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MODERN APPLICATION OF THE PRINCIPLE *AUT DEDERE AUT JUDICARE* IN ACTS OF TERRORISM AND TORTURE

The maxim aut dedere aut judicare refers to the obligation of a state either to exercise jurisdiction over a person suspected of certain crime or to extradite the person to a state able and willing to do so or to surrender the person to an international court/tribunal with jurisdiction to prosecute such crime. The principle which has been postulated by Grotius in 1625 and subsequently laid down in a number of international conventions has a purpose to fight against modern forms of crimes and especially to combat against any form of terrorism and threats to the mankind.

This paper will focus on the application of the principle of "extradite or prosecute" in acts of terrorism through several cases such as the Lockerbie case and the Habré case and lastly will discuss about the obligation of states to punish terrorist crimes or to transfer (extradite) persons to states for such punishment.

Key words: aut dedere aut judicare, extradition, terrorism, prosecution, torture

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1. Introduction

Every day, it seems, we hear new accounts of atrocities being committed in countries around the world. In that sense we can easily get an impression that we live in a brutal world, and that human rights are being denied on a massive scale. Indeed, the last decade was marked with several terrorist attacks around the world which are showing that states must cooperate more eagerly in the fight against sophisticated forms of terrorism.

Undoubtedly, there are many reasons which may prevent states on whose territory the alleged criminal is found from extraditing him/her to a state where the crime was committed or any other state willing to prosecute. For that reason, the principle *dedere aut judicare* exist with a purpose not to allow criminal suspects to escape prosecution or enjoy impunity. This paper discusses first of all the historical overview of the principle extradite or prosecute which is contained in more than sixty international conventions. Then it elaborates several international cases such as the Habré and Lockerbie case including cases which involve terrorism and prohibition of extradition due to the death penalty. Further, it deliberates the work of the International Law Commission in respect of the subject matter and explains the collision between the obligation to extradite or prosecute in acts of terrorism and the problems arising because of the lack of universally accepted definition of terrorism and lack of consideration of terrorism as a *jus cogens*. Lastly, this paper argues the controversial nature of the obligation to extradite or prosecute due to its customary nature.

2. Historical overview of the principle *aut dedete aut judicare*

Terrorism, organized crime and other transnational crimes pose fundamental challenges to the rule of law, peace and security and must be fought at national, regional and international level. Since such crimes transcend "classical" borders of criminal law and in order for States to effectively address the challenges posed by such crimes, they need a coordinated and coherent response mainly through international cooperation in criminal matters, including extradition and mutual legal assistance. Hence, we live in a world where modern forms of crimes have taken advantage before the rule of law without respecting the basic human rights and the sovereignty and territorial integrity of democratic states. For that reasons the justice should not allow criminals to find their own 'safe heaven' and avoid prosecution for committed crimes. Among other, this is the main reason why the rule of extradite or prosecute exist.

From historical point of view, the early beginnings of the maxim *aut dedere aut judicare* have been postulated by Hugo Groitius who wrote the following 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"* (Grotius, 1625).

If we analyze the meaning of Grotius's words, there is no doubt that they possess an astonishing actuality, however 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 as international crimes (Plachta, 2001:72). Albeit it should be admitted that due to the circumstances in that period, the original wording an alternative to *dedere* was *punire* and it pointed actually to real punishment and subsequently has been replaced with *judicare* because the person accused for certain crime has right to a fair trial and to be considered as innocent unless proven guilty which nowadays is known as presumption of innocence. According to Bassiouni, accountability is in close correlation with this principle because it requires that persons who have committed crimes, particularly international crimes either be prosecuted by a state having jurisdiction or to be extradited to a State having jurisdiction and the willingness to carry out effective and fair prosecution (Bassiouni, 2008:35). In correlation to the above mentioned, extradition or prosecution of the accused person are mutually connected under the principle of *aut dedere aut judicare*. Thus, it derives that extradition is the only legal procedure by which a person accused or convicted of a crime (although not usually *in absentia* - in his absence) is formally transferred to a state where he/she is wanted for trial or to serve his/her sentence (Aust, 2005:264). Other forms of illegal extradition such as extraterritorial abductions are not legitimate grounds for prosecution, because their foundation cannot be located in the international law.

During the 18th and 19th centuries, under the influence of the idea that the law of a state resulted from social contract between its members, prosecution of foreigners for offences committed abroad was not very common and, unless their own direct interests should be affected by the offence, states often did not even establish jurisdiction over the time (Keijzer, 1982:412). Due to the fluctuation of people and subsequently many crimes committed outside its state of domicile, changes were inevitably to happen. The rule of *aut dedere aut judicare* has been prescribed in many international conventions and subsequently provisions were adopted in order

to make it easy for the extradition to happen, by making much more offences extraditable between particular states by signing bilateral/multilateral agreements.

The first convention containing an extradite or prosecute rule was the 1929 International Convention for the Suppression of Counterfeiting Currency, which provided that where a state's domestic law did not allow extradition of nationals, nationals returning to their state after committing a crime under the Convention should be punishable in the same manner as if the crime had been committed in that state.[1] This obligation has been repeated in the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs and the 1937 Convention for the Prevention of Terrorism. The four Geneva Conventions of 1949 contain the same provision whereby each High Contracting Party is obliged to search for persons alleged to have committed, or to have ordered to be committed, grave breaches and to bring such persons, regardless of their nationality, before own courts.[2]

The explanation of this principle and its rationale came with the 1996 Draft Code of Crimes against Peace and Security of Mankind prescribing the following: *"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 wither by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition…".*[3]

The principle of aut dedere aut judicare became a subject of interest to the International Law Commission (ILC) which in 2004 identified the topic "Obligation to Extradite or Prosecute" and then the Special Rapporteur Zdzislaw Galicki expressed his opinion that the obligation to extradite or prosecute cannot be treated as a traditional topic only, because from Grotius till recent times, it reflects new developments in international law and pressing concerns of the international community.[4] Afterwards, in 2014, the ILC has adopted its final report under the guidance of Special Rapporteur Kriangsak Kittichhaisaree and addressed to the implementation of the obligation, gaps in the existing conventional regime, the priority between

1 See Article 9 of 1929 International Convention for the Suppression of Counterfeiting Currency.

2 Similar provision is contained in Article 7 of the1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft which provides that: "*The Contracting State 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 offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution".*

3 Article 9 of the1996 Draft Code of Crimes against Peace and Security of Mankind.

4 International Law Commission (2006). Document A/CN.4/572. Preliminary report, by Mr. Zdzislaw Galicki, Special Rapporteur

the obligation to prosecute and the obligation to extradite, the relationship between the obligation with *erga omnes* obligations or j*us cogens* norms.[5]

3. Dilemmas if *aut dedere aut judicare* is part of customary international law?

The obligation to extradite or prosecute is found in numerous treaties; but there are different views as to whether there is such an obligation in customary international law. Upon this issue, there is no consensus, although a large and growing number of scholars are in favor of supporting the concept of an international legal obligation *aut dedere aut judicare* as a general duty based not only on the provisions of particular international treaties, but also on generally binding customary norms, at least concerning certain categories of crimes.[6] Enache-Brown and Fried support the claim that this principle is part of customary international law due to the fact that if a state has signed and ratified a significant number of treaties containing the *aut dedere aut judicare* formula, then that state has demonstrated through this practice that *aut dedere aut judicare* is a customary norm. The state, through the act of signing related international agreements, articulates the belief that *aut dedere aut judicare* is an accepted norm and that it is the most effective way of preventing certain forms of conduct. This belief satisfies the requirement of *opinion juris* when establishing customary norms. If a state accedes to a large number of international treaties, all of which have a variation of *the aut dedere aut judicare* principle, there is a strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law (Enache-Brown and Fried, 1998:629). Moreover, the Article 27 of the Vienna Convention on the Law of Treaties reflects customary international law, thus a State Party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

There are over 60 multilateral treaties combining extradition and prosecution as alternative courses of action in order to bring suspects to justice. As regards the core crimes the obligation *aut dedere aut judicare* relates only to those war crimes that constitute 'grave breaches' of the Geneva Conventions and Additional protocol. There is therefore no treaty-based obligation *aut dedere aut judicare* for genocide, crimes against humanity and, except in the case of grave breaches,

5 International Law Commission (2014). Final Report of the International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare).

6 International Law Commission (2006). Document A/CN.4/572, p.266

for serious violations of the laws and customs applicable in armed conflicts of an international or non-international character (Zgonec-Rozej and Foakes, 2013:3). The International Criminal Court (ICC) whose Rome Statute entered into force on 1 July 2002, has currently jurisdiction for genocide, crimes against humanity and war crimes, and as it is well-known fact the ICC has been designed as a reserve Court in case states are "unable or unwilling" to prosecute. The sixth recital of the Rome Statute's Preamble recalls that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"*. On the other hand distinguished authors such as Christian Tomuschat do not read in the Preamble's recital an implicit obligation to prosecute, reasoning that one cannot impose any duty upon states unless it has been explicitly laid down and agreed upon by them. A mere reference in the Preamble would not suffice to derive any legally binding duty (Wouters, 2005:4). Hence, the dilemma if this principle constitutes part of international customary law or it applies only to those that are parties to some treaties, remains active. It may be recalled that in 2011 the then Special Rapporteur Galicki, in his Fourth Report, proposed a draft article on international custom as a source of the obligation *aut dedere aut judicare* prescribing that: *"Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law. Such an obligation may derive, in particular, from customary norms of international law concerning serious violations of international humanitarian law, genocide, crimes against humanity and war crimes…."*[7] *However, this draft article was not well received and there was general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary proscribing specific international crimes. Afterwards, a recent analysis of state practice has been undertaken by the chairman of the Working Group of the ILC, Kriangsak Kittichaisaree on the topic of the obligation to extradite or prosecute. It reveals that although large number of states provide for universal jurisdiction for core crimes, only several states implement in their national legislation the obligation to extradite for various crimes (Zgonec-Rozej and Foakes, 2013:4). In Kittichaisaree's opinion, the obligation to extradite or prosecute, in respect of core crimes under international law proscribed by jus cogens* 'has crystalized or at least is in process of crystallizing into a rule of customary international law, albeit not a universal rule of customary international law' (Amnesty International, 2011). This point of view has been confirmed in the case of *Belgium v. Senegal*, where it has been clearly stated that an

7 See Article 4 contained in ILC (2011). Fourth report on the obligation to extradite or prosecute (aut dedere aut judicare) by Zdzislaw Galicki, Special Rapporteur.

opportunity has yet to arise so the Court to determine the customary international law status or otherwise of the obligation to extradite or prosecute.

3.1. Landmark decision in the case of Belgium v. Senegal

On 20 July 2012, the International Court of Justice (ICJ) delivered its landmark decision in the case of Belgium v. Senegal concerning the prosecution of Chad's former head of state Hissène Habré or his extradition from Senegal (where he lived in exile) to Belgium for mass acts of torture and enforced disappearances committed in Chad during his presidency for the period 1982-1990. But why this case was of particular importance to the world public and law practitioners? What is the connection of this case with the principle of *aut dedere aut judicare*?

First and foremost, we will start with the early beginnings of the case till we reach the findings of the ICJ and the opinion of judges. In 2005, a Belgium Court indicated Hissène Habré for international crimes and requested (four times) his extradition from Senegal. Due to the fact that there wasn't response, in February 2009 Belgium initiated proceedings against Senegal before the ICJ alleging that Senegal has failed to comply with its obligations under the UN Convention on Torture (CAT) either to prosecute the former president of Chad, or to extradite him to Belgium to face trial here (Zgonec-Rožej e.al. 2013:2). Accordingly, Belgium requested the Court to declare that has jurisdiction to entertain this dispute due to the fact that an investigation has been instigated in Belgium at the behest of a Belgian national of Chadian origin 'a victim of the Habré regime' and Belgian courts were permitted to "exercise passive personal jurisdiction" by virtue of Article 5(1) (c) of the CAT (Garrod, 2018:138). Further, to declare Belgium's claim admissible; to declare that Senegal is obliged to bring criminal proceedings against Mr. Habré and to declare that Senegal failed to prosecute Mr. Habré and as a result of that is obliged to extradite him to Belgium. Contrary to these allegations, Senegal requested that the ICJ has no jurisdiction over the case as a result of the absence of a dispute between Belgium and Senegal and that Senegal has not breach any of the CAT provisions or any rule of customary international law.[8]

Hence, the ICJ found Senegal in breach of the provisions from CAT (Article 6(2) and 7(1)) in relation to the lack of preliminary inquiry into the facts and in breach with the obligation to submit the case to its competent authorities for the purpose of prosecution, if it decided not to extradite the accused person. Therefore, the ICJ confirmed that the obligations of the CAT may be defined as

8 See: International Court of Justice (2012) Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal). Judgment of 20 July 2012, paragraph 12.

"*oblgations erga omnes partes*" in the sense that each state party has an interest in compliance with them in any given case (Harrington, 2012).

Moreover, under Article 7(1) of CAT, the Court agreed with the statement of Belgium that the time frame for implementation of the obligation to prosecute depends on the circumstances of each case and in particular on the evidences gathered, but however, considers that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for the purpose of prosecution.[9] Hence, the ICJ, unanimously found that: '*Senegal must, without further delay to submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution if it does not extradite him'.* From this last statement in the judgment, the ICJ undoubtedly reconfirms the obligation *aut dedere aut judicare*. Regarding this obligation, the Court reiterates that the prohibition of torture is a peremptory nor (*jus cogens*), so the prosecute or extradite formula under the CAT could serve as a model for new prosecute or extradite regimes governing prohibitions covered by peremptory norms such as genocide, crimes against humanity and serious war crimes.[10]

The saga with Habré case started to see its closure one month after the ICJ's judgment when Senegal and the African Union signed a deal to set up a special tribunal to try the former leader. Four years afterwards Habré was found guilty for human rights abuses including rape, sexual slavery and ordering the killing of 40.000 people and sentenced to life in prison.

4. Terrorism as a threat to the modern world

Undoubtedly terrorism is considered as an international crime and as such it requires the international community to act in the prevention of terrorism and the sanction of individuals perpetrating acts of terrorism. Thus, extradition as a legal procedure represents one of the options to fight against acts of terrorism. The other one is to prosecute those heinous crimes which arise from acts of terrorism if there is no possibility to conduct extradition. To conclude this thought, we are coming to the generally accepted principle of *aut dedere aut judicare*.

After the events of 11 September 2001 and the attacks on World Trade Center and Pentagon which subsequently triggered the 'war on terror', terrorist

9 ICJ (2012). Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal), paragraph 106.

10 International Law Commission (2014) Final Report of the International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare), paragraph 15.

acts were committed also in the past but not on these sophisticated methods for creating public fear and terror among people. David Rapoport has outlined four major waves of international terrorism . The first ('anarchist') wave of modern terrorism began in Russia in the 1880s and lasted until the 1920s, the second ('anticolonial') wave began in the 1920s and ended in the 1960s, the third ('new left') wave began in the 1960s and continued through to the 1980s, and the fourth ('religious') wave emerged in 1979 and continues until today (Rapoport,2004:47).

The obligation of states to use their domestic judicial processes to punish terrorist crimes or to transfer custody of suspects to another state for such punishment is therefore an essential cornerstone of the modern framework for confronting transnational terrorist acts (Newton, 2013:68). International law embodies universal and strongly articulated support for the positivist premise that 'any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whosoever committed and are to be unequivocally condemned'. This was confirmed by the UN General Assembly in its Draft Resolution Measures stating that 'no terrorist act can be justified in any circumstances'.[11] Hence, a conclusion can be derived that a battle to suppression of terrorism is a 'must' and every state has a moral and legal obligation to protect its citizens and to give adequate response to acts of terrorism by either their extradition or prosecution.

4.1. Aut dedere aut judicare provisions in international conventions related to acts of terrorism

The principle of *aut dedere aut judicare* represents adequate legal response to different acts of terrorism which happen, unfortunately, on daily basis trying to jeopardize the basic human rights and the sovereignty of democratic states. The major obstacle in prosecution of terrorist offences represents the fact that there is no generally accepted definition of terrorism, so it is left to the discretion of each state individually to decide what could be considered as an act of terrorism and the way for their prosecution.

Even before the United Nations was founded, the extradition of persons accused of committing terrorist activities was formally recognized as a means of international law enforcement. During the League of Nations era, an unsuccessful Convention for the Prevention and Punishment of Terrorism was drafted in 1937. Prompted largely by the assassination of King Alexander of Yugoslavia, this abortive

11 United Nations. Draft Resolution on Measures to Eliminate International terrorism. Doc.A/C.6/62/L.14

instrument obligated parties to prevent and punish offenders who committed "acts of terrorism". The convention went further as it imposed a duty on parties to criminalize certain specific acts amounting to terrorist offenses (Joyner, 203:506). Terrorist offences are on substantive path with the grave breach provisions of the 1949 Geneva Conventions and the 1948 Genocide Convention because of the obligation arising from the principle *aut dedere aut judicare*. Since 1960 four specific issue-areas tended to dominate international concern over global terrorism: crimes against the safety of international aviation; crimes against the safety of individual persons; crimes against the safety of maritime navigation; and crimes associated with violent terrorist activities.

Conventions providing for the punishment of international crimes, such as hijacking, hostage taking, attacks on diplomats and torture rely largely on the procedure of *aut dedere aut judicare* as a means of enforcement. This procedure, which requires contracting parties either to extradite or to try offenders, is made possible by the generous jurisdictional clauses contained in these treaties (Dugard and Van den Wyngaert, 1998:209). As mentioned before in this paper, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft contains provision about the principle of extradite or prosecute just as the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation.

However, what is particularly interesting about the 1970 Hague Convention is the fact that it developed the well-known 'Hague formula' which combines the options of extradition and prosecution by providing that the state party in the territory of which the alleged offender is found is obliged to submit the case to its competent authorities for the purpose of prosecution if it does not extradite the alleged offender. This formula requires states parties to assert jurisdiction over the prohibited conduct even in the absence of any link between itself and such conduct known as universal jurisdiction (Zgonec-Rožej and Foakes, 2013:6). Further, the 1979 International Convention against Taking of Hostages in its Article 8(1) prescribes that: *""The State 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 offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State"*. In this sense, instead of the traditional formula provided by Grotius, which focused on the natural right to exact punishment, this expression better comprise the ambiguous meaning "to judge" or try, and also refers to an inquiry for the purpose of determining whether or not to initiate a trial (Ferreira, Carvalho et.al, 2013:3). Subsequently, the 1984 Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment provides for the application of the principle extradite or prosecute on all acts of torture. Moreover, the 1997 Interna-

tional Convention for the Suppression of Terrorist Bombings in Article 8 provides clear obligation for the State in absence or lack of willingness of extradition without exception to submit the case to competent authorities for the purpose of prosecution (Amnesty International, 2009). The modern framework of multilateral conventions obligates states to cooperate in eradicating the specific acts deemed to be the most representative of the broader phenomenon of transnational terrorism. The 2005 Council of Europe Convention on the Prevention of Terrorism required states parties to adopt three new criminal offences such as: public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism.

4.2. Collision between the obligation to extradite and/or prosecute in acts of terrorism

The *aut dedere aut judicare* obligation as applied to terrorist cases thus reflects an entirely logical extension of the paramount state obligation to protect the basic human rights of all persons within their scope of lawful authority (Newton, 2013:72). However, in some occasions the obligation to prosecute is thus triggered by the refusal to surrender the alleged offender following a request for extradition. While in some circumstances when the obligation to extradite cannot be exercised due to the nationality factor, the obligation to prosecute is provided as an alternative. The major obstacle which appears in the area of application the formula *aut dedere aut judicare* in acts of terrorism is the lack of universally accepted definition of terrorism. Although there is some kind of "framework" that defines and criminalizes different manifestations of terrorism, from today's perspective it's just not enough. Even the 1998 Rome Statue of the International Criminal Court (ICC) does not contain a substantive offence of terrorism *stricto sensu* due to the difficulty of reaching consensus agreement on its incorporation into the fabric of a permanent ICC (Martinez, 2002:18). Although, if we look back, in 1994 the UN General Assembly Resolution titled as: 'Measures to Eliminate International Terrorism' provided some kind of a general definition of terrorism proscribing: "*criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them*". While, the EU Council Framework Decision defines terrorism as: seriously intimidating a population, unduly compelling a government or international organization to perform or abstain from performing any act and seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

Everyone will agree with the statement that acts of terrorism diminish the normal function of every state and endanger the human rights of its citizens and because of this reason; the obligation to extradite or prosecute should be applied in respect of terrorist offenses. Alleged terrorist should not be allowed to hide behind their guaranteed human rights where there are not sufficient evidences that they can be violated on any matter whatsoever. Hence, the states should understand the grave responsibility that they have upon the principle of *aut dedre aut judicare* and they should respect and implement it in practice.

The Canadian case against Mohammed Momin Khawaja illustrates the application of the principle extradite or prosecute. Khawaja's involvement in an al-Qaeda inspired plot that spanned three continents to build and detonate ammonium nitrate-rich fertilizer bombs surfaced during an investigation by the British Security Services and the day after his arrest in Ottawa, his co-conspirators were arrested in London. While Khawaja was convicted in Canada, his seven co-conspirators were sentenced to life imprisonment by British authorities. In this and in other cases, the *aut dedere aut judicare* principle reflects basic common sense of fairness, as well as enduring principles of justice and equal application of law (Newton 2013:72).

However, the international case law is showing several occasions in which the principle of *aut dedere aut judicare* has been limited in respect of the prohibition of the application of death penalty. In December 2002, Denmark released a Chechen terrorist rather than extraditing him to Russia where he might face the death penalty. Britain refused to honor an Egyptian request to arrest and extradite a terrorist implicated in the 1995 assassination attempt against President Mubarak, as conviction for that crime carried the death penalty. Mexico also declined to extradite suspect to the United States who would face the death penalty for their alleged crimes (Kelly, 2003:491). In this connotation, if the principle of *aut dedere aut judicare* has been considered as part of customary international law and terrorism as *jus cogens*, in that circumstances the terrorists would not have the opportunity to escape justice.

4.3. The Lockerbie case

Unfortunately aircrafts are no longer merely the stage form criminal activities, they have become their target and on 11 September 2001, the very means itself. The easy mobility of aircraft may enable hijackers to escape to a state whose government is sympathetic to their cause, or just spineless, thereby evading arrest and punishment. Hence, we are coming to the first question which triggers

the jurisdiction. According to Martin Shaw in respect of the criminal jurisdiction, there are three different concepts: prescriptive jurisdiction which identifies the power of a State to make legal rules; enforcement jurisdiction reflects the power of a State to enforce legal rules by executive action and finally the judicial jurisdiction which addresses the power of the courts of a State to apply legal rules and punish their contravention (Shaw, 1997:452-478). The Lockerbie case, among other issues, first of all it questions the jurisdiction of the ICJ to hear the dispute between Libya from one side and US and UK Government on the other side. However, till we reach the question about jurisdiction and application of the provisions from Montreal Convention, we will start with the facts of the case.

On 3 March 1992, Libya filed in the Registry of the ICJ two separate Applications instituting proceedings against the US and the UK Governments, in respect of a dispute over the interpretation of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971 Montreal Convention). This filing followed the explosion of a bomb in the Pan Am Flight 103 over the town of Lockerbie, Scotland, on 21 December 1988, which killed all 259 passengers and crew, as well as eleven residents of the town of Lockerbie. The Lord Advocate of Scotland and a Grand Jury of the US respectively accused two Libyan citizens, Abdelbaset Ali Mohmed Al Megrahi and Ali Amin Khalifa Fhimah, of this bombing.

During the proceedings, Libya claimed that it had not signed any extradition treaty with the UK and the US, and that, subsequently and in conformity with the 1971 Montreal Convention which requires a State to establish its own jurisdiction over alleged offenders present in its territory an the event of their non-extradition, only Libyan authorities had jurisdiction to try their own citizens (Plachta, 2001). Subsequently, on April 1992, the ICJ declined to order the provisional measures thereby confirming the validity and binding force of Resolution 748.[12] Hence, in 2003 both sides notified the Court that they had "agreed to discontinue with prejudice the proceedings". In the meantime, Libya had agreed that the two accused be tried by five Scottish Judges sitting in a neutral Court, in the Netherlands. Abdelbaset Ali Mohmed Al Megrahi was found guilty on 31 January 2001. He was convicted of 270 counts of murder for his part in the bombing of Pan Am Flight 103 and sentenced to life imprisonment. His co-accused, Al Amin Khalifa Fhimah was found not guilty and released.

12 The US and UK presented the case before the UN Security Council and the General Assembly and in 1992, the Security Council adopted two resolutions. The first, Resolution 731, urged Libya to respond fully and effectively to the request of US and UK and the second, Resolution 748 imposed economic sanctions on Libya.

5. Conclusion

The principle to extradite or prosecute refers to a natural right of the state that had been 'injured' to prosecute the offender and any state which holds the offender should be bound to either extradite or prosecute the offender, so there is no other alternative. However, problems appear in an absence of a bilateral extradition treaty between the two states. Because of this particular reason there is a tendency to establish the principle of *aut dedere aut judicare* as a part of customary international law and in my opinion this should be a next topic of consideration to the International Law Commission which in its last report left this issue open and a subject of different interpretations. Further, the duty to prosecute terrorist crimes represents an extension of state authority to protect the human rights of its citizens. For that manner if a terrorism is considered as a *jus cogens norm* and *aut dedere aut judicare* as part of international customary law, the terrorist offenders would not have a chance to look for 'safe heaven' and stay unpunished for committed crimes.

Literature

- Amnesty International (2009) International Law Commission: The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare).
- Amnesty International (2011) *Universal Jurisdiction: A Preliminary Survey of Legislation around the World - 2012 update*.
- Aust, A. (2005) *Handbook of international law. Cambridge University Press.*
- Bassiuoni C. (2008) *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms – Volume 2. Martinus Nijhoff Publishers.*
- Dugard J. and van den Wyngaert C (1998). *Reconciling Extradition with Human Rights. American Journal of International Law Vol.92 No.2*, pp.187-212.
- Enache-Brown.C. and Fried A. (1998) *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law McGill Law journal Vol.43*, pp.615-633.
- Ferreira. R; Carvalho. A; Graeff Machry.C, and Barreto Vianna Rigon, P *The Obligation to Extradite or Prosecute (aut dedere aut judicare). UFRGS Model United Nations Journal, V1, 2013*, pp.202-221.
- Garrod M. (2018) *Unraveling the Confused Relationship Between Treaty Obligations to Extradite or Prosecute and "Universal Jurisdiction" in the Light of the Habré Case. Harvard International Law Journal Vol.59,* pp.125-196.

- Grotius, H. (1625) *De Jure Belli ac Pacis, Book II, Chapter XXI, section IV, Clarendon Press/Humphrey Milford, 1925.*
- Harrington J. (2012) *Without further delay – Senegal must prosecute or extradite Hissène Habré*. Blog on EIJL Talk https://www.ejiltalk.org/without-further-delay-senegal-must-prosecute-or-extradite-hissene-habre/ accessed on 11.08.2018.
- International Court of Justice (2012*) Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*. Judgment of 20 July 2012.
- International Law Commission (2006) *Document A/CN.4/572. Preliminary report, by Mr. Zdzislaw Galicki, Special Rapporteur.*
- International Law Commission (2014) *Final Report of the International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare).*
- Joyner C. (2003) *International Extradition and Global Terrorism: Bringing International Criminals to Justice. Loyola of Los Angeles International and Comparative Law Review Vol.6/1,* pp.493-542.
- Keijzer N. (1982) Aut dedere aut judicare. *Netherlands Reports to the XIth International Congress of Comparative Law Caracas 1.*
- Kelly M. (2003) *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare Into Customary Law & Refusal to Extradite Based on the Death Penalty. Arizona Journal of International and Comparative Law Vol.20 No.3,* pp.491-532.
- Martinez L. (2002) *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems. Rutgers Law Journal 1,18.*
- Newton M. (2013) *Terrorist Crimes and the Aut Dedere Aut Judicare Obligation. Vanderbilt University Law School – Public Law & Legal Theory. Working Paper Number 13-32*, pp. 68-92.
- Plachta M. (2001) *Contemporary problems of extradition: Human Rights, Grounds for Refusal and the principle aut dedere aut judicare*. Gdansk University; pp.64-86.
- Plachta M. (2001) *The Lockerbie Case: The Role of the Security Council in Enforcing the principle Aut Dedere Aut Judicare. European Journal of International Law Vol.12/1,* pp.125-140.
- Rapoport D. (2004) *Four waves of Modern Terrorism – Attacking Terrorism: Elements of a Great Strategy. Georgetown University Press.*
- Shaw M. (1997) *International Law. Cambridge University Press.*
- UN (1929) *International Convention for Suppression of Counterfeiting Currency.*
- UN (1970) *Hague Convention for the Suppression of Unlawful Seizure of Aircraft.*
- UN (1996) *Draft Code of Crimes against the Peace and Security of Mankind.*

– United Nations General Assembly (2007) *Draft Resolution Measures to eliminate international terrorism UN Doc.A/C.6/62/L.14*.
– Wouters J. (2005) *The Obligation to Prosecute International Law Crimes. The need for justice and requirements for peace and security*, *College of Europe, Bruges.*
– Zgonec-Rožej M. and Foakes J. (2013) *International Criminals: Extradite or Prosecute? Chatham* House IL.BP 2013/01, pp.1-16.
– Zgonec-Rožej M; Foakes J; Kittichaisaree.K and Wilmshurst E. (2013) *International Criminals: Extradition or Prosecution? Chatham House*, pp.1-7.