



# International Criminals: Extradite or Prosecute?

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International Law | July 2013 | IL BP 2013/01

## Summary points

- International courts do not have the resources or the powers to prosecute all perpetrators of international crimes.
- Various treaties impose obligations on states to extradite or prosecute a person found in their territory who is suspected of certain specific offences. This obligation is known as *aut dedere aut judicare*.
- For the 'core crimes' of genocide, war crimes and crimes against humanity, there is a treaty-based obligation *aut dedere aut judicare* only for grave breaches of the Geneva Conventions and Additional Protocol I. For the other core crimes it is questionable whether customary international law imposes such an obligation.
- The obligation *aut dedere aut judicare* is distinct from the principle of universal jurisdiction, which provides a basis for prosecution but does not, in itself, imply any obligation to extradite or prosecute.
- Immunity of state officials, which acts as an obstacle to the exercise by a state of its jurisdiction, could, in practice, preclude the effective application of the obligation to extradite or prosecute.
- For the core crimes of genocide, war crimes and crimes against humanity a treaty imposing an international obligation on states to extradite or prosecute would help to bring perpetrators to justice.

## Introduction

The ending of impunity for the perpetrators of atrocities has long been an objective of the international community. That was the incentive behind the establishment of the International Criminal Court (the ICC) in 1998. But international courts have neither the powers nor the resources to deal with every international crime in the world. Where national courts are able to try offenders effectively and fairly the ICC yields precedence; the principle of complementarity, written into its statute, makes clear that it has jurisdiction only in the absence of such national proceedings. The statute affirms in its preamble ‘that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.’ National trials do take place (as is evidenced by the ongoing proceedings against the former president of Guatemala, Efraín Ríos Montt, for genocide) but they are comparatively rare. Would there be more such trials if states had an *obligation* under international law to bring perpetrators to justice in their own courts or to extradite them to a state that can do so?

There are many treaties that impose on states parties to them an obligation to extradite or prosecute a person found in their territory who is suspected of certain specific offences. This obligation is often known by the Latin tag *aut dedere aut judicare*. The treaties cover crimes such as various acts of terrorism, torture, enforced disappearances, corruption and such organized crimes as human trafficking and drugs trafficking. They aim to deal with these offences by national prosecutions, facilitated by cooperation between governments. One example was the long-running attempt by Belgium to persuade Senegal to prosecute Hissène Habré for torture allegedly committed while he was president of Chad, or to extradite him to Belgium for prosecution there. In proceedings brought

by Belgium, the International Court of Justice (the ICJ) discussed the extent of the obligation to extradite or prosecute contained in the UN Convention on Torture, and decided that Senegal should prosecute without further delay or extradite to another country.

There are some international crimes, however, that are not covered by any treaty requiring states to extradite or prosecute. Genocide, crimes against humanity, war crimes and aggression – the ‘core crimes’ of international law – are within the jurisdiction of the ICC<sup>1</sup> and states have obligations to surrender suspects to it. But in relation to the many offenders who are not before that court there are few relevant treaty obligations.

This paper discusses whether international law adequately provides for inter-state cooperation with the objective of facilitating national prosecutions of international crimes. It begins by considering the legal basis for an *aut dedere aut judicare* obligation, whether in treaty law or in customary international law. It then discusses the content of the obligation and when it is triggered, in the light of the ICJ judgment in the *Belgium v. Senegal* case. The obligation has to be understood in the context of other principles of international law, such as states’ rights to jurisdiction (courts cannot prosecute unless they have jurisdiction) and immunity from suit (if leaders enjoy immunity is there still an obligation to prosecute?). The paper considers the relationship between the *aut dedere aut judicare* obligation and such principles as these. Finally, the paper refers to the work of the International Law Commission (the ILC), which has the subject on its agenda, and considers the options available to it and makes recommendations for its future work.

## Legal bases of the obligation

The obligation to extradite or prosecute is found in numerous treaties; but there are different views as to whether there is such an obligation in customary international law.

<sup>1</sup> These core crimes may be tried by the International Criminal Court if they were committed after 1 July 2002 when the ICC Statute entered into force and have been committed by a national of a state party or within a state party’s territory. But the ICC will not be able to try cases of aggression until the amendments adding it to the statute come into force and states parties take a further decision in 2017.

### Treaty law

There are over 60 multilateral treaties combining extradition and prosecution as alternative courses of action in order to bring suspects to justice.<sup>2</sup> As regards the core crimes the obligation *aut dedere aut judicare* relates only to those war crimes that constitute ‘grave breaches’ of the Geneva Conventions and Additional Protocol I.<sup>3</sup> The Genocide Convention does not incorporate the obligation but does provide that persons charged with genocide are to be tried by a court of the state in the territory of which the crime was committed, or by an international court with jurisdiction.<sup>4</sup> There is therefore no treaty-based obligation *aut dedere aut judicare* for genocide, crimes against humanity and, except in the case of grave breaches, for serious violations of the laws and customs applicable in armed conflicts of an international or non-international character.

A common feature of the different treaties embodying the obligation to extradite or prosecute is that they impose upon states an obligation to ensure the prosecution of the offender either by extraditing the individual to a state that will exercise criminal jurisdiction or by enabling their own judicial authorities to prosecute. Beyond that, the provisions greatly vary in their formulation, content and scope, particularly with regard to the conditions for extradition and prosecution, and the relationship between these two possible courses of action.<sup>5</sup>

### Customary international law

Treaties apply only to those states that are parties to them. But is there an obligation to extradite or prosecute under customary international law, binding on all states? If so, does it apply in respect of all or merely some crimes under international law?

It has been argued that the prohibition of certain crimes under international law, including genocide, crimes against humanity and war crimes, derive their authority from a peremptory norm (*jus cogens*) from which no derogation is ever permitted. A violation of such a norm gives rise to a corresponding obligation *erga omnes* – an obligation owed by states to the international community as a whole – either to institute criminal proceedings or to extradite the suspect to another competent state.<sup>6</sup> This view relies on the Trial Chamber’s conclusion in the *Furundžija* case in the International Criminal Tribunal for the former Yugoslavia (ICTY) that ‘one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.’<sup>7</sup> This view has been criticized by the argument that the *erga omnes* and *jus cogens* nature of the prohibitions do not as such give rise to the formation of customary international law and do not imply the recognition of a customary nature for the obligation to extradite or prosecute.<sup>8</sup>

<sup>2</sup> Survey of multilateral conventions that may be of relevance for the work of the International Law Commission on the topic: ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’, Study by the Secretariat, 18 June 2010, UN Doc.A/CN.4/630, para. 4. A list of the treaties included in the survey with the text of the relevant provisions is available in the Annex (Secretariat’s Survey).

<sup>3</sup> Article 49 of the First Geneva Convention; Article 50 of the Second Geneva Convention; Article 129 of the Third Geneva Convention; Article 146 of the Fourth Geneva Convention; Article 85 of the Additional Protocol I.

<sup>4</sup> Article VI of the Genocide Convention.

<sup>5</sup> Secretariat’s Survey, paras 126, 150.

<sup>6</sup> M. Cherif Bassiouni and Edward M. Wise, *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London: Martinus Nijhoff, 1995), p. 52; Guy S. Goodwin-Gill, *Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute*, in Guy S. Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law, Essays in Honour of Ian Brownlie* 199 (Oxford: Clarendon Press, 1999), pp. 213, 220.

<sup>7</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, Trial Chamber, 10 December 1998, para. 156.

<sup>8</sup> Raphaël van Steenberghe, ‘The Obligation to Extradite or Prosecute, Clarifying its Nature’, 9 *Journal of International Criminal Justice* 1089 (2011), p. 1092; Claire Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law*, Collections électroniques de l’Institut de hautes études internationales et du développement, Graduate Institute Publications Online, 2009, <http://heid.revues.org/249?lang=en>, Chapter 1, paras 21–23, 80. See also *Belgium v. Senegal*, where the ICJ, after establishing that the prohibition of torture is *jus cogens*, examined when the Torture Convention entered into effect for Belgium. This can be understood as confirming the view that *jus cogens* does not generate an automatic obligation to extradite or prosecute. Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, paras 99–104.

Some base the customary status of the obligation to extradite or prosecute on the Draft Code of Crimes against Peace and Security of Mankind (the Draft Code), which was adopted by the ILC in 1996. The Draft Code, however, has never been adopted by governments. Draft Article 9 embodies the obligation to extradite or prosecute in relation to the core crimes. The purpose of this provision is ‘to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.’<sup>9</sup> It seems, however, that this article was thought to represent progressive development rather than a codification of existing customary international law.<sup>10</sup>

In order to establish the existence of a rule of customary international law there has to be widespread state practice and a belief that such practice is required as a matter of law (*opinio juris*).<sup>11</sup> The most recent analysis of state practice has been undertaken by the chairman of the Working Group of the ILC, Kriangsak Kittichaisaree, on the topic of the obligation to extradite or prosecute.<sup>12</sup> It reveals that although a large number of states provide for universal jurisdiction for core crimes, as demonstrated in the Amnesty International report of 2011,<sup>13</sup> only about 25 states implement in their national legislation the obligation to extradite for various crimes. The national courts

of at least eight states in at least 11 cases have asserted the existence of the obligation to extradite or prosecute outside treaty law for various crimes varying from ordinary crimes to war crimes, genocide, crimes against humanity, torture and enforced disappearance. There are also cases in national courts of four states dealing with prosecution in lieu of extradition of nationals. While acknowledging that this practice is not universal, the chairman considers it to be ‘sufficiently convincing and extensive’.<sup>14</sup> He concludes that this obligation, in particular in regard to core crimes under international law proscribed by *jus cogens*, ‘has crystallized or at least is in the process of crystallizing into a rule of customary international law, albeit not a “universal rule of customary international law”’.<sup>15</sup> He acknowledges that this obligation does not bind states that have been persistently objecting to the customary obligation while it was in the process of emerging.<sup>16</sup>

Other sources have been relied upon as evidence of the customary status of the obligation to extradite and prosecute, including resolutions of international organizations, such as UN General Assembly resolutions 2840 and 3074, which urge states to prosecute alleged offenders of crimes under international law or extradite them.<sup>17</sup> It has been argued that the weight of these resolutions is considerable given that no state voted against them and the abstentions did not concern

9 *Yearbook of the International Law Commission*, 1996, Vol. II (Part Two), Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, UN Doc.A/51/10, Article 9, p. 31, para. (2), [http://untreaty.un.org/ilc/reports/english/A\\_51\\_10.pdf](http://untreaty.un.org/ilc/reports/english/A_51_10.pdf) (the 1996 Draft Code with Commentaries).

10 See *International Law Commission Report 2012*, Sixty-fourth session, UN Doc.A/67/10, <http://untreaty.un.org/ilc/reports/2012/2012report.htm>, para. 211.

11 North Sea Continental Shelf (*Federal Republic of Germany/Netherlands*), *ICJ Reports* 1969, para. 73–74; *International Law Association, Final Report of the Committee on Formation of Customary (General) International Law*, London 2000, <http://www.ila-hq.org/en/committees/index.cfm/cid/30>, pp. 20–23, 29–32.

12 Informal working paper by Kriangsak Kittichaisaree, Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*), 5 April 2013 (Chairman’s informal working paper). Other studies on this topic include the report by Amnesty International, ‘International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)’, 2009, <http://www.amnesty.org/en/library/asset/IOR40/001/2009/en/a4761626-f20a-11dd-855f-392123cb5f06/ior400012009en.pdf>; van Steenberghe, ‘The Obligation to Extradite or Prosecute’; Mitchell, *Aut Dedere, aut Judicare*; Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Questions put to the Parties by Members of the Court at the close of the public hearing held on 16 March 2012: compilation of the oral and written replies and the written comments on those replies, <http://www.icj-cij.org/docket/files/144/17202.pdf>, pp. 20–48.

13 Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation around the World*, 2011, <http://www.amnesty.org/en/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf>.

14 Chairman’s informal working paper, paras 33–34, 91–94, 134, 165.

15 *Ibid.*, para. 189.

16 *Ibid.*, para. 192.

17 See the UN General Assembly Resolution 2840 (XXVI), 18 December 1971; UN General Assembly Resolution 3074 (XXVIII), 3 December 1973, UN Security Council Resolutions 1318 (2000), 1325 (2000), 1379 (2001), 1612 (2005), 1674 (2006), 1820 (2008); ECOSOC Resolution 1989/65, 24 May 1989; Inter-Parliamentary Union (IPU) Resolution, 112th IPU Assembly, 8 April 2005, Doc. No. 13, <http://www.ipu.org/Un-e/ipu-112-1-e.pdf>; Organization of American States General Assembly Res. 2225 (XXXVI-0/06), 6 June 2006, p. 252, <http://www.oas.org/en/sla/docs/AG03341E09.pdf>.

the recognition of the obligation.<sup>18</sup> However, although General Assembly resolutions may in some instances constitute evidence of the existence of customary international law, and help to crystallize emerging customary law or contribute to the formation of new customary law, as a general rule they do not as such create new rules of customary law.<sup>19</sup>

‘ The state practice ... demonstrates that there is no clear answer to the question whether the obligation to extradite or prosecute for core crimes ... has become part of customary international law. ’

It has been argued that the accumulation of multilateral treaties containing the obligation to extradite or prosecute, and their wider acceptance by states, signify the existence of a rule of customary international law.<sup>20</sup> But while such treaties can assist in the crystallization of emerging rules of customary international law there is no presumption that they do so.<sup>21</sup> Only in exceptional circumstances may a multilateral treaty give rise to new customary rules or

assist in their creation ‘of its own impact’ if it is widely adopted by states and it is the clear intention of the parties to create new customary law.<sup>22</sup> The condition is that the provision in question must be ‘of a fundamentally norm-creating character’.<sup>23</sup> If for no other reason than the lack of consistency among various conventions, it is questionable whether a common obligation to extradite or prosecute can be drawn from them.<sup>24</sup> It has been argued that there may be an emerging customary obligation to extradite or prosecute operating outside the Geneva Conventions in the light of universal participation in them and increased prosecution of grave breaches.<sup>25</sup> The ICTY held in *Blaškić* that national courts of any state are under ‘a customary obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law’.<sup>26</sup> As regards the Genocide Convention, where there is no treaty-based obligation to extradite or prosecute, it has been concluded that there is not yet enough state practice to find the existence of a customary international law obligation to do so for genocide.<sup>27</sup>

The state practice described above demonstrates that there is no clear answer to the question whether the obligation to extradite or prosecute for core crimes under international law has become part of customary international law. States’ implementation of this obligation seems to be primarily based on treaties to which they are parties. It is thus questionable whether state practice beyond treaties is sufficient to meet the requirements prescribed for the formation of customary international law.<sup>28</sup> The debates in the Sixth Committee of the

18 Van Steenberghe, ‘The Obligation to Extradite or Prosecute’, p. 1100; Chairman’s informal working paper, para. 150.

19 ILA’s report on customary international law, p. 55.

20 Colleen Enache-Brown and Ari Fried, ‘Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law’, 43 *McGill Law Journal* 613 (1998), pp. 629–30. See also Mitchell, *Aut Dedere, aut Judicare*, Chapter 1, paras 25–32; *International Law Commission Report 2011*, Sixty-third session, Doc. A/CN.4/650, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/211/09/PDF/N1221109.pdf?OpenElement>, para. 44.

21 ILA’s report on customary international law, p. 49.

22 *Ibid.*, p. 50.

23 *North Sea Continental Shelf cases (Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, paras 70–74.

24 Mitchell, *Aut Dedere, aut Judicare*, Chapter 1, paras 31–32; Chairman’s informal working paper, para. 175.

25 Similarly, it has been suggested that this conclusion may also be adopted with regard to the Torture Convention. Mitchell, *Aut Dedere, aut Judicare*, Chapter 1, paras 69–70.

26 *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), para. 29.

27 Mitchell, *Aut Dedere, aut Judicare*, Chapter 1, para. 71. For the criticism of this view see Chairman’s informal working paper, paras 187–88.

28 See Mitchell, *Aut Dedere, aut Judicare*, Chapter 1, para. 72; Bassiouni and Wise, *Aut dedere aut judicare*, p. 43. For different views see Amnesty International, ‘International Law Commission’, p. 27; van Steenberghe, ‘The Obligation to Extradite or Prosecute’; Chairman’s informal working paper, para. 189.

UN General Assembly on this topic, which record differing positions taken by states on this issue, seem to confirm this conclusion.<sup>29</sup> It may be, however, that such a rule may develop in the future.

## The content of the obligation to extradite or prosecute

Given the differences in the provisions in the various treaties, the precise content of the obligation to extradite or prosecute has to be assessed on a case-by-case basis. The relevant provisions imposing this obligation must be read in connection with the rules relating to the criminalization of the offences, the establishment of jurisdiction, the search for and arrest of alleged offenders, the investigation, rules on cooperation in criminal matters and the regime of extradition. As regards the content of any emerging rule of customary international law, the practice is not yet clear enough to enable a conclusion to be drawn, but the basic elements may perhaps be drawn from the mechanisms provided in the Draft Code and the Geneva Conventions.

### To prosecute or to extradite?

The first question that needs to be asked concerns the relationship between extradition and prosecution: does the obligation arise once a state is aware that an alleged offender is present on its territory or only once a state receives a request for extradition? Most of the treaties concerned impose an obligation to prosecute whenever the alleged offender is present in the territory of the state: the obligation arises as soon as that presence is discovered, regardless of any request for extradition. It is only when such a request is made that the alternative course of action – extradition – becomes available to the state. The emphasis is on the prosecution of the alleged offender:

extradition is available to facilitate the prosecution in the most appropriate forum. Thus the Geneva Conventions (and Additional Protocol I) require that states must prosecute alleged offenders, regardless of their nationality, but may also, if they prefer, hand them over for trial to another state party concerned.<sup>30</sup> Similarly, Article 9 of the 1996 Draft Code does not give priority to either course of action but gives the custodial state discretion to decide whether to transfer the individual to another jurisdiction for trial in response to a request received for extradition or to try the alleged offender in its national courts.<sup>31</sup> The obligation to prosecute, however, arises independently from any request for extradition.

The terms of the provisions embodying the obligation to extradite or prosecute modelled on the so-called ‘Hague formula’, which was developed in the Convention for the Suppression of Unlawful Seizure of Aircraft (the 1970 Hague Convention), are less clear. This formula combines the options of extradition and prosecution by providing that the state party in the territory of which the alleged offender is found is obliged to submit the case to its competent authorities for the purpose of prosecution if it does not extradite the alleged offender.<sup>32</sup> This formula requires states parties to assert jurisdiction over the prohibited conduct even in the absence of any link between itself and such conduct (universal jurisdiction). The ambiguous clause ‘if it does not extradite him’ raises the question whether the obligation to prosecute arises once a suspect is found or only once the request for extradition is submitted and not granted.

This question has been considered by the ICJ in the dispute between Belgium and Senegal in the context of the Torture Convention, which incorporates the ‘Hague formula’. In 2009, Belgium took Senegal

29 Chairman's informal working paper, paras 137–146, and Annex; Reports by ILC Special Rapporteur, Zdzislaw Galicki, on the obligation to extradite or prosecute (*aut dedere aut judicare*): Second Report, UN Doc.A/CN.4/585, 11 June 2007, paras 50–56; Third Report, UN Doc.A/CN.4/603, 10 June 2008, para. 98; Fourth Report, UN Doc.A/CN.4/648, 31 May 2011, paras 78–81.

30 Article 49 of the First Geneva Convention; Article 50 of the Second Geneva Convention; Article 129 of the Third Geneva Convention; Article 146 of the Fourth Geneva Convention; Articles 85 and 88 of the Additional Protocol I.

31 1996 Draft Code of Crimes with Commentaries, Article 9, para.(6).

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



to the ICJ, alleging that it had failed to comply with its obligations under the UN Convention on Torture to prosecute Hissène Habré for acts including crimes of torture and crimes against humanity or to extradite him to Belgium to face trial there. The ICJ held that under the Torture Convention the obligation to prosecute arises irrespective of the existence of a prior request for the extradition of the suspect. The ICJ explained:

95. [...] 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.<sup>33</sup>

The ICJ also clarified that a state cannot justify its breach of the obligation under Article 7(1) of the Torture Convention by invoking provisions of its domestic laws, or by invoking financial difficulties as a reason for failing to initiate proceedings against the suspect.<sup>34</sup> Seeking guidance from an international organization also does not justify a state's delay in complying with the obligations under the Convention.<sup>35</sup> The ICJ's decision regarding

the Torture Convention may well be important for the interpretation of provisions in other treaties formulated in similar terms. It will generally apply to the formula by which the state in whose territory the alleged offender is found shall, if it does not extradite that individual, submit (or be obliged to submit) the case to its competent authorities for the purpose of prosecution. However, given the variations of provisions embodying the formula, a case-by-case examination is necessary to establish whether they may be interpreted in line with the ICJ's guidance.<sup>36</sup>

There is a second category of treaties incorporating extradite or prosecute obligations; these give priority to extradition over prosecution and make the application of the alternative obligation to prosecute dependant upon the denial of a prior request for extradition.<sup>37</sup> The obligation to prosecute is thus triggered by the refusal to surrender the alleged offender following a request for extradition. Those conventions also provide that prosecution arises only if the alleged offender has the nationality of the requested state or if this state is competent to try the alleged offender. The mechanism for the punishment of offenders is based on the idea that the state in whose territory the crime was committed will request extradition of the offender who has fled to another country and that extradition would, in principle, be granted. A state, however, may be unable to extradite in some cases, for example, if the offender is its own national, and the obligation to prosecute is thus provided as an alternative.<sup>38</sup>

It has been argued that the difference between the two categories of conventions is based on the specific nature of the crimes and the appropriateness of the forum to prosecute and try alleged offenders. Where the

33 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, para. 95.

34 *Ibid.*, paras 112, 113. See also the Decision of the Committee Against Torture under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, 36th Sess., CAT/C/36/D/181/2001 dated 19 May 2006, para. 9.7.

35 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, para. 112.

36 See Secretariat's Survey, para. 131.

37 An example of such a convention is the 1929 Counterfeiting Convention, which provides in Article 9(2) that the 'obligation to take proceedings is subject to the condition that extradition has been requested and the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.'

38 Secretariat's Survey, paras 132-136.

crime is of concern to the international community as a whole, the custodial state appears to have free discretion in choosing between the extradition and prosecution. Conversely, where the interests safeguarded do not transcend state concerns, it seems reasonable to give priority to extradition to a more interested state over the prosecution in the custodial state.<sup>39</sup>

### To prosecute

Most of the relevant treaties impose upon states parties the obligation to establish the relevant acts as criminal offences under their domestic law and to make them punishable by appropriate penalties. They also require states to establish jurisdiction with regard to such offences, to investigate relevant facts and to ensure the alleged offender's presence for the purpose of prosecution or extradition.<sup>40</sup> Some conventions require a state to establish extra-territorial jurisdiction over the offence for the purpose of the 'extradite or prosecute' obligation.<sup>41</sup>

The Geneva Conventions require a state party to enact the legislation necessary to provide effective penal sanctions for persons committing, or ordering the commission of, any of the grave breaches of the conventions. A state party must search for alleged offenders, and, regardless of their nationality, bring them before its own courts. Although the obligation to extradite or prosecute is limited to grave breaches, the states parties are required to take measures to suppress all acts contrary to the conventions other than grave breaches.<sup>42</sup> Similarly, the 1996 Draft Code requires states to take the necessary measures to establish their jurisdiction over genocide, crimes against humanity, war crimes,

and crimes against the UN and associated personnel, irrespective of where or by whom they were committed.<sup>43</sup> The obligation to establish extraterritorial jurisdiction in certain circumstances is also imposed in the 1970 Hague Convention, and other subsequent conventions, including the Torture Convention.<sup>44</sup> These establish a double-layered system of jurisdiction, under which the obligation incumbent upon states having a connection with the crimes to establish their jurisdiction is complemented with the further obligation of each state to establish its jurisdiction in a case where the alleged offender is present in the territory and the state does not extradite that individual to any of the states that have a special link with the offence. The ICJ held in the *Belgium v. Senegal* case that a state's failure to adopt the necessary legislation to implement the Torture Convention interferes with that state's obligation to prosecute. The obligation for the state to criminalize torture and to establish its jurisdiction over it must be implemented by the state concerned as soon as it is bound by the convention thereby equipping itself with the necessary legal tools to prosecute this type of offence.<sup>45</sup>

Some conventions, including the 1970 Hague Convention and the Torture Convention, contain express provisions that require the state in whose territory an alleged offender is present, upon being satisfied that the circumstances so warrant, to take that individual into custody or take such other measures as may be appropriate to ensure his or her presence and to proceed immediately to a preliminary inquiry into the facts.<sup>46</sup> They further detail the conditions applicable to such custody and the obligation of notification to other interested states.<sup>47</sup> The Geneva Conventions, on the other hand, merely require states parties to 'search' for alleged

39 Van Steenberghe, 'The Obligation to Extradite or Prosecute', pp. 1110–15.

40 Secretariat's Survey, para. 144.

41 See further Mitchell, *Aut Dedere, aut Judicare*, Chapter 2, paras 19–24.

42 Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, Article 146 of the Fourth Geneva Convention.

43 Article 8 of the 1996 Draft Code.

44 Article 4 of the 1970 Hague Convention, Article 5 of the Torture Convention.

45 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, paras 75–77.

46 Article 6(1) and (2) of the Torture Convention; Article 6(1) and (2) of the 1970 Hague Convention.

47 Article 6(3) and (4) of the Torture Convention; Article 6(3) and (4) of the 1970 Hague Convention.



offenders.<sup>48</sup> The ICJ has now provided some clarification as to the scope of any such preliminary inquiry. In the *Belgium v. Senegal* case, it indicated that a state party must ensure that a competent authority draw up a case file and collect facts and evidence, including documents and witness statements relating to the event and to the suspect's possible involvement.<sup>49</sup> The ICJ explained that simple questioning of the suspect in order to establish his identity and inform him of the charges cannot be regarded as performance of the obligation to conduct a preliminary inquiry.<sup>50</sup> It has also held that 'steps must be taken as soon as the suspect is identified in the territory of the state, in order to conduct an investigation of that case'.<sup>51</sup>

‘ The obligation to prosecute does not necessarily imply that proceedings will be undertaken, and still less that the alleged offender will be punished. ’

The conventions use various formulations to describe the obligation to prosecute, including 'to try', 'to bring before their own courts' and 'to submit the case to its competent authorities for the purpose of prosecution'.<sup>52</sup> The obligation to prosecute, however, does not necessarily imply that proceedings will be undertaken, and still

less that the alleged offender will be punished.<sup>53</sup> The ICJ in *Belgium v. Senegal* held that the obligation 'to submit the case to the competent authorities' may or may not result in the institution of proceedings, depending on the evidence available against the suspect.<sup>54</sup> Thus, if there is insufficient evidence, the state is not obliged to prosecute the alleged offender; nor, of course, does the obligation to prosecute entail an obligation to punish in the absence of a conviction.

As regards prosecutorial discretion, the ICJ has confirmed that the provision embodying the obligation to prosecute in the Torture Convention does not interfere with the independence of states parties' judicial systems but leaves it to the competent authorities to decide whether or not to initiate proceedings.<sup>55</sup> The Torture Convention, as well as the 1970 Hague Convention, provide that authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.<sup>56</sup> Accordingly, 'the competent authorities involved remain responsible for deciding whether or not to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure'.<sup>57</sup> Although the Geneva Conventions are silent on the question of prosecutorial discretion, the commentary to Article 9 of the 1996 Draft Code explains that the national laws of various states differ concerning the sufficiency of evidence required to initiate a criminal prosecution or to grant a request for extradition. The custodial state has an obligation to prosecute an alleged offender in its territory when there is sufficient evidence for it to do so as a matter of national

48 Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, Article 146 of the Fourth Geneva Convention.

49 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, para. 83. In para. 84, the ICJ further held that Article 7(2) of the Torture Convention requires that 'when they are operating on the basis of universal jurisdiction, the authorities concerned must be just as demanding in term of evidence as when they have jurisdiction by virtue of a link with the case in question.'

50 *Ibid.*, para. 85.

51 *Ibid.*, para. 86.

52 Secretariat's Survey, para. 145.

53 *Ibid.*, para. 146.

54 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, para. 94.

55 *Ibid.*, para. 90.

56 Article 7(2) of the Torture Convention; Article 7 of the Hague Convention.

57 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, para. 90.

law unless it decides to grant a request for extradition. The element of prosecutorial discretion under which an alleged offender may be granted immunity from prosecution in exchange for giving evidence or assisting with the prosecution of another individual whose criminal conduct is considered to be more serious, as recognized in some legal systems, is precluded with respect to the crimes covered by the code.<sup>58</sup> In practice, many states have legislation that provides that prosecutions for certain international crimes committed outside the forum state may not proceed without the approval of a member of the executive branch of government.<sup>59</sup>

The conventions generally provide no time frame for the performance of the obligation to prosecute. The ICJ in *Belgium v. Senegal* stated that, while the Torture Convention does not provide any guidance as to the time frame for performance of the obligation to prosecute under Article 7(1), it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the convention, which is to make more effective the struggle against torture. The proceedings must thus be undertaken 'without delay'.<sup>60</sup>

### To extradite

The term 'to extradite' commonly refers to surrender of a person by one state to another state so that the latter can prosecute the alleged offender. Deportations or informal renditions arguably do not relieve a state of its obligation to extradite or prosecute, because they may fail to ensure that an alleged offender is tried for the crimes. Formal

extradition also provides human rights protection and other safeguards, such as double criminality, which may be absent in other forms of rendition.<sup>61</sup>

The conventions differ in the mechanisms they establish to provide a legal basis for extradition of the relevant offences. A number of conventions establish a system by which the relevant offence shall be deemed to be included as an extraditable offence in any existing extradition treaty between states parties, and states undertake to include the offence as an extraditable offence in every future extradition treaty to be concluded among them.<sup>62</sup> They also provide that states parties that make extradition conditional on the existence of a treaty may consider the relevant convention as the legal basis of extradition and states parties that do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves. It follows that these conventions do not contain an obligation to extradite, but they operate a *renvoi* to extradition treaties, which would provide the legal basis for extradition, but may also provide by themselves, in certain circumstances, such legal basis.<sup>63</sup>

Most of the conventions specify that extradition is subject to the conditions provided by the law of the requested state, which means that the requested state has the right to refuse extradition of an individual on the basis of the provisions of its domestic legislation. The grounds of refusal may be connected to the offence, for example, if the offence is not criminalized in the requested state or if the crime is subject to the death penalty in the requesting state, or, for example, the individual was granted asylum.<sup>64</sup>

58 1996 Draft Code with Commentaries, Article 9, para.(4).

59 See, for example, in the United Kingdom where the consent of the attorney general has always been required in order for the prosecution of certain international crimes to proceed and where section 1 (4A)1 of the Magistrates Courts Act 1980 c 43 now provides that that where a person who is not a public prosecutor brings proceedings in respect of certain offences (including grave breaches of the Geneva Conventions and torture) alleged to have been committed outside the United Kingdom, no warrant shall be issued without the consent of the DPP. See also New Zealand s.13 of the International Criminal Court and International Crimes Act where the consent of the Attorney General is necessary for a prosecution to proceed (see *Wakim v Ya'alon* (District Court, Auckland Civ-2006-004, 27 November 2006).

60 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, paras 114–5.

61 Mitchell, *Aut Dedere, aut Judicare*, Chapter 2, para. 10.

62 Secretariat's Survey, para. 138. See, for example, Article 8(1) of the 1970 Hague Convention, Article 8(1) of the Torture Convention, Article 10(1) of the 1996 Draft Code.

63 Secretariat's Survey, para. 138. See, for example, Article 8(2) and (3) of the 1970 Hague Convention, Article 8(2) and (3) of the Torture Convention, Article 10(2) and (3) of the 1996 Draft Code.

64 For example, Article 8(2) of the 1970 Hague Convention. Secretariat's Survey, para. 139.

The states therefore retain certain discretion in the extradition process.<sup>65</sup>

Some conventions include specific provisions relating to the extradition process. For example, the Geneva Conventions specify that the option of extradition to another state is subject to the condition that that state 'has made out a *prima facie* case'.<sup>66</sup> Many conventions specify that the offences shall be treated, for the purpose of extradition between states parties, as if they had been committed not only in the place in which they occurred but also in the territories of the states required to establish their jurisdiction in accordance with such conventions.<sup>67</sup> The Geneva Conventions regime and the 1996 Draft Code recommend that particular consideration should be given to the request of the state in whose territory the alleged offence has occurred.<sup>68</sup>

With regard to the Torture Convention, the ICJ clarified in *Belgium v. Senegal* that the state in whose territory the suspect is present does have the option of extraditing that person to a country that has made such a request, but on the condition that it is to a state that has jurisdiction in some capacity, pursuant to Article 5 of the Torture Convention, to prosecute and try him.<sup>69</sup> The ICJ did not, however, reach any conclusion regarding Belgium's request for extradition and has not clarified whether a requesting state enjoys a right to request the extradition and if so, at what stage such a right might be triggered.<sup>70</sup>

There is a possible third course of action whereby a state may fulfil its obligations under international law by surrendering the alleged offender found on its territory to an international criminal court for prosecution,

if the state does not extradite or prosecute that person before its own courts.<sup>71</sup> This is expressly provided in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance: a state party will comply with its duty if it extradites the alleged offender to another state, surrenders that individual to an international criminal tribunal or submits the case to its own authorities for the purpose of prosecution.<sup>72</sup>

### The relationship between the obligation to extradite or prosecute and other principles

There are certain principles and rules of international law that are of particular relevance to any consideration of the obligation to extradite or prosecute.

#### Universal jurisdiction

One of these is the principle of universal jurisdiction. There are now many treaties that, in regard to specific crimes, impose an obligation on states parties to prosecute or extradite an offender found in their territory. This is closely linked to the ability of the state concerned to take jurisdiction over the alleged offender. Although the precise nature of the obligation may vary from one treaty to another, typically the treaty will require the parties to establish jurisdiction over the crime in question where the alleged offender is in their territory and, if they choose not to extradite, to exercise that jurisdiction by submitting the matter to their competent prosecuting authorities. This is a jurisdiction that depends solely on the nature of the offence that the individual is alleged to have committed and the presence of the accused, not on any other link. This type of treaty-based jurisdiction is often referred to

65 Van Steenberghe, 'The Obligation to Extradite or Prosecute', p. 1108.

66 Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, Article 146 of the Fourth Geneva Convention.

67 Secretariat's Survey, para. 141. Article 8(4) of the 1970 Hague Convention, Article 8(4) of the Torture Convention, Article 10(4) of the 1996 Draft Code.

68 Article 88(2) of the Additional Protocol I to the Geneva Convention; 1996 Draft Code with Commentaries, Article 9, para.(6).

69 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, para. 120.

70 *Ibid.*, Separate Opinion of Judge Donogue, para. 5; Separate Opinion of Judge Skotnikov, p. 8; Declaration of Judge Owada; Dissenting Opinion of ad hoc Judge Sur, para. 45–46, 59–60; Separate Opinion of Judge Yusuf, para. 24.

71 1996 Draft Code of Crimes with Commentaries, p. 32. See also Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *ICJ Reports 2012*, Dissenting Opinion of Judge Xue, para. 48, who stated that Senegal would not be in breach of its obligation under Article 7(1) of the Torture Convention if it surrendered Habré to a special court established by the African Union.

72 Article 11 of the International Convention for the Prosecution of All Persons from Enforced Disappearance, adopted on 20 December 2006.

as ‘universal jurisdiction’ although, strictly speaking, this may be slightly misleading as it can only apply between those states that are party to the treaty concerned and is effectively triggered by the presence of the accused. Such considerations prompted Judges Higgins, Kooijmans and Buergenthal in their Joint Separate Opinion in the *Arrest Warrant Case* to describe it as an ‘obligatory territorial jurisdiction over persons albeit in relation to acts committed elsewhere.’<sup>73</sup>

‘ Unlike universal jurisdiction, which may be characterized as an important precursor or prerequisite for prosecution, jurisdictional immunity is a potential obstacle. ’

The concept of ‘universal jurisdiction’, on the other hand, is normally taken as referring to the assertion of criminal jurisdiction by a state over certain serious crimes regardless of where the crime was committed or the nationality of either the victim or the alleged perpetrator. This is in contrast to the normal situation where a state may only prosecute for crimes committed in its own territory or in certain other specifically prescribed circumstances.<sup>74</sup> In its purest form universal jurisdiction does not depend upon the existence of any treaty obligation and is based upon the idea that certain crimes are so serious that they affect the whole

international community and that, as a result, every state is free to exercise its jurisdiction to prosecute the perpetrators. This was memorably expressed by the Supreme Court of Israel in the *Eichmann Case* when it stated:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.<sup>75</sup>

Piracy was the first crime for which universal jurisdiction was recognized in international law, and certain other serious crimes such as grave breaches of the Geneva Conventions, genocide and crimes against humanity are now regarded by many states as giving rise to such universal jurisdiction.<sup>76</sup> The essence of the principle in its pure form is that, leaving aside any specific treaty obligations, states are *entitled* but not *obliged* to give their courts such jurisdiction. As a result, the principle is not uniformly applied and, in practice, each state may choose to impose particular conditions or limitations upon its exercise of such jurisdiction. Such limitations are often prompted by practical considerations but are not required by international law. As seen, some have gone further in arguing that, where crimes that are prohibited by

<sup>73</sup> Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), *ICJ Reports 2002*, Joint Separate Opinion of Judge Higgins, Kooijmans and Buergenthal, para. 41.

<sup>74</sup> The ordinary rules of criminal jurisdiction usually require a territorial link with the alleged crime. It is clear, however, that international law also permits a state to exercise jurisdiction over its own nationals and many states, including the United Kingdom, have done so in respect of serious offences committed abroad by their nationals. In addition, states have sometimes asserted jurisdiction over crimes where the victim is a national regardless of location or nationality of the perpetrator (the passive personality principle) and in cases where the alleged crime may produce harmful effects on the general welfare or security of the state (the protective principle). However, these last two examples can, in practice, be controversial.

<sup>75</sup> *Attorney-General of Israel v Eichmann*, 36 ILR 277, 304 (Israel Supreme Court 1962).

<sup>76</sup> A significant number of states now have legislation permitting the exercise of the principle of universal jurisdiction with regard to the crimes in the ICC Statute. See Amnesty International, *Universal Jurisdiction*.

peremptory rules of international law are concerned, states are not only entitled to exercise jurisdiction but are obliged to prosecute, or to surrender the offender to another state or a competent international tribunal for the purposes of prosecution.<sup>77</sup> Such views remain controversial, however, and it is clear that, in practice, the existence of domestic legislation enabling states to prosecute such international crimes is by no means universal.<sup>78</sup> Even when such crimes are covered by specific treaties, some states still lack the necessary implementing legislation, and where there is no specific treaty-based obligation to extradite or prosecute – for example crimes against humanity – many states do not have legal powers to prosecute non-nationals for crimes committed abroad. Some states have legislation that allows extra-territorial jurisdiction for crimes covered specifically by international treaties. But in such cases it is not always clear what the effect of such provision will be. For example, in the case of genocide, the relevant convention establishes the crime but does not appear to contemplate any form of extra-territorial prosecution.

It is important to note that, although closely linked in practice, the treaty-based obligation to extradite or prosecute is quite distinct from the principle of universal jurisdiction, which merely provides a basis for prosecution but does not, in itself, imply any obligation to extradite a suspect or submit a case for prosecution. The existence of some form of extra-territorial jurisdiction is, however, a prerequisite for the proper implementation of the obligation to extradite or prosecute. While it is true that a state can often relieve itself of the obligation by extraditing the offender, in practice such extradition may be constrained or barred by other legal and practical considerations. In such circumstances, a bona fide submission to the competent prosecuting authority may be the only option.

### Immunity from jurisdiction

Another key principle closely linked with that of the obligation to extradite or prosecute is that of immunity

from jurisdiction. Where international law requires a state to give effect to the immunity of the accused, a failure to prosecute, even in the absence of extradition, cannot constitute a breach of the obligation to extradite or prosecute. Unlike universal jurisdiction, which may be characterized as an important precursor or prerequisite for prosecution, jurisdictional immunity is a potential obstacle. If a state has jurisdiction to prosecute a particular crime regardless of where it was committed or the nationality of the victim or perpetrator, the immunity of the particular offender may then have to be considered. Some of the offences that are the subject of a treaty-based ‘extradite or prosecute’ obligation are of the kind that must or are likely to be committed by state officials – for example, torture, enforced disappearance and war crimes. For this reason it is necessary to consider to what extent such immunity could, in practice, preclude the effective application of any such obligation. In this context the judgment of the ICJ in the *Arrest Warrant Case* is relevant:

jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those for Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.<sup>79</sup>

Under customary international law, serving heads of state, heads of government, foreign ministers and possibly certain other incumbent high-level state representatives

<sup>77</sup> See, for example, Goodwin-Gill, *Crime in International Law*, p. 220.

<sup>78</sup> See Amnesty International, *Universal Jurisdiction*.

<sup>79</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ Reports 2002, para. 59.

are entitled to a full personal immunity covering both official and private acts, and this includes immunity from the criminal jurisdiction of foreign states.<sup>80</sup> Diplomats, persons on special mission, high officials of some international organizations and representatives to those organizations are similarly entitled to an extensive immunity from criminal jurisdiction pursuant to the specialized treaty or customary regimes applicable. Moreover, all state officials, including former officials, are generally entitled to immunity *ratione materiae* from foreign criminal jurisdiction in regard to acts carried out in their official capacity.<sup>81</sup> All these types of immunity, although different in certain respects, are ultimately derived from recognition of the independence and equality of states, and a resulting acceptance that no state should claim jurisdiction over another. In *Jurisdictional Immunities of the State (Germany v. Italy)*, the ICJ described this sovereign equality of states as ‘one of the fundamental principles of the international legal order.’<sup>82</sup>

In the *Arrest Warrant* case, the ICJ was concerned primarily with the extensive personal immunity enjoyed by a narrow circle of very high-level state representatives by virtue of the office they hold. It is clear that such immunity remains unaffected by conventions imposing on states an obligation to extradite or prosecute in respect of certain international crimes. However, such immunity does not apply once such persons have left office and the only immunity applicable would be the

immunity *ratione materiae* enjoyed by all state officials in regard to acts carried out in their official capacity. The question as to whether this type of immunity may, in certain circumstances, be displaced by such an obligation is more open to doubt. In the *Pinochet* case, the decision by the UK House of Lords to refuse immunity in respect of the alleged acts of torture rested in part on the existence of an ‘extradite or prosecute’ obligation and the establishment of a system of universal jurisdiction under the Torture Convention.<sup>83</sup> Adopting a purposive interpretation of that convention, it was suggested in some of the judgments that states parties must have implicitly waived immunity in regard to the prosecution of their own officials in foreign jurisdictions.<sup>84</sup> Most commentators now accept that the rationale of the decision in *Pinochet* was based upon the specific language of the Torture Convention under which torture could only be committed by a state official,<sup>85</sup> although some have been prepared to go further, arguing that immunity *ratione materiae* and the existence of extra-territorial jurisdiction in relation to certain international crimes cannot logically coexist.<sup>86</sup>

Even where immunity would clearly bar prosecution of a particular offender, a state’s obligation to conduct a preliminary investigation may still apply as the ICJ has made it clear that the inviolability and immunities enjoyed by certain high-ranking state officials are designed to protect against actions by another state that would ‘hinder him or her in the performance of his or her duties.’<sup>87</sup>

80 See Second Report on the immunity of State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur, 4 April 2013, UN Doc.A/CN.4/661, [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_661.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_661.pdf).

81 Some domestic courts denied the existence of immunity *ratione materiae* for crimes under international law. See, for example, Decision of Swiss Federal Criminal Court, 25 July 2012, File no. BB.2011.140, [http://www.trial-ch.org/fileadmin/user\\_upload/documents/affaires/algeria/Nezzar\\_Judgm\\_Eng\\_translation.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/affaires/algeria/Nezzar_Judgm_Eng_translation.pdf) (English unofficial translation); *Bat v Investigating Judge of the German Federal Court* [2011] All ER (D) 293 (Jul); [2011] EWHC 2029 (Admin), paras 99 and 101; *Bouterse* (2000) 51 *Nederlandse Jurisprudentie* 302; Immunity of State officials from foreign criminal jurisdiction: Memorandum by the UN Secretariat, 31 March 2008, UN Doc.A/CN.4/596, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/290/75/PDF/N0829075.pdf?OpenElement>, paras 184–90.

82 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ Reports 2012, para. 57.

83 It also relied on the particular definition of ‘torture’ adopted in the Torture Convention, which requires that it be carried out in an official capacity, thereby automatically triggering immunity *ratione materiae*.

84 See analysis of Lord Bingham in *Jones v Saudi Arabia* (UK House of Lords 2006) who stated: ‘International law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and at the same time require immunity to be granted to those properly charged.’

85 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ Reports 2012, para. 87.

86 See Lord Phillip’s speech in *Pinochet (No 3)* at 289 and Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21 *European Journal of International Law* 815 (2011).

87 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ Reports 2002, para. 54.



### The Work of the International Law Commission

The International Law Commission, consisting of 34 international law experts, was created by the UN General Assembly in 1947 to promote the progressive development of international law and its codification. The topic of *aut dedere aut judicare* has been on the agenda of the ILC since 2005. Its work has made chequered progress. In 2009 a Working Group of the ILC drew up a General Framework that specifies the issues to be addressed, namely the legal bases of the obligation to extradite or prosecute, the material scope and the content of the obligation, the relationship between the obligation and other principles, including the principle of universal jurisdiction, conditions for the triggering of the obligation to extradite or prosecute, the implementation of the obligation, and the relationship between the obligation and the surrender of the alleged offender to a competent international criminal tribunal.<sup>88</sup>

A further ILC Working Group under the chairmanship of Kriangsak Kittichaisaree considered the topic again in 2012 and members of the ILC proposed a number of suggestions on future work. The chairman of the Working Group prepared an informal working paper on 'The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)', which was considered by the Working Group in May 2013. The Working Group is continuing to meet and after its consideration of the topic this year, the ILC will report to the Sixth Committee of the UN General Assembly in autumn 2013.

As such the key consideration is whether the official has been subjected to any 'constraining act of authority'.<sup>89</sup> In the *Mutual Assistance* case<sup>90</sup> the ICJ held that two witness summons issued by a French investigating judge inviting the head of state of Djibouti to give evidence did not infringe his inviolability or immunity from jurisdiction. In *Certain Criminal Proceedings in France (Congo v. France)* a similar attempt by an investigating judge to obtain evidence from the visiting president of the Republic of Congo was the subject of proceedings before the ICJ alleging that France had violated the jurisdictional immunity of the president. The case was later withdrawn but not before the ICJ had denied provisional measures on the basis that the continuing investigation by French authorities was not, in itself, sufficient to cause 'irreparable prejudice' to Congo's claimed rights.<sup>91</sup>

### Conclusion

However desirable it is that states use their national judicial systems to prosecute perpetrators of international crimes – or to extradite them to states that will do so – it is difficult to argue that there is an international law *obligation* on them to do so in cases where no treaty is applicable. Some commentators reach the conclusion that there is such an obligation, but it is unlikely that there would be agreement on this in the ILC, or – which is more important – among states in the UN General Assembly. Further, even if it can be said that international law is developing in this direction, the content of the obligation is not clear in the absence of treaty provision.

In the light of the challenges being faced by the ICC, it is all the more desirable that perpetrators of international crimes be brought to justice in national courts that are able to try them. But international law does not adequately provide for the necessary international cooperation to ensure such trials.

88 *International Law Commission Report 2009*, Sixty-first session, UN Doc.A/61/10, [http://untreaty.un.org/ilc/reports/english/a\\_64\\_10.pdf](http://untreaty.un.org/ilc/reports/english/a_64_10.pdf), para. 204.

89 See *Dissenting Opinion* of Judge Al-Khasawneh where he expressly noted his view that the mere opening of an investigation could not, in itself, amount to an infringement of a foreign minister's immunity.

90 *Certain Matters of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *ICJ Reports 2008*.

91 *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measures, Order of 17 June 2003*, *ICJ Reports 2003*, p. 102. In seeking provisional measures, the Congo had claimed that the criminal investigation was adversely affecting the Congo's international relations.

Rather than looking to customary international law to fill the gap, one option might be for the ILC to recommend to states the negotiation and conclusion of a treaty providing an *aut dedere aut judicare* obligation in respect of the core international crimes. As noted, there is no such treaty obligation for any of these crimes other than for grave breaches in international armed conflict. There is already a long-running exercise within civil society to draft such a treaty relating to crimes against humanity.<sup>92</sup> But if effort is to be put into negotiating and concluding a treaty, it may be wise to include the other international crimes. One exception might be the crime of aggression; indeed some would argue that this is a crime to be tried only in an international court.<sup>93</sup>

As with the other multilateral agreements, a new treaty should require states to criminalize the offences in their national laws and should include the *aut dedere aut judicare* obligation and certain obligations of cooperation. The negotiation of treaties is always an onerous business and, in order to avoid a process of years, it may be desirable not to add a whole slew of provisions to the agreement but to keep it simple. The relevant provisions of the extradite or prosecute mechanism developed in the Hague formula as incorporated in the Torture Convention and most recently in the Enforced Disappearances Convention might be included.

There are greater obstacles to national prosecutions of perpetrators of major atrocities than the absence of an *aut dedere aut judicare* obligation under international law. Prosecution of offences committed overseas requires huge resources, and there will be political sensitivities if the suspects concerned are or were leaders of another state. But having an international obligation to prosecute or extradite can improve the likelihood that offenders will be brought to justice somewhere in the world – as was the case, finally, with ex-president Hissène Habré.

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The support of the Oak Foundation is gratefully acknowledged.

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92 Crimes Against Humanity Initiative, A rule of law project of the Whitney R. Harris World Law Institute, <http://crimesagainsthumanity.wustl.edu/>; Proposed international Convention on the Prevention and Punishment of Crimes against Humanity, <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>.

93 The Commentary to 1996 Draft Code suggests that 'an international criminal court would have exclusive jurisdiction over the crime of aggression with the singular exception of the national court jurisdiction of the State which committed aggression', para. 13.