Review paper
submitted: 31. 03. 2022.
accepted: 19. 04. 2022.
UDK 341.44

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AUT DEDERE AUT JUDICARE IN INTERNATIONAL AND DOMESTIC LAW

Abstract

Maxim *aut dedere aut judicare* means that the state where the criminal is found should either extradite him or prosecute him. In this paper, the author will explain the origin of this maxim and its meaning. The first part of the paper is devoted to international law and the sources of law. The main question is whether this maxim become the part of international customary law and which of the options has the primacy. The second part is dedicated to domestic law and, in particular, one case in the jurisprudence of Serbia that has left a mark. It has shown how much human rights must be respected, but also how important political will is.

Key words: aut dedere aut judicare, extradition, international criminal law.

1. INTRODUCTION

State sovereignty and equality are the fundamental principles of international law and they could be found in the United Nations Charter. They serve to protect each state from the interference. The jurisdiction is a tool that helps state with protecting its sovereignty. As for the basis of jurisdiction, there are territorial, nationality, protective, passive personality and universal principle. The universality principle allows state that does not have any connection with the crime to exercise its jurisdiction, due to the severity of the offense. The universality jurisdiction is, among other things, often used to describe the right and the obligation of the states to prosecute or extradite when certain categories of crimes are involved.

One of the main objectives of the international criminal law is to punish the offender and to provide justice. Therefore, the guiding principle of the maxim that is the headline of this paper was that it does not matter in the territory of which state the offender is prosecuted and punished, what matters is that the justice is done. The

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This paper was written within the strategic project entitled "Contemporary Problems of the Legal System of Serbia" which is implemented at the Faculty of Law, University of Belgrade.

maxim *aut dedere aut punire* was originally formulated by Hugo Grotius in 1625. In his famous book "De iure belli ac pacis" he wrote that king should either extradite or punish the offender. Of course, we should keep in mind that the scope of the maxim was limited to "crimes which in some way affect human society", which we could interpret today as international crimes.[1] His argument was that there is a general obligation to extradite or punish in respect to all offenses by which another state is particularly harmed, event that the state has a natural right to punish the offender and no other state should interfere.[2] Nowadays, this principle is used with the term "prosecute" instead of "punish", due to the presumption of innocence that all suspects have.[3] Historically, this principle was used as a part of duty to cooperate among the states in the preservation of their national order and in preservation of world public order and just recently, it began to apply to international crimes.[4] So, as the Special Rapporteur Mr. Galicki noted in his Preliminary Report, the formula "extradite or prosecute" is commonly used to refer to the alternative obligation regarding the treatment of an alleged offender, which is contained in a number of multilateral treaties aimed at ensuring the international cooperation in the suppression of certain types of criminal conduct.[5]

Extradition can be defined as the surrender by one state or country to another of an individual accused or convicted of a crime outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender. This is the definition from the Black's Law Dictionary.[6] The oldest extradition treaty was made between the Egyptian Pharaoh Ramses II and the Hittite Prince Hattusili. The modern practice began to develop in the eighteenth century.[7] After that, the principle *aut dedere aut judicare* can be found in the Nuremberg and Tokyo Tribunals and then in the Statutes for the International

[1] M. Plachta, "*Aut Dedere Aut Judicare* : An Overview of the Modes of Implementation and Approaches", *Maastricht Journal of European and Comparative Law*, 6 (4), 1999, 331.
[2] M. J. Kelly, "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*, 20 (3), 2003, 496-497.
[3] A. Caliguri, "Governing International Cooperation in Criminal Matters: The role of the *aut dedere aut judicare* Principle", *International Criminal Law Review*. 18, 2018, 245.
[4] M. C. Bassiouni, "The Penal Characteristics of Conventional International Criminal Law", *Case Western Reserve Journal of International Law*, 15 (1), 1983, 35.
[5] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/571. Preliminary report by Mr. Zdzislaw Galicki, Special Rapporteur, para 4. https://legal.un.org/ilc/documentation/english/a_cn4_571.pdf.
[6] M. J. Kelly, "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*, 20 (3), 2003, 495.
[7] M. J. Kelly, *op. cit.*, 495.

Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda from 1993 and 1994.[8]

2. *AUT DEDERE AUT JUDICARE* IN CONTEMPORARY INTERNATIONAL LAW

It is believed that the principle *aut dedere aut judicare* still does not have the status of a customary norm. However it exists in over seventy international treaties. In order to determine the status of a customary norm, two elements are required, by virtue of Article 38, 1(b) of the Statute of the International Court of Justice. These are general practice and *opinio iuris sive necessitatis*. Most authors of contemporary doctrine think that the principle does not meet these conditions. Some authors consider that *aut dedere aut judicare* has reached the level of a what is called a "general principle of international law", but there are even some authors who would place this principle in the ranks of *jus cogens* norms. *Jus cogens* norms are also known as peremptory norms and are the norms that have the highest status in the international law.[9] Usually the norms that prohibit the international crimes, such as genocide or war crimes, have that status. A violation of such norm would give rise to an obligation that is *erga omnes* and that is to either prosecute the offender or to extradite. Still, it does not mean that there is customary law.[10]

However, there are some views that this principle is becoming part of a customary law. The narrow approach of the argument is that the duty to extradite or prosecute may become customary norm with the respect to the offense defined in one treaty and the broad approach is that the duty has become a customary norm with respect to a class of international offenses or with respect to international offenses in their entirety. This broad approach is becoming increasingly popular. It has three manifestations. The first one is that it applies the duty to those offenders who commit war crimes or crimes against humanity. The second one is that it also includes acts of international terrorism and the third one is that it extends to all international crimes.[11] The question whether *aut dedere aut judicare* became a part of customary international law was also discussed in the work of the International Law Commission. It can be concluded that there is no uniform tendency among states as to the existence of a customary rule, even though the work of the International Law

[8] E. C. W. Mack, "Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity?" *Minesota Journal of International Law*, 24(1), 2015, 75.
[9] M. Plachata, *op.cit.*, 333.
[10] M. Zgonec-Rožej & J. Foakes, "International Criminals: Extradite or Prosecute?" *Chatham House* briefing paper, 2013, 3.
[11] M. J. Kelly, *op. cit.*, 497-498.

Commission actually didn't provide any useful contribution to the customary nature of the principle.[12] It was included in the Draft Code of Crimes against Peace and Security of Mankind which was adopted by the International Law Commission in 1996, but it was never adopted by the states. Draft Article 9 proposed the obligation to extradite or prosecute when it comes to the core crimes with the purpose to ensure that individuals that are responsible for serious crimes be brought to justice, but it seems that it was matter of progressive development rather than a codification.[13] M. C. Bassiouni is one of the scholars who is best known in this field and, during the 1990s, he argued that this obligation does have customary status when it comes to international crimes. Unfortunately, his argument was based on the argument that the customary status was derived from nature of the crimes that is *jus cogens* and nature of the obligation that is *erga omnes* and there are two reasons why this is not suitable. First of all, the two mentioned terms and concepts do not lead to formation of customs in international law, and second of all, it doesn't seem possible that the obligation to extradite or prosecute is grounded upon the general principles of international law, that some scholars proposed.[14]

One of the most debatable questions when it comes to principle *aut dedere aut judicare* is whether these are alternative obligations or one of them has the primacy. Thus, if obligations to extradite or to prosecute are equivalent, this would mean that the state has the right to decide which of them it would pursue. However, if they are not seen as equal, then the obligation to extradite is primary one, which would mean that the duty to prosecute would arise only if the there is a bar to extradition in domestic legislation. That would also mean that the state where the crime happened has the primary responsibility to either prosecute or punish the perpetrator, but, when it comes to the state where the criminal is hiding, they only have the second obligation.[15]

When it comes to treaties, we will not discuss bilateral treaties in this paper. They are certainly an important source of law in this field. Rather, we will focus on multilateral conventions. There are several convention models.[16] The first one allows state of the *forum deprehensionis* to have freedom of choice, either to prosecute or to extradite the offender that is found in its territory. The problem is that this model only works if the bilateral relations do exist between two states. First time this was

[12] A. Caliguri, *op. cit.*, 262-263
[13] M. Zgonec-Rožej & J. Foakes, *op.cit.*, 4.
[14] R. Van Steenberghe, "The Obligation to Extradite or Prosecute – Clarifying its Nature", *Journal of International Criminal Justice*, 9, 2011, 1092.
[15] M. Plachata, *op.cit.*, 334-335.
[16] The convention models are explained in detail in: A. Caligiuri, "Governing International Cooperation in Criminal Matters: The Role of the *aut dedere aut judicare* principle", *International Criminal Law Review*, 18, 247-256.

formulated was in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft from 1970 in the famous article 7. This article said that: The Contracting State in the territory of which the alleged criminal is found shall, *if it does not extradite him*, be obliged, without exception whatsoever and whether the offence was committed in its territory, to submit the case to its competent authorities fort the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary crime of a serious nature under the law of that State.[17] This clause is also known as the "Hague formula" and it is known as the model for most of the contemporary multilateral conventions. It is included in many more conventions, such as the ones that are for the suppression of terrorist offences, torture, forced disappearance of persons and etc. It used to be perceived that the two obligations, to prosecute and to extradite, are of equal weight. However, the state *forum deprehensionis* actually only has the obligation to prosecute. There is even a view, that continues this, that to extradite is only an option, if two states have the extradition treaty.

The second treaty model is the one where the primary obligation of the state where the offender is found is to extradite. Only in case of a refusal of the extradition, the obligation to prosecute arises. The International Convention for the Suppression of Counterfeiting Currency of 1929 was the first one where this model was used. This model was built based on the solidarity system and that the states should cooperate in order to punish the perpetrator, usually within one regional organization. There are also some treaties that provide that obligation to prosecute arises only if the suspect has the nationality of the requested state or if that state is more competent. That means that if the extradition is not possible, only the state that has certain interest or interest of a public order will be competent.[18]

The third model is the one where there is a third option and that is to deliver the offender to the international criminal tribunal, rather than to prosecute or extradite him and the first time this was drafted was in the Convention for the creation of an International Criminal Court back in 1937. Nowadays, this model is incorporated in the 2006 Convention against Enforced Disappearances and the 2007 African Charter on Democracy, Elections and Government.

When it comes to legal regulation, the issue of *aut dedere aut judicare* was a topic at the International Law Commission. Back in 2004 there was a recommendation of the Working-Group on the long-term programme of work. The following year the International Law Commission decided to include it and appointed Mr. Zdislaw Galicki as a Special Rapporteur. He submitted his preliminary report in

[17] Convention for the suppression of unlawful seizure of aircraft. Signed at The Hague on 16 December 1970. Article 7. https://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf.
[18] R. Van Steenberghe, *op.cit.*, 1111-1112.

2006. In that report, he considered the universality of suppression, universal jurisdiction and the obligation to extradite or prosecute and the scope of that obligation. The preliminary plan of action was established.[19] The Second Report was dedicated to the similar topics, but also to the topic of the sources of the obligation to extradite or prosecute.[20] In the third report, the comments and information from Governments were received and the proposal on draft rules was given. The proposal addressed the scope of application of the draft articles, use of terms, and a treaty as a basis for the obligation to extradite or prosecute.[21] In his fourth and last report, Mr. Galicki reported on the discussions in the Sixth Committee and consideration of the sources of the obligation to extradite or prosecute. He established that the leading position when it comes to sources take the international treaty and international custom.[22] In 2009, the Commission had comments and information received from Governments. That year, the Commission established an open-ended Working Group on this topic under the Chairship of Mr. Alain Pellet who presented the oral note. The Working Group had proposed a general framework for the Commission to discuss.[23] In the following years, the Working Group on the obligation to extradite or prosecute was chaired by Mr. Enrique Candioti and Mr. Kriangsak Kittichaisaree. Since Mr. Galicki was no longer member of the Commission since 2012, no Special Rapporteur was appointed in his place. In 2014, the Commission adopted the final report on the topic and decided to conclude its consideration of the topic.[24]

3. *AUT DEDERE AUT JUDICARE* IN DOMESTIC LAW

As for domestic law, in 2009 in Serbia the Law on Mutual Legal Assistance in Criminal Matters (*Zakon o međunarodnoj pravnoj pomoći u krivičnim stvarima*) was adopted. There are four options mutual legal assistance. These are extradition of

[19] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/571. Preliminary report by Mr. Zdzislaw Galicki, Special Rapporteur, https://legal.un.org/ilc/documentation/english/a_cn4_571.pdf.
[20] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/585. Second report by Mr. Zdzislaw Galicki, Special Rapporteur, https://legal.un.org/ilc/documentation/english/a_cn4_585.pdf.
[21] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/603. Third report by Mr. Zdzislaw Galicki, Special Rapporteur, https://legal.un.org/ilc/documentation/english/a_cn4_603.pdf.
[22] International Law Commission, The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Document A/CN.4/648. Fourth report by Mr. Zdzislaw Galicki, Special Rapporteur, https://legal.un.org/ilc/documentation/english/a_cn4_648.pdf.
[23] International Law Commission, Yearbook of the International Law Commission 2009, Volume II, Part Two, Chapter IX, https://legal.un.org/ilc/reports/2009/english/chp9.pdf.
[24] International Law Commission Report, A/69/10, 2014, chapter VI, paras 57-65, https://legal.un.org/ilc/reports/2014/english/chp6.pdf.

the offender, taking over and transferring the criminal prosecution, execution of a criminal conviction and others. The international legal assistance is based on the principle of reciprocity and confidentiality of data. The extradition is permitted if it is for the purpose of criminal prosecution of the offense that can be sentenced to at least one year in prison or for the execution of the sentence for which the court of state that is asking had declared a sentence of not less than four months. The law explains the procedure of extradition before the investigating judge, an extrajudicial panel and the Minister of Justice.[25]

There was one case in Serbian jurisprudence that has left a mark in this particular area, a case of Cevdet Ayaz. The UN Committee Against Torture had decided that Serbia violated the Convention Against Torture by extraditing Mr. Ayaz in 2017. Mr. Ayaz was born in 1973 and his family lives in Turkey.[26] He is ethnically a Kurd. After he turned 18, he became a member of People's Labour Party, but moved to Iraq in the 1990s because of the situation in Turkey. He moved back in 1997 thinking that the political situation improved. Mr. Ayaz was never a member nor a supporter of groups prone to violence or political parties that were illegal or terrorist. In 2000 he went for a mandatory military service in the Turkish army and on April 6th 2001, when he was returning from the base, his bus was stopped by gendarmes and he was taken to the police station. From April 6th to 18th he was subjected to severe torture methods by the policy and finally was forced to sign confession papers on which he signed that he was one of the leaders of the Revolutionary Party of Kurdistan. He later said that he was never a member of such party. After eleven years of investigation, on November 27th 2012 he was sentenced to 15 years in prison, but before his time in prison began, he fled Turkey and travelled through Azerbaijan, the Islamic Republic of Iran, Montenegro, the Russian Federation and Ukraine. He was arrested trying to cross the border between Serbia and Bosnia and Herzegovina.[27]

Based on an arrest warrant issued by Interpol, he was arrested on November 30th, 2016, in Mali Zvornik and the hearing was held with the pre-trial judge in Šabac. Mr. Ayaz said that he left Turkey on March 30th, 2016, and that he is afraid of the serving the sentence in Turkey and that he would like to stay in Serbia. In December 2016 the Embassy of Republic of Turkey in Belgrade sent a note to Ministry of Justice in Serbia where it asked for the extradition of Mr. Ayaz so that he can continue serving the rest of his sentence, which is 10 years and 5 months out of 15

[25] Закон о међународној правној помоћи у кривичним стварима, „Службени гласник РС", бр. 20/2009.
[26] Dževdet Ajaz: Žrtva Vlade Srbije, *Danas*, 4.12.2019., https://www.danas.rs/ljudi/dzevdet-ajaz-zrtva-vlade-srbije/, приступљено 22.3.2022.
[27] Committee against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 857/2017, 2.9.2019., para. 2.1.-2.8.

years, for the the crime of providing accommodation for those who have committed organized crime. High Court in Šabac determined that the assumptions for the extradition are fulfilled. After the Court of Appeal in Novi Sad revoked the first instance decision, High Court in Šabac again said that all the assumptions for the extradition were fulfilled, even though Court in Novi Sad determined that the appropriate translator was not there and that the crime does not exist in criminal code of Republic of Serbia. The Court of Appeal chamber had a meeting in April 2017, when Mr. Ayaz said that he is the president of the political party called the Liberation Party of Kurdistan which is a registered one. He said that he had been exposed to torture in Turkey, by using the electricity, disabling normal breathing and that he was made to sign a text where he pleaded guilty for the crime he did not commit. The Court of Appeal in Novi Sad revoked once again the decision due to the lack of appropriate translator and the lack of knowledge of the crime in case. But High Court in Šabac again decided that all the assumptions for the extradition were there. The defender of Mr. Ayaz on October 10th 2017 delivered to the court the judgment of the European Court of Human Rights from June 22nd 2006 which said that the Turkey violated articles 5, paragraphs 3 and 4 of the European Convention of Human Rights during the procedure which was before declaring judgment, mostly several days detention in police custody without judicial control, denial of the right to effective and effective remedy, when it comes to Mr. Ayaz as well. Due to the fact that his maximum duration in detention has expired, on November 11th 2017 his detention was abolished and he was ordered not to leave Banja Koviljača territory and his passport was taken from him, but he was released. But, instead of realising him, he was sent to a shelter for foreigners in Padinska Skela, without any official decision. For the fourth time, the High Court in Šabac declared all assumptions fulfilled. The defender said that the UN Committee against torture asked Serbia not to extradite until it considers her appeal, so in December 2017 the Committee declared order on temporary measures and that extradition of Mr. Ayaz to Turkey would make a violation of international obligations. The same was sent to Ministry of Justice of Republic of Serbia. Minister of Justice had issued a decision on December 15th 2017 based on which Cevdet Ayaz was extradited to Turkey on December 25th 2017.[28] The Ministry of Justice claimed that the decision from the UN Committee that Serbia should not extradite due to the possibility of torture in Turkey had arrived late, on December 18th, and the decision of his extradition was signed on December 15th.[29]

[28] S. Beljanski, "Sud u službi politike – slučaj izručenja Dževdeta Ajaza", *Glasnik Advokatske komore Vojvodine.* 2/2019, 228-232.

[29] Turski državljanin izručen uprkos preporuci Komiteta UN, *N1*, 26.12.2017., https://rs.n1info.com/vesti/a352061-turski-drzavljanin-izrucen-uprkos-preporuci-komiteta-un/, приступљено 22.3.2022.

The United Nations Committee against Torture made a decision on September 2nd 2019 that Serbia violated articles 3 and 22 of the Convention against torture. Due to the violation, the Committee considers that Serbia has an obligation to provide redress for the complainant, that would include adequate compensation of non-pecuniary damage resulting from the physical and mental harm caused. Also, Serbia should explore ways and means how to monitor the conditions of Mr. Ayaz detention in Turkey, so that it can ensure he is not subjected to treatment contrary to article 3 of the Convention, and also should inform the Committee about the results of such monitoring.[30]

4. CONCLUSION

This paper has shown that in this area, as in many others when it comes to the public international law, the political factor plays an enormous role. There are several examples of this. The principle *aut dedere aut judicare* was conceived as one that would be useful for mutual legal assistance and cooperation between states. It has existed for centuries and states have even signed many bilateral treaties considering extradition. But, when the time came for a multilateral convention to be made, the lack of political will on the part of the governments prevented its creation. The work of the International Law Commission remained inconclusive. The case of Mr. Ayaz also showed that, no matter what, human rights and freedoms must be respected, no matter what. It was discussed whether the decision of the Ministry of Justice of Republic of Serbia been made under political pressure and due to bilateral relations between Serbia and Turkey. Regardless of whether or not this is the case, it leads us back to the conclusion that international law is inseparable from international politics. It is of utmost importance to keep in mind that basic human rights must be implemented, no matter what.

[30] Committee against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning Communication No. 857/2017, 2.9.2019., para. 10 and 11.

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AUT DEDERE AUT JUDICARE У МЕЂУНАРОДНОМ И УНУТРАШЊЕМ ПРАВУ

Резиме

Максима *aut dedere aut judicare* значи да је држава на чијој територији окривљени нађе дужна да га или изручи или да спроведе судски поступак. У овом раду, ауторка ће објаснити порекло ове максиме и њено значење. Први део рада посвећен је међународном праву и изворима права. Главно питање на које се тежи одговорити јесте да ли је овај принцип постао део међународног обичајног права и која од ове две обавезе има приоритет. Други део рада посвећен је унутрашњем праву и, конкретно, једном случају у судској пракси Србије који је оставио обележје. Он је показао да људска права увек морају да се поштују и колико је политичка воља важна.

Кључне речи: *aut dedere aut judicare*, изручење, међународно кривично право.