A SYNOPSIS OF THE INTERNATIONAL LAW COMMISSION'S FINAL REPORT ON THE OBLIGATION TO EXTRADITE OR PROSECUTE *

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1 Introduction

Historically, the exercising of jurisdiction by a state over all persons within its territory and the right to punish them for the violation of its laws, was often frustrated by the escape of the offender into the territory of another state. When this happened, it then fell within the domestic law of that latter state to determine whether such a person could be tried and punished for the offences committed prior to entry. A state could refuse to exercise jurisdiction over offences committed outside its territory. Even if the state of refuge decided to exercise jurisdiction over the offences committed outside its territory, the state authorities on whose territory the crimes were committed, remained in the best position to assemble the evidence necessary for a trial and thus had the greater interest in punishing the offender.

These considerations gave rise to the legal institution known as extradition, which was defined as the formal surrender of a person by one state to another state for prosecution or punishment.[1] This was postulated by Grotius[2] as *aut dedere aut judicare* (either extradite or punish).

Extradition did not, however, become a general legal obligation. The surrender of fugitive offenders was dealt with as a matter of courtesy or reciprocity. International law has not imposed either a duty to surrender nor a duty to prosecute. The principle became established that, without some formal authority — either by treaty or statute — fugitive offenders would not be surrendered, nor would their surrender be requested.

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* The final report on which this synopsis is based, is reprinted in (2015) 54 *International Legal Materials* 761.

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1 'Draft Convention on Extradition' (1935) 29 *American Journal of International Law* Supplement: Research in International Law 21.

2 H Grotius *De Iure Belli ac Pacis* 2 21 6. A modern exposition of *aut dedere aut judicare* is set out in MC Bassiouni & EM Wise *Aut Dedere Aut Judicare*: *The Duty to Extradite or Prosecute in International law* (1995) 3–69; and GS Goodwin-Gill 'Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute' in GS Goodwin-Gill & S Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (2000) 220.

Nevertheless, it appeared from General Assembly Resolution 2840 (XXVI) of 18 December 1971; General Assembly Resolution 3074 (XXVII) of 3 December 1973; Principle 18 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions as recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989; and General Assembly Resolution 67/1 of 24 September 2012 that there was a heightened desire among states for closer co-operation between themselves and competent international tribunals in order to take a stand against crimes of international concern. This was especially emphasised by the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at National and International Levels, in which heads of states, governments and delegations made certain commitments in this regard.[3] The purpose of these commitments was to ensure that impunity is not tolerated for genocide, war crimes, crimes against humanity, violations of international humanitarian law and gross violations of human-rights law. Furthermore, such violations were to be properly investigated, appropriately sanctioned and the perpetrators of any such crimes were to be brought to justice: be it through national, regional or internal fora in accordance with international law.

The obligation to co-operate in combating impunity for these intended crimes has been emphasised in various international conventions through, among others, the obligation to extradite or prosecute. Examples include article 1(3) of the 1945 UN Charter; the preamble to the 1998 Rome Statute of the International Criminal Court; and guideline XII of the Guidelines of the Committee of Ministers of the Council of Europe.[4] Reference must also be made to the ICJ decision *Questions Relating to the Obligation to Prosecute or Extradite*,[5] in which the ICJ, with reference to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), held that extradition or

3 General Assembly Resolution (GA Res) 67/1 (24 November 2012).

4 Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations A/CN.4/648 (30 March 2011) available at https://www.justice.gov.sk/Dokumenty/Ochrana_pred_mucenim/b_USMERNENIA/Guidelines%20impunity%20EN.pdf (accessed 22 September 2017) paras 26–33.

5 *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) 2012 ICJ Reports. 422 443 para 50; N Andenas & T Weatherall 'International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgement of 20 July 2012' (2013) 62 *International and Comparative Law Quarterly* 753.

prosecution are alternative ways to combat impunity in accordance with article 7(1) of CAT.[6]

The International Law Commission (ILC) began its examination of the obligation to prosecute or extradite as far back as 1949 when looking at jurisdiction with regard to crimes committed *outside* national territory. This obligation was specifically addressed in its report to the General Assembly concerning the 1996 Draft Code of Crimes against Peace and Security of Mankind.[7] In 2004 the ILC included the topic in its long-term programme and in 2005 it appointed Zdzislaw Galicki as Special Rapporteur on the obligation to extradite and prosecute. After states had been invited to provide the ILC with related legislation and state practice, Galicki produced four reports between 2006 and 2011. Galicki was not re-elected as Special Rapporteur in 2011 and in 2013 the UN General Assembly invited the ILC to give the topic priority.[8] The ILC thereupon appointed a working group, chaired by Kittichaisaree, with the goal of achieving an outcome that would be of practical value to the international community. Kittichaisaree, as the chairman of the working group, prepared the basic draft, which eventually culminated in the 2014 Final Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*) (ILC Final Report).[9]

This ILC Final Report relied mainly on the UN Secretariat's 2010 survey of multilateral conventions on the topic and the ICJ's *Belgium v Senegal* judgement.[10] In this latter case, Belgium filed an application against Senegal alleging that Senegal had refused to extradite Habré, the former president of Chad, accused of war crimes. The ICJ held that Senegal should submit the case for prosecution or extradition.[11]

At its 66th session in 2014, the ILC completed its final report on the obligation to extradite or prosecute and submitted it to the UN General Assembly to consider at its 69th session.[12] The UN General Assembly, after taking note of this final report, encouraged its widest

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6 The Convention was published in (1984) 23 *International Legal Materials* 1027.

7 Published in (1996) 2 *Yearbook of the International Law Commission* 15.

8 GA Res 68/12 (16 December 2013).

9 'Draft Final Report of the Working Group on the Obligation to Extradite or Prosecute (*aut Dedere aut Judicare*)' A/CN.4/L.844 (5 June 2014). This report was only a draft. The final version is contained in the 'Report of the International Law Commission on its Work in the Sixty-sixth Session (5 May–6 June and 7 July–8 August 2014)' A/69/10 Supplement no 10 139–145 (Final Report).

10 The survey was published as 'Survey of Multilateral Conventions which May be of Relevance for the Work of the International Law Commission on the Topic The Obligation to Extradite or Prosecute (a*ut Dedere aut Judicare*)' A/CN.4/630 (18 June 2010). See, also, *Belgium v Senegal* (note 5 above).

11 ILC Final Report (note 9 above) para 19.

12 See Final Report (note 9 above).

dissemination.[13] In what follows, a synopsis of the ILC Final Report is provided, with emphasis only on its main themes.

2 Main Themes

The ILC Final Report addressed a variety of issues, including the obligation to fight impunity in accordance with the rule of law and the gaps in the existing convention regime. The report examined the priority between the obligation to prosecute and the obligation to extradite; the scope of the obligation to prosecute; as well as the relationship between the obligation to extradite or prosecute in relation to *jus cogens* norms. The customary-international-law status of the obligation to extradite or prosecute was also considered.

2.1 Implementing the Obligation to Extradite or Prosecute

As its basic formula for extraditing or prosecuting, the ILC used the provisions from the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft.[14] Article 7 stipulates

> that the Contracting State in the territory of which the alleged offender is found, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.

The ILC referred to this formula as the 'Hague formula'. The Hague formula was seen as a model for subsequent conventions, being principally used in the fight against terrorism, but also in other areas, such as the prevention of torture and other transnational crimes.[15] The ILC found that the Hague formula was followed in approximately three-quarters of post-1970 conventions for the suppression of specific offences, the common thread throughout being that the custodial state must, without exception, submit the case to a competent authority if it does not extradite.[16]

The ILC found the *Belgium v Senegal* decision of the ICJ, which was confined to an analysis of the mechanism to combat impunity under CAT by obliging prosecution or extradition, to be of the most assistance. Not only did the ICJ apply the Hague formula of prosecuting or extraditing to CAT, but it also held that the prohibition of torture is a peremptory norm

13 GA Res 69/118 (10 December 2014).
14 As published in (1971) 10 *International Legal Materials* 133.
15 For examples of these conventions, see ILC Final Report (note 9 above) 773 note 440.
16 Id para 13.

(*jus cogens*) and the prosecute-or-extradite formula could serve as a model governing prohibitions covered by peremptory norms (*jus cogens*), such as genocide, crimes against humanity and serious war crimes.[17]

The ILC found that basic fulfilment of the obligation to extradite or prosecute requires that several necessary measures be taken at national level: the relevant offences must be criminalised; jurisdiction must be established over the offence(s) and the person present in the territory of the state; an inquiry should be undertaken; the suspect should be apprehended; and the case should be submitted to the prosecuting authorities. If, for whatever reason, the case is not submitted for prosecution, extradition should take place if an extradition request is made by another state with the necessary jurisdiction and capability to prosecute the suspect. The establishment of jurisdiction can also be founded on universal jurisdiction.

The four Geneva Conventions of 1949 and CAT are examples of conventions creating universal jurisdiction.[18] Where the crime was committed abroad with no nexus to the forum state, the obligation to prosecute or extradite would reflect an exercise of universal jurisdiction, implying 'the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events'.[19]

The ILC Final Report emphasised that the obligation to prosecute is actually a duty to submit a case to the prosecuting authorities and does not involve a duty to initiate a prosecution. Furthermore, such extradition may only be to a state that has jurisdiction in some capacity to prosecute and try the alleged offender pursuant to an international legal obligation binding on the state in whose territory the person is present.[20]

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17 Id para 99.

18 See, eg, 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Geneva Convention Relative to the Treatment of Prisoners of War; and 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

19 *Arrest Warrant of 11 April 2000* (*DRC v Belgium*) 2002 ICJ Reports 3 (Joint separate opinion of judges Higgins, Kooijmans and Burgenthal) 75 para 42. See, also, C Enache-Brown & A Fried 'Universal Crime, Jurisdiction and Duty: The Obligation of *aut Dedere aut Judicare* in International Law' (1998) 43 *McGill Law Journal* 613 631.

20 ILC Final Report (note 9 above) paras 21 and 22.

2.2 *Gaps in the Existing Convention Regime*

The ILC Final Report observed that there are important gaps in the present convention regime governing the obligation to prosecute or extradite that need to be closed. These gaps concern crimes against humanity, war crimes other than grave breaches thereof and war-crimes in non-international armed conflicts. The ILC was of the opinion that the international regime regarding genocide could be strengthened beyond the rudimentary regime under the 1948 Genocide Convention.[21] In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), the ICJ held that article VI of the Genocide Convention obligates contracting parties to institute and exercise territorial criminal jurisdiction and to co-operate with an 'international penal tribunal' under certain circumstances.[22]

The ILC was of the opinion that the uncertainty of the difference between an obligation to extradite or prosecute by the territorial state where the alleged offender is and the state to which the alleged offender must supposedly be extradited to, can be removed by an alternative approach, namely the surrender of the alleged offender to a competent international criminal tribunal.[23] An example of such a tribunal is the Extraordinary African Chambers, established within the Senegalese court system and set up by in 2013 as a result of an agreement to try Habré in the wake of the ICJ's *Belgium v Senegal* decision. Here the ICJ followed the example of the Extraordinary Chambers in the Courts of Cambodia,[24] the Special Court for Sierra Leone[25] and the Special Tribunal for Lebanon.[26]

2.3 *The Hierarchy of the Obligations to Prosecute or Extradite*

The ILC addressed the matter of hierarchy of prosecution and extradition, by observing that in *Belgium v Senegal* the ICJ had held that, under CAT, the two duties did *not* carry the same weight — the former being an obligation and the latter being an option.[27] The ILC also found

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21 For a general discussion of the Genocide Convention, see WA Schabas *Genocide in International Law: The Crime of Crimes* (2009) 75–76.

22 2007 ICJ Reports 43 paras 226, 229, 442 and 449.

23 ILC Final Report (note 9 above) para 35.

24 2003 Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under the Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea.

25 2002 Statute of the Special Court of Sierra Leone.

26 S/RES/1595 (7 April 2005).

27 Id para 40.

that various conventions differed regarding the *obligation* to extradite and the *option* to extradite. Moreover, the Common Articles 49, 50, 129 and 146 of the 1949 Geneva Conventions clearly illustrate the obligation (each state party 'shall bring' persons — regardless of their nationality — alleged to have committed, or have ordered to be committed, grave breaches to those Conventions, regardless of their nationality, before its own courts) and the option ('may also, if it prefers' hand such persons over for trial to another member state concerned).[28] In addition, the Hague formula does not unequivocally resolve the question of whether the obligation to prosecute arises *ipso facto* or only once a request for extradition is submitted and not granted.[29]

The ILC Final Report emphasised that the problems caused by the fact that the *option* between prosecuting or extraditing not carrying the same weight, needed to be clarified as state responsibility could become an issue. This was because all member states to a convention have a legal interest in invoking the international responsibility of another member state for being in breach of its obligation to extradite or prosecute.[30]

2.4 *The Customary International Law Status of the Obligation to Extradite or Prosecute*

The ILC Final Report noted that there was a difference of opinion between delegations to the UN Sixth Committee as to whether *aut dedere aut judicare* had become international customary law. A draft article, submitting that international custom was a source of the obligation *aut dedere aut judicare*, was not well received by the ILC itself.[31] There was general disagreement among the members of the ILC on this matter. As a result of the lack of consensus on the point within the ILC, the latter decided to remain silent on the question whether the principle enjoyed the status of customary international law.[32]

An opportunity has thus yet to arise for the ILC to decide on the customary-law status of the obligation to extradite or prosecute. In *Belgium v Senegal* the dispute did not relate to customary-law obligations. Importantly, that judgement related only to *jus dedere jus judicare* in relation to crimes against humanity and war crimes in internal armed conflicts. It did not refer to genocide, war crimes in international

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28 See Bassiouni & Wise (note 2 above) 15; and D Costello 'International Terrorism and the Development of the Principle "*aut Dedere aut Judicare*"' (1975) 10 *Journal of International Law and Economics* 48.

29 Art 7 of the 1970 Hague Convention (note 14 above).

30 ILC Final Report (note 9 above) para 42.

31 Id para 51.

32 Id para 55.

armed conflicts and other crimes of international concern, such as acts of terrorism.

2.5 Matters of Continued Relevance to the ILC's Work on aut Dedere aut Judicare

Despite these remaining questions, certain matters will continue to be of relevance to the ILC's work relating to the obligation to extradite or prosecute. These include the relationship of the obligations with the principle of *nullum crimen sine lege*; the principle of *non bis in idem* (double jeopardy); non-extradition of nationals; the risk of the accused being tortured or subjected to the death penalty; lack of due process in a state to which extradition is envisaged; constitutional limitations; guarantees in case of extradition; the existence of humanitarian reasons; the triviality of the request for extradition; and taking into account new developments or a changed environment.

An important matter of continued relevance to the ILC's work in future on *aut dedere aut judicare* will be its relationship with the exercise of universal jurisdiction. The fact that the ILC appeared to be reluctant to draw a close link between universal jurisdiction and *aut dedere aut judicare*, seems to suggest that the principle was largely a creature of treaty law.[33]

3 Conclusion

The ILC Final Report concluded that whatever the conditions under domestic law or under a convention referring to extradition, such conditions must not be applied in bad faith with the effect of shielding an alleged offender from prosecution.[34]

According to Moyo, this does not amount to a 'progressive development' of international law under article 15 of the 1947 Statute of the ILC, which refers to 'draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'.[35] Instead, Moyo views the ILC Final Report as significant, because it amounts to a conclusion of the ILC's most recent work on the topic.

In practice, although the Statute of the ILC distinguishes between the progressive development of international law (the exposition of

[33] Id para 18.
[34] Id para 59.
[35] MP Moyo 'Introductory Note to Final Report on the Obligation to Extradite or Prosecute (*aut Dedere aut Judicare*)' (2015) 54 *International Legal Materials* 758 759.

new principles of law) and the codification of international law (the formulation and systematisation of existing rules of law), it has been extremely difficult to maintain this distinction. The work of the ILC goes beyond draft conventions that can be converted into multilateral treaties. Indeed, it also includes draft codes, guidelines, restatements of the law, draft articles that may be incorporated into treaties and the reports of special rapporteurs.

Nevertheless, it is a moot point whether the ILC Final Report will fill the existing gaps in the conventional regime concerning extradition, or whether states will rely on their interpretation of customary law to fill existing or future gaps. It must be noted, however, that most of these outstanding issues still to be decided on by the ILC, have, to a certain extent, been addressed in the 2004 Model Law on Extradition, which was prepared by the UN Office on Drugs and Crime and has been revised since.[36]

It would thus appear that Dugard's statement that international law does not recognise any *general duty* on the part of states to surrender criminals[37] and Botha's assertion that a duty to extradite arises only in the context of a treaty commitment to do so,[38] still remain valid.

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[36] The document is available at http://www.undoc.org/pdf/model_law_extradition pdf (accessed 3 June 2014).

[37] J Dugard et al *International Law: A South African Perspective* 4 ed (2011) 214.

[38] N Botha 'The Basis of Extradition: The South African Perspective' (1991) 17 *South African Yearbook of International Law* 117 131. See, also, *Attorney-General v Andreson* 1897 Off Rep 287, where the majority held that there could be no extradition without an extradition agreement (Ameshoff CJ at 291 and 294 dissenting). RMM Wallace *International Law: Student Introduction* 3 ed (1997) 127 is in agreement with this 1897 decision by bluntly stating that there is no duty to extradite in the absence of a treaty. See, further, *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) para 4.