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Prosecute after the ICJ's Judgment in *Belgium v Senegal***

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# Wither *Aut Dedere*? The Obligation to Extradite or Prosecute after the ICJ's Judgment in *Belgium v Senegal*

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**Abstract:** In this article I explore a narrow question that was raised, but not fully addressed, in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* case: does a state that has custody over a person who is suspected of the crime of torture, but that is unwilling or unable to prosecute that person itself, have an obligation to extradite that person to a state that seeks extradition, and that is able and willing to prosecute the suspect? The International Court of Justice (ICJ or Court) answered the question in the negative. The Court's judgment exposes the fundamentally weak legal position of states that may have the strongest links with a suspect, and that may be best capable of prosecuting that person. The emergence of an absolutist obligation to prosecute of the custodial state has annihilated competing claims, whether or not these are based on a stronger link or better enforcement capabilities. Paradoxically, the result may be that a suspect may not be prosecuted at all.

## 1. Introduction

Under Article 5 of the Torture Convention,<sup>2</sup> multiple states may be obliged to establish jurisdiction over a person suspected of the crime of torture. These include the state in whose territory the offences are committed, the state of nationality of the suspect, and the state of nationality of the victim.<sup>3</sup> They also include states where the alleged offender is present if that state does not extradite the suspect.<sup>4</sup> We thus could have a scenario where four states would be obliged to establish jurisdiction over the offender.

In case multiple states indeed have established jurisdiction under Article 5, the question may arise what the legal relationship between such states is and, more in particular, which state is to prosecute the person. To answer these questions, the Torture Convention advances the

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<sup>2</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (hereinafter 'Torture Convention').

<sup>3</sup> Torture Convention (n 2), art 5(1).

<sup>4</sup> *ibid*, art 5(2).

principle *aut dedere aut judicare*. Article 7 of the Convention against Torture, which reads as follows:

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These 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. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

According to its literal meaning, the principle *aut dedere aut judicare* tells us that a state having a suspect of torture in custody, either has to submit the case to its competent authorities for the purpose of prosecution, or to extradite him to another state that has an interest in prosecution. Bassiouni and Wise capture the traditional understanding when they write that the expression *aut dedere aut judicare* is commonly used to refer to ‘the alternative obligation to extradite or prosecute’.<sup>5</sup>

The principle of *aut dedere aut judicare* thus is a principle that regulates the performance of shared responsibilities between multiple states.<sup>6</sup> The term ‘responsibilities’ here does not refer to the responsibility for wrongdoing, but to an *ex ante* allocation of obligations and entitlements of multiple states.<sup>7</sup> Each of these states is required to establish jurisdiction over an offender and, depending on the circumstances, can be obliged to prosecute that offender. *Aut dedere aut judicare* then does not allocate the responsibility to one state at the expense of the others, but recognises that a custodial state must either perform the obligation itself or allow another state to do so. Collectively, the states then can secure that the aim underlying the Torture Convention (effective prosecution) is realised.

A question that is not expressly answered in the Torture Convention is whether a custodial state that is unable or unwilling to prosecute a suspect, is obliged to extradite the suspect to a state that has a legal title to prosecute and that is willing and able to do so. If the aim of the Convention indeed is to prevent impunity, an affirmative answer would seem logical.

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<sup>5</sup> M Cherif Bassiouni and Edward Martin Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers 1995) 3.

<sup>6</sup> See generally André Nollkaemper and Dov Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *Michigan Journal of International Law* 359-438.

<sup>7</sup> Nollkaemper and Jacobs (n 6) 365-366.

However, the language of the Convention does not offer firm support for such an (alternative) obligation.

In *Questions relating to the Obligation to Prosecute or Extradite*<sup>8</sup> the ICJ now has given an authoritative interpretation of the *aut dedere aut judicare* principle as included in the Torture Convention.

The facts leading up to the case are briefly as follows. Hissène Habré took power in the Republic of Chad in 1982. During his eight year reign, severe violations of human rights were reported, including torture. After having been overthrown in 1990, he was granted asylum in Senegal. Attempts were made to prosecute him in Senegal in 2000, but the Senegalese Courts found they lacked jurisdiction. Belgium then initiated investigations against Habré after complaints by persons with a dual Belgian-Chadian nationality.<sup>9</sup> In 2005, the Belgian investigating judge issued an international arrest warrant and asked Senegal to extradite Habré. Senegal referred the matter to the African Union, which decided in 2006 that Habré should be tried by a competent Senegalese court.<sup>10</sup> In 2006, the United Nations Committee against Torture (CAT Committee) found in response to a communication submitted by several Chadian nationals that Senegal had failed to perform its obligations under Article 5 and 7 of the Convention against Torture.<sup>11</sup>

Senegal implemented several legislative reforms in 2007 to comply with the findings of the Committee and informed Belgium of its intention to prosecute Habré. On 19 February 2009, Belgium instituted proceedings before the ICJ. Senegal argued before the Court in the hearings relating to Belgium's request for provisional measures that the only impediment to trying Hissène Habré itself was a lack of financial resources.<sup>12</sup> However, the ECOWAS Court of Justice found in 2010 that Senegal could not try Habré as it had to respect the previous decisions by its own national courts in line with the principles of *res judicata* and non-retroactivity.<sup>13</sup> During 2011 and 2012, Belgium transmitted three further requests for extradition, the latter of which at the time of judgment was still pending before the Senegalese Courts.<sup>14</sup>

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<sup>8</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] General List No 144.

<sup>9</sup> *ibid*, para 19.

<sup>10</sup> *ibid*, para 23.

<sup>11</sup> CAT Committee, *Suleymane Guengueng v Senegal* (19 May 2006), Communication No 181/2001, CAT/C/36/D/181/2001.

<sup>12</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] General List No 144, para 33.

<sup>13</sup> ECOWAS Court of Justice, *Hissène Habré v Republic of Senegal*, Judgment No ECW/CCJ/JUD/06/10 of 18 November 2010.

<sup>14</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] General List No 144, para 40.

In this situation, the Court had to decide on the competing claims by Senegal and Belgium, and in particular on the question whether the principle *aut dedere aut judicare* not includes an alternative obligation to extradite if Senegal did not itself prosecute. The Court answered the question in the negative. It held that the custodial state has to submit the case to its competent authorities for the purpose of prosecution. If it does not do this, and also does not extradite, it commits a wrongful act, which will carry its own consequences. But an obligation to extradite is not among these consequences. This would seem to imply that a state, which has an obligation or a right to vest jurisdiction under Article 5, does not (at least not under the Convention) have a right to claim that the person in question is extradited to it by a custodial state – even if that latter state is unable or unwilling to prosecute.

In this article, I reconstruct the judgment of the Court from the perspective of the ability of the *aut dedere* principle to allocate responsibility for prosecution in a way that the aims of the Torture Convention are realised. I argue that the absolutist construction of the obligation to prosecute affirmed by the Court, annihilates entitlements of other states. This construction limits the potential of the principle of *aut dedere* to help to ensure that the person in question is prosecuted in a state that has best normative entitlements to prosecute and that may be best equipped to do so. Paradoxically, the weight of the obligation to prosecute may hinder the realisation of the fight against impunity that the Convention (and the Court) is said to pursue.

The *Questions relating to the Obligation to Prosecute or Extradite* case may not present the strongest facts to build this argument. The basis of the Belgium entitlements was relatively weak. Though the grounds for Belgium are articulated in a somewhat inconsistent manner in the various materials brought to the Court, it appears that the claim was based on the interests of a victim of dual Belgium-Chadian nationality and otherwise on universal jurisdiction. The latter principle is, if the suspect is not present on the territory, not recognised by the Convention. However, the Court addressed the issues in more general terms and the scope of the holdings does not appear to be limited by the weak nature of Belgium's claim.

I will proceed as follows. In section 2, I will first summarise three possible configurations of the relationship between the custodial state, on the one hand, and a state seeking extradition, on the other. In section 3, I will identify the two main issues at stake in choosing between these constructions of the *aut dedere* principle. Section 4 then will discuss the Court's reconfiguration of that relationship in *Questions relating to the Obligation to Prosecute or Extradite*. In section 5 I will discuss what remains, after the Court's judgment, of the entitlements of states that have established jurisdiction over a person suspected of torture, but that do not have custody over that person.

## 2. Accommodating competing entitlements: a typology

More than sixty treaties contain a principle that fits the general features of the *aut dedere aut judicare* principle. The relationship between the obligation to prosecute and the obligation to extradite, and thus the contents and meaning of the *aut dedere aut judicare* principle, differs between these treaties. We can classify the treaties in three categories, that each represents a distinct construction of the principle.

### 2.1 Priority of extradition

A first construction of the relationship between the obligation to prosecute and the obligation to extradite is to give priority to extradition. In this construction, prosecution is only an obligation if there is a prior denial of a request for extradition. Treaties that fall in this category usually apply to ordinary crimes with an international nexus.<sup>15</sup> They are modeled on the basis of the International Convention for the Suppression of Counterfeiting Currency of 1929.<sup>16</sup> Article 9 of this Convention provides:

Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

Treaties with similar provisions include the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs,<sup>17</sup> the 1937 Convention for the Prevention and Punishment of Terrorism,<sup>18</sup> the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,<sup>19</sup> the 1961 Single Convention on Narcotic Drugs,<sup>20</sup> and the 1971 Convention on Psychotropic Substances.<sup>21</sup>

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<sup>15</sup> Raphaël van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9 Journal of International Criminal Justice 1089, 1111.

<sup>16</sup> International Convention for the Suppression of Counterfeiting Currency (adopted 20 April 1929, entered into force 22 February 1931) 112 LNTS 371.

<sup>17</sup> Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (adopted 26 June 1936, entered into force 10 October 1947) 198 LNTS 301.

<sup>18</sup> Convention for the Prevention and Punishment of Terrorism (adopted 16 November 1937, not entered into force) (1938) 19 League of Nations Official Journal 23.

<sup>19</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 21 March 1950, entered into force 25 July 1951) 96 UNTS 271.

<sup>20</sup> Single Convention on Narcotic Drugs (adopted 30 March 1961, entered into force 13 December 1964) 520 UNTS 151.

<sup>21</sup> Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175.

This construction thus is characterised by two aspects. First, it does not oblige states to create jurisdiction over persons committing these crimes. Second, even if national law of the custodial state has established jurisdiction, the obligation to initiate proceedings is only triggered by a request for extradition, and the custodial state cannot extradite the person ‘for some reason which has no connection with the offence’. Although this construction does recognise to some extent a shared responsibility, – in that both states may prosecute – the entitlements are not of equal weight. Extradition, not prosecution, is the primary instrument through which objectives of the treaties are to be achieved.

## 2.2 Alternative obligations

The second construction of *aut dedere aut judicare* differs in two respects from the first construction. On the one hand, states are under certain conditions obliged to establish jurisdiction. On the other hand, prosecution and extradition are equal obligations. The obligation of a custodial state is not contingent on a prior request for extradition.<sup>22</sup>

The model for this construction is the 1970 Hague Convention for the suppression of Unlawful Seizure of Aircraft (1970 Hague Convention).<sup>23</sup> Many treaties, including the Torture Convention, have followed this model since.<sup>24</sup> Under such treaties, states are to take measures to establish its jurisdiction over the offence in case of a link of territoriality or nationality. A State in which an alleged offender is present likewise shall establish jurisdiction over the offence if it does not extradite to any of the states with a link based on territoriality or nationality.<sup>25</sup> If a custodial state does not extradite, it has to act itself and submit the case to its competent authorities for the purpose of prosecution.

The explanation of the difference with the first category has been said to lie in the different nature of the crimes covered by these treaties,<sup>26</sup> which are supposed to be more serious crimes.

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<sup>22</sup> International Law Commission Secretariat, ‘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 (*aut dedere aut judicare*)”’, study by the secretariat presented at the 62<sup>nd</sup> session of the ILC, UN Doc A/CN.4/630, 64, para 127-29.

<sup>23</sup> Hague Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (hereinafter ‘1970 Hague Convention’).

<sup>24</sup> Eg the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the European Convention on the Suppression of Terrorism; the International Convention against the Taking of Hostages; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries; the Inter-American Convention on the Forced Disappearance of Persons; the Convention on the Safety of United Nations and Associated Personnel; the International Convention for the Suppression of Terrorist Bombings; the International Convention for the Suppression of the Financing of Terrorism; the United Nations Convention against Transnational Organized Crime and its Protocols; the United Nations Convention against Corruption; the International Convention for the Protection of All Persons from Enforced Disappearance; see Bassiouni and Wise (n 5) 16-19.

<sup>25</sup> 1970 Hague Convention (n 23), art 4.

<sup>26</sup> Van Steenberghe (n 15) 1111, 1112.

The significance attached to actual prosecution means that, on the one hand, states have an affirmative obligation to establish jurisdiction<sup>27</sup> and that, on the other hand, prosecution should not be made dependent on a decision of a state to request extradition.<sup>28</sup> In this respect it can be said that this construction provides for alternative obligations to extradite or to prosecute.<sup>29</sup>

It is somewhat unclear whether treaties in this category indeed reject a primary entitlement of the territorial state, however.. Bassiouni and Wise infer from the *travaux préparatoires* of the 1970 Hague Convention that the obligation to prosecute was meant as a residual obligation, that was necessary because an absolute obligation to extradite could not be realised in this Convention, since that would require the extradition of nationals and also foreclose the possibility of political asylum in cases in which it might be thought appropriate. The obligation to prosecute when extradition is refused was a fall-back option.<sup>30</sup> Arguably, outside these narrow situations, the state requesting extradition would retain a primary position. The text of the Torture Convention, which is also placed in this second category, is not clear on this point and appears to support alternative obligations. But, as will be further discussed below, the open question is whether the custodial state is obliged to extradite if it cannot itself prosecute.

### 2.3 Reverse hierarchy

The third construction of the *aut dedere aut judicare* principle establishes an order that is the reverse from the first construction. In this construction the obligation to prosecute has primacy, and there is only an option to extradite. This construction is included in the four Geneva Conventions of 1949,<sup>31</sup> which provide:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with

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<sup>27</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, Separate Opinion of President Guillaume 38, para 7 (stating that '[The Hague Convention of 1970] places an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or prosecute him. But this would have been insufficient if the Convention had not at the same time placed the States parties under an obligation to establish their jurisdiction for that purpose.'

<sup>28</sup> Colleen Enache-Brown and Ari Fried, 'Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law' (1998) 43 McGill Law Journal 613, 626.

<sup>29</sup> Van Steenberghe (n 15) 1089, 1111.

<sup>30</sup> Bassiouni and Wise (n 5) 16.

<sup>31</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, art 49; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, art 50; Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 129; Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 146.



the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting party has made out a prima facie case.<sup>32</sup>

Compared to the second construction, these provisions contain a clearer priority for prosecution compared to extradition. States may decide not to prosecute, and extradite persons to another state. But there is no obligation to extradite, even if a state for any reason would not prosecute. There thus is no question of an alternative obligation – there is only an obligation to prosecute with an option to release oneself from the obligation by extradition.

This construction appears to be justified by the idea that, given the nature of the prohibited conduct with respect to which the obligation to extradite or prosecute is imposed, all states have an equal interest in prosecution. It is therefore said that the formula *prosequi vel dedere* seems to be more suitable than *aut dedere aut judicare*: this ‘reflects that states bound by this obligation have a free choice between prosecution and extradition, while emphasis is put on prosecution. Extradition appears only as a means at the disposal of the custodial state for complying with its obligation to prosecute.’<sup>33</sup>

### 3. Interests at stake

The relationship between the obligations and entitlements of custodial states on the one hand, and states seeking extradition, on the other hand, and the choice for one of the three possible configurations discussed above, is determined by two sets of considerations. The first consideration relates to the question whether the obligation to prosecute has precedence over extradition, whether they are of equal value, or whether the interest of states seeking extradition should prevail (section 3.1). The second consideration relates to the question whether the custodial state has an obligation to extradite if it does not prosecute (section 3.2).

#### 3.1 The question of precedence

The fact that in the second of the above three categories (in which the Torture Convention normally is placed, an obligation to prosecute exists even where no request for extradition has been made, in itself does not answer the question what the relationship is between prosecution and extradition when a request for extradition *has* been made.

If we assume a situation where a suspect of a crime committed in state A is present in state B, and state A seeks extradition, it may be argued that the interests of that state should have

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<sup>32</sup> It appears that this type of provision has not been replicated in later treaties; see ILC Secretariat (n 22) para 59.

<sup>33</sup> Van Steenberghe (n 15) 1113-1114.

priority.<sup>34</sup> Even though Article 5 itself does not expressly create a hierarchy, in particular cases the state where international crimes were committed may have a stronger normative entitlement than a state with jurisdiction under Article 5(2). The same may be said to hold for the state of nationality of the suspect, and even a state whose nationals have been victim of the crime in question. Of course, even when either of these states does have strong connections to the crime, its claim may be weak if it is unable or unwilling to provide a fair trial. That would in particular be the case if the territorial state would itself be implicated in the crimes. Given the fact that many international crimes have been committed under auspices of, or at least with support of states, it cannot be presumed that the state of territoriality or nationality is the best venue. However, such consideration are to some extent of a subsidiary nature. The main question is which states has the strongest connection. If that state indeed is the territorial state, the second question is whether that state is willing and able to prosecute. If the answer to this latter question is in the negative, this should block extradition. But that does not take away the fact that the territorial state has a stronger link than the state where a suspect happens to be.

This argument that territoriality should have priority has some support in scholarship.<sup>35</sup>

Michael Wood wrote in 1974 that extradition should be the ‘normal procedure’.

Extraterritorial exercise of jurisdiction ‘which goes beyond what is normally permitted by customary international law’, was acceptable ‘only as a secondary jurisdiction, where for any reason extradition did not take place’.<sup>36</sup> Brown and Fried noted that if (the suggestion appears to be ‘only if’) ‘extradition is not a viable option, then the second element of *aut dedere aut judicare* imposes an obligation on the host state to begin criminal proceedings against the alleged perpetrator of the universal crime.’<sup>37</sup>

However, there is ample support for a reverse construction.<sup>38</sup> Attempts to agree on a hierarchy in the International Law Commission (ILC) failed, and the dominant position appears to be that no hierarchy exists.<sup>39</sup> In this construction, that is, as we will see in section 4 below, upheld by the ICJ, the obligation (and right) of the custodial state has priority: ‘there appears to be a

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<sup>34</sup> *ibid*, at 1089, 1112.

<sup>35</sup> Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *European Journal of International Law* 481, 491; Diane F. Orentlicher, ‘Settling accounts; The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *Yale Law Journal* (1991) 2537, 2562; Harmen van der Wilt ‘The International Criminal Court and Domestic Jurisdictions: Competition or Concerted Action?’, in Fons Coomans et al. (eds.), *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven* (Kluwer, Den Haag 2000), 323-338; Harmen van der Wilt, ‘Universal Jurisdiction Under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States’ (2011) 9 *Journal of International Criminal Justice* 1043-1066.

<sup>36</sup> Michael C. Wood, ‘The Convention on the prevention and punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents’ (1974) 23 *International and Comparative Law Quarterly* 808, 808.

<sup>37</sup> Enache-Brown and Fried (n 28) 626.

<sup>38</sup> ILC Secretariat (n 22) para 130.

<sup>39</sup> See eg Commentary to art 9 of the ILC Draft Code of Crimes against the Peace and Security of Mankind, with commentaries (1996) adopted at the 48<sup>th</sup> Session (Yearbook of the ILC 1996 Vol II, Part Two) UN Doc A/51/10, at p 31-32.

growing tendency to consider that the “prosecute” obligation in treaties that concern the “core” international crimes takes precedence over the ‘extradite’ obligation.’<sup>40</sup>

It would seem that the consideration that would justify this reversal is the normative weight given to international crimes. All states are supposed to have an equal interest in prosecution, and an equal responsibility in their prosecution. This equality would push aside any priority based on links of territory or nationality. Once there is a situation of normative equality, the obligation to prosecute simply requires that whoever has custody should prosecute, unhindered by competing claims. That state has to prosecute, unless it uses the option of extradition – an option ‘at the disposal of the custodial state for complying with its obligation to prosecute.’<sup>41</sup>

The idea that all states in the world would have an equal interest in prosecution is a theoretical construct that in some degree is reflected in law, but it is a construction that fails to do justice to the wide variety of factual situations in which the question of prosecution or extradition may arise. As noted, *Questions relating to the Obligation to Prosecute or Extradite* was not a strong case to examine this proposition critically as it was in part based on claims based by persons who invoked the Belgium universal jurisdiction provision, which is not a recognised jurisdictional basis of the Convention. But it is not difficult to construe hypotheticals where a state seeking extradition has normatively superior claims over the state where a person happens to be. An unqualified higher ranking of the interest of prosecution than the interest served by extradition seems based on a dubious claim that all states in all situations have an equal interest in prosecuting acts of torture. Should we accept an interpretation that would accord to a state that has no connection to a suspect other than that he or she happens to be on its territory, a stronger entitlement than the state where that person tortured victims, and if that latter state is able and willing to provide for independent prosecution and trial?

### 3.2 The question of obligation

The second question is whether the custodial state has an obligation to extradite if it does not prosecute. This question has to be distinguished from the question whether prosecution or extradition has precedence. Even if the custodial state’s obligation to prosecute has priority, this does not say anything on the legal obligations of that state if it does *not* prosecute.

An affirmative answer to the question whether a custodial state is or should be obligated to extradite if it does not itself prosecute can be reached when we read the relationship between the two alternatives in the light of the aim of the Convention: to ensure that crimes of torture

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<sup>40</sup> Fannie Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’ (2012) 10 Journal of International Criminal Justice 1277, 1288; Van Steenberghe (n 15) 1091-92.

<sup>41</sup> Van Steenberghe (n 15) 1089, 1114.

do not go unpunished. The CAT Committee found that ‘The alternative [of extradition] available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, *the objective of the provision being to prevent any act of torture from going unpunished.*’<sup>42</sup>

Thus, the interest underlying the emergence of the obligation to prosecute would support an alternative obligation to extradite in case there is no prosecution. It may be compatible with the objective ‘to prevent any act of torture from going unpunished’, to say that a state where a suspect is found should prosecute him irrespective of stronger claims from a territorial state.. But it is questionable whether a rule that allows a custodial state not to extradite, even if it does not prosecute, is compatible with this objective.

Such reasoning may be implied by Bassiouni and Wise’s statement that the Torture Convention imposes ‘an *obligation* to extradite or submit for prosecution.’<sup>43</sup> Likewise, it may be inferred from the ILC’s suggestion that ‘the State Party in the territory of which an individual alleged to have committed a crime ... is found *shall extradite* or prosecute that individual.’<sup>44</sup> Arguably, this also may be read in the CAT decision on Habré, which referred to the *obligations* of states party under Article 7 of the Convention.<sup>45</sup> Boulesbaa argues that ‘the fact that no prosecution ensues does not automatically mean that a duty to extradite arises, provided the State has made a bona fide submission of the case to the authorities who have, in the end, decided not to prosecute.’<sup>46</sup> One may infer that when no such *bone fide* submission is made, a duty to extradite may arise.

However, the dominant position appears to be that the *aut dedere* principle results in a discretion, not an obligation to extradite.. Despite the language quoted immediately above, the ILC was of the opinion that it is only when [any request for extradition] is made that an alternative course of action becomes available to the State, namely the surrender of the alleged offender to another State for prosecution. In other words, in the absence of a request for extradition, the obligation to prosecute is absolute, but, once such a request is made, the State concerned has *the discretion* to choose between extradition and prosecution.<sup>47</sup>

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<sup>42</sup> CAT Committee, *Suleymane Guengueng v Senegal* (n 11) para 9.7 (emphasis added).

<sup>43</sup> Bassiouni and Wise (n 5) 17 (emphasis added).

<sup>44</sup> Art 9 (emphasis added), ILC Draft Code of Crimes against the Peace and Security of Mankind, with Commentaries (1996), (n 39) 31.

<sup>45</sup> *Suleymane Guengueng v Senegal* (n 11) para 9.7.

<sup>46</sup> Ahcene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff Publishers 1999) 207.

<sup>47</sup> ILC Draft Code of Crimes against the Peace and Security of Mankind, with Commentaries (1996), (n 39), p 31-32.

It is to be acknowledged that the text of the Torture Convention allows for this interpretation. The Convention does not speak of an obligation to extradite. It also may not be insignificant that while the Convention does speak of an obligation to establish jurisdiction for the purpose of prosecution, it does not establish an obligation that would enable a request for extradition.<sup>48</sup>

A major obstacle to any construction of an obligation to extradite, is that states have reserved the right not to extradite in particular circumstances. Indeed, The fact that some states do not allow the extradition of their nationals, or of persons suspected of political crimes, has led to the inclusion of the obligation to prosecute as a fall-back option in the Torture Convention.<sup>49</sup> Moreover, certain states may not allow for the extradition of persons in the absence of an extradition treaty. Also Article 8(2) of the Torture Convention may speak against such an obligation, as it provides that 'If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it *may* consider this Convention as the legal basis for extradition in respect of such offences (emphasis added).' It also provides that 'Extradition shall be subject to the other conditions provided by the law of the requested State' In this light, it can be concluded that Article 8 'did not make extradition itself mandatory or automatic.'<sup>50</sup>

Such objections to a construction of an obligation to extradite may be countered by the argument that it may be possible to construe at least a qualified obligation to extradite. Article 8(1) and 8(3) of the Torture Convention do contain obligations, respectively to the effect that the offences referred to in Article 4 '*shall* be deemed to be included as extraditable offences in any extradition treaty existing between States Parties (emphasis added)' and that 'States Parties which do not make extradition conditional on the existence of a treaty *shall* recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State'(emphasis added).

Moreover, it is quite common for extradition treaties to include obligations to extradite, which then are subject to certain exceptions. Thus, the European Convention on Extradition provides that 'The requested Party has no discretionary power to grant or refuse extradition, except in certain cases.'<sup>51</sup> Also in this treaty, the obligation to prosecute is a back-up option.<sup>52</sup> In this

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<sup>48</sup> J Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment* (Martinus Nijhoff Publishers 1988) 139.

<sup>49</sup> Bassiouni and Wise (n 5) 16.

<sup>50</sup> ILC Secretariat (n 22) para 106. See also Burgers and Danelius, (n 48) at 139 (stating that: 'Even where a request for extradition is made, there is never any obligation to extradite under the Convention. It follows from Article 7 that the requested State always has a choice between extradition and criminal proceedings in its own territory. '); also Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (OUP 2008) at 364.

<sup>51</sup> Council of Europe, 'Explanatory report on the European Convention on Extradition', available at <<http://conventions.coe.int/treaty/en/Reports/Html/024.htm>> last accessed 13 June 2013, para 9.

<sup>52</sup> European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) 359 UNTS 5146, art 6(2).

light, it would seem that there is no principled reason why a treaty could not provide for an obligation to extradite, with prosecution of the custodial state as a fall back option if for one reason or another extradition is not possible.

However, even if the above argument is accepted as a matter of principle, the question remains whether the Torture Convention can be construed in this way. Both on the questions of precedence and obligation, the text of the Convention is not conclusive. The normative strength of links based on territoriality and nationality over those based on universality, on the one hand, and the importance of non-impunity, on the other, suggest that states with links based on nationality and/or territoriality have a claim that should be recognised by custodial states, in any case if these do not themselves prosecute. However, the text of the Convention does not provide firm support. In recent literature, and the work of the ILC, there seems considerable support for a construction that puts prosecution by the custodial state on top, irrespective of links with other states, and that sees extradition not as an obligation but as an option. It is in this setting, that the question came to the Court.

#### **4. The construction of the ICJ**

The ICJ in no equivocal terms opted for a construction of Article 7 of the Torture Convention in which precedence is given to the custodial state and that considers extradition to a territorial state as an option, not an obligation. It thus replaced a construction that placed the Convention in the second category identified in section 2, by a construction that places it in the third category.

The Court's conclusion that the entitlements of the custodial state had to have priority over those of Belgium was, given the fact of the case, relatively easy. Belgium did not appear to push its own entitlements over those of Senegal. It seemed content to seek prosecution in Senegal and only in the alternative for extradition. It claimed that Senegal was required to cease its internationally wrongful acts by submitting without delay the Habré case to its competent authorities for prosecution; or failing that, by extraditing Habré to Belgium.<sup>53</sup>

In this context, not much can be inferred from the preference that the Court gave to prosecution over extradition, since Belgium itself formulated its claim primarily in terms of implementation of the obligation to prosecute. It cannot be concluded from this part of the judgment that the Court in other situations would have rejected a claim that prioritised extradition over prosecution.

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<sup>53</sup> *Questions relating to the Obligation to Prosecute or Extradite* (n 8), para 12.

However, the answer that the Court gave to the second question ('obligation or option') leaves little doubt as to how it would have answered such a claim. The Court could not escape a direct answer to this second question, as this was at the heart of the Belgian claim. Belgium argued that Senegal was required to cease these internationally wrongful acts by submitting without delay the Habré case to its competent authorities for prosecution; or failing that, by extraditing Habré to Belgium. In its pleadings, Belgium stated that both the Convention and customary international law 'requires States to prosecute or extradite perpetrators of the crimes under international law'.<sup>54</sup> It added that given that this obligation is borne by the obligor towards all other states, Belgium would have rights which are the corollary to Senegal's obligation in the case of Mr Hissène Habré: 'the right to see Senegal directly try Mr Hissène Habré or, failing which, the right to have him extradited.'<sup>55</sup>

Senegal took the view that the Convention required it to prosecute Habré, which it claims it had endeavoured to do by following the legal procedure provided for in that instrument, but that it had no obligation to Belgium under the Convention to extradite him.<sup>56</sup>

The Court sided with Senegal and held:

...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>57</sup>

The last sentence makes clear that the Court does not construe extradition as an obligation. Only non-performance of the obligation to prosecute will engage the responsibility of the custodial state.

Because there is no obligation to extradite, there also is no correlative right of Belgium to the performance of such an obligation (even though it of course has a right to request extradition). There is no suggestion, and indeed no basis in the construction offered by the Court, that an obligation to prosecute will be replaced by an obligation to extradite when a custodial state cannot or does not prosecute. The only consequence is that the international responsibility of the custodial state will be engaged.

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<sup>54</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Oral Proceedings, CR 2009/8, verbatim account of the public sitting held on Monday 6 April 2009, at 10 a.m., at the Peace Palace, President Owada presiding, p 25, para 23.

<sup>55</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Application Instituting Proceedings 13, para 12, available at < <http://www.icj-cij.org/docket/files/144/15054.pdf> > last accessed 18 April 2013; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Oral Proceedings of 6 April 2009, 32, para 23, available at < <http://www.icj-cij.org/docket/files/144/15106.pdf> > last accessed 18 April 2013.

<sup>56</sup> *Questions relating to the Obligation to Prosecute or Extradite* (n 8), para 93.

<sup>57</sup> *ibid*, para 95 (emphasis added).

On this point, the Court seems to deviate from the CAT Committee, that appeared to view the extradition in terms of an obligation. The CAT Committee found that Senegal had failed to perform its obligations under Article 7, paragraph 1, of the Convention, to submit the case concerning Mr Habré to its competent authorities for the purpose of prosecution or, in the alternative, since a request for extradition had been made by Belgium, to comply with that request.<sup>58</sup> It also seems to deviate from the African Union Assembly decision, which had ‘confirm[ed] the mandate given to Senegal to try Habré on behalf of Africa’ and ‘urge[d] [the latter] to carry out its legal responsibility in accordance with the Torture Convention, the decision of the CAT Committee, as well as the said mandate to put Habré on trial expeditiously or extradite him to any other country willing to put him on trial’.<sup>59</sup> Nowak and McArthur note on this case that if the forum state, on the basis of its domestic laws, is not in a position to prosecute a suspected torturer, the choice between extradition and prosecution turns into a legal obligation to extradite, provided that such extradition is in accordance with international law.<sup>60</sup> Various separate opinions leave no doubt that the Court indeed intended to follow a different line. Judge Donoghue wrote that it would be misleading to characterise the obligation of Article 7 in terms of the phrase *aut dedere aut judicare*, as that suggests an obligation to extradite. She inferred from the text ‘that prosecution and extradition are not on equal footing’. The provision obligates a state party to submit the case to its competent authorities for prosecution. The option of extradition may be helpful as an effective means of bringing an alleged offender to justice, but ‘extradition is not required by this provision nor by any other provision of the Convention’.<sup>61</sup>

Given the fact that the Belgian entitlements were weak, and that Belgium did not argue that extradition should have priority, , it is not problematic that the Court in this particular case prioritised prosecution over extradition. But, as a categorical statement, this does raise fundamental questions on the regime that the Torture Convention has put in place.

Three points should be made in this context. First, as a matter of internal logic of the Convention, it may well be argued that the Convention in fact does provide for a subsidiary role for an obligation to extradite. Article 7 of the Convention ‘requires’ that a state chooses either option A (prosecution) or option B (extradition) to perform its obligations under that Article. When a state opts for option B, not A, no problem arises. The same is true when a state opts for A, not B. But when a state does not fulfill option A, nor B, it will violate its obligations under Article 7. This would logically seem to mean that when a state cannot

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<sup>58</sup> *ibid*, para 27.

<sup>59</sup> African Union, Assembly of the Union, Seventeenth Session, ‘Declarations, Decisions and Resolution’ [2011] 22: Decision on the Hissène Habré case, Doc. Assembly/AU/8(XVII).

<sup>60</sup> Nowak and McArthur (n 50) 365.

<sup>61</sup> *Questions relating to the Obligation to Prosecute or Extradite* (n 8), Declaration of Judge Donoghue, para 3.



perform option A, but it can perform option B, it has to perform option B to perform its obligations under the Convention, if that option is available in the concrete situation. In this situation, option B cannot be reduced to an option, but can actually constitute an obligation. If Senegal's argument had been that it could not prosecute Habré for financial or legal reasons, it would seem that the Court could and should have said that in that case it had to extradite, where that option was available.

Second, the construction of the Convention as proposed by the Court exposes that the Convention does not protect the interests of states that may have stronger ties with Mr Habré than Senegal and that actually have asked for extradition. It would not leave room for a priority for the state where the crimes were committed (assuming that state would be willing and able to provide for independent prosecution and a fair trial) over a state where the person happens to be. In the case at hand, the Court did not need to address this scenario, but the wording of the judgment suggests that as a general proposition, the custodial state never has to extradite to a state with stronger ties, even if it does not prosecute itself. As noted above, in particular factual circumstances this may be problematic on the basis of a normative weighing of the entitlements of the respective states.<sup>62</sup>

It can be noted that the construction advanced by the Court also deviates from the primary responsibility of the territorial state and the state of nationality that is recognised by Article 12(2) of the ICC Statute,<sup>63</sup> that requires that one or both of these states are party to the Statute. The construction also sits uneasily with the fact that under human rights law the territorial state has an obligation to investigate and where necessary prosecute suspects of international crimes. It is a bit odd to construe another human rights treaty (the Torture Convention) in a way that grants precedence to a state without a strong link, and in case that state would not prosecute, would not oblige that state to extradite the person to states that, with a view to the protection of human rights, have to investigate and prosecute.

Third, it is difficult to see how the construction of the Convention can be squared with the emphasis that the Convention and the Court place on impunity. In case the custodial state would not extradite, there is no reserve obligation to fall back on. Judge Donoghue wrote that 'The option of extradition in lieu of submission to prosecution is an important component of the anti-impunity provisions of the Convention; there are many circumstances in which extradition might be the more effective means of bringing an alleged offender to justice. Nonetheless, extradition is not required by this provision nor by any other provision of the

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<sup>62</sup> See Van Steenberghe (n 15) 1089, 1112.

<sup>63</sup> Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (ICC Statute).

Convention.’<sup>64</sup> The question is whether, if prevention of impunity is the overriding aim, that aim would not be better served by an alternative obligation rather than an option?

The Court’s approach exposes that under the Convention, inability or unwillingness of the custodial state does not trigger an obligation to extradite. Such a situation may trigger the responsibility of the custodial state. It would breach directly Article 5 and could not invoke any deficiency of its domestic law in defence. On this point, the Court held that ‘Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007.’<sup>65</sup> In such a case, in the approach of the Court, Senegal might extradite to prevent it from committing a wrong, but would not be obliged to do so.

None of this is to say the Court got it wrong. The text of the Convention does not clearly establish an obligation to extradite that would protect the interests and capabilities of states seeking extradition. More fundamentally, there are no easy solutions, as a construction that would support an unqualified obligation to extradite (whether primary or alternative) would be problematic in case the state seeking extradition would be unwilling or unable to provide for a fair trial. It would have required more than a little judicial interpretative freedom to read this into the Convention that was the basis of its decision. But the judgment does expose the shortcomings of the Convention, which in some situations will not be able to do justice to the entitlements of territorial states and to the value of non-impunity. In this construction, *aut dedere* is transformed into an one-dimensional obligation of the custodial state to prosecute, that does not necessarily serve the interest of the fight against torture.

## 5. Invocation as a surrogate-right

Somewhat paradoxically, the Court combined its narrow reading of the legal position of non-custodial states (they have no right to extradition), with a very broad statement of the entitlements of all third states to invoke the responsibility of the custodial state. The Court’s celebrated approach to invocation<sup>66</sup> implies that while Belgium could not demand that Senegal

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<sup>64</sup> *Questions relating to the Obligation to Prosecute or Extradite* (n 8), Declaration of Judge Donoghue, para 3.

<sup>65</sup> *Questions relating to the Obligation to Prosecute or to Extradite* (n 8), para 113.

<sup>66</sup> Cindy Galway Buys, ‘Belgium v. Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture’ (2012) 16 ASIL Insights 29; Inna Uchkunova, ‘Belgium v. Senegal: Did the Court End the Dispute between the Parties?’ EJILTalk < <http://www.ejiltalk.org/belgium-v-senegal-did-the-court-end-the-dispute-between-the-parties/> > last accessed 13 June 2013; Sangeeta Shah, ‘Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*)’ (2013) 13 Human Rights Law Review advance access available at < <http://hrlr.oxfordjournals.org/content/early/2013/04/26/hrlr.ngt012.full> > last accessed 13 June 2013.

would extradite Mr Habré, it, or for that matter any other state party, could invoke the responsibility of Senegal for failing to comply with its obligations to establish jurisdiction and to initiate prosecution.<sup>67</sup> The Court suggested that for the right to invoke such responsibility, the question whether the invoking state would itself have an entitlement (and corresponding obligation) under Article 5(1) would be immaterial.<sup>68</sup>

In principle invocation and an alleged right to extradition are separate questions. But they are linked in the sense that to the extent that Belgium would have had an entitlement to seek extradition (a point not decided by the Court), this may have given it a special interest in terms of invocation. They also may be linked in that the question may arise whether a state that invokes responsibility, could as a remedy seek extradition to itself or to another state.

The Court did not shed any light on these questions. Belgium had done little to induce the Court to clarify the relationship between the right to seek extradition, on the one hand, and the right to invoke responsibility of the custodial state, on the other. In its pleadings, Belgium stated that the obligation to prosecute or extradite perpetrators of torture was borne by the obligor towards all other states. Therefore, Belgium would have ‘the right to see Senegal directly try Mr Hissène Habré or, failing which, the right to have him extradited.’<sup>69</sup> That argument raises several problems. If a case is brought on the basis of a special interest, it could be combined with a claim to seek extradition. If no special interest exists, a case may in the approach of the Court still be brought based on a common interest. But in the latter case it is difficult to see what would be the basis for an entitlement to seek extradition. The argument that all states parties would be entitled to invoke responsibility with a view to have a person who is not prosecuted extradited, without any special interest, would in effect be based on the proposition that all states would be entitled to seek extradition and to exercise jurisdiction. That does not appear to be provided for in the Convention.<sup>70</sup> Perhaps it was for this reason that Belgium also relied on customary law – a claim not taken up by the Court. But even if the Court would have found that customary law applied, it is more than unlikely that this would grant third states a right to exercise universal jurisdiction over suspects of torture, where the Convention does not do so.<sup>71</sup>

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<sup>67</sup> *Questions relating to the Obligation to Prosecute or to Extradite* (n 8), para 69.

<sup>68</sup> *ibid.*, para 70.

<sup>69</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Application Instituting Proceedings 13 (n 55) para 12; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Oral Proceedings of 6 April 2009, 32 (n 55) para 23.

<sup>70</sup> Sienho Yee, ‘Universal Jurisdiction: Concept, Logic and Reality’ (2011) 10 *Chinese Journal of International Law* 503. Theoretically Article 5(3) may be read to provide a basis; see however the convincing critique by Yee at p 518.

<sup>71</sup> *ibid.*

Alternatively, Belgium had claimed a special interest, because ‘it has availed itself of its right under Article 5 to exercise its jurisdiction and to request extradition’.<sup>72</sup> In its Memorial, Belgium had stated that ‘The Belgian State is affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed’.<sup>73</sup> The Belgian argument was in part based on the ground that its Belgian courts were actively seized of the Habré case as a result of the complaints filed in 2000; some of the victims were of Belgian nationality.<sup>74</sup>

The Court did not discuss this claim. For the standing of Belgium it was not relevant whether Belgium satisfied the criteria of Article 5.<sup>75</sup> It held that ‘... any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.’<sup>76</sup>

One explanation of why the Court did not engage with the Belgian argument based on special interests is that the Court did not believe that there was a right to seek extradition. Whether or not Belgium would have had a jurisdictional title under Article 5, this could not be translated into a special interest for purposes of invocation. An alternative construction is that since the Court took the view that Senegal in any case was not obliged to extradite to Belgium, invocation on the basis of special interest could not grant Belgium any right that it would not have when it based itself on a common interest.

As noted by Judge Skotnikov, the route taken by the Court allowed it to avoid ‘dealing at the merits stage with the question as to whether Belgium has established its jurisdiction in respect of Mr Habré in accordance with Article 5, paragraph 1, of the Convention’.<sup>77</sup> The issue of the validity of Belgium’s request for extradition remains unresolved.<sup>78</sup> If it would have addressed this, the Court might have clarified the lack of an unqualified right to exercise universal jurisdiction under the Convention.<sup>79</sup> However, it would also seem that given the fact that the Court did not find a basis for a duty/right correlation in relation to extradition, such discussion would not have led to a different outcome.

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<sup>72</sup> *Questions relating to the Obligation to Prosecute or to Extradite* (n 8), para 65.

<sup>73</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Memorial of Belgium, para 5.17, available at < <http://www.icj-cij.org/docket/files/144/16933.pdf> > last accessed 18 April 2013.

<sup>74</sup> *ibid*, Memorial of Belgium (n 73), para 5.17-18.

<sup>75</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 8), para 67.

<sup>76</sup> *ibid*, para 69.

<sup>77</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 8), Separate Opinion of Judge Skotnikov, para 4.

<sup>78</sup> *ibid*, para 8.

<sup>79</sup> Yee (n 70) 503.

It could be argued that even if the Convention does not itself provide for an obligation to extradite in a case where the custodial state cannot prosecute, the option of extradition may exist as a remedy. In its final submissions, Belgium indeed had requested the Court to adjudge and declare that Senegal is required to cease these internationally wrongful acts by submitting without delay the ‘Hissène Habré case’ to its competent authorities for the purpose of prosecution, or, ‘failing that, by extraditing Mr Habré to Belgium without further ado.’<sup>80</sup> However, it would seem that if extradition was not a primary obligation, extradition could also not be construed as a separate form of reparation. That construction would be precluded by the principle that the Court cannot order a state to do more than what it would be obliged to under the primary norms. Indeed, the Court’s consideration of reparation did not deviate from its earlier statement that extradition was only an option.<sup>81</sup>

It follows from the primary obligation as construed by the Court, that the broad power of invocation is essentially without consequence for the question of extradition. If it would have recognised an obligation to extradite, the combination of that obligation with a broad invocation rule would have led to a range of additional question from which the Court now was spared.

## 6. Conclusion

Given the competing entitlements that states may have to prosecute suspects of international crimes, international law would be well served by a principle of allocation that does justice to these various entitlements, and to the overarching aim to prevent impunity. The *aut dedere* principle in its original meaning (type two in the typology identified in section 2) may allow for such an allocation. This could be construed in a way that custodial states that do not or cannot prosecute should extradite to states seeking extradition, if such states would have a legal title to prosecute and if they would be able and willing to prosecute in accordance with international (human rights) law. This interpretation would apply the principles underlying admissibility as contained in the ICC Statute in a horizontal setting. It would recognise that multiple states may have a shared responsibility in securing prosecution, and allow for a contextual approach to determining which state in a given context is to exercise jurisdiction.

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<sup>80</sup> *Questions relating to the Obligation to Prosecute or to Extradite (Belgium v Senegal)*, Oral Proceedings, CR 2012/6, Public sitting held on Monday 19 March 2012, at 10 a.m., at 5. Final submissions, para 11.2.

<sup>81</sup> *Questions relating to the Obligation to Prosecute or to Extradite (Belgium v Senegal)* (n 8), para 121: ‘The Court emphasizes that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr Habré.’

It may be said that a construction that would impose on custodial states, that are unwilling or unable to prosecute, an alternative obligation to extradite to a state that is willing and able to prosecute may be of little practical relevance. If the custodial state is unwilling to comply with its obligation to prosecute, it surely also will be unwilling to comply with an obligation to extradite. However, it is submitted that such a construction would be important for three reasons. First, it would serve the symbolic purpose of recognising that the entitlements of states seeking extradition may be at least as legitimate (and often more) as those of the custodial states. Second, it will be relevant for situation where the custodial state will not be unwilling but unable to prosecute – in such cases it need not be presumed that the custodial state it will not comply with an alternative obligation to extradite. Third, the suggested construction would be relevant since it would provide a normative basis for allowing an international court to order extradition as a remedy.

However, the Convention as construed by the Court does not allow for such flexibility. By holding in unqualified terms that a state that has custody has no obligation to extradite the person to another state who seeks prosecution; the construction advanced by the Court has prioritised the entitlements of custodial states over those of states seeking extradition. One can also say that this has made the principle as traditionally understood, victim of an all annihilating obligation to prosecute international crimes – paradoxically with the result that a suspect may not be prosecuted.

There may be many cases where this need not lead to problematic outcomes, but categorical statements are to be tested by applying them to hard cases. A construction of the principle that accords to a state where a person who has been responsible for systematic torture only passes by, a preferential right to prosecute compared to the state where the crimes were committed, and that does not oblige the former state to extradite, even if it cannot prosecute itself and if the latter state would be willing and able to provide for adequate prosecution and trial, is normatively problematic.

For the case of Habré, none of this mattered much. In February 2013, six months after the ICJ's judgment, Extraordinary African Chambers were inaugurated which will conduct the trial of Hissène Habré in Dakar.<sup>82</sup>

However, the judgment has exposed a systemic problem of the system of treaties, like the Torture Convention, that include the *aut dedere* principle. The Court could hardly be expected to solve that problem. The legacy of the case then may well be that the lack of balance in the allocation of entitlements is now clearly exposed.

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<sup>82</sup> Human Rights Watch, 'Senegal: Hissène Habré Court Opens' available at < <http://www.hrw.org/habre-case> > last accessed 22 August 2013.