



## International Law Summary

# International Criminals: Extradition or Prosecution?

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## INTRODUCTION<sup>1</sup>

This is a summary of an event held at Chatham House on 11 July 2013. The purpose of the meeting was to discuss the obligation on states to prosecute or extradite, also known as *aut dedere aut judicare*, in relation to perpetrators of international crimes. The meeting coincided with the publication of a Chatham House briefing paper entitled *International Criminals: Extradite or Prosecute?* by Miša Zgonec-Rožej and Joanne Foakes and began with a presentation of the briefing paper. Next, Ambassador Kriangsak Kittichaisaree outlined the work of the International Law Commission (ILC) on this subject. This was followed by a discussion in which the audience participated.

## INTERNATIONAL CRIMINALS: EXTRADITE OR PROSECUTE?

The decision to write the Chatham House briefing paper was influenced by two important developments in international law. The first was the judgment of the International Court of Justice (ICJ) in July 2012 in the dispute between Belgium and Senegal concerning the obligation to extradite or prosecute Hissène Habré.<sup>2</sup> In its judgment in this case, the ICJ provided important clarifications regarding the scope and the content of the obligation to extradite or prosecute. Although the ICJ focused on the obligation in the UN Convention on Torture, it may be important for the interpretation of provisions in other treaties which contain similar formulations.

Belgium took Senegal to the ICJ in 2009, alleging that the latter had failed to comply with its obligations under the UN Convention on Torture to either prosecute the former president of Chad, Hissène Habré, or to extradite him to Belgium to face trial there. Habré is allegedly responsible for international crimes committed during his presidency between 1982 and 1990 including thousands of political killings and systematic torture. He fled Chad after being deposed in 1990 and since then has been living in Senegal in exile.

In 2005, a Belgian court indicted Habré for international crimes and requested – four times – his extradition from Senegal. Senegal did not comply with any of the requests. In July 2012 the ICJ ruled that Senegal failed to meet its obligation under the Torture Convention and ordered it to prosecute Habré without further delay if it did not extradite him. In December 2012, on the basis of an agreement with the African Union, Senegal adopted a law establishing the Extraordinary African Chambers within its domestic judicial system to try Habré. The chambers were inaugurated in February 2013. On 30 June 2013, Habré was arrested and charged with war crimes, crimes against humanity and torture.

It is clear that in this case the obligation to extradite or prosecute under the Torture Convention played a crucial role in bringing to justice the ex-head of state of Chad. This case shows that an obligation to extradite or prosecute can help reduce impunity for those allegedly responsible for international crimes by depriving them of safe havens.

The second factor that influenced the decision to write the Chatham House briefing paper on the obligation to prosecute or extradite was that this topic has been on the agenda of the ILC since 2005. The ILC has been considering various possibilities regarding the outcome of its work on this topic, and is due to report to the Sixth Committee of the General Assembly in the autumn of 2013 on the progress of its work. To contribute to the discussion in the commission, the briefing paper makes a recommendation for the commission's future work, which is to negotiate a treaty providing an *aut dedere aut judicare* obligation in respect of the core international crimes.

The briefing paper starts out by analysing the legal basis of the obligation. The obligation to extradite or prosecute is found in a number of treaties. The United Nations Secretariat prepared a very useful survey of multilateral conventions that may be of use to the commission's future work on *aut dedere aut judicare*. That survey reveals that there are over 60 multilateral treaties combining extradition and prosecution as the courses of action to bring suspects to justice. These

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<sup>1</sup> This summary was prepared by Annie O'Reilly.

<sup>2</sup> Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), No. 2012/24, 20 July 2012, <http://www.icj-cij.org/docket/files/144/17084.pdf>.

conventions regulate various activities such as acts of terrorism, torture, enforced disappearances, corruption, organized crimes and trafficking.

As regards the core crimes under international law, the obligation of *aut dedere aut judicare* relates only to grave breaches of the Geneva Conventions and Additional Protocol I. There is no treaty-based obligation to prosecute or extradite for genocide,<sup>3</sup> crimes against humanity, nor – except in cases of grave breaches of the Geneva Conventions – 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 jurisdiction or by enabling their own judicial authorities to prosecute. Beyond that, the provisions greatly vary in their formulation, content and scope, particularly with regards to the conditions for extradition and prosecution and also the relationship between those two possible courses of action.

Whereas a treaty applies only to the states that are parties to it, a customary international law rule obliging states to extradite or prosecute would apply irrespective of any applicable treaties. There have been various attempts to prove that an obligation exists as a part of customary international law – either in respect of particular crimes or in respect of *all* international crimes – and those attempts are assessed in the briefing paper.

The authors of the briefing paper take the view that state practice in the form of national legislation, judicial decisions as well as state declarations, including those in the form of resolutions by international or regional organizations, such as the United Nations General Assembly, demonstrate that there is no clear answer to the question whether the obligation to extradite or prosecute for core crimes under international criminal law has become part of customary international law. State practice beyond treaties does not seem to be sufficient to meet the requirements prescribed for the formation of international customary law at this juncture.

The authors then analyse the content of the obligation to extradite or prosecute as provided in various treaties. Given the difference in the provisions in those treaties, the precise content of the obligation has to be assessed on a case by case basis. As regards the relationship between the obligations to extradite or prosecute, the treaties fall into two broad categories, one giving priority to prosecution over extradition, and the other giving priority to extradition over prosecution.

The first category comprises clauses which impose an obligation to prosecute whenever the alleged offender is present in the territory of the state, regardless of any request for extradition. It is only when a request for extradition is made that this course of action becomes available to the state. This approach is, the so-called ‘Hague Formula,’ is to be found in the Convention for the Suppression of Unlawful Seizure of Aircraft and the Torture Convention.

The second category comprises clauses that impose an obligation to extradite and in which prosecution become an obligation only after the refusal of extradition. An example in this category is the International Convention for the Suppression of Counterfeit Currency.

The briefing paper then examines conditions that are applicable to prosecution and extradition, respectively, under various treaties. It is important to point out that the relevant provisions regarding the obligations to prosecute and extradite must be read in connection with the rules on the criminalisation of the offences, the establishment of jurisdiction, the search for and arrest of alleged offenders, investigation, rules on cooperation in criminal matters and the regime of extradition.

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<sup>3</sup> There is an obligation to prosecute for genocide committed in a state's own territory.

## THE INTERNATIONAL LAW COMMISSION

The ILC, which consists of 34 international law experts and was created in 1947, has had the obligation to prosecute or extradite on its agenda since 1949. However, the priority at that time was to draft the Nuremberg principles and it was not until 1996 that it was possible to draft the Draft Code of Crimes. That code includes the obligation to extradite or prosecute. During the Cold War, for political reasons it was impossible to work on issues of universal jurisdiction and extraterritorial criminal jurisdiction. But with the drafting of the Rome Statute of the International Criminal Court, and the establishment of the *ad hoc* tribunals during the 1990s, interest among the international community on topics of international criminal justice was rekindled.

By 2005, the issue was back on the ILC agenda and a Special Rapporteur, Zdzislaw Galicki, was appointed to work on the topic. However, his efforts were largely unsuccessful as the questions he put to states went mostly unanswered, giving him very little material with which to work. The lack of cooperation from states has been a significant obstacle to successive attempts to make progress on this issue.

In 2009, the ILC set up a Working Group on the assumption that the Special Rapporteur process had failed. In 2009, the working group drew up a General Framework, outlining the legal basis for the obligation to prosecute or extradite, the subject matter, and temporal scope of the obligation, and the way ahead.

In 2011, a report was prepared with the gist of a draft article, setting out a customary international law obligation for the obligation to extradite or prosecute based on the *jus cogens* status of the prohibitions against the core crimes.<sup>4</sup> The conclusion that there was a customary rule, independent of treaty obligations, was rejected in the ILC and the Sixth Committee of the General Assembly because, it was argued, the existence of a customary international law norm must be proved; it cannot be deduced from the presumption that these crimes are proscribed by peremptory norms.

A further Working Group under Kriangsak Kittichaisaree considered the topic in 2012. Kittichaisaree 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 paper tentatively concludes that there is an emerging customary international law obligation, albeit not a universal one, on the basis that about 25 states implement the obligation in their national legislation for various crimes. This conclusion has been criticized but, the ambassador argues, it cannot be that uniformity of practice across all 193 member states of the UN would be required to support the existence of a customary rule. Whatever the standard, it must be less exacting than that.

The Working Group will continue to meet and will report to the Sixth Committee of the UN General Assembly in autumn 2013.

## DISTINGUISHING BETWEEN *OPINIO JURIS* AND TREATY OBLIGATIONS

The difficulties inherent in any attempt to identify a rule of customary international law were noted by several participants in the meeting. But, as one participant said, customary international law, which is binding on all, is an important tool for encouraging rule-abiding behaviour because those governments most likely to commit atrocity crimes are least likely to sign and ratify treaties prohibiting such conduct. If the conduct in question is the subject of a customary international law prohibition, it does not matter that the state in question has not signed up to a treaty: the obligation exists anyway.

In 2009, Amnesty International published a report entitled *International Law Commission: the Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*.<sup>5</sup> The report aimed at filling some gaps in information that states had failed to provide to the commission. It does so by setting out

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<sup>4</sup> *Fourth Report on the Obligation to Prosecute or Extradite (Aut Dedere Aut Judicare)*, 31 May 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/358/84/PDF/N1135884.pdf?OpenElement>.

<sup>5</sup> Amnesty International, *International Law Commission: The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*, 2009, <http://www.amnesty.org/fr/library/info/IOR40/001/2009/en>.

state legislation on criminal matters including the obligation to extradite or prosecute, the text of treaty provisions on the obligation, along with the most relevant declarations and reservations and the status of signatures and ratifications to those treaties.<sup>6</sup>

Regrettably – though it no doubt a difficult task – the Amnesty report fails to differentiate between situations where states legislate for *aut dedere aut judicare* on the basis of a treaty obligation binding on that state or pursuant to customary international law. This is a crucially important distinction. To illustrate, if there were a customary rule of international law on extradite or prosecute it would mean that for the Rwandan genocidaires found in the United Kingdom, the government would have an international law obligation to prosecute if they were not extradited.

On this point, one participant suggested that, although the United Kingdom has taken extradition proceedings against suspected genocidaires, it has probably done so out a sense of political prudence as opposed to legal obligation, since the government does not want to allow the United Kingdom to become a safe haven for genocidaires. Interestingly, five years ago, four Rwandan genocide suspects were released in the United Kingdom because extradition to Rwanda failed on human rights grounds. As a result the law was changed to allow for prosecution here. In this situation, the United Kingdom clearly wanted to be able to extradite and, if this was not feasible, to be able to prosecute – hence the change in legislation. This might be evidence of a belief that there is an international law obligation (the existence of *opinio juris*) to prosecute or extradite that requires the United Kingdom to legislate for both eventualities, but then again, it may simply be evidence of a policy. The existence of national legislation does not give rise to an international law obligation to prosecute. As one participant observed, if there were indeed an international *obligation* to prosecute or extradite, then presumably we would see a lot more proceedings of one kind or another.

One participant noted that in Denmark proceedings were brought against a Rwandan alleged genocidaire who had received asylum and had been living in the country for a number of years. During those proceedings there was an extradition request by Rwanda, which the court granted to encourage Rwanda to establish its own rule of law, despite finding that Denmark had jurisdiction deriving from legislation in relation to the Genocide Convention. It did not find that it was obliged to extradite him, and did not indicate whether there was an obligation to either prosecute or extradite. This is another example of the ambiguity that surrounds the issue.

One participant suggested that the notion of customary international law works much better with respect to more traditional relations between states, such as when a state's ships are in the territorial waters of another state or a state's diplomats are in another state. In those situations, custom builds up over time on a more or less informal basis, and after a while a *modus agendi* for dealing with such matters will emerge which eventually takes on the character of a legal obligation. The matter of what we do with suspects accused of core international crimes is somewhat different and does not lend itself so easily to the development of custom.

Another participant noted that although identifying state practice in this area is difficult we must remember that the search is not limited to just domestic legislation and judicial decisions: we can also look to other sources to identify customary international law, such as statements by governments, the resolutions of international organizations (the UN General Assembly has adopted two unanimous resolutions urging states to prosecute or extradite) and the accumulation of multilateral treaties. This opens up more possibilities but possibly further complicates the issue as well.

Another participant argued that only specially affected states need be considered in the development of a particular rule; so, for instance, states or regions in which no genocidaires live can be legitimately excluded from a study of customary international law surrounding the obligation to prosecute or extradite in respect of genocide.

It was also suggested that perhaps the rule on extradition is separable from the rule on prosecution and that perhaps a customary rule on one could develop independently of the other.

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<sup>6</sup> Ibid, pp.6–7.

## IMMUNITIES

Whenever the obligation to prosecute or extradite exists, whether under customary international law or treaty, the question of immunity from proceedings will arise if the crimes concerned are alleged to have been committed by state officials. Anyone who enjoys personal immunity, including inviolability and full immunity from prosecution, could not be prosecuted or extradited pursuant to a customary international law obligation. Included in this category would be a serving head of state or head of government or foreign minister. This was made clear in the ICJ's *Arrest Warrant Case*<sup>7</sup> though it left open the question of whether there were other high-level officials who might also enjoy immunity.<sup>8</sup>

In order to determine whether immunity applies, one must first consider the particular category of state official and the nature of the visit. Personal immunity covers acts carried out in an official capacity and private acts, even where those private acts are committed prior to their term in office. However, such immunity only applies during the term of office. There are others, such as those on special mission and diplomats, who enjoy a similar full immunity though only vis-à-vis the receiving state. Special mission immunity, as laid down in the 1969 Convention on Special Missions,<sup>9</sup> is regarded by some as reflecting international customary law.

Twice in recent times the United Kingdom has granted special mission status to foreign officials, both Israeli.<sup>10</sup> In the first instance, it extended special mission status to Israeli Major General Doron Almog, Prime Minister Binyamin Netanyahu's chief adviser on Bedouin affairs. He canceled his trip to the country at the last minute. The other occasion related to a visit by the chief of the defence staff of Israel, General Benny Gantz, who was granted immunity to come to the United Kingdom in July 2013 to meet with Chief of Defense Staff David Julian Richards and other officials to discuss military cooperation. Gantz is suspected of war crimes particularly in relation to Operation Pillar of Defense, an assault on the Gaza strip which took place in November 2012.

The ILC recently had the first reading of draft articles on personal immunity, on the basis that only three groups of persons were covered: heads of state, heads of government and foreign ministers. But a number of participants took issue with the ICJ *Arrest Warrant* case on the basis that the ICJ does not cite any state practice to support the conclusion that ministers of foreign affairs are entitled to personal immunity. Another argument that was raised in the ILC was that only those who are the personification of the state should be entitled to immunity; those who merely represent the state should not necessarily be entitled.<sup>11</sup> Others take the view that there should be no immunity for serious crimes. But even if this *should* be the law, it is not clear that it *is* the law. Domestic courts of various countries still give immunities to heads of state and ministers of foreign affairs, even after the *Pinochet* case, which seemed to roll back immunity to some degree.

## THE ILC'S FUTURE WORK

Some people are convinced that there is in customary international law an obligation to extradite or prosecute, at least with respect to the core international crimes. Others in the commission and at the meeting were convinced that there is not such an obligation. The ILC has decided not to pursue the issue. The question then arises, what next for the ILC?

The ILC would welcome guidance from the Sixth Committee on the topics that it should cover in its future work. The Working Group has considered a number of options but since there is no Special Rapporteur it is difficult for the Working Group to agree on a fixed agenda. One proposal is for the ILC to draft a model law on extradite or prosecute. Another proposal – which the authors of the Chatham House briefing paper advocate – is to draft a new treaty requiring states to criminalize the

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<sup>7</sup> International Court of Justice, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), <http://www.icj-cij.org/docket/files/121/8126.pdf>.

<sup>8</sup> *Ibid.*, para. 51.

<sup>9</sup> Convention on Special Missions, 1969, [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_3\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf).

<sup>10</sup> 'UK Grants Judicial Immunity to Israel Army Chief Suspected of War Crimes, Alakhbar English, 3 July 2013, <http://english.al-akhbar.com/node/16312>.

<sup>11</sup> The king of Spain was cited as an example of one who does not represent the state but is the personification of the state.

international crimes, that is genocide, crimes against humanity and all of the remaining war crimes and including the extradite or prosecute obligation. This would fill a gap, and render the debate over customary international law largely moot (and may help foster the development of the obligation to prosecute or extradite under customary international law).

Some members of the commission are concerned that drafting a new treaty would be duplicative of efforts already undertaken by the ILC. They take the view that the 1996 Draft Code of Crimes already sets out the content of the obligation to prosecute or extradite and that taking up the issue again from the very beginning would be a waste of time. Any new treaty would however include ancillary obligations on state cooperation, which are not included in the Draft Code.

There is some support within the ILC for dealing with core crimes that are not already covered under any treaties, and assigning two Special Rapporteurs – one on substantive legal issues, the other on procedural legal issues – to progress the matter.

One participant observed that there are a number of issues with the existing framework that should take precedence over a new treaty. There is, for example, a need to flesh out the meaning of key terms contained in existing treaties, such as the duty to prosecute. Is there a duty to investigate fairly and what duties does a prosecutor have to explain its decision making? Furthermore, despite the fact that the obligation to prosecute or extradite already exists in a number of treaties, there is not a large number of prosecutions or extraditions. A participant noted that it may be more productive to focus on the already existing framework, by encouraging states to act on duties that are already binding on them. The authors of the briefing paper however recommended its suggestions for future work for consideration.