

Undesirable yet Unreturnable - Extradition and Other Forms of Rendition

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1. Introduction

This paper will focus on the ability of the state of protection to utilize its laws on extradition or other forms of rendition to ensure the alleged fugitive does not escape punishment if granted protection such that s/he is *prima facie* unreturnable. Transfer to some international court or tribunal may be available and, where excluded, international law may permit the person to be deported to a state where jurisdiction to prosecute can be asserted, so-called 'disguised extradition'. The interplay of international refugee law, international human rights law and international criminal law, however, render this a complex enough question before one takes into account the domestic criminal laws, procedures and rules of evidence that will have to be applied.

2. First Principles

Before looking at the laws pertaining to extradition and other forms of rendition, it is necessary to set out how international refugee law, international human rights law and international criminal law interact in various scenarios.

(a) Removing Protection

As will be seen, the law relating to extradition and rendition is complicated and that is multiplied if the person qualifies as a refugee or is an asylum-seeker who benefits from *non-refoulement*. Thus, removing such protection makes transfer to stand trial more viable. This section discusses exclusion under Articles 1F and 33.2 as it particularly pertains to extradition or other forms of surrender.

Article 1F(a) and (b) vs. 1F(c): The first two subparagraphs of Article 1F refer to there being serious reasons for considering that the applicant for refugee status has committed crimes, whereas Article 1F(c) refers to her/him being "guilty of *acts* contrary to the purposes and principles of the United Nations". Nevertheless, just because it refers to acts does not mean that criminality is necessarily irrelevant since the RSD process must be able to deem the applicant "guilty". Thus, there could be an interface between Article 1F(c) and extradition law. That being said, Article 1F(c) is problematic: it is derived from Article 14.2 of the Universal Declaration of Human Rights 1948 and was originally believed to be dealing with human rights violations that did not amount to crimes against humanity, although that interpretation is clearly inadequate now.¹ Although many states are known to use Article

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¹ See UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (4 September 2003) at paragraph 17, and associated Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. NB. Given that Article 14(2) of the Universal Declaration of Human Rights (UDHR), 1948, includes a similar phrase, there is some merit in this argument. See also,

1F(c) only in conjunction with subparagraphs (a) and (b), the UK Supreme Court applied it in the case of *Al-Sirri and DD v SSHD*² so as to exclude a person who mounted an armed insurrection against a Security Council mandated intervention force in Afghanistan, ISAF, without making clear that war crimes contrary to Article 1F(a) were a necessary component of the decision; it was enough that ISAF was mandated to maintain international peace and security. Even so, the link between Article 1F(c) acts and extraditable crimes may not always be straightforward, although prosecution before the International Criminal Court may be possible.³

Article 33.2 (both limbs): Article 33.2 allows for *non-refoulement* protection to be withdrawn from an Article 1A.2 refugee if there are reasonable grounds for regarding her/him ... as a danger to the security of the country in which s/he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The first limb, dealing with “danger to the security of the country”, is sufficiently wide to allow the *non-refoulement* protection in Article 33.1 to be disapplied based on criminality abroad post-refugee status, with extradition available as a means by which to ensure prosecution, but the criminality must pose a danger to the security of the protecting state. Given that Article 32 deals with expulsion on grounds of national security or public order and there is no loss of the guarantees provided by Article 33.1, then the “danger to the security of the country” in Article 33.2 must be extremely serious if there is to be an interference in the fundamental humanitarian protection offered by *non-refoulement*. As for the second limb, particularly serious crime, the refugee needs to have been convicted by a final judgment, which suggests jurisdiction would have to exist in the protecting state, although the crime may have occurred outside and either universal or representative jurisdiction has been asserted.

Paragraph 7 of the 1950 Statute: Subparagraph (d) is worded completely differently from Article 1F. UNHCR’s own documentation states that since Article 1F is subsequent to the 1950 Statute, the organisation should use that definition of exclusion.⁴ However, it is arguable, based on Paragraph 1’s mandate of providing international protection to refugees, that if applying Paragraph 7(d) would be less restrictive of international protection for someone who would otherwise qualify as a refugee, that is the test that ought to be applied

Pushpanathan v Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982 at 983, which suggests that the purpose of Art. 1F(c) “is to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting”. See also, J. Rikhof, ‘Purposes, Principles and *Pushpanathan*: The Parameters of Exclusion Ground 1F(c) of the 1951 Convention as seen by the Supreme Court of Canada’, paper submitted as part of the responses to the UNHCR Global Consultations on Refugee Protection, 2001.

² [2012] UKSC 54 at paragraphs 65 and 68.

³ Rome Statute of the ICC circulated as document A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, Article 8(2)(b)(iii)/ (e)(iii).

⁴ Guidance Note on Extradition and International Refugee Protection, April 2008, paragraph 78, fn 108, available at RefWorld website <<http://www.refworld.org/cgi-bin/tehis/vtx/rwmain>>. See also, S. Kapferer, *The Interface Between Extradition and Asylum*, November 2003, PPLA/2003/05, available at: <<http://www.refworld.org/docid/3fe846da4.html>>, accessed 31 March 2015.

when UNHCR is carrying out RSD. On the other hand, whenever the organisation is acting on behalf of a state party it should use Article 1F and even where not, on the basis that this is a process that might lead to resettlement in a third state which is party to the 1951 Convention, then it will be necessary to show to that state that the applicant is not excluded under Article 1F.

Participation:⁵ There is not space here to delve into the intricacies of participation for criminal prosecution (to which extradition or surrender lead and where the requirement of double criminality would present further problems), whether that be before some international court or tribunal or at a domestic trial.⁶ The question is whether there ought to be a separate test for participation for the purposes of excluding someone.⁷ Does participation in that context require an autonomous meaning separate from that used in criminal proceedings because Article 1F is a limitation on a humanitarian provision, *non-refoulement*, that is customary international law?

(b) Extraditable ≠ Excludable and vice versa

Unlike Paragraph 7(d) of the 1950 Statute, Article 1F makes no reference to extradition, although Article 1F(b) clearly draws on an extradition law concept, the political offence exemption.⁸ At its most basic level, it has to be a *serious* non-political crime to fall within Article 1F(b). However, what are the criteria by which to determine seriousness? The potential sentence for the extradition crime, the threat to the protecting state *à la* Article 33.2, something that renders the non-political crime one equivalent to the crimes listed in Article 1F(a) such that 1F is consistent, or serious *vis-à-vis* the victim?

There are also different evidentiary requirements between extradition hearings and a determination that an applicant should be excluded from refugee status. Some extradition hearings only require evidence relating to the alleged participation by the fugitive, others a *prima facie* case, while Article 1F looks for “serious reasons for considering that” and Article 33.2, “reasonable grounds”. There may be different rules as to the admissibility of evidence in each type of hearing. More significantly, the two types of hearing, extradition and RSD, should not be fused: the former cannot deal with all the matters essential to deciding that someone who would otherwise qualify as a refugee should lose that protection of her/his fundamental right not to be returned to the frontiers of a territory where his life or freedom would be threatened. Fewer problems should arise, though, where an extradition hearing has

⁵ The question of excluding applicants for refugee status for crimes committed as a minor will not be addressed. Please note, though, that the Special Court for Sierra Leone had jurisdiction to prosecute anyone over the age of 15 - Article 7 (available at: <<http://www1.umn.edu/humanrts/instree/SCSL/statute-sierraleone.html>>).

⁶ For a mere *amuse-gueule* of the problems, see G. Gilbert, ‘International Criminal Law Is not a Panacea - Why Proposed Climate Change ‘Crimes’ Are Just Another Passenger on an Overcrowded Bandwagon’, 14 *International Criminal Law Review* 551 at pp.570-74 (2014).

⁷ See *R (on the application of JS) (Sri Lanka) (Respondent) v Secretary of State for the Home Department (Appellant)* [2010] UKSC 15; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40; and the Khad/WAD UNHCR letter to the Dutch MFA of 9 July 2009.

⁸ See generally, G.Gilbert, *Responding to International Crime*, (2006, Martinus Nijhoff), especially Chapters 5 and 8.

already decided that the requested crimes were non-political in character - only the strongest evidence that was not admissible at the extradition hearing but which can be presented in a refugee status determination hearing should reverse that finding for the purposes of Article 1F(b).⁹ Otherwise, extradition and RSD are such different processes that one cannot superimpose one on to the other.

(c) Exclusion and international human rights law/ Customary international law *non-refoulement*

Exclusion from refugee status does not remove the protections that international human rights law provides. Such guarantees are easy to apply where there is an individualized risk of irreparable harm following return.¹⁰ More interesting, though, is the decision in *NA v United Kingdom*,¹¹ where the Fourth Section of the European Court of Human Rights held that a general situation of violence might expose the claimant to a real risk of ill-treatment contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, more especially so if s/he is a member of a persecuted section of society.

Whilst referring to international human rights law in this context, the applicant's right to confidentiality, especially as regards the country of nationality, must be preserved at all times for her/his safety and in relation to their associates still in that state. Thus, the process of obtaining evidence regarding the person's potential exclusion for the RSD hearing should not increase the threat they might face.¹² Moreover, nothing in the extradition hearing, where the country of nationality may be the requesting state, should reveal the fact the applicant is applying for refugee status or that s/he may be excluded therefrom.

Therefore, on the basis of the above, it is now possible to have regard to the role, if any, of extradition law in dealing with the undesirable but unreturnable alien.

2. Substantive Issues

(a) Extradition Requests and Exclusion

This topic may seem to be contrary to two of the elements described as first principles, above, that extraditable does not equal excludable and that international human rights law requires confidentiality as between the hearings on RSD and extradition. To deal with the latter first, it does not apply *vice versa* - information that comes to light in the extradition hearing that is

⁹ See *T v SSHD* [1996] 2 All ER 865.

¹⁰ *Soering v United Kingdom* Series A, Vol.161 (1989); *Chahal v United Kingdom* (70/1995/576/662), 15 November 1996, both European Court of Human Rights. See also, *Judge v Canada* Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003).

¹¹ Application no. 25904/07, European Court of Human Rights (Fourth Section) 17 July 2008, at paragraphs 115-17.

¹² See UNHCR's Guidance Note, above note 4, at paragraphs 51, 57-58, 93 and 96.

admissible can and should be available so that any decision to exclude is based on the most complete picture. The former basic principle, that extraditable does not automatically entail that the person is excludable, is more complicated. The existence of an extradition request must put the adjudicators on notice that the applicant for refugee status might need to be investigated *vis-à-vis* Article 1F, much more so if it is a request to surrender issued by the International Criminal Court. However, on its own, even an ICC indictment on its own, an indictment or arrest warrant cannot lead to automatic exclusion. “Serious reasons” is a higher standard of proof than “reasonable grounds for suspecting” or “mere suspicion”.¹³ All that being said, if the extradition request is for someone to serve out a sentence post-conviction in the requesting state, that might be a serious reason for considering that s/he should be excluded for an Article 1F crime, but that is because there has been a conviction and even that has to be reviewed to ensure it had not been imposed as a form of persecution.

(b) Article 1A.2 is no bar to extradition, if safe

When would extradition of a refugee or asylum-seeker be safe? If the fugitive is a refugee and the request is from her/his country of nationality, the obligation in Article 33.1 to respect *non-refoulement* will render surrender impossible. Even if the fugitive is still only applying for refugee status, given that that is declaratory in character, only once the RSD process is complete could a proper decision be taken as regards surrender to the country of nationality. If the request is made by a third state, though, the dangers are reduced, but the requested state, the protecting state, still has to be satisfied that extradition will not make the fugitive less protected against *refoulement* whether s/he be a refugee or an asylum-seeker. Transfer to the ICC would present the fewest problems, but only given that one can rely on The Netherlands offering protection on an acquittal and that the ICC itself will choose a place of incarceration if convicted that did not risk *refoulement* on release. Of course, an extradition request may alert the state to crimes that, once dealt with as part of the RSD process, would exclude the refugee¹⁴ or asylum-seeker. Then international human rights law needs to be taken into account.¹⁵ Even if international human rights law would not prevent extradition, there are still a plethora of remedies available in extradition law that could protect an excluded refugee. There is no possibility to accord them a complete analysis in this limited space,¹⁶ but these additional forms of protection complement those available under international refugee law and international human rights law and call into doubt the propriety of simply deporting someone excluded:

- (i) Non-extradition of nationals - this might seem completely inappropriate in the context of an application for refugee status, but some states, including The Netherlands, have held that refugees have the same rights as nationals in this regard and when ratifying the 1957 European Convention on Extradition the Nordic states

¹³ *JS (Sri Lanka)*, above note 7, at paragraph 39. More jurisprudence from the ICC on the issuance of arrest warrants is needed before one can be categorical in these matters.

¹⁴ Article 1F(a) or (c).

¹⁵ See cases cited above, note 10, and *Agiza v Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 20 May 2005.

¹⁶ See Gilbert, above note 8, chapters 4 and 5.

made declarations that protect domiciled aliens.¹⁷ However, France, Germany and Switzerland do not treat refugees as nationals.¹⁸

(ii) The Political Offence Exemption - This is possibly the most complex element of extradition law and there is no one accepted understanding of the exemption for political offences. For certain, a political motive is a necessary but insufficient element. The approach of courts in the United States has been to look for a political uprising and then any offence that is part of or incidental to that uprising is one of a political character,¹⁹ no matter how disproportionate.²⁰ The European approach to the political offence exemption looks only for a political disturbance rather than an uprising,²¹ but the crime must be proximate to the ultimate goal of the fugitive's organisation²² and proportionate.²³ While the exemption will not, by definition, protect someone excluded under Article 1F(b) and is extremely unlikely to protect in a 1F(a) case,²⁴ it might be of relevance in relation to acts contrary to the purposes and principles of the United Nations and it complements the political opinion ground set out in Article 1A.2 of the 1951 Convention. Equally, where the request is for a common crime, but it is politically motivated, then there is a direct overlap with persecutory prosecutions.²⁵

(iii) Related to the political offence exemption is the non-discrimination clause. Akin to Article 1A.2's grounds of race, religion, nationality, political opinion, it prevents extradition if the fugitive would be prosecuted or punished on those grounds - in many ways the direct correlative protection to the 1951 Convention's exclusion clause, although it does not usually include discrimination on grounds of membership of a particular social group. That it is even incorporated into most of the UN's anti-

¹⁷ See *MY v Public Prosecutor*, 100 ILR 401 and *KM v The Netherlands*, 100 ILR 430. See ETS 24.

¹⁸ See B. Karle, 'Some Problems Concerning the Application of the European Convention on Extradition, in Council of Europe, *Legal Aspects of Extradition* at pp. 49 *et seq.* (1970); and *T v Swiss Federal Prosecutor's Office*, 72 ILR 632 at 635-36 (1966).

¹⁹ See *In re Ezeta* 62 F. 972 (1894); *Quinn v Robinson* 783 F.2d 504 (1981); *cf. Extradition of Atta, Ahmed v Wigen* 910 F.2d 1063 at 1066 (1990).

²⁰ The *Artukovic* cases 140 F.Supp 245 (1956); 247 F.2d 198 (1957); 355 US 393 (1958); 170 F.Supp 383 (1959). *Cf.* 784 F.2d 1354 (1986).

²¹ *In re Castioni* [1891] 1 QB 149.

²² *Cheng v Governor of Pentonville Prison* [1973] AC 931 at 945; *In re Nappi* 19 ILR 375 at 376 (Swiss Federal Tribunal, 1952).

²³ *In re Pavan* [1927-28] Ann.Dig. 347 at 349 (Swiss Federal Tribunal); *Watin v Ministère Public Fédéral* 72 ILR 614 at 617 (Swiss Federal Tribunal, 1964); *T*, above note 9; *McGlinchey v Wren* [1982] IR 154 at 159.

²⁴ It is hard to imagine when such crimes would be proportionate.

²⁵ See *R v Governor of Brixton Prison, ex parte Kolczynski* [1955] 1 QB 540; see also, *In re Kavic, Bjelanovic and Arsenijevic* 19 ILR.371 (Swiss Federal Tribunal).

terrorism conventions²⁶ throws into even greater contrast the fact that outside RSD carried out by UNHCR, the RSD process undertaken by states does not allow for a proportionality test.²⁷

(iv) Double criminality - Even if excluded, but particularly so if excluded under Article 1F(c), the extradition request must be for a crime that is recognised as such in both the requesting state and requested state. There may well be further requirements as to the minimum potential sentence a fugitive would face.

(v) Death penalty - many extradition treaties allow the requested state to refuse extradition if the person might face the death penalty in the requesting state, but would not in the requested state. Moreover, international human rights treaty bodies have held that an abolitionist state cannot surrender to a state that retains capital punishment without obtaining a guarantee that it will not be carried out on the fugitive.²⁸ This guarantee would apply as much to an excluded person as any other alleged fugitive.

(vi) Finally, extradition contains the so-called specialty principle. At its simplest, this requirement entails that a fugitive can only be dealt with for the crimes in the extradition request, so no persecution may be perpetrated through filing subsequent additional charges following surrender. However, it also means that ordinarily a fugitive cannot be transferred by the requesting state to a third state, even after a sentence has been served, without the consent of the state of protection, thus rendering chain *refoulement* via the extradition process contrary to treaty obligations.

The above is a limited review of how extradition law may provide an alternative series of guarantees for the applicant for refugee status, even if s/he is excluded and international human rights law provides no complementary protection.

(c) Post-status criminality and Article 1F(a) and (c)

UNHCR's 2003 Guidelines on Exclusion²⁹ set out that 1F(a) crimes and 1F(c) acts can be used to revoke refugee status, so in this case the extradition request could be made with respect to a refugee who travelled abroad to commit a crime and that would permit the state of protection, the requested state, to exclude her/ him from the protections of the 1951 Convention, although that would have to be determined in a separate proceeding from the extradition hearing. International human rights law would still apply once revocation occurs, but it is possible that an extradition request would not result, in and of itself, in revocation under Article 1F(a) or (c). It is also very likely that if the request is for an Article 1F(a) crime,

²⁶ See G. Gilbert and AM. Rüsç, 'Jurisdictional Competence Through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?' 12 JICJ 1093 at 1106-08 (2014).

²⁷ See, for example, *Judgment of the Court (Grand Chamber) of 9 November 2010 (reference for a preliminary ruling from the Bundesverwaltungsgericht - Germany) - Bundesrepublik Deutschland v B (C-57/09), D (C-101/09)*, paragraph 3 of the operative part of the judgment. Cf. Gilbert, 'Current Issues in the Application of the Exclusion Clauses' in Feller, Türk and Nicholson, *Refugee Protection in International Law*, (CUP, 2003), pp.425-78 and 2003 Background Note at paragraph 76, especially the Swiss cases cited in footnote 71 - above, note 1.

²⁸ See *Judge and Soering*, above note 10.

²⁹ Above, note 1, at paragraph 6.

then the protecting state will have jurisdiction to prosecute and convict; once convicted of a particularly serious crime, then Article 33.2 could be applied, too.

(d) Diplomatic Assurances³⁰

Diplomatic assurances are sought in extradition cases as much as exclusion cases as a way of allowing the protecting state to rid itself of the fugitive. In the same way, however, their reliability is discounted by UNHCR and human rights treaty bodies in relation to states where the use of torture and ill-treatment is endemic.³¹ As a solution to the issue of undesirable aliens who are, nevertheless, unreturnable, it is extremely limited and cannot be treated as the default by states trying to counter impunity whilst upholding human rights.

(e) Disguised Extradition post-Exclusion

Subject to international human rights law concerns, an excluded person can be deported to their country of nationality. However, if deportation is being used to avoid the protections offered by extradition law where extradition arrangements exist between the country of nationality and the state where the person sought refugee status, then that might be deemed to be an *ultra vires* exercise of power by the relevant minister.³² Nevertheless, the fact that the accused will be prosecuted on deportation is not sufficient on its own to deem the order invalid - there has to be a conscious attempt to disregard the proper extradition procedures.

(f) *Aut dedere, Aut judicare*

The principle of *aut dedere, aut judicare*, extradite or prosecute, is not customary international law.³³ It is often established in treaties providing for extradition as a means of combatting serious international crimes. Where the state where the person is found does not extradite, it is obliged to prosecute. However, if the state that excludes does not prosecute the Article 1F crime and cannot return them to the *locus delicti*, are there any circumstances in which third states have an obligation/ right to seek extradition in order that the person might not escape punishment? It is arguable that if the crime is genocide for the purposes of the 1948 Convention,³⁴ then all states parties are required under Article 1 “to prevent and punish”

³⁰ See the paper ‘Expelling Undesirable Foreigners: The Challenge of Human Rights’ by Mariagiulia Giuffr , delivered at this conference.

³¹ See UNHCR Guidance Note, above note 4, at paragraphs 25 and 27-30; *Agiza*, above note 15, and *Saadi v Italy* Application no. 37201/06, European Court of Human Rights (Grand Chamber) 28 February 2008.

³² Compare and contrast *R v Brixton Prison (Governor), ex parte Soblen* [1962] 3 All ER 641 with *Schlieske v Minister for Immigration and Ethnic Affairs*, 84 ALR 719 (1988) and *Bennett v Horseferry Road Magistrates' Court* [1994] 1 AC 42.

³³ See the Final Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere, aut judicare*), UN Doc. A/CN.4/L.844, 5 June 2014. See also the Fourth Report on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*) of the then Special Rapporteur, Zdzislaw Galicki, UN Doc. A/CN.4/648, 31 May 2011. See also, M.C. Bassiouni and E. Wise, *Aut Dedere, Aut Judicare: the Duty to Extradite or Prosecute in International Law*, (Martinus Nijhoff, 1995).. See generally, Gilbert and R sch, above note 26, at pp.1105-10.

³⁴ 78 UNTS 277.

it. A similar obligation might be imposed as regards grave breaches of the Geneva Conventions of 1949 and Additional Protocol 1, 1977, where the treaties require *aut judicare, aut dedere*.³⁵ It may even be said that the same ought to apply in cases of torture.³⁶ On the whole, however, relying on *aut dedere, aut judicare* in its current state of development will provide an inadequate response, apart from in a limited number of situations, to ensuring that those excluded but who are unreturnable do not escape punishment. A more generic response by states asserting domestic jurisdiction to prosecute whenever protection is afforded, either under international refugee law or international human rights law, may be the only effective answer to the present situation of impunity, no matter how limited the success has been so far - diplomatic assurances are ineffective and the state of limbo for the failed applicant for refugee status is unacceptable. Extradition may play a part in that response, too, but trial in the protecting state needs to be re-considered and legislated for more fully.³⁷

3. Conclusion

Transferring anyone who has sought refugee status to another state, whether their application was successful or not, raises a plethora of issues beyond those that ordinarily beset extradition law. That it is part of the response to dealing with undesirable yet unreturnable aliens cannot be gainsaid, but it offers no comprehensive solution to this situation. States cannot try and pass on their responsibility to prevent impunity in the face of serious reasons for considering that the applicant for refugee status has committed an Article 1F crime or act to other states, whether that be through a fruitless search for diplomatic assurances, rendition or the “long dark night of limbo” that the failed refugee presently faces.

³⁵ 75 UNTS 31-417 and 1125 UNTS 3-608.

³⁶ See *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*; *R v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)* [1999] 2 WLR 827; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Judgment of 20 July 2012.

³⁷ Gilbert and Rüsçh, above note 26.