Annex

THE OBLIGATION TO EXTRADITE OR PROSECUTE ("*AUT DEDERE AUT JUDICARE*") IN INTERNATIONAL LAW

Preliminary remarks by Zdzislaw Galicki

I. General introduction to the topic

1. The formula "extradite or prosecute" (in Latin *aut dedere aut judicare*) is commonly used to designate the alternative obligation concerning the treatment of an alleged offender "… which is contained in a number of multilateral treaties aimed at securing international co-operation in the suppression of certain kinds of criminal conduct".[1]

2. As it is stressed in the doctrine, "[t]he expression *aut dedere aut judicare* is a modern adaptation of a phrase used by Grotius: *aut dedere aut punire* (either extradite or punish)".[2] It seems, however, that for applying it now, a more permissive formula of the alternative obligation to extradition ("prosecute" (*judicare*) instead of "punish" (*punire*)) is suitable, having additionally in mind that Grotius contended that a general obligation to extradite or punish exists with respect to all offences by which another State is injured.

3. A modern approach does not seem to go so far, taking also into account that an alleged offender may be found not guilty. Furthermore, it leaves without any prejudice the question if the discussed obligation is deriving exclusively from relevant treaties or if it also reflects a general obligation under customary international law, at least with respect to specific international offences.

4. It was underlined by the doctrine that, to determine the effectiveness of the system based on the obligation to extradite or prosecute, 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*".[3] It also seems necessary to find out if there is any hierarchy of particular obligations which may derive from the obligation to extradite or prosecute (henceforth the "*obligation*"), or if it is just a matter of discretion of States concerned.

5. A preliminary task in future codification work on the topic in question would be to complete a comparative list of relevant treaties and formulas used by them to reflect this *obligation*. Some attempts have already been done by the doctrine, listing a large number of such treaties and conventions.[4] These are both substantive treaties, defining particular offences and requiring their criminalization and the prosecution or extradition of offenders, as well as procedural conventions, dealing with extradition and other matters of legal cooperation between States.

6. In particular, the obligation to extradite or prosecute during the last decades has been included into all so-called "sectoral" conventions against terrorism, starting with the Convention for the suppression of unlawful seizure of aircraft, which in article 7 states:

> 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.

7. As was noticed by the doctrine, two variants of the Convention formula can be identified:

(*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 jurisdiction;

(*b*) the obligation to submit a case for prosecution only arises when a request for extradition has been refused.[5]

8. By way of example, the following conventions can be mentioned:

– as concerns (*a*): United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 6, para. 9);

– as concerns (*b*): the European Convention on the suppression of terrorism (art. 7).

9. Through such a formulation, as contained in the Convention for the suppression of unlawful seizure of aircraft, the *obligation* in question has been significantly strengthened by combining it with the principle of universality of suppression of appropriate terrorist acts. The principle of universality of suppression should not be identified,

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[1] M. Cherif Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht, Martinus Nijhoff, 1995, p. 3.

[2] *Ibid*., p. 4. See also H. Grotius, *De Jure Belli Ac Pacis*, book II, chap. XXI, paras. III and IV (English transl. by F. W. Kelsey, *The Law of War and Peace*, in J. B. Scott (ed.), *Classics of International Law*, Oxford, Clarendon, 1925, pp. 526–529.

[3] M. Plachta, "Aut dedere aut judicare: an overview of modes of implementation and approaches", *Maastricht Journal of European and Comparative Law*, vol. 6, No. 4 (1999), p. 332.

[4] Cherif Bassiouni and Wise, *op. cit.* (footnote 1 of this annex), pp. 75–302; see also *Oppenheim's International Law* (footnote 54 above), vol. I, pp. 953–954.

[5] Plachta, *op. cit.* (footnote 3 of this annex), p. 360.

however, with the principle of universality of jurisdiction or universality of competence of judicial organs. The universality of suppression in this context means that, as a result of application of the obligation to extradite or prosecute between States concerned, there is no place where an offender could avoid criminal responsibility and find so-called "safe haven".

10. On the other hand, a concept of the principle of universal jurisdiction and competence, especially in recent years, is often connected with the establishment of international criminal courts and their activities. In practice, however, the extent of such "universal jurisdiction and competence" depends on the number of States accepting the establishment of such courts and is not directly connected with the obligation to extradite or prosecute.

11. It seems inevitable, when analysing various aspects of applicability of the *obligation*, to trace an evolution of the principle of universality from its initial form, contained in the above-quoted article 7 of the Convention for the suppression of unlawful seizure of aircraft, up to the provisions of the 1998 Rome Statute of the International Criminal Court.

12. In the realm of already performed codification, the *obligation* may be found in article 9, (Obligation to extradite or prosecute), contained in the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission at its forty-eighth session in 1996, which provides:

> 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[6] is found shall extradite or prosecute that individual.[7]

13. Although the Commission in the quoted provision has recognized the existence of the *obligation* in question, it has done it, however, exclusively in relation to a strictly limited and defined group of offences, described generally as crimes against the peace and security of mankind (with exclusion of "crime of aggression"). In any case, this recognition may be considered as a beginning point for further considerations as to what extent this *obligation* may be extended to other kinds of offences. Furthermore, it is worth noticing that the Commission has introduced a concept of "triple alternative", considering a possibility of parallel jurisdictional competence to be exercised not only by interested States, but also by international criminal courts.

14. One of the earliest examples of such "third choice" may be found in the Convention for the Creation of an International Criminal Court, opened for signature at Geneva on 16 November 1937.[8] The said court was intended to be established for the trial of persons accused of an offence dealt with in the Convention for the Prevention and Punishment of Terrorism from the same date.[9] In accordance with the provisions of article 2 of the first Convention, the persons accused could be prosecuted either by a State before its own courts, or extradited to the State entitled to demand extradition, or committed for trial to the international criminal court. Unfortunately, the said Convention has never entered into force and the court in question could not be established.

15. Alternative competences of the International Criminal Court, established on the basis of the Rome Statute of the International Criminal Court of 17 July 1998, are generally known. The Rome Statute gives a choice between the State exercising jurisdiction over an offender or having him surrendered to the jurisdiction of the International Criminal Court.

16. It seems that the existing treaty practice, significantly enriched in recent decades, especially through various conventions against terrorism and other crimes threatening international community, has already created a sufficient basis for considering the extent to which the obligation to extradite or prosecute, so important as a matter of international criminal policy, has become a matter of definite legal obligation.

17. In addition, there is already a judicial practice which has been dealing with the said *obligation* and has confirmed its existence in contemporary international law. The *Lockerbie* case before the ICJ brought a lot of interesting materials in this field, especially through dissenting opinions of five judges to the decisions of the Court of 14 April 1992 "not to exercise its power to indicate provisional measures" as requested by the Libyan Arab Jamahiriya.[10] Although the Court itself was rather silent with regard to the obligation in question, the dissenting judges confirmed in their opinions the existence of "the rule of customary international law, *aut dedere aut judicare*"[11] and of "a right recognized in international law and even considered by some jurists as *jus cogens*".[12] These opinions, though not confirmed by the Court, should be taken into account when considering the trends of contemporary development of the said *obligation*.

18. It seems to be obvious that the main stream of considerations concerning the obligation to extradite or prosecute goes through the norms and practice of international law. It cannot be forgotten, however, that:

> … efforts towards optimalization of the regulatory mechanism rooted in the principle *aut dedere aut judicare* may be undertaken either on the international level or on the domestic level.[13]

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[6] These are such crimes as "crime of genocide", "crimes against humanity", "crimes against the United Nations and associated personnel" and "war crimes".

[7] *Yearbook … 1996*, vol. II (Part Two), p. 30.

[8] League of Nations, document C.547(1).M.384(1).1937.V, reproduced in United Nations, *Historical Survey of the Question of International Criminal Jurisdiction (Memorandum submitted by the Secretary-General)*, (Sales No. 1949.V.8), p. 88, appendix 8. See also *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest*, M. O. Hudson (ed.), vol. VII (1935–1937), Nos. 402–505, Washington, Carnegie Endowment for International Peace, 1941, p. 878.

[9] League of Nations, document C.546.M.383.1937.V. See also *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest* (footnote 8 above), p. 862.

[10] Two identical decisions were adopted in the cases *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*; and *ibid. (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 3 and 114 respectively.

[11] *Ibid.*, pp. 51 and 161 (Judge Weeramantry, dissenting opinion).

[12] *Ibid.*, pp. 82 and 187 (Judge Ajibola, dissenting opinion).

[13] M. Plachta, *loc. cit.* (footnote 3 of this annex), p. 332.

Internal criminal, and even constitutional, regulations should be taken into consideration here on an equal level with international legal norms and practices.

19. As it has been correctly noticed in the doctrine:

> … the principle *aut dedere aut judicare* cannot be perceived as a panacea whose universal application will cure all the weaknesses and ailments that extradition has been suffering from for such a long time. […] In order to establish *aut dedere aut judicare* as a universal rule of extradition, the efforts should be made to gain the acceptance of the proposition that: *first*, such a rule has become an indispensable element of the suppression of criminality and bringing offenders to justice in an international arena, and *second*, that it is untenable to continue limiting its scope to international crimes (and not even all of them) as defined in international conventions.[14]

It seems that this guideline could be followed in future codification work to be undertaken by the Commission.

20. In the light of what has been said above it seems that the topic of *The obligation to extradite or prosecute* (aut dedere aut judicare) *in international law* has achieved sufficient maturity for its codification, with a possibility of including some elements of progressive development. At this stage it seems premature, however, to decide if a final product of the Commission's work should take the form of draft articles, guidelines or recommendations. If the topic is going to be accepted, the main points to be considered at the beginning by the Commission could be as follows:

II. Preliminary plan of action

21. Comparative analysis of appropriate provisions concerning the *obligation*, contained in the relevant conventions and other international instruments—systematic identification of existing similarities and differences.

22. Evolution and development of the *obligation*—from the "Grotius formula" to "triple alternative":

(*a*) extradite or punish;

(*b*) extradite or prosecute;

(*c*) extradite or prosecute or surrender to international court.

23. Actual position of the *obligation* in contemporary international law:

(*a*) as deriving from international treaties;

(*b*) as rooted in customary norms—consequences of customary status;

(*c*) possibility of mixed nature.

24. The extent of substantial application of the *obligation*:

(*a*) to "all offences by which another State is particularly injured" (Grotius);

(*b*) to a limited category or categories of offences (e.g. to the "crimes against the peace and security of mankind", or to "international offences", etc.)—possible criteria for qualifying such offences.

25. The content of the *obligation*:

(*a*) obligations for States (*dedere* or *judicare*):

(i) extradition: conditions and exceptions;

(ii) jurisdiction: grounds for establishing;

(*b*) rights for States (in case of application or non-application of the *obligation*).

26. Relation between the *obligation* and other rules concerning jurisdictional competences of States in criminal matters:

(*a*) "offence-oriented" approach (e.g. article 9 of the Draft Code of Crimes against the Peace and Security of Mankind,[15] article 7 of the Convention for the suppression of unlawful seizure of aircraft);

(*b*) "offender-oriented" approach (e.g. article 6, paragraph 2 of the European Convention on Extradition);

(*c*) principle of universality of jurisdictional competences:

(i) as exercised by States;

(ii) as exercised by international judicial organs.

27. Nature of particular obligations deriving under international law from the application of the *obligation*:

(*a*) equality of alternative obligations (extradite or prosecute), or a prevailing position of one of them (hierarchy of obligations);

(*b*) possible limitations or exclusions in fulfilling alternative obligations, (e.g. non-extradition of own nationals, political offences exception, limitations deriving from human rights protection, etc.);

(*c*) possible impact of such limitations or exclusions on another kind of obligations (e.g. impact of extradition exceptions on alternatively exercised prosecution);

(*d*) the *obligation* as a rule of substantive or procedural character, or of a mixed one;

(*e*) position of the *obligation* in the hierarchy of norms of international law:

(i) secondary rule;

(ii) primary rule;

(iii) *jus cogens* norm (?).

[14] *Ibid.*, p. 364.

[15] See footnote 7 of this annex.

28. Relation between the *obligation* and other principles of international law (e.g. principle of sovereignty of States, principle of human rights protection, principle of universal suppression of certain crimes, etc.).

III. Compatibility with the conditions of the selection of new topics

29. The topic *The obligation to extradite or prosecute* (aut dedere aut judicare) *in international law*, proposed for the consideration by the Commission, fulfils the conditions established by the Commission at is forty-ninth[16] and fifty-second sessions[17] for the selection of the topics and based on the following criteria:

(*a*) The topic should reflect the needs for the States in respect of the progressive development and codification of international law;

(*b*) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;

(*c*) The topic should be concrete and feasible for progressive development and codification;

(*d*) The Commission should not restrict itself to traditional topics, but it should also consider those that reflect new developments in international law and pressing concerns of the international community.

30. The topic *The obligation to extradite or prosecute* (aut dedere aut judicare) *in international law* seems to reflect real needs for the States in respect of the progressive development and codification of international law. A developing practice, especially during the last decades, of including the said *obligation* into numerous international treaties and its application by States in their mutual relations raises the question of unification of different aspects of operation of the *obligation*. Among the most important problems which require a clarification without delay is a possibility of recognizing the *obligation* in question not as treaty-based only but having also its roots, at least to some extent, in customary norms.

31. The topic appears to be sufficiently mature to permit progressive development and codification, especially in the light of developing State practice, its growing reflection in courts activities and numerous works of doctrine. A development and precise legal identification of the elements of the obligation to extradite or prosecute seem to be in the interest of States as one of the main positive factors for the development of the effectiveness of their cooperation in criminal matters.

32. The topic is precisely formulated and the concept of the said *obligation* is well established in international relations of States since ancient times. It is neither too general nor too narrow, and its feasibility for progressive development and codification does not seem to be doubtful. As such, the *obligation* has been already put by the Commission on the list of topics suitable for future consideration.[18] Since then it has become obvious that this consideration should begin as soon as possible.

33. Although the obligation to extradite or prosecute may look, at first, like a very traditional one, we should not be misled by its ancient Latin formulation. The *obligation* itself cannot be treated as a traditional topic only. Its evolution from the period of Grotius up to recent times and its significant development as an effective tool against growing threats deriving for States and individuals from criminal offences can bring us easily to one conclusion—that it reflects new developments in international law and pressing concerns of the international community.

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[16] *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238.

[17] See footnote 625 above.

[18] See *Yearbook ... 1996*, vol. II, (Part Two), Annex II, p. 135, para. 4 (sect. VII.2(a) of the General Scheme).