CHAPTER FIVE

THE “INDIRECT ENFORCEMENT SYSTEM:”
MODALITIES OF INTERNATIONAL COOPERATION IN PENAL MATTERS

SECTION 1. INTRODUCTION

The “indirect enforcement system” is the term applicable to the enforcement of ICL through national legal systems. It is founded on two aspects. The first aspect is the assumption that states will incorporate in their national laws the obligations arising under ICL. This process of domestication of ICL is intended in part to adopt treaty-obligations to the requirements of national law. Thus, as domesticated ICL becomes applicable through national legal systems in accordance with their legal requirements. The second aspect derives from the first, and that is for states to use their internal legal processes not only to enforce their treaty obligations domestically, but also enforce their treaty obligations to cooperate internationally. The term “inter-state cooperation in penal matters” applies to the modalities relied upon by states in their bilateral relations to enforce their respective criminal norms.

As discussed in Chapter I, section 2, these two legal regimes, respectively applicable to the enforcement of international and domestic crimes, differ as to the sources of their legal obligations, but not as to their modalities. In fact, these two legal regimes share the same eight modalities, which are: extradition, legal assistance, execution of foreign penal sentences, recognition of foreign penal judgments, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal conduct, intelligence and law enforcement information-sharing, and regional and sub-regional “judicial spaces.” Since the “indirect enforcement system” operates through the intermediation of national legal systems, the effectiveness of the modalities of international cooperation necessarily reflects the strength and weaknesses of the respective national legal systems.

SECTION 2. THE MAXIM AUT DEDERE AUT JUDICARE

2.1. Origin and Rationale

The maxim aut dedere aut judicare is the cornerstone of ICL’s “indirect enforcement system.” The maxim originated in a longer formula developed by Hugo

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Grotius in 1624 as “aut dedere... aut punire.” In 1973, this writer changed aut 
punire to aut judicare, since the purpose of contemporary criminal law is to 
judicare those who are believed to have committed a crime, and not to punire, 
until after guilt has been established.

The position attributed to Grotius—that all states have a common interest in 
suppressing international crimes is the foundation of why states should engage 
in international cooperation in penal matters. At the time of Grotius and until 
the twentieth century, international cooperation was essentially limited to 
extradition. Thus, the legal literature of almost five hundred years remained focused 
on extradition, whose rationale, however, extends to all other forms of interna-
tional cooperation in penal matters.

The cornerstone of the “indirect enforcement system” and of the “inter-state 
cooperation in penal matters” regimes remains the concept aut dedere aut judi-
care. All other modalities of international cooperation are secondary to the goals 
of prosecution or extradition. Consequently, it is necessary to start with the ques-
tion of why prosecution or extradition is mandatory.

The first answer is self-evident: states have a duty to prosecute a national crime 
when the crime is within their jurisdiction. However, the duty to prosecute is not 
always so evident, for example, when the crime has been committed elsewhere, 
or when neither the perpetrator or the victim are nationals of the state. The 
second answer, concerning extradition, appears less compelling in the absence 
of a duty to do so. Therefore, the threshold question is: What are the controlling

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2 See HUGO GROTIIUS, DE JURE BELLI AC PACIS, bk II, ch. XXI secs. III and IV, in CLAS-
note 12 and corresponding text, which reveals that Grotius’ concept was based on Baldus, 
who posited a similar proposition in the fourteenth century.

3 The verb judicare primarily means “to judge” or “to try.” It suggests a full trial. The noun form 
judicatio refers to “an inquiry into an accusation.” Thus, the Latin may be sufficiently ambiguous to 
cover an inquiry for the purpose of determining whether or not to initiate a trial (as well as differ-
ent national procedures for reaching such a determination). The expression aut dedere aut judicare 
does not seem to have been widely used much before 1974. It figures in the Final Document: Conclu-
sions and Recommendations of the Conference on Terrorism and Political Crimes, held in Siracusa, 
Italy in June 1973, which is printed in INTERNATIONAL TERRORISM AND POLITICAL CRIMES at xi, xix 
(M. Cherif Bassiouni ed. 1975). M. Cherif Bassiouni, INTERNATIONAL EXTRADITION AND WORLD 
PUBLIC ORDER 7 (1974). This was a recurrent question at the International Seminar on Extradition, 
held in Siracusa in December 1989, the proceedings of which are contained in 62 REV. INT’L’E DE 
Treaty Practice in the Forty Years Since Nuremberg, 57 NORDIC J. INT’L L. 49 (1988); E.M. Wise, The 
Obligation to Extradite or Prosecute, 27 ISRAEL L. REV. 268 (1993).

4 For contemporary perspectives, see Bassiouni & Wise, AUT DEDERE AUT JUDICARE, supra 
note 1; M. Cherif Bassiouni, INTERNATIONAL EXTRADITION 3 (5th rev. ed. 2007); Declan Costello, 
INTERNATIONAL TERRORISM and the Development of the Principle Aut Dedere Aut Judicare, 10 J. INT’L 
L. & ECON. 483 (1975); Edward M. Wise, PROLEGOMENON to the Principles of International Criminal 
Law, 16 N.Y.L.F. 562, 575 (1970); Edward M. Wise, SOME PROBLEMS of Extradition, 15 WAYNE L. 
REV. 799, 720–23 (1969); CHRISTINE VAN DEN WYNGAERT, THE POLITICAL OFFENSE EXCEPTION to 
EXTRADITION: THE DELICATE PROBLEM of Balancing the Rights of the INDIVIDUAL and the 
INTERNATIONAL WORLD PUBLIC ORDER 8, 158–62 (1980).