Examining the Impact of Implementing the Principle of "AutDedere, Aut Judicare" (Extradite or Prosecute) in Combating Impunity for Criminals Perpetrating International Crimes

Samira Mohammadi: PhD Student, Department of Criminal Law and Criminology, Science and Research Branch, Islamic Azad University, Tehran, Iran.

Mohammad Ali Madhavi Sabet: Assistant Professor, Department of Criminal Law and Criminology, Science and Research Branch, Islamic Azad University, Tehran, Iran (Corresponding Author).

Nasrin Mehra: Professor, Department of Criminal Law and Criminology, Shahid Beheshti University, Tehran, Iran.

Mohammad Ashouri: Professor, Department of Criminal Law and Criminology, Science and Research Branch, Islamic Azad University, Tehran, Iran.

*****Correspondence: e-mail: ali@mahdavi.fr

Abstract

Prosecution and punishment serve as essential tools in preventing crimes and international offenses to a significant extent. However, the characteristics of the global community often facilitate impunity for perpetrators of such crimes, and fundamental traditional principles of international law have frequently enabled the escape of those responsible for these offenses. In recent years, particularly over the past decade, the international community has shifted its perspective from prioritizing the sovereignty of states to emphasizing the maintenance of international order and security. Consequently, this shift has led to profound transformations in the global approach to international crimes, one of which is the insistence on implementing the principle of "Extradite or Prosecute." This insistence has reached the point where international tribunals have, in crucial cases, deviated from fundamental principles such as the principle of immunity. Since traditional principles of international law have historically contributed to impunity at the international level, this study examines the relationship between immunities—one of the most significant obstacles to prosecuting and punishing international criminals—and the principle of "Extradite or Prosecute." The findings indicate that, unlike in the past when traditional principles took precedence over newer principles, today, maintaining international order and security has become so crucial that the principle of immunity is set aside in favor of implementing "Extradite or Prosecute." Furthermore, we analyzed the impact of applying the principle of "Extradite or Prosecute" in combating impunity for perpetrators of international crimes. The results demonstrate that this principle has such a significant effect that its diversity and flexibility are evident in international legal instruments and judicial practice, ultimately preventing the perpetrators of international crimes from escaping justice.

Keywords: Impunity, Extradition, Prosecution, International Criminal Law.

Received: 17 November 2023
Revised: 11 December 2023
Accepted: 24 December 2023
Published: 01 January 2024

Citation: Mahdavi Sabet, M. A. (2024). Examining the Impact of Implementing the Principle of "Aut Dedere, Aut Judicare" (Extradite or Prosecute) in Combating Impunity for Criminals Perpetrating International Crimes. *Legal Studies in Digital Age*, 3(1), 1-11.

1. Introduction

In recent decades, we have witnessed the commission of crimes with the potential to manifest at the international level. Due to their transnational nature and the anonymity that exists beyond borders, in the absence of legal rules with strong enforcement guarantees, the commission of such crimes becomes easier, and perpetrators become bolder in committing them. These characteristics have significantly increased the likelihood of impunity for perpetrators of international crimes and their escape from punishment within the global community, as offenders in the international arena are well aware that they will rarely be brought to justice and thus confidently carry out their unlawful intentions.

Apart from this significant gap in the international community, certain international laws and regulations themselves enable perpetrators of international crimes to evade punishment, effectively becoming one of the principal factors for global criminal impunity. Nevertheless, the necessity of maintaining international order and security has consistently compelled practitioners in this field to propose effective and appropriate solutions and to create legal institutions and judicial practices aimed at preventing the impunity of perpetrators of international crimes.

Following the occurrence of world wars—especially the Second World War—when unchecked boldness in committing unlimited atrocities led to the establishment of the Nuremberg and Tokyo tribunals, and subsequently the tribunals for the former Yugoslavia and Rwanda for the prosecution of heinous international crimes of that period, the ultimate establishment of the International Criminal Court (ICC) was among the international community's efforts to combat the phenomenon of impunity. The principle of "Extradite or Prosecute" is one of the crucial measures in international criminal law that directly targets the impunity of international offenders, drawing special attention. Indeed, we observe its inclusion in a considerable number of international instruments, and in significant, sensitive cases, by applying this principle, perpetrators of international crimes have been tried and punished, thereby ensuring the security of the global community.

Given the extensive scope of international relations and the prevailing conditions that considerably increase the likelihood of committing offenses, research of this kind is imperative, and the proposed solutions will be influential in preventing the occurrence of crimes and international offenses. In this study, we aim to present the factors contributing to the impunity of perpetrators of international crimes and then analyze the impact of the aforementioned principle in combating this phenomenon.

2. Factors of Impunity for Perpetrators of International Crimes

Beyond the attributes and characteristics of the global community that pave the way for international criminals to remain unpunished, it must be noted that the factors enabling perpetrators of international crimes to evade punishment do not stem from one single subject or issue. Numerous overt and covert factors influence this situation. Among the most significant are political considerations and relations, gaps in international instruments, the existence of traditional principles of international law such as immunity, amnesty, and statutes of limitations, Article 16 of the Rome Statute, the absence or ineffectiveness of international adjudicative bodies and judicial practices, the preservation of sovereignty and the domestic nature of criminal law, and the complementary jurisdiction of the Court. These are deemed substantial reasons for impunity in the international community. The prevailing approach of maintaining state independence has often led international instruments—and consequently international judicial practice—to facilitate and exacerbate the impunity of those who orchestrate and commit international crimes.

However, it is noteworthy that, in recent decades, large-scale and heinous international wars and atrocities have shaken global public opinion, driving major and significant changes in this regard and prompting international criminal law practitioners to devise strategies to prevent offenders from evading punishment. In what follows, we will examine these strategies. Given the multitude of the abovementioned factors, this article focuses on the role of the principle of "Extradite or Prosecute" in combating the impunity of perpetrators of international crimes. Nonetheless, because traditional international principles—particularly immunities—significantly affect the implementation of this principle, we will first discuss the concept of impunity, then analyze immunities, and finally address the impact of failing to implement "Extradite or Prosecute" on the impunity of perpetrators of international crimes.

3. The Concept of Impunity

Linguistically, impunity signifies exemption from punishment or freedom from harmful consequences for an act. In legal terminology, impunity refers to the capacity of remaining immune or exempt from punishments, liabilities, and other consequences arising from committing crimes. In international law and human rights, impunity means the absence of punishment for human rights violators, which, in effect, constitutes a denial of victims' rights to justice and compensation. Impunity is particularly widespread in countries lacking the rule of law, suffering from systemic corruption, or in cases where the judiciary is weak or members of the security forces are shielded by judicial authority or special immunities. Interestingly, some even consider impunity a form of denial of historical atrocities (Enache & Fried, 1998; Grotius, 1925; Jafari Langroudi, 2007).

3.1. Comparing the Impact of a Traditional Principle and a Modern Principle of International Law on the Impunity of Perpetrators of International Crimes

As previously noted, one of the major contributing factors to the impunity of perpetrators of international crimes is the existence of certain traditional principles in international law, which have repeatedly led to the acquittal of perpetrators and instigators of international atrocities in significant cases. One such principle is the principle of immunity for state officials, which, on numerous occasions, has facilitated escape from punishment at the international level, essentially serving as a robust guarantee for international criminals to commit offenses with ease and confidence, leading to impunity (Kazemi, 2022).

As in notable cases such as the Yerodia case in 2002, relying on customary international law afforded heads of state absolute immunity and inviolability, thereby helping perpetrators of international crimes evade justice. By contrast, when invoking the relatively novel principle of "Extradite or Prosecute," earlier precedents were markedly departed from, embracing prosecution and punishment. This shift is so significant that in the Belgium v. Senegal case, the required legislative changes were permitted.

To compare the effects of applying these two principles on the impunity of perpetrators of international crimes, we shall provide a concise overview of each principle and then compare the outcomes of their implementation (Bonini, 2012).

3.2. The Principle of Immunity

"Immunity," in lexical terms, means being protected or shielded from harm, indicating a special status in which the holder is exempt and protected from a specific threat (Jafari Langroudi, 2007). Legally, immunity is a status whereby, owing to overarching social objectives deemed more important than imposing punishment, an individual or entity is not held responsible for violating the law. The scope of such legal immunity may encompass criminal prosecution or civil liability or both.

This principle has a relatively long history and tradition in international law, arising from states' concerns to guarantee the safety of their envoys while establishing relations with other states to resolve mutual disputes (Lakouraj & Abbasi, 2020). Immunity is derived from an old principle and belief known as "equals have no dominion over each other," which evolved into the principle of the equality of states. Under this principle, states, as the primary subjects of international law, enjoy equal rights; consequently, none can assert sovereignty over another (Karbasi Mahshid, 2022). Therefore, when one state intends to exercise jurisdiction over another, it refrains from doing so in order to preserve international order and cooperation. Thus, the effect of immunity is to protect one state from the jurisdiction of the courts and other domestic authorities of another state.

Although the principle of immunity is indispensable and irrefutable at the international level, its application in numerous circumstances contributes to the impunity of perpetrators of international crimes. There is a wide array of legal immunities that may be invoked under the rubric of sovereign rights (Bassiouni & Wise, 2002). In practice, immunities fall into three categories: personal immunities, functional immunities, and immunities stipulated in domestic laws. The notion of immunity for heads of state and government officials has undergone notable changes since the early twentieth century. These evolutions can be seen in texts ranging from the 1919 Treaty of Versailles to the statutes of ad hoc international tribunals such as Nuremberg and Sierra Leone, to the Rome Statute of the International Criminal Court, as well as in the jurisprudence of various international and domestic courts (Keijzer, 1982; Mitchell, 2009). A careful examination of these legal documents reveals that, in international forums, the scope of immunities has significantly narrowed. From the current perspective of international

legal texts, heads of state who commit international crimes, violate human rights and international humanitarian law, or breach peremptory norms of international law are subject to criminal responsibility.

3.3. Failure to Implement the "Extradite or Prosecute" Principle

In addition to international instruments, the principle of "Extradite or Prosecute" has been incorporated into the domestic legislation of many countries. Its historical roots can be traced back two centuries to Australia, underscoring the importance that various states have historically attached to combating the impunity of perpetrators of extraterritorial crimes. In international judicial practice, there have been significant cases on this subject in which the rulings of the International Court of Justice (ICJ) not only affirmed the established rule of "Extradite or Prosecute," but also led to inventive and creative developments in this area.

This principle is one of the main prerequisites—and, indeed, the most crucial condition—for exercising universal jurisdiction. Its importance is so profound that it is sometimes mistakenly treated as synonymous with universal jurisdiction (Ziaei & Hakimiha, 2016). In international law, the principle of "Extradite or Prosecute" refers to the legal responsibility of states to either prosecute in their own territory the individuals accused of committing serious and significant international crimes outside the jurisdiction and sovereignty of a specific state or to accept requests from other states to extradite such individuals for trial. This principle applies irrespective of the extraterritorial nature of the crime and regardless of the perpetrator's or victim's nationality (Ardabili, 2011; Ardabili & Mirfalah Nasri, 2016). By applying this principle, not only is punishment for international offenders ensured, but an even more crucial goal is achieved: the prevention of international crimes.

3.3.1. Definition

Regarding the principle of "Extradite or Prosecute," it has been stated that a significant portion of the principles contained in international criminal treaties obligates states to extradite or prosecute an individual suspected of committing crimes stipulated in an international treaty. This principle is increasingly prominent in the emerging legal framework, serving as a countermeasure against impunity, and plays a pivotal role in equipping states with mechanisms to enforce international criminal law (Mahdavi Sabet & Rezaei, 2021). Given its major role, it is unsurprising that the International Law Commission has deemed this issue ripe for review. In its fifty-sixth session in 2004, the Commission included it in its long-term program.

The rationale behind this principle in international criminal law is to ensure that no legal void or loophole persists in the prosecution and trial of international crimes. Although obliging states to exercise this jurisdiction might initially seem extraordinary—because, in most cases, a different state would have an interest in prosecuting the perpetrator of an international crime and thus typically requests the extradition of the accused—"Extradite or Prosecute," by emphasizing the international nature of the offense and the necessity for the international community to punish perpetrators irrespective of where the suspect is apprehended or where the crime occurs, underscores the gravity of these crimes (Beygi & Khoshiyari Haji Baba).

Concerning the core of the rule, as its name implies, the detaining state has two options. First, it may extradite the perpetrator to his or her own state for prosecution. Alternatively, it can prosecute the individual itself. The priority of one option over the other is occasionally contested, but from the ICJ's point of view, the requested state is free to pursue prosecution itself or to extradite (Ziaei & Hakimiha, 2016). Indeed, this is the concept derived directly from the name of the principle. In the early years following the inclusion of this principle in international instruments, this was largely the approach adopted. Yet, given the fundamental objective pursued by the international community—namely, the prevention and suppression of international crimes—its implementation has been marked by interesting innovations in international judicial practice. A review of various cases reveals that relying solely on these two actions is insufficient. In certain circumstances, based on a new interpretation of this obligation, in addition to choosing between extradition or prosecuting the individual in domestic forums, the state holding the suspect may adopt another measure and deliver the suspect to an international criminal court possessing jurisdiction over the charges (Ardabili, 2011).

3.3.2. The Status of the Principle of "Extradite or Prosecute" in International Law

a) The International Court of Justice and Other International Tribunals

The International Court of Justice (ICJ) has issued notable decisions regarding the application of this principle in several significant cases, prompting some to assert that it may have gained customary status. For example, the Lockerbie case involved a conflict between the binding nature of Security Council resolutions under Article 25 of the United Nations Charter and Libya's obligation to extradite or prosecute the alleged perpetrators of the Pan Am bombing, pursuant to the Montreal Convention, who were present on its territory. Acting under Chapter VII, the Security Council demanded that Libya extradite these individuals, whereas the Montreal Convention obliged Libya to either extradite or prosecute them, yet still granted Libya the choice of either option. Although the request for provisional measures—wherein the Court discussed this conflict of obligations—ultimately hinged on Article 103 of the Charter and its application for resolving inconsistencies between Charter obligations and other treaty commitments, several judges used this forum to discuss the nature of the obligation to implement "Extradite or Prosecute," culminating in a decision.

Judges Ovington, Tarassov, Guillaume, and Aguilar Maudsley stated in their joint declaration that, under public international law, a requested state is not obligated to extradite. Furthermore, they believed that customary international law imposes no duty to prosecute when extradition is not granted. Dissenting judges argued that, in customary international law, there is no obligation to extradite nationals, and while an obligation to implement "Extradite or Prosecute" does exist under customary international law—requiring states to take affirmative measures—it is up to the state to decide which option it prefers under the circumstances. Two dissenting judges, noting that many states (including Libya) have constitutional restrictions on extraditing their nationals, referred to the view of certain authors who maintain that this obligation has attained a peremptory status.

What stands out in the Lockerbie case with respect to "Extradite or Prosecute" is that, contrary to the principle's title and the existing practical approach, the ICJ took an extraordinary, unexpected step. The Court decided that the two Libyan nationals accused of the crime be transferred to a neutral country so that their charges could be adjudicated there under Scottish law. This highly innovative move by the Court, which was unforeseen, underscores its emphasis on punishing international offenders and reveals that the Court can offer solutions to overcome potential deadlocks and barriers to applying this principle—solutions that can significantly expand the principle's scope.

Likewise, in Belgium v. Senegal, the ICJ affirmed that the arrest warrant issued by Belgium against the then–Minister of Foreign Affairs of the Democratic Republic of the Congo for crimes against humanity and severe violations of the Geneva Conventions and their Additional Protocols was lawful. Although Belgium's arrest warrant and prosecution were based on universal jurisdiction, the majority of the Court opted not to address whether Belgium actually had the capacity to pursue such prosecution; instead, they focused on whether the defendant was immune from prosecution due to his position (Bahman Tajani & Mirfalah Nasri, 2015).

The Court's judgment in Belgium v. Senegal could serve as a model for applying this principle in the case of violations of peremptory norms, given that a state's duty to prosecute individuals accused of breaching a peremptory norm exists regardless of whether another state has submitted an extradition request. From the Court's perspective, under the Convention Against Torture, extradition is one of the options available to a state party, but prosecution is an international obligation; failure to fulfill it results in the international responsibility of that state. As the Court explains, implementing this principle goes beyond merely enacting national laws. Rather, effective enforcement requires domestic criminalization of the relevant offenses, the assertion of jurisdiction, the investigation of the crime, the suspect's arrest, criminal prosecution, or extradition (Ramezani Qavamabadi, 2013, 2016).

b) The International Law Commission

The International Law Commission (ILC), established to promote, develop, and advance international law, functions as a possible source of international law, chiefly through codifying existing customary rules or progressively developing a legal domain via in-depth study of a topic. According to the Special Rapporteur of the Commission on the principle of "Extradite or Prosecute," this principle was part of the ILC's preliminary planned agenda in 1948 (Report of ILC, 1949). At first, it received little attention until 1996, when it was included in the Draft Code of Crimes Against the Peace and Security of Mankind, where

it played a role in the "combined approach proposed by the Commission to jurisdiction based on the broadest national court jurisdiction, along with possible jurisdiction" (Mahmoudi & Setayeshpour, 2018).

Articles 8 and 9 of the Draft Code provided that states are bound to extradite or prosecute individuals suspected of committing crimes within the Code's scope. The commentary on the Draft Code indicates that, from the Commission's viewpoint, the obligation is only meaningful insofar as the courts of the arresting state possess jurisdiction over such acts. If jurisdiction does not exist, then the detaining state cannot utilize the inherent options under this obligation and is compelled to accede to any extradition request. Consequently, should no extradition request be made, the alleged criminal might evade prosecution, ultimately subverting the principle's purpose. It should be noted, however, that if a perpetrator escapes prosecution because the state has no jurisdiction to prosecute in the absence of an extradition request, that state remains liable for its wrongful act in failing to establish jurisdiction.

Even though the central theme of the Rome Statute is that the jurisdiction of the International Criminal Court (ICC) is complementary to national courts, there has been no specific effort to define clearly the basis for national jurisdiction, nor does the treaty impose an obligation on states to apply the principle in question. The Commission's Special Rapporteur on "Extradite or Prosecute" noted that the Draft Code largely reflects codification of customary international law as it stood in 1996 or as confirmed by the adoption of the Rome Statute on international criminal law two years later, rather than constituting progressive development of international law. As noted above, the mandatory application of this principle was placed on the ILC's long-term program at its 56th session in 2004 and has since undergone multiple reviews. By that time, the Commission appeared sufficiently prepared to codify the principle. During those years, Galicki was appointed as the Special Rapporteur, and in his 58th and 59th reports, he provided valuable information on this principle. In fact, based on the reports submitted to date, it seems that the Special Rapporteur intends to conduct a comprehensive examination of the sources, scope, and shortcomings of the principle, especially focusing on its status in customary international law (Galickli, 2007).

c) The General Assembly

General Assembly (GA) resolutions or other declaratory statements typically serve as forums for examining state practice and opinio juris. As Judge Tanaka pointed out in his dissenting opinion in the 1966 South West Africa cases, the repetition of practice and the legal opinion necessary to form custom can emerge very rapidly within an international organization. This is because a state, rather than communicating its views directly to a few interested countries, can declare its position to all the organization's members and immediately learn their reactions on the same issue. When voting on a resolution, a state may not only reflect its own practice but also express its legal standpoint on that matter.

Generally, there is a strong inclination to treat GA resolutions as evidence that the item contained therein may have a customary character. Nonetheless, it must be recalled that resolutions are merely part of the fabric of international legal instruments (Higgins, 1994). Moreover, although there are several fundamental resolutions emphasizing the importance of prosecuting those accused of war crimes, they do not require states to extradite or prosecute such offenders. The number of General Assembly resolutions referencing the principle of "Extradite or Prosecute" is smaller than might be presumed. For instance, Resolution 2712 of the General Assembly (UN Doc. A/8028, 1970) calls on all states to implement the relevant General Assembly resolutions and adopt measures consistent with international law to bring an end to war crimes and crimes against humanity, prevent their commission, and ensure that all those who commit such crimes are punished. Among these measures is the extradition of such offenders to requesting states (Resolution 2712, 1970).

Likewise, Resolution 2840 of the General Assembly (UN Doc. A/8429, 1971) states that any refusal by states to cooperate in apprehending, extraditing, prosecuting, and punishing individuals guilty of war crimes or crimes against humanity runs contrary to the purposes and principles of the UN Charter and generally recognized norms of international law (Resolution 2840, 1971). Resolution 3074 of the General Assembly (UN Doc. A/9030, 1973) adds that war crimes and crimes against humanity shall be prosecuted wherever they take place and that individuals for whom there is evidence of such crimes shall be sought, arrested, tried, and, if found guilty, punished (Resolution 3074, 1973).

Below is a list of 14 General Assembly resolutions that contain the principle under discussion:

1. Resolution on the Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel (2006)
2. Resolution on the United Nations Global Counter-Terrorism Strategy (2006)
3. Resolution on Human Rights and Terrorism (2002)
4. Resolution on Human Rights and Terrorism (2000)

5. United Nations Declaration on Crime and Public Security (1997)
6. Resolution on Measures to Eliminate International Terrorism (1997)
7. Resolution on Measures to Eliminate Terrorism (1995)
8. Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly (1992)
9. Resolution on Measures to Eliminate Terrorism (1991)
10. Resolution on Measures to Eliminate International Terrorism (1989)
11. Resolution on Measures to Eliminate International Terrorism (1987)
12. Resolution on Measures to Eliminate International Terrorism (1985)
13. Resolution on Measures to Eliminate International Terrorism (1983)
14. Resolution on Measures to Eliminate International Terrorism (1979)

All the above instruments directly address "Extradite or Prosecute," and as can be seen, most concern terrorism. One of the strongest is Resolution 60/288, dated 20 December 2006, which sets forth the United Nations Global Counter-Terrorism Strategy, wherein member states agree to deny safe haven—by applying "Prosecute or Extradite"—to those who finance, plan, facilitate, or perpetrate terrorist acts. In all these instruments, states generally reaffirm their positions on ending impunity and prosecuting criminals. The General Assembly also underscores the duty to investigate and refer for trial and punishment those alleged to have committed serious violations of international humanitarian law or human rights law.

The Preamble to the Rome Statute of the International Criminal Court likewise reminds states that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." It further establishes "putting an end to impunity for the perpetrators of such crimes" and notes that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." In order to avoid appearing overly positivist, it must be acknowledged that creating a customary obligation under certain conditions—particularly when negotiating states choose not to include a proposed provision explicitly obliging states to extradite or prosecute—means that applying this principle alone is not sufficient (Sadoff, 2016).

3.3.3. The Status of the "Extradite or Prosecute" Principle in Domestic Laws

One additional source needed for considering this principle as customary is its inclusion in the domestic legislation of various countries. In practice, to implement the principle effectively, it is necessary to adopt measures in domestic laws that, in a way, provide a foundation for enforcing this principle.

Most modern treaties that incorporate this principle obligate states to take measures for establishing jurisdiction over crimes in situations where the suspected offender is present, but no extradition is carried out. Pursuant to Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, failure to enact such legislation, in violation of the obligation set forth in a treaty, is deemed a breach of a state's treaty obligations. In any event, to enable a country to fulfill its obligation under this principle, it must pass domestic laws allowing it to prosecute an alleged offender when extradition is not granted. Likewise, in instances where the alleged offender is a national of the detaining state but the crime occurred elsewhere, a law permitting prosecution of that national under active personality jurisdiction must exist. Or, in cases involving a foreigner who allegedly committed a crime outside the detaining state's territory, a law must provide for the extraterritorial application of the detaining state's criminal code. Because many states apply their domestic criminal laws—including those covering their own nationals—to acts committed elsewhere, this latter type of legislative provision is particularly noteworthy when considering whether the principle in question has acquired customary status. Indeed, any law enabling universal jurisdiction clearly allows a state to fulfill its prosecutorial obligations when extradition is denied.

In general, states seeking to prosecute foreign nationals for international crimes typically rely on one or more of the following approaches:

• **Legislative action to directly implement specific conventions or treaties,** which entails enacting separate laws for each convention in order to comply with the jurisdictional requirements set out in particular conventions. Each such law contains the necessary provisions granting extraterritorial effect. Common law jurisdictions frequently use this form of implementation—examples include the United Kingdom, Australia, New Zealand, Canada, and the United States.

• **Adopting a "general principle or article,"** often within a country's penal code, that does not refer to any specific convention or offense but rather confers universal or extraterritorial jurisdiction over a category of crimes. In some countries, if required by a treaty or convention, many such "general principles" confer extraterritorial jurisdiction over international crimes. For instance, Article 7 of the Brazilian Penal Code recognizes universal jurisdiction over offenses committed abroad that Brazil is obliged to suppress under its international treaty commitments. Its conditions stipulate that the accused must be in Brazil, that the offense must be criminalized in the state where it was perpetrated, and that extradition for the offense must be permissible under Brazilian law. Other countries, however, have general rules enabling the prosecution of a foreign national for offenses committed abroad, provided these offenses exceed a certain minimum penalty threshold (Bonini, 2012; Cassese & Lal Chand, 2003).

• **Cases in which a country's constitution allows for the direct application of international law—whether treaty-based or customary.** Some governments have stated that their jurisdiction to enable criminal proceedings in lieu of extradition is derived from the obligation to apply the principle of "Extradite or Prosecute." In its detailed report on universal jurisdiction, Amnesty International remarks that, although such a view may sometimes suffice to allow courts to exercise universal jurisdiction over crimes recognized under international law, it is not always clear whether these provisions cover only the substantive criminal rules of treaties or also encompass judicial procedures, such as the jurisdictional requirement to prosecute an offender for conduct committed elsewhere (Mitchell, 2009).

4. The Relationship Between Accepting Immunities and Applying "Extradite or Prosecute" in Preventing the Impunity of Perpetrators of International Crimes

Reflecting on the earlier discussion, there is a clear correlation between enforcing immunities and the inability to implement the principle of "Extradite or Prosecute." In other words, the more one insists on granting immunities in prosecuting and punishing perpetrators of international crimes, the less feasible—and even impossible—it becomes to apply the principle in question. By categorically recognizing immunities, international bodies are effectively barred from pursuing these offenders, thereby rendering application of the principle problematic. It is not without reason that Article 27 of the Rome Statute expressly provides that an individual's official capacity does not exempt them from criminal responsibility, thereby taking a major step toward preventing impunity for perpetrators of atrocities. Interestingly, this issue is not reflected in customary law, and customary international law pertaining to personal immunities does not necessarily follow the Statute (Beygi & Khoshiyari Haji Baba).

One significant international case exemplifying the intersection of these two concepts is Belgium v. Senegal. Aside from its emphasis on the international community's determination to prosecute perpetrators of international crimes, it demonstrates that the Court, in pursuit of this goal, takes every possible measure—even disregarding immunities—to prosecute and punish offenders.

The facts are as follows: Hissène Habré served as President of Chad from 07 June 1982 to 01 December 1990. During his tenure, he committed serious crimes against humanity, including unlawful and inhumane detentions, extrajudicial executions, and acts of torture. In 1990, he sought refuge in Senegal. In January 2000, multiple complaints against him—filed by both Belgian nationals and Chadian nationals—were submitted to courts in Senegal and Belgium (Raeisi & Shobankareh, 2021).

At the end of 2005, Senegal brought the dispute before the African Union, which, in a 2006 ruling based on Article 7 of the Convention Against Torture and its "Extradite or Prosecute" obligation, required Senegal to prosecute Habré. In 2012, the International Court of Justice concluded that if Senegal does not intend to extradite Habré to Belgium, it must prosecute him without delay (Beygi & Khoshiyari Haji Baba).

The importance of this judgment becomes clear when noting that, contrary to its earlier precedents, the Court in this case pays no attention to Habré's functional immunity as a former head of state. Previously, one of the fundamental prerequisites for exercising universal jurisdiction was observing immunities, and the Court had never deviated from that principle. For instance, in its 2002 Yerodia ruling, it stated that customary international law accorded absolute immunity to heads of state, with no distinction between acts performed in an official or personal capacity, nor between conduct prior to or during their

term in office. Yet in Hissène Habré's case, the Court completely departed from its earlier stance and held Senegal accountable for failing to prosecute him.

In that judgment, the Court's approach was previously grounded in preserving state authority and adhering to the conditions for exercising universal jurisdiction; in such a view, the principle under discussion in this study was often superseded by the protection of state immunities. However, in its 2012 judgment, the Court obliged Senegal to prosecute Habré with urgency, prioritizing the punishment of the defendant over preserving immunities and thereby introducing a profound transformation in international criminal law and the nature of universal jurisdiction and the "Extradite or Prosecute" principle. The ICJ's ruling in Belgium v. Senegal can also serve as an apt model for applying this principle to violations of peremptory norms. A state's duty to prosecute those accused of breaching a peremptory norm remains valid irrespective of whether any other state has requested extradition. From the Court's perspective, under the Convention Against Torture, "extradition is one of the available options for a state party to the convention, but prosecution is an international obligation, whose violation engages the international responsibility of that state." As the Court emphasizes, implementing this principle surpasses merely enacting national legislation: effective implementation also requires establishing criminal provisions in domestic law, asserting jurisdiction, carrying out criminal investigations, arresting the accused, and initiating prosecution or extradition (Ramezani Qavamabadi, 2013, 2016).

This judgment established a fresh and bold precedent and functioned as a robust barrier to those hoping to evade punishment. In the clash between a customary international principle and a treaty-based principle, here the treaty-based principle emerged victorious. This outcome highlights the international community's determination to maintain world order and security, as well as international law's commitment to combating the impunity of individuals responsible for international crimes.

5. Conclusion

The impunity of perpetrators of international crimes is one of the primary concerns of international criminal law. In practice, constraints within this field have often prevented it from achieving its crucial objectives. For instance, the power and efficacy of criminal law, whether domestic or international, depend on the certainty and definiteness of prosecution and punishment—a notion stemming from the classical school of thought, which holds that such certainty is vital to crime prevention. Yet, particularly in past decades, international criminal law has, for various reasons—chiefly states' willingness to preserve national authority—been shaped by principles and rules that enable perpetrators of international crimes to avoid punishment. The outcomes in cases concerning grievous international crimes confirm this trend.

However, bolstered by humanitarian progress, heightened attention to human rights regulations in recent years, and public outcry over injustice and the impunity of international criminals, the field has gradually transformed, and we now witness significant changes. Initially, international criminal law was profoundly influenced by general international law, prioritizing the safeguarding of internal sovereignty above adjudicating or punishing international criminals, to the extent that international law arguably could not effectively challenge the primacy of domestic law. Over time, though, as maintaining global security took on greater importance, international criminal law evolved into a different framework. Various principles and standards—once mere theoretical statements frequently overlooked in practice—have been revisited, especially in the last decade, resulting in notable shifts in the jurisprudence of international courts. In crucial cases, even longstanding principles of customary international law have been set aside to ensure that the perpetrators of international crimes are brought to justice.

One foundational tenet of customary international law that has, in multiple high-profile cases, enabled international criminals to elude punishment or even any form of prosecution is the principle of immunity—long established in this field of law. Yet the strengthening global commitment to the certainty of punishment has led to heightened attention to judicial proceedings, trials, and, consequently, a stronger belief in "Extradite or Prosecute" as a treaty-based principle. This development is noteworthy in international criminal law, since rules categorized as customary international law are ordinarily deemed peremptory and obligatory, whereas treaty provisions are typically lacking in such a binding effect.

An especially critical component of implementing the "Extradite or Prosecute" principle is its inclusion in domestic legislation. Domestic laws constitute a legitimate and influential source, effectively serving as an enforcement mechanism for this principle in international criminal law. This legislative gap in Senegal, for instance, contributed to Hissène Habré's long-term avoidance of trial and punishment in the Belgium v. Senegal case; the failure to criminalize international offenses in

Senegal's domestic law was one of the factors in halting the proceedings. Hence, incorporating the principle into domestic legislation is essential, and states generally do so through (1) enacting separate laws for each convention, (2) incorporating a "general principle or article," typically found in a penal code, which neither refers to a specific convention nor a specific crime but extends universal or extraterritorial jurisdiction to a range of offenses—such as Iran's approach in Article 9 of its Islamic Penal Code regarding universal jurisdiction—or (3) instances where a state's constitution permits the direct implementation of international laws, whether treaty-based or customary.

Belgium v. Senegal serves as an excellent illustration. In that case, the Court, unlike in its previous decisions, disregarded Habré's functional immunity as a former head of state, compelling Senegal to prosecute and punish him. By prioritizing the punishment of the accused over immunities, the Court introduced a pivotal shift in international criminal law and the essence of the "Prosecute or Extradite" principle. Its judgment may well be a model for applying this principle in instances involving violations of peremptory norms.

Ultimately, the principal objectives of international criminal law wield sufficient force to eliminate or modify fundamental principles and peremptory rules. As demonstrated by concrete cases, the principle at issue here is one of the most practical and effective approaches to combating impunity, prompting the global community to incorporate it into numerous international treaties. In so doing, the international community strives to ensure that perpetrators of international crimes are prosecuted and punished, thereby safeguarding global security.

Ethical Considerations

All procedures performed in this study were under the ethical standards.

Acknowledgments

Authors thank all participants who participate in this study.

Conflict of Interest

The authors report no conflict of interest.

Funding/Financial Support

According to the authors, this article has no financial support.

References

Ardabili, M. A. (2011). *Extradition or Prosecution* (Vol. 1). Mizan.

Ardabili, M. A., & Mirfalah Nasri, S. N. (2016). Implementation of International Conventions Containing the 'Extradite or Prosecute' Rule in Iran. *Journal of Justice Law*, *81*(98).

Bahman Tajani, S., & Mirfalah Nasri, S. N. (2015). The Foundations and Effects of the ICJ's Change of Approach in Revoking the Criminal Immunity of Heads of State in the Hissène Habré Case (Former President of Chad). *Criminal Law Research Journal*, *6*(1).

Bassiouni, M. C., & Wise, E. (2002). *International Extradition: United States Law and Practice*. Oceana Publications.

Beygi, J., & Khoshiyari Haji Baba, R. Impunity of Criminals and Confronting it in the Mirror of International Law with Emphasis on the Statute of the International Criminal Court. https://civilica.com/doc/327166

Bonini, A. (2012). ICJ Belgium v Senegal:Temporal Issues and the Prosecution of Torture. ilawyerblog.com

Cassese, A., & Lal Chand, V. (2003). *Man's Inhumanity to Man:Essay on International Law Houner of Antouio Cassese*. Kluwer Law International Publisher.

Enache, B., & Fried. (1998). Universal Crime, Jurisdiction and Duty:The Obligation of Aut Dedere Aut Judicare in International Law. *McGill Law Journal*, *43*.

Galickli. (2007). *Second Report on the obligation to extradite or prosecute (aut dedere aut judicare)*.

Grotius, H. (1925). *De Jure Belli ac Pacis*. Carnegie Classics of International Law.

Jafari Langroudi, M. J. (2007). *Legal Terminology*. Ganj Danesh Library.

Karbasi Mahshid, A. M. K. A. Z. A. (2022). Immunity of States and Their Property in Light of the Domestic Law of Countries (Case Study of Japan and Italy). *Journal of Legal Research*, *21*(51), 47.

Kazemi, S. S. (2022). Review and Critique of the Implementation of the Principle of Universal Jurisdiction over Perpetrators of Modern Maritime Piracy. *Critical Studies of Texts and Programs of Human Sciences*(22).

Keijzer. (1982). *(Aut dedere, aut judicare)*. Kluwer Law and Taxation Publishers. https://doi.org/10.1007/978-94-017-4443-0_22

Lakouraj, A. M., & Abbasi, A. (2020). A Comparative Study of the Impunity of Offenders in Iranian Law and International Documents: Cases and Solutions. *Comparative Law*, *4*(2), 126-137.

Mahdavi Sabet, M. A., & Rezaei, H. (2021). The Origin and Legitimacy of Applying the Principle of Universal Jurisdiction in National Courts to Prosecute International Crimes. *Criminal Law and Criminology Research*, *9*(17).

Mahmoudi, S. H., & Setayeshpour, M. (2018). The Passage of 'Time' in the Creation of a Rule of Customary International Law: An Examination of Legal Concepts and the Practice of the International Court of Justice. *Bi-Quarterly Journal of Comparative Law*, *6*(1).

Mitchell, C. (2009). *AUT DEDERE,AUT JUDICARE :The Extradite or Prosequte clause in international law*. https://doi.org/10.4000/books.iheid.249

Raeisi, L., & Shobankareh, Y. (2021). A Legal Analysis of Issues Related to the 'Obligation to Extradite or Prosecute' in Light of the ICJ's Judgment of July 20, 2012 (Belgium v. Senegal). *Quarterly Journal of Criminal Law Research*, *9*(35).

Ramezani Qavamabadi, M. H. (2013). The Establishment of Extraordinary African Chambers in Senegal for the Trial of Hissène Habré: A Step Forward in the Fight Against International Crimes. *Criminal Law Research Journal*, *4*(2).

Ramezani Qavamabadi, M. H. (2016). International Responsibility Arising from the Violation of the Obligation to Extradite or Prosecute in Light of the ICJ's Judgment in the Case of Belgium v. Senegal. *Journal of Criminal Law and Criminology Research*, *4*(8), 14.

Sadoff, D. A. (2016). *Bringing International Fugitives to Justice:Extradition and its Alternatives*. Cambridge University Press. https://doi.org/10.1017/9781316422922

Ziaei, S. Y., & Hakimiha, S. (2016). Legal Conditions for Exercising Universal Jurisdiction in International Law. *Quarterly Journal of Public Law Research*, *18*(53).