

## ***AutDedereAutJudicare (Extradite or Prosecute) Obligation- Whether a Duty Rooted in Customary International Law?***

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### **Abstract**

Extradite or Prosecute (*Autdedereautjudicare*) obligation finds expression in nearly all Counter-Terrorism and Organised Crime conventions and a number of UNSC resolutions as primary means to deny safe heavens to fugitive offenders. This led some scholars to claim that the duty has its roots in customary international law. The assertion has its implications for state cooperation in law enforcement. By asserting that *autdedereautjudicare* is embedded in customary international law, these scholars imply that the obligation becomes enforceable as soon as a fugitive arrives in the territory of a state party, whether or not any bilateral treaty exists between state of refuge and state of commission of crime. This paper suggests that *autdedereautjudicare* as contained in Counter-Terrorism and Organised Crime conventions still remains a bilateral and reciprocal undertaking, dependent on the existence of a bilateral treaty between cooperating states. There might be a number of crimes with respect to which the obligation may have assumed the character of an emerging norm of customary international law; however, 'treaty crimes' do not fall under this category of crimes.

**Keywords:** *AutDedereAutJudicare*, Treaty Crimes, International law, Counter-terrorism Conventions, Organised Crime Conventions, *Belgium v. Senegal*(2012), Extradition, International Court of Justice

### **Introduction**

The UN Sponsored international suppression conventions on Terrorism and Organised Crime oblige the parties to adopt the mechanism of *autdedereautjudicare*. The mechanism requires a state in the territory of which an offender is found either to extradite or prosecute him. Hence, the mechanism demands the adoption of alternative modalities of law enforcement, so that if one fails, the other can be employed to offer inter-state assistance in apprehension of the offenders. Its purpose is to make sure that the offender may not avoid punishment under any circumstances. The international suppression conventions are designed to facilitate state cooperation in law enforcement with respect to crimes that transcend national borders.<sup>1</sup> State cooperation has so far been carried out on reciprocal basis necessitating a bilateral treaty between cooperating states, duplicating the principles of national law.<sup>2</sup> According to some scholars, the inclusion of *autdedereautjudicare* in international suppression conventions has transformed the nature of the obligation by making it an international rather than a reciprocal undertaking.<sup>3</sup>

This paper looks into the question of the extent to which *autdedereautjudicare* rule as contained in Counter-Terrorism and Organised Crime conventions represents an international obligation independent of bilateral treaty. It will be suggested that formulation of the obligation as well as the nature of the crimes set forth by the conventions indicate that both the alternative obligations i.e. extradition and prosecution are subject to national law and bilateral treaties. Had there been an international duty, independent of bilateral treaty, the same would have required states to perform their alternative obligations irrespective of the contrary provisions of their national laws which invariably demand the existence of a bilateral treaty for state cooperation.

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<sup>1</sup>Carrie Lyn Donigan Guymon, 'International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention' 18 Berkeley J. Int'l L. (2000) 53 at 86-89; see also Neil Boister, 'Transnational Criminal Law' 14 EJIL(2003) 953 at 953-968

<sup>2</sup>M. Cherif Bassiouni, 'International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanisms' (3<sup>rd</sup> edn, MartinusNijhoff, Netherlands, 2008) 324; See also In the words of Edward Wise, "Principle of reciprocity envisages that extradition aims at an exchange of comparable favors". See Edward M Wise, "Some Problems of Extradiation", 15 Wayne L. Rev.(1968-1969)pp.709-731 at 713

<sup>3</sup>See Guymon, Boister (n1)

However, as things stand, both obligations can be avoided, if they are inconsistent with national law of the concerned state. It is therefore clear that no international duty exists, independent of bilateral treaty, to extradite or prosecute the offender. In this backdrop, scholarly focus on tracing the customary origin of the obligation amounts to misdirecting the debate. More importantly, it defies the principle of reciprocity or mutuality of obligations which underlies the very making of the international suppression conventions on Counter-Terrorism and Organised Crime. In order to make *autdedereautjudicare* an effective tool of law enforcement cooperation, it should be treated as a treaty based mechanism subordinate to national law and bilateral treaties.

### **1.1)-Autdedereautjudicare-an Introduction**

The maxim *autdedereautjudicare* refers to alternative obligations to extradite or prosecute the offender found in the territory of a state, which is party to a treaty containing the obligation. It finds expression in multilateral treaties of universal scope aimed at promoting state cooperation in law enforcement.<sup>4</sup> It represents the modern adaptation of the ancient phrase *autdedereaut punier* which was introduced by a Dutch scholar Grotius in 1625.<sup>5</sup> In the words of Grotius, international law imposed a duty on the state in the territory of which an alleged offender had escaped after committing his crime elsewhere, either to return him to the state of commission, or to punish him according to its own law.<sup>6</sup> Grotius presumed the existence of an international community sharing certain common values and goals including the right of states to punish those who had committed crimes in their territories.<sup>7</sup> Pursuant to this view, bringing an offender to justice was considered a right exercised by individual states on behalf of entire international community because elimination of every type of criminality was thought to be in the interest of all mankind.<sup>8</sup> Thus, if an offender had escaped to another state, the state of custody was deemed under an international obligation not to interfere with the right of the injured state to exact punishment.<sup>9</sup> Nonetheless, the injured state was not allowed to send its forces to the territory of the state where the offender had taken refuge. It was rather given the right to demand transfer of physical custody of the offender. The custodial state was not absolutely bound to transfer, as an alternate; it could punish the offender itself through domestic proceedings. However, taking one of the two measures was mandatory.<sup>10</sup>

According to Grotius, the duty to extradite or prosecute applied to every type of crime including domestic law crimes such as murder and robbery.<sup>11</sup> However, a number of other scholars held the view that the duty never transformed into positive law and at best remained a moral obligation.<sup>12</sup> The modern equivalent of Grotius's phrase in multilateral treaties replaced the verb '*punier*' with '*judicare*' to give recognition to the fact that the alleged offender may as well be found innocent, thereby, restricting the scope of the obligation to prosecution rather than punishment.<sup>13</sup> Therefore, in contemporary legal instruments, the obligation has been rephrased as '*autdedereautjudicare*' implying that a state in the territory of which an offender is found has a duty to either extradite or prosecute. As of 2010, the obligation found expression in over 70 international law instruments including multilateral treaties as well as resolutions of General Assembly and Security Council of the United Nations.<sup>14</sup> Furthermore, it is widely applied in municipal laws on extradition of fugitives.<sup>15</sup>

<sup>4</sup>M.CherifBassiouni& Edward M Wise, 'AutdedereAutJudicare: The Duty to Extradite or Prosecute in International Law' (Netherlands: MatinusNijhoff Publishers 1995)3

<sup>5</sup>M.Plachata, 'AutDedereAutJudicare: An overview of modes of implementation and approaches' 6 Maastricht J. Eur. & Comp. L.(1991)331

<sup>6</sup>Bassiouni (n1)5

<sup>7</sup> ibid at 5 & 22, 28

<sup>8</sup> ibid

<sup>9</sup> ibid

<sup>10</sup> Ibid at 22-28

<sup>11</sup> ibid

<sup>12</sup> ibid

<sup>13</sup>ibid at 4; See also ZdzislawGalicki, 'preliminary report on the obligation to extradite or prosecute' A/CN.4/571 at p.6

<sup>14</sup>ZdzislawGalicki, '4<sup>th</sup> report on the obligation to extradite or prosecute submitted in the 63<sup>rd</sup> session of the ILC' See A/CN.4/648

<sup>15</sup>Amnesty International's report on the obligation to extradite or prosecute 2009,

<<http://www.amnesty.org/ar/library/asset/IOR40/001/2009/en/a4761626-f20a-11dd-855f-392123cb5f06/ior400012009en.pdf>>[date accessed 17/03/13]

### **1.2)-Argument that *Autdedereautjudicare* represents Customary International Law**

The widespread recognition of the maxim has led some scholars to claim that it represents a rule of customary international law,<sup>16</sup> a few even go to the extent of regarding it *jus cogens* or peremptory norm of international law, from which no departure is possible.<sup>17</sup> This implies that states are bound to comply with the obligation, notwithstanding, the contrary provisions of their national law.<sup>18</sup> Thus, it was held by the International Court of Justice (ICJ) in *Belgium v. Senegal* (2012) that Senegal may have evoked international responsibility by not bringing necessary changes to its national law to make it conducive to the requirements of *autdedereautjudicare*, as contained in the Torture Convention 1984.<sup>19</sup> The opposite view is that *autdedereautjudicare* typifies a rule based on reciprocity or mutuality of obligations having no legal force beyond the treaty containing it. Since treaties are subordinate to national law, the obligations contained in them including *autdedereautjudicare* cannot be deemed to have over-ridden the contrary provisions of national law.<sup>20</sup> The argument is advanced by those who do not believe in the existence of an international community sharing common values; they rather believe that each member of international system interacts with the other on the basis of reciprocal protection of self-interest or exchange of comparable favors.<sup>21</sup> In the words of Bassiouni,

'[E]xtradition is readily explicable in terms of self-interest of states. Each state has an interest in getting back fugitives from its own law who flee to a foreign state. But to secure their return on regular basis, a state is likely to have to agree to extradite in its own turn. This is the main motive of concluding extradition treaties.'<sup>22</sup>

There has been a tendency of late to view international law as a system based on common values of international community rather than reciprocal protection of self-interest.<sup>23</sup> According to one commentator, it has become fashionable these days to argue that international law is witnessing a shift from reciprocity based bilateral system to a multilateral system founded on common values of international community.<sup>24</sup> In line with this argument, it has been suggested that incorporation of *autdedereautjudicare* in multilateral treaties of universal scope has transformed its nature from a rule embedded in reciprocity to an obligation underlying an international duty, independent of bilateral treaty. In the words of Jennings, there is a tendency to speak of multilateral treaties as if they could in some way legislate for states generally without their consent.<sup>25</sup> To support this view, it is said that 'generalizable' treaty provisions produce customary rules binding on all states including non-parties.<sup>26</sup> Thus, according to dissenting opinion of Judge Weeramantry in the *Lockerbie* case, principle of *autdedereautjudicare* represents a rule of customary international law.<sup>27</sup>

Two justifications have so far been advanced to give credence to the argument that *autdedereautjudicare* rule represents an international duty not requiring the medium of bilateral treaty for its application. Firstly, it has been argued that consistent appearance of the obligation in multilateral treaties of universal scope testifies to its customary status. Secondly, it has been suggested that the rule underlies a general international duty to cooperate in fight against impunity.

<sup>16</sup> C. Enache-Brown, A. Fried, 'Universal Crime, Jurisdiction and Duty: The Obligation of Aut DedereAutJudicare in International Law' 43 McGill Law Journal (1998) 628-629; See also Bassiouni (n1)22-26, 51-53

<sup>17</sup> Bassiouni (n1)26

<sup>18</sup> Bassiouni (n 1)20

<sup>19</sup> Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), ICJ Judgement July 20, 2012 at para 75 & 95

<sup>20</sup> Abraham Abramovsky, 'Multilateral Conventions for suppression of unlawful seizure and interference with aircraft part 1: Hague Convention' 13 Colum. J. Transnat'l L.(1974) 381 at 400

<sup>21</sup> Puffendorf quoted in Bassiouni (n 1)23

<sup>22</sup> Bassiouni (n 1)37

<sup>23</sup> Richard Falk quoted in Bassiouni (n 1)35

<sup>24</sup> Bassiouni (n 1)20,21

<sup>25</sup> Bassiouni (n 1)46

<sup>26</sup> Bassiouni (n 1)47

<sup>27</sup> *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; See also Plachata (n2)5

### **1.2.1)-Consistent Appearance in Multilateral Treaties**

Modern international suppression conventions containing *aut dedere aut judicare* rule can be classified into 11 headings, each corresponding to a particular category of international wrongs. These include: (1) Aircraft Hijacking and related offences (2) Offences against safety of Maritime Navigation (3) Violence against or injury to Internationally Protected Persons(4) Hostage Taking (5) Nuclear theft and Terrorism (7) Bombing of places (8) Financing of Terrorism (9) Drug Trafficking(10) Corrupt practices (11) Organized crimes including smuggling of weapons, Human Smuggling and Human Trafficking. Although there is little in common with respect to nature of these crimes, one factor is shared by all these conventions i.e. the requirement to extradite or prosecute the offender found in state territory. Considering this, it is quite plain to see that the argument of consistent appearance of the obligation does hold some ground. Apart from this, a majority of these conventions are widely ratified and can be said to have established obligations of universal application. Hence, the contention that the conventions in question lay down the obligations of universal application also carries weight. For example, out of 193 UN member states,<sup>28</sup>185 are members of the Hague Convention 1970,<sup>29</sup>188 have ratified Montreal Convention 1971,<sup>30</sup> 168 are parties to Hostages Convention 1979,<sup>31</sup> 167 are parties to IPP Convention 1973,<sup>32</sup> Rome Convention 1988 has 156 parties,<sup>33</sup> 142 are parties to Nuclear Materials Convention 1980,<sup>34</sup>Terrorist Bombings Convention 1997 has 165 parties,<sup>35</sup>Financing Convention 1999 has 173 parties,<sup>36</sup>Drugs Convention 1988 has 188 parties,<sup>37</sup>UNTOC 2000 has 174 parties<sup>38</sup> and UNCAC 2003 has 165 states.<sup>39</sup> Out of the treaties under consideration, only two do not enjoy the support of overwhelming majority of the UN member states i.e. Beijing Convention on Civil Aviation 2010 and Nuclear Terrorism Convention 2005. The former has <sup>340</sup> and the latter 84 parties.<sup>41</sup>

### **1.2.2)-General International Duty to Cooperate in Fight against Impunity**

Another argument which is frequently advanced to establish the elevated status of *aut dedere aut judicare* is that the obligation underlies a general international duty to cooperate in fight against impunity. According to Zdzislaw Galciki, the duty to cooperate is a well-established principle of international law and can be found in numerous international law instruments.<sup>42</sup> It can for example be seen in article 1(3) of the UN Charter 1945, UN General Assembly (UNGA) Declaration on Friendly Relations 1970<sup>43</sup> and Council of Europe's Guideline XII on International Cooperation.

<sup>28</sup><<http://www.unvienna.org/unov/en/faq.html>[date visited 21/03/03]

<sup>29</sup><[http://www.icao.int/secretariat/legal/List%20of%20Parties/Hague\\_EN.pdf](http://www.icao.int/secretariat/legal>List%20of%20Parties/Hague_EN.pdf)>[date visited 21/03/13]

<sup>30</sup><<http://cil.nus.edu.sg/1971/1971-convention-for-the-suppression-of-unlawful-acts-against-the-safety-of-civil-aviation/>>>[date visited 21/03/13]

<sup>31</sup><[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-5&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-5&chapter=18&lang=en)>[date visited 21/03/13]

<sup>32</sup><[http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-7&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-7&chapter=18&lang=en)>[date visited 21/03/13]

<sup>33</sup><<http://cil.nus.edu.sg/1988/1988-convention-for-the-suppression-of-unlawful-acts-against-the-safety-of-maritime-navigation/>> [date visited 21/03/13]

<sup>34</sup><<http://cil.nus.edu.sg/1979/1979-vienna-convention-on-the-physical-protection-of-nuclear-materials/>>[date visited 21/03/13]

<sup>35</sup><<http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xviii/xviii-9.en.pdf>>[date visited 21/03/13]

<sup>36</sup><<http://cil.nus.edu.sg/1999/1999-international-convention-for-the-suppression-of-the-financing-of-terrorism/>> [date visited 21/03/13]

<sup>37</sup><<http://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20vi/vi-19.en.pdf>>[date visited 21/03/13]

<sup>38</sup><[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en)> [date visited 21/03/13]

<sup>39</sup><<http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xviii/xviii-14.en.pdf>>[date visited 21/03/13]

<sup>40</sup><[http://www.icao.int/secretariat/legal/List%20of%20Parties/Beijing\\_Conv\\_EN.pdf](http://www.icao.int/secretariat/legal>List%20of%20Parties/Beijing_Conv_EN.pdf)>[date visited 21/03/13]

<sup>41</sup><[http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XVIII%7E15&chapter=18&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVIII%7E15&chapter=18&Temp=mtdsg3&lang=en)> [date visited 21/03/13]

<sup>42</sup>Zdzislaw Galciki, 4<sup>th</sup> report on the obligation to extradite or prosecute submitted in the 63<sup>rd</sup> session of the ILC. See A/CN.4/648 at 6

<sup>43</sup> GA Res 2625 (XXV) of 24 October 1970 annex para 1

Similarly, the obligation to deny safe heavens to terrorists, as found in the Security Council's binding resolution 1373(2001) is said to be a corollary of the duty to cooperate in fight against impunity.<sup>44</sup> Arguably, the duty to cooperate in fight against impunity represents a rule of customary international law.<sup>45</sup> However, the duty can be realized in the best and most effective way by applying the principle of *aut dedere aut judicare*.<sup>46</sup> The fact has been acknowledged not only in the scholarly writings but also in successive resolutions of the Security Council. For example, resolutions 1456(2003) and 1566(2004) make it clear that the obligation to bring terrorists to justice shall be carried out on the basis of the principle of extradite or prosecute.<sup>47</sup> Similarly, with respect to *Eichman* case several scholars held the view that Argentina had a duty not to withhold war criminals from justice, whether by granting asylum or by affording them a heaven of refuge.<sup>48</sup> Likewise, Hersch Lauterpacht observed that it would be an abuse of the right to cooperate in fight against impunity, to refuse extradition of a wrongdoer whose misdeed did not constitute a political crime.<sup>49</sup> Recently, in *Belgium v. Senegal* (2012) Eric David argued before the ICJ, 'the right of Belgium to see states fulfill their obligation to prosecute or extradite, the perpetrators of crimes under international law...is ultimately nothing more than transposition into law by international community of a fundamental moral and social value which has now become a legal requirement-not to let some of the very gravest crimes go free'.<sup>50</sup>

Due to the above reasons, the working group of the International Law Commission (ILC) on the obligation to extradite and prosecute has reaffirmed in its successive reports that duty to cooperate in fight against impunity constitutes a primary source of the obligation of *aut dedere aut judicare*.<sup>51</sup> Notably, this argument was also relied by Professor Higgins while expounding UK's position in *Lockerbie case*.<sup>52</sup> However, despite these positive assertions, the argument that an international duty underlies *aut dedere aut judicare* suffers from three fundamental weaknesses. Firstly, it overlooks the fact that expression of the obligation in various international conventions is not uniform enough to give birth to a generalizable rule, producing customary law obligation. Secondly, even if it is admitted that an international duty underpins *aut dedere aut judicare*, it must apply to crimes under international law, whereas, the international conventions on Terrorism and Organized Crime set forth 'treaty crimes'. Thirdly, the wording of *aut dedere aut judicare* in the international suppression conventions points to its subordination to domestic law and bilateral treaties.

## **2.1)-Expression of the Obligation in International Conventions on Terrorism and Organised Crime**

A crucial factor in determining the customary status of a treaty obligation is its consistent appearance in the treaties containing it.<sup>53</sup> This leads to emergence of generalizable treaty provision, binding all states including non-parties. The analysis of the obligation as contained in Counter-Terrorism and Organised Crime conventions reveals that the element of uniformity is lacking in the expression of the obligation.<sup>54</sup> While counter-terrorism conventions provide more or less uniform version of the obligation, their *travaux préparatoires* indicate that the obligation can be subjected to multiple interpretations. By contrast, the version of the obligation as reflected in the Organised Crime conventions differs markedly from Counter-Terrorism conventions.

<sup>44</sup> See para 2(c) S/RES/1373 (2001) adopted on 28 September 2001, S/RES/1373 (2001)

<sup>45</sup> Zdzislaw Galicki, 4<sup>th</sup> report on the obligation to extradite or prosecute submitted in the 63<sup>rd</sup> session of the ILC. See A/CN.4/648 at 7

<sup>46</sup> ibid at 9

<sup>47</sup> See para 3, S/RES/1456 (2003) adopted by the Security Council at its 4688th meeting, on 20 January 2003; See also para 2, S/RES/1566 (2004) Adopted by the Security Council at its 5053rd meeting, on 8 October 2004

<sup>48</sup> Bassiouni (n 1)45

<sup>49</sup> Hersh Lauterpacht quoted in Bassiouni ibid

<sup>50</sup> Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*) ICJ Judgement of July 20, 2012 <<http://www.icj-cij.org/docket/files/144/17064.pdf>>[Date visited 19/04/13]

<sup>51</sup> Zdzislaw Galicki, 4<sup>th</sup> report on the obligation to extradite or prosecute submitted in the 63<sup>rd</sup> session of the ILC. See A/CN.4/648 at 7; See also A/65/10 para 339

<sup>52</sup> Oral Hearings on Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (*Libyan Arab Jamahiriya v. UK*) 1992 I.C.J 17; See also Omer Y. Elegab, "The Hague as the Seat of Lockerbie Trial: Some Constraints"34 The International Lawyer (2000) 289 at 298

<sup>53</sup> Bassiouni (n 1)44,45

<sup>54</sup> Bassiouni (n 1)18

The first dissimilarity in the two versions is that *aut dedere aut judicare* rule as contained in the Organised Crime conventions gives explicit recognition to the fact that jurisdiction of the custodial state to prosecute the offender is activated only once a request for extradition has been made to it and the same has been rejected.<sup>55</sup> In other words, the custodial state is not bound to prosecute, merely because the offender is present in its territory, its obligation takes effect, once it receives an extradition request from a state in the territory of which or within whose jurisdiction the crime has been committed, and it decides not to extradite. By contrast, the Hague Convention 1970 and the conventions modeled after it requires no such trigger mechanism. The second difference is that the Organised Crime conventions allow the parties not to extradite their nationals for crimes committed abroad, if their domestic law does not authorize them to do so. In such cases, the custodial state is required to submit the case to its competent national authorities for domestic prosecution.<sup>56</sup> Conversely, the Hague Convention 1970 and the conventions modeled after it afford no such concession with respect to non-extradition of nationals. The third discrepancy relates to Organised Crime conventions not requiring the mandatory prosecution of non-nationals for crimes committed abroad. As per the language used in these conventions, states 'may' prosecute non-nationals for crimes committed abroad, whereas, for prosecution of nationals, the word 'shall' have been used.<sup>57</sup> By comparison, the Hague formula gives no such concession with respect to prosecution of non-nationals; instead it requires their prosecution regardless of the locus of crime. In view of the above, it is apparent that at least three different variants of the 'Hague Formula' can be seen. These include the requirement of trigger mechanism, permissibility to refuse extradition of nationals and the requirement to prosecute non-nationals only when the national law applies to extraterritorial crimes. Needless to say, these discrepancies are so fundamental that existence of a generalizable provision to extradite or prosecute is difficult to prove.

## **2.2) - Nature of the Crimes**

Even if it is accepted that duty to extradite or prosecute does have its roots in customary international law, such duty may only arise with respect to crimes under international law. However, the crimes established by Counter-Terrorism and Organised Crime conventions can at best be regarded crimes of international concern.

### **2.2.1)-Crimes under International Law**

The international instruments which are usually cited to support customary law status of *aut dedere aut judicare* refer to crimes under international law.<sup>58</sup> For example, ILC's Draft Code of Crime against Peace and Security of Mankind 1996 recognizes the existence of an international duty to extradite or prosecute with respect to certain types of crimes which constitute threats to international peace and security.<sup>59</sup>

<sup>55</sup>See for instance article 44(11) UN Convention against Corruption (UNCAC) 2003: "A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution." See also article 16(10) UN Convention against Transnational Organized Crime 2000

<sup>56</sup>See for instance article 15(3) UN Convention against Transnational Organized Crime 2000 "For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals." See also article 42(3) UN Convention against Corruption 2003 and article 4(2)(a) UN Convention against Drugs 1988

<sup>57</sup> See for instance article 42(3) &(4) UN Convention against Corruption(UNCAC) 2003, article 15(3) &(4) UN Convention against Transnational Organized Crime(UNTOC) 2000 and article 4(2)(a)&(b) UN Convention against Drugs 1988. The Drugs Convention 1988 establishes mandatory obligation to prosecute non-nationals where the crime is committed in state territory or in an aircraft or vessel owned by the requested state. However, both these bases may not be considered extraterritorial.

<sup>58</sup>See article 1(2) Draft Code of Crimes against Peace and Security of Mankind 1996 "Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law."

<sup>59</sup>See article 9 Draft Code of Crimes against Peace and Security of Mankind 1996

These include Genocide, War Crimes, Crimes against United Nations and Associated Personnel and Crimes against Humanity.<sup>60</sup> In the same way, certain crimes which shock the conscience of humanity or endanger its commonly held values are also considered to be crimes under international law. These include Torture, Slavery and Piracy.<sup>61</sup> Following are some distinctive features of these crimes.

### **2.2.1.1-Individual Criminal Responsibility**

One common feature is that nearly all these crimes give rise to individual criminal responsibility of the offender at international law. This implies that the offender is held responsible for his crime, independent of the responsibility of the state concerned.<sup>62</sup> For example, Draft Code of Crimes against Peace and Security of Mankind 1996 provides: 'A crime against peace and security of mankind entails individual criminal responsibility.'<sup>63</sup> Similarly, 1998 Rome Statute of the ICC provides, 'A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.'<sup>64</sup> Although individual criminal responsibility is not established by every convention proscribing crimes under international law, in relation to these crimes the responsibility is said to flow from customary international law.<sup>65</sup> For example, the Torture Convention 1984 does not establish individual criminal responsibility. However, the prohibition against torture doubtlessly represents customary international law.<sup>66</sup> Thus, it was held by the ICJ in *Belgium v. Senegal*(2012): '[i]n the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.<sup>67</sup>

### **2.2.1.2- Prosecution before International Criminal Court (ICC)**

A number of these crimes have been made prosecutable before International Criminal Court (ICC).<sup>68</sup> These include Genocide, War Crimes, Crimes against Humanity and Aggression.<sup>69</sup> The ICC has been given complementary jurisdiction over these crimes along with the jurisdiction of national courts.<sup>70</sup> However, since the jurisdiction of the ICC does not extend to the whole class of crimes under international law, some of them are prosecutable before national courts only.<sup>71</sup> For example, the crimes of Torture and Piracy despite being considered crimes under international law are prosecutable before national courts alone.<sup>72</sup>

<sup>60</sup>See article 17, 18, 19 & 20 Draft Code of Crimes against Peace and Security of Mankind 1996

<sup>61</sup>*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Judgment July 20, 2012 at para 68; See also See Neil Boister, "Treaty Crimes, International Criminal Court? 12 New Criminal Law Review: An International and Interdisciplinary Journal(2009) 341 at 349

<sup>62</sup>See article 25 Rome Statute of the ICC 1998

<sup>63</sup>See article 2(1) Draft Code of Crimes against Peace and Security of Mankind 1996 "A crime against the peace and security of mankind entails individual responsibility."

<sup>64</sup>See article 25(2) Rome Statute of the ICC 1998

<sup>65</sup> See Neil Boister, "Treaty Crimes, International Criminal Court? 12 New Criminal Law Review: An International and Interdisciplinary Journal(2009) 341 at 349

<sup>66</sup>*ibid*

<sup>67</sup>*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Judgement July 20, 2012 at para 99

<sup>68</sup>The examples of international conventions setting up international courts or tribunals include Genocide Convention 1948 and Rome Statute of the ICC 1998. See for instance article 1 and 6 of the Genocide Convention 1948. Article 1 provides states parties confirm that Genocide constitutes a crime under international law and article 6 makes the offence triable by national courts as well as by such international penal tribunal which may have jurisdiction and whose jurisdiction has been consented to by states parties. See also article 5(1) of the Rome Statute of International Criminal Court(ICC)1998. "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." These include Genocide, Crimes against humanity, War Crimes and aggression. Also see article 25 Rome Statute 1998

<sup>69</sup>See article 5 Rome Statute of ICC 1998

<sup>70</sup>See article 17 Rome Statute of ICC 1998

<sup>71</sup>Examples of Crimes under International law prosecutable before national courts alone include Piracy and Torture. The International Conventions dealing with both these crimes make the offences prosecutable before national courts only. See for instance, UN Convention on Law of the Sea (UNCLOS) 1982, Rome (SUA) Convention 1988 and UN Convention against Torture 1984.

<sup>72</sup>*ibid*

### **2.2.1.3- Threat to Common Values of Mankind**

In relation to crimes under international law, it is believed that the custodial state owes it to the entire international community besides the injured state to bring the offender to justice.<sup>73</sup> This is so because the crimes are deemed to threaten the commonly shared values of humanity.<sup>74</sup> In the words of Bassiouni: ‘These are offences reprehended by international community as a whole. These are offences against world public order. They are of concern to all states and all states ought to cooperate in bringing to justice those who commit such crimes.’<sup>75</sup> The argument is fortified by the judgment of the ICJ in *Belgium v. Senegal* (2012). In para. 68 the Court observed: ‘The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity...’<sup>76</sup>

### **2.2.1.4- No Treaty is required for Extradition or Prosecution of the Offender**

As regards crimes under international law, the duty to extradite or prosecute flows from common interest which states have in the suppression of international offences. Hence, no bilateral treaty is required between the state of refuge and the injured states with respect to extradition or prosecution of the offender involved in these crimes, the obligation automatically flows from customary international law.<sup>77</sup> According to Bassiouni, ‘In the absence of a system of direct law enforcement through prosecution before international court, reliance has to be placed on individual states to prosecute international offenders before their own courts. The whole effort to bring such offenders to justice will be frustrated if states do not accept a duty to prosecute or else to extradite them to a state which is prepared to prosecute’.<sup>78</sup>

### **2.2.2-Crimes of International Concern or Treaty Crimes**

By contrast, crimes set forth by international Counter-Terrorism and Organised Crime conventions are called crimes of international concern or treaty crimes.<sup>79</sup> These include varying types of offences ranging from Aircraft Terrorism, Hostage Taking, Bombing of Places, Navigational Terrorism, Nuclear Terrorism and theft, Financing of Terrorism, Corruption, Drug Trafficking, Human and Arms trafficking and Human Smuggling. The only factor common in all these crimes is their transgression of national boundaries.<sup>80</sup> The incorporation of these crimes in multilateral conventions shows that there is a level of international concern about them. Following are the major differences between these crimes and the crimes under international law.

#### **2.2.2.1-Absence of Individual Criminal Responsibility at International Law**

Unlike Rome Statute and the Draft Code, the conventions on Terrorism and Organised Crime while defining these offences, do not establish individual criminal responsibility of the offenders at international law, neither do they make these crimes prosecutable before international courts.<sup>81</sup> Instead, these conventions only require the parties to take all necessary measures to establish them as crimes under their national law.<sup>82</sup>

#### **2.2.2.2- Absence of Precise Definition**

The crimes of international concern do not have any precise definitions.<sup>83</sup> The conventions establishing these crimes define them only broadly and leave it up to the parties to settle the particularities of their definitions.<sup>84</sup>

<sup>73</sup>Either by surrendering him or through subjecting him to domestic prosecution

<sup>74</sup>such as prohibition against genocide or war crimes

<sup>75</sup>Bassiouni (n 1)24

<sup>76</sup>Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), ICJ Judgement July 20, 2012 at para 68

<sup>77</sup>Bassiouni (n 1)21

<sup>78</sup>Bassiouni (n 1)24

<sup>79</sup> Neil Boister, ‘Treaty Crimes, International Criminal Court? 12 New Criminal Law Review: An International and Interdisciplinary Journal(2009) 341 at 349

<sup>80</sup> In relation to the involvement of more than one state in their perpetration or nationality of the victims and offenders or their location

<sup>81</sup> See article 2(1) Draft Code of Crimes against Peace and Security of Mankind 1996 “A crime against the peace and security of mankind entails individual responsibility.” See also article 25 Rome Statute of the ICC 1998

<sup>82</sup>Some of the international conventions do require the states to take legislative measures to establish these offences as crimes under national law. These for example, include Terrorist Bombing Convention 1997, Terrorist Financing Convention 1999 and UN Convention against Transnational Organized Crime(UNTOC) 2000. However, even these conventions provide in their separate provisions that offences shall be defined in accordance with national law.

<sup>83</sup>Neil Boister (n 79) at 346

Accordingly, the UN Convention against Transnational Crime (UNTOC) 2000 and UN Convention against Corruption 2003(UNCAC) expressly provide that description of offences is reserved to domestic law of states parties.<sup>85</sup> This scheme is implicit in Counter-Terrorism conventions because majority of them do not require the adoption of exact definitions of crimes and those which do, leave enough room for the parties to adjust them in accordance with domestic law requirements.<sup>86</sup> To the contrary, crimes under international law are usually defined with precision.<sup>87</sup>

#### **2.2.2.3- Insufficient Level of Threat Evoked by Treaty Crimes**

The most significant dissimilarity between the two categories of crimes is that crime of international concern or treaty crimes do not generate sufficient level of threat to evoke international response.<sup>88</sup> According to Neil Boister, ‘treaty crimes are not by definition a threat to international peace and security or so egregious to shock the conscience of humanity’.<sup>89</sup> Hence, the offenders can at best be regarded enemies of states parties.<sup>90</sup> The incorporation of these crimes in multilateral conventions shows that there is a level of international concern about them; however, they still remain crimes under national law.

#### **2.2.2.4-Requirement of Bilateral Treaty to give Effect to Duty to Extradite or Prosecute**

Since the crimes established by Counter-Terrorism and Organised Crime conventions do not pose a threat to commonly shared values, it is safe to assume that no customary law duty underpins extradite or prosecute obligation pertaining to these crimes. The obligation in relation to these crimes flows from treaty law only, which is based on principle of reciprocity or exchange of comparable favours.<sup>91</sup> Under this principle, a requested state agrees to surrender fugitives, in anticipation of receiving similar treatment from the requesting state in future, if the circumstances are reversed.<sup>92</sup> There is no international duty, independent of the treaty to bring the offender to justice.<sup>93</sup> In other words, there is no international right to insist upon surrender of fugitives, absent bilateral treaty.<sup>94</sup> This argument is fortified by the ICJ’s judgment in *Lockerbie case*.<sup>95</sup> A Joint declaration by Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley provides, ‘Insofar as general international law is concerned, extradition is a sovereign decision of the requested state which is never under an obligation to carry it out. Moreover, in general international law, there is no obligation to prosecute in default of extradition... This being so every state is at liberty to request extradition and every state is free to refuse it.’<sup>96</sup>

#### **2.3-ILC’s Working Group’s report on the Status of *aut dedere aut judicare* and the ICJ’s Judgement in *Belgium v. Senegal* (2012)**

According to the report of ILC’s working group, the essential requirements of custom are found to be missing with respect to the obligation to extradite or prosecute.<sup>97</sup>

<sup>84</sup> ibid

<sup>85</sup> See article 30(9) UN Convention against Corruption(UNCAC) 2003; also see article 11(6) UN Convention against Transnational Organized Crime(UNTOC) 2000

<sup>86</sup> ibid

<sup>87</sup> See for example article 2 Genocide Convention 1948; See also articles 6, 7 & 8 Rome Statute of the ICC 1998

<sup>88</sup> See Neil Boister, “Treaty Crimes, International Criminal Court?” 12 New Criminal Law Review: An International and Interdisciplinary Journal(2009) 341 at 349

<sup>89</sup> ibid at 346

<sup>90</sup> ibid

<sup>91</sup> Bassiouni (n 1)21 &22, 37

<sup>92</sup> Bassiouni (n 1) 37

<sup>93</sup> ibid

<sup>94</sup> ibid

<sup>95</sup> 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, 1992 ICJ Reports 3(Apr 14); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), ICJ Reports (1992) 225

<sup>96</sup> Joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, 1992 I.C.J 136(Apr 14) para 2;See also Omer Y. Elegab, “ The Hague as the Seat of Lockerbie Trial: Some Constraints”34 The International Lawyer (2000) 289 at 300

<sup>97</sup>ZdzislawGalicki, 4<sup>th</sup> report on the obligation to extradite or prosecute submitted in the 63<sup>rd</sup> session of the ILC. See A/CN.4/648

These requirements are given under article 38(i)(b) of the statute of International Court of Justice(ICJ) and demand the existence of dual elements of state practice and *opinio juris*.<sup>98</sup> The report suggests, neither the practise of states is uniform enough<sup>99</sup> nor states consider it their legal obligation to extradite or prosecute the offender, in the absence of a treaty.<sup>100</sup> However, the report emphasizes that a customary rule may well be in the making concerning the crimes under international law.<sup>101</sup> This observation has partially been overruled by the judgment of the ICJ in *Belgium v. Senegal*(2012), according to which, to the extent of crimes under international law such as Torture, the obligation to prosecute represents an international obligation whereas the obligation to extradite remains reciprocal. In para. 95 of the judgment the, Court observed, ‘Extradition is an option offered to the State by the (Torture) Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.’<sup>102</sup> Since the crimes set forth by Counter-Terrorism and Organised Crime conventions do not fall into this category of crimes, in relation to them, neither the obligation to prosecute can be said to underpin an international obligation nor is it likely that both the obligations may in future acquire the status of custom.

In the light of above, scholarly emphasis on tracing the customary origin of *aut dedere aut judicare* rule, as contained in Counter-Terrorism and Organised Crime conventions, appears to be misplaced. The aim of giving customary status to a treaty obligation is to enhance the case for its observance by making the parties realize that the obligation is not simply contractual but represents a rule of international law.<sup>103</sup> Nevertheless, states are already bound to perform their treaty obligations in good faith under article 26 of the Vienna Convention 1969, which is said to represent customary international law.<sup>104</sup> If states can violate this obligation, it is possible; they will not refrain from breaching other obligations under customary law. It can thus be argued that the weakness lies in the law of state responsibility rather than less binding nature of *aut dedere aut judicare* rule.<sup>105</sup>

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<sup>98</sup> See article 38(I)(b) Statute of International Court of Justice “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply...? (b) International custom, as evidence of a general practice accepted as law...

<sup>99</sup> with respect to performance of the obligation

<sup>100</sup> Zdzislaw Galicki, 4<sup>th</sup> report on the obligation to extradite or prosecute submitted in the 63<sup>rd</sup> session of the ILC. See A/CN.4/648

<sup>101</sup> *ibid*

<sup>102</sup> Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), ICJ Judgement July 20, 2012 at para 95

<sup>103</sup> Bassiouni (n 1)20

<sup>104</sup> See article 26 Vienna Convention on Law of Treaties 1969 ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

<sup>105</sup> Bassiouni (n 1)41-42