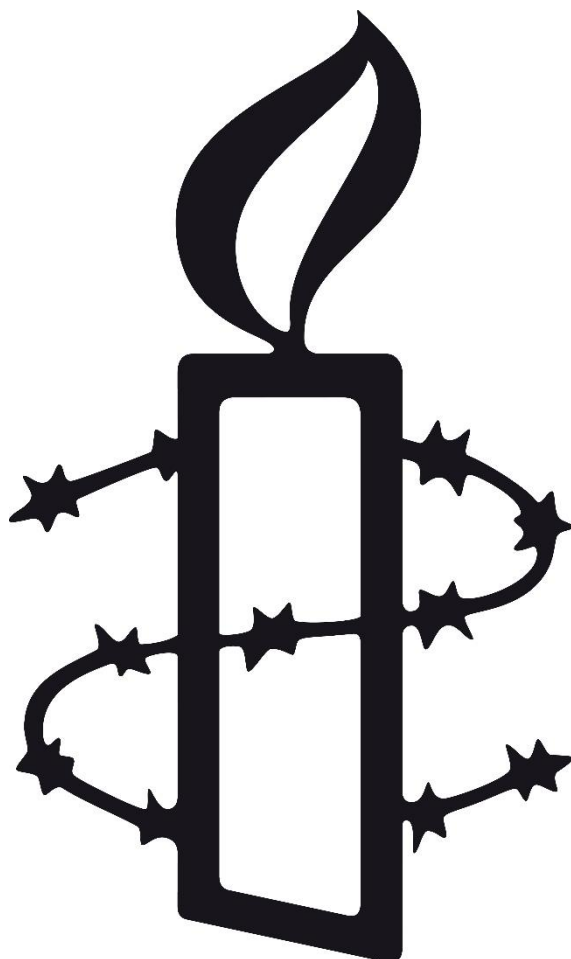


ESTABLISHMENT AND EXERCISE OF CRIMINAL JURISDICTION IN A FUTURE CONVENTION ON CRIMES AGAINST HUMANITY



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In this briefing, Amnesty International submits, for consideration by states at the 2nd resumed session of the UN General Assembly's 6th Committee and subsequently, that there is no prescribed hierarchy between jurisdictional bases when it comes to national prosecutions of crimes against humanity. The organization further submits that a state that has custody over a suspected perpetrator has the primary duty to investigate and potentially prosecute their individual criminal responsibility, independent from any request for extradition by another state asserting jurisdiction. Overall, Amnesty International recommends that any future Convention on Crimes against Humanity should retain Draft Articles 7, 9(3), 10 and 13(12)-(13) as currently drafted.

1. INTRODUCTION

The International Law Commission's (ILC) Draft Articles on Prevention and Punishment of Crimes Against Humanity (Draft Articles)¹ are a welcome basis to open negotiations on a future Convention, and UN member states should in 2024 adopt a procedure to move them forward to that stage. Among other things, the Draft Articles require states to establish national criminal jurisdiction over crimes against humanity and to initiate an investigation when a suspected perpetrator is present in any territory under its jurisdiction.² Under Draft Article 7, a state must establish domestic jurisdiction over crimes against humanity, including when crimes are committed on any territory under its jurisdiction (territorial jurisdiction), when the perpetrator or the victim³ is a national of that state (active personality and passive personality jurisdiction, respectively), when a perpetrator is present in any territory under its jurisdiction or in accordance with other forms of jurisdiction under domestic law, including protective jurisdiction⁴ and universal jurisdiction.⁵

This briefing discusses the framework for establishing and exercising jurisdiction as set out in the ILC's Draft Articles and how it should be interpreted in a future convention in cases where more than one state may claim jurisdiction. Draft Article 7, like equivalent provisions on the establishment of jurisdiction included in other treaties addressing crimes, does not establish a hierarchy among the various bases of jurisdiction. Amnesty International agrees with this approach and submits it should be retained in any future convention, as further discussed below.⁶

To be read with Draft Article 7 in this context is Draft Article 10, which codifies the *aut dedere aut judicare* (prosecute or extradite) principle. This, first, imposes an obligation on states to submit the case to their competent prosecutorial authorities for purposes of investigation once a suspect is present in any territory under their jurisdiction, regardless of the basis of jurisdiction relied on. Draft Article 10, secondly, provides the alternative option to such a state whether to extradite the detained suspect to other states or surrender the suspect to a "competent international criminal court or tribunal". Under Draft Article 10, any of the bases of jurisdiction envisaged under Draft Article 7 may be relied on when a state opens an investigation against a suspect, confirming that no form of jurisdiction prevails over the other.⁷

Draft Articles 9 and 13 regulate instances where more than one state might or intend to initiate proceedings against a suspect. In particular, Draft Article 9(3) requires that a state which has custody of a suspect present on any territory under its jurisdiction notify those states which may exercise territorial, active or passive personality jurisdiction. In turn, Draft Article 13(12) provides that a state, which receives an extradition request from the state which can exercise territorial jurisdiction, give due consideration to such a request. Draft Article 13(13) further requires that, before refusing an extradition request, the state which has custody of a suspect provide the requesting state "with ample opportunity to present its opinions and to provide information relevant to its allegation". The Draft Articles, therefore, provide avenues for state-to-state cooperation whenever more than one state may assert jurisdiction over the same crime.⁸

It should be noted, however, that some states contend that some bases of jurisdiction should be accorded priority, particularly territorial and active personality jurisdiction.⁹ According to some views, for instance, the

¹ Adopted by the International Law Commission at its seventy-first session, 2019, UN Doc. A/74/10.

² Draft Articles on Crimes against Humanity, Articles 7, 9 and 10.

³ In this case, only if the state "considers it appropriate". See Draft Articles on Crimes against Humanity, Article 7(1)(c).

⁴ This basis concerns cases where a crime is deemed to affect a state's national interest or security.

⁵ Universal jurisdiction allows a State to investigate and prosecute crimes under international law, including crimes against humanity, committed outside their territories, which are not linked to the prosecuting State in any way by the nationality of the suspect or the victims, or by harm to the state's own national interests.

⁶ See section 2 below.

⁷ See section 3 below.

⁸ See section 4 below.

⁹ Draft Articles on Prevention and Punishment of Crimes Against Humanity, Comments and Observations by Israel, December 2023, https://www.un.org/en/ga/sixth/78/cah/israel_e.pdf, paras 14-15; Written Comments and Observations of the Republic of Singapore Submitted in Response to Paragraph 6 of General Assembly Resolution A/RES/77/249 on the Agenda Item Crimes Against Humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/singapore_e.pdf, para. 6; Response of the Republic of Türkiye to the International Law Commission's Request for Comments and Observations on the Draft Articles on Crimes Against Humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/turkey_e.pdf, pp.

exercise of universal jurisdiction by the custodial state should be dependent on a prior extradition offer to any state that can assert territorial or active nationality jurisdiction;¹⁰ or, it is suggested that extradition should be granted to the latter state if it has made a request, provided it intends to pursue prosecution genuinely.¹¹ Some states have enacted legislation subordinating the exercise of universal jurisdiction to the absence of genuine proceedings in the state where the crime has been committed.¹² On the other hand, several states have expressed support for the way Draft Articles 7 and 10 regulate the establishment and exercise of criminal jurisdiction over crimes against humanity, in a way that does not accord priority to one basis of jurisdiction over another.¹³ Amnesty International submits that this second view is in line with what is required by international law and standards.

It is worth pointing out that, so far, Amnesty International is not aware of any actual dispute between states genuinely eager to try persons suspected of criminal responsibility for crimes against humanity. However, should the case arise where two or more states compete to exercise jurisdiction, the organization is of the view that the Draft Articles already address this situation in a sufficient manner.

In this briefing, Amnesty International submits that, by not establishing a hierarchy among the various bases of jurisdiction, the Draft Articles align with existing international law, particularly as reflected in treaties, international and domestic jurisprudence, as well as academic and expert opinions.¹⁴ In view of future negotiations for a Convention on Crimes against Humanity, Amnesty International therefore recommends that:

- States retain the text of Draft Article 7 on the establishment of criminal jurisdiction, Draft Article 10 on the *aut dedere aut judicare* principle, and Draft Articles 9(3) and 13(12)-(13) on notification of proceedings and consideration of extradition requests.

2 and 4; Comments from the United States on the International Law Commission's Draft Articles on the Prevention and Punishment of Crimes Against Humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/us_e.pdf, p. 6.

¹⁰ Observations and comments of the Kingdom of Saudi Arabia regarding the draft articles on prevention and punishment of crimes against humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/saudi_arabia_e.pdf; International Court of Justice (ICJ), Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, <https://icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-05-EN.pdf>, para. 59; Institute of International Law, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow Session, 2005, https://www.idi-il.org/app/uploads/2017/06/2005_kra_03_en.pdf, para. 3(c).

¹¹ Draft articles on crimes against humanity, Written Comments and Observations of the Federative Republic of Brazil, December 2023, https://www.un.org/en/ga/sixth/78/cah/brazil_e.pdf, paras 37-38; Institute of International Law, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes (previously cited), para. 3(d).

¹² UN Secretary General, Report: *The scope and application of the principle of universal jurisdiction*, 28 June 2016, UN Doc. A/71/111, paras 21-22 (Spain).

¹³ Comments and observations of the Argentine Republic on the draft articles of the International Law Commission on crimes against humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/argentina_e.pdf, pp. 3-4; Written comments by Austria on the ILC Draft Articles on the Prevention and Punishment of Crimes against Humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/austria_e.pdf, pp. 2-3; Comments of the Kingdom of Belgium on the draft articles on prevention and punishment of crimes against humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/belgium_e.pdf, p. 4; Observations of the Republic of Colombia, pursuant General Assembly resolution 77/249 of 30 December 2022, concerning the draft articles on prevention and punishment of crimes against humanity of the International Law Commission, December 2023, https://www.un.org/en/ga/sixth/78/cah/colombia_e.pdf, pp. 7-8; Comments of the Czech Republic on the International Law Commission's Draft Articles on Prevention and Punishment of Crimes Against Humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/czechrep_e.pdf, pp. 3-4; Comments of Mexico on the draft articles on prevention and punishment of crimes against humanity and the recommendation of the International Law Commission, December 2023, https://www.un.org/en/ga/sixth/78/cah/mexico_e.pdf, p. 3; Joint Nordic comments on the International Law Commission's Draft articles on Prevention and Punishment of Crimes Against Humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/nordic_countries_e.pdf, pp. 3-4; Comments and observations by Portugal to the text of the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission, December 2023, https://www.un.org/en/ga/sixth/78/cah/portugal_e.pdf, pp. 7 and 9; Written comments by the European Union on the International Law Commission's Draft articles on Prevention and punishment of Crimes Against Humanity, December 2023, https://www.un.org/en/ga/sixth/78/cah/eu_e.pdf, pp. 7-8.

¹⁴ See below sections 2 and 3.

2. THE ABSENCE OF A HIERARCHY AMONG THE VARIOUS BASES OF JURISDICTION UNDER INTERNATIONAL LAW

Article 7(1) of the Draft Articles on Crimes against Humanity (“Establishment of national jurisdiction”) provides that states parties must establish jurisdiction over crimes against humanity based on territoriality,¹⁵ active personality (nationality of the suspect)¹⁶ and, if the state considers it appropriate, passive personality (nationality of the victim).¹⁷

In addition, Draft Article 7(2) provides that each state shall also take the necessary measures to establish its jurisdiction over crimes against humanity in cases where the person suspected of criminal responsibility “is present in any territory under its jurisdiction and it does not extradite or surrender the person” concerned.¹⁸ Finally, Draft Article 7(3) provides that the draft articles “do not exclude the exercise of any criminal jurisdiction established by a [s]tate in accordance with its national law”. This provision offers the conventional basis for the establishment of other forms of jurisdiction.¹⁹

Draft Article 7 reflects language and content included in several international treaties.²⁰ In particular, and related to crimes under international law, Draft Article 7 envisages the same bases of jurisdiction provided for in the Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment (Convention against Torture),²¹ the International Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention),²² and the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (Ljubljana-The Hague Convention).²³

Like other treaties, of either universal or regional character,²⁴ providing for the establishment of domestic jurisdiction over certain crimes, Draft Article 7 does not indicate that one basis of jurisdiction is to be preferred over another. Accordingly, territorial, active personality and passive personality jurisdiction, as envisaged under Draft Article 7(1), do not have priority over other bases of jurisdiction envisaged under Draft Article 7(2) and (3). This is also in line with the Convention against Torture, the Enforced Disappearance Convention and the Ljubljana-The Hague Convention.

The absence of hierarchy among the various bases of jurisdiction has been explicitly confirmed in domestic case law, academic commentary and expert opinions. For example, in the *Eichmann* case,

¹⁵ Article 7(1)(a): “... when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State.”

¹⁶ Article 7(1)(b): “... when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State’s territory.”

¹⁷ Article 7(1)(c): “... when the victim is a national of that State if that State considers it appropriate.”

¹⁸ Draft Article 7(2) provides the basis for so-called “conditional” universal jurisdiction, which requires the presence of the suspect on a state’s territory in order for the latter to assert jurisdiction over a crime. See TRIAL International, *Towards a Convention on the Prevention and Punishment of Crimes against Humanity: Recommendations to States*, March 2024, https://trialinternational.org/wp-content/uploads/2024/03/CAHC_Briefing-paper_website-v2.pdf, pp. 8-9.

¹⁹ For example, protective or security jurisdiction or universal jurisdiction without the requirement of the suspect’s presence. On the latter, see ILC, Final Report: *The obligation to extradite or prosecute* (aut dedere aut judicare), 2014, UN Doc. A/69/10, para. 18.

²⁰ For a list, see ILC, Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, 2019, UN Doc. A/74/10 (Commentary on the Draft Articles on Crimes against Humanity), p. 85, footnote 419.

²¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85, Article 5.

²² International Convention for the Protection of All Persons from Enforced Disappearance, (adopted on 20 December 2006, entered into force 23 December 2010), 2716 UNTS 3, Article 9.

²³ Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (adopted on 26 May 2023, not yet entered into force at the time of writing), <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/konvencija-dokoncna/The-Ljubljana-The-Hague-Convention-Final-English.pdf>, Article 8. 35 states signed the treaty at the signing ceremony on 14 February 2024. See Amnesty International, “Amnesty International calls for adoption of new treaty on cooperation in prosecuting crimes under international law”, 13 February 2024, <https://www.amnesty.org/en/latest/news/2024/02/global-amnesty-international-calls-for-adoption-of-new-treaty-on-cooperation-in-prosecuting-crimes-under-international-law/>.

²⁴ See, for example, Hague Convention for the Suppression of Unlawful Seizure of Aircraft (adopted on 16 December 1970, entered into force 14 October 1971), 2178 UNTS 197; International Convention against the Taking of Hostages (adopted on 17 December 1979, entered into force 3 June 1983), 316 UNTS 205; International Convention for the Suppression of Terrorist Bombings (adopted on 15 December 1997, entered into force 23 May 2001), 2149 UNTS 256; Council of Europe Convention on the Prevention of Terrorism (adopted on 16 May 2005, entered into force 1 June 2007), CETS No. 196; Inter-American Convention on Forced Disappearance of Persons (adopted on 9 June 1994, entered into force 28 March 1996), OAS Treaty Series No. 68.

Israel's Supreme Court rejected the claim, expressly made by the defence, that territorial and active personality jurisdiction have priority over other forms of jurisdiction, including universal jurisdiction. It instead noted that preference for a specific basis of jurisdiction, particularly territorial jurisdiction, is "purely practical", by reason of the fact that "the great majority of the witnesses and the greater part of the evidence are concentrated in that state, and it becomes, therefore, the most convenient place (*forum convenicus*) for the conduct of the trial".²⁵

Similarly, in the more recent *Kumar Lama* case, the Court of Appeal of England and Wales in the United Kingdom stated that with regard to the Convention against Torture, no basis of jurisdiction has priority over another:

[t]he Convention against Torture does not establish a hierarchy of possible jurisdictions or embody any principle of *forum conveniens*. While it is correct that, in any given case, it may be more convenient or effective to prosecute in one jurisdiction rather than another, for example because of the availability of evidence, this is no more than a reflection of the circumstances of the particular case.²⁶

Leading commentators of the Convention against Torture have confirmed that:

[S]tates are not permitted to make the exercise of universal jurisdiction dependent on any legal act of another State. All attempts by States in the Working Group to establish an *order of priority* among the different grounds of jurisdiction mentioned in Article 5 or to make universal jurisdiction *dependent on a request for extradition* by another State have been rejected by well-informed decisions arrived at after extensive discussions.²⁷

Likewise, an *ad hoc* expert group set up by the African Union (AU) and the European Union (EU) to clarify the understanding of the principle of universal jurisdiction stated that:

Positive international law recognises no hierarchy among the various bases of jurisdiction that it permits. In other words, a state which enjoys universal jurisdiction over, for example, crimes against humanity is under no positive legal obligation to accord priority in respect of prosecution to the state within the territory of which the criminal acts occurred or to the state of nationality of the offender or victims.²⁸

Moreover, the Report of the UN Fact-Finding Mission on the Gaza Conflict, also known as the *Goldstone Report*, concluded that:

The exercise of criminal jurisdiction on the basis of the universality principle concerns especially serious crimes regardless of the place of commission, the nationality of the perpetrator or the nationality of the victim. This form of jurisdiction is concurrent with others based on more traditional principles of territoriality, active and passive nationality, and it is not subsidiary to them.²⁹

In its study on customary international humanitarian law, the International Committee of the Red Cross (ICRC) further affirmed that "[t]he universality principle is additional to other bases of criminal jurisdiction ..."³⁰

In addition to these authoritative observations, the absence of such a hierarchy is also in line with the object and purpose of establishing jurisdiction over crimes under international law, including crimes against humanity. As stated in the preamble of the Draft Articles, "crimes against humanity threaten the peace, security and well-being of the world, ... the prohibition of crimes against humanity is a

²⁵ Israel's Supreme Court, *Attorney-General of the Government of Israel v. Eichmann*, Case 336/61, Appeal judgment, 29 May 1962, https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Appeals_Judgement_29-5-1962.pdf, para. 12(d).

²⁶ Court of Appeal of England and Wales, *KL v. Regina*, Case EWCA Crim. 1729, 7 August 2014, <https://caselaw.nationalarchives.gov.uk/ewca/crim/2014/1729?query=EWCA+Crim.+1729>, para. 71(3).

²⁷ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, 2008, p. 317 (emphasis in the original).

²⁸ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Doc. 8672/1/09 REV 1, 16 April 2009, <https://data.consilium.europa.eu/doc/document/ST-8672-2009-REV-1/en/pdf>, para.14.

²⁹ UN Fact-Finding Mission on the Gaza Conflict, Report, 25 September 2009, UN Doc. A/HRC/12/48, para. 1849.

³⁰ International Committee of the Red Cross, Customary International Humanitarian Law, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule157>, Rule 157.

peremptory norm of general international law (*jus cogens*), [and] crimes against humanity [...] are among the most serious crimes of concern to the international community as a whole...”³¹ In addition, the preamble lays out that “it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity”, and that “the effective prosecution of such crimes must be ensured by taking measures at the national level”,³² without limiting the exercise of these duties to specific states with regard to specific crimes. Accordingly, as set out by Draft Article 3(2),³³ states have a general obligation to punish crimes against humanity.

The rationale for adopting a Convention on Crimes against Humanity is to better enable the prosecution of, and thereby more effectively combat impunity for, such crimes.³⁴ Establishing a hierarchy among the bases of jurisdiction, and consequent duties of deference towards certain states, would not only introduce additional obstacles, but would also imply that specific manifestations of these crimes are *not* of equal “concern to the international community as a whole”, but more of concern to some states than others. This would run contrary to the spirit and *raison d’être* of a future Convention on Crimes against Humanity.

While the exercise of territorial jurisdiction may be intuitive or convenient for practical reasons, such as the availability of evidence and the proximity to witnesses and victims,³⁵ international law does not prescribe a hierarchy or priority among the various jurisdictional bases. They are complementary to each other and so designed to maximize the means of accountability for crimes under international law.

As clarified by the ILC,³⁶ Draft Article 13(12)-(13) regulates instances of multiple exercises of criminal jurisdiction through state-to-state cooperation. Section 4 below will show that also this provision does not establish a primacy of territorial jurisdiction over other bases.

3. THE *AUT DEDERE AUT JUDICARE* (PROSECUTE OR EXTRADITE) PRINCIPLE

According to the *aut dedere aut judicare*³⁷ principle, whenever a state finds a person suspected of criminal responsibility for certain categories of crimes in any territory under its jurisdiction, it has the primary obligation to submit the case to the competent national authorities for the purposes of criminal investigation and potential prosecution.³⁸ Alternatively, the state may relieve itself of this obligation if it extradites the suspect to another state,³⁹ or surrenders them to a competent

³¹ Draft Articles on Crimes against Humanity, Preamble, paras 2, 4 and 5.

³² Draft Articles on Crimes against Humanity, Preamble, paras 8 and 10.

³³ Draft Articles on Crimes against Humanity, Article 3: “... 2. Each State undertakes to prevent and to punish crimes against humanity ...”

³⁴ See also ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, para. 74; UN Committee against Torture, Decision: *Suleymane Guengueng et al. v. Senegal*, adopted on 19 May 2006, UN Doc. CAT/C/36/D/181/2001, para. 9.7; ICRC, Commentary on the Third Geneva Convention: Article 129, 2020, <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-129/commentary/2020?activeTab=1949GCs-APs-and-commentaries>, paras 5125 and 5129-5130, discussed below in this section.

³⁵ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 119, para. 32.

³⁶ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 87, para. 12.

³⁷ The principle is more accurately described as *prosequi vel dedere* (prosecute or extradite) or *primo prosequi, secundo dedere* (first to prosecute, second to extradite) rather than *aut dedere aut judicare* (either extradite or try). This owes to the fact that international law establishes that prosecution is an obligation while extradition is an option. See Raphael van Steenberghe, “The Obligation to Extradite or Prosecute: Clarifying its Nature”, November 2011, *Journal of International Criminal Justice*, Volume 9, p. 1114; ICRC, Commentary on the Third Geneva Convention: Article 129 (previously cited), para. 5125. This paper will generally refer to the *aut dedere aut judicare* principle, as this is the formula employed in the Draft Articles on Crimes against Humanity.

³⁸ As clarified by the ILC, “[a]lthough regularly termed the obligation to extradite or ‘prosecute’, the obligation is to ‘submit the case to its competent authorities for the purpose of prosecution’, meaning to submit the matter to police and prosecutorial authorities, who may or may not decide to prosecute in accordance with relevant procedures and policies”. See ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 93, para. 3 (also below). See also ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (previously cited), para. 90.

³⁹ Extradition, however, is prohibited if there is a risk that the state seeking extradition would apply the death penalty, or that the suspect would be subjected to torture or other ill-treatment, or that their right to a fair trial would not fully be respected in the receiving state. See Draft Articles on Crimes against Humanity, Article 13(11); Ljubljana-The Hague Convention, Article 51(1).

international criminal court or tribunal. The *aut dedere aut judicare* principle is contained in a vast number of multilateral treaties addressing crimes.⁴⁰

One should note that the establishment of jurisdiction in domestic law, discussed in the previous section, and the *aut dedere aut judicare* principle are distinct but interrelated obligations: the former concerns the ability of a state to assert jurisdiction over a crime as a matter of domestic law, while the latter regards the activation of such criminal jurisdiction when a state finds a suspect on any territory under its jurisdiction.⁴¹ In this context, the establishment of criminal jurisdiction through national legislation will typically provide the domestic legal basis for a state to initiate an investigation against a suspect present in any territory under its jurisdiction.⁴²

Article 10 of the Draft Articles on Crimes against Humanity ("*Aut dedere aut judicare*") sets out the principle as follows:

The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, 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 other offence of a grave nature under the law of that State.

The text of Draft Article 10 reproduces the content, and partially the language, of equivalent provisions included in the Convention against Torture (Article 7), the Convention against Enforced Disappearance (Article 11) and the Ljubljana-The Hague Convention (Article 14), as well as the 1949 Geneva Conventions (Articles 49, 50, 129 and 146 of Geneva Conventions I-IV, respectively).

Regarding the content of the obligation, the ILC's commentary explains that:

Draft article 10 obliges a State, in the territory under whose jurisdiction an alleged offender is present, to submit the case to its competent authorities for the purpose of prosecution. The only alternative means of meeting this obligation is if the State extradites or surrenders the alleged offender to another State or competent international criminal court or tribunal that is willing and able itself to submit the case to prosecution. ... the obligation [to prosecute] arises whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition.⁴³

In its 2014 Final Report on the *aut dedere aut judicare* principle, the ILC similarly held that:

... an obligation to prosecute *ipso facto* ... arises as soon as the presence of the alleged offender in the territory of the State concerned is ascertained, regardless of any request for extradition. Only in the event that a request for extradition is made does the State concerned have the discretion to choose between extradition and prosecution.⁴⁴

In its commentary to Article 9 ("Obligation to extradite or prosecute") of the 1996 Draft Code of Crimes against the Peace and Security of Mankind,⁴⁵ the ILC had further clarified that, when receiving an extradition request from another state, "the custodial State is not required to grant such a request".⁴⁶

⁴⁰ For a list, see ILC, Second report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, 21 January 2016, UN Doc. A/CN.4/690, paras 158-159.

⁴¹ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 87, para. 11.

⁴² ICJ, Questions relating to the Obligation to Prosecute or Extradite (previously cited), para. 91.

⁴³ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), pp. 92-93, paras 1 and 3.

⁴⁴ ILC, Final Report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), 5 June 2014, UN Doc. A/CN.4/L.844, para. 25 (footnotes omitted).

⁴⁵ Article 9: "... the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against UN and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual."

⁴⁶ ILC, Draft Code of Crimes against the Peace and Security of Mankind, with commentaries, in Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 31, para. 6.

Accordingly, under the present Draft Article 10:

- The prosecution of crimes against humanity may indistinctly be based on any of the jurisdiction principles envisaged under Draft Article 7 – territoriality, active personality, passive personality, or other bases envisaged under domestic law.
- States have an obligation to submit the case to their competent authorities for purposes of criminal investigation,⁴⁷ and this obligation is independent of any extradition offers to or requests by other states, irrespective of the basis of jurisdiction relied on. Extradition or surrender is an option left to states to meet their obligation under Draft Article 10.
- The competent authorities' decision whether to initiate proceedings against a suspect are to be taken in accordance with the ordinary rules, procedures and standards applicable to serious offences under domestic law.

Importantly, in its commentary on the Draft Articles the ILC also addressed instances where more than one state might exercise its criminal jurisdiction over crimes against humanity:

... it is possible that one or more other States [beside the state in the territory under whose jurisdiction an alleged offender is present] will have established jurisdiction over the offence and will wish to exercise such jurisdiction, in which case they may seek extradition of the alleged offender from the State where he or she is present. If so, draft article 13, paragraph 12, requires that a State where the alleged offender is present "give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred".⁴⁸

Draft Article 13(2) will be further discussed in section 4 below.

The ILC's interpretation of the *aut dedere aut judicare* principle under Draft Article 10, according to which the obligation to prosecute is independent of extradition requests or offers, aligns with international and domestic jurisprudence.

In the *Belgium v. Senegal* case, the International Court of Justice (ICJ) interpreted the equivalent obligation under the Convention against Torture⁴⁹ in the following way:

The Court considers that Article 7, paragraph 1, [of the Convention against Torture] *requires* the State concerned to submit the case to its competent authorities for the purpose of prosecution, *irrespective of the existence of a prior request for the extradition of the suspect* ... However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas *prosecution is an international obligation* under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.⁵⁰

Similar views had been previously expressed by the UN Committee against Torture in the *Suleymane Guengueng* case:

... 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

⁴⁷ In such an instance, and in accordance with Draft Article 9 ("Preliminary measures when an alleged offender is present"), a state will typically proceed to adopt such preliminary measures, including arrest, aimed to secure the presence of the suspect. In addition, Draft Article 13(12)-(13) lay out that the custodial state must consider and consult with other states if they request extradition, but not that it must comply with, defer to or invite such requests. See section 4 below.

⁴⁸ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 95, para. 6.

⁴⁹ Convention against Torture, article 7(1): "The State Party in the territory under whose jurisdiction a person alleged to have committed ... [an act of torture] 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."

⁵⁰ ICJ, Questions relating to the Obligation to Prosecute or Extradite (previously cited), paras 94-95 (emphasis added).

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.⁵¹

In the *Kumar Lama* case, the Court of Appeal in England and Wales confirmed the ICJ and Committee against Torture's interpretation:

... there is no obligation under the Convention scheme to extradite a suspect to another Contracting State if the Contracting State where he is present decides to exercise jurisdiction itself. Furthermore, the exercise of jurisdiction under Article 5(2) is not dependent on the State assuming jurisdiction having refused extradition to an Article 5(1) State. In addition, there is no obligation to await a request for extradition to another Contracting State before exercising jurisdiction. The Contracting State in which a suspect is present has an unfettered choice as to whether to extradite or to submit the case to its competent authorities for the purpose of prosecution.⁵²

While there is no similar body of jurisprudence with respect to the Enforced Disappearance Convention, its article 11,⁵³ which sets out the *aut dedere aut judicare* principle, should be given the same meaning. This follows from the fact that article 7 of the Convention against Torture and article 11 of the Enforced Disappearance Convention are fully equivalent. The same should apply for the Ljubljana-The Hague Convention with reference to its article 14.⁵⁴

With respect to war crimes, the ICRC provided an interpretation similar to the above jurisprudence. The 1949 Geneva Conventions include a common article which establishes an obligation on states parties to "search for" suspected perpetrators of grave breaches⁵⁵ of the Conventions and "bring such persons, regardless of their nationality, before its own courts" or, alternatively, to "hand such persons over for trial" to other states parties.⁵⁶ The ICRC explained that:

... This obligation can be referred to as *primo prosequi, secundo dedere* (first to prosecute, second to extradite). The Convention clearly puts the obligations to search, investigate and prosecute first, and this obligation exists independently of any extradition request. The obligations to search for and prosecute alleged offenders before a State's own courts must be carried out 'regardless of their nationality'. The effective implementation of these obligations requires that each State Party ... has previously extended the universality principle to the list of grave breaches in its national legislation. ... Prosecutions for grave breaches could of course be based on other accepted titles of jurisdiction, such as territoriality, active and passive personality or the protective principle. However, universal jurisdiction must also be provided for in national legislation, to ensure that any State Party, and not only States party to an armed conflict is able to exercise its jurisdiction over alleged offenders regardless of their nationality. The object and purpose of this paragraph is clearly to give all States Parties the means to prevent impunity and to deny safe haven to alleged perpetrators of grave breaches.⁵⁷

⁵¹ UN Committee against Torture, Decision: *Guengueng et al. v. Senegal* (previously cited), para. 9.7.

⁵² Court of Appeal of England and Wales, *KL v. Regina* (previously cited), para. 71(4).

⁵³ Enforced Disappearance Convention, 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."

⁵⁴ Ljubljana-The Hague Convention, Article 14(1): "The State Party in the territory under whose jurisdiction a person alleged to have committed any crimes to which this Convention applies ... is found shall in the cases contemplated in article 8, if it does not extradite or surrender the person to another State or a competent international criminal court or tribunal, submit the case to its competent authorities for the purposes of prosecution."

⁵⁵ Grave breaches refer to any of a series of war crimes expressly listed in the four Geneva Conventions of 1949 or their Additional Protocol I, when committed against people or property protected by those Conventions and the Protocol.

⁵⁶ First Geneva Convention, article 49; Second Geneva Convention, article 50; Third Geneva Convention, article 129; Fourth Geneva Convention, article 146.

⁵⁷ ICRC, Commentary on the Third Geneva Convention: Article 129 (previously cited), paras 5125 and 5129-5130.

The established interpretation of the *aut dedere aut judicare* principle confirms, first, that no hierarchy exists among the various bases of jurisdiction, and second, that the exercise of the obligation to prosecute is independent from a prior request to extradite or surrender the suspect. If such a hierarchy existed, requesting or granting extradition to a state who can exercise a “priority” jurisdiction would be an obligation, not an option. Instead, under international law, a state in any territory under whose jurisdiction a suspected perpetrator is found may open a criminal investigation without having to offer, grant, or wait for requests of extradition to other states.

4. COOPERATION IN AND CONSIDERATION OF EXTRADITION REQUESTS

Draft Articles 9 and 13 envisage avenues of cooperation when multiple states might or intend to initiate criminal proceedings against the same person suspected of crimes against humanity.

Draft Article 9(1)-(2) (“Preliminary measures when an alleged offender is present”) requires states to ensure the presence of a suspect who is found in any territory under their jurisdiction, including by taking them into custody,⁵⁸ and to conduct an immediate “preliminary inquiry”.⁵⁹ In this context, Draft Article 9(3) further provides:

When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

The purpose of this twin obligation to notify both the adoption of custodial measures and the possible initiation of criminal proceedings⁶⁰ against a suspect is to allow the states which could assert territorial, active personality or passive personality jurisdiction “to consider whether they wish to exercise jurisdiction, in which case they might seek extradition”.⁶¹

In case extradition is sought by another state which can exercise jurisdiction, Draft Article 13 (“Extradition”) provides, among others, that:

13(12). A requested State shall give due consideration to the request of the State in the territory under whose jurisdiction the alleged offence has occurred.

13(13). Before refusing extradition, the requested State shall consult, as appropriate, with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

The ILC’s commentary clarifies that the obligation under Draft Article 13(12) to give “due consideration” to extradition requests by the state who can exercise territorial jurisdiction serves practical purposes: “[t]he State where the alleged offence has occurred may be best placed to proceed with a prosecution if it is the principal location of the victims, witnesses or other evidence

⁵⁸ Draft Articles on Crimes against Humanity, Article 9: “1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted. 2. Such State shall immediately make a preliminary inquiry into the facts.”

⁵⁹ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 90, para. 2.

⁶⁰ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 91, para. 3: “The State’s reporting of its findings need only be ‘as appropriate’, meaning that in some circumstances the State may need to withhold some of the information it has uncovered, for example, to protect the identities of victims or witnesses or to protect an ongoing investigation. Nevertheless, such withholding of reporting must be undertaken in good faith.”

⁶¹ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 91, para. 3.

relating to the offence.”⁶² In turn, the obligation under Draft Article 13(13) to consult with a requesting state, before extradition is refused, is meant to provide the context for states to enter into good faith consultations about extradition requests:

Such consultation may allow the requesting State to modify its request in a manner that addresses the concerns of the requested State. The phrase “[as] appropriate”, however, acknowledges that there may be times when the requested State is refusing extradition but consultation is not appropriate, for example when the requested State has decided to submit the case to its own competent authorities for the purpose of prosecution, or when consultations are not possible due to reasons of confidentiality.⁶³

Importantly, Draft Articles 9(3) and 13(12)-(13) are to be read in conjunction with Draft Article 10 on the *aut dedere aut judicare* principle. Accordingly, by opening a criminal investigation against a suspect present in a territory under its jurisdiction, a state would comply with its obligation to prosecute under Draft Article 10.⁶⁴ The obligation to give notification of such criminal proceedings under Draft Article 9(3), as well as the obligations to “give due consideration” to an extradition request by the territorial state, and consult with it as appropriate before refusing such a request, under Draft Article 13(12)-(13), are meant to provide a chance to other states to seek extradition of the suspect; granting such a request is an alternative way for a state to comply with the *aut dedere aut judicare* principle, but there is no legal duty to solicit, wait for or defer to such a request (as explained in section 3 above).

However, as highlighted by the ILC, “a State may decline to extradite for any reason, so long as it submits the case to its own competent authorities for the purpose of prosecution”.⁶⁵ In this respect, it may be noted that the Ljubljana-The Hague Convention, the main object of which is to regulate mutual legal assistance between states, including extradition, lists the existence of ongoing criminal proceedings against a suspect in the state where they are present as a ground to refuse extradition requests by other interested states.⁶⁶ On the other hand, a state that both refuses extradition *and* “refrains from pursuing prosecution or that conducts a ‘sham’ proceeding solely to shield an alleged offender from accountability has not fulfilled the obligation set forth in draft article 10”.⁶⁷

This interpretation of the *aut dedere aut judicare* principle is confirmed by the equivalent reading the ICRC has provided of the provision after which Draft Article 13(12) was modelled, that is, article 88 of Additional Protocol I to the Geneva Conventions:⁶⁸

The possibility of handing over the accused to be tried by another Contracting Party willing to prosecute him is an option open to the Contracting Party in whose territory the accused is or in whose hands he has fallen. ... Some States wanted to adopt as a general rule that there should, in general, be extradition to the country where the alleged grave breach had been committed. This proposal was only retained in part, namely in the form of an obligation to consider such a request in accordance with the second sentence of this paragraph, because of the opposition of other States to extradition being given special priority, or in general, to give this any systematic preference. ... As long as the penal repression of grave breaches is ensured, the right of each Contracting Party to choose between prosecuting a person in its power or to hand him over to another Party interested in prosecuting him therefore remains

⁶² ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 119, para. 32. In the same paragraph, the ILC further explained: “... the complementarity system of the Rome Statute, in practice, often accords deference to the State where the crime occurred (or the State of nationality of the alleged offender, which is often the same) if that State is able and willing to exercise jurisdiction.”

⁶³ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 120, para. 33.

⁶⁴ See section 3 above.

⁶⁵ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 119, para. 29. In this sense, see also

⁶⁶ Ljubljana-The Hague Convention, Article 51(2)(d): “Extradition may be refused if: ... (d) The competent authorities of the requested State Party are proceeding against the person whose extradition is sought in respect of an alleged crime based on the same criminal conduct for which extradition is requested.”

⁶⁷ ILC, Commentary on the Draft Articles on Crimes against Humanity (previously cited), p. 95, para. 9.

⁶⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3, Article 88(2): “Subject to the rights and obligations established ... [in relation to the prosecution of grave breaches], and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.”

absolute ... On the other hand, there is a duty to co-operate in the matter of extradition when circumstances permit: ... this involves giving favourable consideration to a request for extradition from a country justifying its legal interest in the prosecution, if the conditions imposed by the law of the State to which the request is made are satisfied. The interest of another Contracting Party in the prosecution may be founded on the fact that the grave breach was committed in its territory, or that it was committed against its nationals.⁶⁹

Article 88 of Additional Protocol I thus contains a procedural duty of states parties to “give due consideration” to an extradition request from a state which intends to exercise territorial jurisdiction, but not a substantive one to defer to such a request and grant extradition. In this respect, extradition requests should be especially refused when aimed at ultimately shielding the suspected perpetrator of grave breaches from prosecution.⁷⁰

While no hierarchy exists among the various bases of jurisdiction, and no obligation exists to comply with extradition requests, Draft Articles 9(3) and 13(12)-(13) provide a reasonable avenue to address cases of potential competing exercises of jurisdiction. In fact, based on the concrete circumstances of a case, these provisions allow all states interested in bringing criminal proceedings against a suspected perpetrator of crimes against humanity to have an opportunity to make their case for genuine prosecution. When such cases arise, both the custodial state and the state seeking extradition should cooperate in good faith to realize in full the objectives of the Draft Articles: “to put an end to impunity for the perpetrators of ... crimes [against humanity] and thus to contribute to the prevention of such crimes.”⁷¹

5. CONCLUSION

As Amnesty International explained several years ago when the authorities of Chile claimed jurisdiction to investigate the then Senator-for-life Augusto Pinochet, detained in London pursuant to a warrant of arrest issued by a Spanish investigating judge:

[i]n the unlikely event that more than one state claimed priority to investigate and prosecute a suspect for the same crimes under international law based on the same conduct, the state with custody seeking to exercise universal jurisdiction would normally have a better claim than the territorial state to act on behalf of the international community, since the presence of the suspect outside the territorial state creates a presumption that the authorities of the territorial state are not acting with due diligence to investigate and prosecute. Failure to transmit an extradition request would be compelling evidence that the territorial state was not serious.⁷²

Amnesty International considers that, by not prescribing any hierarchy among the various bases of jurisdiction, the Draft Articles on Crimes against Humanity align with existing international law, particularly as reflected in the Convention against Torture, the Enforced Disappearance Convention, the Ljubljana-The Hague Convention, as well as international and domestic jurisprudence. When the *aut dedere aut judicare* principle applies, the custodial state, that is the state in the territory under whose jurisdiction the suspected perpetrator of crimes against humanity is present, has a primary obligation to exercise criminal jurisdiction.

⁶⁹ ICRC, Commentary on Additional Protocol I: Article 88, 1987, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-88?activeTab=1949GCs-APs-and-commentaries>, paras 3565 and 3576-3578.

⁷⁰ ICRC, Commentary on the Third Geneva Convention: Article 129 (previously cited), para. 5148: “... a request for extradition from a State whose aim might be to protect its own national, and conduct a sham trial that will lead to an acquittal, should be refused.” See also Institute of International Law, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes (previously cited), para. 3(d).

⁷¹ Draft Articles on Crimes against Humanity, Preamble, para. 6.

⁷² Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation* (IOR 53/002/2001), September 2001, <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530022001en.pdf>, p. 47.

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