The obligation to extradite or prosecute (aut dedere aut judicare)

1. Historical background

The expression *aut dedere aut judicare* is commonly used to refer to the alternative obligation to extradite or prosecute which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of multilateral conduct. The obligation is phrased in different ways in different treaties, but essentially it requires a state holding someone who has committed a crime of international concern either to extradite the offender to another state which is prepared to try him or else to take steps to have him prosecuted before its own courts (Bassiouni and Wise 1996, 3).

The term “extradition” comes from Voltaire’s extradition—the combination of the Latin “ex” (“out”) with “traditionem” (“a delivering up, handing over”). Although the expression is recent (from the 18th century), the institute consists of the most traditional instrument of international cooperation. Its first traces in History can be found in Ancient Egypt with Ramses II and Hattusili III’s Peace Treaty, which is engraved on the walls of the Amon temple, at Karnak.

Not only did extradition have a political scope for a long period, but it was treated as an incidental matter; that is to say that until a comparably recent past there were no legal instruments exclusively concerned about extradition proceedings (Blakesley 1981, 12). It was in the year of 1376 that the very first establishment of a mechanism of delivery of non-political convicts was conceived, through Charles V of France and the Count of Savoy’s treaty, but it is the treaty between France and the Netherlands in 1736 that is considered to be the first modern treaty on extradition. When it comes to the exclusion of political convicts from the scope of such instrument, however, the Peace Treaty of Amiens between France, England and Spain in 1802 constitutes the great breakthrough.

Nonetheless, it was only centuries later, with Grotius’s *De Jure Belli Ac Pacis*, that the embryo of what is today the obligation to extradite or prosecute was
created: the formula *aut dedere aut punire*, i.e. extradite or punish (ILC 2006, 3). Even so, it has been noted that the use of the expression *aut dedere aut judicare* can be misleading, for “*judicare*” implies a full trial and the obligation established in certain conventions, such as the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of December 16th of 1970, does not actually require a trial in lieu of extradition (Bassiouni and Wise 1996, 4).

It is worth observing that, as asserted by the Special Rapporteur of the International Law Commission in his Preliminary Report:

> “although the obligation to extradite or prosecute may look, at first, as a very traditional one, we should not be misled, however, by its ancient, Latin formulation. The obligation to extradite or prosecute cannot be treated as a traditional topic only.”

The obligation *aut dedere aut judicare* has been present in several legal collaboration instruments, such as the four Geneva (Red Cross) Conventions of 1949 and treaties which follow either the 1929 Convention for the Suppression of Counterfeiting or the aforementioned Hague Convention of 1970’s Article 7 formula (great examples of which would be, respectively, the Vienna Convention on Traffic in Narcotics of 1988 and the Montreal Convention on Unlawful Acts Against the Safety of Civil Aviation of 1971), as well as extradition ones—that do not necessarily deal with international offenses (Bassiouni and Wise 1996, 11-18). Also, when it comes to already performed codification, it is important to bear in mind Article 9 of the Draft Code of Crimes against the Peace and Security of Mankind proposed by the International Law Commission itself.

Another important point worth noting is the relationship between the obligation to extradite or prosecute and universal jurisdiction, which has been the subject of many doctrinal discussions. According to the doctrine of universal jurisdiction, some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or the sacrosanct nature of national frontiers (Kissinger 2001, 1). Its concept is rather recent, and the closest applied notion was *hostes humanis generis* (“enemies of the human race”), for piracy, hijacking and similar crimes committed outside the territory. The precise differences between these institutes still require deeper elaboration.

The increasing adherence to the obligation to prosecute or extradite in treaties has given rise to the debate about its potentially customary character. Here, it is worth mentioning the Hissène Habré case between Belgium and Senegal, recently judged by the International Court of Justice.

### 2. Statement of the issue

At its 56th session, in 2004, the International Law Commission decided to include the topic of obligation to extradite or prosecute in its long term programme of work as a result of the growing necessity of international cooperation in...
combating impunity, appointing Mr. Zdzislaw Galicki as its Special Rapporteur (ILC 2006). Until the present day, four reports were submitted to the Commission by the Special Rapporteur, as well as a Survey of multilateral conventions related to the topic by the Secretariat.

2.1. Definition of the term “aut dedere aut judicare”

Outlined in Articles 8 and 9 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, this formula is commonly used to designate the alternative obligation concerning the treatment of an alleged offender (ILC 2006), in the sense that a state subject to this obligation is bound to adopt one of the two possible courses: it must extradite if it does not prosecute, and prosecute if it does not extradite (Bassiouni and Wise 1996). However, there are many interpretations and derived formulas applied to designate the obligation in question, such as “aut dedere aut punire”, “aut dedere aut judicare aut tergiversare”—as in extradite, prosecute and avoiding to act—and a triple alternative obligation that includes the surrender to international courts, whereby a State would be able to hand an alleged offender over to an international tribunal rather than prosecute itself (ILC 1996).

2.1.1. The alternative obligation to extradite or prosecute

Despite the existence of various different approaches, the majority of the doctrine understands that the modern expression aut dedere aut judicare is the one that better translates the contemporary idea of this obligation (Larsaeus 2004), constant in many modern conventions under the following version:

“[a]rticle 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” (International Convention Against the Taking of Hostages 1979).

In this sense, instead of the traditional formula provided by Grotius, which focused on the natural right to exact punishment, this expression better comprise the ambiguous meaning “to judge”, or try, and also refers to an inquiry for the purpose of determining whether or not to initiate a trial. Accordingly, it is only demanded that the requested State steps towards prosecution (Bassiouni and Wise 1996, 4).

2.1.2. Relationship between the obligation aut dedere aut judicare and universal jurisdiction

It is important to highlight the distinctions and relations between the principle of universal jurisdiction and the obligation to extradite or prosecute, as it has been
a concern in this Commission’s previous sessions (ILC 2011). Mainly, because the assumption that every state has an interest in exercising jurisdiction to combat egregious offenses that States universally have condemned (RANDALL 1988, 113) is distinct and yet closely related to the obligation to extradite or prosecute.

That is to say that when the aut dedere aut judicare rule applies, the State where the suspect is found must ensure that its courts can exercise all possible forms of jurisdiction, including universal jurisdiction, in those cases in which it will not be in a position to extradite the suspect to another state or—under the comprehension of a triple alternative obligation—surrender that person to an international criminal court (Amnesty International 2001). Nonetheless, it is not yet crystallized in the doctrine that this obligation is applicable to all universally condemnable crimes nor should both concepts be mixed up, which is regarded as a rather extreme position (Larsaeus 2004).

In a different perspective, it would seem that, at least at the level of customary international law, universal jurisdiction may only be exercised to substitute other countries that would be in a better position to prosecute the offender, but for some reason do not. In other words, under customary international law, universal jurisdiction may only be triggered if those other states—territorial and active nationality states—fail to act, or else have legal systems so inept or corrupt that they are unlikely to do justice. Universality operates, then, as a default jurisdiction (Cassese apud Lafontaine 2012, 1278). That is to say that universal jurisdiction should be taken rather lightly in face of State sovereignty, taking into account three fundamental conditions: firstly, that the alleged offender be present in the territory of the prosecuting state; secondly, that universal jurisdiction be exercised as a “default jurisdiction”, only where the states with a “primary claim” to jurisdiction, namely the territorial state or the state of active nationality, are unable or unwilling to prosecute; and thirdly, that states maintain full respect for immunities, particularly the personal immunities that shield certain high-level State officials from prosecution, even for the worst international crimes, while they remain in office (Lafontaine 2012, 1278).

Cassese’s understanding of universal jurisdiction and its relation to State sovereignty also involves the obligation to extradite or prosecute, since he understands that, by reinforcing the sovereignty character of jurisdiction, the alternative to prosecute takes precedence to extradition and, therefore, it is merely an option offered to the State. This reasoning was endorsed by the International

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1 There are five different types of criminal jurisdiction comprehended in international law. Territorial jurisdiction, by which States have the right to exercise jurisdiction over all events in their territory or to over facts originated or completed elsewhere, if one of the elements of the offense occurs in its territory. The principle of active nationality, differently, entitles States to exercise jurisdiction with respect to the conduct of their nationals abroad. On the other hand, the passive nationality principle asserts that jurisdiction is exercised by a State over crimes committed against its nationals whilst they are abroad. Moreover, a State has jurisdiction according to the protective principle over extraterritorial activities that threaten State security (Robert Cryer et al. 2007, 40 - 44). Lastly, the universal jurisdiction can be understood as a jurisdiction to prescribe in the absence of any other jurisdictional nexus at the time of the relevant conduct (Roger O’Keefe 2004, 744).
Court of Justice in the recent *Belgium v. Senegal* judgment, as it stated that a State which received a request for extradition can relieve itself of its obligation to prosecute by acceding to that request (Questions relating to the obligation to prosecute or extradite 2012).

As an essential tool of international justice, however, universal jurisdiction is the ability of the court of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests. It would apply to three categories of crimes—those under international law, under national law of international concern and finally ordinary crimes under national law (Amnesty International 2001).

Such principle, which is now regarded as customary international law was born related to piracy, so that States would exact jurisdiction in areas where no State had territorial power, the so called *terrae nullius*. It was included in different national legislations and jurisprudences, because it was in the interest of all States to combat maritime piracy under the orientation of cohabitation at the time, where international law's raison d'être was merely to solve or regulate any existing conflict (Del Chicca 2012, 83-85). The subsequent evolution of international relations, however, lead to an era marked by the orientation of international cooperation and thus to the adaptation of the principle as a reflection of international values whose protection is of interest to all members of the international community (Brown and Fried 1998, 621-622).

The obligation *aut dedere aut judicare*, on the other hand, provides that a State may not shield a person suspected of certain categories of crimes in territory subject to its jurisdiction. Instead, it is required to either exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or extradite the person to a State able and willing to do so, or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime (Amnesty International 2001). The relationship between both principles is one of complementarity and it is an essential part of a cooperating international system.

2.2. Sources of the Obligation

2.2.1. Treaty-based obligation

The obligation to extradite or prosecute is set forth in a number of international agreements—bilateral and multilateral—, requiring the parties to suppress a determined offense. The most notable agreements in this stead are those imposing the alternative obligation to extradite or prosecute offenders who are not extradited, falling into four distinguished categories: extradition treaties, the counterfeiting convention formula, the Geneva conventions, and the Hague convention formula (Bassiouni and Wise 1996, 12-19).
Without dealing with specific offenses, the first category provides for local prosecution when extradition fails, mostly aiming to prevent the problem that many States refuse to extradite their nationals. This formula, enshrined in Article 7 of the 1970 Hague Convention for the suppression of unlawful seizure of aircraft, requires a State “to submit the case to its competent authorities for the purpose of prosecution” in the case it does not extradite. The same language appears in different bilateral treaties related to the issue of non-extradition of nationals (Bassiouni and Wise 1996, 12).

The subsequent category, which has, as its first expression, Article 6 (1) (d) of the 1929 Convention for the Suppression of Counterfeiting, is focused on dealing with specific international offenses and it takes into consideration the fact that States may have different views on exacting jurisdiction to offenses taking place abroad. Therefore, it is complies with the mentioned comprehension of the obligation as requiring a step towards prosecution with respect to the State’s politics. For this reason, it is important to distinguish between nationals and non-nationals of the requesting State, since it is presumable that States which refuse to extradite nationals will have no impending issues for trying them.

Thirdly, the four Geneva (Red Cross) Conventions of 1949 aims at the repression of grave breaches, by stating that offenders are to be accordingly prosecuted or handed over to another party for trial. This type of provision, beyond the obligation to extradite or prosecute, also enables the grasp of the alternative obligation to surrender to international courts.

As to the last category, the obligation contained in the 1970 Hague Conventions and following agreements that followed its pattern, has as main fundament to deny safe haven to offenders. The technique used to such purpose was the establishment of a duty not subordinate to the States parties existing laws regarding extraterritorial jurisdiction. In this sense, the judicare duty arises without the necessity of request for extradition by the State where the offense took place.

There are different variations of the formula proposed by the Hague Conventions, such as the one contained in the 1988 Vienna Convention on Traffic in Narcotic Drugs, which subjects the obligation to prosecute, when a non-national is involved, to the authorization of the exercise of extraterritorial jurisdiction. Or, as constant in different documents by which, for instance, the case must be submitted to the “competent authorities for the purposes of prosecution, through proceedings in accordance with the laws of that State” (New York Convention on Crimes Against Internationally Protected Persons 1973, Article 7) or “without exception whatsoever and without undue delay” (Convention on the Protection of Nuclear Material 1980, Article 10). While there are small fluctuations, the main idea has persisted through time and an expression of this obligation appears in every subsequent treaty requiring the repression of international offenses.
2.2.2. Customary status of the obligation

There is a large and growing number of scholars supporting the concept of an international legal obligation *aut dedere aut judicare* as a general duty based not only on provisions of particular international treaties but also on generally binding customary norms, at least concerning certain categories of crimes (ILC 2006). Following this layout, Bassiouni (Bassiouni and Wise 1996, 20-23) asserts two main views on the customary status of the principle *aut dedere aut judicare*. The first, a more narrow assertion, is related to each specific offense in a particular treaty, whereas the second is a more sweeping and developed understanding of the customary status of this obligation that covers three typical forms. The first is the existence of an exception to the rule that with the absence of a treaty the surrender of a fugitive cannot be demanded as of right, related to war crimes or crimes against humanity; the second is the extension of the this exception to include acts of international terrorism, due to the execration of such acts by the international community as whole; and the third the extension to all international offenses under the same comprehension that there is a demand to enforce international cooperation. The latter view was defended by Bassiouni in several occasions and endorsed by the dissenting opinion of Judge Weeramantry in the *Lockerbie* case before the ICJ (Bassiouni and Wise 1996, 21).

The argument for the customary status of the obligation is the claimed *erga omnes* and *jus cogens* nature of these prohibitions, because they are related to fundamental interests of the international community. The immediate implication of characterizing such norms as *jus cogens* would be that they cannot be derogated by agreements between States, as well as they cannot be set aside unilaterally by an act of a single State (Bassiouni and Wise 1996, 52). Furthermore, they would imply a duty of maintenance of the public order and repression of such crimes. In other words, the main reason behind this construction is the combat of impunity, so that no countervailing political considerations can warrant an international accord granting safe haven to a fugitive that has committed any grave violation of human rights.

However, this position is very controversial, since *erga omnes* and *jus cogens* concepts do not as such lead to the formation of any source of international law, including custom, and would clearly fail to maintain the distinction between *lex lata* and *lex ferenda* (Steenberghe 2011, 1092-1093). Statements that normative expressions recognizing universal principles as the positive law of the international community should be accepted as such, even in the face of inconclusive or contrary practice, can only become general international law if accepted as binding by States.

Despite this position, the main source of the customary status of the obligation to extradite or prosecute is strictly related to *opinio juris* and State practice, encompassing States’ material conduct and declarations. Therefore, through the analysis of treaty practice and internal judicial and legislative State practice, it is
possible to visualize a construction of the rendered obligation. In this sense, the customary obligation to extradite or prosecute may derive from State practice, but only with respect to a limited number of crimes, namely core international crimes such as genocide, crimes against humanity or war crimes, and only to the extent that such a customary nature is ascribed to the obligation as it is correctly understood (Steenbergh 2011, 1095).

As to the material sources providing for an obligation to extradite or prosecute, one that requires an special attention is the inclusion of the obligation in different instruments. There is an important collection of treaties containing this provision, and many of them have been ratified by a considerable number of States, including the four 1949 Geneva Conventions and the conventions concerning terrorism and torture (Steenbergh 2011, 1095). State practice could, thus, be analyzed from the perspective of the number of States which have ratified the various treaties; the number of treaties that a particular State has ratified; the number of treaties that include such a clause; and the importance or centrality of these treaties in the wider area of international criminal law.

The significant result from inferring a customary obligation emerging from these efforts would be that, with respect to the offences prohibited in those conventions, the obligation would extend to States which are not a party to the relevant convention. In spite of the understanding of the ICJ in the North Sea Continental Shelf case, in which it understood that the ratification by a large number of States could lead to the transformation into customary law of the treaty provisions (North Sea Continental Shelf 1969), the wide ratification of the convention brings out the problem of whether the practice reveals the opinio juris sive necessitatis of its signatories or only their opinio juris conventionalis, incident of the reduced number of the participants in the process of creating customary law. Hence, the paradox is that, as the number of the parties to a treaty increases, it becomes more difficult to demonstrate what the state of customary international law is dehors the treaty (Baxter 1970).

Therefore, on the one hand, in order to solve this impasse, one may take into consideration non-traditional sources of international law, such as national legislation, precedents and verbal State practice and no longer concerns the issue of identifying a customary rule on the basis of treaty practice. This position is endorsed by the statement that significant evidence of opinio juris on this issue could come from the judgments of national courts or official declarations of States which state explicitly that the refusal to extradite places an obligation on the requested State to refer the case to the competent national authorities, even in the absence of a relevant treaty obligation (General Assembly 2008). However, on the other hand, the proposed solution may be considered not convincing (Steenbergh 2011, 1096) and resulting in a weak basis for proposing the customary status of the obligation.
2.3. Core crimes

It is important to emphasize the relevance of defining and distinguishing core crimes to a better understanding of the *aut dedere aut judicare* principle, since it generated directly from the cooperation between States in the repression of these actions. Additionally, the different approaches to those crimes in international law produce different results when observing the customary character of this obligation and the reflections on universal jurisdiction.

2.3.1. Crimes under international law

International crimes can be understood as breaches of international rules that entail the personal criminal liability of the individual concerned and require the cumulative presence of a few elements: violation of customary rules; that values encompassed by those rules are protected and considered important by the whole international community, thus biding on all states; the existence of an universal interest in repressing these breaches, that, subject to certain conditions, gives rise to universal jurisdiction; and that the immunity enjoyed by state officials acting in exercise of their functions cannot be raised with the exception of heads of state, foreign ministers or diplomatic agents (Cassese 2008).

2.3.1.1. War Crimes

Entertaining all the above mentioned elements, war crimes are serious infringements of customary or treaty rules of international humanitarian law protecting important values that can be perpetrated in the course of both internal and international armed conflicts, as it was stated in the *Tadić* case. This set of rules, contained mostly in the Hague and Geneva Conventions covers international warfare, internal and international armed conflicts and the means and methods of combat. The peremptory character of those prohibitions is to such an extent that they can be considered *jus cogens* and obligations *erga omnes* biding on all states to enact jurisdiction over perpetrators (*Prosecutor v. Duško Tadić* 1995).

The international community’s view on the necessity of suppression of war crimes was put forward in the preamble of the Rome Statute, which states that

“wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and if found guilty, to punishment” (*Rome Statute* 1998).

In addition, according to the Geneva Conventions of 1949, States are not only empowered to enact jurisdiction over the offenders, but are also bound by the obligation to extradite or prosecute them (*Amnesty International* 2001).
2.3.1.2. Crimes against humanity

The definition of crimes against humanity, which are a very wide category, covers serious attacks to human dignity or grave humiliation or degradation of one or more persons; part of a widespread or systematic practice of atrocities either part or tolerated by the government policy or part of a massive attack on the civilian population; being in times of war or peace and directed to civilian, persons not involved in the hostilities or enemy combatants (Cassese 2008). It can be said that they are inhumane acts attacking the most essential assets of the human being—their life, liberty, physical welfare, health, and dignity—and whose gravity and extent go beyond the limits tolerable by the international community transcending the individual and setting humanity itself as a victim (Prosecutor v. Blaskic case 1996).

A rather objective approach to these crimes was made by the Rome Statute, that define in its Article 7 the jurisdiction of the court over crimes against humanity, including: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other crimes of sexual violence, persecution, enforced disappearance, the crime of apartheid and other inhumane acts. Being regarded as both jus cogens and an erga omnes prohibition, it can be clearly noticed the existence of a duty biding all states to try or prosecute alleged offenders (International Law Commission 1985).

2.3.1.3. Genocide

Genocide and its auxiliary crimes, such as conspiracy, direct and public incitement, attempt and complicity is defined as the intentional destruction of a specific national, ethnical, racial or religious group or of members of one of these groups (Cassese 2008). This notion was adopted in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide and is now widely accepted, however in the past genocide was merely described as a criminal conduct falling within the elements of war crimes or crimes against humanity.

Notwithstanding its recognition as a distinct category under international criminal law and the large number of ratifications of the aforementioned convention, resulting in the prohibition being considered jus cogens as well as an erga omnes obligation (India v. Pakistan 1972), the international community still does not acknowledge its customary status. Therefore, it does not support the application of universal jurisdiction or the existence of an obligation to extradite or prosecute in regards to the crime of genocide. Nevertheless, there is a strong support by scholars and other experts to the view that genocide is a crime under customary international law over which any State may exercise universal jurisdiction (Amnesty International 2001). In the same path is the perspective of an obligation to extradite or prosecute, which has been incorporated for instance
in Article 9 of the 1996 Draft Code of Crimes under the reasoning that it was a more effective jurisdictional regime to adequately fulfill the interests of the international community (International Law Commission 1996).

2.3.2. Torture

As stated in Article 1 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidation of any kind, when such pain or suffering is inflicted by or at the instigation of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. This definition achieved a customary status, since the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture (Prosecutor v. Anto Furundija 1998).

It is understood that by now a general rule has evolved to prohibit individuals from perpetrating torture and authorizing all states to prosecute or punish the alleged author of such acts (Cassese 2008). Also, both in Article 5 of the 1984 Convention against Torture and in the Inter-American Convention of Human Rights, the principle aut dedere aut judicare is observed, in the alternative that whenever a person suspected of torture is found in their territory, State parties have to submit the case to their prosecuting authorities for the purposes of prosecution, or to extradite that person. There are those who go even further to assert a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture (Committee Against Torture 1989) and in so have a duty to either exercise universal jurisdiction over suspects or extradite them to a state able and willing to do so.

2.3.3. Terrorism

There is an intense discussion over the meaning of terrorism and the causes of this phenomenon, to such an extent that no treaty rules addressing a comprehensive definition have been agreed upon. It is possible to realize in the spread of international treaties and concern on the matter the very sphere of the fight against impunity in the form of the inclusion of an obligation to prosecute or extradite, as noted in the European Convention on the Suppression of Terrorism, the UN Convention on the Suppression of the Financing of Terrorism or the UN Convention for the Suppression of Terrorist Bombings. However, Cassese argues that, because of the growing concern and strong pressure on the issue of spreading terrorism, a consensus on an acceptable understanding of the matter has been
reached, to the point that a customary definition of international terrorism in
times of peace has developed (Cassese 2008). In this same sense, it is ultimate to
regard the decision exerted by the STL where it defines the elements of terrorism
in times of peace as “an intentional act, whether or not constituting an offence
under other provisions of the Criminal Code, aimed at spreading terror” and
“the use of a means “liable to create a public danger”, such as explosive devices,
inflammable materials, toxic or corrosive products and infectious or microbial
agents” (Interlocutory Decision 2011, 85).

The factors pointing to the formation of this consensus are the adoption of
Conventions on terrorism by different international organizations, the different
UN documents relating the topic and the fact that most national laws, as well as
precedents, use the same approach. The constitutive elements consisting of this
possible definition are: politically or ideologically motivated acts, or assistance
in the commission of such acts, criminalized under any national legal system
whenever they are performed in time of peace, intended to cause terror in the
population or coerce a state or international organization to act or refrain from
acting in a certain way (Cassese 2008).

2.3.4. Crimes under national law of international concern

This category includes crimes committed by individuals and defined differently
by the national law of each state, such as piracy (before it became a clearly defined
crime under international law), counterfeiting, theft of nuclear materials, hijacking,
certain forms of hostage-taking in peacetime, attacking diplomats, acting as
mercenaries, drug-trafficking and attacks on the United Nations and associated
personnel (Amnesty International 2001).

There are multiple and different multilateral treaties that acknowledge and have
their specific formula to deal with *aut dedere aut judicare* for each specific offense.
Still, there is not strong evidence that these crimes give prompt to any general
customary rule involving the obligation of extradite or prosecute in individual
treaties, other than the seriousness of the violations.

2.3.5. Ordinary crimes under national law

This last category of crimes comprises acts such as murder, assault or even car
thefts, which are crimes in almost every national legal system. That is because
many States have legislation authorizing their courts to exercise jurisdiction
or have entered into agreements with other States permitting them to exercise
jurisdiction over such crimes—this of course does not include crimes which are
not recognized in most legal systems (Amnesty International 2001). In face of the
lack of a clear definition of these offenses and the complexity of the principle of
sovereignty, the scope of extraterritorial jurisdiction over these crimes remains
very controversial.
2.4. Relationship between the obligation *aut dedere aut judicare* and human rights

The principle *aut dedere aut judicare* has a very close relationship with human rights and could even possibly inherit a *jus cogens* status from the human rights whose protection it envisages. However, the connection between the two has different aspects, other than the protection granted by the treaties in which the obligation appears. Since the inception of the extradition system, treaties have included clauses which safeguard important individual rights (Dugard and Wyngaert 1998, 188) and, although of extreme importance, this protection also creates a difficult barrier to the exercise of the obligation to extradite when prosecute is not a viable option.

The starting point for the consideration of extradition and human rights at the international level came with the *Soering* case before the European Court of Human Rights, although the linkage between the two goes way back. I appeared as an adaptation of the *non-refoulement* provision\(^2\) in Article 11 of the 1957 European Convention on Extradition, in the form of an exclusion of extradition where the requested state has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that such person's position may be prejudiced for any of these reasons. Many following agreements adopted this same formula in the years to come, culminating in the approval by the UN of a Treaty on Extradition in 1990, to guarantee core human rights including the right to a fair trial (Dugard and Wyngaert 1998, 192-193).

The enforcement of human rights, however has increased the individual protection through time, has also produced many obstructions to extradition. The Institute of International Law, for instance, has adopted the 1983 recommendation (New Problems of Extradition 1983) stating that extradition may be refused in cases where there is a well-founded fear of the violation of the fundamental rights of an accused in the territory of the requesting State. The main obstructions to extradition involve, moreover, the idea of inhuman and degrading treatment.

For example, despite the inexistence of a prohibition of death sentence and the likely existence of an *opinio juris* that the practice is still considered lawful, as it is applied by several States, extradition was sometimes denied because the requesting State’s legal system admitted such penalty. Additionally, the inhuman and degrading treatment, the extensive period in the death row, or the death row phenomenon, or to the technique used in execution, rather than the death sentence itself, were also used to justify the denial of extradition (Dugard and Wyngaert 1998, 194-196). Nevertheless, despite the inexistence of a prohibition of death sentence or any obligation to its abolishment, it is understood that there is an obligation to limit its use (United Nations Human Rights Council 1991).

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\(^2\) Also contained in Articles 1, 33, 189 of the 1951 Convention Relating the Status of Refugees.
Differently from the contentious views related to death sentence, there is little controversy with respect to conduct such as torture, cruel, inhuman or degrading treatment or punishment, discrimination or the right to a fair trial. All these rights are recognized by different instruments\(^3\). Torture is addressed in different specific instruments\(^4\) and, despite there is little *opinio juris* on the matter, there is a consensus on the status of jus cogens of this prohibition (Dugard and Wyngaert 1998, 197-198), this position is reinforced by the recent case decided where the ICJ held that “the prohibition of torture is part of the customary international law and it has become a peremptory norm (*jus cogens*)” (Belg. v. Sen. *case* 2012, 33). As to the prohibition on cruel, inhumane, or degrading treatment or punishment, many interpretations are possible due to its broad character. One example relates to the death row phenomenon and the capital punishment causing prolonged suffering, as previously mentioned and which appeared remarkable in situations such as the one held by the United Nations Human Rights Committee in *Ng. v. Canada*, in which the execution by gas was framed as cruel and inhuman treatment because it might take over ten minutes to cause death, resulting in prolonged suffering. Other examples regard corporal punishment, which has been abolished by several countries and whose prohibition is contained in the UN Standard Minimum Rules for the Treatment of Prisoners; discrimination, recognized by the first time in the European Convention on Extradition of 1957 and later repeated in the UN Model Treaty on Extradition, which expands the range of protection of the provision; the right to a fair trial, which appeared in the *Soering* case stated as a flagrant denial of a fair trial (*Soering v. UK* 1989).

In spite of the general protection of human rights and its important status, there is not enough evidence that all human rights qualify as potential obstacles to extradition and, therefore, it seems impossible to advocate for a general exception to extradition whenever any human right is threatened (Dugard and Wyngaert 2012, 205-212).

2.5. Case law

2.5.1. ICJ: Questions relating to the obligation to prosecute or extradite (*Belgium v. Senegal*)

*Belgium* filed an application against Senegal before the ICJ, on 17 February 2009, arguing that Senegal had refused to grant Belgium’s request for extradition of the former dictator of Chad, Mr. Hissène Habré, for crimes against humanity and acts of torture. *Belgium* alternatively requested Senegal to prosecute the offender accordingly with the obligation to extradite or prosecute, as provided by both customary international law, with respect to crimes against humanity, and by

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\(^3\) These instruments include the four Geneva Conventions, the UN Declaration of Human Rights or the United Nations Convention Against Torture.

\(^4\) Such as the 1984 Convention against Torture and Other Inhuman or Degrading Treatment and the 1985 Inter-American Convention to Prevent and Punish Torture.
the 1984 Convention Against Torture, to which both States are parties.

Mr. Hissène Habré was President of the Republic of Chad for a very complicated period, in which large-scale violations of human rights were allegedly committed, such as arrests of political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances (Questions relating to the obligation to prosecute or extradite 2012). The court, after analyzing the different aspects of the dispute, considered it was within its jurisdiction and decided unanimously that Senegal should, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution or, alternatively, if did not, extradite him.

As to the *aut dedere aut judicare* provision of Article 7 of the Torture Convention, the Court took the position also, defended by Cassese (Cassese 2001), that extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State (Questions relating to the obligation to prosecute or extradite 2012). Yet, it recognized the customary status of the prohibition of torture, and asserted that it was a *jus cogens* norm, basing such affirmation on different instruments of universal application, as the Universal Declaration of Human Rights of 1948, and on the expression of the prohibition in national legislations and judicial decisions by national and international courts.

This recent precedent emphasized the question of whether there is a normative hierarchy when dealing with the obligation to extradite or prosecute. It also dealt with the obstructions to the fulfillment of the obligation, such as financial necessity or lack of a provision in internal law. In the Court’s understanding, none of the mentioned reasons obstructions justified the delay in the compliance with the duty, asserting that, even though the Torture Convention did not contain any temporal indication, it was implicit in the text of Article 7 that it must be implemented within a reasonable time (Questions relating to the obligation to prosecute or extradite 2012).

2.5.2. ICTY: *Prosecutor v. Anto Furundzija*, IT-95-17/-T, 10 December 1998

The *Furundzija* case, initiated by Prosecutor of the International Criminal Tribunal for the former Yugoslavia in 1998, concerned a series of violations of international humanitarian law, including torture and rape in respect of acts allegedly committed at the headquarters of the Jokers, a special unit within the armed forces of the Croatian Community of Herzeg-Bosna, known as the Croatian Defence Council. In its decision, the ICTY considered the prohibition against torture as *jus cogens*. It not only affirmed the *jus cogens* character bestowed by the international community upon the prohibition of grave breaches, such as torture, but also asserted that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory
under its jurisdiction (Prosecutor v. Anto Furundja 1998)—affirming the existence of a link between jus cogens and the principle aut dedere aut judicare, as affirmed by Bassiouni (Bassiouni and Wise 1996).

2.5.3. ECHR: Soering v. UK

This case is considered a landmark for the protection of human rights in a globalized, representing a new model of judicial cooperation (Felipe and Martín 2012, 581-583). It involved a West German national, who had allegedly murdered his girlfriend’s parents in Virginia and later fled to the United Kingdom, and discussed one of the fundamental objections to extradition: human rights.

After the United States requested Soering’s extradition and the United Kingdom detained him in prison pending extradition, the case was brought to the European Court of Human Rights (ECHR). The center of the discussion involved the possibility of extradition when there is a real risk of inhuman or degrading treatment.

In the Soering case, the question proposed was whether death sentence, or in the specific approach of the ECHR the death row phenomenon, could obstacle extradition under Article 3 of the European Convention on Human Rights. In its finding, the Court—although, as aforementioned, did not reject the death penalty—stated that, due to the very long period of time spent on death row, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, the applicant’s extradition to the United States would expose him to a real risk going beyond the threshold set by Article 3 (ECHR 1989).

From this statement, one may conclude that the fact that human rights violations would take place outside the territory of the requested state did not absolve it from responsibility for any foreseeable consequence of extradition suffered outside its jurisdiction (Dugard and Wyngaert 1998, 212). It represented the birth of a new model of judicial cooperation, partially because it seem to authorize the exportation of fundamental rights from one country to another, as well as represented the demise of the traditional model of extradition and of judicial cooperation—known as the doctrine of non-inquiry, rooted in territorial jurisdiction and based on comity, reciprocity among states and sovereignty.

2.5.4. ICJ: Lockerbie case (Libyan Arab Jamahiriya v. United Kingdom and Libyan Arab Jamahiriya v. United States of America)

At its core, the Lockerbie case revolved around the discussion of whether the binding nature of UN Security Council Resolutions under Article 25 of the UN Charter or the obligation aut dedere aut judicare, under the Montreal Convention, were conflicting and, if so, which one should be applied to the alleged bombers of the PanAm airline who were present in Libya’s territory. The Security Council
demanded that Libya extradited these men, whereas the Montreal Convention obliged Libya to either extradite or prosecute them. However this impasse was ultimately decided on the basis of Article 103 of the Charter, the judges did discuss the nature of the aut dedere aut judicare obligation.

The discussion went even further than the crimes expressly on the Montreal Convention and recognized that, under general international law, not only the requested State is under no obligation to extradite but that customary international law does not advocates for either prosecute in default of extradition or the contrary (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie 1992). Although the decision was decided in the Preliminary Objections, the Court understood that the obligation was to be complied with even when involving the extradition of nationals—bearing in mind that many States, including Libya, have restrictions on the extradition of their nationals— and that to such an extent that the alternative choice between extradite or prosecute was brought down to the (Platcha 2001, 129-130).

3. Previous work by the ilc

Although the aut dedere aut judicare principle was only recommended by the ILC’s Working-Group as a topic for the long-term program of work in 2004, the Commission has been concerned about the obligation to extradite or prosecute almost since its conception, with its Draft Code of Crimes against the Peace and Security of Mankind.

It was in the year of 1947 that the General Assembly of the United Nations (UNGA) requested the International Law Commission to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal and to prepare a draft Code of offenses against the peace and security of mankind, indicating clearly the place to be accorded to the Nuremberg principles. Therefore, the ILC began to work on the draft code already at its first session in 1949.

In spite of the submission of a draft in 1954, the UNGA did not take any action on the Code until the end of 1981, when the organ invited the ILC to resume its work. In 1991, the ILC provisionally adopted the draft articles of the Code and transmitted them to governments for their observations. Then, after further deliberation, the Draft Code of Crimes against the Peace and Security of Mankind was finally adopted in 1996, in second reading by the International Law Commission.

An important fact is revealed by the history of Draft Code: with the exception of the Hague Convention of 1907 and the Nuremberg Charter, practically all of the conventional and charter-based sources of international criminal law and international humanitarian law, which substantially, if not entirely, overlap with the subject matter of the Draft Code, have emerged since 1947(Allain and Jones 1997, 101), which shows a proactive and groundbreaking approach by the
Commission on the theme.

In the words of Martin Ortega:

“the general provisions of the Draft Code contain an advanced jurisdictional system whose aim is to widely expand jurisdiction over the crimes against the peace and security of mankind. The relevant provisions are innovative as to their broad scope, since they tend to encompass every crime of the Draft Code” (Martin Ortega 1997, 293).

When it comes to the obligation to extradite or prosecute, the main provision in the Draft Code is contained in Article 9, which determines that the State in whose territory an individual alleged to have committed one of the crimes contemplated in articles 17 to 20 (genocide, crimes against humanity, crimes against the UN and Associated Personnel and war crimes, respectively) of the Draft Code is present must “take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction” (ILC 1996, 31). Finally, the introductory clause of this article offers a third alternative course of action for the custodial State, which is transferring the alleged offender to an international criminal court for prosecution.

4. Questions to ponder

1. The ILC Members, when approaching the obligation of extradite or prosecute and its different developments, be it by issuing draft report, a model clause or even adopting draft articles, are asked to consider the following questions during the debates:

2. In which points are the existing treaty provisions regarding the obligation to extradite or prosecute different and similar, and is there a comprehensive understanding of these provisions leading to a consensual obligation?

3. What is the concept and relation between universal jurisdiction and the obligation to extradite or prosecute?

4. May the aut dedere aut judicare principle be regarded as having customary character? If yes, what are the implications of such assertion?

5. Is there a hierarchy between prosecution and extradition or are they alternative options?

6. To which offenses under international and national law does the aut dedere aut judicare principle apply?

7. What are the possible reservations and hindrances to the application and enforcement of the obligation?

8. How do human rights norms influence the application of the principle?
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**Abstract**

There is, today, a growing concern among the international community about ending impunity for international crimes and grave human rights violations. To that end, efforts have been made to establish appropriate fora for the prosecution and trial of alleged criminals. In this context, the debate over the obligation to extradite or prosecute, also known by the Latin expression aut dedere aut judicare, becomes fundamental. The obligation aut dedere aut judicare can be described as an alternative obligation concerning the treatment, by a State, of an alleged offender, according to which a State holding a person accused of certain crimes has an obligation to either prosecute such person or extradite him or her to another country willing to do so. This obligation is included in a number of international treaties. Part of the doctrine affirms that the obligation is also of a customary nature. There are still many doubts surrounding this rule, since many of its main aspects remain unsettled: its possible customary nature, the hierarchy between the two alternatives contained in the formula, the effects on it of the creation of international criminal courts, the crimes comprised in its definition, the difficulties concerning prosecution and extradition processes, among many others.