

CONTEMPORARY PROBLEMS OF EXTRADITION: HUMAN RIGHTS, GROUNDS FOR REFUSAL AND THE PRINCIPLE *AUT DEDERE AUT JUDICARE*

*Michael Plachta**

I. EXAMINATION OF HUMAN RIGHTS IN THE CONTEXT OF EXTRADITION

The growth and expansion of the human rights concept have inevitably led it to cover the vast area of international cooperation in criminal matters whose most renowned form, extradition, has been for centuries dominated by considerations and concerns deeply rooted in state interests, such as sovereignty, maintaining power and domestic order, keeping external political alliances, etc. Human rights have been granted protection only in so far as that would correspond with these stated priorities. The human rights movement with its unequivocal emphasis on their protection as such, has changed that perspective.

This development coincided with the tendency towards strengthening the position of individuals through the recognition of their personality in international law, albeit in a very limited scope and yet still contested by some authorities, and acknowledgment that they should have their say in international matters involving their interests. Stipulations of recent multilateral conventions regarding the rule of speciality illustrate this tendency. One example can be found in the 1995 Convention on Simplified Extradition Procedure, elaborated within the European Union.¹

Since the mutual relationship between extradition and human rights has raised a

lot of interest² recently which, in turn, produced a number of publications on this subject,³ this paper offers some general comments which may become a “food for thought” and a basis for further discussion.

Mutual relationships between human rights and extradition are often characterized as a “tension” between protective and cooperative functions of this form of international legal assistance. Generally, this problem can be approached and viewed from three perspectives. First, these relationships can be described in the

¹ *Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union*, 10 March 1995, O.J. 30.03.1995, No. C.78/1.

² In the eighties, the problem of extradition and human rights was discussed by the Institute of International Law at its Dijon session which adopted a resolution, following a report submitted by K. Doehring, 60 *Yearbook of the Institute of International Law* 211, 306 (1983). In the nineties, this problem was a subject of a conference held by the International Association of Penal Law in Rio de Janeiro in 1994, 41 *Revue internationale de droit pénal* 67 (1995). In the most recent years, the International Law Association has devoted much of its attention to this problem, producing three reports elaborated by Ch. Van den Wyngaert and J. Dugard and adopting three resolutions. See Report of the 66th Conference of the International Law Association (Buenos Aires, 1994), 4, 142; Report of the 67th Conference of the International Law Association (Helsinki, 1996), 15, 214; Report of the 68th Conference of the International Law Association (Taipei, 1998).

* Gdansk University, Faculty of Law, First Vice-Dean, Chair of Criminal Procedure, Poland

“rule-exception” terms. Second, it could be argued that only one side sets the goal or the objective while the other has to yield by making necessary concessions. One of the issues that would have to be resolved here refers to the starting point in this analysis: should it be the needs of law enforcement or the protection of human rights? Third, and the most appropriate, the coexistence between the interests, needs and values involved in the international cooperation in criminal matters, on the one hand, and the protection of human rights, on the other, should be sought and based on a reasonable compromise which would avoid the “critical point” beyond which human rights become unbalanced and, therefore, constitute an obstacle to an effective cooperation in the fight against crime.

Reaching a compromise is a difficult task, for it requires recognizing, taking into due consideration, assessing and weighing

³ See e.g. J. Dugard, Ch. Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AJIL 1 87 (1998); Ch. Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandoras Box?*, 39 International and Comparative Law Quarterly 757 (1990); O. Lagodny, S. Reisner, *Extradition Treaties, Human Rights and “Emergency Brake”-Judgments: A comparative European Survey*, 2 Finnish Yearbook of International Law 237 (1994); O. Lagodny, W. Schomburg, *International Cooperation in Criminal Matters and Rights of the Individual from a German Perspective*, 2 European Journal of Crime, Criminal Law and Criminal Justice 379 (1994); A.H.J. Swart, *Human Rights and the Abolition of Traditional Principles*, in: A. Eser, O. Lagodny (eds.) *Principles and Procedures for a new Transnational Criminal Law* 505 (1992); G. Gilbert, *Aspects of Extradition Law* 79-93 (1991); C.H.W. Gane, *Human Rights and International Cooperation in Criminal Matters*, in: P.J. Cullen and W.C. Gilmore (eds) *Crime Sans Frontieres* 186 (1998).

many various factors and components. The process of balancing all the interests involved should be carried out on two levels: first, human rights *versus* needs of law enforcement and international cooperation; second, human rights of the requested person (fugitive) *versus* human rights of others (and society).

In addressing and evaluating the relevancy of human rights in the context of extradition, two criteria could be employed. One would emphasize the nature of a specific right as vital or necessary. This approach requires sorting out all human rights in order to “designate” the appropriate ones. It is here that the concept of “fundamental human rights” has emerged and is gaining a widespread acceptance. This concept is based on the understanding that out of all human rights a group has been recognized as non-derogable in all universal and regional instruments and, therefore, has to be granted protection the specificity of extradition notwithstanding. An obvious disadvantage of applying this criterion is that it offers a very restrictive scope of human rights which are covered under the notion of “fundamental human rights”. At present, there are only four such rights which are regarded as non-derogable: the right to life; the prohibition on torture and other forms of cruel, inhuman and degrading treatment and punishment; the prohibition on slavery; and freedom from *ex post facto* or retroactive criminal laws.

The second criterion points to the scope, degree and severity of the violation rather than the nature of the right. By emphasizing the threshold, this approach indicates that controlling is not the right as such but the way it was, or likely to be, violated. There seems to be a general agreement that this threshold must be sufficiently high to justify the refusal of the extradition request. Such standard was

elaborated by the European Court of Human Rights in its seminal judgment in the *Soering* case where the Court held that the United Kingdom, acting as the requested state, must have not extradited a fugitive “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”.⁴

The “real risk” test was followed by the UN Human Rights Committee in *Ng v. Canada*.⁵ Also the national courts seem to be going along the similar lines when they ground the refusal of extradition on the notions of a “blatant unjust”, “violation to the principles of fundamental justice”, “shock to the conscious of Jurists”, offensive to the conceptions of “ordre public”, “gross violation”, “flagrant breach”, etc. An appropriate scrutiny is called for by the recommendations adopted by both the International Law Association at its Taipei Conference in 1998 and the participants of the Oxford Conference on International Cooperation in Criminal Matters, convened by the Commonwealth Secretariat and held in 1998. Both documents propose that extradition be refused if there is substantial evidence that if a fugitive were returned there is a real risk of a serious violation of human rights. The “real risk” test is, therefore, qualified and combined with the requirement of a “serious violation”.

Besides “fundamental human rights”, there is another category which raises a difficult question: are the fair trial rights relevant and applicable to extradition, and if so, which ones and to what extent? This

problem should be discussed in two separate contexts as it generates different issues when the application of the right to fair trial is analyzed from the point of view of the requesting state and the requested state. In the context of the former, two situations (or scenarios) must be distinguished depending on whether there has been an actual violation of fair trial rights in the proceedings that have led to the conviction and sentence, or there is merely a potential for such a violation. The following flowchart represent an attempt to point out and illustrate major problems involved in the process of examination as well its methodology.

FLOWCHART

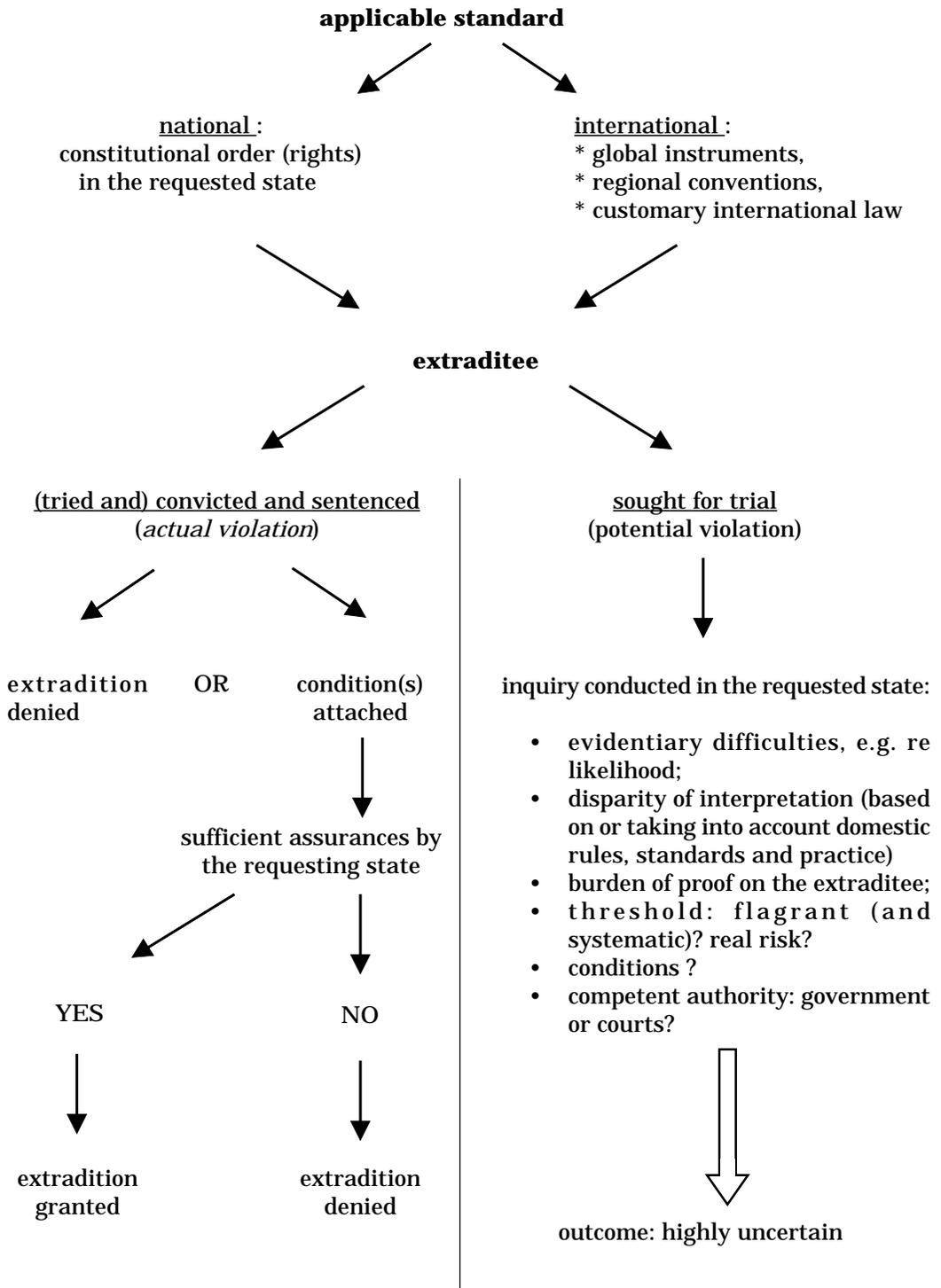
The questions raised in the context of the requested state are different. They relate to the nature of the extradition proceedings carried out by the competent authorities of that country. The disparity of domestic legislation and state practice is striking. The solutions adopted in various parts of the world range from purely administrative procedure, judicial or mixed procedures, criminal proceedings to the procedure *sui generis*. Given such a disparity it does not seem advisable or feasible to propose a uniform procedural and organizational system that would be acceptable to all states. Instead, efforts should concentrate the elaboration of a list of “core fair trial rights” that must be guaranteed to the *extraditurus* by the requested state no matter which procedural system it has adopted. Although the International Covenant of Civil and Political Rights (Article 14) and the European Convention on Human Rights (Article 6) might offer a good “starting point” an examination should not stop there: the rights embodied therein have to be tailored to the specific nature and needs of extradition.

⁴ *Soering v. United Kingdom*, E.C.H.R. Series A, No. 161 (1989); 28 ILM 1063 (1989).

⁵ *Ng v. Canada*, H.R.C., Communication No. 469/1991, 5 November 1993, 98 ILR 479 (1994).

114TH INTERNATIONAL TRAINING COURSE
VISITING EXPERTS' PAPERS

Flowchart: *examination of a fair trial objection to extradition*



II. GROUNDS FOR REFUSAL OF EXTRADITION: A CRUCIAL AND YET CONTENTIOUS ISSUE

A. Criteria for the classification of grounds for refusal of extradition

1. Binding Force:

- A. Mandatory,
- B. Optional,

2. Source:

- A. International law:
 - 1. treaty and convention stipulations,
 - 2. customary norms,
- B. Domestic legislation:
 - 1. constitution,
 - 2. statutes,
- C. Jurisprudence of the judiciary:
 - 1. domestic courts,
 - 2. international tribunals,

3. Subject Matter:

- A. Nature of the offence:
 - 1. political,
 - 2. military,
 - 3. fiscal,
- B. Requested person:
 - 1. nationality,
 - 2. immunity (under):
 - a) international law,
 - b) doctrine of state,
 - c) domestic statutory or case law,
 - 3. refugee status,
 - 4. humanitarian considerations,
 - 5. discriminatory treatment,
- C. Obstacles to prosecution or punishment:
 - 1. substantive:
 - a) principle of legality (*nullum crimen sine lege*, non-retroactivity),
 - b) statute of limitation (prescription),
 - c) other,

2. procedural

- a) *ad hoc* or extraordinary tribunal,
- b) trial (judgment) *in absentia*,
- c) *res judicata* (*ne bis in idem*, double jeopardy):
 - (i) final judgment in the requested state,
 - (ii) final judgment in the third state,
- d) *lis pendens* (pending prosecution),
- e) declining to prosecute,
- f) amnesty and pardon,
- g) lapse of time (unreasonable delay),
- h) immunity under:
 - (i) international law,
 - (ii) doctrine of state,
 - (iii) domestic statutory or case law,
- i) other,

[Note: obstacles under “a” and “b”—extradition-specific, obstacles under “c” through “i” — general.]

D. Punishment:

- 1. death penalty,
- 2. other sanctions,

E. Jurisdiction:

- 1. concurrent jurisdiction,
- 2. extraterritorial jurisdiction,

F. Human rights:

- 1. prohibition of cruel, inhuman or degrading treatment or punishment,
- 2. other:
 - a) direct application of international instruments,
 - b) indirect application - *via* domestic legislation,

4. State's Interests Involved:

- A. Rooted predominantly in the requested state:
 - 1. nature of the offence,
 - 2. requested person,
 - 3. *lis pendens* (pending prosecution),
 - 4. declining to prosecute,
 - 5. amnesty and pardon,
 - 6. immunity under domestic statutory or case law,
- B. Rooted predominantly in the requesting state:
 - 1. *ad hoc* or extraordinary tribunal,
 - 2. trial (judgment) *in absentia*,
 - 3. punishment,
 - 4. human rights,
 - 5. lapse of time (unreasonable delay),
- C. "Neutral" (or any of the states involved):
 - 1. statute of limitation (lapse of time),
 - 2. *res judicata* (*ne bis in idem*, double jeopardy),
 - 3. immunity under:
 - a) international law,
 - b) doctrine of state,

5. Rationale :

- A. Mistrust among states and the lack of confidence in one another's justice system,
- B. Political considerations,
- C. International undertakings of a state,
- D. Protection of human rights,
- E. Sovereignty,
- F. Tradition,
- G. Notions of fundamental justice and fairness embodied in the domestic legal system,
- H. Discrepancies between legal systems.

B. Comments on the grounds for refusal of extradition

Admittedly, both the size of the catalogue and the length of the list of the grounds for

refusal of extradition are impressive. Not only have they grown significantly over the last hundred years but, more importantly, still have a considerable potential for further growth (refer to section III of the Chart: C.1 .c, C.2.g, D.2, F.2). This tendency worries many government officials and people directly involved in the extradition process who fear that, if upheld and strengthened, the continuous expansion of defences, exceptions, exemptions, and exclusions may, in the long run, seriously undermine this mechanism and frustrate efforts aimed at bringing fugitive offenders to justice. Besides, the grounds for refusal are a "double dulled sword": while it is rightly argued that their existence is a *conditio sine qua non* for each and every form of international cooperation in criminal matters because they give an assurance to the states involved that their vital interests will be respected, at the same time, it must not be ignored that frequent or, viewed from the perspective of the requesting state, unwarranted resort to refusal may have adverse effects on international relationships. Undeniably, the longer the list of grounds for refusal, the weaker the extradition may become.

To prevent the deterioration of the mechanism of international rendition of offenders and to strengthen its effectiveness, one of the available options is to improve this process itself through the optimization of its treaty and statutory regulation. One way to proceed would be to downsize the catalogue of grounds for refusal, or at least, to stop or slow down the process of its further growth. However, since the possibilities for improvement in this way are naturally limited the resources have to be sought elsewhere. This is where the principle *aut dedere aut judicare* comes into play as an alternative solution. The properly designed mechanism for "*judicare*" may become an effective countermeasure that will, to a

certain degree, compensate for the expansionist approach towards the grounds for refusal.

It must be made clear that the chart does not cover all situations where the request submitted for extradition is denied. It is limited to the categories which, by way of tradition and linguistic convention falls under the “grounds for refusal”.⁶ In addition to them, there are all the conditions and requirements pertaining, e.g. to the definition of an extraditable offence, which, if not met or fulfilled, also result in the request being denied.

The first criterion used in the classification, the binding force of a particular ground for refusal, is of utmost importance for the states involved in the extradition process, especially for the requested state. In countries where the courts have been empowered to inquire into the legal admissibility of the surrender, the contents of the catalogue for mandatory refusal is the most valuable guide, for it delimits the scope of situations where the court will issue a negative opinion regarding extradition. It is then only logical that the executive organ authorized to make the final decision is bound by this kind of court’s ruling which says that the extradition is not (legally) allowed.

However, this classification presents little value and help for those whose efforts focus on modifying and improving the treaty and domestic regulations in this area. Shuffling the grounds for refusal between the two catalogues back and forth is not very promising, nor does it bear any valuable fruits, especially in terms of common acceptance of a particular solution; therefore, we have to reach deeper

into the problem and examine the nature and meaning of each ground, irrespective of legal consequences it produces.

To carry out this task successfully, we have to start from elaborating distinct categories that could accommodate all of the existing (and potential) grounds for refusal. Section III of the Chart raises a number of problems, questions and doubts. For example, are all these categories fully disjunctive, i.e. do they not overlap? Should “human rights” be, as they appear in the chart, placed separately, or — as some authors maintain⁷ — no separate-category is needed as they can, and should, be accommodated in other categories, most notably under the “obstacles to prosecution and punishment”? Why are some categories left open (C.1.c C.2.g, D.2, F.2)? Two reasons: first, the author did not have an opportunity to conduct a full-scale comparative analysis of all international treaties and domestic legislation, otherwise chances are that these blank spaces would have been filled in; second, the author sees them as a “potential for growth”.

Section IV represents yet another attempt aimed at examining and analyzing this problem. If we consider extradition as a process based on bipartite relationship between the requesting state and the requested state, then the question arises concerning the side on which the obstacle to which the particular ground for refusal relates is located. When the requested state refuses to surrender the person sought, does it so because the real problem lies within its borders and its own jurisdiction, or, maybe, the invoked ground for refusal points to the requesting state? While seeking answers to these questions, the distinction was made between grounds

⁶ A.H.J. Swart, *Refusal of Extradition and the United Nations Model Treaty on Extradition*, 23 Netherlands Yearbook of Int’l L. 175 (1992).

⁷ See e.g. M. Ch. Bassiouni, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 496 (3rd ed. 1996).

114TH INTERNATIONAL TRAINING COURSE
VISITING EXPERTS' PAPERS

for refusal which are based on circumstances for which the responsibility are borne predominantly by the requested state and those which fall predominantly within the realm of the requesting state. The third category was also distinguished as there are a few instances where the ground for refusal, as defined in general and abstract terms, is "neutral" in the sense that it there is not an inseparable link between the underlying obstacle and only one of the states concerned. An analysis carried out along these lines should generate further arguments in favor of mandatory or optional nature of some grounds for refusal. It should also contribute to the elaboration of a more efficient mechanism based on the principle *aut dedere aut judicare* by indicating where it may be reasonable to expect from the requested state to proceed with "*judicare*" when its authorities deny the extradition request.

An attempt was also made to get to the heart (or roots) of the problem by asking the question: WHY does the requested state deny extradition when its executive authority invokes this or that ground for refusal? This question has nothing to do with the problem of legal and factual justification of the negative decision in any given case. Nor does it imply any sort of assessment or evaluation of the propriety of the refusal. Rather, it suggests that it may be more instructive to move this inquiry further back to see why that particular ground for refusal was included in a treaty or domestic law in the first place. Therefore, when it comes to the application of that legislative enactment or treaty stipulation in practice the rationale behind it in many cases either is not fully realized, or lies somewhere in the "shadow". It is this author's strong belief that only by bringing the true motives and reasons to light can we challenge them, and only by challenging them, better still removing

some of them, can we make any meaningful changes within the framework of the grounds for refusal possible, thereby modernizing and re-shaping the existing system of international extradition. The proposed inquiry does not necessarily have to confirm the *status quo*; instead, it may indicate either that the rationale, although well founded and valid in the past (e.g. in the 19th century), has out-lived, and is not sustainable today as completely incompatible with the evolved international relationships, or, conversely, that the need has emerged calling for new exceptions and exemptions.

Section V of the Chart summarizes the results of the preliminary investigation into this problem. The classification based upon the rationale behind the grounds for refusal is far from perfect, and the resulting picture is not as clear-cut as in the case of other criteria. Several factors have contributed to this. First, the grounds for refusal usually are not analyzed from this perspective; its examination is carried out in legal terms, and is limited to treaty and/or legislative regulation. Second, the real significance and role of the rationale for refusal are downplayed, if not completely ignored, by the governments and their authorities involved in the process of extradition. Third, since no inquiry into these matters is being made as irrelevant to the rendition it is not an easy task to "translate" each and every category of rationale into one (and only one) ground for refusal, and *vice versa*.

The mutual relationships between the grounds for refusal and the rationale are somewhat "muddled" due to the fact that there does not exist a logical link between them, the result being that the categories of rationale do not have their specific counterparts within the grounds for refusal which could be easily identified and established by way of necessity. The

opposite is true: a ground for refusal may be based on more than just one rationale and, based on one category of rationale, more than one ground for refusal may be invoked. For example, the political offence exception (section III, A.1) may be rooted in at least the following categories of rationale (section V): mistrust among states and the lack of confidence in one another's justice system (A), political considerations (B), and notions of fundamental justice and fairness embodied in the domestic legal system (of the requested state)(G). Similarly, the mistrust and the lack of confidence (section V, A) may result in refusing extradition on one of the many grounds (section III), such as nationality of the requested person (B.1), discriminatory treatment (B.5), some procedural obstacles to prosecution (C.2), and the protection of human rights (F).

It is submitted that this rather unexplored territory should become a subject of further and more detailed studies. A report from such an analysis, especially when drafted in a comprehensible language and formulated in practical terms, may constitute a much more effective tool that could be used to convince both the government officials and the politicians, most notably the members of the national parliaments, that, possibly, the time has come to change their approach to and their way of thinking about extradition and the grounds for refusal thereof. Most importantly, such a study should contribute to the common understanding that the so-called traditional grounds for refusal, based on the rationale which itself is rooted in the "old days" concepts and notions, may be preserved and accommodated insofar as they are compatible with the modern approach to extradition.

III. THE PRINCIPLE *AUT DEDERE AUT JUDICARE*

A. Present status of the principle *aut dedere aut judicare* under international law

If the possibility of an offender's impunity is recognized as the most serious danger caused by the practice of non-extradition of nationals, then from the point of view of criminal justice it should not matter in the territory of which state he is prosecuted and punished as long as the justice is done. This was the underlying idea of the maxim *aut dedere aut punire* as it was originally formulated by Hugo Grotius in 1625:

"The state in which he who has been found guilty dwells ought to do one of two things. When appealed to, it should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal. This latter course is rendition, a procedure more frequently mentioned in historical narratives (...) All these examples nevertheless must be interpreted in the sense that a people or king is not absolutely bound to surrender a culprit, but, as we have said, either to surrender or to punish him".⁸

When interpreting these words today, it must be remembered that the scope of application of this maxim was limited to "crimes which in some way affect human society" as a whole, and which in contemporary language can be identified, to a certain extent, as international crimes.⁹ Moreover, the rule presupposed an existence of a "triggering mechanism",

⁸ H. GROTIUS, *DE IURE BELLI AC PACIS*, Book II, Chapter XXI, para. III-1,2, IV-1,3; *transl.* F. W. Kelsy (ed.), *THE CLASSICS OF INTERNATIONAL LAW* 526-529 (1925).

or “appeal”, which today would be translated as an extradition request. Finally, while in the original wording an alternative to *dedere* was *punire*, it cannot be held that Grotius really meant exacting punishment without first establishing guilt.¹⁰ The accused fugitive may turn out to be innocent. Thus, the most that can rightly be demanded from the requested state in lieu of extradition is to put him on trial, or prosecute him (*judicare*).¹¹

Under the aegis of this maxim, instead of it being a last resort if extradition is refused on the grounds of nationality of the fugitive offender, prosecution and trial in the requested state would be elevated to a more pro-active status in international criminal law. At present, the prevailing view holds that extradition, or some variant thereof, is the exclusive way of bringing fugitive offenders to justice. It is accepted that the principal aim must be to prosecute

the fugitive and that international public order requires international cooperation and mutual assistance, then a more positive acceptance of trial in the extraditee's home country is necessary. To determine the effectiveness of the system based on *aut dedere aut judicare* with respect to the extradition of nationals, the following three problems have to be addressed: first, the status and scope of application of this principle under international law; second, the hierarchy among the options embodied in this rule, provided that the requested state has a choice; third, practical difficulties in exercising *judicare*.

Despite persuasive arguments advanced by leading authorities in international criminal law to the contrary,¹² the principle *aut dedere aut judicare* has not gained the status of a norm of international customary law. In order to qualify as a customary rule of international law binding on the international community and to satisfy the requirements of Article 38, paragraph 1 (b) of the Statute of the International Court of Justice concerning sources of international law, two elements have to be proved: (1) a material element manifested by a general practice, and (2) *opinio juris sive necessitatis*, that is the conviction that the practice is “accepted as law”. However, contemporary practice furnishes far from consistent evidence of the actual existence of a general obligation to extradite or prosecute with respect to international offences.¹³ The most that can be said about *aut dedere aut judicare* is that it constitutes a “general principle of international law”,¹⁴

⁹ Generally, two methods have been proposed to define an international crime. One is to use a concise and general definition, the other is to employ a set of criteria (“penal characteristics”) for identifying such offences. The former is advocated by E.M. Wise, *International Crimes and Domestic Criminal Law*, 38 DePaul L. R. 923-933 (1989), while the latter is supported by M. C. BASSIOUNI, A DRAFT INTERNATIONAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT 21-65 (1987).

¹⁰ In fact, GROTIUS himself seems to have been cognizant of the principle of fundamental justice, for he added the following note: “For surrender should be preceded by judicial investigation; it is not fitting ‘to give up those who have not been tried’”. GROTIUS, *supra* note 144. Book II, Chapter XXI, para. IV(1).

¹¹ M.C. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5(3rd ed. 1996): G. Guillaume, *Terrorisme et droit international*, 215 Hague Rec. 287, 371 (1989-III): “the true option which is open to states is necessarily *aut dedere aut prosequi*”.

¹² M.C. BASSIOUNI & E.M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 22-26, 51-53 (1996).

¹³ J.J. LAMBERT, *TERRORISM AND HOSTAGES IN INTERNATIONAL LAW* 190 (1990).

¹⁴ BASSIOUNI, *EXTRADITION*, *supra* note 7, at 9.

although some authors go further by arguing that it belongs to the *jus cogens* norms.¹⁵ The latter proposal would mean that this principle is an overriding or “peremptory” norm which cannot be set aside by treaty. The consequences of such a proposal might be quite dramatic: if every state under any circumstances had this alternative obligation (either to surrender or to prosecute) treaty stipulations notwithstanding, that would invalidate both international instruments providing exclusively for “*dedere*” and treaties providing for the extradition of nationals.¹⁶

In his dissenting opinion in the *Lockerbie* case, Judge Weeramantry in his characterization of this principle as a “rule of customary international law” seems to have equated it with the proposition that a state is entitled “to try its own citizens in the absence of an extradition treaty”.¹⁷ In this sense, the principle is “an important facet of a State’s sovereignty over its nationals”.¹⁸ However, the proposition that there is no duty, absent treaty, to extradite nationals whom a state is prepared to try itself can be relevant only in the face of an obligation to surrender. But, as the practice of contemporary international law demonstrates, there is no duty to extradite in the absence of treaty.¹⁹

The uncertainties surrounding the status of this principle under international law directly affect both the scope of its application and its effectiveness. Practically, the alternative obligation of states either to surrender or to prosecute exists insofar as has been expressly spelled out in an international instrument or, only exceptionally, in the domestic legislation. It has been a standard policy to have the principle *aut dedere aut judicare* included in general extradition treaties, either bilateral or multilateral,²⁰ especially with respect to the refusal of surrender of nationals.²¹ In addition, such a stipulation appears in almost all conventions aimed at defining international offences as well as securing international cooperation in the suppression of such acts.²² It is feared that an unrestricted, or absolute, principle *aut dedere aut judicare* might imply that all states are obliged to prosecute any offence committed in any place by any person found in their territory, unless an offender is extradited.²³

All the difficulties concerning the scope of application and the contents of an obligation envisaged by various formulas in which this principle appears notwithstanding, the validity of the system based on *aut dedere aut judicare* has been confirmed not only in numerous international instruments, but also in domestic jurisprudence in many states.

¹⁵ BASSIOUNI & WISE, *supra* note 12, at 25.

¹⁶ E.M. Wise, *The Obligation to Extradite or Prosecute*, 27 Israel L. R. 268, 280 (1993).

¹⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992. I. C. J. Reports 1992*, 50 at 51.

¹⁸ *Ibid.*, at 69.

¹⁹ H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 188 (5th ed. 1916).

²⁰ I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 116-117, 124-125 (1971).

²¹ See the formula recommended for inclusion in bilateral treaties which appears in Article 4 of the United Nations Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A Res/45/116 (1991).

²² For a list of such conventions, see BASSIOUNI & WISE, *supra* note 12, at 75-287.

²³ See e.g. N. Keijzer, *Aut dedere aut judicare*, in *NETHERLANDS REPORTS TO THE XIth INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 412 (H.U. JESSURUN D’OLIVEIRA ed. 1982).

For example, the Austrian Supreme Court held that where the extradition of a national has been refused “the right to prosecute must, as a general rule and without prejudice to the continued existence of the right to prosecute of the State in whose territory the offence has been committed, be offered to the home State of the offender”.²⁴ On some occasions, the principle *aut dedere aut judicare* is relied upon to demonstrate that it works “both ways”. In the Pesachovitz case where an extradition request was submitted to the Israeli authorities under the European Convention on Extradition, the court assuming that Israel is obligated to do one of two things: either to extradite Pesachovitz or to punish him²⁵ decided to order the extradition the fugitive on the grounds that prosecution was precluded under Israeli law.²⁶

B. Hierarchy of obligations or a matter of discretion?

One of the most intriguing and delicate questions in the context of the principle *aut dedere aut judicare* is whether both alternative obligations embodied in this maxim are placed on equal footing. If that was the case, then the requested state, that is, the *forum deprehensionis*, would have a completely free choice as to which alternative it will elect to pursue. On the other hand, it could be argued that *dedere* and *judicare* are not really equal alternatives to the effect that the duty to extradite should be regarded as primary,

with the duty to prosecute arising only if the domestic legislation contains a bar to extradition. A corollary of the latter proposition is a view that the state *loci delicti commissi* has the primary responsibility to prosecute and punish the offender, whereas the prosecuting authorities and courts of the custody state, i.e. the country in whose territory an offender has been found, have only a secondary duty. Such a conclusion could be based on several treaty stipulations and domestic laws making *judicare* conditional on: (1) the submission of the extradition request; (2) the refusal of surrender, and (3) the requesting state’s specific demand that the case be submitted to the competent authorities of the requested state for the purpose of prosecution.

The rationale for an *a priori* hierarchy of the alternative obligations embodied in the principle *aut dedere aut judicare* with extradition being preferred over prosecution, seems to be grounded in three considerations: first, the state where the offence was committed, has the primary interest in seeing the offender brought to justice; second, in most cases, mainly due to the evidentiary issues, the *forum delicti commissi* is the most convenient place for investigation, prosecution and trial; third, there may be cases where prosecution in the *forum deprehensionis* will appear to be ineffective or unfair. Although it is argued that “whenever possible, extradition should take priority, at least in cases in which the requesting state asserts territorial jurisdiction over the offence”,²⁷ the formula containing the principle *aut dedere aut judicare* that can be found in almost all multilateral conventions prescribing international crimes as extradition treaties, is formulated in such language that does not seem to accord any special priority to extradition. A purely theoretical

²⁴ *Service of Summons in Criminal Proceedings (Austria Case)*, 21 February 1961, 38 I.L.R. 133, Ö.J.Z. 95 (1961) at 134

²⁵ European Convention on Extradition, 1957, E.T.S. No. 24, Article 6.

²⁶ Criminal Appeal 308/75, Supreme Court Decision of 21 March 1977, Israeli Law Reports (1977), vol. 31, II, p.449. See also C. Shachor-Landau, *Extra-territorial Penal Jurisdiction and Extradition*, 29 Int'l & Comp. L. Quarterly 274-279 (1980).

²⁷ BASSIOUNI & WISE, *supra* note 12, at 57.

attempt based on an interpretative distinction between “alternative” or “disjunctive” and “co-existent” obligation to prosecute or extradite does not seem to be successful in this context either.²⁸

Thus, it is submitted that, absent treaty stipulation to the contrary, the present status of this principle does not warrant an assertion that *judicare* is “subordinated” to *dedere* to the effect that the requested state’s first obligation is to deliver up the offender sought, and that it is allowed to institute its own criminal proceedings only after it has showed that extradition is prohibited on legal grounds.²⁹ However, one qualification has to be put on this proposition: efforts must be made to solve a problem that comes up in a situation where an offender holds the citizenship of the requested state, while at the same time, the investigation, prosecution and trial in the territory of that state appears to be not merely inefficient, but simply impossible for practical, evidentiary and political reasons.

In the henceforth international practice, the only attempt to effectively end the ensuing stalemate (and the total frustration to criminal justice as well) has been made in a concerted action by the governments of the United States and the United Kingdom in the *Lockerbie* case. Frustrated by Libya’s refusal to extradite its two nationals suspected of having blown up Pan Am Flight 103 over Lockerbie, Scotland, and determined not to submit all the evidence that have been gathered as a result of the three-year extensive

investigation, the United States and the United Kingdom (joined by France) presented the case before the UN Security Council and the General Assembly.³⁰ In January and March 1992, the Security Council adopted two resolutions in this matter: the first was urging Libya to respond fully and effectively to the requests³¹ of the United States, the United Kingdom and France,³² while the second imposed economic sanctions on Libya.³³ Libya brought the case before the International Court of Justice seeking provisional measures to prevent the United States or the United Kingdom from taking any action to coerce Libya into handing over the two suspects or otherwise prejudice the rights claimed by that country.³⁴ On April 14, 1992, the Court declined (by a vote of 11 to 5) to indicate

³¹ The requests consisted of the following demands: to

- surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials;
- disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
- pay appropriate compensation.” See , U.N. Doc. S/23308 (1991).

³² S.C. Res. 731 (1992) 21 Jan. 1992.

³³ S.C. Res. 748 (1992) 31 March 1992. In 1993, the Security Council adopted a further resolution extending previously imposed sanctions on Libya. See S.C. Res. 883 (1993) 11 Nov. 1993.

³⁴ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), provisional Measures, Order of 14 April 1992*, I.C.J. Reports 1992 at 114. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*), *provisional Measures, Order of 14 April 1992*, I.C.J. Reports 1992 at 3.

²⁸ BASSIOUNI, EXTRADITION, *supra* note 7, at 10.

²⁹ In essence, this was the position Libya held in the *Lockerbie* case. See e.g. Letter dated 18 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, *reprinted* in 31 I.L.M. 728-729 (1992).

³⁰ See UN Doc. A/46/825; S/23306; 31 Dec.1991. 75

114TH INTERNATIONAL TRAINING COURSE
VISITING EXPERTS' PAPERS

the provisional measures thereby confirming the validity and binding force of Resolution 748.³⁵ The following three interpretations of the of the U.N. Security Council involvement in the *Lockerbie* case are possible:

- (a) Libya failed to demonstrate convincingly that it is capable of fulfilling the obligation which it claimed under the Montreal Convention, that is, to make a good faith effort to prosecute the crimes itself.
- (b) The resolutions signal a substantial loss of faith in the Montreal Convention's authority and efficacy in bringing the offenders to justice.
- (c) The Security Council offered an extraordinary remedy which, while upholding the existing extradition system, at the same time, supplemented it with the recourse to that organ for intervention in exceptional situations, especially where the traditional treaty model proves unworkable.

The latter seems to be the most persuasive. The Court's ruling means that under Article 103 of the U.N. Charter the Resolution 748 takes precedence over any other international agreement, including the Montreal Convention. In one sense, the genuine choice between extradition and prosecution has been brought down to an alternative: extradite or extradite. On the other hand, given the U.N. Charter's Chapter VII exceptions to Article 2(7), the security Council has the authority to determine whether a situation is so severe that it constitutes a threat to the peace, a breach of the peace, or an act of aggression. Therefore, the Security Council has the authority to take up such matters. In order to reconcile both the Security Council

resolutions and the decision of the International Court of Justice in the *Lockerbie* case, it was suggested that the international extradition law has not been violated or altered because in exceptional cases, "the law merely operates at a different level through the internationally sanctioned ways and means of the United Nations".³⁶

It is doubtful, however, whether *Lockerbie* could and should be viewed as the most appropriate mechanism designed to end the stand-off in other similar cases. Rather, it is submitted that in seeking the solution, a rigid approach should be abandoned in favour of a more flexible one which, in turn, should be based on modifications to *judicare*, so that it can constitute a viable option which, more importantly, would be acceptable also to the requesting state. Such a system, called "substituting prosecution", was proposed by the Institute of International Law in 1981:

1. "The system of substituting prosecution should be strengthened and amplified.
2. The system of substituting prosecution should be completed by stipulating detailed methods of legal assistance.
3. When governments acts in substituting prosecution, the interested governments-and in particular the government of the territory in which the offence was committed-should be entitled to send observers to the trial unless serious grounds, in particular with respect to the preservation of State security, would justify their non-admittance.
4. In cases of substituting prosecution, if the tribunal concerned determines that

³⁵ *Ibidem* para. 39.

³⁶ C.C. Joyner & W.P. Rothbaum, *Libya and the Aerial Incident at Lockerbie; What Lessons for International Extradition Law?*, 14 Mich. J. Int'l L. 222, 256 (1993).

the accused is guilty, an appropriate penalty should be imposed, similar to that which would be applied to nationals in a cognate case".³⁷

Instead of having a fixed hierarchy of alternative obligations embodied in the principle *aut dedere aut judicare*, it is more desirable to base the decision whether to prosecute, or not to prosecute in the requested country and surrender the person sought, on mutual consultations between the appropriate authorities of the states involved. There may be cases in which it will be preferable for an accused to be tried in a foreign state rather than in his home country. The problem becomes even more delicate where an offence was committed in the territory of both the requesting and the requested states, both of which are, therefore, entitled to claim jurisdiction based on the principle of territoriality. A general and rigid rule of refusing to extradite nationals in such cases would reduce the effectiveness of extradition as a major tool in combatting transnational crime. To allow the particular circumstances of each case being given due consideration in the process of making a decision regarding the principle *aut dedere aut judicare*, one of the Canadian courts suggested that the following factors should be included:

- where was the impact of the offence felt or likely to have been felt;
- which jurisdiction has the greatest interest in prosecuting the offence;
- which police force played the major role in the development of the case;
- which jurisdiction has laid charges;
- which jurisdiction has the most comprehensive case;
- which jurisdiction is ready to proceed

to trial;

- where is the evidence located;
- whether the evidence is mobile;
- the number of accused involved and whether they can be gathered together in one place for trial;
- in what jurisdiction were most of the acts in furtherance of the crime committed;
- the nationality and residence of the accused;
- the severity of the sentence the accused is likely to receive in each jurisdiction.³⁸

Moreover, due regard should be also given to the question as to whether prosecution would be equally effective in the requested state, given its domestic law and international instruments for the cooperation in criminal matters.³⁹

No matter how persuasive and reasonable such recommendations are, they seem to be much easier to follow by the common law countries. It is more than doubtful whether they can become equally attractive and compelling for countries whose domestic legislation has traditionally opposed the idea of extradition of their own nationals. For example, narcotic offences involving Colombians have often been committed in Colombia but the effects of these crimes have been felt in the United States and have constituted crimes under United States law. In such instances the United States may have the greater interest in the prosecution of the crime, especially if the crime did not cause much injury in Colombia. However, it is rather unlikely that this argument is powerful enough to convince the Colombian government and

³⁷ Resolution adopted by the 12th Commission at its session in Dijon. See 59 Institute of Int'l L. Yearbook 176-177 (1981).

³⁸ *Swystun v. United States of America* (1988), 40 C.C.C. (3d) 222, 227-228 (Man. Q.B.).

³⁹ *United States v. Cotroni* (1989), 48 C.C.C. (3d) 193, 194 (S.C.C.).

legislature that they should lift the ban on extradition of nationals.

C. Practicality of prosecution in lieu of extradition

Practical problems in fulfilling its obligation under *judicare* do not necessarily have its source in the lack of good will on the part of the requested state. Rather, the impunity of an offender and the frustration of justice should be viewed as a result of their inability to break with the rule of non-extradition of nationals, on the one hand, and to overcome difficulties inherently involved in prosecuting and punishing offenders for crimes committed abroad, on the other hand. Admittedly, in some instances the requested country may be unwilling or unable, because of legal or other reasons, to prosecute its national whose extradition has been requested by another state. Moreover, even when the requested state institutes criminal proceedings, problems may arise. At the least, the refusal to extradite may strain relations between the requesting and the requested states. Furthermore, the former may believe, and the facts may in some instances support this belief, that the latter will inadequately pursue the prosecution, with the result that the accused will be acquitted or will receive a too lenient sentence.⁴⁰ In 1938, the United States Secretary of State Hull complained that "such punishment as has been inflicted upon nationals of other countries in the own lands for offenses committed in the United States has, in general, been much lighter than the offenses committed appeared to warrant, and in many cases no punishment as all has been inflicted and the trials held have resulted in acquittals"⁴¹. Much earlier, Lewis held that since a government has not substantial interest in punishing crimes committed in the territory of another state, prosecution and trial in such cases will be conducted in a "careless, indifferent and intermittent manner".⁴²

Even where the competent authorities of the requested state have instituted criminal proceedings against the national of that country whose extradition was refused, frequently they cannot to carry them out because to pursue their investigation they need evidence which, obviously, can only be found in the territory of the requesting state where the offence was committed. The latter, however, is either not in a position or unwilling to put such evidence at the disposal of the requested state. Worse still, the problem may not always be satisfactorily corrected through the use of mutual (legal) assistance for it may be precluded on the grounds of *ordre public*, especially where the state seeking such an assistance exercises its own inherent criminal jurisdiction over an offence.⁴³ Even to the extent that seeking evidence abroad is legally possible, that operation creates three types of problems: first, bringing witnesses from distant countries imposes a heavy financial burden on both them and the accused, not to mention serious practical difficulties; second, some evidence are not available at all, such as the viewing of the scene of the

⁴⁰ See M.P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1 Duke J. Comp. & Int'l L. 135, 151-152 (1991).

⁴¹ Secretary of State Hull to Robert W. Rafuse, letter, April 20, 1938, MS. Department of State, file 200.00/893. See 6 WHITEMAN, DIGEST 883. Hull admitted that there may be "the tendency, perhaps natural, to refrain from punishing a fellow countryman for an offense he committed in a distant country and as to which there may be in the minds of his fellow countrymen who pass in judgment upon him a feeling that there may have been extenuating circumstances". *Id.*

⁴² LEWIS, FOREIGN JURISDICTION AND THE EXTRADITION OF CRIMINALS 30 (1859).

⁴³ See P. Wilkitzki, *Inclusion of the principle "aut dedere aut judicare" in the European Convention on Extradition*, in EUROPEAN COMMITTEE ON CRIME PROBLEMS PC-OC 9 (1987).

crime; third, if the evidence were taken abroad the court might have troubles to use them at the trial due to possible procedural restrictions on such evidence. To overcome the latter impediment, the law of evidence would have to be substantially changed, especially in the common law countries.⁴⁴ However, the possibility of such a

“revamping” has met with skepticism⁴⁵ Generally, government declarations and treaty (convention) stipulations notwithstanding, prosecution of nationals in lieu of extradition is viewed as a sort of “second class” criminal proceedings,⁴⁶ although this was not always the case.⁴⁷

IV. APPROACHES TO THE PRINCIPLE *AUT DEDERE AUT JUDICARE*

		"Traditional"		Proposed
		<i>I</i>	<i>II</i>	
Scope of Application	<i>ratione criminis</i> (offences)	limited	unrestricted	unrestricted
	<i>ratione exceptionis</i> (grounds for refusal)	unrestricted	limited to one	limited
Nature of the Stipulation		offence-related (derivative of the gravity and definition of an offence)	nationality-related	grounds-for refusal-related (logical supplement of the duty to extradite)
Applicability		prior state's jurisdiction as a precondition		"self-executing"
Scope of "<i>judicare</i>"		<ul style="list-style-type: none"> • Prosecution • Trial 		<ul style="list-style-type: none"> • prosecution • trial • enforcement of a sanction (<i>aut dedere aut poenam persequi</i>)
Ne bis in idem		no		yes

⁴⁴ For example, in Israel it was proposed that evidence lawfully taken abroad should be accepted as *prima facie* evidence and that the court should not allow the examination of the witnesses for the prosecution, unless the accused had requested that such an examination be held and had established to the satisfaction of the court that it was required in order to prevent a denial of justice. See T. Meron, *Non-extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306*, 13 Is. L. R. 215, 221 (1978).

⁴⁵ See e.g. M.D. Gouldman, *Extradition from Israel*, Michigan Yearbook of Int'l Leg. Studies 173, 198 (1983); Cotroni, *supra* note 39, at 224.

⁴⁶ See E.A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N. Y. U. J. Int'l. L. & Politics. 813, 856 (1993).

A. Traditional approaches

Generally, from the available legislative pronouncements and treaty stipulations, two basic approaches to the principle *aut dedere aut judicare* can be discerned: one is based on an inseparable link between duty to prosecute and the offence as defined in the international instrument while the other relates this duty to the grounds for refusal: only one has been singled out, i.e. the nationality of the requested person, as a relevant and appropriate basis for this obligation. The former can be called the “offence-oriented approach” and the latter the “offender-oriented approach”.

1. “Offence-oriented approach”

The traditional, “offence-oriented”, approach has been widely applied in multilateral conventions prescribing international crimes. Typically, the solution adopted in those instruments consists of two provisions which are of interest here. The chronologically first one either confers a jurisdictional competence on the signatory states to prosecute the respective offence or obliges them to establish such a jurisdiction. The jurisdictional clause is usually followed by a separate stipulation on the principle *aut dedere aut judicare*.

As regards national court jurisdiction, the former provision can be seen as a corollary of the former which establishes the obligation of a state party to extradite or prosecute an individual who is allegedly responsible for the crime defined in the convention. In this regard, the

jurisdictional “component” of this system is intended to secure the possibility for the custodial state to fulfil its obligation to extradite or prosecute by opting for the second alternative with respect to such an individual. This alternative for the custodial state consists of the prosecution of that individual by its competent national authorities in a national court. It is meaningful only to the extent that the courts of the custodial State have the necessary jurisdiction over the crimes set out in the particular instrument to enable that state to opt for the prosecution alternative. Failing such jurisdiction, the custodial state would be forced to accept any request received for extradition which would be contrary to the alternative nature of the obligation to extradite or prosecute under which the custodial state does not have an absolute obligation to grant a request for extradition. Moreover, the alleged offender would elude prosecution in such a situation if the custodial state did not receive any request for extradition which would seriously undermine the fundamental purpose of the *aut dedere aut judicare* principle, namely, to ensure the effective prosecution and punishment of offenders by providing for the residual jurisdiction of the custodial state.

One of the new examples of the “offence-oriented approach” to this principle is represented by the DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, adopted by the International Law Commission at its 48th session in 1996⁴⁸.

⁴⁷ In 1910, the British Foreign Office advised the United States' Ambassador that “according to the experience of His Majesty's Government, the result of the prosecution of foreign subjects by their own Governments in lieu of surrender to this country has been, generally speaking satisfactory”. Foreign Office to Mr. Whitelaw Reid, 25 July 1910, F.O. 372/262.

⁴⁸ Report of the International Law Commission on the work of its 48th session, U.N. G.A. Official Records 51st session (A/51/10) at 14. See also T.L.H. McCormack, G.J. Simpson, *The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 Crim. L. Forum 1 (1994).

Article 9 - Obligation to extradite or prosecute

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

The crimes defined in the Draft Code are: aggression (Article 16), genocide (Article 17), crimes against humanity (Article 18), crimes against United Nations and associated personnel (Article 19), and war crimes (Article 20).

The obligation to prosecute or extradite is imposed on the custodial state in whose territory an alleged offender is present. The custodial state has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that state or by another state which indicates that it is willing to prosecute the case by requesting extradition. The custodial state is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial state has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction.

The custodial state has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial state may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other state or by prosecuting that individual in its

national courts. Article 9 does not give priority to either alternative course of action. The custodial state has discretion to decide whether to transfer the individual to another jurisdiction for trial in response to a request received for extradition or to try the alleged offender in its national courts. The custodial state may fulfil its obligation under the first alternative by granting a request received for extradition and thereby transferring to the requesting state the responsibility for the prosecution of the case. However, the custodial state is not required to grant such a request if it prefers to entrust its own authorities with the prosecution of the case.

This kind of approach to the principle *aut dedere aut judicare* has been adopted in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft⁴⁹ and several international instruments patterned after it. The Convention does not subordinate the duty to prosecute to the requested state's rules of competence regarding the extraterritorial jurisdiction. The obligation to prosecute arises whenever the extradition is not granted:

Article 7

"The Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of the that state".

This mechanism for the implementation of the rule *aut dedere aut judicare* has been replicated in several subsequent

⁴⁹ Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 860 U.N.T.S. 105.

conventions for the suppression of international offences concluded under the auspices of the United Nations or its specialized agencies⁵⁰. The following two variants of the Hague Convention formula can be discerned:

a) the alternative obligation to submit a case for prosecution is subject, where a foreigner is involved, to whether a state has elected to authorize the exercise of extraterritorial jurisdiction⁵¹;

b) the obligation to submit a case for prosecution only arises when a request for extradition has been refused⁵².

2. "Offender-oriented approach"

The other traditional approach the "offender-oriented approach", presupposes that the scope of application of the principle *aut dedere aut judicare* should not be limited to the most serious international crimes; instead it should encompass all extraditable offences. This approach focuses on the situation where the requested state refuses to surrender its own nationals and perceives such a case as extremely frustrating to the whole system of international extradition. To avoid the most blatant abuses whereby that state might take advantage of this exception in order to grant protection

against punishment to its citizens, it is only logical to demand from that state that it institute the criminal proceedings against the requested persons and subject them to its domestic criminal justice system. In this approach, it is not the offence that matters and is decisive - it is the offender himself that is the "triggering element" for the mechanism *aut dedere aut judicare*.

Examples of this approach can be found in both multilateral conventions and bilateral treaties on extradition. The 1957 European Convention on Extradition⁵³ provides one of them. Its Article 6, paragraph 1 (a) confers on the contracting states a right to refuse extradition of their nationals. Consequently, paragraph 2 of this article stipulates that:

"If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request".

Some bilateral treaties also contain provisions to the same effect. For example, Article 44(a) of the 1992 Treaty on Legal Assistance in Criminal Matters, Transfer of Sentenced Persons and Extradition⁵⁴ between Poland and Egypt has been modelled on the European Convention on

⁵⁰ By way of example, the following instruments can be mentioned: Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971, 974 U.N.T.S. 177 (the Montreal Convention); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1973, 1035 U.N.T.S. 167 (the New York Convention); International Convention Against the Taking of Hostages, 1979, 18 I.L.M. 1456 (1979).

⁵¹ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 28 I.L.M. 493 (1989), Article 6, paragraph 9.

⁵² See e.g. the European Convention on the Suppression of Terrorism, 1977, E.T.S. No. 90, Article 7.

⁵³ E.T.S. No. 24. See also Explanatory Report on the European Convention on Extradition, Council of Europe 1969 at 17.

⁵⁴ The Treaty was signed on May 17, 1992, and entered into force on February 20, 1993 (DZ.U. [Journal of Laws, Polish] of 1994, No. 34, Item 129).

Extradition. Also the United Nations Model Treaty on Extradition incorporated a clause formulated along the similar lines⁵⁵.

3. A compromise position

A variant formula has been worked out by drafters of some international conventions which represents a compromise between the two approaches referred to before. The “middle position” takes account of differing views among states on whether the exercising criminal jurisdiction over offences committed abroad is proper, useful, and reasonable, the extradition notwithstanding. The compromise formula allows the states involved to consider and evaluate such factors.

This formula was adopted in the 1929 Convention for the Suppression of Counterfeiting Currency⁵⁶ whose drafters abandoned the rigid clause embodied in the international instruments discussed above under A, and favored a more flexible solution which confers, to a certain extent, a discretion on the requested state with respect of exercising its jurisdiction to prosecute in lieu of extradition. To accommodate both the variety of views and the discretion, two different procedures have been provided for depending on the nationality of the requested person. If that person is a national of the requested state and his status is the only ground for refusal of his surrender, that is, if there are no other obstacles to extradition, Article 8 provides that he “should be punishable” in his home country for an offence committed abroad. On the other hand, the Convention has imposed a slightly diminished burden on the requested state with respect to foreigners.

They “should be punishable” for offences committed outside the borders of the requested state only if it has been established that the domestic law of that country “recognizes as a general rule the principle of prosecution of offences committed abroad” (Article 9). Furthermore, the obligation to prosecute is conditioned on two other circumstances: first, the extradition request has been submitted by another state; second, the grounds for refusal are not offence-related⁵⁷.

B. Proposed approach

The mechanism for the implementation of the principle *aut dedere aut judicare* envisioned by the new approach can be characterized as follows:

1. The scope of application of this principle *ratione criminis* should remain unrestricted to the effect that the duty to prosecute should arise with respect to all extraditable offences.
2. The scope of application *ratione exceptionis* should be limited to certain grounds for refusal of extradition where, after a careful analysis, it is both realistic and reasonable to expect the requested state to institute and conduct criminal proceedings in the case at hand. In making this assessment, two sets of factors have to be taken into account: first, the rationale behind each ground for refusal, especially any political over-or undertones; second, the legislative enactments, most notably the constitution, in the requested state pertaining to the admissibility of the criminal prosecution.

⁵⁵ United Nations Model Treaty on Extradition, G.A. Res. 45/1 1 6, U.N. Doc. A/Res/45/1 16 (1991).

⁵⁶ International Convention for the Suppression of Counterfeiting Currency, April 20, 1929, 112 L.N.T.S. 371.

⁵⁷ Article 9

“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”.

114TH INTERNATIONAL TRAINING COURSE
VISITING EXPERTS' PAPERS

3. While the typical stipulation of this principle rooted in the traditional approach can be seen as a derivative of the gravity and the definition of an offence the new approach postulates that the rule is a logical supplement of the duty to extradite.
4. As opposed to the existing system under which the requested state's criminal jurisdiction and "*judicare*" are treated not only as two separate elements but, more importantly, as the former being a necessary precondition for the latter, the new approach suggests that stipulation of the principle *aut dedere aut judicare* itself constitute sufficient jurisdictional basis for the competent authorities of the requested state to prosecute and punish the offender. In a sense, the proposed mechanism would be similar to the system of the so-called "vicarious administration of Justice"⁵⁸ based on the "principle of representation"⁵⁹.
5. The "*judicare*" option should be interpreted in functional and not strictly legal ("legalistic") terms. Consequently, the meaning of this alternative should not be limited to two stages of the criminal process, i.e. prosecution and trial. The requested state should be allowed to fulfill its obligation under the rule *aut dedere aut judicare* by undertaking to enforce the final sentence imposed on the offender whose extradition was requested. This rule should, therefore, be supplemented by a new clause: *aut dedere aut poenam persequi*⁶⁰.
6. Last but not least, all the efforts towards treaty and legislative regulation of the principle *aut dedere aut judicare* notwithstanding, the rule is at present an "open end concept". A crucial element is missing which would make this mechanism fully operational and, at the same time, considerably contribute to this principle being treated seriously; this is the rule *ne bis in idem* as the most logical consequence of both prosecution and trial (sentence). The inclusion of the protection against double jeopardy in this context⁶¹ is required not only by the need to secure the effectiveness of this system but also, and more importantly, by the considerations of human rights, world public order, and the most fundamental notions of justice. As the Romans used to say: *finis coronat opus*. This "finishing touch" on the principle *aut dedere aut judicare* is overdue⁶².

⁵⁸ See J. Meyer, *The Vicarious Administration of Justice; An Overlooked Basis of Jurisdiction*, 31 Harv. J. Int'l L. 108-116 (1990).

⁵⁹ The basic elements of this principle have been adopted in the 1972 European Convention on the Transfer of Proceedings in Criminal Matters, Articles 2 and 3, E.T.S. No. 73. See also S.Z. Feller, *Jurisdiction Over Offences with a Foreign Element*, in 2 TREATISE ON INTERNATIONAL CRIMINAL LAW 34-37 (BASSIOUNI & NANDA eds. 1973); D. OEHLER, INTERNATIONALES STRAFRECHT 497-518 (2nd ed. 1983).

⁶⁰ See PLACHTA, TRANSFER OF PRISONERS UNDER INTERNATIONAL INSTRUMENTS AND DOMESTIC LEGISLATION. A COMPARATIVE STUDY 191-193 (1993).

⁶¹ Similar proposal was submitted by J.E. Schutte, *Enforcement Measures in International Criminal Law*, 52 Revue internationale de droit pénal 441-453 (1981).

⁶² This author is fully aware that the proposed concept may be considered a “*teoria prematura*” as long as the mistrust persists in the relationships between states, not necessarily limited to the politically, geographically, and culturally distant ones. It is quite clear that, given the lack of confidence in the administration of justice frequently demonstrated by the states involved in the practice of extradition, the non-inclusion of the rule *ne bis in idem* in the principle *aut dedere aut judicare* is treated as an “emergency valve” which may be turned on and off depending on whether or not the requesting state is satisfied with the results of the requested state’s efforts to bring an offender to justice. Also, since on the one hand, the procedures falling under “*judicare*” are governed exclusively by the domestic law of the requested state, and on the other, the striking discrepancies between the national legislation of various countries continue to exist, it is understandable why the governments are extremely unwilling to give up what might be perceived as a “final assurance” that the offender, one way or another, will eventually be punished in terms consistent with the rules and notions of justice as adopted in the country concerned. To include the rule in this system, and then to implement it, would amount to giving up hope.