

Faculty of Law

Public International Law  
Prof.dr C.J.R. Dugard



Professor Matthew Meselson  
Department of Molecular and Cellular Biology  
Harvard University

FAX 00 1 617 496 2444

Number

Leiden, 10 September 1998

Subject

Phone (31)(0)71 527 7532

Dear Matthew,

I apologise for my delayed reply to your fax and emails. The past week has been very difficult for me: leaving South Africa, and arriving in The Netherlands.

I share your concern about the problem of State A which has an offender present in its territory but with whom there is no jurisdictional link of the kind mentioned in Article V(1) and in respect of whom no extradition request is forthcoming. I agree with you that we should make it clear that such a person is subject to the jurisdiction of State A.

In defense of the present Article V(2) let me say:

(a) It is modelled on provisions in other treaties providing for international crimes. This will make it more acceptable to the Sixth Committee of the General Assembly. Lawyers feel comfortable with established precedent.

(b) Article V(2) is not clear on the requirement of a prior extradition request from another State for it (State A) to exercise jurisdiction. To the best of my knowledge there is no case in which this issue has arisen in practice. In my view it is open to State A to exercise criminal jurisdiction over a person present in its territory where (i) there is no jurisdictional link of the kind listed in Article V(1); and (ii) there is no extradition request from another State  
**PROVIDED STATE A'S OWN MUNICIPAL LAW PERMITS THE EXERCISE OF JURISDICTION.**

This is the real problem. State A's own municipal law will usually not permit it to exercise criminal jurisdiction where there is no link of the kind listed in Article V(1) because international law does not clearly permit the exercise of jurisdiction in such a case.

Hugo de Grootstraat 27  
P.O. Box 9520, 2300 RA Leiden  
The Netherlands  
Telephone (31)-(0)71-5277532/5277533  
Fax (31)-(0)71-5277600  
Email [jfrjd@uljur.LeidenUniv.NL](mailto:jfrjd@uljur.LeidenUniv.NL)

Rijks Universiteit



In order to encourage a State to exercise jurisdiction over an offender who is simply "present" its territory I believe that we should make it clear in the Convention that international law permits or authorizes the exercise of jurisdiction in such a case. This could be done

either by deleting the words "and it does not extradite such person etc. etc." (as you suggest) (Article VIII could then be left as it is)

or by including an additional clause V(1)(f):

"when the offence involved the intentional use of biological or chemical weapons against the nationals of any State".

Such a provision would accord with my thoughts expressed at Cambridge (post lunch, paragraph four and Multiple Extradition Requests). James and Philip did not like such a clause, largely because it departs from precedent and creates a new basis for the exercise of jurisdiction. My own view is that this would accord with new developments in respect of obligations erga omnes and that States might be prepared to accept it.

(I have included the word "intentional" to exclude a "negligent" release of gas that injures State Z's own nationals. But it would cover Iraq's use of gas against the Kurds.)

#### Other Issues

##### Preamble

(1) I do not think this is necessary if you adopt either of my suggestions on Article V. If not, you might add a clause of the following kind:

"Declaring that States are obliged to refrain from using biological and chemical weapons against their own nationals and the nationals of other States".

(2) OK.

(3) Agreed.

##### Article 1

Yes, threatening should be criminalized.

##### Article II

Yes.

##### Article V

No. This is understood. Here I suggest respect for precedent.

##### Article VI

(1) Not in line with provisions in the treaties creating international crimes but in accordance with international human law.

Agreed.

(2) I would retain as it is. I believe it does apply to non-parties.

##### Article VIII

(1) No, the possibility of a friendly prosecution is not excluded. But I do not believe we should depart from precedent here. States resent being told how to run their criminal trials. Criminal justice is still seen by States as an important feature of sovereignty.

(2) I believe that a State Party is obliged to take action against an offender even if there is no extradition request.

##### Article XIII

Not necessary as the UN Secretary-General is informed and 99.9 per cent of States are members of UN.

*Number*  
*Subject*

*Leiden, 10 September 1998*

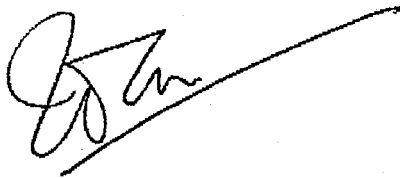
page 3

---

As to the Council on Foreign Relations. It will be very difficult for me to leave Leiden in November and December as I have a busy teaching schedule and I am "new". If absolutely necessary I would consider in the light of the importance of the project. James will be in New York in November (I think) for meeting of the Sixth Committee. I suggest that you try to plan to hold the meeting while he is in New York.

Yours sincerely,

John Dugard

A handwritten signature in black ink, appearing to read 'John Dugard', with a long horizontal flourish extending to the right.