Non-Extradition of Nationals:

The Lockerbie Case Revisited

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Contents

1) Introduction

No aircraft disaster in history produced the amount of legal wrangling as the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988, which resulted in the killing of 270 people.[1] One of the many important issues that the incident raises is the argument on the doctrine of non-extradition of nationals.

In November 27, 1991, after a long-standing investigation, the U.K. and the U.S. issue a joint declaration requesting Libya to surrender two of its nationals in connection with the bombing of the flight, to be tried either in the U.S. or the U.K..[2] In response, Libya refuses the request on grounds of the doctrine of non-extradition of nationals, claiming that it has no obligation under international law to extradite its nationals. In light of the pressure exerted, Libya brings the dispute before the International Court of Justice seeking confirmation that it has fulfilled its international obligations.[3] Meanwhile the U.N. Security Council interferes in the dispute and issues two resolutions addressing Libya, demanding that it responds to the request of the U.S. and the U.K..[4] Libya, however, persists upon what it considers its right not to comply.

The aim of this paper is to examine the legal bases of the Libyan position, to decide whether it has breached its legal obligations under international law concerning its refusal to extradite the two-suspected nationals. This paper also seeks to evaluate the grounds on which the pertinent U.N. Security Council resolutions were issued. Those issues will be set out in chapters in the following manner:

The first chapter is an introduction serving as a background, providing working definitions, setting the context, and presenting the doctrine of non-extradition of nationals and the facts of the case of Lockerbie. The second chapter examines the legal grounds of the Libyan argument in the light of customary international law and existing treaties. The U.N. Security Council resolutions are discussed and evaluated in later chapters, while the final chapter is devoted to recent developments represented in the International Criminal Court to examine to what extent its Statute affects the doctrine of non-extradition of nationals.

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1 Lee S. Kreindler, *Litigation Status in Lockerbie Case*, (1998), *New York Law Journal*. Volume 219, Number 82, Available at: http://www.globalpolicy.org/wldcourt/kriend.htm

2 International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April1992,I. C.J. Reports 1992, p.* 6.

3 International Court of Justice, *supra* note 2, at 6-7.

4 S.C. Res. 731, S/RES/731, U.N. Doc. S/RES/731(Jan. 21,1992). & S.C. Res. 748, S/RES/748, U.N. Doc. S/RES/748(Mar. 31,1992).

2) Preliminary Points

a. Definitions

i. Nationality

According to the Encyclopedia of Public International Law, "Nationality as a legal term denotes the existence of a legal tie between an individual and a State, by which the individual is under the personal jurisdiction of that State."[5] In the Merriam-Webster Dictionary, it is "a legal relationship involving allegiance on the part of an individual and usually protection on the part of the state."[6]

There are, on the face of it, no standard criteria of conferring nationality in the different legal systems across the world. There are two main systems in coexistence: the first recognizes descent as a criterion for conferring nationality, and the second considers those born in the territory of a state as its nationals.[7] In any case, the concept of nationality is given to mean a status that grants nationals various rights and assumes of them some duties and responsibilities. Among these rights that nationals enjoy are the right to protection by law, and to take for granted the safeguarding of such rights from violation. [8]

ii. Extradition

"Extradition in contemporary practice means a formal process by which a person is surrendered by one state to another based on a treaty, reciprocity, comity, or on the basis of national legislation."[9] This has evolved between states as an act of international cooperation for combating criminal activities and punishment of criminals,[10] to prevent them from escaping justice. As such, extradition plays a major role in enforcing international criminal law and assists states to combat impunity, not only to prosecute violations of a domestic character, but also the most serious crimes of international criminal law such as genocide, war crimes, and crimes against humanity - which generally are still prosecuted by individual states rather than international criminal courts.[11]

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5 Albrecht Randelzhofer, *3 Encyclopedia of Public International Law* 501, 502 (1997).
6 *The Merriam-Webster Online Dictionary,* http://mw1.merriam-webster.com/dictionary/nationality
7 Zsuzsanna Deen-Racsmany, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 *A.J.I.L.* 608 (July, 2001).
8 Dr. Zaidan Laith, *The Citizenship in the Democratic System* (Arabic Script), *Donia Al-Raai*, (2005). Available at: http://pulpit.alwatanvoice.com/content-32150.html, Last visited 11-02-2008.
9 M. Cherif Bassiouni, *International Extradition, United States Law and Practice* 1 (Fifth Edition 2007).
10 Satyadeva Bedi, *Extradition: A Treaties on the Law Relevant to Fugitive Offenders Within and With the Commonwealth Countries* 1 (2002)
11 Geoff Gilbert, *Responding to International Crime* 5 (2006).

b. The Doctrine of Non-extradition of Nationals

i. Origin and development

The history of ancient civilizations shows that the principle of non-extradition of national is as old as those civilizations. For instance, the peace treaty between Ramses II of Egypt and the Hittite prince Hattusili III in 1280 B.C., which brought peace to the warring powers, excluded nationals from the extradition process.[12] In ancient Greece, the authorities exclusively exercised jurisdiction over the national offenders instead of extraditing them. In ancient Rome, the national law explicitly stated the principle of non-extradition of nationals to foreign states.[13]

The principle has been justified by three main reasons: firstly, the fear of receiving ill treatment on an unfair trial in the foreign state when the matter relates to a foreigner; secondly, the right of the fugitive not to be withdrawn from his national justice system; thirdly, the state's obligation to protect its subjects by its own law.[14] In 1881, a commission appointed by the Italian government to report on extradition concluded refusal to the surrender of nationals "because Italy owes protection to its sons, and cannot abandon them to their lot, if charged with crime, to the mercy of foreign law and judges. The national dignity cannot consent that a citizen, a member of the state, should be compelled to bow his head in obedience to the commands of a foreign authority." [15]

An alternative to this exemption of extradition was to try the national accused in the state to which he/she belongs.[16] With the passage of time, the principle has become a national policy of states whose legal system is based on the Greco-Roman heritage.[17]

ii. State Practice

The role of nationality in extradition, either in law or in practice, illustrates an extreme difference between common law and civil law countries. Contrary to the real continuous changes in the attitude of the international community and its legal order, the content of the debate over the rule of non-extradition has noticeably escaped improvement and the vast majority of states still refuse to surrender their nationals.[18]

1. Civil Law Countries

It is a national policy of those countries, whose legal system is mostly influenced by the Rome heritage, to not hand over their nationals to foreign states. The principle of non-extradition of nationals has been incorporated and explicitly expressed in the

12 Satya Deva Bedi, *supra* note 10, at 120.

13 Michael Plachta, *"(Non-)Extradition of Nationals: A Neverending Story?"*, 13 *Emory Int'l L. Rev.* 82 (1999).

14 Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 *Am. U. Int'l L. Rev.* 175-176 (2002).

15 Michael Plachta, *supra* note 13, at 94.

16 M. Cherif Bassioun, *supra* note 10, at 743.

17 Satya Deva Bedi, *Extradition: A Treaties on the Law Relevant to Fugitive Offenders Within and With the Commonwealth Countries* 120 (2002).

18 Michael Plachta, *supra* note 13, at 93.

national codes or constitutions of many civil law countries.[19] France, for example, has adopted the principle of never extraditing its nationals to be prosecuted in a foreign state. In lieu of that, it exclusively prosecutes and punishes them for crimes committed abroad.[20] Both Germany and Brazil have incorporated the principle in their constitutions.[21]

In general, the Libyan legal system is a heritage of the French and Italian systems, and thus it adopts the principle of non-extradition of nationals. Article 493(A)(1)(a) of the Criminal Procedures Code provides that: "The extradition of those accused or convicted of a crime is applicable under the following conditions: . . . (4) that the demand is not for a criminal of Libyan nationality". It also states that: "Libyan law structures those rules of extradition and recovery, which are not regulated by agreements and International customary Law." This can be interpreted in a way that would mean Libya does not establish a strict principle of non-extradition of nationals. The Libyan prerogative in respect to extradition in general is applicable only in the absence of regulations in the international law, either in the form of treaties or in international customary law. Therefore, a Libyan national can be extradited to a foreign state in cases where the international customary law or an applicable treaty requires so.

2. Common Law Countries

Common law countries adopt the principle of the territoriality of a crime on the basis that a crime can be most thoroughly investigated in the state where it was committed and where the most relevant evidence can be easily obtained. In addition, people in that place are the most interested in bringing the offender to justice.[22]

The U.K. ans the U.S., as common law countries, permit extradition of nationals on aforementioned basis. The general practice in the U.K., however, requires in effect a binding treaty.[23] The U.S. contemporary extradition treaties do not exclude U.S. nationals from extradition even to states that adopt the principle of non-extradition of nationals, the only condition being that extradition can only be requested or granted on the basis of a treaty, whether a bilateral or a multilateral extradition treaty. However, the Secretary of the state has the legal right, in case the applicable treaty or convention does not oblige the U.S. to extradite its citizens to a foreign country, to exercise the discretion not to hand over a U.S. citizen.[24]

c. Lockerbie Case Facts

On December 21, 1988, Pan Am flight 103 explodes over the town of Lockerbie in southern Scotland resulting in the death of all 259 passengers and 11 people on the ground. The victims include 189 Americans and 41 British citizens. In July 1990, the

19 Satya Deva Bedi, *Extradition in International Law and Practice* 94 (1968).
20 Geoff Gilbert, *supra* note 11, at 167.
21 Donn E. Arzt, *supra* note 17, at 170.
22 Satya Deva Bedi, *supra* note 19, at 97.
23 Dr. Ibrahim Ighneiwa, *The Lockerbie Legality: What went wrong in international criminal law?*, Available at: http://ourworld.compuserve.com/homepages/dr_ibrahim_ighneiwa/lockerbi.htm, last visited 11-10-2008.
24 M. Cherif Bassioun, *supra* note 10, at 79,745.

U.K. Air Accidents Investigation Branch concludes that the crash was the result of "the detonation of an improvised explosive device located in a baggage container".[25]

In November 27, 1991, the U.K. and the U.S. issue a joint declaration following the charges brought forward by the Lord Advocate of Scotland against two Libyan nationals (AbdelBaset Ali Mohamed Al-Megrahi and Al-Amin Khalifa Fhimah) in connection with the destruction of Pan Am flight 103. The charges include conspiracy to murder, murder according to British Penal Codes and offenses under the Aviation Security Act of 1982 SS. 2(1) and 2(5), as well as accusations under the Criminal Justice Act of 1988. In the declaration, the British and American Governments request Libya to ". . . surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials; disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers; pay appropriate compensation."[26]

In November 28, 1991, Libya responds to the U.S. and the U.K. with a statement that the request will "receive every attention," and that the competent Libyan authorities will seriously start their investigation in accordance with the international obligations to insure justice for both victims and the accused.[27]

After receiving the indictment, the two accused persons are put into custody to start judicial investigation by a Libyan Supreme Court Justice who seeks information from all U.S.' and U.K.'s authorities to assist the investigation even if that requires traveling to the location of the evidence. Neither the U.S. nor the U.K. gives any answer to the request. Instead, on November 27, 1991 they issue a joint declaration demanding that Libya surrender for trial those charged with the crime.[28]

Libya decides to prosecute the offenders and not to extradite them, claiming that this action is in accordance with its obligations under the 1971 Montreal Convention on Unlawful Acts against the Safety of Civil Aviation - which does not oblige Libya to extradite its nationals as long as proceedings are instituted against them in its own courts. Libya relies in the refusal to grant extradition on the principle *aut dedere aut judicare* as incorporated into article 7 of the Convention.[29]

On January 17, 1992 Libya requests arbitration based on Article 14(1) of the Montreal Convention,[30] which provides that any dispute between Contracting States involving the interpretation or application of the Convention shall be submitted to

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25 Derek Brown, *Lockerbie trial: what happened when*, Available at: http://www.guardian.co.uk/uk/2001/jan/31/lockerbie.derekbrown (January 31, 2001), last updated on January 31 2001, last visited on 11-10-2008.

26 International Court of Justice, *supra* note 2, at 6.

27 International Court of Justice, *supra* note 2, at 185.

28 Dr. Ibrahim Ighneiwa, *supra* note 23.

29 M. Cherif Bassiouni and Edward M. Wise, *aut dedere aut judicare The Duty to Extradite or Prosecute in International Law* 58,59 (1995).

30 M. Cherif Bassiouni and Edward M. Wise, *supra* note 29, at 58-59.

arbitration, and in case of conflict, parties may refer the dispute to the International Court of Justice.

On January 21, 1992 the U.N. Security Council adopts resolution 731(1992) urging "the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism."

The governments of the U.S. and the U.K. did not respond to the Libyan arbitration request. As a result, Libya, in March, 1992, brings the case to the International Court of Justice instituting separate, but identical, proceedings against the U.S. and the U.K. seeking the interpretation or application of the 1971 Montreal Convention, requesting the Court to determine:

> "(a) that Libya has fully complied with all of its obligations under the Montreal Convention; (b) that the U.S. [and the U.K. have] . . . breached, and [are] continuing to breach, [their] legal obligations to Libya under articles 5(2), 5(3), 7, 8(2) and 11 of the Montreal Convention; and (c) that the U.S. [and the U.K.] [are] under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya."

It also requested an indication of provisional measures to prevent the U.S. and the U.K. from taking actions against Libya in coercing it to respond to their request.[31]

On March 31, 1992 the U.N. Security Council adopts resolution 748 deciding that Libya "must now" comply with the request, including extraditing the two accused persons to the U.S. or the U.K.. It also decides to impose economic, political, and technical sanctions in 15 days until Libya complies with the said request.

On April 14, 1992, the day before resolution 748 comes into effect, the International Court of Justice, by 11 votes to 5 declines to exercise its power to take provisional measures, deciding that "the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures." The Court reasons its decision on grounds that the U.N. Security Council Resolution 748 (1992) requires Libya to hand over the fugitive suspects, and according to the Article 103 of the U.N. Charter,[32] all the parties are obliged to comply with the resolution which prevails over their obligations under any treaty. The Court, however, does not decide about the applicability of the Montreal Convention yet.[33] On the April 15, 1992, economic, political and technical sanctions were put into force by the United Nations against Libya, and had been renewed every 6 months till a compromise between

31 International Court of Justice, *supra* note 2, at 6.

32 Charter of the United Nations (1945).

33 International Court of Justice, *supra* note 2, at 125-127.

Libya, on one hand, and the U.S. and the U.K., on the other, to try the two suspects in a third state by a Scottish court is reached.[34]

3) Was Libya Justified Not to Extradite its Own Nationals?

To judge the validity of Libya's refusal to extradite its nationals to the U.S. or U.K., this chapter examines the international standards for the obligation to extradite nationals to a foreign state. The form and the source of such an obligation may vary depending on whether or not an arrangement among states exists.

a. Treaty Basis

The general framework of international cooperation in the suppression of crime constitutes binding international commitment as the most important source to such obligations. This framework can be either a bilateral or a multilateral treaty wherein states express conditions and obligations regarding the extradition process.[35]

i. Bilateral Treaties

The majority of international agreements relating to extradition take the form of bilateral treaties. They were the first mechanism used to regulate extradition.[36] Signatories of such treaties tend to be the ones whose laws or practice require an international agreement to facilitate cooperation in combating criminals by trying and punishing them in the relevant courts.[37] The growth of bilateral extradition treaties has ceased in recent years. The U.S. alone, as a common law country, has more than 100 bilateral treaties relating to extradition,[38] none of which Libya is a state party.

ii. Multilateral Treaties

The atrocities that the international community witnessed in World Word II led states to enter into treaties to strengthen international institutions and lend greater clarity and force to international criminal law. Many of those treaties have established the universality principle upon which parties can exercise universal jurisdiction by their national courts to fill the gap in law enforcement and create a "weapon against impunity."[39] States in their multilateral treaties tend to incorporate such jurisdiction to give States Parties the right to prosecute and punish offences, those need not necessarily be of international character. Almost in all cases those treaties explicitly impose an

34 Moqatel, The Lockerbie Case, (Arabic script), Available at: http://www.moqatel.com/openshare/Behoth/Siasia21/Lokerby/sec10.doc_cvt.htm , Last visited, 11-05-2008.
35 I. A. Shearer, *Extradition in International Law* 22,23 (1971).
36 Geoff Gilbert, *supra* note 11, at 29.
37 I. A. Shearer, *supra* note 35, at 34-35.
38 M. Cherif Bassioun, *supra* note 10, at 24.
39 Stephen Macedo, *Univeral Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* 18, 19 (2003).

alternative obligation require the signatory either to prosecute or to extradite violators of the treaties' proscriptions[40]- aiming to mitigate the rigor of the fact that many states refuse to extradite their nationals .

Several international criminal law treaties concerning international crimes contain extradition provisions and they declare the principle of *aut dedere aut judicare*, that is, the obligation for states to prosecute or extradite offenders existing in their territory.[41] For instance, Article 6 of the European Convention on Extradition of 1957 provides that:

> "1. a. A Contracting Party shall have the right to refuse extradition of its nationals. . . . 2. If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. . . ."

Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975 states that:

> "1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. . . ."

Articles 7 of Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, and of 1971 Montreal Convention on Unlawful Acts against the Safety of Civil Aviation provide that:

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

- **The 1971 Montreal Convention on Unlawful Acts against the Safety of Civil Aviation:**

The 1971 Montreal Convention deals with crimes related to sabotage or an attempt to sabotage a civilian aircraft, which appears to fit the offence in the Lockerbie case since all parties of the dispute are States Parties to this Convention. Libya Claims that it has fulfilled its obligations under Article 7 of the Convention by submitting the offenders to its competent authorities for the purpose of prosecution, and that its refusal to extradite its nationals is consistent to the Convention and Article 493(A) of the Libyan Code of Criminal Procedures. In this context, the requesting states are obliged under Article 11(1) to assist with the criminal proceedings brought by Libya.[42]

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40 M. Cherif Bassiouni and Edward M. Wise, *supra* note 29, at 11.

41 Geet-Jan Alexander Knoops, *Surrendering to the International Criminal Courts: Contemporary Practice and Procedures* 90 (2002).

42 International Court of Justice, *Application Instituting Proceedings Filed In The Registry of The Court On 3 March 1992 Questions of Interpretation And Application of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie (Libyan Arab Jamahiriya V. United Kingdom).* Available at: http://www.icj-cij.org/docket/files/88/7207.pdf , last visited: 12-02-2008.

According to Libya, as previously mentioned, the applicability of the Montreal Convention to the incident of the American Pan Am aircraft is unquestionable, as Libya, U.S., and U.K. are all parties to the Convention. It is the relevant treaty not only to the offence, but also to the dispute as a whole and so Libya only can be obliged by duties imposed therein and to which it has already complied.[43]

In assessing that argument, pertinent Articles should be invoked for the purpose of interpretation to examine how far Libya has complied with the obligations set therein. Article 5(2) and Article 6(1) of the convention oblige states where the offender is present to establish criminal proceedings and to take the offender into custody- Libya as mentioned before has done all that.

A more pertinent condition to the dispute is Article 7, which states that if a State Party does not extradite the alleged offender, it must "submit the case to its competent authorities for the purpose of prosecution." According to this Article, a custodial state must apply the *aut dedere aut judicare* principle, so that in case it does not extradite an offender, whatever the reason, it still can satisfy its duty by prosecuting that offender before a competent authority providing this authority classifies the offence as a serious crime.[44] The Article does not give any priority to extradition over prosecution. Therefore, a requested state has the absolute power to exercise prosecution in lieu of extradition and no correlative right to other states to insist on forcing a certain choice.[45] The only restriction to this right is that prosecution of a crime under the Convention must be genuine to exonerate a requested state from its obligation to extradite an offender. Genuine prosecution entails that prosecution authorities must investigate the crime effectively, and if there is enough supporting evidence, prosecution and trial must be fair and impartial.[46]

Consequently, when Libya abstained from extradition deciding to prosecute, it was acting in conformity with the Convention. It is noteworthy, however, that the obstacle standing against instituted criminal proceedings, in case a requested state chooses to prosecute them, is that such a state usually cannot carry out the proceedings because of the lack of the evidence which is mostly found in the territory of the requesting state.[47] This is exactly the matter in the Lockerbie case in which the Libyan authority requested cooperation from U.S. and U.K. authorities. In doing so, the Libyan authority was acting according to Article 11(1) of the Convention, which requires states to "afford one another the greatest measure of assistance in connection with the criminal proceedings brought in respect of the offences." Neither the U.S. authorities nor the U.K.'s gave any attention to Libyan Request.

One can conclude that the acts of Libya were in conformity with the applicable international treaty law, and that the lack of cooperation of the U.S. and the U.K. with the

43 Dr. Ibrahim Ighneiwa, *supra* note 23.

44 John P. Grant, *Terrorism on Trial: Beyond the Montreal Convention*, 36 *Case W. Res. J. Int'l L.* 458 (2004).

45 M. Cherif Bassiouni and Edward M. Wise, *supra* note 29, at 59,60.

46 John P. Grant, *supra* note 44, at 459.

47 Michael Plachta, *supra* note 13, at 137.

Libyan authorities was what put an end to the case in its infant stage at Libyan judicial process. As such, Libya has not violated its obligation under the Montreal Convention.[48]

b. Extradition without General Arrangement

The rule of non-extradition of nationals has recently been challenged and criticized for being incompatible with the fundamental principle of justice. For this reason, states were called upon to abandon their policy of non-extradition.[49] But the best existing practice among states, including those which do not prohibit extradition of their nationals, still requires a formal arrangement, such as a treaty, for the possibility of extradition. On the other hand, states notwithstanding, under international customary law may have an obligation even in the absence of a treaty to extradite their nationals. They also may exercise exceptional measures in absence of any legal obligation.

i. The Duty to Extradite under the Customary International Law

1. *aut dedere aut judicare*

The essence of applying criminal justice and combating impunity requires prosecuting the offenders and punishing them if convicted, regardless of the state in which they are prosecuted or punished insofar as justice is applied. The principle of this meaning was first recognized centuries ago when Hugo Grotius in 1625 formulated the maxim *aut dedere aut punier*.[50] He states that a state, which was injured by an offence, has a natural right to punish the offender, and the state in which the offender is found is bound to either punish him or extradite him to that injured state.[51] The clause *aut dedere aut judicare* is a modern abstract to this historical postulate.[52]

The question arises then is whether this principle has been accepted as a norm of customary international law so as to impose duties and obligations even in the absence of a treaty?

As said above, the duty to prosecute or extradite has been set out in many treaties, at least seventy international criminal law conventions, over many years. However, the duty to prosecute or extradite as part of customary international law in the absence of a treaty provision is still a controversial question.[53]

A narrow approach of opponents to the principle as a customary norm holds that the duty to prosecute or extradite is a customary international law only in respect to the offences subjected to such duty in international treaties, because those treaties reflect general acceptance for the duty as an international customary law. Therefore, they are

48 International Court of Justice, *supra* note 2, at 203.

49 Michael Plachta, *supra* note 13, at 93-94.

50 Michael Plachta, *supra* note 13, at 124-125.

51 M. Cherif Bassioun, *supra* note 10, at 9-10.

52 M. Cherif Bassiouni and Edward M. Wise, *supra* note 29, at 22.

53 Michael 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,* 20 *Ariz. J. Int'l & Comp. Law* 498 (2003).

binding not only on state parties, but also on non-states parties with respect to the offences defined therein.[54]

Professor M. Cherif Bassiouni supports a broad approach, arguing that the duty to prosecute or extradite represents a customary norm with respect to the entire classification of international offences. He states that the historical fact, derived from the concept of *aut dedere aut punier*, was supposed to apply to all crimes, ordinary crimes as well as international crimes. The concept, in his view, is connected to a common social order and interest that all states try to satisfy. But since the modern state practice shows that the obligation to prosecute or extradite does not exist in respect to the ordinary crimes in the absence of a treaty prescribing that obligation, it then covers only those of international character.[55]

In fact, it has not been clearly established as *opinio juris* that the doctrine to prosecute or extradite imposes a duty on states regarding all international crimes. Yet, it only embodies that duty in respect to crimes falling within the scope of the exercise of universal jurisdiction, that is, international crimes of a *jus cogens* essence.[56]

2. The Universality Principle

The universality principle recognized by international law creates the right for any state in the world to exercise jurisdiction to prosecute and punish those accused of certain international crimes even if that state has no links to territorial or nationality aspects. In other words, no matter where or by whom those crimes were committed.[57] The Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences to the International Law Association defines the principle as follows: "Under the principle of universal jurisdiction, as state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim."[58]

The considerable overlap between the principle of universal jurisdiction and the principle of *aut dedere aut judicare* makes them seem the same. Some suggested that, in the strict sense, they are different notions because the principle of *aut dedere aut judicare* does not stipulate any bases of jurisdiction to be exercised, hence, as long as an accused is prosecuted within a state where he/she is present in the absence of extradition, that principle is satisfied. They overlap only when a state has no other nexus to the crime or to the accused other than the presence of the accused within its territory.[59] But the

54 Michael J. Kelly, *supra* note 53, at 498-499.
55 M. Cherif Bassiouni and Edward M. Wise, *supra* note 29, at 20-23.
56 Geet-Jan Alexander Knoops, *supra* note 41, at 313.
57 Farhed Malekian, *International Criminal Law* 18 (1991).
58 Committee on International Human Rights Law and Practice, International Law Asociation, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, (2000), Available at: http://74.125.95.104/search?q=cache:ViNG3x9P9UEJ:www.ila-hq.org/download.cfm/docid/43F56C67-C59D-496E-A7C9FF418D88FCF4+Committee+on+International+Human+Rights+Law+and+Practice,+London+Conference,+2000+universal+jurisdiction&hl=en&ct=clnk&cd=1&gl=us
59 Mitsue Inazumi, *Universal Jurisdiction in Modern International Law* 121,122 (2005).

fact, as indicated above, that the universality principle has been much adopted by treaties,[60] made both principles noticeably overlap.

A state may rely on universal jurisdiction to request extradition for the purpose of prosecuting the fugitive accused or convicted of committing a serious crime under international law. Yet, when the principle is recognized by a treaty, the competence to exercise such jurisdiction does not include non-state parties unless the alleged offence has the character of being subject to universal jurisdiction under a customary norm.[61]

International criminal law includes 28 crime categories. They are evident by 281 treaties concluded between 1815 and 1999. 93 of those treaties reflect the obligation to prosecute or extradite indicating that states choose to enforce this technique over universal jurisdiction on any or all states.[62]

In its Princeton Project on Universal Jurisdiction, the U.N. High Commissioner for Human Rights named seven crimes as serious under International law and that are subject to universal jurisdiction. These crimes "include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.", concluding that this list "is without prejudice to the application of universal jurisdiction to other crimes under international law."[63]

Since 1990, when the international prosecutions of perpetrators of war crimes and crimes against humanity during World War II were the main example of prosecuting offenders under the fundamental norms of international humanitarian law, the growing world consensus condemning crimes such as hijacking, hostage taking, crimes against internationally protected persons, torture, and genocide led to the adaptation of many treaty's provisions for national universal jurisdiction.[64] It has been established that international crimes of *jus cogens* character are of universal relevance. Those crimes include piracy, slavery, war crimes, crimes against humanity, genocide, and torture. But there is still some debate regarding some other serious crimes. Professor M. Cherif Bassiouni, as mentioned, asserts that several international crimes although not of *jus cogens* character are of relevance to universal jurisdiction as well. This encompasses terrorism as it is condemned and combated in many conventions including the 1971 Montreal Convention.[65]

As for the Lockerbie dispute, when Libya refused extraditing its suspected nationals, it was in such an instance relying on its national law, which mainly prohibits extradition of nationals. It was also taking into account the Montreal Convention in which

60 J. Paust et al, *International Criminal Law Cases and Materials* 155 (3rd ed.2007).
61 *Id*. at 163.
62 Stephen Macedo, *supra* note 39, at 46.
63 United Nations High Commissioner for Human Rights, *The Princeton Principles on Universal Jurisdiction* (2001), Available at:
http://www.law.depaul.edu/centers_Institutes/ihrli/downloads/Princeton%20Principles.pdf, last visited: 11-25-2008.
64 Colleen Enache-Brown and Ari Fried, "*Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*", 43 *McGill L.J.* 622 (1998).
65 M. Cherif Bassiouni, *supra* note 9, at 425-449.

States Parties had alternative duties to either prosecute or extradite. In addition, Libyan demand has its grounds in customary international law, which also treats the principles of prosecution and extradition as alternatives on equal footing.

Therefore, Libya was acting in accordance with both international and national legal norms. Taking this to its logical conclusion, the question ought to be whether Libya- by choosing prosecution rather than extradition- is considered to have fulfilled the obligation imposed by international law or was it, legally speaking, obliged to do more in order for its efforts to be deemed satisfactory? This issue will be tackled in the following Chapter.

ii. Comity: Third State Prosecution

Extradition is looked upon by states as a sovereign act, and that is why most states, in the absence of international duty or national legislation, do not tend to extradite their nationals.[66] However, States occasionally provide for extradition without any international obligation to ensure that they do not become a safe-haven for international criminals and to facilitate in particular the comity of nations.[67]

In the Lockerbie Case, despite the fact that Libya was rejecting handing over its nationals on legal grounds, it took, to some extent, a flexible position. Inconsistently with its domestic law and the offenders' rights under this law, it offered a trial out of its territory. It only refuses extradition to the U.S. and the U.K. claiming the absence of legal basis and expressing doubts about a fair trial in either country.[68] Judge Oda of International Court of Justice, confirms that in his dissenting opinion stating that: "We note that Libya has repeatedly stated its readiness to deliver the suspects for trial by a Scottish court sitting in a third country."[69] In April 12, 1992, Libya proposed a trial in a neutral place[70] as an effort to put an end to the dispute. It offered to hand them over to a third neutral state. Both the U.S. and the U.K. continued to insist that the two suspects must be tried either in Scotland or the U.S.. The proposal was rejected for years even after Libya declared that it does not object to Scottish law or Scottish judges.[71] It also offered on March 23, 1992 to hand over the suspects to the Arab league, and on March 3, 1994, it proposed their prosecution before an international tribunal. Those proposals, like the others, were all rejected for a long time until an agreement on a trial in Netherland operating under Scottish law by a Scottish court was reached.[72]

c. The involvement of the International Court of Justice in the Lockerbie Case

The International Court of Justice gave its decision on the preliminary objections in February 27, 1998 declaring that the Libyan application filed on 3 March 1992 is

66 M. Cherif Bassiouni, *supra* note 9, at 25.
67 Geoff Gilbert, *supra* note 11, at 30.
68 Dr. Ibrahim Ighneiwa, *supra* note 23.
69 International Court of Justice, *supra* note 2, at 179-180.
70 Lee S. Kreindler, *supra* note 1.
71 Derek Brown, *supra* note 27.
72 Moqatel, *supra* note 34.

admissible and that it has the discretion to decide where the two Libyan suspects should be tried.[73] Due to the parties' agreement to "discontinue with prejudice the proceedings initiated by the Libyan Application, the Court did not address this issue in its judgment as the case was removed from the List on September 10, 2003.[74] However, almost all the judges expressed their opinions regarding the scope of the duty to extradite. The dissenting judges based their opinions on the customary international law.

Judge Ad Hoc El-Kosheri states that the doctrine of *aut dedere aut judicare* has been incorporated in the Montreal Convention. It "necessarily implies conformation of the deeply rooted principle of general international law according to which no state can be obliged to extradite any persons, particularly its own citizens, in the absence of a treaty explicitly providing for such extradition . . . ."[75]

Judge Bedjaoui states that the obligation to prosecute or extradite adopted in the Convention is "in keeping with the traditional option to which the maxim *aut dedere aut judicare* refers."[76]

According to Judge Weeramantry, "the principle *aut dedere aut judicare* is an important facet of a state's sovereignty over its nationals and the well-established nature of this principle in customary international is evident from the following description: 'The widespread use of the formula "prosecute or extradite" either specifically stated, explicitly stated in the duty to extradite, or implicit in the duty to prosecute or criminalize, and the number of signatories to these numerous conventions, attests to the existing general *jus cogens* principle'." He also asserts that "Libya relies on the rule of customary international law, *aut dedere aut judicare*, as the governing principle which entitles it to try its own citizens, in absence of an extradition treaty."[77]

Judge Ajibola emphasizes that, under the Montreal Convention, the Libyan right to prosecute its nationals or extradite is "a right recognized in international law and even considered by some jurists as *jus cogens*." He shares the view of some of his colleagues, especially Judge Weeramantry, that "Libya is entitled to prosecute the two accused Libyans if she wants."[78]

Some of the judges who voted in favor also acknowledged that Libya is not obliged to surrender its accused nationals since the Montreal Convention incorporates the doctrine of *aut dedere aut judicare*. Judges Evensen, Tarassov, Guillaume, and Aguilar in their joint declaration assert that "the Montreal Convention, which in our opinion was

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73 International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I. C. J. Reports 1998*, p. 135-136.

74 International Court of Justice, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, ORDER of the President of the International Court of Justice*, September 10, 2003.

75 International Court of Justice, *supra* note 2, at 214.

76 *Id*, at 148.

77 *Id*, at 161.

78 *Id*, at 187.

applicable in this case, did not prohibit Libya from refusing to extradite the accused to the U.K. or the U.S.."[79] Judge Oda declares identical outcome although based on different reasoning. He states that the Montreal Convention imposes, as an exception, an obligation on States Parties to extradite criminals to other contracting states. Yet, since "there is a long-standing International practice which recognizes that there is no obligation to extradite one's own nationals," the Montreal Convention does not impose the duty to extradite national even when they are alleged to commit "these universally recognized unlawful acts," as long as the state that does not extradite prosecutes the accused before a competent authority. Therefore, Libya according to its claims was proceeding along lines of acceptable measures and moreover it expressed its willingness to extradite the two accused persons to a neutral state, it is not obliged to provide extradition.[80]

Even though the Court did not address the Libyan right not to extradite as long as it decides to prosecute, it is quite clear that almost all judges unanimously asserted that Libya was not obliged to surrender its accused nationals either on basis of treaty law or customary law.

4) Was the U.N. Security Council Justified to Decide that Libya Must Comply with the Requests?

In January 21, 1992, as indicated above, the Security Council under Chapter VI adopted resolution 731 strongly deploring the 'non-cooperation' of the Libyan Government to "establishing responsibility for the terrorist acts . . . against Pan Am flight 103 . . . urging that Libya responds immediately to the requests of the governments of the U.S. and the U.K.." Libya did not comply and brought the dispute before the ICJ.

Two months later, on March 31, the Security Council adopts the resolution 748 invoking Article 39 of the U.N. Charter declaring that non-responding of the Libyan Government to the requests in the formal resolution constitutes a threat to international peace and security. Demanding "to eliminate international terrorism", and acting under Chapter VII, the Security Council decides that Libya "must now comply without any further delay with" the requests stated in resolution 731.

a. Scope of the Full Cooperation Required

The validity of Resolution 731 by which the cooperation was demanded has been questioned for adopting the concurring votes of the U.S., and the U.K. with whom Libya had the dispute. The criticism is based on Article 27(3) of the U.N. Charter, which provides "in decisions under Chapter VI . . . a party to a dispute shall abstain from voting."[81]

79 David Schweigman, *The Authority of the Security Council under Chapter VII of the U.N. Charter* 247 (2001).

80 International Court of Justice, *supra* note 2, at 179-180.

81 David Schweigman, *supra* note 79, at 67.

Resolution 731 was adopted under Chapter VI not Chapter VII, which means that it was not binding. As a result, it did not affect Libyan rights and obligations as set in the Montreal Convention in terms of extradition,[82] and thus Libya, acting under the Convention, was entitled to refuse extraditing its nationals. The matter is different concerning Resolution 748, where the Security Council was operating under Chapter VII. In this case, the resolution not only becomes binding, but also, as the ICJ states, results in an obligation which supersedes those imposed in a treaty.

One could easily conclude that Resolution 731 was based on the assumption of 'guilty until proven innocent'. This is particularly evident by the fact that the Resolution requires Libya to comply *fully* with the requests of the U.K. and U.S. without mentioning any exception. This means that Libya was required not only to extradite the suspects, but also to pay compensations sought in the request for damages, which have yet to be proved.

The main assumption of Resolution 748 was that Libya had not cooperated with the mentioned requests to hand over the two Libyan persons accused of committing a crime of international terrorism. To evaluate how far Libya cooperated with the requesting states and to what extent it was willing to deal with a terrorist crime, it is worth mentioning that the Montreal Convention, as one of the internationally binding terrorism conventions, existed to provide a proper mechanism for combating terrorist acts such as the Lockerbie bombing. The 176 States Parties to the Montreal Convention, including Libya, the U.S., and the U.K., agree on the obligation to establish jurisdiction over offences covered by the treaty. The treaty demands that a state in whose territory an offender is present is obliged to investigate the crimes for the purpose of bringing to justice those responsible for such crimes. In addition, as shown above, the Montreal Convention does not impose an obligation over States Parties to extradite an alleged offender providing that the custodial State submits the case to its competent authorities for the purpose of prosecution.

Under the Convention, Libya instituted criminal proceedings thus showing the willingness to prosecute the offenders in conformity with its international obligation in accordance to the Montreal Convention, as well as with its domestic law. Yet, the investigation was frustrated due to the rejection of the U.S. and the U.K. to assist – this inevitably led to suspending such proceedings and rendering them unfit due to lack of available evidence.

Libya could have been obliged under the convention to extradite the two offenders in only one case, i.e. if it had not complied with its alternative obligation to prosecute them. Such prosecution must be held before a competent court and in good faith after being furnished with the requisite assistance regarding the evidence from the other parties.

The U.N. Security Council does not invoke the duties imposed by the applicable treaty; indeed, it does not mention the treaty at all. It does not even refer to the principles

82 David Schweigman, *supra* note 79, at 257.

of prosecution or extradition. The cooperation required by the U.N. Security Council which was explicitly defined as responding to the requests, and the lack of that cooperation as the reason for the next resolution pose the question of the legal basis of such cooperation.

b. What Constitutes a Threat to International Peace and Security

Under Article 39 of the U.N. Charter, the U.N. Security Council, as a reactionary organ, can only react when a situation has "the potential to spark international armed conflict in the short or medium term." In fact, the prevention of all possible long-term tensions is not a duty of the Security Council. However, based on the principle that the threat to international peace and security is a dynamic concept subject to change, the Security Council has invoked Article 39 in many occasions using its own interpretation to what constitutes a threat to international peace and security in cases other than international armed conflict.[83]

The Security Council firmly established that terrorism poses a threat to international peace and security.[84] Yet Resolution 748 was a precedence in which the Security Council determines that the refusal to surrender alleged offenders for committing a terrorist act constitutes a threat to international peace and security.[85] The Resolution does not explain the character of the threat set therein, so "it remains absolutely unclear why and how the failure to denunciate terrorism by concrete actions . . . or how the failure to surrender suspects, or the refusal of compensation claims which are not established under any legal procedure, could constitute a threat to the peace."[86] As judge Bedjaoui states, "no small number of people may find it disconcerting that the horrific Lockerbie bombing should be seen *today* as an *urgent* threat to international peace when it took place *over three years ago*."[87]

The broad interpretation of the Security Council to the term 'threat to international peace and security' in Resolution 748, and the duties such a definition consequently imposed, did not follow a systematic method. In other occasions, it imposed different duties upon different states from those imposed upon Libya to combat terrorism. In Resolution 1269 (1999), for instance, it called upon states to "implement fully the international anti-terrorist conventions to which they are parties," and to take "appropriate steps to . . . deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition."[88] It explicitly

83 Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* 138–167 (2004).
84 E.J. Flynn, *The Security Council's Counter-Terrorism Committee and Human Rights*, Human Rights Law Review 1 (Apr. 2007) Available at: http://hrlr.oxfordjournals.org/cgi/content/full/ngm009v1, last visited on 5-12-2008.
85 Graefreth, *Leave to the Court What belongs to the Court: The Libyan Case*, European Journal of International Law, Volume 4, Number 1, 196 (1993), Available at: http://ejil.oxfordjournals.org/cgi/reprint/4/1/184, last visited: 12-05-2008.
86 *Id.*, at 196.
87 International Court of Justice, *supra* note 2, at 153.
88 S.C. Res. 1269, U.N. Doc. S/RES/1269 (October 19, 1999).

establishes an alternative duty as a means to combat terrorism contrary to that in Resolution 748.

For an act committed many years ago and covered by an applicable international treaty, and where the custodial state offered its cooperation to bring suspects to justice, the Security Council lacks the legal prerogative to act in the same manner as it did in Resolution 748. If Libya- given reasonable time, access to evidence and assistance- had failed to fulfill its obligation to provide a genuinely fair and impartial trial, it could have been justified to decide in the light of the outcome whether it tends to support terrorism rather than cooperates to combat it.

Some argues that the prior involvement of Libya in international terrorism could have provoked unilateral military action against Libya by the U.S. and the U.K., especially when taking into account that the U.S.' previous bombing of Libya because of terrorist activities. According to this point of view, the possibility of such an attack was what prompted the Security Council to adopt the resolution.[89]

This reasoning simply lacks to any logical justification, let alone legal one. It leads to legalization of a pre-emptive action from the Security Council against one state to prevent an unlawful act of retribution made by another state. In other words, neither the U.S. nor the U.K. has a lawful reason under international law to attack Libya. Therefore, their possible attack, not the Libyan positon, is what could have been a threat to international peace and security. The truth of the matter, as it appears, is that the Security Council could not act against those two states to maintain peace and security. Rather, it has to use a convoluted method to act against Libya for an alleged threat which was yet to be proven.

5) Surrender of National to the International Criminal Court

a. Mitigating the Rigor of the Doctrine of Non-Extradition of Nationals

With the aim of combating impunity, as declared in the Preamble of the Rome Statute,[90] States Parties in 2002 established the International Criminal Court (ICC) as an international mechanism to prosecute those responsible for the most serious crimes. The subject-matter jurisdiction of the Court is limited to four certain crimes, that is, genocide, crimes against humanity, war crimes, and crimes of aggression.[91]

As the ICC jurisdiction is treaty based, an individual suspected of committing a crime falling under ICC's jurisdiction must be either a national of a State Party to the Rome Statute, or the offence for which they are being prosecuted must have been

89 Erika De Wet, *supra* note 83, at 167,168.
90 Rome Statute of the International Criminal Court (2002).
91 *Article 5* of the Rome Statute.

committed on the territory of a State Party.[92] According to Article 13(b) of the Rome Statute, the scope of the jurisdiction also includes any cases involving one or more of previously mentioned crimes if referred to the Court by the U.N. Security Council. In this case, the Court can assert jurisdiction over these crimes even if committed by individuals who are not nationals of a State Party and in the territory of a non-state Party.[93]

Considering the obstructions of an effective application of extradition, the Rome Statute makes a distinction between the terms "surrender" and "extradition" using the first to refer to the transferring of a person to the ICC, and the second to refer to the transferring to another state.[94] This serves to differentiate the surrender process from that of extradition[95] so that those obstacles of the extradition process do not apply. One of the most important distinctions that differentiate surrender to the ICC from extradition is that the nationality of an offender as a ground to refuse "traditional extradition" does not apply to surrender for the ICC. Otherwise, it would undermine the court's ability to function effectively.[96] However, mere non-recognition of nationality as an obstacle to prosecute criminals before the ICC does not guarantee prosecution in all cases. There is another major condition to be met as discussed in the following section.

b. The Principle of Complementarity as a Prerequisite to the ICC Jurisdiction

The complementarity principle, as recognized in the Preamble to the Rome Statute and in Article 1, explicitly states that the Court's jurisdiction shall be complementary to that of national jurisdictions.[97] The complementarity principle is one of the important distinctive features of the ICC to function as a court of last resort when national courts are unwilling or unable to genuinely conduct the investigation and prosecution process.[98]

Under Article 17(3) of the Rome Statute, a state may be deemed unable to investigate or prosecute alleged crimes when "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." A

92 Charles Villa-Vicencio and Erik Doxtader, *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* 80-82 (2005).

93 Mark S. Ellis and Richard J. Goldstone, *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century* 249-250 (2008).

94 Dr. Goran Sluiter, "*The Surrender of War Criminals to the International Criminal Court"*, 25 *Loy. L.A. Int'l & Comp. L. Rev.* 608-609 (2003).

95 Deen-Racsmány, Zsuzsanna, *A new passport to impunity? Non-Extradition of Naturalized Citizens versus Criminal Justice, Journal of International Criminal Justice, Volume 2*, Number 3, September 2004 , *p.* 777. Available at: http://docstore.ingenta.com/cgi-bin/ds_deliver/1/u/d/ISIS/47658720.1/oup/jicjus/2004/00000002/00000003/art00761/290E2FCE8537114312287989932899D0F5A50A672F.pdf?link=http://www.ingentaconnect.com/error/delivery&format=pdf, last visited: 12-08-2008. *See* also Article 97 of the Rome Statute.

96 Dr. Goran Sluiter, *supra* note 94, at 642-643.

97 Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 *Loy. Int'l L. Rev.* 108-109 (2006).

98 Christopher D. Totten & Nicholas Tyler," *Arguing For An Integrated Approach To Resolving The Crisis In Darfur: The Challenges Of Complementarity, Enforcement, And Related Issues In The International Criminal Court", 98 J. Crim. L. & Criminology* 1080-1081 (2008).

state might be able to investigate and to prosecute, yet unwilling. This is the case when it "fails to conduct proceedings, or obstructions of justice are carried out for the purpose of shielding individuals from prosecution by other tribunals; or where proceedings lack independence and impartiality, and are otherwise inconsistent with bringing an offender to justice; or that there is an unjustified delay in the proceedings evidencing a lack of intent to bring an offender to justice."[99]

The conclusion relevant to the issue being discussed is that States Parties to the Rome Statute established a new mechanism by which combating impunity meant effective and thorough implementation of method. However, there seems to be a tendency towards certain connotations: the doctrine of prosecute or extradite tends to prioritize jurisdiction of national courts, and that a state is not obliged to surrender insofar as it ensures effective and fair prosecution. It follows that, even if the ICC were in existence when the Lockerbie case was in progress, and assuming it had jurisdiction over offences of the Lockerbie character, its jurisdiction to adjudge would not have been applied unless the inability of the Libyan authorities or the lack of their willingness to investigate and prosecute genuinely was proved.

6) Conclusion

Contrary to some commentaries on the Lockerbie case, Libyan law does not object to extradition of nationals despite the fact that it is a civil law system. The rule under Articles 493 and 493(A) of the Criminal Procedure Code is more flexible than that of many of other civil law countries in that Libyan Law deems itself applicable only in the absence of an applicable international norm.

It is the possibility of impunity what is viewed as a serious danger resulted from practice of non-extradition of nationals. Ensuring criminal justice, regardless of territory and nationality, is what should be sought, and for this, the doctrine "*aut dedere aut punier*" has been widely adopted.[100] Only when a state does not extradite its accused nationals and, at the same time, is unwilling to prosecute them is it deemed as taking a position against ensuring criminal justice and ought to be confronted by the entire international community represented by appropriate mechanisms.

Under the "*aut dedere aut punier*" principle, recognized by the Montreal Convention, Libya opted to prosecute enjoying its right to choose from alternative duties in enforcing international criminal justice. For this reason, its choice has been widely approved by legal experts.

When the U.N. Security Council ignores all that, assuming the guilt of suspects, issuing a resolution requesting compensations for damages, such a resolution lacks any legal validity. Likewise, when it takes up another resolution in light of Libya's refusal, imposing severe sanctions and creating an unprecedented decision to force a state to hand over her "sons" on grounds of illusory threat to international peace and security, or of threat the state did not cause, such a decision also lacks any legal validity. Both resolutions represent to what extent the Security Council abuses its powers.

99 Julie B. Martin, *supra* note 97, at 111-113.
100 Michael Plachta, *supra* note 13, at 124.