the preparatory works of the Convention,³¹⁵ the text of this provision does not unequivocally resolve the question of whether the obligation to prosecute arises ipso facto or only once a request for extradition is submitted and not granted. Moreover, the views expressed in the legal literature on provisions of this kind do not give a

³¹¹ Paragraph 3 of the commentary to article 9, *Yearbook of the International Law Commission 1996*, vol. II (Part Two), p. 31. Reference should also be made to the commentary to article 8 (whereby each State party “shall take such measures as may be necessary to establish its jurisdiction” over the crimes set out in the draft code “irrespective of where or by whom those crimes were committed”); the Commission observes therein that, failing the establishment of jurisdiction, “the custodial State would be forced to accept any request received for extradition which would be contrary to the alternative nature of the obligation to extradite or prosecute under which the custodial State does not have an absolute obligation to grant a request for extradition”, and “the alleged offender would elude prosecution in such a situation if the custodial State did not receive any request for extradition”(paragraph 6 of the commentary to article 8, *ibid.*, p. 29).

³¹² See paragraph 6 of the commentary to article 9 of the draft code of offences against the peace and security of mankind, *ibid.*, pp. 31-32.

³¹³ *Ibid.* The commentary also recalls that it had been proposed in the Commission to give priority to the request of the territorial State, but that the Drafting Committee considered that this question was not ripe for codification, consistent with article 16 of the Model Treaty on Extradition adopted by the General Assembly.

³¹⁴ Article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft.

³¹⁵ Article 4, paragraph 2 (under which each Contracting State is under an obligation to take such measures as may be necessary to establish their jurisdiction over the offence “in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8”) seems to make the establishment of jurisdiction in that case conditional to a refusal to extradite. As described in section II.D.1 (b) above, in the preparatory works, the Legal Committee had placed the obligation to prosecute on the State of registration of the aircraft and the State of landing; while not obliged to extradite, other States were expected to grant extradition to those States or, in the alternative, to prosecute the alleged offender. Article 4, paragraph 2, was the result of an amendment only aiming at ensuring the effectiveness of the mechanism in the absence of extradition (see note 172 above). On the other hand, the preparatory works make it clear that the overall purpose of the Convention was to design a mechanism that would avoid impunity of those who had committed the relevant offence.

definitive answer to this question.³¹⁶ However, the interpretation according to which provisions of this kind³¹⁷ impose an obligation to prosecute independently from any request for extradition may today find support in the case law of the Committee against Torture. In a decision relating to a similar provision contained in the

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³¹⁶ Authors are either split or ambiguous about the scope of this obligation; see, for example, Yoram Dinstein, "Criminal Jurisdiction over Aircraft Hijacking", *Israel Law Review*, vol. 7, 1972, p. 196 (noting that the obligation to prosecute arises in case of "failure of extradition"); Gillian M. E. White, note 156 above; S. Z. Feller, "Comment on 'Criminal Jurisdiction Over Aircraft Hijacking'", *Israel Law Review*, vol. 7, 1972, p. 207; Michael Wood, "The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents", *International and Comparative Law Quarterly*, vol. 23, 1974, pp. 808-809 (according to whom extradition should be the "normal procedure" and extraterritorial jurisdiction, "which goes beyond what is normally permitted by customary international law", was acceptable in negotiations "only as a secondary jurisdiction, where for any reason extradition did not take place"); Jacques Bigay, "Extrader ou punir", *Revue de droit penal et criminel*, 1980, p. 118 (noting the ambiguity of the terminology and pointing out that the French delegation at the International Conference on Air Law (1970 Hague Conference) had argued that the refusal of a prior request for extradition was required); Edward Wise, "The Obligation to Extradite or Prosecute", *Israel Law Review*, vol. 27, 1993, p. 272 (according to whom the obligation under the Hague formula "is not contingent on a request for extradition, nor on an offer of extradition being refused"); Bassiouni and Wise, note 309 above, p. 18 (noting that, while in certain regional conventions on terrorism the obligation to prosecute comes into play only when a request for extradition has been refused, in the Convention for the Suppression of Unlawful Seizure of Aircraft "it makes no difference that extradition has not been requested by the state where the offence took place"); Colleen Enache-Brown and Ari Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law", *McGill Law Journal*, vol. 43, 1998, p. 626; Henzelin, note 307 above, pp. 301, 303-304 and 370 (who considers that the State where the alleged offender is present has the obligation to arrest the individual, initiate investigations and inform other interested States (pursuant to article 6 of the Hague Convention); if no extradition is filed, the State would have the obligation to submit the case to its competent authorities for prosecution); Michael Plachta, "Contemporary Problems of Extradition: Human Rights, Grounds for Refusal and the Principle *Aut Dedere Aut Judicare*", *Resource Material Series*, No. 57, 2001, pp. 75-76 (arguing that the principle does not subordinate *judicare* to *dedere*); Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists", in A. Bianchi, ed., *Enforcing International Law Norms Against Terrorism*, Oxford, Hart Publishing, 2004, pp. 250-254; Maierhöfer, note 309 above, pp. 338-341; Mitchell, note 309 above, pp. 75-76; Amnesty International, "International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)", February 2009, pp. 8-9. On this issue, see the intervention of the representative of the Netherlands at the General Assembly, during the preparatory works of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, commenting on the rejection of an amendment proposed by his delegation making an express reference to a previous request for extradition: "It is now clear that a State party, where an alleged offender is found, will be bound to submit the case to prosecution even if the States which have primary jurisdiction under the terms of article 3 all shirk requesting extradition. I wish to make it clear that we regard the listing of States with primary jurisdiction as the expression of those States' duty to bear, as a rule, the heaviest burden of the Convention. In other words, the primarily interested States have at least a moral duty to request extradition when the alleged offender is found in a State which, under normal jurisdictional rules, would have no involvement with the crime at all" (*Official Records of the General Assembly, Twenty-eighth Session, Plenary Meetings, 2202nd meeting* (A/28/PV.2202), p. 131).

³¹⁷ As described in section II.D above.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 7),³¹⁸ the Committee found 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 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.”³¹⁹

131. The question arises whether other clauses formulated in similar terms should also be interpreted in the same way. In light of the decision of the Committee against Torture, it may be argued that the formula by which the State in whose territory the alleged offender is found shall, if it does not extradite him, submit (or be obliged to submit) the case to its competent authorities for the purpose of prosecution, indicates that the obligation to prosecute exists *ipso facto*. However, this interpretation is to be set aside at least in those cases where the clause expressly specifies that the obligation to prosecute is subject to the existence of a prior request for extradition³²⁰ or to a further request made by the State seeking extradition for the requested State to prosecute the individual;³²¹ these variants of the formula belong to the second category described hereinafter. Other specificities of the provision may also have a bearing on how the clause should be interpreted in this respect. Thus, for example, as described above, some conventions place the said provision in a paragraph of the article concerning extradition;³²² some conventions provide that the obligation is only applicable when extradition is refused for specific reasons (notably, the nationality of the offender);³²³ some conventions only contain an obligation for States parties to establish their jurisdiction over the relevant offences (in cases where an alleged offender is present in their territory and they do not extradite him to another party), but do not contain a clause that imposes upon States parties, if they do not extradite, the subsequent obligation to submit the case to their competent authorities for prosecution.³²⁴ A definitive answer to this question cannot therefore be given in general terms and should rather be based on a case-by-case examination of the exact formulation of the provision, its context and preparatory works.

³¹⁸ Under this provision, “[t]he State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”.

³¹⁹ CAT/C/36/D/181/2001, para. 9.7. The complainants, all Chadian nationals purportedly tortured by agents of the Chadian State answerable directly to Hissène Habré, claimed, *inter alia*, that Senegal, by neither prosecuting nor extraditing Mr. Habré, was in breach of its obligations under the principle *aut dedere aut judicare* enshrined in article 7 of the Convention (*ibid.*, paras. 3.8-3.10). The complainants refuted in particular Senegal’s argument that there would be an obligation to prosecute under article 7 only after an extradition request had been made and refused (para. 8.12).

³²⁰ See note 242 above.

³²¹ See note 245 above.

³²² See note 239 above.

³²³ See note 243 above.

³²⁴ See note 237 above.

2. Clauses imposing an obligation to prosecute only when extradition has been requested and not granted

132. The second category encompasses those provisions for which the obligation to prosecute is triggered by the refusal of a request for extradition. Under the conventions belonging to this category, States parties (at least those who do not have a special link with the offence) do not have a general obligation *ipso facto* to prosecute alleged offenders present in their territory. When a State receives a request for extradition, these conventions recognize the possibility for the State to refuse the surrender of the individual, either on grounds based on its own national legislation or for reasons explicitly contemplated in the conventions themselves. If it decides not to grant extradition, however, the State has the obligation to prosecute the individual. In other words, these conventions appear to give some priority to the option of extradition (*rectius* to prosecution by certain States, most notably those where the crime was committed, to which the alleged offender should normally be surrendered) and provide the alternative of prosecution as a safeguard against impunity. These conventions thus appear to follow the very same lines as originally foreseen by Hugo Grotius when he referred to the principle *aut dedere aut punire*.³²⁵

133. The 1929 Counterfeiting Convention and subsequent conventions inspired from it belong to this second category. The Counterfeiting Convention expressly provides that, in the case of foreigners who have committed a relevant offence abroad, “[t]he obligation to take proceedings is subject to the condition that extradition has been requested and the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence”(article 9, paragraph 2).³²⁶ The overall structure of the mechanism for the punishment of offenders in these conventions is indeed based on the idea that the State in whose territory the crime was committed will request the extradition of the offender who has fled to another country and that extradition should, in principle, be granted; these conventions, however, recognize that States may be unable to extradite in some cases (most notably, when the individual is their national or when they have granted asylum to him) and provide for the obligation to prosecute as an alternative.³²⁷

134. Multilateral conventions on extradition are also to be placed in this second category. By their very nature, the application of the rules of judicial cooperation provided in them is triggered by the submission of a request for extradition. These conventions are based on the general undertaking by States parties to surrender to each other all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted for the carrying out of a sentence or detention order. This obligation to extradite, however, is subject to a number of exceptions, particularly in the case in which the individual whose

³²⁵ Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey, Oxford/London, Clarendon Press/Humphrey Milford, 1925, pp. 527-529).

³²⁶ It should be noted that an earlier preparatory draft for this convention had proposed that proceedings be taken if extradition had not been requested (Société des Nations, Comité mixte pour la repression du faux monnayage, *Mémoire et projet de convention préparé par M. Pella* (doc. F.M. 4, 23 June 1927), Part IV, p. 7). As seen in section II.A.1 (b) above, this proposal was modified in subsequent negotiations of the 1929 Convention.

³²⁷ See Henzelin, note 307 above, p. 286 (who qualifies the system as *primo dedere secundo prosequi*).

extradition is sought is a national of the requested State. These conventions provide for an alternative obligation to prosecute the offender whenever his extradition is refused, particularly on the grounds that he is a national of the requested State, as a mechanism to avoid impunity.³²⁸

135. As observed above, some of the conventions described in section II.D above should also be included in this category, whenever the relevant clause is to be interpreted as subjecting the obligation to prosecute to the refusal of a request for extradition.³²⁹

136. It should be noted, however, that conventions belonging to this category adopt very different mechanisms for the punishment of offenders, which may affect the interaction between extradition and prosecution. For example, those conventions that aim at the suppression of specific international offences generally contain detailed provisions concerning the prosecution of such offences, while multilateral conventions on extradition rather regulate the extradition process and do not include provisions on the conduct of prosecution. In the former category, while older conventions (such as that on counterfeiting) contain very limited obligations concerning the punishment of offenders (which remain without prejudice to national limitations to the exercise of extraterritorial jurisdiction), more recent conventions (notably those described in section II.D above) provide for more elaborate regimes, which may include obligations for certain States to establish extraterritorial jurisdiction. These issues will be further examined below.

B. Conditions applicable to extradition

137. Three aspects of the regulation of the conditions applicable to extradition in the relevant conventions deserve particular consideration: the provision of a legal basis for extradition; the subjection of extradition to the national legislation of the requested State; and the inclusion of other norms relating to extradition proceedings.

138. The conventions reviewed differ in the mechanisms they establish to provide a legal basis for extradition of the relevant offences. Multilateral conventions on extradition,³³⁰ as well as a few conventions regarding specific international offences,³³¹ directly impose upon States parties a general obligation to extradite, subject to certain conditions. The 1949 Geneva Conventions do not address the issue of the legal basis for extradition, and Additional Protocol I only calls on States parties to cooperate in the matter of extradition and safeguards the obligations arising from other treaties on the subject of mutual assistance in criminal matters (article 88). The majority of the conventions reviewed, however, establish a system by which the relevant offence shall be deemed to be included as an extraditable offence in any existing extradition treaty between States parties and such States undertake to include the offence as an extraditable offence in every future extradition treaty to be concluded among them, which is usually combined with provisions whereby States parties which make extradition conditional on the

³²⁸ See section II.C above. See also Bassiouni and Wise, note 309 above, pp. 11-12; Maierhöfer, *op. cit.*, pp. 346-347.

³²⁹ Maierhöfer, note 309 above, p. 344.

³³⁰ See section II.C above.

³³¹ See the OAU Convention on the Prevention and Combating of Terrorism, referred to in paragraph 118 above.

existence of a treaty may consider the relevant convention as the legal basis of extradition and States parties which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves.³³² In other words, these conventions do not contain an obligation to extradite,³³³ they operate a *renvoi* to extradition treaties, which would provide the legal basis for extradition, but may also provide by themselves, in certain circumstances, such legal basis.

139. Besides the multilateral conventions on extradition (which usually spell out the conditions applicable to the extradition process, including possible grounds of denial), nearly all the conventions reviewed specify that extradition is subject to the conditions provided by the law of the requested State.³³⁴ This implies that the requested State has the right to refuse extradition of an individual on the basis of the provisions of its domestic legislation. Such grounds of refusal may be connected to the offence (e.g., the statute of limitations has expired, the offence is not criminalized in the requested State or the crime is subject to death penalty in the requesting State) or not (e.g., the individual was granted political asylum or there exist humanitarian reasons to deny extradition).

140. The need to safeguard the conditions provided by national laws was often a major point of discussion in the preparatory works of the conventions reviewed. In particular, it was emphasized in negotiations that the mechanism for the punishment of offenders to be established should take into account the fact that many States have constitutions which expressly prohibit the extradition of their own nationals and that States sometimes grant political asylum to individuals later sought for extradition. It was then considered that such conventions could not impose upon States parties an absolute obligation to extradite and should allow for the possibility for the requested State to refuse extradition based on its national law. As illustrated by the preparatory works of the Bustamante Code and the 1929 Counterfeiting Convention, this discussion is what originally led to the elaboration of a mechanism that would combine the possibility of extradition with that of prosecution.³³⁵ This discussion is then reflected in those conventions (such as the 1929 Counterfeiting Convention and other conventions following its model) that contain separate provisions on extradition and prosecution applicable to foreigners and nationals, in

³³² Such provisions are found in the Convention for the Suppression of Unlawful Seizure of Aircraft and in most of the conventions following the "Hague formula", as well as in the 1929 Counterfeiting Convention and other conventions following the same model. However, as described in sections II.A and II.D above, the precise formulation of the provisions varies and, in some cases, some provisions are missing (for example, the 1929 Counterfeiting Convention does not provide for the possibility for States parties which make extradition conditional on the existence of a treaty to consider the convention as the legal basis for extradition).

³³³ See para. 99 above. See also White, note 156 above, pp. 43-44; Costello, note 309 above, p. 487; Guillaume, note 307 above, pp. 356-357; Luis Benavides, "The Universal Jurisdiction Principle: Nature and Scope", *Anuario Mexicano de Derecho Internacional*, vol. 1, 2001, p. 33.

³³⁴ See White, note 156 above, p. 43, according to whom the corresponding provision in the Convention for the Suppression of Unlawful Seizure of Aircraft "... in no way affects any restriction there may be in national law on the extradition of an offender. Thus, for example, the law of many States prohibits the extradition of political offenders or of nationals of the State requested to extradite. The Convention does not require such rules to be waived: it merely provides that hijacking is an extraditable offence and leaves it to national law to determine whether in any given case the hijacker should be extradited."

³³⁵ See sects. II.A.1 (b) and II.C.1 (b) above. See also, with respect to the "Hague formula", Wise, note 316 above, p. 271.

conventions in which the obligation to prosecute is triggered by a refusal to extradite on the specific ground of the nationality of the alleged offender,³³⁶ or in certain conventions which expressly safeguard the right of asylum.³³⁷

141. Finally, it should be noted that some conventions have included more elaborate provisions relating to the extradition process, which affect the operation of the clauses on prosecution and extradition. Thus, for example, the Geneva Conventions specify, in the clause itself, that the option of extradition to another State is subject to the condition that such State “has made out a *prima facie* case”. Many of the conventions described in section II.D above specify that each of the crimes concerned shall be treated, for the purpose of extradition between States parties, “as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction” in accordance with such conventions, thus eliminating a possible bar to extradition. Some conventions contain other provisions according to which a request for extradition may not be refused on certain grounds (particularly by reason of the political character of the offence or for the fact that it involves fiscal matters³³⁸) or, on the contrary, such a request shall be denied in certain circumstances (for example, when prosecution in the requesting State will be conducted on discriminatory grounds or would otherwise prejudice the person’s position for that reason, or when the request for extradition is based on trivial grounds³³⁹). Additionally, some conventions impose further obligations aimed at enhancing cooperation and effectiveness in extradition proceedings.³⁴⁰

142. In conclusion, it appears that, beyond certain common features included in all conventions, the degree of specificity of the rules concerning the conditions applicable to extradition have varied depending on several factors. Among these, one may note that the inclusion of more detailed provisions has sometimes taken into account the specific concerns voiced in the course of negotiations (e.g., when the issue of the non-extradition of nationals has been raised, it has often led to the express recognition of this exception in the relevant convention), the particular nature of the offence (for instance, the risk of refusal of extradition based on the political character of the offence appears to be more acute with respect to certain crimes) and a certain evolution in the drafting of the relevant provisions to take into account problems that may have been overlooked in the past (for instance, the possible triviality of the request for extradition or the protection of the rights of the alleged offender). Once again, the reasons for the adoption of a certain type of regulation appear to depend on the particularities of each convention and its negotiating history, and should be assessed on the basis of a detailed examination of the relevant preparatory works.

³³⁶ See, for example, the multilateral extradition conventions described in section II.C above, as well as the conventions cited in footnote 243 above.

³³⁷ See note 269 above.

³³⁸ See, respectively, notes 267 and 268 above. It has been argued that, in the absence of such explicit provisions, the conventions following the model of the Convention for the Suppression of Unlawful Seizure of Aircraft should be interpreted as allowing the possibility of refusing extradition on these grounds; see, for example: Bigay, note 316 above, p. 120.

³³⁹ See notes 270 and 274 above.

³⁴⁰ See notes 275 and 278 above.

C. Conditions applicable to prosecution

143. Three aspects of the regulation of the conditions applicable to prosecution are of particular relevance for our purposes, namely the measures that States parties are obliged to take in order to be able to prosecute when the situation arises; the precise scope of the obligation to prosecute, including the issue of prosecutorial discretion; and the conditions applicable to subsequent judicial proceedings.

144. The conventions concerning specific international offences usually contain detailed provisions imposing upon States parties the obligation to adopt such measures as may be necessary to establish the relevant acts as criminal offences under their domestic law and to make them punishable by appropriate penalties; to establish their jurisdiction with regard to such offences; and to investigate relevant facts and ensure the alleged offender's presence for the purpose of prosecution or extradition. These preliminary steps are essential to allow the proper operation of the mechanism for the punishment of offenders in the relevant convention. In earlier conventions, the failure to impose obligations of this kind implied that there were loopholes in the mechanism. For example, as is apparent from the preparatory works,³⁴¹ the drafters of the 1929 Counterfeiting Convention were careful not to impose upon States parties any duty to establish extraterritorial jurisdiction. As a consequence, article 9 limits the obligation to take proceedings against foreigners having committed an offence abroad to the case in which they are in a country "whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad": foreigners in other countries would therefore escape punishment.³⁴² One of the major innovations of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft was to address this loophole by establishing a double-layered system of jurisdiction, under which the obligation incumbent upon States having a connection with the crime to establish their jurisdiction was complemented by the further obligation of each State to "take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him" to any of the above-mentioned States.³⁴³ In other words, the 1970 Convention established a link between the operation of the provision on extradition and prosecution, on the one hand, and what appears to be a subsidiary exercise of universal jurisdiction, on the other hand. If one recalls, however, that the formula used in that convention has been interpreted as imposing an obligation to prosecute *ipso facto*, it may be considered that there is a general obligation to exercise universal jurisdiction, unless the State proceeds to extradition. As seen above,³⁴⁴

³⁴¹ See sect. II.A.1 (b) above.

³⁴² As noted by Wise, note 316 above, pp. 273-274, the 1929 Convention "does not require the parties to be prepared to assert jurisdiction in every case in which an offender is not extradited. It allows for the fact that states may have different views about the propriety of exercising jurisdiction over offences taking place abroad, even in cases in which extradition is refused. The obligation to prosecute in lieu of extradition is therefore conditioned on a state's general posture with respect to the propriety of exercising extraterritorial jurisdiction". See also Bassiouni and Wise, note 309 above, p. 13; President Guillaume's separate opinion appended to the judgment of the International Court of Justice in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, *I.C.J. Reports* 2002, p. 38, para. 6.

³⁴³ See President Guillaume's separate opinion, note 342 above, pp. 38-39, paras. 7-8; Plachta, note 316 above, p. 81.

³⁴⁴ See note 228 above.

this mechanism has later been followed in many (albeit not all) other conventions concerning specific international crimes.

145. The determination of the scope of the obligation to prosecute is complicated by the fact that the formulation used in the various conventions to describe this obligation varies: the Bustamante Code uses the verb “to try”; the 1929 Counterfeiting Convention provides that individuals “should be punishable” and refers to an “obligation to take proceedings”; the 1949 Geneva Conventions impose upon States parties the obligation to “bring before their own courts” the alleged offenders; the 1957 European Convention on Extradition refers to the obligation of the State to “submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate”; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and other later conventions employ the expression “to submit the case to its competent authorities for the purpose of prosecution”; etc.

146. The question arises whether the submission of the case to competent national authorities would necessarily result in the prosecution and punishment of the offender.³⁴⁵ As described above, the question was already raised in the context of the negotiations of the 1929 Counterfeiting Convention and led to the adoption of an express provision on the matter.³⁴⁶ The same issue was considered in detail during the preparatory works of the European Convention on Extradition, in the course of which it was pointed out that the requested State had the obligation to submit the case to its competent authorities, but that “legal proceedings need not necessarily be taken, unless the competent authorities consider they are appropriate”.³⁴⁷ The Subcommittee that prepared the first draft for the Convention for the Suppression of Unlawful Seizure of Aircraft took inspiration from this formula, specifying that “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”.³⁴⁸ In other words, this obligation does not necessarily imply that proceedings will be taken, let alone that the alleged offender will be punished. For this reason, it has been authoritatively argued that the formula used in the Convention for the Suppression of Unlawful Seizure of Aircraft should, strictly speaking, be described as “*aut dedere aut persequi*”.³⁴⁹

147. This raises the issue of whether the authorities to whom the case is referred enjoy any “prosecutorial discretion” in their decision whether to go forward with the proceedings. In this regard, following debates in the negotiations, the 1929 Counterfeiting Convention expressly provides that it does not affect the principle that the relevant offences “should in each country, without ever being allowed

³⁴⁵ In this regard, it should be noted that the very strict terms used in various conventions adopting the “Hague formula” (for example, “without exception whatsoever and whether or not the offence was committed in its territory” or “without undue delay”) refer to the obligation to submit the case to the competent authorities, but not to the subsequent proceedings undertaken by these authorities following the submission (see para. 105 above, as well as notes 246 and 247 above).

³⁴⁶ See para. 24 above.

³⁴⁷ See para. 83 above.

³⁴⁸ See para. 99 above.

³⁴⁹ Guillaume, note 307 above, pp. 354 and 368 (Mr. Guillaume was the President of the subcommittee that prepared the first draft of the Convention for the Suppression of Unlawful Seizure of Aircraft). See also Henzelin, note 307 above, pp. 302 and 304-306.

impunity, be defined, prosecuted and punished in conformity with the general rules of its domestic law”(article 18). Many of the most recent conventions described in section II.D above contain an explicit limitation whereby “[t]hose 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”(article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft), thus excluding that, for the purpose of prosecution, the offence be considered of a political nature. Some other conventions of the same group alternatively specify that the submission to competent authorities is to be made “through proceedings in accordance with the laws of” the State concerned and/or “as if the offense had been committed within its jurisdiction”;³⁵⁰ in some cases, it is established that “the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply” in other similar cases (article 7, paragraph 2, of the 1984 Convention against Torture). It follows from these provisions that competent authorities do retain some prosecutorial discretion and that there may be cases in which a State would abide by its obligations under these conventions, while the alleged offender would neither have been extradited nor actually prosecuted.³⁵¹ However, in the context of the preparation of the International Law Commission’s draft Code of Offences against the Peace and Security of Mankind, the argument was made that the ordinary sort of prosecutorial discretion would be inappropriate for the crimes dealt with in the Code.³⁵² It was noted, in particular, that the regime of the 1949 Geneva Conventions was to be interpreted as not providing for prosecutorial discretion for grave breaches.³⁵³ The terminology used in article 9 of the draft Code (“to prosecute”) was therefore intended to impose an obligation to prosecute whenever there was sufficient evidence for doing so as a matter of national law, without there being any possibility of granting immunity in exchange for giving evidence or assisting with the prosecution in other cases.³⁵⁴ In sum, 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.

³⁵⁰ See notes 249 and 250 above.

³⁵¹ In this regard, it has been noted, with regard to the Convention for the Suppression of Unlawful Seizure of Aircraft, that “some States would have liked a somewhat stronger Convention which would have bound each contracting State in every case either to prosecute a hijacker found in its territory or to extradite him (whether he had committed the offence of hijacking for political reasons or not) to a State which would prosecute him. However it was apparent that many States could not accept such provisions and the purpose of the Convention would be frustrated if it were not widely adopted”(White, note 145 above, p. 44). For authors interpreting the “Hague formula” as allowing for prosecutorial discretion, see Wood, note 316 above, p. 792, with respect to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; Costello, note 309 above, p. 487; Bigay, note 316 above, pp. 118-119; Bassiouni and Wise, note 309 above, p. 4; John Dugard and Christine Van den Wyngaert, “Reconciling Extradition with Human Rights”, *American Journal of International Law*, vol. 92, 1998, p. 209; Henzelin, note 307 above, pp. 304-306; Mitchell, op. cit., pp. 67-69.

³⁵² See the explanation of the Chairman of the Drafting Committee, *Yearbook of the International Law Commission 1996*, vol. I, p. 50, para. 36.

³⁵³ Ibid., p. 51, para. 48 (Mr. Yamada).

³⁵⁴ See paragraph 4 of the commentary to article 9, *Yearbook of the International Law Commission 1996*, vol. II (Part Two), p. 31.

148. Finally, some conventions spell out conditions that shall be respected in the conduct of the judicial proceedings, such as the standards of evidence, cooperation among States on evidentiary and procedural matters, guarantees of fair treatment of the alleged offender at all stages of the proceedings, etc.³⁵⁵ Variations in the content of these provisions appear to depend on different factors, including issues expressly raised in the negotiations, the risk of breach of such standards in the case of prosecution for certain crimes or the progressive evolution of such clauses.³⁵⁶ In any event, it would appear reasonable to argue that the general conditions applicable to the conduct of judicial proceedings established by international standards binding upon the State would also apply in the case of prosecution in the context of the clauses envisaging prosecution or extradition.

D. Final remarks

149. On the basis of the examination of conventional practice, the following conclusive observations are proposed.

150. Firstly, clauses usually qualified as containing an obligation to extradite or prosecute share two fundamental characteristics, namely (a) their objective to ensure the punishment of certain offences at the international level; and (b) 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. Beyond these basic common features, however, such provisions, as found in multilateral conventions, greatly vary in their formulation, content and scope, particularly with regard to the conditions they impose upon States with respect to extradition and prosecution, and the relationship they establish between these two possible courses of action.

151. Secondly, in order to make an accurate assessment of the scope of the obligations incumbent upon States under the clauses that combine the options of extradition and prosecution, the relevant provisions should not be read in isolation. As shown above, these provisions are but one element of an overall mechanism for the punishment of offenders provided for under the relevant international instruments, which usually also includes rules relating to the criminalization of certain offences, the establishment of jurisdiction, the search for and arrest of alleged offenders, rules on cooperation in criminal matters and the regime of extradition. A study of the topic of “The obligation to extradite or prosecute (*aut*

³⁵⁵ See, for example, the fourth paragraph of the common article to the Geneva Conventions, which provides that “[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War”, as well as the conventions referred to in notes 251 and 254 above.

³⁵⁶ In its resolution on “New Problems of Extradition” (Session of Cambridge, 1983), the *Institut de droit international* called for a strengthening and amplification of the rule *aut dedere aut judicare*, emphasizing some aspects relating to the conduct of proceedings: “When a State undertakes to prosecute the person concerned, other interested States, in particular the State on the territory of which the offence was committed, should be entitled to send observers to the trial unless serious grounds related to the preservation of State security in fact justify the non-admittance of such observers” (sect. VI.2); “In cases of such prosecution, if the tribunal concerned finds the accused guilty, an appropriate penalty should be imposed similar to that which would normally be applied under the law of that State in a similar case” (sect. VI.3). See also Costello, note 309 above, pp. 491-494.

dedere aut judicare)” in conventional practice therefore requires that due consideration be given to the other elements of the mechanisms for the punishment of offenders in which these provisions are found.

152. Thirdly, multilateral conventions containing provisions that combine the options of extradition and prosecution may be classified according to different criteria, none of which, however, fully succeeds in reflecting the complexity of conventional practice in this regard. The present study has proposed a categorization of multilateral conventions which combines chronological and substantive criteria. This approach was considered to be the most effective to expose the main sources of inspiration of each convention, the overall historical trends in the evolution of such provisions, as well as the most important common features shared by certain groups of conventions. Nevertheless, other classifications could have been proposed. One could observe, for example, that a fundamental distinction exists between, on the one hand, multilateral conventions on extradition (which aim at regulating international judicial cooperation on criminal matters regardless of the nature of the offence concerned) and, on the other hand, conventions concerning specific offences of international concern (which aim at the criminalization of such offences and the establishment of an effective international system for this purpose). While the former emphasize the obligation to extradite (which is regulated in detail) and only contemplate prosecution as an exceptional alternative to avoid impunity, the latter focus on the conditions to ensure prosecution, mainly regulating extradition as a mechanism to ensure that the alleged offender is brought to trial. In any event, whatever the classification adopted, it should be noted that there has always been a transversal process of cross-fertilization, under which conventions belonging to seemingly different groups have served as inspiration to each other for the purpose of the elaboration of new mechanisms for the punishment of offenders.

153. Fourthly, in light of the study undertaken and beyond the observations made above in the present section, it appears to be difficult to draw general conclusions as to the precise scope of the conventional obligations incumbent upon States under the clauses that combine the options of extradition and prosecution, including on issues such as the exact meaning of the obligation to prosecute and conditions applicable thereto (including prosecutorial discretion), the legal basis and conditions applicable to extradition (including handling of multiple requests, standard of proof and circumstances that may exclude its operation), the relationship between the two courses of action provided for under the obligation, the relationship with other principles (including universal jurisdiction), the implementation of the obligation, or the availability of a “third alternative”. The examination of conventional practice in this field shows that the degree of specificity of the various conventions in regulating these issues varies considerably, and that there exist very few conventions that adopt identical mechanisms for the punishment of offenders (including with respect to the relationship between extradition and prosecution). The variations in the provisions relating to prosecution and extradition appear to be determined by several factors, including the geographical, institutional and thematic framework in which each convention is negotiated, notably the pre-existence of other conventions in the same region or substantive field that may have had an influence on the preparatory works; the specific concerns voiced by delegations in the course of the negotiations; the particular issues arising from the nature of the offence that the convention aims at combating; a certain general evolution in the drafting of such clauses to take into account new issues that have arisen in practice;

and the development of related areas of international law, such as human rights and international criminal justice. It follows that, while it is possible to identify some general trends and common features in the relevant provisions, conclusive findings regarding the precise scope of each provision need to be made on a case-by-case basis, taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works.

Annex

Multilateral conventions included in the survey, in chronological order, with the text of the relevant provisions

Convention on Private International Law (Bustamante Code) (Pan American Union)

Havana, 20 February 1928, League of Nations, *Treaty Series*, vol. 86, No. 1950

Article 345

The contracting States are not obliged to hand over their own nationals. The nation which refuses to give up one of its citizens shall try him.

International Convention for the Suppression of Counterfeiting Currency

Geneva, 20 April 1929, League of Nations, *Treaty Series*, vol. 112, No. 2623

Article 8

In countries where the principle of the extradition of nationals is not recognized, nationals who have returned to the territory of their own country after the commission abroad of an offence referred to in Article 3 should be punishable 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.

This provision does not apply if, in a similar case, the extradition of a foreigner could not be granted.

Article 9

Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

Convention on Extradition adopted by the Seventh International Conference of American States (Pan American Union)

Montevideo, 26 December 1933, League of Nations, *Treaty Series*, vol. 165, No. 3803

Article 2

When the person whose extradition is sought is a citizen of the country to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgment of the surrendering State, determine. If the accused is not surrendered, the latter State is obliged to bring

action against him for the crime with which he is accused, if such crime meets the conditions established in subarticle (b) of the previous article. The sentence pronounced shall be communicated to the demanding State.

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs

Geneva, 26 June 1936, League of Nations, *Treaty Series*, vol. 198, No. 4648

Article 7

1. In countries where the principle of the extradition of nationals is not recognized, nationals who have returned to the territory of their own country, after the commission abroad of any of the offences referred to in Article 2, shall be prosecuted and punished in the same manner as if the offence had been committed in the said territory, even in a case where the offender has acquired his nationality after the commission of the offence.

2. This provision does not apply if, in a similar case, the extradition of a foreigner cannot be granted.

Article 8

Foreigners who are in the territory of a High Contracting Party and who have committed abroad any of the offences set out in Article 2 shall be prosecuted and punished as though the offence had been committed in that territory if the following conditions are realized — namely, that:

(a) Extradition has been requested and could not be granted for a reason independent of the offence itself;

(b) The law of the country of refuge considers prosecution for offences committed abroad by foreigners admissible as a general rule.

Convention for the Prevention and Punishment of Terrorism

Geneva, 16 November 1937, League of Nations, 19 *Official Journal* 1938, p. 23 (*Official No.: C.546.M.383.1937.V*)

Article 9

1. When the principle of the extradition of nationals is not recognized by a High Contracting Party, nationals who have returned to the territory of their own country after the commission abroad of an offence mentioned in Articles 2 or 3 shall be prosecuted and punished in the same manner as if the offence had been committed on that territory, even in a case where the offender has acquired his nationality after the commission of the offence.

2. The provisions of the present article shall not apply if, in similar circumstances, the extradition of a foreigner cannot be granted.

Article 10

Foreigners who are on the territory of a High Contracting Party and who have committed abroad any of the offences set out in Articles 2 and 3 shall be prosecuted

and punished as though the offence had been committed in the territory of that High Contracting Party, if the following conditions are fulfilled — namely, that:

- (a) Extradition has been demanded and could not be granted for a reason not connected with the offence itself;
- (b) The law of the country of refuge recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners;
- (c) The foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners.

Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field

Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 970

Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea

Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 971

Geneva Convention relative to the treatment of prisoners of war

Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 972

Geneva Convention relative to the protection of civilian persons in time of war

Geneva, 12 August 1949, United Nations, *Treaty Series*, vol. 75, No. 973

Paragraph 2 of articles 49/50/129/146

Each High Contracting Party shall be under the obligation to 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. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

New York, 21 March 1950, United Nations, *Treaty Series*, vol. 96, No. 1342

Article 9

In States where the extradition of nationals is not permitted by law, nationals who have returned to their own State after the commission abroad of any of the offences referred to in articles 1 and 2 of the present Convention shall be prosecuted in and punished by the courts of their own State.

This provision shall not apply if, in a similar case between the Parties to the present Convention, the extradition of an alien cannot be granted.

European Convention on Extradition (Council of Europe)

Paris, 13 December 1957, United Nations, *Treaty Series*, vol. 359, No. 5146

Article 6

Extradition of nationals

...

2. If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.

Single Convention on Narcotic Drugs

New York, 30 March 1961, United Nations, *Treaty Series*, vol. 520, No. 7515

(See also **Protocol amending the Single Convention on Narcotic Drugs, 1961**, Geneva, 25 March 1972, United Nations, *Treaty Series*, vol. 976, No. 14151)

Article 36

Penal Provisions

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) ...

(iv) Serious offences heretofore referred to committed either by nationals or by foreigners 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, and if such offender has not already been prosecuted and judgment given.

General Convention on Judicial Cooperation [Convention générale de coopération en matière de justice] (Afro-Malagasy Common Organization [Organisation Commune Africaine et Malgache])

Antananarivo, 12 September 1961, *Journal Officiel de la République Malgache*, 23 December 1961, p. 2242

Article 42

The High Contracting Parties shall not extradite their respective nationals; the status of national shall be determined at the time of the offence in respect of which extradition is requested.

Nevertheless, the requested State undertakes to initiate proceedings against its own nationals who have committed infractions in the territory of another State which are punishable as crimes or offences under its own legislation, insofar as it is competent to try such persons, if the other State transmits a request for prosecution

along with files, documents, objects and information in its possession. The requesting State shall be kept informed of the action taken on its request.

**Convention for the Suppression of Unlawful Seizure of Aircraft
(Hague Convention)**

The Hague, 16 December 1970, United Nations, *Treaty Series*, vol. 860, No. 12325

Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Convention on Psychotropic Substances

Vienna, 21 February 1971, United Nations, *Treaty Series*, vol. 1019, No. 14956

Article 22

...

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) ...

(iv) Serious offences heretofore referred to committed either by nationals or by foreigners 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, and if such offender has not already been prosecuted and judgment given.

**Convention for the Suppression of Unlawful Acts against the Safety
of Civil Aviation**

Montreal, 23 September 1971, United Nations, *Treaty Series*, vol. 974, No. 14118

(See also **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**

Montreal, 24 February 1988, United Nations, *Treaty Series*, vol. 1589, No. 14118)

Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Organization of American States)

Washington, D.C., 2 February 1971, United Nations, *Treaty Series*, vol. 1438, No. 24381

Article 5

When extradition requested for one of the crimes specified in Article 2 is not in order because the person sought is a national of the requested state, or because of some other legal or constitutional impediment, that state is obliged to submit the case to its competent authorities for prosecution, as if the act had been committed in its territory. The decision of these authorities shall be communicated to the state that requested extradition. In such proceedings, the obligation established in Article 4 shall be respected.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

New York, 14 December 1973, United Nations, *Treaty Series*, vol. 1035, No. 15410

Article 7

The State Party 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 the purpose of prosecution, through proceedings in accordance with the laws of that State.

European Convention on the Suppression of Terrorism (Council of Europe)

Strasbourg, 27 January 1977, United Nations, *Treaty Series*, vol. 1137, No. 17828

Article 7

A Contracting State in whose territory a person suspected to have committed an offence mentioned in Article 1 is found and which has received a request for extradition under the conditions mentioned in Article 6, paragraph 1, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Geneva, 8 June 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512

Article 85

Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

...

Organization of African Unity Convention for the elimination of mercenarism in Africa

Libreville, 3 July 1977, United Nations, *Treaty Series*, vol. 1490, No. 25573

Article 9
Extradition

...

3. Where a national is involved in the request for extradition, the requested State shall take proceedings against him for the offence committed if extradition is refused.

International Convention against the Taking of Hostages

New York, 17 December 1979, United Nations, *Treaty Series*, vol. 1316, No. 21931

Article 8

1. The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

Convention on the Physical Protection of Nuclear Material

Vienna and New York, 3 March 1980, United Nations, *Treaty Series*, vol. 1456, No. 24631

Article 10

The State Party 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 the purpose of prosecution, through proceedings in accordance with the laws of that State.

Inter-American Convention on Extradition (Organization of American States)

Caracas, 25 February 1981, United Nations, *Treaty Series*, vol. 1752, No. 30597

Article 2
Jurisdiction

...

3. The requested State may deny extradition when it is competent, according to its own legislation, to prosecute the person whose extradition is sought for the offence on which the request is based. If it denies extradition for this reason, the requested State shall submit the case to its competent authorities and inform the requesting State of the result.

*Article 8**Prosecution by the Requested State*

If, when extradition is applicable, a State does not deliver the person sought, the requested State shall, when its laws or other treaties so permit, be obligated to prosecute him for the offence with which he is charged, just as if it had been committed within its territory, and shall inform the requesting State of the judgment handed down.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

New York, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, No. 24841

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Inter-American Convention to Prevent and Punish Torture (Organization of American States)

Cartagena de Indias, Colombia, 9 December 1985, OAS Treaty Series, No. 67

Article 14

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition.

South Asian Association for Regional Cooperation Regional Convention on the Suppression of Terrorism

Kathmandu, 4 November 1987, *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.03.V.9, p. 153

Article IV

A Contracting State in whose territory a person is suspected of having committed an offence referred to in Article I or agreed to in terms of Article II is found and which has received a request for extradition from another Contracting State, shall, if it does not extradite that person, submit the case without exception and without delay, to its competent authorities who shall take their decisions in the same manner as in the case of any offence of a serious nature under the law of the State.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

Rome, 10 March 1988, United Nations, *Treaty Series*, vol. 1678, No. 29004

Article 10

1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Vienna, 20 December 1988, United Nations, *Treaty Series*, vol. 1582, No. 27627

Article 6

Extradition

...

9. Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law, a Party in whose territory an alleged offender is found shall:

(a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph 1, on the grounds set forth in article 4, paragraph 2, subparagraph (a), submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting Party;

(b) If it does not extradite him in respect of such an offence and has established its jurisdiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph (b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

International Convention Against the Recruitment, Use, Financing and Training of Mercenaries

New York, 4 December 1989, United Nations, *Treaty Series*, vol. 2163, No. 37789

Article 12

The State Party in whose territory the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

**Inter-American Convention on the Forced Disappearance of Persons
(Organization of American States)**

Belém do Pará, Brazil, 9 June 1994, *International Legal Materials*, vol. XXV, 1994, p. 1529

Article VI

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition.

Economic Community of West African States Convention on Extradition

Abuja, 6 August 1994, ECOWAS Convention A/P1/8/94, reproduced in *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, vol. 3, June 2007, p. 1085

Article 10

...

2. The requested State which does not extradite its nationals, shall at the request of the requesting State submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted, without charge, through the diplomatic channel or by such other means as shall be agreed upon by the States concerned. The requesting State shall be informed of the result of its request.

Convention on the Safety of United Nations and Associated Personnel

New York, 9 December 1994, United Nations, *Treaty Series*, vol. 2051, No. 34547

(See also **Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel**

New York, 8 December 2005, General Assembly resolution 60/42, annex)

Article 14

The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.

Inter-American Convention against Corruption (Organization of American States)

Caracas, 29 March 1996, see E/1996/99

Article XIII

Extradition

...

6. If extradition for an offence to which this article applies is refused solely on the basis of the nationality of the person sought, or because the requested State deems that it has jurisdiction over the offence, the requested State shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the requesting State, and shall report the final outcome to the requesting State in due course.

Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (Organization of American States)

Washington, D.C., 14 November 1997, United Nations, *Treaty Series*, vol. 2029, No. 35005

Article XIX

Extradition

6. If extradition for an offence to which this article applies is refused solely on the basis of the nationality of the person sought, the requested State Party shall submit the case to its competent authorities for the purpose of prosecution under the criteria, laws, and procedures applied by the requested State to those offences when they are committed in its own territory. The requested and requesting States parties may, in accordance with their domestic laws, agree otherwise in relation to any prosecution referred to in this paragraph.

Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Paris, 21 November 1997, S. Treaty Doc. No. 105-43, reprinted in *International Legal Materials*, vol. XXXVII, 1998, p. 1

Article 10

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

International Convention for the Suppression of Terrorist Bombings

New York, 15 December 1997, United Nations, *Treaty Series*, vol. 2149, No. 37517

Article 8

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

...

Arab Convention on the Suppression of Terrorism (League of Arab States)

Cairo, 22 April 1998, *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.03.V.9, p. 158

Article 6

Extradition shall not be permissible in any of the following circumstances:

...

h. If the legal system of the requested State does not allow it to extradite its nationals. In this case, the requested State shall prosecute any such persons who commit in any of the other Contracting States a terrorist offence that is punishable in both States by deprivation of liberty for a period of at least one year or more. The nationality of the person whose extradition is sought shall be determined as at the date on which the offence in question was committed, and use shall be made in this regard of the investigation conducted by the requesting State.

Convention on the Protection of the Environment through Criminal Law (Council of Europe)

Strasbourg, 4 November 1998, Council of Europe, *Treaty Series*, No. 172

[See footnote 237 above.]

Criminal Law Convention on Corruption (Council of Europe)

Strasbourg, 27 January 1999, United Nations, *Treaty Series*, vol. 2216, No. 39391

Article 27

...

5. If extradition for a criminal offence established in accordance with this Convention is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case to its competent authorities for the purpose of

prosecution unless otherwise agreed with the requesting Party, and shall report the final outcome to the requesting Party in due course.

Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict

The Hague, 26 March 1999, United Nations, *Treaty Series*, vol. 2253, No. 3511

Article 17

1. The Party in whose territory the alleged offender of an offence set forth in Article 15 subparagraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

Convention of the Organization of the Islamic Conference on Combating International Terrorism

Ouagadougou, 1 July 1999, *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.03.V.9, p. 188

Article 6

...

8. If the legal system of the requested State does not permit extradition of its national, then it shall be obliged to prosecute whosoever commits a terrorist crime if the act is punishable in both States by a freedom restraining sentence for a minimum period of one year or more. The nationality of the person requested for extradition shall be determined according to the date of the crime taking into account the investigation undertaken in this respect by the requesting State.

Organization of African Unity Convention on the Prevention and Combating of Terrorism

Algiers, 14 July 1999, United Nations, *Treaty Series*, vol. 2219, No. 39464

Article 8

...

4. A State Party in whose territory an alleged offender is present shall be obliged, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution if it does not extradite that person.

International Convention for the Suppression of the Financing of Terrorism

New York, 9 December 1999, General Assembly resolution 54/109, annex, United Nations, *Treaty Series*, vol. 2178, No. 38349

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

New York, 25 May 2000, General Assembly resolution 54/263, annex II, United Nations, *Treaty Series*, vol. 2171, No. 27531

Article 5

...

5. If an extradition request is made with respect to an offence described in article 3, paragraph 1, and the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution.

United Nations Convention against Transnational Organized Crime

New York, 15 November 2000, General Assembly resolution 54/263, annex I, United Nations, *Treaty Series*, vol. 2225, No. 39574

(See also **Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime**

New York, 15 November 2000, United Nations, *Treaty Series*, vol. 2237, No. 39574

Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime

New York, 15 November 2000, United Nations, *Treaty Series*, vol. 2241, No. 39574

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

New York, 8 June 2001, United Nations, *Treaty Series*, vol. 2326, No. 39574)

Article 16

...

10. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take

their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

Convention on Cybercrime (Council of Europe)

Budapest, 23 November 2001, United Nations, *Treaty Series*, vol. 2296, No. 40916

Article 24

...

6. If extradition for a criminal offence referred to in paragraph 1 of this article is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case at the request of the requesting Party to its competent authorities for the purpose of prosecution and shall report the final outcome to the requesting Party in due course. Those authorities shall take their decision and conduct their investigations and proceedings in the same manner as for any other offence of a comparable nature under the law of that Party.

London Scheme for Extradition within the Commonwealth, incorporating the amendments agreed at Kingstown in November 2002^a

Available at www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf

16 (1) For the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice, each country which reserves the right to refuse to extradite nationals or permanent residents in accordance with clause 15 paragraph (3), will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground.

(2) The legislative action necessary to give effect to paragraph (1) may include —

(a) providing that the case be submitted to the competent authorities of the requested country for prosecution;

(b) permitting:

(i) the temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence; and

(ii) the transfer of convicted offenders; or

(c) enabling a request to be made to the relevant authorities in the requesting country for the provision to the requested country of such evidence and other information as would enable the authorities of the requested country to prosecute the person for the offence.

...

^a The Scheme is not a binding international instrument.

African Union Convention on Preventing and Combating Corruption

Maputo, 11 July 2003, *International Legal Materials*, vol. XLIII, 2004, p. 5

Article 15

...

6. Where a State Party in whose territory any person charged with or convicted of offences is present and has refused to extradite that person on the basis that it has jurisdiction over offences, the requested State Party shall be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting State Party, and shall report the final outcome to the requesting State Party.

United Nations Convention against Corruption

New York, 31 October 2003, General Assembly resolution 58/4, annex, United Nations, *Treaty Series*, vol. 2349, p. 41

Article 44

...

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism

Kuwait, 4 May 2004, *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2, p. 259

Article 20

Extradition shall not be possible in the following cases:

...

(h) If the law of the requested State prohibits it from extraditing its nationals. In this case, the requested State shall undertake to convict a national who has committed a terrorist offence in any other Contracting State if the offence is punishable by deprivation of liberty of at least one year in both States. The nationality of the person whose extradition is sought shall be deemed to be the nationality as at the date of the commission of the offence for which extradition is sought, on the basis of investigations conducted by the requesting State.

International Convention for the Suppression of Acts of Nuclear Terrorism

New York, 13 April 2005, General Assembly resolution 59/290, annex

Article 11

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Council of Europe Convention on the Prevention of Terrorism

Warsaw, 16 May 2005, Council of Europe, *Treaty Series*, No. 196

Article 18

The Party in the territory of which the alleged offender is present shall, when it has jurisdiction in accordance with Article 14, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a serious nature under the law of that Party.

International Convention for the Protection of All Persons from Enforced Disappearance

New York, 20 December 2006, General Assembly resolution 61/177, annex

Article 11

1. 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.

Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism

Cebu, Philippines, 13 January 2007, *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2, p. 336

Article XIII

Extradition

1. The Party in the territory of which the alleged offender is present shall, in cases to which Article VII of this Convention applies, if it does not extradite that

person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the domestic laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the domestic laws of that Party.
