

## **AUT DEDERE AS ERGA OMNES TO SUPPRESS CIVIL AVIATION CRIMES UNDER THE INTERNATIONAL LAW: THE ISLAMIC LAW PERSPECTIVE**

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## **ABSTRACT**

*Aut dedere* (extradition) is an *erga omnes* obligation towards the international community aimed at closing the gate of safe haven so that the international criminal will face the consequence of his heinous act directed at the international community from the requesting state. The term *aut dedere* has not been used in conventions or treaties until the eighteenth century. This paper examines the necessity of integrating the doctrine of '*aut dedere*' (extradition) into International Aviation Conventions to combat civil aviation offenses and seeks to explore its treatment under Islamic law, and the potential for punishment for refusal to extradite offenders. Through doctrinal legal research, the paper reveals that while *aut dedere* is obligatory under conventional law, it lacks enforceability without associated punishments. Conversely, extradition under Islamic law is deemed mandatory due to its universal nature. The paper underscores the relevance of Islamic jurisprudence in modern international legal frameworks and recommends amendments to International Civil Aviation Organization conventions to enforce extradition provisions and recognize civil aviation crimes as international offences, consistent with Islamic legal principles.

## Introduction

Civil aviation crimes that have been rampaging airports, aircraft and passengers are as old as the beginning of civil aviation itself. These include the hijacking of aircrafts that began in 1931 for political reasons (Jefferey and Jefferey, 2009; Elias, 2010; Adua, 2014) to sabotaging of aircrafts (Adua & Adam, 2014; Adua, 2014) to hostage-taking (Hostage-Taking Convention, 1971) (Sultan & Muhmmaed, 2023). Even though these aforementioned crimes had whittled down the growth and development of civil aviation during the early stages of the aviation business, the efforts of the international community through the International Civil Aviation Organization (ICAO) toward the suppression and prevention of these crimes are adequately noticed. The Convention on International Civil Aviation 1944 (Chicago Convention 1944), Tokyo Convention On Offences and Certain Other Acts Committed On Board Aircraft, 1963 (Tokyo Convention 1963), Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (Hague Convention, 1970), Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (Montreal Convention, 1971) and Beijing Convention 2010 on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention 2010) among others constitute regulatory efforts of the ICAO to suppress civil aviation crimes across the globe.

Although bringing criminals to justice through the doctrine of *aut dedere* or *aut judicare* (Kosianenko, 2023; Bernhard & Johannes, 2023) is an uphill task (Kelly, 2023), it is desirable to punish all criminals to serve as a deterrence to those who might have the intention to perpetrate similar or other unlawful acts. It is equally expedient to determine the processes and mode of enforcing the punishment in a jurisdiction where the offence is committed. This is because the evidence to prove the elements of crime would best be available in a place where the offence is committed. Therefore, the need for extradition of fugitives as an international obligation has been incorporated into the Civil Aviation Security Conventions. Historically, extradition proceedings have been in existence from the period of antiquity to the Middle Ages to this present modern day of treaty-based extradition (Blakesley, 1980). In the eighteenth century, political and religious ideologists were labelled as threats to all the nations.

Consequently, the doctrine of *aut dedere* was administered against the political and religious offenders, while the real criminals were left unprosecuted. In the nineteen-century extradition was adopted as one of the means of suppressing crimes due to the advancement in transportation coupled with an increase in the industrial revolution that paved the way for the common criminals to move from one state to threaten another (Kenneth, 1983). Since extradition is founded based on the retention of criminals, it, therefore, means that it is only applicable in criminal matters as opposed to civil rights. Yet, the nature of extradition and its practice is hidden from legal practitioners because many legal practitioners do not know its practice and procedure as applicable in the area of their jurisdiction (Ladapo & Okebukole, 2016).

Further, many Muslims do not know the nature and principles of Islamic law guiding the extradition of criminals from one country to another. Hence, this study attempts to address the following issues: What is the status of *aut dedere* under the International Conventions on Aviation Security to suppress civil aviation crimes? What is the Islamic law perspective on *aut dedere* of offenders to suppress civil aviation crimes? Can there be punishment for refusal to extradite the offender(s) under International Conventions on Aviation Security and Islamic law?

## Literature Review

At the moment, there is a dearth of academic works addressing the issues of the Islamic law perspective on extradition to suppress civil aviation crimes. Previous literature have mostly discussed the nature and extent to which extradition can be implemented to suppress international crimes. For example, Grotius (1646), (Kunter 1947), Bodin (1962), Blakesley (1981), Bassiouni (1987), and Blakesley (1992) in their works examined the general nature of extradition in international law. In addition, Blakesley (1992), Roberto (2009), Glahn (1996), and Borelli (2004) examined the political factor as one of the exceptions to the doctrine of *aut dedere* under conventional international law. The position of this exception under the Civil Aviation Security Conventions or Islamic law was neither raised nor considered. What appears to be a discussion under the Islamic law perspective on extradition are the works of Awdah (1985), Abu Zahra (1998), and Al-Dawoody (2011, 2015). They examined the general nature of extradition from the Islamic law perspective, but no reference is made to international law on civil aviation security nor any international law. Therefore, to the knowledge of the researchers, to date, no literature has examined or discussed the Islamic law perspective on the doctrine of '*aut dedere*' as an *erga omnes* to suppress civil aviation crimes under international civil aviation security law. It is this gap which this article seeks to abridge.

## Methodology

This article is doctrinal and adopts descriptive analytical approaches to analyse the provisions of International Conventions on Aviation Security and the Islamic law concerning the *aut dedere* as a suppressive device to curb civil aviation crimes. To arrive at appropriate findings and conclusion, the article relies on two sources of data which are the primary and secondary sources of international law and Islamic law. From an international law perspective, the primary sources are the International Conventions on Civil Aviation Security. These include the Convention on Offences and Certain Other Acts Committed Onboard Aircraft 1963 (Tokyo Convention 1963); the Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (Hague Convention, 1970); the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971 (Montreal Convention 1971); the Beijing Convention 2010. The provisions of these treaties are examined to identify the relevant provisions on the extradition of civil aviation criminals. From the Islamic law perspective, Quranic verses and the "*Treaty of Hodaybiyyah*" are also analysed to discover the root of *aut dedere* from the Islamic law perspective. The secondary sources consist of the relevant academic materials such as journal articles, newspapers, conventional and modern Islamic law textbooks, and credible internet sources.

## The Nature of *Aut Dedere* in the International Community

*Aut dedere* is one of the twin principles of public international law; "*aut dedere aut judicare*" which been traditionally interpreted to mean "obligation to either extradite or prosecute" (Stephen, 2006; Bernhard & Johannes, 2023). The twin principle was first qualified as the *aut dedere aut punier* principle by Grotius in the 16<sup>th</sup> century when he was considering the work of Baldus in the 14<sup>th</sup> century (Raphael, 2013). Therefore, the doctrine of *aut dedere* has been in existence since antiquity (Grotius, 1646; Bodin, 1962; Blakesley, 1981; Bassiouni, 1987; Kunter, 1947; Blakesley, 1992). It should be noted that this paper is primarily concerned with *aut dedere* as against the twin principle of *aut dedere aut judicare*.

It appears that the term *aut dedere* has not been used in conventions or treaties until the eighteenth century (Kenneth, 2023), its equivalent words such as *restituere*, meaning 'to restore or hand over, or *remettre* (Boz, 2022) which connotes to send back, restore or hand over, had been adopted in the early

treaties of France with Wurttemberg of 26 March 1759, and 3 December 1765; France with Spain in 29 September 1765; and France with Spain and Portugal in 1778 but ratified on 5 July, 1783.

Interestingly, none of the International Conventions on Civil Aviation Security defines *aut dedere*. Oxford Advanced Learner's Dictionary interprets 'extradition' to mean "to officially send back somebody who has been accused or found guilty of a crime to the country where the crime was committed" (Hornby, 2014). However, various scholars have offered to define *aut dedere*, for example, it is an international judicial rendition of fugitives charged with an extraditable offence and sought for trial, or already convicted and sought for punishment (Blakesley, 1980; Merle and Vitus, 1988; Whiteman 1968). Black's Law Dictionary defines the term as "the official surrender of an alleged criminal by one State or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authority where the fugitive is found (Garner, 2004). Extradition has been defined as the official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged or the return of a fugitive for justice, regardless of his/her consent, by the authorities where the fugitive is found (Thaddeus, 2021). A French commentator defines it as:

'the procedure by which a sovereign State, the requested state, accepts to deliver an individual who is found on this latter's territory to another state, the requesting state, to permit the latter to judge the subject or, if he has already been convicted, to have it execute its sentence'

(Merle & Vitus, 1984)

Extradition is a process by which a person accused or convicted of a crime is officially transferred to the State where s/he is either wanted for trial or required to serve a sentence after being duly convicted by a court of law' (Ladapo, O & Okebukola, 2016). Oppenheim defined extradition as — the delivery of an accused or a convicted individual to the State where he is accused of, or has been convicted of, a crime, by the State on whose territory he happens for the time to be (Jenning & Watt, 1992; AbdulGhafur, 2001; Roberto, 2009). It has judicially been defined in the Nigerian case of *George Udeozor v Federal Republic of Nigeria* (CA/L/376/05) as:

'the process of returning somebody, upon request, accused of a crime by a different legal authority to the requesting authority for trial or punishment'.

It is submitted that during the 18<sup>th</sup> century, the motive behind extradition requests was to prosecute the political offenders leaving out the real criminals from prosecution and punishment. The requesting government deemed it fit the extraditees must be prosecuted for opposing the government of the day, hence the suspected politicians sneaked out of their countries to another state for safe haven. It was in the 19<sup>th</sup> century that the international community started the doctrine of *aut dedere* as a means to suppress criminal activities thereby closing the gate of safe haven. It is, therefore, safer to conclude that the motive behind *aut dedere* in the modern era is for security purposes. Hence, the doctrine of *aut dedere* is incorporated into the Civil Aviation Security Convention 2010 to suppress unlawful acts against civil aviation in all circumstances.

From the foregoing, it is submitted that a careful examination of all the definitions and meaning of the term *aut dedere* reveal the following elements: (a) it is only applicable in criminal matters; (b) there must have been a commission or omission of an offence or offender has been convicted in the territory of requesting state; (c) the offender must have escaped by whatever means from the territory of the requesting state to the requested state;(d) the requesting state is willing to prosecute or make

the offender serve his conviction; and(e) the parties are tripartite in nature including the offender, requesting and requested states respectively.

### **International Conventions on Aviation Security and the Doctrine of *Aut Dedere***

It has been established that International Civil Aviation Security Conventions do not create true universal jurisdiction (Reydam, 2004, 2010; Okeefe, 2004; Colangelo, 2006-2007; Macedo, 2004). What then, is the importance of the principle of *aut dedere aut judicare*” embodied in The Hague 1970, Montreal Conventions 1971 and Beijing Convention 2010? The Hague Convention states:

The Contracting state in the territory of which the alleged offender is found, 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...

(Hague Convention 1970, article 7)

The above provision is not different from what is embodied in the Montreal Convention 1971 (article 7) and the Beijing Convention 2010 (article 10). Therefore, there is no basis for comparison of the provisions as contained in those Conventions. The State parties to the Convention have a mandatory obligation to implement extradition provisions as contained in the Convention. However, if such a state party does not wish to extradite, the prosecutorial machinery must be put in place to give effect to the other later part of the Convention-*aut judicare*.

Under the Beijing Convention 2010, an application to extradite a criminal can be made purely on the basis of an extradition treaty between the requesting and requested states or on a non-extradition treaty between the requested and requesting states (Beijing Convention 2010, article 12). It is, therefore, safer to state that parties to the Beijing Convention 2010 need not have a special extradition treaty or agreement before a criminal could be extradited to the requesting state. This position is reinforced by Article 12 (1) of the Beijing Convention (2010) which provides:

If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in Article 1. Extradition shall be subject to the other conditions provided by the law of the requested State.

(Beijing Convention 2010, Article 12 (1))

Accordingly, offences mentioned in Article 1 of the Beijing Convention 2010 shall be recognized as extraditable offences subject to the law of the requested state. Consequently, the basis of extradition of fugitives in article 12 (3) is an offence extraditable under the Convention. Article 12 (3) provides:

States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in Article 1 as extraditable offences between themselves subject to the conditions provided by the law of the requested State

(Beijing Convention 2010, article 1)

It is submitted that the application of Article 12 (3) of the Beijing Convention 2010 requires that: (1) the offence must be extraditable ones as spelt out in Article 1 of the Convention; (2) the parties must have been parties to the Convention; and (3) the requested state may decide to exercise other extraditable conditions. While the provision of Article 12 of the Beijing Convention 2010 aims to fast-track extradition of civil aviation criminals, the cooperation of the parties to the convention is a necessity to achieve its objective of suppressing the offences against civil aviation. The parties to the convention must treat civil aviation offences as customary international offences for extradition between the State parties. It, therefore, behoves the state parties to treat aviation offences committed in one state as if it was committed against the whole world. The Convention provides thus:

Each of the offences shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties required to establish their jurisdiction in accordance with subparagraphs (b), (c), (d) and (e) of paragraph 1 of Article 8, and who have established jurisdiction in accordance with paragraph 2 of Article 8.

(Beijing Convention 2010, Article 12 (4))

It is submitted that, status-wise, the provisions of the 2010 Convention apply only between the parties to it. Although, the purpose of the extradition provision embodied in the Convention is to “close safe haven” (Bernhard, 2023), the provision is however not binding even between the parties to it. Because (1) forcing the state to extradite criminals will amount to usurpation of the sovereignty of the requested state by the requesting state. Sovereignty is one of the cardinal principles of international law wherein states are to refrain from intervening in the sovereign affair of another state (Zeynap, 2021); and (2) The extradition provision in the Convention does not carry punishment for any of the state parties who refused to extradite the criminal (Mahsa & Sadeq, 2023). This is because none of the civil aviation crimes is regarded as an international crime, thus, no state has the power to exercise universal jurisdiction over the civil aviation crimes. It should be noted that certain exceptions to the doctrine of *aut dedere* are worth mentioning and discussing in this paper. The discussions are hereby set out hereunder.

### **Exceptions to the Applicability of *Aut Dedere* in the Community of Nations**

#### ***Political Offence Exception***

The political offence exception is widely acceptable; virtually all the national and international extradition laws have it as one of the exceptions (Chandan & Renuwati 2021). This is because most States have lost interest in extraditing the political offender on the ground that the offence committed only goes against the government of his home nation (Kenneth, 2023). Despite this submission, the acceptability of political exception is not free from being opposed by some other international laws (Van Den, 1985; Bassiouni, 1987). Interestingly, no Extradition Treaty or Conventions on Civil Aviation Security define ‘*political offence*’ (Chandan & Renuwati 2021). However, some judicial definitions have been offered. For example, the District Court of the United States of America defined ‘*political offences*’ as those which are “*incidental to and form a part of political disturbances*” (United States of America v. Mehmed Bilic (2022); Re Castioni (1891) 1 Q.B 149 at 166). The Swiss court also defined it in *re Ockert* as ‘acts which have the character of an ordinary crime appearing on the list of extraditable offences, but which, because of the motive and the object, are of a predominantly political complexion’ (Re Ockert, 7 I.L.R 369).

Extradition based on an existing extradition agreement between the requesting and the requested state may provide an opportunity for the requesting state to refuse extradition on grounds of political offence exception and non-extradition of its national (Glahn, 1996; Borelli, 2004). This is because existing extradition agreements may contain political offence exceptions and non-extradition of national as mandatory grounds for refusing extradition (Roberto, 2009).

Blakesley (1992) submitted that three types of conduct have been found to exist in the political offence exception to extradition. These include; (i) purely political offences which include offences of sedition, treason or espionage; (ii) offences of a political character or common crime such as burglary, or homicide when committed during civil unrest; and (ii) requisition submitted on the ground of political purpose (Blakesley, 1992).

In the interest of justice and fair determination of any matter brought before the court, the judiciary of some jurisdictions including the United States of America, United Kingdom, France, and Switzerland, among others, have adopted some tests to determine whether an offence falls within the ambit of political offence exception to extradition of criminals. The political motivation test; the injured theory test; the model of connexity test; the political incidence or disturbance test; and the combination of these tests constituting a mixed approach were adopted in various cases brought before the court (Blakesley, 1992).

While the political motivation test emphasises on the *mens rea* of the offender for determining the political character of the offence, the injured rights theory test focuses on the prosecution of the state's political organization on the ground that '*the offence does not derive its political character from the motive of the offender but from the nature of the rights, it injures*' (The Gatti case 1947). The model connexity theory proponents are of the view that common crime is considered a political offence when it has a connection with a purely political offence (Van Den, 1985). Thus, an offender who aids the escape of a hijacker from criminal prosecution would fit into this type of theory. The political incidence approach theory as encapsulated by the British judges in 1891 maintained that any offence which is incidental and forms part of political disturbances constitutes a political offence (Re Castioni (1891)). The offence is not itself a pure one but incidental thereto. A mixed approach theory consisting of the predominance test or proportionality theory, developed by the Swiss judges using subjective and objective criteria to determine whether a particular offence is sufficient to classify it as having a political character to make it an exception to the political offence for extradition (Re Vogt, 1924; Re Kaphengst, 1930; Costari case, 19 1975) is subscribed to in this article. It is submitted that all the theories can fit in to determine the culpability of civil aviation security offenders as a wider definition of civil aviation crimes has been provided under the Beijing Convention 2010 (Beijing Convention 2010, article 1).

The main purpose of the political offence exception of the law of extradition is to protect the persecution of dissidents and opposition by the government on purely political grounds. However, in the modern era of terrorism, terrorists also usually have political motives to commit heinous crimes including aircraft hijacking. That is why States are now of the view that terrorists (including hijackers) should not be entitled to political offence exceptions. Some states have even made the offence of aircraft hijacking one of the exceptions to political offence defence (Netherland Yearbook, 1999; Bianchi, 2004). It merits mentioning that this is why the Beijing Convention 2010 excludes political offence as a ground for non-extradition of the hijacker(s) (Beijing Convention 2010, article 13). Thus, the offence of aircraft hijacking recognised as one of the exceptions to the political offence exception as contained in the Beijing Convention 2010 should be most welcome.

### ***Human Rights Exception***

The protection of human rights has constituted an impediment to the implementation of extradition provisions (Wijngaert,1990). The doctrine of fear of inhumane treatment that could be meted out to the would-be fugitive, and the issue of discrimination as envisaged in the 2010 Convention are worthy of notice when dealing with the issue of extradition of a fugitive. For example, in Soering’s case, the European Court of Human Rights refused to grant the extradition of a fugitive from the United Kingdom to the United States on the ground that it contradicts art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, because the would-be fugitive may be subjected to degrading and inhumane treatment subjected to death row for years (Soering vs UK,1989).

Non-discrimination is one of the most fundamental human rights under the international human rights law. Thus, an extradition request based on discrimination is unlawful and it must be discountenanced. Refusal to extradite on the grounds of fear of discrimination is not stated in the earlier anti-hijacking Conventions. However it can be found in the recent Beijing Convention 2010:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in Article 1 or for mutual legal assistance concerning such offences has been made to prosecute or punish a person on account of that person’s race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person’s position for any of these reasons

(Beijing Convention 2010, article 14)

The Human Rights Committee (Human Rights Committee, 1966) defines discrimination as ‘*any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion political or other opinion, natural or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*’ (186 HRC General Comment No 18, paragraph 7; Convention on the Elimination of all Forms of Racial Discrimination ICERD, 1966, Article 1 (1); Convention on the Elimination of all Forms of Discrimination Against Women CEDAW, 1979, article 1).

Therefore, hijacker(s) will not be extradited if the requested state has substantial ground(s) for believing that such a request is made for prosecuting or punishing the alleged hijacker because of his race, religion, nationality, ethnicity, origin, political opinion or gender, or where extradition will be prejudiced to the alleged offender’s position for any of the discriminatory features (Beijing Convention 2010, article 14). Non-discrimination is a rule of international customary law and has now been introduced into the Beijing Convention 2010 (Beijing Convention 2010, article 14).

### ***Capital Punishment***

Another factor weighing against the extradition of offenders is the issue of the capital punishment phenomenon. France, Italy, Netherlands, Canada and some other States tend to refuse extradition of their nationals to a requesting state where a death punishment is to be imposed without assurances. They argue that the death penalty or death row phenomenon is inhumane, and cruel and thereby contradicts principles of fundamental human rights (Charter & Fundamental Rights of the European Union, 2000; Schubas, 2001; *United States v Burn* (2001)). Most of these States are parties to the

international conventions on aircraft hijacking. It is submitted that insisting on the assurances that the death penalty or death row phenomenon will not be imposed before their national could be extradited might result in releasing the offender without being punished or imposing lesser punishment which will not be commensurate with the gravity of the offence of aircraft hijacking. Furthermore, such assurances might lead the criminals to commit a further or similar offence(s) knowing fully that they are protected against the death penalty even if their actions result in the death of the victim(s). In addition, looking at the gravity of the offence of aircraft hijacking, the assurances that the death penalty or death row phenomenon will not be imposed should be discarded, more so, the hijackers have equally tampered with the victim's fundamental human rights whenever an aircraft is hijacked.

### *Nature of Extradition under the Principle of Islamic Law*

The doctrine of *aut dedere* plays an important role in the exercise of universal jurisdiction to realise the aim and objectives of an international Convention on the prevention of terrorism of any form (Petersen, 1992). Under Islamic law, there is neither direct authority from al-Qurán nor Hadith on extradition. However, what appears to be a source of extradition procedure under Islam is indirectly provided for in a six-clause treaty between the Prophet Muhammad (PBUH) representing the Islamic state of Madinah and the People of Quraysh in Makkah in January 628 (Dhu al-Qidah, 6 A.H) otherwise known as the "*Treaty of Hdaybiyyah*" (Karen, 2002; Asyiqin, 2008). A clause of the Treaty that is indirectly related to the return of fugitive(s) is reproduced hereunder:

Translation: Anyone from the Makkan Quraysh who joins Muhammad PBUH without any permission from his chief or guardian must be returned back to Makkah

(Asyiqin, 2008; Muhammed, 2018)

What further appears to be a document that is related to extradition is, according to classical Islamic jurists a letter written from one judge to another (*kitāb al-qāḍī ilā al-qāḍī*) within the Islamic territory requesting the retention of a criminal or requesting the execution of a sentence passed on the convicted criminal. Accordingly, a Muslim who commits a crime in an Islamic state can be prosecuted in another Islamic state if he escaped to another Islamic State, on one hand, and, on the other hand, if he was prosecuted in an Islamic state where he committed the offence but escaped to another Islamic State before the execution sentence, the punishment can be inflicted in an Islamic state where he ran to (Al-Dawoody, 2015). Abu Hanifah defines an Islamic State as a state where Islamic law is applicable; neighbouring to Muslims; and enjoys the protection of Islam (Al-Kasani, 2000). Maliki school of Islamic thought maintains that the Islamic state (Daral-Islam) is where "*Muslim provisions prevail*" (Ibn Rushd, 1408 A.H; Ansari, 1313 A.H). Shāfi'ites are of the view that the Islamic state is any land where Islamic provisions can be displayed by Muslims. Similarly, the Hanbali school is of the view similar to that of Shāfi'ī that the Islamic state connotes "*every land where Islamic provisions prevail*" (Imam ibn Moflih al-Hanbali, 1391 A.H/1971 AD; El-Wafa, 2009). It is submitted that this arrangement is between two Islamic States to punish criminals to combat terrorism.

However, two important situations exist in a matter of extradition between an Islamic State and a non-Islamic State. The first situation is where the offender escaped from an Islamic State to a non-Islamic State and the Islamic State requests for the extradition of the offender; the second is where the criminal escaped from a non-Islamic State to an Islamic State.

In the first situation, an Islamic jurist, Shaykh Muḥammad Abū Zahrah (1898–1974) argues that the Islamic State can request the extradition of criminals in this case but subject to a treaty between the two States, however, if there is no such an agreement, then the Islamic State can rely on the principle

of permissibility under international customs to request extradition. He relied on the following juristic ruling: a well-known custom is equivalent to a binding treaty (Al-Dawoody, 2011). The opinion of Abu Zahra is the same as what is contained in articles 12 (2) and (3) of the Beijing Convention 2010 on civil aviation security and thus, is “*congruent with modern international treaty law and current international practices*” (Al-Dawoody, 2015). It is safer to state that the principle of Islamic law on extradition has been in existence long before the adoption of the Beijing Convention 2010. By implication, the modern-day extradition provision as embodied in the Beijing Convention 2010 is borrowed from the principle of Islamic law.

The second situation is when the non-Islamic State requests the Islamic State to extradite terrorist offenders to the jurisdiction of the non-Islamic State. Again, the contributions of Abū Zahrah provide clarification to address the ambiguities. Consequently, he distinguishes between the extradition of Muslims and *Dhimmi* citizens of the Islamic States and “*non-Muslim non-citizens*” of the Islamic State. He argues that the Islamic State must honour the pact she entered into with the non-Islamic state, thus the non-Muslim non-citizens of the Islamic State must be extradited. He relied on the provisions of the Qur’ān in verses 16:92 and 17:34 respectively which say “*Agreement must be respected*” (*pacta sunt servanda*) (Abu Zahra, 1998; Awdah, 1985). He further pointed out that the classical Islamic jurists did not agree to the extradition of Muslims and *Dhimmi*s from an Islamic State to a non-Islamic State. Consequently, Abū Ḥanīfah, a minority in this discourse, reiterates that any agreement entered into between the Islamic State and non-Islamic State on the extradition of Muslims and *Dhimmi*s to a non-Islamic State is null and void and of no effect whatsoever because the non-Muslim State lacks jurisdiction over the citizens of the Islamic State. While the majority consisting of Mālik and al-Shāfi‘ī maintain that the Islamic state has to respect the treaty, however, al-Shāfi‘ī further opines that the legality of such agreement is subject to a condition and assurances that requested Muslim criminals will not be forced to practice another religion Islam if they are extradited to non-Islamic state (Abu Zahra, 2011; Awdah 1985).

The contributions of Abu Zahra to the development of the Islamic extradition principle have been duly recognised. However, his contributions appear to be contradictory. On one hand, he supports the view that extradition of Muslim criminals from an Islamic State to a non-Islamic State is prohibited because a non-Muslim judge who applies non-Islamic law to adjudication of cases is prohibited from hearing suits involving Muslims (Abu Zahra, 2011; Awdah, 1985). On the other hand, relying on international treaties or customs, he opines that the Islamic state could request for the retention of Muslims who committed crimes in the Islamic State but absconded to a non-Muslim State. It is submitted that the doctrine of reciprocity which he had acceded to in his book *Al-‘Alāqāt al-Dawliyyah fī al-Islām* is one of the fundamental principles of international relations in Islam, (Abu Zahra, 1998), consequently, the Islamic State should respect the principle and accept extradition of its Muslim citizens to non-Muslim State if he “committed a crime outside the Islamic State” (Al-Dawoody, 2015).

It is submitted that this article is in support of the view that where the extradition is based on a treaty signed by the requesting and requested states, it must be respected. This view is based on the verse of the Qurān where Allah says:

Translation: O you who believe, why do you say that which you do not do?

(Surah As-Saf, 61: 2)

Although the quoted verse of the Quran is not directly related to extradition, it ordains the principle that all agreements must be respected. Therefore, any extradition based on an agreement having created legal relations must be fulfilled otherwise such an Islamic State will be in a state of hypocrisy. The Prophet (PBUH) is reported to have said:

Translation: The hypocrite has three signs even if he offers the prayer and observes fast, and professes to be a Muslim: That then he spoke he lied; when he made a promise, he broke it; and when he entrusted with something, he proved dishonest.

(Sahih Muslim, 2007, 1:26, Hadiths 111, 112 and 113)

Accordingly, Islamic law scholars are of the view that any promise made with somebody must be fulfilled unless such a promise is prohibited. However, he needs to expiate its violation (Al-Jassas and Ibn al 'Arabi). Hence, an Islamic State should not enter into an extradition agreement to which the subject matter is prohibited or illegal.

The paper therefore maintains that under Islamic law, the status of doctrine of *aut dedere* to suppress civil aviation crime is obligatory. It is therefore mandatory for the government of an Islamic State to respect an extradition treaty, in this respect, the 2010 Convention on Aviation Security to suppress civil aviation crime, failing which the Head of the government of that Islamic State will be accountable for adopting a treaty, on behalf of his State, which he could not fulfil. This position is based on the authority of Surah As-Saf, 61: 2 and the Hadith quoted above.

It is further submitted that unlike the Civil Aviation Security Conventions where *aut dedere* is applicable only between the parties, its application under Islamic law is universal, because of the universality of Islamic law. This position is found on the authority of Surah Al-Anbiya' verse 21 which reads thus:

Translation: We have sent you only as a blessing for the people of the world.

(Surah Al-Anbiya', 21:107)

It is safer to state that any subject of discourse that is sourced from the primary and secondary sources of Islamic law is universal in nature. Therefore, *aut dedere* under the Islamic law principle is universal to solve the problem of non-extradition of civil aviation criminals to suppress civil aviation crimes.

## Conclusion

Indubitably, *aut dedere* aims to make sure that no criminal escapes from prosecution for the crime he committed either against the particular State or international community. The implication is therefore to close the gate of safe haven against the civil aviation criminals. This is the position under both international law and Islamic Law. Although the Conventions on Civil Aviation Security do not define "extradition", the basis upon which extradition may be considered may be based on an agreement between the requesting and requested states which culminates into the doctrine of reciprocity between the parties to the agreement. This is the basis of administering extradition provisions under the International Civil Aviation Conventions. The implication of this is that the provision is not universal in nature as it is only binding the parties to the convention. It is therefore safer to state and emphasise that the status of extradition provisions in international law is mandatory but not binding. This is because a clear analysis of the provisions reveal that the conventions do not provide for the punishment of a state who refuses to extradite. Therefore, the provisions are more "moral" than "legal". While it is obvious that extradition will not be granted based on the political nature of the offence, fundamental human rights and the nature of punishment to be imposed by the

requesting state among others. However, the political offence exception under international law is no longer a limitation to the extradition of civil aviation criminals. Some criminals may take advantage of political intention to commit offences such as aircraft hijacking, sabotage of aircraft and passengers' hostage taking which by their nature are very serious. The aim is therefore to suppress civil aviation offences in all situations. Under the Islamic law principle, the nature of *aut dedere* and the conditions attached thereto are binding and must be respected. That is why the Quranic verse 61:2 in the preceding discussion is relevant to the issue of extradition, irrespective of whether the agreement is oral or written, except that such may amount to illegality under Islam. It is, therefore, safer to conclude that extradition agreements under Islamic law must be adhered to and executed because it is an obligatory duty to respect the covenant an Islamic State enters into. Thus, the extradition agreement is binding, including the punishment for non-compliance, irrespective of whether or not the punishment is provided under the Convention. Consequently, Islamic law is universally applicable and its adoption to modern issues is encouraging. In essence, the cooperation of the international community is needed to fully utilize the device as one of the weapons to suppress criminality across the world. Of course, a requesting state may not have a treaty or arrangement to extradite with the requested state. Yet categorizing civil aviation offences as international crimes that affect the whole world will make the international community treat the issue of extradition as an *erga omnes*. This will catalyze to make sure that the offender will not choose a state as a safe haven to escape punishment.

### Recommendation

The paper recommends that the International Civil Aviation Organization should review Article 12 of the Beijing Convention 2010 to accommodate punishment for State parties who refused to extradite or prosecute the civil aviation criminals. Also, civil aviation crimes mentioned in Article 1 of the 2010 Convention should be recognised as international crimes so that the international community will be able to exercise universal jurisdiction, which is the precept under Islamic law. By implication, the doctrine of safe haven will be completely closed irrespective of whether or not an offence is political in nature.

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