MINISTRY OF EDUCATION AND SCIENCE OF UKRAINE
NATIONAL UNIVERSITY «ODESA LAW ACADEMY»
MINISTRY OF EDUCATION AND SCIENCE OF UKRAINE
NATIONAL UNIVERSITY «ODESA LAW ACADEMY»

Qualifying research
work as manuscript

KOSIANENKO Serhii Olegovych

UDC: 341.44:341.49:343.123.5(043.5)

DOCTORAL THESIS

***AUT DEDERE AUT JUDICARE* PRINCIPLE IN INTERNATIONAL LAW**

Specialty: 081 – Law
Field of study: 08 – Law

Doctoral thesis for an academic degree of the Doctor of Philosophy

The doctoral thesis contains the results of my own research. Use of ideas, results and texts of other authors have reference to the source _________S.O. Kosianenko

Scientific adviser
ANDREICHENKO Svitlana Serhiivna,
Doctor of Juridical Sciences, Professor

Odesa – 2024

АНОТАЦІЯ

Кос'яненко С.О. **Принцип *aut dedere aut judicare* у міжнародному праві.** – Кваліфікаційна наукова праця на правах рукопису.

Дисертація на здобуття ступеня доктора філософії за спеціальністю 081 – Право. – Національний університет «Одеська юридична академія», МОН України, Одеса, 2024.

Дисертація присвячена дослідженню принципу *aut dedere aut judicare* в міжнародному праві. Принцип *aut dedere aut judicare* розглядається крізь призму трьох взаємопов'язаних аспектів: по-перше, захисту інтересів міжнародного співтовариства (недопущення безкарності за вчинені міжнародні злочини та забезпечення міжнародного порядку); по-друге, захисту інтересів держави (запитуючої та запитуваної) щодо екстрадиції, кримінального переслідування та кримінальної юрисдикції (зокрема, універсальної юрисдикції) та, по-третє, захисту прав та інтересів осіб, які підлягають кримінальному переслідуванню чи екстрадиції.

З урахуванням еволюції доктрини та практики міжнародного кримінального права представлено періодизацію розвитку принципу *aut dedere aut judicare*: період появи загальних контурів принципу безкарності, які були сформульовані в працях таких авторів, як Ф. Віторія, Г. Гроцій та Е. Ваттель (16-18 ст.); період активного розвитку екстрадиції та зародження звичаєвого зобов'язання затримувати або карати підозрюваних у вчиненні певних злочинів (18 - до середини 20 ст.); період з 1945 р. до 90-х рр. 20 ст. (поява міжнародних кримінальних трибуналів *ad hoc*, розвиток універсальної юрисдикції та включення зобов'язання *aut dedere aut judicare* до міжнародних багатосторонніх і двосторонніх договорів про боротьбу з міжнародними злочинами); період з 90-х років 20 ст. по теперішній час (робота Комісії міжнародного права ООН на тему зобов'язання видавати або здійснювати судове переслідування; поява постійного органу міжнародного кримінального правосуддя та інших міжнародних і спеціалізованих судів і

трибуналів, що призвело до появи «третьої альтернативи» як моделі зобов'язання *aut dedere aut judicare*).

Пропонується авторське визначення принципу *aut dedere aut judicare* з урахуванням трьох можливих альтернатив і цілей принципу: принцип *aut dedere aut judicare* встановлює зобов'язання або видати ймовірного правопорушника, або передати справу компетентним органам запитуваної держави для здійснення кримінального переслідування, або передати ймовірного правопорушника компетентному міжнародному (гібридному) кримінальному суду чи трибуналу з метою забезпечення міжнародного правопорядку, захисту інтересів запитуючої та запитуваної держав та забезпечення прав осіб, які беруть участь у кримінальному провадженні.

Висвітлено діяльність Комісії міжнародного права ООН над темою «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)». У роботі проаналізовано такі основні документи, що були представлені Комісією міжнародного права ООН: Попередні зауваження «Зобов'язання видавати або здійснювати судове переслідування («*aut dedere aut judicare*») у міжнародному праві», представлені Спеціальним доповідачем З. Галицьким (2004); чотири доповіді Спеціального доповідача З. Галицького по темі «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)» (Попередня доповідь 2006 р., Друга доповідь 2007 р., Третя доповідь 2008 р., Четверта доповідь 2011 р.), Доповідь Робочої групи щодо зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*) (2013), Остаточна доповідь Робочої групи щодо зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*) (2014). Встановлено, що десятиліття роботи Комісії міжнародного права ООН над темою «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)» не принесло суттєвих результатів, до прикладу, проєктів статей про зобов'язання видавати або здійснювати судове переслідування.

Особливу увагу було приділено аналізу численних конвенцій, спрямованих на боротьбу з міжнародними та транснаціональними злочинами, що містять положення *aut dedere aut judicare*. Конвенції, що містять клаузулу *aut dedere aut judicare* можна класифікувати за трьома основними групами в залежності від співвідношення між зобов'язанням видавати та зобов'язанням здійснювати судове переслідування. Перша група договорів містить положення, які покладають зобов'язання щодо видачі, а зобов'язання судового переслідування виникає лише у випадку відмови від екстрадиції. В такому разі пріоритет надається екстрадиції. Друга група конвенцій включає положення, які покладають зобов'язання здійснювати судове переслідування у разі, коли підозрюваний правопорушник перебуває на території держави-учасниці, незалежно від того, чи запитує інша держава-учасниця екстрадицію. Третя група договорів містить положення, які передбачають альтернативу для держави, на території якої знаходиться ймовірний правопорушник. Держава, оскільки вона має свободу у реалізації одного з двох варіантів, орієнтується на вибір рішення, найбільш сумісного з її національною правовою системою.

Проаналізовано різні джерела зобов'язання видавати або здійснювати судове переслідування з метою визначення характеру та обсягу зобов'язання *aut dedere aut judicare* у міжнародному праві. Зроблено висновок, що зобов'язання *aut dedere aut judicare* випливає не лише з положень конкретних міжнародних договорів, але й із звичаєвих норм міжнародного права. Продемонстровано, що національне кримінальне право є важливим джерелом зобов'язання видавати або здійснювати судове переслідування. Ефективна реалізація принципу *aut dedere aut judicare* у кожному конкретному випадку залежатиме від виконання державою як своїх міжнародних зобов'язань, так і реалізації необхідних заходів (зокрема щодо встановлення юрисдикції над кримінальними правопорушеннями та правопорушниками), визначених у національному законодавстві з питань екстрадиції та кримінального переслідування.

Встановлено, що виконання зобов'язання здійснювати судове переслідування пов’язане із виконанням низки дій: проведення досудового розслідування, направлення провадження до відповідних органів для притягнення до кримінальної відповідальності, виконання вимог щодо своєчасності притягнення до кримінальної відповідальності, прийняття необхідного законодавства щодо криміналізації певних видів діянь, встановлення відповідної кримінальної юрисдикції, співпраця та обмін інформацією з іншими державами або міжнародними організаціями. Вимоги щодо зобов’язання здійснювати судове переслідування варіюються залежно від договору. Виконання зобов’язання здійснювати судове переслідування залежить від наявності та дотримання національних матеріально-правових та процесуальних норм, зокрема щодо достатніх доказів для порушення кримінальної справи, положень про амністію або притулок, необхідності присутності обвинуваченого, положень про імунітет посадових осіб від іноземної кримінальної юрисдикції тощо. За відсутності достатніх доказів держава не зобов’язана притягувати особу докримінальної відповідальності.

Проаналізовано три основні конструкції, що визначають зв’язок між двома зобов’язаннями (видавати або здійснювати судове переслідування), викладеними в принципі *aut dedere aut judicar*е: конструкція, яка надає перевагу екстрадиції, а не судовому переслідуванню; конструкція, яка надає перевагу судовому переслідуванню, а не екстрадиції; альтернативний підхід. Було встановлено, що зміст зобов’язання видавати або здійснювати судове переслідування залежить від положень договорів, укладених між сторонами та обставин кожної справи. Рішення про екстрадицію або судове переслідування має прийматися державою відповідно до її внутрішнього законодавства та міжнародно-правових зобов’язань.

Встановлено, що за наявності відповідних положень договору, принцип *aut dedere aut judicare* передбачає реалізацію третьої альтернативи (поряд з екстрадицією та судовим переслідуванням у власних судах держави). Держава, на території якої знаходиться ймовірний правопорушник, має можливість виконати свої зобов’язання шляхом передачі такої особи міжнародному кримінальному суду чи трибуналу. Наразі такі міжнародні конвенції як Міжнародна конвенція про захист усіх осіб від насильницьких зникнень 2006 р., Африканська хартія з питань демократії, виборів й управління 2007 р., Люблянсько-Гаазька Конвенція про міжнародне співробітництво при розслідуванні та переслідуванні злочину геноциду, злочинів проти людяності, воєнних злочинів та інших міжнародних злочинів, яка була підписана в лютому 2024 р., закріплюють механізм, що дозволяє державам-учасницям обирати між трьома варіантами: судове переслідування, екстрадиція або передача до міжнародного кримінального суду. Проєкт Кодексу злочинів проти миру та безпеки людства 1996 р. також закріплює модель потрійного вибору, запропоновану Комісією міжнародного права ООН.

Висвітлено зв'язок між принципом *aut dedere aut judicare* та принципом універсальної юрисдикції. Встановлено, що універсальна юрисдикція застосовується за відсутності іншого зв'язку з державою (територіальність, громадянство чи інша підстава); зобов'язання *aut dedere aut judicare* передбачає передачу справи компетентним органам для судового переслідування чи екстрадиції, а не встановлення юрисдикції. Зобов'язання *aut dedere aut judicare* не обмежується ситуаціями, які потребують застосування універсальної юрисдикції для судового переслідування чи екстрадиції.

Наголошується, що визнання зобов'язання видавати або здійснювати судове переслідування за злочини *jus cogens* як зобов'язання *erga omnes* є спірним. З одного боку, у міжнародній практиці можна знайти підтвердження, що у разі вчинення міжнародних злочинів, що досягають статусу *jus cogens*, держави зобов'язані здійснювати кримінальне переслідування або екстрадицію правопорушників і таке зобов'язання набуває характеру *erga omnes*. З іншого боку, той факт, що конкретна норма набула статусу *jus cogens*, не означає, що пов'язаний з нею обов'язок здійснювати екстрадицію або судове переслідування також набув цього статусу. У практиці є приклади надання амністії чи притулку особам, які вчинили злочини *jus cogens*.

Ключові слова: зобов'язання видавати, зобов'язання здійснювати судове переслідування, екстрадиція, боротьба з безкарністю, основні міжнародні злочини, транснаціональні злочини, відповідальність за міжнародні злочини, органи міжнародної кримінальної юстиції, універсальна юрисдикція, міжнародна співпраця у боротьбі зі злочинністю, міжнародне співтовариство, права людини, міжнародне кримінальне право.

ABSTRACT

***Kosianenko S.O. Aut dedere aut judicare* principle in international law.** – Qualifying research work as manuscript.

Doctoral thesis for an academic degree of the Doctor of Philosophy in specialty 081 – Law. – National University «Odesa Law Academy», Ministry of Education and Science of Ukraine, Odesa, 2024.

The thesis is devoted to a study of the *aut dedere aut judicare principle* in international law. The principle of *aut dedere aut judicare* is considered through the prism of three interrelated aspects: firstly, protection of the interests of the international community (preventing impunity for committed international crimes and ensuring international order); secondly, protection of the interests of a state (requesting and requested) regarding the extradition, criminal prosecutions and criminal jurisdiction (in particular, universal jurisdiction) and; thirdly, protection of the rights and interests of persons subject to prosecution or extradition.

Based on the evolution of the doctrine and practice of international criminal law, a periodization of the development of the *aut dedere aut judicare principle* is presented: the period of the initial general contours of the principle of impunity, which were formulated in the works of such authors as F. Vitoria, G. Grotius and E. Vattel (16-18th centuries); the period of active development of extradition and origins of the customary obligation to apprehend or punish alleged perpetrators of certain crimes (18 - to the middle of the 20th century); the period after 1945 to 90s of the 20th century (the emergence of the international criminal tribunals *ad hoc*, the development of universal jurisdiction and inclusion of the *aut dedere aut judicare* clause in international multilateral and bilateral treaties on combating international crimes); the period from the 90s of the 20th century to the present (the work of the UN International Law Commission on the topic of the obligation to extradite or prosecute; the emergence of a permanent body of international criminal justice and other international and specialized courts and tribunals, which led to the emergence of a «third alternative» as a model *of aut dedere aut judicare*

obligation).

The author's definition of the principle of *aut dedere aut judicare* is proposed, taking into account three possible alternatives and purposes of the principle: the *aut dedere aut judicare* principle establishes either the obligation to extradite the alleged offender or to transfer the case to the competent authorities of the requested state for prosecution or to surrender an alleged offender to a competent international (hybrid) criminal court or tribunal in order of ensuring international order, protection of the interests of a requesting and requested states and ensuring rights of persons involved in criminal proceedings.

The activities of the International Law Commission on the topic «Obligation to Extradite or Prosecute (*aut dedere aut judicare*)» has been highlighted. The following main documents submitted by the International Law Commission has been analysed: Preliminary remarks «The Obligation to Extradite or Prosecute («*aut dedere aut judicare*») in International Law» (2004) by Special Rapporteur Z. Galicki; four reports of the Special Rapporteur Z. Galicki on the obligation to extradite or prosecute (*aut dedere aut judicare*) (the Preliminary report of 2006, the Second report of 2007, the Third report of 2008, the Fourth report of 2011); the Report of the Working Group on the Obligation to extradite or prosecute (*aut dedere aut judicare*) (2013); the Final report of the Working Group on the Obligation to extradite or prosecute (*aut dedere aut judicare*) (2014). A decade of study of the topic «Obligation to Extradite or Prosecute (*aut dedere aut judicare*)» of the ILC has not produced substantive results, such as draft articles on the obligation to extradite or prosecute.

Special attention was given to the analysis of the numerous conventions aimed at combating international and transnational crimes which contained *aut dedere aut judicare* clause. Conventions containing the *aut dedere aut judicare* clause can be divided into three main groups, depending on the relationship between the obligations to extradite and prosecute. The first group of the treaties includes provisions that impose an obligation to extradite, and criminal prosecution is an obligation only in case of refusal to extradite. Therefore, in this case, priority is given to extradition. The second group of conventions includes provisions that impose an obligation to prosecute, whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition. The third group of treaties contains provisions which provide for an alternative for the state in whose territory the alleged offender is located. The state, because of the absolute freedom it has in the implementation of one of the two options, should be oriented at choosing the solution which is the most compatible with its national legal system.

The analysis of the various sources of the obligation to extradite or prosecute is carried out with a view to determining the nature and scope of the obligation *aut dedere aut judicare* in international law. It was concluded that the obligation *aut dedere aut judicare* arises not only from the provisions of specific international treaties, but also from customary international norms. It has been shown that national criminal law constitutes an important source of the obligation to extradite or prosecute. The effective implementation of the principle of *aut dedere aut judicare* in each specific case will depend on the state's fulfillment of both its international obligations and the implementation of the necessary measures (in particular, regarding the establishment of jurisdiction over criminal offenses and offenders) defined in national legislation concerning extradition and prosecution.

It has been found that the fulfillment of the obligation to prosecute is conditioned by a number of actions: to conduct a preliminary inquiry, to submit the case to the relevant judicial authorities for prosecution, to fulfill the requirements regarding the timeliness of prosecution, to adopt the necessary legislation in order to criminalize certain types of conduct, to implement the relevant criminal jurisdiction, to co-operate and to exchange information with other states or international organizations. The requirements for the obligation to prosecute vary from treaty to treaty depending in particular on the type of international crime covered by the treaty. Fulfillment of the obligation to prosecute depends on the availability and compliance with national substantive and procedural norms regarding the conduct of criminal proceedings, in particular, the availability of sufficient evidence for the initiation of proceedings, provisions on amnesty or asylum, the need for the presence of the accused in the proceedings, provisions on the immunity of public officials from foreign criminal jurisdiction, etc. In the absence of sufficient evidence, the state is not obliged to prosecute the alleged offender.

Three main constructions of the relationship between the two obligations (to extradite or prosecute) set forth in the principle of *aut dedere aut judicare* have been analyzed: the construction that favors extradition over prosecution; the construction that favors prosecution over extradition; an alternative approach. It has been shown that the content of the obligation to extradite or prosecute depends on the provisions of the treaties concluded between the parties and on the circumstances of each case. The decision to extradite or prosecute should be made by the state in accordance with its domestic laws and international legal obligations.

It has been found that in the case of the appropriate treaty provisions, the principle of *aut dedere aut judicare* provides for the implementation of a third alternative (along with extradition and prosecution before the state's own courts). The state in whose territory the alleged offender is located may be able to satisfy its obligations through the transfer of such person to an international criminal court or tribunal. Currently, such international conventions as: the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the 2007 African Charter on Democracy, Elections and Government, the Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes, the last one was signed on February 2024 – enshrine a mechanism that allows states parties to choose between three options: prosecution, extradition or transfer to an international criminal court. The 1996 Draft code of crimes against the peace and security of mankind also enshrines the «triple» choice model proposed by the International Law Commission.

The relationships between the *aut dedere aut judicare* principle and principle of universal jurisdiction have been brought to light. It has been found that the universal jurisdiction applies when there is no other connection to the state (territoriality, nationality or any other basis); *aut dedere aut judicare* obligation entails the transfer of the case to the competent authorities for prosecution or extradition, not the establishment of jurisdiction. *Aut dedere aut judicare* obligation is not limited to the situations in which a universal jurisdiction is required to be applied for the prosecution or extradition.

It is emphasized that the recognition of the obligation to extradite or prosecute for *jus cogens* crimes as an *erga omnes* obligation is debatable. On the one hand, in international practice, one can find confirmation of the position that in case of committing international crimes that reach the level of *jus cogens*, the states are obligated to prosecute or extradite the perpetrators and such an obligation has acquired the character of *erga omnes*. On the other hand, the mere fact that a particular rule has acquired the status of *jus cogens* automatically does not mean that its related duty to extradite or prosecute has also gained that status. In practice, there are examples of granting amnesty or asylum to individuals who have committed *jus cogens* crimes.

Key words: obligation to extradite, obligation to prosecute, extradition, fight against impunity, international core crimes, transnational crimes, responsibility for international crimes, international criminal justice bodies, universal jurisdiction, international cooperation in the fight against crime, sources of international law, international community, human rights, international criminal law.

LIST OF PUBLISHED SCIENTIFIC WORKS ON THE TOPIC OF THE THESIS

Articles in scientific publications included in the list of scientific specialized publications of Ukraine

1. Kosianenko S. The work of the International Law Commission on the topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)». *Юридичний вісник*. 2023. № 3. С. 188−196. URL: http://yurvisnyk.in.ua/v3_2023/24.pdf/. DOI https://doi.org/10.32782/yuv.v3.2023.24.

2. Kosianenko S. The obligation to extradite or prosecute and universal jurisdiction. *Аналітично-порівняльне правознавство*. 2023. № 5. P. 612-617. URL: https://app-journal.in.ua/wp-content/uploads/2023/11/112.pdf. DOI: https://doi.org/10.24144/2788-6018.2023.05.110.

3. Кос'яненко С. О. Національне законодавство як джерело зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*). *Науковий вісник Ужгородського національного університету. Серія: Право*. 2024. Вип. 81. Частина 3. С. 269-274. URL: https://visnyk-juris-uzhnu.com/wp-content/uploads/2024/03/81_part-3.pdf/. DOI https://doi.org/10.24144/2307-3322.2024.81.3.40.

4. Кос'яненко С. О. «Третя альтернатива» за зобов'язанням видавати або здійснювати судове переслідування (*aut dedere aut judicare*). *Юридичний науковий електронний журнал.* 2024. № 1. С. 687-689. URL: http://www.lsej.org.ua/1_2024/166.pdf. DOI https://doi.org/10.32782/2524-0374/2024-1/164.

Publication in foreign journals

5. Kosianenko S. International treaties as sources of the obligation to extradite or prosecute. *European Political and Law Discourse*. 2023. N 10. Issue

4. P. 68−75. URL: https://eppd13.cz/wp-content/uploads/2023/2023-10-4/06.pdf. DOI: 10.46340/eppd.2023.10.4.4.

6. Kosianenko S. International custom as a source of the obligation to extradite or prosecute. *Knowledge, Education, Law, Management*. 2023. N 5 (57). P. 182-186. URL: https://kelmczasopisma.com/ua/viewpdf/11025. DOI https://doi.org/10.51647/kelm.2023.5.30.

Publications certifying the approbation of the thesis and additionally reflecting the scientific results of the thesis

7. Andreichenko S., Kosianenko S. The fight against impunity in international criminal law (through the prism of the aut dedere aut judicare obligation. Європейські орієнтири розвитку України в умовах війни та глобальних викликів XXI століття: синергія наукових, освітніх та технологічних рішень : у 2 т. : матеріали Міжнар. наук.- практ. конф. (м. Одеса, 19 травня 2023 р.) / за заг. ред. С. В. Ківалова. Одеса : Видавництво «Юридика», 2023. Т. 1. С. 309-312. (Особистий внесок здобувача – 0,06 д.а.).

8. Кос’яненко С. О. Зобов’язання здійснювати судове переслідування як складова принципу *autdedereautjudicare*. *Global Society in Formation of New Security System and World Order: Proceedings of the 2nd International Scientific and Practical* Internet Conference. July 27-28, 2023. Dnipro, Ukraine. P. 213−215. URL: http://www.wayscience.com/wp-content/uploads/2023/08/Conference-Proceedings-July-27-28-2023.pdf.

9. Kosianenko S. *A civitas maxima* through the prism of the *aut dedere aut judicare* principle. *Recent Advances in Global Science*: *Proceedings of the 3rd International Scientific and Practical Conference*. September 16-18, 2023. Vilnius, Lithuania. P. 86-89. URL: https://archive.interconf.center/index.php/conference-proceeding/issue/view/16-18.09.2023/180.

10. Kosianenko S. The relationship between the obligations to extradite and prosecute under the *aut dedere aut judicare* clause. Актуальні проблеми

юридичної науки. Політико-правові передумови європейської та євроатлантичної інтеграції України: збірник тез Міжнародної науково-практичної конференції «Двадцять другі осінні юридичні читання» (м. Хмельницький, 13 жовтня 2023 року), Хмельницький університет управління та права імені Леоніда Юзькова, 2023. Р. 160-161.

11. Kosianenko S. The *aut dedere aut judicare* principle and *erga omnes* obligations. Collection of abstracts. VII International scientific and practical conference «Scientific Research: Theoretical Foundations and Practical Applications», January 24-26, 2024. Vienna, Austria, International Scientific Unity. 2024. P. 179-182. URL: https://isu-conference.com/wp-content/uploads/2024/01/Scientific_research_theoretical_foundations_and_practical_applications.pdf.

12. Kosianenko S. The *aut dedere aut judicare principle* and *jus cogens violations*. International scientific conference «Scientific innovations in law amidst the impact of the Russian-Ukrainian war on the legal system» : conference proceedings (February 7–8, 2024. Riga, the Republic of Latvia). Riga, Latvia : Baltija Publishing, 2024. P. 196-198.URL: http://www.baltijapublishing.lv/omp/index.php/bp/catalog/download/436/11728/24527-1?inline=1 DOI https://doi.org/10.30525/978-9934-26-409-2-45.

TABLE OF CONTENTS

ABBREVIATIONS ……………………………………………………..… 18
INTRODUCTION………………………………………………………. 19
CHAPTER 1. GENERAL THEORETICAL AND LEGAL FRAMEWORK OF THE *AUT DEDERE AUT JUDICARE* PRINCIPLE IN INTERNATIONAL LAW……………………………………………………. 29
1.1. Genesis of the *aut dedere aut judicare* obligation through the prism of the fight against impunity (from «Grotius formula» to «triple alternative»)………………………………………………………..……… 29
1.2. Approaches to understanding the essence of the maxim *aut dedere aut judicare* in the doctrine and practice of international law…………………… 43
1.3. The work of the International Law Commission on the topic «The obligation to extradite or prosecute» (*aut dedere aut judicare*)……………….. 54
CHAPTER 2. SOURCES, SUBSTANTIVE ELEMENTS AND CONTENT OF THE OBLIGATION *AUT DEDERE AUT JUDICARE*…………………… 63
2.1. International treaty as source of the obligation to extradite or prosecute... 63
2.2. International custom as a source of the obligation to extradite or prosecute……………………………………………………………... 77
2.3. National legislation as a source of the obligation to extradite or prosecute…………………………………………………….……….. 97
2.4. The scope of the obligation to extradite or prosecute…………………. 111
2.4.1. Meaning of the obligation to prosecute…………………………..... 119
2.4.2. Meaning of the obligation to extradite…………………………... 129
2.5. The relationship between the obligation to prosecute and the obligation to extradite………………………………………………………………. 138
2.5.1. Priority of extradition……………………………………………. 139
2.5.2. Priority of prosecution…………………………………….……… 142

2.5.3. Alternative obligations………………………………………… 146
2.6. Option of surrender to international criminal tribunal or a hybrid tribunal («*third alternative*»)………………………………………………………… 151
CHAPTER 3. RELATIONSHIP BETWEEN THE OBLIGATION TO EXTRADITE OR PROSECUTE AND OTHER PRINCIPLES………………. 159
3.1. Universal jurisdiction and the obligation to extradite or prosecute……… 159
3.2. The *aut dedere aut judicare* principle and *erga omnes* obligations……… 173
3.3. The *aut dedere aut judicare* principle and *jus cogens* violations…………. 179
CONCLUSION………………………………………………………... 188
BIBLIOGRAPHY……………………………………………………… 196
APPENDIX ………………………………………………..…………... 227

ABBREVIATIONS

ASEAN − Association of Southeast Asian Nations

AU – African Unity

CAT Convention − Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Draft Code 1996 − Draft Code of Crimes against the Peace and Security of Mankind (1996)

ECOWAS − Economic Community of West African States

ICC – International Criminal Court

ICHR − Inter-American Commission on Human Rights

ICJ –International Court of Justice

ICTY − International Criminal Tribunal for the former Yugoslavia

ILC – International Law Commission

OAU − Organization of African Unity

SADC − Southern African Development Community

UN – United Nations

UNGA – the United Nations General Assembly

VCLT − Vienna Convention on the Law of Treaties

INTRODUCTION

The substantiation of the choice of research topic. The threat of international and transnational crimes has increased to unprecedented levels in recent years, posing unprecedented challenges to international security in general, and to the national security of states in particular. As part of efforts to eliminate «impunity» for these crimes, the obligation to extradite or prosecute has important practical implications. As a fundamental principle of extradition and international criminal law in general, the application of the *aut dedere aut judicare* clause is essential for the accountability of people who have committed crimes of international concern by ensuring that they are prosecuted and punished within the relevant jurisdiction.

The Special Rapporteur of the United Nations (hereinafter – UN) International Law Commission (hereinafter – ILC) on the topic «Obligation to extradite or prosecute (*aut dedere aut judicare*)» Z. Galicki noted that «although the obligation to extradite or prosecute may look, at first, as a very traditional one, we should not be misled, however, by its ancient, Latin formulation. The obligation itself cannot be treated as a traditional topic only. Its evolution from the period of G. Grotius up to recent times and its significant development as an effective tool against growing threats deriving for States and individuals from criminal offences can bring us easily to one conclusion – that it reflects new developments in international law and pressing concerns of the international community» [275, p. 321].

«With the beginning of the russian armed aggression against Ukraine in 2014» [1; 9; 11; 25; 34; 39], «which turned into a full-scale invasion on February 24, 2024» [215], the legal content and practical implementation of the principle of *aut dedere aut judicare* acquires special importance. Human rights are being massively and grossly violated, and thousands of international crimes are being committed on the territory of Ukraine, which requires, in particular, the cooperation of Ukraine and other states on criminal matters and ensuring the punishment for crimes committed. It is crucial for Ukraine to minimize impunity for crimes committed through international cooperation, specifically due the application of the *aut dedere aut judicare* principle, while adhering to existing international standards regarding extradition and prosecution.

It is important to note that «on May 2023 in Ljubljana, Slovenia, 80 states approved the text of the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (the Ljubljana - the Hague Convention)» [261] and in February 2024, «a number of states, including Ukraine, signed this convention» [42]. This Convention outlines the obligations of states with respect to cooperation and extradition in the investigation of crimes under international law. In addition to cooperation between states, the Convention also lays down a fundamental legal principle for the prosecution of the most serious crimes by states in black and white: the obligation *aut judicare aut dedere* (Article 14 of the Convention). According to this Article, every state-party has an obligation to prosecute anyone found on its territory who has allegedly committed international crimes under this Convention. And if a state does not wish to prosecute on its territory, it is then obliged, according to this principle, to hand over the suspected person either to another state or to an international tribunal for prosecution. This article was hotly debated, and as a result, the right to formulate a reservation on the principle *aut judicare aut dedere* for a renewable period of three years was declared [255].

Despite the fact that the principle of *aut dedere aut judicare* has been widely reflected in numerous international treaties, state and judicial practices, the application of the *aut dedere aut judicare* principle raises a number of complex questions that are discussed and debated both at the legal and political levels and require careful examination and resolution. These questions include, but are not limited to defining the range of crimes covered by the *aut dedere aut judicare* principle; the hierarchy between the obligation to extradite and prosecute; consistency between treaties containing the *aut dedere aut judicare* clause; ambiguity on the existence of customary obligation *aut dedere aut judicare*;

connection between amnesty and *aut dedere aut judicare* obligation; absence of a universal international treaty regarding the *aut dedere aut judicare* obligation.

As a part of the effort to safeguard Ukraine's interests in the face of russian aggression, it is especially important to develop universal jurisdiction, which provides for criminal prosecutions to be brought by states for international crimes committed against Ukraine and/or on its territory.An important aspect of universal criminal jurisdiction is the application of the principle of *aut dedere aut judicare*, which is intended to prevent impunity for committed crimes.

Thus, it appears that there are a number of significant uncertainties in regards to the application of the obligation to extradite or prosecute, which necessitates further study of the *aut dedere aut judicare* principle. It is notable that in Ukrainian legal science the principle of *aut dedere aut judicare* has not been the subject of separate monographic studies and, therefore, deserves further in-depth analysis. The relevance of the presented research is determined by the need to present the modern comprehensive vision of the *aut dedere aut judicare* principle in international law at the level of fundamental scientific research.

Connection of work with scientific programs, plans, topics. The dissertation was carried out within the framework of the planned research topic of the National University «Odesa Law Academy», namely, «Legal and social life of Ukraine in the human-centered dimension in the digital era» for 2021-2025 (state registration number 0122U000266) and within the framework of the research work plan of the Department of International Law and European law of the National University «Odesa Law Academy», namely, «International law and protection of human rights in the digital era» for 2021-2025.

The aim and objectives of the study. The *aim of the doctoral thesis* is to reveal the content, nature, scope and features of the application of the *aut dedere aut judicare* principle in international law.

To achieve the aim, the following *research objectives* were set forth:

− to reveal the genesis of the *aut dedere aut judicare* obligation through the prism of the fight against impunity (from «Grotius formula» to «triple alternative»);

– to determine approaches to understanding the essence of the maxim *aut dedere aut judicare* in the doctrine and practice of international law;

– to trace the work of the International Law Commission on the topic «The obligation to extradite or prosecute» (*aut dedere aut judicare*);

– to consider the international treaties as sources of the obligation to extradite or prosecute;

– to consider the international custom as a source of the obligation to extradite or prosecute;

– to reveal the issue of national legislation as a source of the obligation to extradite or prosecute;

– to define the scope of the obligation to extradite or prosecute;

– to find out the specifics of the three constructions of the relationship between the obligation to extradite and the obligation to prosecute (priority of extradition, priority of prosecution, alternative obligations) under the *aut dedere aut judicare* clause;

– to characterize the option of surrender to international criminal tribunal or a hybrid tribunal («*third alternative*»);

– to highlight the issue of the relationship between the *aut dedere aut judicare* principle and concept of universal jurisdiction;

– to consider whether the obligation *aut dedere aut judicare* exists as a matter of *erga omnes* and *jus cogens.*

The *object of the study* is the international relations that arise between states when the *aut dedere aut judicare* principle is applied.

The *subject of the study* is the *aut dedere aut judicare* principle in International Law.

The research methods are determined by the aim and objectives of the study. In order to conduct a comprehensive research and substantiate the scientific findings, the thesis employed a variety of philosophical, general scientific, and special legal methods.

The *dialectical method* became the basis for the scientific analysis of the study and made it possible to establish the relationship of the principle of *aut dedere aut judicare* with other legal phenomena and categories in the field of extradition, prosecution and fight against crime in general, to consider the obligation to extradite or prosecute in a multifaceted way, taking into account changes in perception about the main functions of such an obligation (chapters 1-3). The *historical-legal method* enabled the study of the evolution and understanding of the principle of *aut dedere aut judicare* from its inception to the present day (1.1, 1.2). The *instrumental method* was useful for understanding the *autdedere aut judicare principle* as a valuable legal tool to prevent impunity for international crimes committed (1.1). The *comparative legal method* was applied in order to compare various approaches to understanding the essence of the *aut dedere aut judicare* principle (1.2), as well as to distinguish the principle of *aut dedere aut judicare* from universal jurisdiction (3.1). The *systematic method* was used for studying the relationship between obligation to extradite and obligation to prosecute as structural elements of the principle *aut dedere aut judicare* (2.4, 2.5). The *formal legal method* was applied in the analysis of international treaty and customary law relating to obligations to extradite and prosecute, decisions of international and national courts (chapters 1-3). The *logical method* was used to clarify the main categories based on the analysis of the doctrine and practice of international criminal law (chapters 1-3). In their complex, the specified methods were used to achieve the most objective and comprehensive analysis of this subject.

The theoretical basis of the research is the scientific provisions contained in the works of such scientists as: S. Andreichenko, M. Cherif Bassiouni, O. Bazov, H. Behruz, Yu. Blazhevich, V. Bortnytska, J. Brownlie, M. Buromenskyi, O. Butkevych, A. Caligiuri, A. Cassese, J. Crawford, R. Cryer, V. Denisov, N. Dryomina-Volok, J. Foakes, Z. Galicki, G. Geoff, G. Gilbert, M. Gnatovsky, V. Gutnyk, V. Hrebenyuk, K. Gallant, K. Kittichaisaree, S. Kivalov, T. Korotkyi, O. Kyyivetz, M. Mattarolo, P. Michael, M. Scharf, A. Nollkaemper, M. Pashkovsky,

A. Pidhorodynska, M. Plachta, V. Pylypenko, C. Soler, M. Svistulenko, C. Tiribelli, S. Vykhryst, O. Vynogradova, G. Werle, E. Wise, R. Wolfrum, O. Zadorozhnii, K. Zadoya, N. Zelinska, M. Zgonec-Rožej and others.

The normative and empirical basis of the study consists of treaties and other international acts, documents of the International Law Commission, international customs, national legislation of different states, and decisions of international and state courts.

The scientific novelty of the obtained results is that the dissertation is the first comprehensive monographic study in Ukraine of the *aut dedere aut judicare* principle in international law. The main theoretical and practical results are specified in the following provisions:

for the first time:

− the principle of *aut dedere aut judicare* is comprehensively considered through the prism of three interrelated aspects: firstly, protection of the interests of the international community (preventing impunity for committed international crimes and ensuring international order); secondly, protection of the interests of a state (requesting and requested) regarding the extradition, criminal prosecutions and criminal jurisdiction (in particular, universal jurisdiction) and; thirdly, protection of the rights and interests of persons as a subject to prosecution or extradition;

− the author's definition of the principle of *aut dedere aut judicare* is proposed, taking into account three possible alternatives and purposes of the principle: the *aut dedere aut judicare* principle establishes either the obligation to extradite the alleged offender or to transfer the case to the competent authorities of the requested state for prosecution or to surrender an alleged offender to a competent international (hybrid) criminal court or tribunal in order of ensuring international order, protection of the interests of a requesting and requested states and ensuring rights of persons involved in criminal proceedings;

− the periodization of the development of the *aut dedere aut judicare* principle is proposed, taking into account the evolution of the doctrine and practice of international criminal law: the period of the initial general contours of the principle of impunity, which were formulated in the works of such authors as F.Vitoria, G.Grotius and E.Vattel (16-18th centuries); the period of active development of extradition and origins of the customary obligation to apprehend or punish alleged perpetrators of certain crimes (18 - to the middle of the 20th century); the period after 1945 to 90s of the 20th century (the emergence of the international criminal tribunals *ad hoc*, the development of universal jurisdiction and inclusion of the *aut dedere aut judicare* clause in international multilateral and bilateral treaties on combating international crimes); the period from the 90s of the 20th century to the present (the work of the UN International Law Commission on the topic of the obligation to extradite or prosecute; the emergence of a permanent body of international criminal justice and other international and specialized courts and tribunals, which led to the emergence of a «third alternative» as a model *of aut dedere aut judicare* obligation);

improved:

− understanding the fulfillment of the obligation to prosecute, which is determined by the number of actions: to conduct a preliminary inquiry, to submit the case to the relevant judicial authorities for prosecution, to fulfill the requirements regarding the timeliness of prosecution, to adopt the necessary legislation in order to criminalize certain types of conduct, to implement the relevant criminal jurisdiction, to co-operate and to exchange information with other states or international organizations. It was established that the requirements for the obligation to prosecute vary from treaty to treaty and depend on the availability and compliance with national substantive and procedural norms regarding the conduct of criminal proceedings;

− understanding of the relationship between the two obligations (to extradite or prosecute) set forth in the principle of *aut dedere aut judicare* (construction that favors extradition over prosecution; construction that favors prosecution over extradition, «pure model»). It is proved that the decision to extradite or prosecute should be made by the state in accordance with its domestic laws and international legal obligations, with a focus on combating crime, preventing impunity, and upholding individual rights;

− the provision that in case of appropriate treaty provisions, the principle of *aut dedere aut judicare* provides for the implementation of a third alternative (along with extradition and prosecution before the state's own courts), namely, the state in whose territory the alleged offender is located may be able to satisfy its obligations through the transfer of such person to an international criminal court or tribunal («triple» choice model);

− justification of the difference between the categories of universal jurisdiction and *aut dedere aut judicare*. It is proved that *aut dedere aut judicare* obligation is not limited to the situations in which a universal jurisdiction is required to be applied for the prosecution or extradition of an individual;

− provisions regarding the interaction of the *aut dedere aut judicare* principle with the concepts of *erga omnes* obligation and *jus cogens crimes.* It was established that on the one hand, in international practice, one can find confirmation of the position that in case of commissions of international crimes that reach the level of *jus cogens*, states are obligated to prosecute or extradite the perpetrators and such an obligation has acquired the character of *erga omnes*. On the other hand, the mere fact that a particular rule has acquired the status of *jus cogens* automatically does not mean that its related obligation to extradite or prosecute has also gained that status;

acquired further development:

− the provision that the obligation *aut dedere aut judicare* arises not only from the provisions of specific international treaties, but also from customary international norms, in relation to certain categories of international crimes;

− characteristics of national legislation as an important source of the obligation to extradite or prosecute. The effective implementation of the principle of *aut dedere aut judicare* in each specific case will depend on the state's fulfillment of both its international obligations and the implementation of the necessary measures (in particular, regarding the establishment of jurisdiction over criminal offenses and offenders) defined in national legislation concerning extradition and prosecution;

− statement about the necessity of using a flexible approach when applying the principle of *aut dedere aut judicare*, taking into account the interests of the international community, the interests of a requesting state and a requested state and the rights and interests of persons subject to prosecution or extradition.

The practical significance of the obtained results. The conclusions and proposals obtained as a result of the study can be used in the *research field:* as a basis for further scientific research of international criminal law and its institutions; *law enforcement practices*: in the development and improvement of legislative acts related to issues of extradition, prosecution, cooperation in the fight against crime and activities of government bodies; *educational process:* in applying the results of the work in the practice of teaching such disciplines as: «International criminal law», «Public international law», «International human rights law», as well as in the development of training programs, teaching aids and textbooks, manuals.

The approbation of the dissertation results. The conclusions and provisions of the dissertation were discussed at the meetings of the Department of International Law and European law of the National University «Odessa Academy of Law».

The main results of the dissertation were presented at the following international scientific and practical conferences: International scientific and practical conference «European guidelines for the development of Ukraine in the conditions of war and global challenges of the 21st century: synergy of scientific, educational and technological solutions» (Odesa, Ukraine, May 19, 2023); 2-nd International scientific and practical Internet conference «Global Society in Formation of New Security System and World Order» (Dnipro, Ukraine, July 27-28, 2023); 3rd International scientific and practical conference «Recent Advances in Global Science» (Vilnius, Lithuania, September 16-18, 2023); International scientific and practical conference «Twenty-second autumn legal readings» (Khmelnytskyi, Ukraine, October 13, 2023); VII International scientific and practical conference «Scientific Research: Theoretical Foundations and Practical Applications» (Vienna, Austria, January 24-26, 2024); International scientific conference «Scientific innovations in law amidst the impact of the Russian-Ukrainian war on the legal system»: conference proceedings (Riga, the Republic of Latvia, February 7–8, 2024).

The publications. The main provisions and conclusions of the study are reflected in 12 scientific publications, including 4 articles in scientific periodicals, recommended by the Ministry of Education and Science of Ukraine, 2 articles in periodical scientific publications of a member country of the Organization for Economic Co-operation and Development and the European Union, 6 publications in the materials of scientific and practical conferences.

The work structure. The dissertation consists of an introduction, three chapters including twelve subsections, conclusions and a list of references. The total volume of work is 234 pages, of which the main text is 176 pages, the list of sources used is 283 items on 30 pages, the appendix is presented on 8 pages.

CHAPTER 1.
GENERAL THEORETICAL AND LEGAL FRAMEWORK OF *AUT DEDERE AUT JUDICARE* PRINCIPLE IN INTERNATIONAL LAW

1.1. Genesis of *aut dedere aut judicare* obligation through the prism of the fight against impunity (from «Grotius formula» to «triple alternative»)

The central research question to be investigated is how the current form of obligation *aut dedere aut judicare* appeared and interacted in the international society during the ages. It should be noted that the intellectual tradition and reasoning behind *aut dedere aut judicare* did not appear out of nowhere. They can be found in the annals of legal scholarship over the centuries.

The researchers have examined the problems of the rationale behind this obligation and its connection to broader objectives, such as reducing impunity. «In the early stages of the development of international law, the existence and logic of the concept of individual responsibility and the obligation of the State to take actions against individuals can be traced» [214, p. 2]. «The initial general outlines of the principle of non-impunity, based on overarching social values and the responsibility of individuals through the prosecution of specific criminal acts, were articulated in the works of such authors as: F. Vitoria, A. Gentili, H. Grotius, C. Wolf and E. Vattel» [214, p. 2].

F. Vitoria argued for a link between the international community and the notion that the obligation to prosecute under international law is binding as it arises in the community, on the various subjects involved in state affairs. «With A. Gentili's universalization of international law, the initial, rough contours of the obligation *aut dedere aut judicare* became more refined. «A. Gentili postulated that there are certain acts which constitute crimes against natural law, and reason and nature equally bestow upon any nation the right to resort to correct such violations» [214, p. 12-13]. A. Gentili asserted that «there was an inherent right to intervene because crimes against nature, like crimes against humanity, were a threat to all of humanity» [213, p. 356].

It should be noted that extradition, as well as the other forms of interstate co-operation, turn largely on reciprocal self-interest. «The practice of extradition is quite easily explicable in terms of the interests of the existing states. Each state has self-interest in getting back fugitives who flee to a foreign country trying to escape the punishment from the national legal system.To secure their return on a regular basis, however, a state may have to agree to extradite them in its own turn. This is the general motive for making extradition treaties. Such treaties are predicated on considerations of mutual advantage on the part of the essentially self-regarding members of a «society of states» [276, p. 117]. «There is, however, an alternative line of argument, also starting with the premise that the international system comprises a «society of states», but reaching a different conclusion. This is the line of argument adopted, in essence, by H. Grotius and E. Vattel. It goes back to J. Bodin» [276, p. 117-118]. All states assert, in one form or another, an obligation to extradite. Each of them is interested in suppressing crime. This vision is shared by all members of the «international community». «The argument in support of the obligation to extradite was that the international system is a «society of states» and that there is a need to avoid harming another sovereign. It was not about the obligation to extradite a fugitive in order to achieve a common interest in the prevention and suppression of crime» [78, p. 492]. J. Bodin's argument is stated as follows: «[E]very prince by the laws both of God and nature . . . [is] bound to do justice. . . . Magistrates in the same Commonweal are by mutual obligation bound to help one another . . . why then should princes be exempted from the like bond, so well agreeing with the laws both of God and nature? Wherefore I hold it to be an injury unto the estate of another man, to detain a guilty fugitive after he is demanded to be again unto his own prince restored» [80, p. 492].

In the view of some writers, such as D. Covarruvias and H. Grotius, it was considered intolerable that a foreign criminal should be permitted to enjoy peacefully the fruits of his crimes on the territory of another state. Consequently, they argued that «perpetrators of certain particularly serious crimes should be prosecuted not only in the country where the crime was committed, but also in the country where they sought refuge. The state, in their opinion, was obligated to arrest, followed by extradition or prosecution, in accordance with the maxim *aut dedere aut judicare»* [184, p. 3].

H. Grotius suggests, in response to J. Bodin's argument on the question of returning an alien fugitive to «his own prince» that «it makes no difference whether the fugitive is an alien or a subject: the same rules apply. Those rules give the right to prosecute or punish the offender to the state where a crime has occurred. The state where the accused or guilty person resides ought not to interfere with this right. But since it has not been usual or expedient for a state to permit the forces of another country to enter its territory with the purpose of inflicting punishment, the state where one who has been found guilty lives should do one of two things: either punish him / her itself or deliver him / her to the requesting party» [80, p. 492-493].

H. Grotius made an essencial contribution to the advancement of the rationalization of accountability and justice principles in international law. He elevated justice to the highest value within the international legal order. According to H. Grotius, «the application of punishment is possible in case of harm that affects not only the states directly, but excessively violates the law of nature or nations in regard to any persons whatsoever» [214, p. 13-15]. «H. Grotius coined the phrase *aut dedere aut punire* for the first time» [154, p. 236]. «He incorporated the duty as part of State responsibility. When a crime is committed, the sovereign is indirectly injured by that offence. When a fugitive flees to another State, the crime remains unpunished. The harbouring State of the fugitive becomes liable in two ways according to H. Grotius. First, the custodial State fails to prevent recurrent injurious acts towards the requesting State by not apprehending the fugitive whom Grotius called *patientia.* Second, the State is liable for harbouring the fugitive who protracts the non-punishment of the injury to another State, which H. Grotius labeled *receptus»* [257, p. 236].

According to H. Grotius, «… since for one State to admit within its

Territories another foreign Power upon the Score of exacting Punishment is never practised, nor indeed convenient, it seems reasonable, that that State where the convicted Offender lives or has taken Shelter, should, upon Application being made to it, either punish the demanded Person according to his Demerits, or else deliver him up to be treated at the Discretion of the injured Party. This is that delivering up so commonly to be met with in History» [154, p. 1062].

It is important to note that H. Grotius does not base the obligation to extradite or punish on a common interest in the prevention and repression of crime. Like J. Bodin, he treats it as «a matter of bilateral obligation, of respect for the prerogatives of another sovereign and only where that sovereign has been in some special sense injured by a particular offense. H. Grotius discusses extradition in the course of talking about what we would now call state responsibility for the acts of private individuals» [80, p. 493].

«The concept of *civitas maxima*, described by Ch. Wolff in the eighteenth century as the foundation of the law of nations, despite the fact that it was later rejected by Emmerich de Vattel, later influenced the development of the theory of international law, including the field of international criminal law, and in particular, *aut dedere aut judicare* obligation» [186, p. 86]. «The purpose of the great community of nations is to promote the general welfare of states through their cooperation in accordance with the norms arising from the *civitas maxima»* [16].

Emerich de Vattel in 1758 highlighted that «international law imposed a definite legal duty on the state to extradite persons accused of serious crimes» [276, p. 136]. E. Vattel follows H. Grotius in considering extradition as a way of avoiding state responsibility for the acts of private individuals. Where J. Bodin contemplated only the extradition of aliens, E. Vattel contemplates only the extradition of nationals. Vattel's argument was the following: «Since the sovereign should not permit his subjects to trouble or injure the subjects of another state, much less be so bold as to offend a foreign power, he should force the offender to repair the evil, if that can be done, or punish him as an example to others, or finally, according to the nature and circumstances of the case, deliver him up to the injured state, so that it may inflict due punishment upon him. A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it» [195, p. 494].

E. Vattel linked the obligation to punish or to release the offender with the responsibility of the state. Both with J. Bodin and with H. Grotius, «the Vattelian obligation to extradite derives from a particular view of the duties which a state owes to other sovereigns, not on the criminal justice policy of an «international community» [80, p. 494]. At the time of H. 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 international cooperation in penal matters» [80, p. 488].

«The historical development of the practice of extradition reveals that the surrender of fugitives, which originated with the need to preserve the internal order of the respective states, was not deemed to be a tool of international cooperation for the preservation of common societal interests. Hugo Grotius first articulated this latter concern in 1624 and it gained momentum between the seventeenth and eighteenth centuries as part of the efforts of the international community to combat piracy. Thus, extradition, which at one time had manifested itself as a practice designed to preserve the personal interests of monarchs and the political and religious interests of states, gradually shifted to serve xenophobic and militaristic tendencies, before it finally evolved into an international means of cooperation in the suppression of criminality. This was due in part to philosophers of the Age of Enlightenment, such as: Voltaire, Samuel von Pufendorf, Emerich de Vattel, and Jean-Jacques Rousseau. In the eighteenth century Cesare Beccaria built on these theories and argued for the extradition of common criminals» [80, p. 6].

In Europe, the history of international extradition did not match the practice of the older civilizations of the eastern and southern Mediterranean. Prior to the

18th century, the newly-born and independent sovereign states in Europe did not see the necessity for collaborative initiatives, largely due to the prevailing atmosphere of suspicion or frequent warfare among them. As a result, «asylum was typically provided to individuals seeking refuge from the justice systems of other states, and a sovereign could only compel the return of these fugitives through the use of arms. Since the specter of war was ever-present, it didn't significantly serve as a deterrent to granting asylum. The practice of extradition, aimed at promoting peaceful relations and amicable cooperation between states, began to emerge in Europe between the 1700s and 1800s and has continued to grow, especially since the beginning of the twentieth century» [80, p. 6].

«The exploration of the complex interaction between specific crimes, treaties and custom as regards *aut dedere aut judicare* principle may be traced back to the late 19th-early 20th centuries. The origins of the customary obligation to apprehend or punish alleged perpetrators of crimes against non-nationals was founded on the notion of the international minimum standard in international law. This nascent regime resembled the substance of the 'extradite or prosecute' principle as the primary obligation on the custodial States was to initiate proceedings against the alleged perpetrator of criminal acts against non-nationals. The international minimum standard also alludes that the obligation to prosecute and punish offenders is not exclusively based on a bilateral relation between the custodial State and the State of the victim but as a community interest» [214, p. 202].

It should be highlighted that «the modern practice of extradition began to develop in the eighteenth century» [181, p. 214]. After that, «the principle *aut dedere aut judicare* can be found in the Nuremberg and Tokyo Tribunals and then in the Statutes for the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda from 1993 and 1994» [270, p. 215]. «The 1998 Rome Statute established the International Criminal Court (hereinafter – ICC) and contained a more specific obligation on State parties to either extradite or prosecute crimes against humanity offenders» [196, p. 75].

Since the conclusion of the Second World War, the world has observed a substantial rise in diverse manifestations of international and transnational criminal activities. Consequently, extradition has gained significance as states increasingly aim to manage various kinds and manifestations of international and transnational criminality. Thus, «not since the 1600s when piracy threatened world order has the maxim of H. Grotius, *aut dedere aut punire*, been more relevant than it has been in the last years. Its inclusion in international criminal law conventions and in multilateral and bilateral treaties under the formulation *aut dedere aut judicare* (the duty to prosecute or extradite) has added new dimensions to the processes of extradition. Among them these is the question of whether extradition is a concurrent or alternative duty to prosecution; this remains to be settled» [80, p. 52].

As highlighted by M. Cherif Bassiouni, historically, the duty to prosecute and extradite was not limited to certain international crimes as it emerged and developed in scholars' writings. Indeed, it was advocated as «*civitas maxima* with respect to all common crimes that states recognized in their respective legal systems, because that was a way of preserving world public order. The duty to prosecute or extradite, even in the writings of scholars, is an imperfect obligation with respect to non-international crimes as domestic crimes require either the existence of extradition treaties, national legislation, or both» [80, p. 12].

«In the course of the evolution of international criminal law, the duty can also be construed as imperfect because it emerged on an *ad hoc* basis in international criminal law conventions; some conventions do not even explicitly state the duty. But after consistent reaffirmation of the duty to prosecute or extradite in conventional international criminal law it can be argued that this principle constitutes an emerging customary duty. The duty itself has not been expressed with sufficient specificity to indicate whether it is an alternative or a coexistent duty. Whatever doctrine there is on the subject, it is unclear whether the duty to prosecute or extradite is disjunctive or coexistent» [80, p. 12-13]. «The obligation to prosecute or extradite is nevertheless more justified in the era of globalization with respect to international crimes because of worldwide consensus flowing from commonly-shared values and interests of the global society which impel worldwide interests in preventing and suppressing such crimes» [80, p. 494].

Up to the end of the XXth century «the most instruments just expressed the obligation in terms of a dual option - either extradite to another state or prosecute before the courts of the state where the suspect was located. Since the establishment of the *ad hoc* International Criminal Tribunals, the ICC and a number of other international courts later, it appears to be reasonable to conclude that a state handing over a person requested by any international court would satisfy its duty and would not be breaking any obligation under international law. States have begun to provide for such a triple option in legislation, which is not only state practice, but evidence that two branches of the state – the legislature and the executive − believe that the legislation is permitted under international law» [64, p. 9-10].

Thus, the idea of fulfilling a State party's obligation by handing over the alleged perpetrator to an international court or tribunal, often termed as a «third alternative», has gained prominence in recent times through the establishment of the ICC and «other international and specialized courts and tribunals. States have expressed their desire to cooperate among themselves, and with competent international tribunals, in the fight against impunity for crimes, in particular offences of international concern and in accordance with the rule of law» [174].

The oldest international law society, the Institute of International Law, concluded in 1983 that «the rule *aut judicare aut dedere* should be strengthened and amplified, and it should provide for detailed methods of legal assistance» [64, p. 9]. «The ILC included a rule on *aut dedere aut judicare* obligation in 1996 Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code), explaining: «The fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction» [129].

The obligation to extradite and prosecute is recognized as a fundamental element of international cooperation in the strict fight against impunity and violence. «The fight against impunity is one of the most important principles in international criminal law. Every person guilty of committing a crime under international law is a subject to criminal responsibility and punishment» [66, p. 309].

«Aut dedere aut judicare clause constitutes an effective instrument to achieve the aim of the fight against impunity, without which the requirement of the prohibition of offences would be insufficient to combat illegal conducts» [86, p. 257].

«Impunity means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not a subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims. Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations» [132, p. 6-7].

Pursuant to the resolution of the UN Commission on Human Rights (2004/72), «the Set of Principles for the protection and promotion of human rights through action to combat impunity have been updated to reflect recent developments in international law and practice, including international jurisprudence and State practice, and taking into account the independent study on impunity (E/CN.4/2004/88) commissioned by the Secretary-General pursuant to resolution 2003/72» [132, p.2].

«The UN Commission on Human Rights in its resolution 2003/72» [272] of

25.04.2003 emphasized «the importance of combating impunity to the prevention of violations of international human rights and humanitarian law and urged States to give necessary attention to the question of impunity for violations of international human rights and humanitarian law and to take appropriate measures to address this important issue (para. 1). The UN Commission on Human Rights recognized «that crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law and that perpetrators of such crimes should be prosecuted or extradited by States», and urged all States «to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes» (para. 10) [272].

«The UN Principles to Combat Impunity (2005), developed under the aegis of the UN Commission on Human Rights and then affirmed by the Human Rights Council, are today widely accepted as constituting an authoritative reference point for efforts in the fight against impunity for gross human rights abuses and serious violations of international humanitarian law» [268].

According to the Principles, states should initiate criminal prosecution against persons in respect of which there is credible evidence of the commission of serious crimes under international law if extradition has not occurred or if these persons have not been brought to an international court.

«The phrase *serious crimes under international law* encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery» [132, p. 6].

Principle 21 under the title «Measures for strengthening the effectiveness of international legal principles concerning universal and international jurisdiction» claims: «States should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law. States must ensure that they fully implement any legal obligations they have assumed to institute criminal proceedings against persons with respect to whom there is credible evidence of individual responsibility for serious crimes under international law if they do not extradite the suspects or transfer them for prosecution before an international or internationalized tribunal» [132].

Principle 26 under the title «Restrictions on extradition / *non bis in idem*» deals with possible grounds for refusal in extradition. At the same time, it is stipulated that if extradition is refused, the requested state shall forward the case for prosecution to the competent authorities.

Principle 26 claims the following: «Persons who have committed serious crimes under international law may not, in order to avoid extradition, avail themselves of the favourable provisions generally relating to political offences or of the principle of non-extradition of nationals. Extradition should always be denied, however, especially by abolitionist countries, if the individual concerned risks the death penalty in the requesting country. Extradition should also be denied where there are substantial grounds for believing that the suspect would be in danger of being subjected to gross violations of human rights such as torture; enforced disappearance; or extra-legal, arbitrary or summary execution. If extradition is denied on these grounds, the requested State shall submit the case to its competent authorities for the purpose of prosecution» [132].

«The obligation to cooperate in combating impunity is given effect in numerous conventions, *inter* alia, through the obligation to extradite or prosecute» [176]. For exmple, «states parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity» [171]. «Extradition and prosecution are alternative ways to combat impunity in accordance with paragraph 1 Article 7 of the Torture Convention» [171].

«The view that the obligation to extradite or prosecute plays an important role in combating impunity is broadly shared among states» [176]. For instance, «Belgium considers that all States must cooperate in suppressing certain extremely serious crimes − particularly crimes of international humanitarian law (crimes against humanity, genocide and war crimes) − since such crimes pose a threat, both qualitatively and quantitatively, to the most fundamental values of the international community. This contribution to the suppression effort may take the form of direct prosecution of the alleged perpetrators of such crimes or of extradition of those responsible to any State that wishes to prosecute them. Thus, there is indeed an obligation to prosecute, but of *judicare vel dedere* rather than *aut dedere aut judicare* nature. This is a customary obligation» [175].

The Nordic countries agreed that the duty interact in the fight against impunity and violence underpinned the obligation to extradite or prosecute. The common aim of combating impunity is a key policy objective of their Governments. «With the principle of universal jurisdiction, the obligation to extradite or prosecute ensured that there would be no safe haven for the perpetrators of international crimes» [150].

Italy confirmed that «the obligation to extradite or prosecute (*aut dedere aut judicare)* was a normative mechanism intended to fill gaps that might allow those responsible for the most serious crimes to escape prosecution and punishment» [150].

«The obligation to extradite or prosecute applies in respect of a wide range of crimes of serious concern to the international community and has been included in all sectoral conventions against international terrorism concluded since 1970» [174]. «Impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law, and for this purpose States are encouraged to strengthen national judicial systems and institutions» [149].

«In multilateral conventions the clauses relating to *aut dedere aut judicare* obligation have an important place within the repressive system to fight against impunity» [86, p. 256]. The principle *aut dedere aut judicare* ensures that international and national judicial organs administer justice, thus fulfilling the task of combating international crime.

Judge Trindade convincingly formulated the position regarding the fact that «in this second decade of the XXIst century, after a far too long a history, the principle of jurisdiction, as set forth in the CAT Convention (Articles 5(2) and 7(1)), appears nourished by the ideal of a universal justice, without limits in time (past or future) or in space (being transfrontier). Furthermore, it transcends the inter-State dimension, as it purports to safeguard not the interests of individual States, but rather the fundamental values shared by the international community as a whole. There is nothing extraordinary in it, if we keep in mind that, in historical perspective, international law itself precedes the inter-State dimension, and even the States themselves. What stands above all is the imperative of universal justice. This is in line with jusnaturalist thinking. The contemporary understanding of the principle of universal jurisdiction discloses a new, wider horizon» [149].

Currently the principle *aut dedere aut judicare* «becomes the bridge between the vertical and horizontal systems of enforcement. Both systems are engrafted upon *aut dedere aut judicare*. In a nutshell, all this reveals that *aut dedere aut judicare* is not merely confined to the horizontal system of enforcement. It is the pivot upon which the general enforcement of international criminal justice hinges.An Office's of the Prosecutor of the ICC policy paper in fact found that 'the duty to exercise criminal jurisdiction should be read in a manner consistent with the customary obligation *aut dedere aut judicare*, and is therefore satisfied by extradition and surrender, since those are criminal proceedings that result in prosecution'.It is hence not surprising that the historical roots of complementarity derive directly from *aut dedere aut judicare* rule. The net effect of this is that a

State which declines to exercise jurisdiction favours an ICC prosecution to the extent that William Schabas paradoxically deems such State conduct as reflective of a theory whereby «a State respected its obligation to prosecute by failing to prosecute» [252, p. 174].

In this regard international criminal tribunals play a pertinent role in the functioning of *aut dedere aut judicare* obligation and the elimination of impunity.

Taking into account the above mentioned, such stages of the development of the *aut dedere aut judicare* principle can be determined:

- the period of the initial general contours of the principle of impunity, which were formulated in the works of such authors as: F. Vitoria, A. Gentili, H. Grotius, C. Wolf and E. Vattel (16-18th centuries), it should be noted that H. Grotius first introduced the phrase *aut dedere aut punire* and considered this duty as a part of state responsibility; extradition, like other forms of interstate cooperation, was mostly based on mutual self-interest of sovereigns;
- the period of active development of extradition and origins of the customary obligation to apprehend or punish alleged perpetrators of certain crimes (from the eighteenth century – to the middle of the twentieth century);
- the period after 1945 to 90s of the twentieth century (the appearance of the international criminal tribunals *ad hoc*, the development of universal jurisdiction and inclusion of *aut dedere aut judicare* clause in international multilateral and bilateral treaties on combating international crimes);
- the period from the 90s of the twentieth century to the present time (the active work of the UN International Law Commission on the topic of the obligation to extradite or prosecute and the recognition of this principle as an important tool in the fight against impunity for committed international crimes; the emergence of a permanent body of international criminal justice and other international and specialized tribunals and courts which led to the appearance of a «third alternative» as a model *of aut dedere aut judicare* obligation).

Thus, summing up, the obligation *aut dedere aut judicare* continues to exist throughout the centuries and is known from the time of such eminent writers as:

F. Vitoria, A. Gentili, H. Grotius, C. Wolf and E. Vattel. The understanding of the essence and goals of the principle *aut dedere aut judicare* has undergone an evolution: from Grotius' understanding of the protection of the interests of another state (sovereign), to the recognition of the need to protect human rights during the extradition procedure, as well as ensuring fair prosecution and the necessity to defend the interests of the international community. The obligation to extradite and prosecute currently is recognized as a fundamental element of international cooperation in the fight against impunity. In spite of the item that the *aut dedere aut judicare* obligation has existed throughout the ages, its purpose remains relevant today.

1.2. Approaches to understanding the essence of the maxim *aut dedere aut judicare* in the doctrine and practice of international law

Firstly, it should be marked that «the expression *aut dedere aut judicare* is a modern adaptation of the phrase used by H. Grotius: *aut dedere aut punire* (either extradite or punish)» [79, p. 4]. However, it seems that for applying it nowadays, «a more permissive formula of the alternative obligation to extradition («prosecute» (judicare) instead of «punish» (punire)) is suitable, having additionally in mind that Grotius contended that a general obligation to extradite or punish exists with respect to all offences by which another State is injured» [275, p. 312].

«From the viewpoint of contemporary international criminal law, *aut dedere aut judicare* is a means to an end, a tool in the enforcement paradigm» [259, p. 325]. «A logic of *aut dedere aut judicare* principle is set out by the President Guillaume of the International Court of Justice (hereinafter – ICJ) in his Separate Opinion in the Arrest Warrant case of 2000» [69]: «The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example.... However, the question has always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation in Europe of the major modern States» [184, p. 3].

Judge V. den Wyngaert in dissenting opinion in the Arrest Warrant case, paid attention to the issue of codifying the principle *aut dedere aut judicare.* Judge V. den Wyngaert noted that «Article 146 of the IV Geneva Convention lays down the principle *aut dedere aut judicare* for war crimes committed against civilians» [70]. «From the perspective of the drafting history of international criminal law conventions this is probably one of the first codifications of this principle, which, in legal doctrine, goes back at least to Hugo Grotius but has probably much older roots. However, it had not been codified in conventional international law until 1949. There are older Conventions such as the 1926 Slavery Convention» [251] or «the 1929 Convention on Counterfeiting» [168, p. 418], «which require States to lay down rules on jurisdiction but which do not provide *aut dedere aut judicare* obligation. The 1949 Conventions are probably the first ones to lay down this principle in an article that is meant to cover both jurisdiction and prosecution. Judge V. den Wyngaert pointed out that subsequent Conventions have refined this way of drafting and have laid down distinctive provisions on jurisdiction on the one hand and on prosecution (*aut dedere aut judicare*) on the other hand. The examples are the following: 1970 Convention for the Suppression of Unlawful Seizure of Aircraft 133 (Articles 4 and 7 respectively) and the 1984 Convention against Torture (Articles 5 and 7 respectively)» [70, p. 59].

«The principle *aut dedere aut judicare* may be defined in many ways because it does not encompass a 'one size fits all' prototype. The nature and status of the *aut dedere aut judicare* principle are greatly influenced by the circumstances underlying and surrounding it» [252, p. 350]. Chair of the Working Group on the obligation to extradite or prosecute by name K. Kittichaisaree in his fundamental work «The Obligation to Extradite or Prosecute» (2018) pointed out, that «the complex nature of *aut dedere aut judicare*is not cast in stone but is still clouded by controversy. *Aut dedere aut judicare* may be referred to in many ways ranging from: a customary obligation of international law; a customaryright, an entitlement, under international law; a general principle of law which bestows rights and obligations bilaterally, between the State where an offender is present and the State directly linked to the offence; a principleof customary international law; an obligation, habitually by States and prosecutors; an obligation specifically deriving from the UNC; an erga omnes obligation; a corollary of the principle of complementarity; a defence, by counsel before the ICC; *a jus cogens* norm, by a few publicists; a dead letter; a general norm of international law; a ground of jurisdiction; a form of universality; a jurisdiction-bestowing device; a system; a communitarian principle; an open-ended concept» [252, p. 322].

According to Kriangsak Kittichaisaree, «the obligation to extradite or prosecute is the obligation assumed by a State having custody of an alleged offender to extradite that person to stand trial in another State or, failing that, to prosecute the person in the custodial State itself. Its underlying rationale is to close any gap and eliminate any safe haven that would allow perpetrators to remain unpunished for serious crimes they have committed» [184, p. 69].

M. Cherif Bassiouni and E. Wise, devoting fundamental work to the principle *aut dedere aut judicare* («Aut Dedere aut Judicare: The Duty to Extradite or Prosecute in International Law» 1995), stated that «the formula *extradite or prosecute* (in Latin *aut dedere aut judicare*) is commonly used to designate the alternative obligation concerning the treatment of an alleged offender»… «which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct» [79, p. 3]. M. Cherif Bassiouni and E. Wise made an invaluable contribution to the understanding of the principle *aut dedere aut judicare.*

M. Cherif Bassiouni published a number of works in which the issues of understanding and application of the principle *aut dedere aut judicare* were discussed in relation to other categories of international law («International

Crimes: Jus Cogens and Obligatio Erga Omnes» (1996), «Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice» (2001), «International extradition: United States law and practice» (2014). E. Wise analyzed the principle as a whole («The obligation to extradite or prosecute» (1993), as well as made special emphasis on the hypothesis of *civitas maxima (*«Extradition: the hypothesis of a *civitas maxima* and the maxim *aut dedere aut judicare*).

M. Plachta, several of whose works are devoted to the principle *aut dedere aut judicare* («Extradition and the principle aut dedere aut judicare in the new Polish legislation» (1998), «Aut Dedere Aut Judicare: An Overview of Modes of Implementation and Approaches» (1999), «Contemporary Problems of Extradition: Human Rights, Grounds for Refusal and the Principle Aut Dedere Aut Judicare» (2001), pointed out that «under the aegis of the *aut dedere aut judicare* maxim, instead of it being the last resort if extradition is refused on the grounds of nationality of the fugitive offender, prosecution and trial in the requested state would be elevated to a more pro-active status in international criminal law» [220, p. 73].

M. Plachta emphasizes that when interpreting the maxim *aut dedere aut punire* (as originally formulated by Hugo Grotius), it must be remembered today that «the scope of this maxim was limited to *crimes which in some way affect human society* as a whole, and which in contemporary language can be identified, to a certain extent, as international crimes. M. Plachta pointed out, that while in the original wording an alternative to *dedere* was *punire*, it cannot be held that Grotius really meant exacting punishment without first establishing guilt» [220, p. 72]. In fact, H. Grotius seems to have been aware of the principle of fundamental justice, as he made the following remark: «Surrender should be preceded by judicial investigation; it is not fitting 'to give up those who have not been tried» [220, p. 73]. M. Cherif Bassiouni in this regard noted that «the accused fugitive may turn out to be innocent. Thus, the most that can rightly be demanded from the requested state in lieu of extradition is to put him on trial, or prosecute him officially (*judicare*)» [82, p. 5].

According to M. Plachta, for «the effectiveness of the system based on the obligation to extradite or prosecute three problems must be resolved: the status and scope of application of this principle under international law; the hierarchy among the options embodied in this rule, provided that the requested State has a choice; practical difficulties in exercising judicare» [219, p. 332].

«R. Pedretti, offering a comprehensive assessment of the norms of customary international law regarding the immunity of heads of state and other public officials in the context of crimes under international law («Immunity of Heads of State and State Officials for International Crimes», 2015), examines the relationship of such norms with universal jurisdiction and the obligation *aut dedere aut judicare*. From the point of view of R. Pedretti, the obligation *aut dedere aut judicare* is best described as the State's duty to submit a case involving a crime of international concern to its competent authorities for the purpose of prosecution or extradition» [216, p. 383].

S. Panov in his PhD thesis devoted to the topic «The obligation *aut dedere aut judicare* (*extradite or prosecute*) in international law: scope, content, sources and applicability of the obligation *extradite or prosecute»* (2016) notes that «the obligation *aut dedere aut judicare* is broadly defined as the duty of a state, which has custody of a person who is accused of committing a crime to either hand over the person to another state willing and able to try him or initiate legal proceedings against the same person in its own domestic legal system» [214, p. 8-9]. According to the writer, «an individual criminal responsibility and the fight against impunity are strongly facilitated through the obligation *aut dedere aut judicare* in order to uphold the rule of law at both international and national levels» [214, p. 8-9].

R. Kolb, considering the exercise of criminal jurisdiction over international terrorists, focuses on the obligation to prosecute or extradite. He writes that «the obligation of the State is not to try, but to submit the case to the competent authorities in view of prosecution. That is the reason why it is preferable to speak of *autdedere aut prosequi* rather than using the more freguently encountered version of *aut dedere aut iudicare»* [185, p. 263]. It should be noted the following: «working on the topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)» some members of the International Law Commission, including Special Rapporteur Z. Galicki, questioned the use of the Latin formula «*aut dedere aut judicare*». This was especially true of the term «judicare», which, in their opinion, did not quite correspond to the scope of the term «prosecution». However, the Special Rapporteur considered at the time that it would be premature to delve into the precise definition of terms and would be better to leave for a future draft article on «Use of terms». In the report, the Commission decided to proceed on the basis that the priority of mandatory «extradition» over «prosecution» or *vice versa* depends on the context and the applicable legal regime in particular situations» [275, p. 143]. Even though «a literal translation of *aut dedere aut judicare* may not fully convey the meaning of the obligation, the Commission preferred to use the term in the title since it has been commonly used when referring to this type of obligation» [233, p. 92].

In the Ukrainian doctrine of international law, *aut dedere aut judicare* principle did not find its proper reflection. The obligation to extradite or prosecute is considered within «the framework of issues of international cooperation of states in the fight against crime, in particular, within the framework of the institution of extradition, or in the context of the implementation of the criminal law or criminal procedure law of Ukraine. For instance, N. Dromina-Voloc in the work «The Concept of Racial Discrimination in International Law» (2016)» [20, p. 501] devoted to the holistic international legal concept of racial discrimination examined the application of the *aut dedere aut judicare* obligation in connection with *jus cogens* crimes, in particular racial discrimination and its individual manifestations. V. Bortnitskaya in PhD thesis, «dedicated to the development of theoretical provisions and recommendations aimed at improving the simplified procedure for extradition of persons from Ukraine («Simplified procedure for extradition of persons from Ukraine», 2020), considered the principle *aut dedere aut judicare* as one that together with a number of other general and special principles ensures the operation of a simplified extradition procedure» [6, p. 59]. S. Nesterenko [44] in the work «International Legal Human Rights Protection in Extradition Proceedings» (2010) considered «*aut dedere aut judicare* principle in the context of the international legal system of human rights protection in extradition proceedings». Certain aspects of the application of *aut dedere aut judicare* principle are discussed by such scientists as: S. Vykhryst [12], K. Zadoya [26], N. Zelinska [27], M. Svistulenko [50], A. Pidhorodynska [47] and others. For instance, A. Pidhorodynska noted that «the existence of such a form of international cooperation as taking over criminal proceedings is conditioned by the principle of «extradite or procecute» (*aut dedere aut judicare*), as a result *it may be postulated the following:* when extradition of a person for criminal prosecution is impossible, it is necessary to take over the criminal prosecution of a person and resolve the issue of the further implementation» [89, p. 191]. Meanwhile, there are no separate monographic studies devoted to the principle *aut dedere aut judicare*.

As noted earlier, there are different approaches to understanding the principle. M. Plachta distinguishes two traditional approaches to the principle *aut dedere aut judicare* based on the available legislative pronouncements and treaty stipulations: «offence-oriented approach» and «offender-oriented approach» as well as proposes a compromise approach.

The «offence-oriented approach» is «based on an inseparable link between duty to prosecute and the offence as defined in the international instrument. This approach has been widely applied in multilateral conventions prescribing international crimes. Typically, the solution adopted in those instruments consists of two provisions which are of interest here. The chronological first one either confers a jurisdictional competence on the signatory states to prosecute the respective offence or obliges them to establish such a jurisdiction. The jurisdictional clause is usually followed by a separate stipulation on the principle *aut dedere aut judicare»* [220, p. 81]. One of the examples of the «offence-oriented approach» to the principle *aut dedere aut judicare* is represented by the Draft code of crimes against the peace and security of mankind, of 1996» [220, p.

81]. The crimes which are defined in the Draft Code are the following: aggression (Article 16), genocide (Article 17), crimes against humanity (Article 18), crimes against United nations and associated personnel (Article 19), and war crimes (Article 20).

«The obligation to prosecute or extradite is imposed on the custodial state on whose territory an alleged offender is present. The custodial state has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that state or by another state which indicates that it is willing to prosecute the case by requesting extradition. The custodial state is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial state has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction» [220, p. 82].

«This kind of approach to the principle *aut dedere aut judicare* has been adopted in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and several international instruments patterned after it. The Convention does not subordinate the duty to prosecute to the requested state's rules of competence regarding the extraterritorial jurisdiction. The obligation to prosecute arises whenever the extradition is not granted» [220, p. 82]. Article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft states: «The Contracting Party, in the territory of which the alleged offender is found, shall 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 if it does not extradite the offender. 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» [105].

«This mechanism for the implementation of the rule *aut dedere aut judicare* has been replicated in several subsequent conventions for the suppression of international offences concluded under the auspices of the United Nations or its specialized agencies» [103, p. 177]. «The following two variants of the Hague Convention formula can be discerned: a) the alternative obligation to submit a case for prosecution is subject, where a foreigner is involved, to whether a state has elected to authorize the exercise of extraterritorial jurisdiction» [273]; b) «the obligation to submit a case for prosecution only arises when a request for extradition has been refused» [139], [220, p. 83].

Offender-oriented approach relates to the duty to prosecute on the grounds for refusal in extradition. The author notes «as a ground for refusal the nationality of the requested person, as a relevant and appropriate basis for this obligation. This approach presupposes that the scope of application of the principle *aut dedere aut judicare* should not be limited to the most serious international crimes; instead it should encompass all extraditable offences. Offender-oriented approach focuses on the situation where the requested state refuses to surrender its own nationals and perceives such a case as extremely frustrating to the whole system of international extradition. To avoid the most blatant abuses whereby that state might take advantage of this exception in order to grant protection against punishment to its citizens, it is only logical to demand from that state to institute the criminal proceedings against the requested persons and subject them to its domestic criminal justice system. In this approach, it is not the offence that matters and is decisive – it is the offender himself that is the so called a triggering element for the mechanism *aut dedere aut judicare»* [220, p. 81-83].

«The examples of this approach can be found in both multilateral conventions and bilateral treaties on extradition. The 1957 European Convention on Extradition provides one of them. Article 6, paragraph 1 (a) confers on the contracting states a right to refuse extradition of their nationals» [220, p. 83]. Some bilateral treaties also contain provisions to the same effect. For example, Article 44(a) of the 1992 «Treaty on Legal Assistance in Criminal Matters, Transfer of Sentenced Persons and Extradition» [60] «between Poland and Egypt has been modelled on the European Convention on Extradition. Also the United Nations

Model Treaty on Extradition incorporated a clause formulated along the similar lines» [274], [220, p. 84].

In some international conventions, drafters have developed a variant formula that represents a compromise between the two approaches mentioned previously. «The *middle position* takes account of differing views among states on whether the exercising criminal jurisdiction over offences committed abroad is proper, useful, and reasonable, the extradition notwithstanding. The compromise formula allows the states involved to consider and evaluate such factors» [220, p. 84].

«This formula was adopted in the 1929 Convention for the Suppression of Counterfeiting Currency whose drafters abandoned the rigid clause and favored a more flexible solution which confers, to a certain extent, discretion on the requested state with respect of exercising its jurisdiction to prosecute in lieu of extradition. To accommodate both the variety of views and the discretion, two different procedures have been provided for depending on the nationality of the requested person. If that person is a national of the requested state and his status is the only ground for refusal of his surrender, that is, if there are no other obstacles to extradition, Article 8 provides that he should be punishable in his home country for an offence committed abroad. On the other hand, the Convention has imposed a slightly diminished burden on the requested state with respect to foreigners. They should be punishable for offences committed outside the borders of the requested state only if it has been established that the domestic law of that country recognizes as a general rule the principle of prosecution of offences committed abroad (Article 9). Furthermore, the obligation to prosecute is conditioned on two other circumstances: first, the extradition request has been submitted by another state; second, the grounds for refusal are not offence-related» [220, p. 84].

M. Plachta stated that «as opposed to the existing system under which the requested state's criminal jurisdiction and *judicare* are treated not only as two separate elements but, more importantly, as the former being a necessary precondition for the latter, the new approach suggests that stipulation of the principle *aut dedere aut judicare* itself constitutes sufficient jurisdictional basis for the competent authorities of the requested state to prosecute and punish the offender. In a sense, the proposed mechanism would be similar to the system of the so called «vicarious administration of Justice» based on the «principle of representation» [220, p. 85].

Thus, the understanding of the essence and goals of the principle *aut dedere aut judicare* has undergone an evolution: from Grotius' understanding of the protection of the interests of another state (sovereign), to the recognition of the need to protect human rights during the extradition procedure, as well as ensuring fair prosecution and the necessity to defend the interests of the whole international community.

Therefore, based on the modern understanding of international law, our comprehensive interpretation of *aut dedere aut judicare* principle, requires three dimensions to be considered. First, through the prism of protecting the interests of the international community (i.e. preventing impunity for the most serious crimes). Secondly, through the prism of protecting the interests of a specific state (requested or requesting) with respect to criminal prosecution and extradition.Thirdly, through the prism of protecting the rights of the person to be extradited or prosecuted.

The three directions mentioned above do not conflict with each other, as they share a common objective – to punish international and transnational crimes on the grounds defined in international and national law and to prevent impunity for committed crimes. However, the application of these approaches in each specific case impacts the implementation of *aut dedere aut judicare* principle: regarding the scope of obligations to extradite or prosecute; relationship between two obligations, namely, to prosecute and to extradite; the possibility of referring to various legal sources for the obligation to extradite or prosecute; the possibility of applying for an alternative transfer to international criminal courts and tribunals.

1.3. The work of the International Law Commission on the topic «The obligation to extradite or prosecute» (*aut dedere aut judicare*)

The progressive development of the rules concerning the obligation to extradite or prosecute is extremely important.

«Pursuant to the Statute of the International Law Commission (Commission, ILC), this body composed of persons who have recognized competence in international law and represent as a whole the major forms of civilization and the major legal systems of the world, has the purpose of the promotion of the progressive development of international law and its codification (Art. 1 of the Statute of the International Law Commission)».

The topic «Obligation to extradite or prosecute (*aut dedere aut judicare*)» appeared on the list of planned topics as early as the first session of the Commission in 1949. However, «the subject had not been addressed by the Commission for more than half a century, until it was briefly considered in articles 8–9 of the draft Code of Crimes against the Peace and Security of Mankind of 1996» [173]. In these articles, as it is seen, «the minimum contours of the principle *aut dedere aut judicare* were indicated, as well as the related principle of universal jurisdiction» [173].

The Commission, in developing the draft Code of Crimes against Mankind, incorporated the *aut dedere aut judicare* rule, while simultaneously explaining its rationale: «The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of an individual alleged to have committed a crime. This phrase is used to refer to a person who is singled out, not on the basis of unsubstantiated allegations, but on the basis of pertinent factual information. As noted by the Commission, the decision to prosecute or extradite would depend on the sufficiency of the evidence. However, there is a disagreement between the laws of different states regarding the amount of evidence required in order to initiate a criminal prosecution or to comply with the extradition request» [173].

In 2004 the International Law Commission had an idea to come back to the topic that was identified firstly for thorough study in 1949 and to involve the issue «obligation to extradite or prosecute (*aut dedere aut judicare)*» as a part of its long-term program of work.

In 2005 the ILC «agreed to include the topic on Obligation to extradite or prosecute (*aut dedere aut judicare*) in its programme of work and appointed Mr. Z. Galicki as Special Rapporteur. The General Assembly by its Resolution 60/22 of 23 November 2005 endorsed that decision» [143].

Special Rapporteur Z. Galicki, in his «Preliminary remarks» (2004) noted that «the topic of «The Obligation to Extradite or Prosecute (*aut dedere aut judicare*) in International Law» has achieved «a sufficient substantial maturity for its codification, with a possibility of including some elements of progressive development». The Special Rapporteur also in «Preliminary remarks» commented on the question «regarding the form of the final product of the Commission's work on the subject under consideration. More precisely, he noted that at that time it was not possible to determine what form the document should have, which would be the final product of the Commission's work: draft articles, guidelines or recommendations» [232].

Special Rapporteur Z. Galicki introduced 4 reports on the topic under discussion: the preliminary report (2006), the second report (2007), the third report (2008) and the fourth report (2011).

It's worth considering briefly the main content of each report.

«The Preliminary report (2006) referred to the following issues: universality of suppression and universality of jurisdiction; universal jurisdiction and the obligation to extradite or prosecute; sources of the obligation to extradite or prosecute; scope of the obligation to extradite or prosecute; methodological questions; preliminary plan of action» [173].

It should be marked that «the Preliminary report (2006) was a very preliminary set of initial observations, identifying the most important points for further consideration and for the Commission's future work in the field relating to *aut dedere aut judicare* principle» [173].

«The General Assembly, in resolution 61/34 of 4 December 2006, invited Governments to provide the Commission information on legislation and practice regarding the topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)» [144]. «Pursuant to this, the states were invited to provide information to the ILC on international treaties to which they were bound, containing the obligation to extradite or prosecute and reservations made to limit the application of this obligation; domestic legal regulations concerning the obligation; judicial practice reflecting the application of the obligation and crimes or offences to which the obligation is applied in the legislation or practice of a state» [178, p. 21].

«The second report (2007) made by the Special Rapporteur Z. Galicki was closely connected with the preliminary report introduced to the Commission in 2006. This report consisted of four main parts. The first two parts were of an introductory character, summarizing briefly the work of the ILC on these topics. In the third part of the second report, the Special Rapporteur indicated that «he intended to address some old and new questions regarding the topic to the newly elected members of the Commission and to have the preliminary report reviewed» [248]. The fourth part of the second report contains «the formulation of draft articles, rules, principles, guidelines or recommendations reflecting «the actual status quo of international law and the practice of states in a certain field of international relations» [248].

«The second report (2007) contained one draft article on the scope of application of the draft articles as well as a proposed plan for further development. At that session, the Commission also had the comments and the information received from Governments in relation to this topic» [177]. «The General Assembly, in resolution 62/66 of 6 December 2007, invited Governments to provide to the Commission the information on practice regarding this topic» [145]. By means of Resolution 62/66, the invitation to participating states was widened to cover some more topics, such as: «a) whether the state has authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality; b) whether the state has authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals; c) whether the State considers the obligation to extradite or prosecute as an obligation under customary international law and if so to what extent» [178, p. 22].

In 2008, Special Rapporteur Mr. Z. Galicki submitted to the Committee the third report (2008). A review of this report was undertaken by the ILC along with the comments and information provided by governments. The third report continued the process of formulating questions on the most substantive aspects of the subject that were addressed both to States and Committee members. The Special Rapporteur, on the basis of an examination of such questions, had to reach a final conclusion on the main question of whether «the obligation *aut dedere aut judicare* existed as a matter of customary international law» [269]. The Committee, taking into account the basis of the third report of Mr. Z. Galicki, also discussed «the issue of the connection of *aut dedere aut judicare* principle with universal jurisdiction, the issue of transfer of persons to international tribunals and procedural issues that should be considered in the future» [177].

In 2009, the Commission considered «the latest views and comments received from governments» [264]. «In 2009 at the sixty-first session of the ILC, an open-ended Working Group was established under the chairmanship of Mr. A. Pellet» [176]. During this session, «the chairman of the Working Group presented his oral report» [142].

«The Working Group proposed the following general framework for the Commission's consideration of the topic: (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation to extradite or prosecute; (c) the content of the obligation to extradite or prosecute; (d) the relationship between the obligation to extradite or prosecute and other principles; (e) the conditions for the triggering of the obligation to extradite or prosecute; (f) the implementation of the obligation to extradite or prosecute; and (g) the relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal» [142].

«The ILC reconstituted the Working Group at the sixty-second session (2010) and entrusted it with the leadership of Mr. E. Candioti in the absence of its Chairman» [150]. «As part of the Working Group's efforts to assist the Special Rapporteur with his work, it continued its discussions focused on identifying the concerns that need to be addressed. In addition, the Commission received a Secretariat-prepared Survey of multilateral conventions relevant to its work along with a general framework developed by the Working Group in 2009» [177].

The survey indicates that there are more than sixty multilateral agreements, both global and regional, that contain provisions that combine extradition and prosecution as alternative punishment methods.

According to the survey, relevant instruments are described and classified, and the preparatory work of some important conventions that have become models in this field is reviewed. Among other things, considerations were made regarding the relevant provisions, as well as similarities and differences between the provisions and their development of different conventions. Based on the survey, general conclusions were provided «regarding: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions» [142].

The Special Rapporteur also presented the Working Group with a working paper titled «Bases for discussion in the Working Group on the topic *The* *obligation to extradite or prosecute (aut dedere aut judicare)* for the consideration» [77, p. 367-371]. According to the Working Group, future reports of the Special Rapporteur should generally include «draft articles for consideration by the Commission, based on the framework agreed upon in 2009, taking into account the Commission's experience in developing international law and codifying it» [177]. «In its resolution 65/26 (2010), the General Assembly requested that the Commission should give priority to the examination of this topic, among others» [146].

In 2011, the Commission examined Z. Galicki's fourth report at the sixty-third session. A major focus of this report was «the question of the source of the obligation to extradite or prosecute. The report focused on treaties and customs as sources of the obligation to extradite or prosecute. Three draft articles were proposed: Article 2: Duty to cooperate; Article 3: Treaty as a source of the obligation to extradite or prosecute; Article 4: International custom as a source of the obligation *aut dedere aut judicare»* [142]. «As stated in its resolution 66/98 (2011), the General Assembly invited the Commission to give priority to the issue and to work towards its resolution» [147].

«After Z. Galitsky was no longer a member of the Commission in 2011, no other Special Rapporteurs were appointed» [176, p. 5].

In 2012, during its sixty-fourth session, «the ILC established an open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), which was chaired by K. Kittichaisaree. The task of the group was to evaluate the progress of work on the topic and study possible future options for the Commission [177]. Special attention of the group was given to the judgment of the ICJ in the Belgium v. Senegal case (2012)» [150].

The Chairman «K. Kittichaisaree submitted four informal working papers at the sixty-fourth session (2012) and another four informal working papers at the sixty-fifth session (2013). The Working Group's discussion of those informal working papers formed the basis of the 2013 Working Group's report» [176].

«The Working Group held 7 meetings, on 8, 14, 16 and 28 May, on 5 June and on 18 and 24 July 2013. On 31 July 2013, the Commission took note of the report of the Working Group» [65]. This report was «intended to summarize and to highlight particular aspects of the work of the Commission on the topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)», in order to assist States and to facilitate discussion on the topic in the Sixth Committee» [176]. «Based on the 2013 report, the working group developed its final report» [174].

«The Working Group also discussed issues that were partially or not covered in the 2013 report but were subsequently raised in the Sixth Committee during the sixty-eighth session of the General Assembly, namely: gaps in the existing conventional regime; the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; the customary international law status of the obligation to extradite or prosecute; and other matters of continued relevance in the 2009 general framework» [177].

In 2014 at its sixty-sixth session, «the ILC Commission took note of the report of the Working Group, which was subsequently adopted as its final report» [177].

«The final report (2014) noted that all the issues remaining to be analyzed in relation to this topic were exhausted. Therefore, the Working Group recommended to the ILC to adopt the 2013 report of the Working Group and the present final report of the Working Group as well as conclude consideration of the topic «Obligation to extradite or prosecute (*aut dedere aut judicare*)» [176].

«Due to the diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice, the effort at drafting specific articles related to the obligation seems to have been abandoned» [196, p. 97]. In fact, in 2013, the Working Group noted that «it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation» and «consider[ed] that when drafting treaties States can decide for themselves as to which conventional formula on the obligation to extradite or prosecute their objective in a particular circumstance suits best» [196, p. 97]. «[W]hile it is possible to identify some general trends and common features in the relevant provisions, conclusive findings regarding the precise scope of each provision need to be made on a case-by-case basis, taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works» [262].

In resolution 69/118 (2014), the General Assembly demonstrated its appreciation to the work of the Commission for «the completion of the work on the topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)» by the adoption of the final report on the topic» [148]; taken «note of the final report on the topic and encouraged its widest possible dissemination» [148].

As N. Dryomina-Volok rightly pointed out, despite the lack of a practical result, the conducted by the ILC research on the following topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)» has extraordinary scientific value» [23, p. 93]. «The Final Report, by not comprising draft articles, has the potential to impact a wider audience of actors in the field of international law, «one made up not just of states, but also of attorneys, judges, policymakers, and academics» [198, p. 146-147].

Thus, the evolution of *aut dedere aut judicare* principle from the period of Grotius to the present demonstrates the effectiveness of this tool in the fight against international crime, as well as the undeniable development of international law in this area. During the ILC's work on such «topic as: *Obligation to Extradite or Prosecute* (*aut dedere aut judicare*), facing various complex legal and political issues» [193, p. 188], the following main documents such as: preliminary remarks of 2004, four reports of the Special Rapporteur Mr. Z. Galicki (2006, 2007, 2008, 2011), the presented report of the Working Group (2013), the final report of the Working Group (2014) were introduced.

In conclusion it can be noted that a decade of study on the topic under consideration «Obligation to Extradite or Prosecute (*aut dedere aut judicare*)» carried out by the ILC has not produced any substantive results, such as draft articles on the obligation to extradite or prosecute. For this, only the political will of the states was not enough.

CHAPTER 2.
SOURCES, SUBSTANTIVE ELEMENTS AND CONTENT OF THE OBLIGATION *AUT DEDERE AUT JUDICARE*

2.1. International treaty as source of the obligation to extradite or prosecute

The examination of the various sources concerning the obligation to extradite or prosecute is necessary in order to define the scope and nature of *aut dedere aut judicare* obligation in international law.

«The duty to extradite or prosecute has traditionally been established by treaties» [244, p. 750]. «The *aut dedere aut judicar*e principle has become a fundamental component within a wide range of international treaties» [197, p. 88]. «By including this clause in treaties, states affirm their commitment to combatting impunity and upholding accountability for grave violations of international law. It should be taken into account that the way of the reflection of the maxim *aut dedere aut judicar*e in national legislation and its effect differ from state to state and even from category to category of offence within a single country» [83, p. 103].

The list of treaties that contain the rule *extradite or prosecute* is «extensive and includes international humanitarian law treaties and treaties against genocide, apartheid, enslavement, the prostitution of others, piracy, the hijacking of aircraft, drug trafficking and terrorism» [197, p. 88].

As C. Soler asserts, «scholars identified seventy-two instances where in «*aut dedere aut judicare* rule appears, after having examined three hundred and twelve international legal instruments» [252, p. 320].

«According to Amnesty International's research, a minimum of 37 international or regional agreements incorporate *aut dedere aut judicare obligation*. Additionally, several bilateral extradition agreements also include this obligation, further clarifying its essence and extent» [178, p. 22-23].

«Aut dedere aut judicare obligation is contained in conventions of different

nature, covering both crimes under international law as well as ordinary crimes of international concern and international private law» [178, p. 9]. «Number of international treaties, which address international (or transnational) crimes, oblige the State Parties to investigate and prosecute the offence in question, or to extradite suspects to another State Party willing to do so» [124, p. 58]. «The *aut dedere aut iudicare formula* is incorporated at international and regional conventions» [244, p. 750]. «These are both substantive treaties, defining particular offences and requiring their criminalization and the prosecution or extradition of offenders, as well as procedural conventions, dealing with extradition and other matters of legal cooperation between States» [275, p. 313].

Multilateral conventions which have provisions *aut dedere aut judicare* may be categorized judging by different criteria, however, as A. Caligiuri writes «none of which fully succeeds to draw the complexity of convention practice in this regard». A. Caligiuri introduces the following classification: «*Aut dedere aut judicare* Model; *Primo dedere secundo judicare* Model; Model with a Third Option» [86, p. 247-254].

«In the Fourth Report on the obligation to extradite or prosecute (*aut dedere aut judicare*)» [142] four models of classification of treaties are mentioned. They embrace the clause in question: «(a) the classification of M. Cherif Bassiouni and E. Wise; (b) the classification of Amnesty International; (c) the classification of S. Mitchell and d) the classification of the Secretariat of the International Law Commission» [86, p. 246].

A typology and comparative analysis of multilateral conventions that may be relevant to «the Commission's work on the topic *The obligation to extradite or prosecute* (*aut dedere aut judicare*) is reflected in Survey prepared by the Secretariat, aims at assisting the Commission by providing information on multilateral conventions which may be of relevance to its future work on the present topic» [262, p. 323].

There is a need to consider the classification proposed by the International Law Commission as the main body responsible for developing the topic named

The obligation to extradite or prosecute (*aut dedere aut judicare*).

«Conventions including provisions on the obligation to extradite or prosecute have been classified into the following four categories:

(1) The International Convention for the Suppression of Counterfeiting Currency;

(2) The Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and Protocol I;

(3) Regional conventions on extradition;

(4) The Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions that adopt a similar approach» [262, p. 323].

«This classification combines chronological and substantive criteria. First of all, it roughly reflects an evolution in the drafting of provisions combining the options of extradition and prosecution, which is useful for understanding the influence that certain conventions (such as International Convention for the Suppression of Counterfeiting Currency (1929) or Convention for the Suppression of Unlawful Seizure of Aircraft (1970)) have exercised over conventional practice and how such provisions have changed over time. Secondly, the classification highlights some fundamental similarities in the content of provisions pertaining to the same category, thus facilitating a better understanding of their precise scope and of the main issues that have been discussed in the field. However, it must be pointed out at the outset that this classification, while revealing some general tendencies in the field, should not be understood as reflecting a separation of the relevant provisions into rigid categories: conventions pertaining to the same category are often very different in their content, and drafting techniques adopted by certain conventions have sometimes been followed by conventions belonging to a different category» [262, p. 323].

A brief overview of each of the above-mentioned 4 convention groups is presented below.

(1) «The International Convention for the Suppression of Counterfeiting Currency (1929) encompasses provisions on extradition and prosecution, setting an

illustrious example for a series of subsequent treaties dedicated to suppression of international offenses (for instance, Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1950; Single Convention on Narcotic Drugs of 1961, and Convention on Psychotropic Substances of 1971)» [168, p. 418].

Article 9 of the International Convention for the Suppression of Counterfeiting Currency says the following: «Foreigners who have committed abroad any offence referred to Article 3, and who are in the territory of a country whose internal legislation recognizes the principle of the prosecution of offences committed abroad as a general rule, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is a subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence» [168, p. 418].

The mechanism embraced within the framework of the Convention was widely regarded as an indispensable manifestation of the fundamental principle that counterfeiting currency must be met with unequivocal punishment, leaving no room for impunity anywhere across the globe. The same notion is also reflected in the first article of the Convention, in which the parties recognize the rules laid down in part I of the Convention «as the most effective means in present circumstances for ensuring the prevention and punishment of the offence of counterfeiting currency. Under article 3, the parties undertake to make the offences concerned punishable as ordinary crimes» [262, p. 323].

«The mechanism in the Convention makes a distinction between nationals and non-nationals of the State concerned. States employ different practices with regard to the exercise of extraterritorial jurisdiction and therefore does not oblige States to assert jurisdiction in every case in which extradition is refused» [262, p. 323].

(2) «Four Geneva Convention 1949 encompass war crimes classified as

'grave breaches' and contain an identical provision regarding the repression of 'grave breaches' of international humanitarian law (Convention I at Art. 49, Convention II at Art. 50, Convention III at art.129 and Convention IV at Art. 146). For instance, Article 49 of the Convention I states: «The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case...».

The underlying principle for the mechanism enshrined in Geneva Conventions is «the establishment of universal jurisdiction over grave breaches of the Conventions» [262, p. 239]. The imperative to implement measures against an alleged offender remains unencumbered by any jurisdictional constraints imposed by individual states. In addition to this, the mechanism also provides an obligation to prosecute and as an alternative, the accused may be extradited. An alleged offender is obliged to be prosecuted regardless of whether or not another party seeks extradition.

At a conceptual level, the provision of a title of universal jurisdiction in relation to the repression of grave breaches is based – in contrast to what happens for the conventions that accept «the Hague formula – on the view that the grave breaches are part of the core international crimes and that the purpose of their repression is not to protect the interests of individual states but to safeguard the fundamental values of the international community as a whole» [86, p. 252].

For other serious violations of the Geneva Conventions, which are not grave breaches, «the principle does not apply under the treaty scheme, but States still have a right, although not a duty, to prosecute such violations» [124, p. 58].

(3) «Extradition and prosecution are offered as options under a number of regional extradition conventions. These conventions are concluded between states «agreeing to extradite persons for ordinary crimes or to submit them to their own system for prosecution» [183, p. 532].

«Regional treaties on extradition are often concluded in addition to bilateral treaties. In large part, this is aimed at preventing impunity when civil law states refuse to extradite their own nationals. As a result, many of these treaties do not require use of universal jurisdiction, but only subsidiary nationality jurisdiction» [183, p. 532]. For instance, «in the *Fujimori* extradition case, the Supreme Court of Chile declared that the 1932 Extradition Treaty between Chile and Peru permits both states to deny the extradition of a national citizen. However, the Supreme Court also recognized that in such cases there is a duty to prosecute the case before national courts as if the crime had been committed in its own territory. Chile had reported to the ILC that the 1932 Extradition Treaty contained the *aut dedere aut judicare* obligation» [264, p. 26].

«Regional conventions on extradition can change, supplement bilateral treaties, and impose obligations on the parties to amend national legislation. The conclusion of regional conventions on extradition contributes to the harmonization of national extradition legal systems. Within the third group, we will consider the conventions concluded within the American («Bustamante Code» 1928, Inter-American Convention on Extradition 1981, Inter-American Convention on Forced Disappearance of Persons 1994) and European (European Convention on Extradition 1957) contexts, the League of Arab States Convention on the Extradition 1952, ECOWAS Convention on Extradition of 1994. The conventions concluded within the American and European regional systems appear to be the most influential» [262, p. 332].

«The American conventions relating to extradition appear to be among the first ones to provide for a combination of extradition and prosecution options. The Convention on Private International Law («Bustamante Code»)» [106, p. 23] in

Article 344 establishes:

«In order to render effective the international judicial competence in penal matters, each of the contracting States shall accede to the request of any of the others for the delivery of persons convicted or accused of crime, if in conformity with the provisions of this title, subject to the dispositions of the international treaties and conventions containing a list of penal infractions which authorize the extradition». Article 345 stipulates: The contracting States are not obliged to hand over their own nationals. The nation which refuses to give up one of its citizens shall try him» [106, p. 23].

«The 1981 Inter-American Convention on Extradition holds that a state refusing to accede to extradition requests shall, in turn, prosecute the accused within its own jurisdiction «when its laws or other treaties so permit» [159].

Article 8 «Prosecution by the Requested State» states: «If, when extradition is applicable, a State does not deliver the person sought, the requested State shall, when its laws or other treaties so permit, be obligated to prosecute him for the offense with which he is charged, just as if it had been committed within its territory, and shall inform the requesting State of the judgement handed down». This requires a state «to use any of its ordinary jurisdictional bases to prosecute a person for whom extradition is refused» [183, p. 523].

«The Inter-American Convention on Forced Disappearance of Personswhile addressing various repercussions of enforced disappearance, provides for the obligation to extradite or prosecute» [160].

Article IV of the Convention contains a provision that «Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him» [160].

Article VI of this Convention provides that if a«State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition» [160].

«The European Convention on Extradition» [137, p. 24] «incorporates provision combining the options of extradition and prosecution and partially served as a model for the corresponding provision included in the Convention for the Suppression of Unlawful Seizure of Aircraft» [262, p. 334], [246].

Article 1 of the European Convention confirms the obligation to extradite: «The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order» [262], [246].

«Under article 2, paragraph 1, [e]xtradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty» The subsequent provisions of the Convention spell out exceptions to these rules, as well as the conditions for extradition. These include the non-granting of extradition for political offences or when the request for extradition is made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or when the person's position may be prejudiced for any of these reasons (art. 3), the possibility of refusing extradition when the offence was committed in whole or in part in the territory of the requested State (art. 7) or when the competent authorities of such State are proceeding against the person or a final judgment has been passed for the offence for which extradition is requested (arts. 8 and 9), the possibility to refuse extradition when the relevant offence is punishable by death under the law of the requesting party and the death penalty is not provided for in respect of such offence by the law of the requested party or is not normally carried out, unless the requesting party gives sufficient assurance that the death penalty will not be carried out (art. 11), etc.» [262].

Article 6 includes *aut dedere aut judicare* clause, imposing the following: «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. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge… The requesting Party shall be informed of the result of its request» [262].

«The Economic Community of West African States (ECOWAS) Convention on Extradition of 1994 [133] is also based on the general obligation of States Parties to extradite individuals at the request of the requesting State (Article 2). Extradition may be refused, for example, if the request concerns a national of the requested State. If extradition is denied, there is an alternative obligation to prosecute the alleged perpetrator».

«Article 10 of the ECOWAS Convention on Extradition establishes: «1. The extradition of a national of the requested State shall be left to the discretion of that State. National status is assessed at the time of the commission of the offense for which extradition is requested. 2. The requested State which does not extradite its national shall, at the request of the requesting State, submit the case to the competent authorities so that legal proceedings can be instituted if necessary. To this end, the files, information and objects relating to the offense will be transmitted free of charge either by diplomatic means or by any other means which will be agreed between the States concerned. The requesting State will be informed of the follow-up which will have been given to its request» [133].

«A similar provision is contained in the League of Arab States Convention on the Extradition of 1952. Article 7 of the Convention provides for the possibility of refusing to extradite own citizen, but with the condition that such a person be prosecuted by requested state» [260].

(4) «The fourth category of conventions containing an *aut dedere aut judicare* clause, according to the classification proposed by ILC, are conventions that establish clear obligations for member states to detain a criminal suspect on their territory and either extradite him or refer the case to their own authorities for

criminal prosecution (*the Hague Convention formula*)» [260].

According to E. Wise, «the expression *aut dedere aut judicare* has been widely adopted to describe the principle embodied in the Hague formula. «As so used, it refers to the obligation incumbent on particular states with respect to the particular offenses set out in these conventions; possibly, with respect to war crimes, on all states. Up to a point, use of the Hague formula has been inspired by thinking about the common good of an ‘international community» [278, p. 122].

The object of the Hague Convention was to deny aircraft hijackers a safe haven in any part of the world. An absolute obligation to extradite hijackers seemed unacceptable. «Efforts therefore centered on imposing an obligation to prosecute where extradition is refused. But even in such cases, the parties were not prepared to undertake an absolute obligation to prosecute and punish. The negotiations nearly foundered over this issue. The formula appearing in article 7 was an eleventh hour compromise» [278, p. 121].

«This principle is formulated in Art. 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft 1970» [105, p. 105], «Art. 7 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971» [103, p. 177], «Art. 7 of the the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents 1973» [111, p. 167].

Thus, «Article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in the Hague on 16 December 1970, sets out 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. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft explicitly establishes the obligation of the state in which the accused is located to initiate prosecution if extradition is not carried out» [105, p. 105].

«As Plachta M. pointed out the Hague Convention formula can be categorized into two distinct variants:

«(a) the alternative obligation to submit a case for prosecution is subject, where a foreigner is involved, to whether a State has elected to authorize the exercise of extraterritorial jurisdiction;

(b) the obligation to submit a case for prosecution only arises when a request for extradition has been refused» [219, p. 360].

«The majority of treaties incorporating the Hague formula also incorporates a clause stipulating that the «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 party». This provision was included to avoid the possibility of invoking political grounds, which could lead to misunderstandings between states. Therefore, the usual procedures relating to serious crimes, both in relation to extradition and criminal proceedings, are subject to application.

In his Separate Opinion in the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judge Yusuf addresses the typology of «treaties containing the formula *aut dedere aut judicare*» and divides them into two broad categories. The first category comprises clauses which impose an obligation to extradite, and in which submission to prosecution becomes an obligation only after the refusal of extradition. These conventions are structured in such a way that gives priority to extradition to the State in whose territory the crime is committed. The majority of these conventions does not impose any general obligation on States parties to submit to prosecution the alleged offender, and such submission by the State on whose territory the alleged offender is present becomes an obligation only if a request for extradition has been refused, or some factors such as nationality of the alleged offender exist. Examples of this first category are article 9, paragraph 22 of the 1929 International Convention for the Suppression of Counterfeiting Currency, article 15 of the African Union Convention on Preventing and Combating Corruption, and article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography»

[174].

«The second category of international conventions comprises clauses which impose an obligation to submit to prosecution, with extradition being an available option, as well as clauses which impose an obligation to submit to prosecution, with extradition becoming an obligation if the State fails to do so. Such clauses in this second category can be found in, for example, the relevant provisions of the four Geneva Conventions of 1949, article 7, paragraph 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and article 7, paragraph 1 of the Convention against Torture» [174].

«The Committee against Torture has concluded, while explaining the scope of Article 7 of the Convention against Torture, that: «The Committee recalls that, under article 7 of the Convention, «the State Party in the 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». It notes that the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished» [258, p. 24].

It should be marked that «the obligation to extradite or prosecute under a treaty applies only to facts that have occurred after the date of entry into force of the treaty for the State concerned, unless a different intention appears from the treaty or is otherwise established.Upon becoming a party to a treaty containing the obligation to extradite or prosecute, a State may, with effect from that date, request compliance by another State party. Consequently, the obligation to criminalize and establish necessary jurisdiction over acts proscribed by a treaty that contains an extradition or prosecution obligation must be implemented as soon as the State becomes bound by it» [174].

«The State is, however, not prohibited from investigating or prosecuting acts committed prior to the entry into force of the treaty for that State. The scope of the obligation to extradite or prosecute under the relevant conventions should be analyzed on a case-by-case basis» [174].

«It was found by the Committee in the case *O.R. et al. versus Argentina»* [92, p. 108] that «the CAT Convention did not apply to acts of torture alleged to have occurred prior to Argentina's entry into force of the Convention. However, since then, the Committee has adopted a different approach, as illustrated in two subsequent cases. Thus, in 2003, in the case of *Bouabdallah Ltaief versus Tunisia*, the Committee considered allegations of acts of torture allegedly committed in 1987, notwithstanding the fact that the Convention entered into force for Tunisia in 1988. Therefore, the Committee made no distinction between acts allegedly committed before the entry into force of the CAT Convention for Tunisia and those allegedly committed afterward» [87, p. 144]. «Similarly, in 2006, in the case of *Suleymane Guengueng et al. versus Senegal»* [258], «the Committee again did not differentiate between those that occurred before and those that occurred after the entry into force of the Convention for Senegal. Thus, it can be considered that the approach of the Committee, as illustrated by these two decisions of 2003 and of 2006, has been to apply the CAT Convention without distinguishing between acts alleged to have occurred *before* the Convention entered into force for the respondent State, and those alleged to have occurred *thereafter»* [87, p. 144].

Thus, «the goal of joint efforts by States to fight impunity for international and transnational crimes committed finds practical expression in numerous conventions that, among other provisions, include the obligation to either extradite or prosecute (the *aut dedere aut judicare* principle).

The important thing to pay attention to is the different wording of the treaties suggests that the requirement to prosecute differs between them. Furthermore, a notable distinction lies in the fact that certain treaties address crimes under universal jurisdiction, in accordance with customary international law, while others do not» [188, p. 73].

«The principle *aut dedere aut judicare* is enshrined in conventions of various natures: these conventions can relate to both international crimes and ordinary crimes; these can be universal and regional conventions (international humanitarian law treaties, treaties against genocide, enslavement, piracy, the hijacking of aircraft, drug trafficking, terrorism and others), as well as bilateral extradition treaties; these can be both substantive treaties and procedural conventions» [188].

«All conventions containing *aut dedere aut judicare* clause can be divided into three main groups, depending on the relationship between the obligations to extradite and prosecute. The first group of treaties includes provisions that impose an obligation to extradite, and criminal prosecution is an obligation only in case of refusal to extradite. Therefore, in this case, priority is given to extradition (for instance, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Art. 9))» [102].

«The second group of conventions includes provisions that impose an obligation to prosecute, whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition. Extradition is also a possible option in this case. The obligation to prosecute can be absolute if no request for extradition has been received (for instance, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Art. 49); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Art. 50); the Geneva Convention relative to the Treatment of Prisoners of War (Art. 129)».

«There are also treaties, the provisions of which provide for a clear alternative for the state in whose territory the alleged offender is located. The first formulation of this model appeared with The Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970) (the *Hague formula*). The state, because of the absolute freedom it has in the implementation of one of the two options, should be oriented at choosing the solution most compatible with its national legal system. If the state does not receive any extradition request, it cannot choose between the two options» [105].

A careful analysis of the conventions with the *aut dedere aut judicare* provision affords to conclue that although an *aut dedere aut judicare* mechanismis one of the effective instruments in combating impunity for international and transnational crimes, it has its weaknesses. For instance, the content of the conventions does not usually enable a state to determine a clear legal framework when it is faced with the decision of whether or not to extradite or prosecute. The comprehensive analysis of the obligation to either extradite or prosecute, as stipulated in the relevant conventions demands a thorough scrutiny of each individual scenario.

It should be stated that as a result of the conclusion of an increasing number of treaties that embrace *aut dedere aut judicare* clause, it would become that the obligation to extradite or prosecute is in the process of the development under customary international law. The question connected with the obligation to extradite or prosecute in customary international law will be considered in the next subsection.

2.2. International custom as a source of the obligation to extradite or prosecute

For decades, the following questions have been asked: «Is there an obligation to extradite or prosecute under customary international law, binding on all states? If so, does it apply in respect of all or merely some crimes under international law?» [283, p. 3].

«The question of whether the obligation to extradite or prosecute is a customary nature is debatable and has both its supporters and opponents. At the General Assembly Sixth Committee's sixty-eighth session (2013) some delegations expressed their position that under customary international law, there was no obligation to extradite or prosecute and that the obligation was derived from treaty provisions. Other delegations believed that the question merited further consideration and suggested that a review of state practice be conducted in order to address this issue» [172].

In the scientific literature, «there is a confirmation of the position according to which a duty to prosecute or extradite exists in customary international law and regardless of whether a state is a party to the treaty, this duty would apply» [124, p.59].

The well-known leading researchers such as: M. Cherif Bassiouni [78], C. Edelenbos [134], D. Orentlicher [212], N. Roht-Arriaza [238], L. Sadat, [241] have argued that «there is a customary international law duty to prosecute persons accused of crimes against humanity» [202, p. 751].

M. Scharf notes that the principle, «the duty to extradite or prosecute» can also be established by customary international law. Customary international law, which is just as binding upon states as treaty law, arises from a general and consistent practice of States followed by them from a sense of legal obligation referred to as *opinio juris»* [202, p. 751]. A Caligiuri claims that «treaties are also proof of custom since they «manifest a certain conception of the legal obligation of contracting states (*opinio juris*)…, contributing to the birth of one or more rules of customary law, especially if they are instruments with a universal or almost universal character» [86, p. 265]. According to R. Mattarollo, «the most evident conventional obligation, which has become a principle of customary international law, is the obligation to «prosecute or extradite» included in treaties that criminalize human rights violations such as torture or disappearances. This is so because such conventional norms codify principles well recognized in the doctrine for a long time. In 1758 E. de Vattel recognized the duty to extradite persons accused of serious crimes» [197, p. 183]. «Multilateral treaties have the potential to contribute to the formation of new customs» [187, p. 183].

The following main arguments are used to justify the existence of a customary obligation to extradite or prosecute:

(1) the Resolutions of the UN General Assembly;

(2) the nature of international crimes;

(3) the existence of the international community (a *civitas maxima*).

It is worth considering these provisions in more detail.

«For the purpose of justifying the customary duty to extradite or prosecute, some resolutions of the General Assembly are referred to as expressions of *opinio juris»* [124, p. 60]. «For instance, UNGA Resolution *Question of the punishment of war criminals and of persons who have committed crimes against humanity* (1971), UNGA Resolution *Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* (1973). In advocating the customary international law duty to prosecute or extradite, the 1967 UN Declaration on Territorial Asylum is frequently cited as «the earliest international recognition of a customary law obligation to prosecute perpetrators of crimes against humanity» [202, p. 751]. «Art. 1 (2) Declaration on Territorial Asylum provides that «the right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes» [202].

Another argument is that the obligation to prosecute stems from the nature of international crimes. Core international crimes violate the *jus cogens* norms and entail *erga omnes* obligations to the entire international community. The obligation *erga omnes* is not to leave unpunished the perpetrators of such core international crimes and thus to carry out either prosecution or extradition. This argument finds support in the case law of the International Court of Justice in relation to genocide» [124, p. 60].

«The next argument is related to the previous one and concerns the existence of an international community − a *civitas maxima*. It should be noted that various names have been used to refer to the hypothetical international community. That popularized by Christian Wolff in the eighteenth century, speaks of a *civitas maxima*, a supreme state or body politic» [278, p. 109].

The concept of *civitas maxima*, described by Ch. Wolff in the eighteenth century as the foundation of the law of nations, despite the fact that it was later rejected by Emmerich de Vattel, later influenced the development of the theory of international law, including the field of international criminal law.

«Ch. Wolff's claims on behalf of a *civitas maxima* are to be found in his great work on the law of nations, *Jus gentium methodo scientifica pertractatum*, published first in 1749» [211, p. 282]. «Ch. Wolff's remarks on power follow a discussion of the duties of a nation and, because the nation has formed itself into a *civitas*, its form of government (status) and finally its head (rector *civitatis*)» [211, p. 292]. «Ch. Wolff considers nations as an organized community, association, state, which he calls *civitas maxima*, which in turn consists of separate civitates, that is, states, which are associations of individuals» [16]. «*Civitas maxima* according to Wolff is rational consensus of all human beings and of all states» [90, p. 563]. «The purpose of the great community of nations is to promote the general welfare of states through their cooperation in accordance with the norms arising from the *civitas maxima»* [16].

«Although *civitas maxima* not formally an issue of customary international law, some commentators have argued that a general obligation to extradite or prosecute an alleged offender exists in respect of international crimes because these are offences - reprehended by the international community as a whole. They are offenses against the world public order. They are of concern to all states and all states ought therefore to cooperate in bringing those who commit such offenses to justice» [204, p. 55].

«In light of this position, the international community has a common interest in preventing international crimes. At the same time, every state has the right to prosecute international crimes. Subsequently, states have a legal obligation to prosecute or extradite. «Hence, shared moral values have turned into a legal obligation» [124, p. 60-61]. As explained by E. Wise, so far as extradition is concerned, «the hypothesis of a *civitas maxima*, of a moral order binding on all humanity, seems to imply a common concern with crime wherever committed. This common concern both justifies and requires the extradition of offenders, or else their trial by a state that refuses extradition» [278, p. 116]. «This approach is consistent with the view that the international community is moving from a system where the nation State is the dominant element to one where the common good of the global community is more central» [204, p. 53].

E. Wise considering the question of the connection between the idea of «a *civitas maxima* and the maxim *aut dedere aut judicare*, draws attention to the fact that there are elements in international relations that lend plausibility to the hypothesis of a *civitas maxima*. There also are elements, however, that lend plausibility to two other competing and very different images or pictures of what relations between states really are like; two alternative constellations of thought about the nature of international relations» [278, p. 112]. To these two competing elements, E. Wise attributes «the school of thought that sees the international system as essentially anarchical (not subject to rule), a field of perennial conflict and power politics» and the theory according to which the international system «is a moral and legal vacuum)». E. Wise also identifies a third model pattern of thought about international relations, according to which the international system is seen neither as a «state of nature, nor as the inclusive moral community implicit in the hypothesis of a *civitas maxima*, but rather as a «society of states». In this international society, there is no «common superior», «but, neither is there such complete anarchy». E. Wise concluded that «international relations cannot be adequately described entirely in terms of any one of these three patterns. None provides a completely accurate account of what the reality of the international system and relations actually is like» [278, p. 113-115].

«Whilst most, if not all, international lawyers see something intrinsically desirable in an international order in which states take certain actions because they are seen as enhancing the common interest of the international community as a whole, it is equally apparent that this remains an ideal. States very seldom look to the common interest of mankind as a motivation for action. However, even advocates of the *civitas maxima* acknowledge that it is still an imperfect obligation, unless it is explicitly included in an international agreement or is accepted tacitly by state practice» [204].

«Thus, as desirable as it may seem to find a general obligation to extradite or prosecute for international crimes based on an idealistic notion of the good of the international community as a whole, it is necessary to look at State practice and *opinio juris* to determine whether this obligation exists beyond those treaty obligations willingly accepted by States» [204].

«The position of the ILC regarding the nature of the obligation to extradite or prosecute deserves special attention. Special Rapporteur Z.Galicki emphasized that the «rules of the Draft Code of Crimes against Peace and Security of Mankind (1996) (Articles 8 and 9) were an expression of a codification of customary international law. Article 8 «Establishment of jurisdiction» of the Draft Code of Crimes Against the Peace and Security of Mankind states: «Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in Article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article» [129].

«Article 9 (Obligation to extradite or prosecute» of the Draft Code of Crimes Against the Peace and Security of Mankind) writes the following things: «Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in Articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual». These are such crimes as: «Crime of genocide», «Crimes against humanity, «Crimes against the United Nations and associated personnel» and «War crimes» [129].

«These texts were the result of a codification exercise of customary international law rather than a work aimed at its progressive development, as confirmed by the adoption of the Statute of the ICC in 1998» [86, p. 262].

«Z. Galicki pointed out in his Third Report, that the number of international and regional treaties containing this obligation is growing every year and this could be an indication of state practice. The Special Rapporteur stated that «the development of international practice based on the growing number of treaties establishing and confirming such an obligation may lead at least to the beginning of the formulation of an appropriate customary norm» [269]. According to M. Mendelson, «the possibility that multilateral treaties can become a source of inspiration for the conduct of states and contribute to the process of forming a new custom is not excluded» [199, p .328].

«In the context of the issue under consideration, the question arises whether there is a customary obligation to extradite or prosecute in relation to all international crimes or in relation to specific core crimes. The claim is sometimes made by reference to a particular crime, but sometimes by reference to all international crimes» 124, p. 59]. M. Cherif Bassiouni asserts that «the obligation may apply to all international crimes however prescribed» [151, p. 293]. «Much commentary, largely from the non-governmental organization community opposing impunity for international crimes, argues that states are required to assert universal jurisdiction over core international crimes under customary international law» [183, p. 516].

«Amnesty International paper concerning the obligation to extradite or prosecute (*aut dedere aut judicare*) shows that several states have provided for the obligation to extradite or prosecute while implementing the Rome Statute or amending their criminal legislation, even for crimes whose conventions do not contain such a provision (such as genocide and some war crimes which do not amount to «grave breaches»), or crimes which are not covered by any convention (such as murder, extermination, deportation and most sexual crimes). Therefore, the existence of an obligation under customary international law or its beginning could reasonably be presumed. Several decisions by national courts seem to confirm such an interpretation, at least regarding crimes under international law, such as genocide, crimes against humanity, war crimes, torture, enforced disappearances and extralegal, arbitrary or summary executions» [265, p. 29].

«The International Law Commission in Articles 8 and 9 of the Draft Code of Crimes against Peace and Security of Mankind of 1996 has recognized the existence of the obligation in question, it has done it, however, exclusively in relation to a strictly limited and defined group of offences, described generally as crimes against the peace and security of mankind (with exclusion of «Crime of aggression»). In any case, this recognition may be considered as a beginning point for further consideration of to what extent this obligation may be extended on other kinds of offences» [275, p. 315].

According to A. Caligiuri, «the work of the International Law Commission does not provide any useful contribution in defining the customary nature of the *aut dedere aut judicare* obligation» [86, p. 263]. «The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) did not express support for a position on the existence of a customary obligation to extradite or prosecute but did not reject such a possibility. The Working Group's final report did not exclude the possibility that the obligation to extradite or prosecute has become or is yet crystallising «into a rule of customary international law, be it a general or regional one» [172, p. 53].

Several examples from the court practice can be presented. They demonstrate the customary status of the *aut dedere aut judicare* principle.

«The Court of Justice of the European Union, in the Petruhhin case» [116] «seems to consider the *aut dedere aut judicare* principle as a general principle of law applicable to any situation, in order to guarantee the effectiveness of ternational cooperation between states and to ensure an accused person is not left without punishment [86, p. 269].

The ICTY Appeals Chamber in *Tihomir Blaškić* case has stated that «[n]ational courts of the states of the former Yugoslavia, like the courts of any State, are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law» [157].

«In the case of the Native Title Amendment Act 1998 and Arabunna People, the Federal Court of Australia confirmed the customary character of the *obligation aut dedere aut judicare.* The Court noted that: «It follows from the obligation to prosecute or extradite, imposed by international customary law on Australia as a nation State, that it would be constitutionally permissible for the Commonwealth Parliament to enact legislation providing for the trial within Australia of persons accused of genocide, wherever occurring». It was noted, that the prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogatable obligation by each nation State to the entire international community. This is an obligation independent of the Convention on the Prevention and Punishment of the Crime of Genocide. It existed before the commencement of that Convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946. The obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention. It is generally accepted this definition reflects the concept of genocide, as understood in customary international law» [178, p. 25]. In responding to the refusal by Guatemala to grant the five extradition requests, the investigating judge in Madrid asserted that «the *aut dedere aut judicare* obligation is based not only on conventional law but also on customary international law and it arises out of the *jus cogens* character of the prohibition of genocide and crimes against humanity» [178, p. 28].

«The Lockerbie Case before the International Court of Justice» [223] «has brought a lot of interesting materials in this field, especially through dissenting opinions of five judges to the decisions of the Court of 14 April 1992 not to exercise its power to indicate provisional measures» as requested by Libya. Although the Court itself was rather silent as it concerns the obligation in question, the dissenting judges have confirmed in their opinions the existence of «the principle of customary international law *aut dedere aut judicare*» [224, p. 69] and of «a right recognized in international law and even considered by some jurists as *jus cogens*» [225, p. 82]. «These opinions, though not confirmed by the Court, should be taken into account when considering the trends of contemporary development of the said obligation» [275, p. 317].

In the context of the problem under consideration, attention should be focused on the question of whether state practice can take the form of state statements.

«Although state practice has been strictly characterized as being composed of the conduct of states without regard to their public pronouncements, a better view seems to be that state practice consists not only of what states do, but also of what they say» [62, p. 29]. States «in conjunction with a significant number of legal scholars (and arguably the International Court of Justice), [have] asserted that these resolutions and declarations [of international organizations, particularly those of the U.N.] are important instances of state practice which create, or at least indicate, rules of customary international law» [85, p. 118], [135, p. 628]. «There is a strong support for the notion that state practice can come in the form of both state action or state assertions, the latter emerging primarily in the form of written documents» [135, p. 628].

«In the *Nicaragua Case,* the International Court of Justice stated that in order for statements made by states to attain customary norm status there must be evidence of action» [203, p. 98]. «Although the Court declared that *opinio juris* must be confirmed by stateby practice» [203, p. 98], «it also found *opinio juris* in verbal statements» [200, p. 41-43]. «If, on the one hand, the Court stated that *opiniojuris* must be confirmed by state action, and then on the other, found that *opinio juris* may emerge simply from statements made by states, it appears that what the Court is supporting is the proposition that what a state says is equivalent to what a state does with respect to the determination of the content of state practice» [135, p. 628].

According to C. Mitchell, the national legislation that would enable the *aut dedere aut judicare* clause to operate is «another source of state practice relevant to the customary nature of the extradition or prosecution clause» [202].

S. van Raphaël, connecting the issues of state practice, national legislation regarding extradition and jurisdiction and customary nature of the *aut dedere aut judicare* obligation, writes the following. «According to the classical conception of the customary law formation and given the numerous state declarations made on the subject, it would be difficult to deny ascribing a customary status to the obligation to extradite or prosecute. This customary obligation is nonetheless limited in some respects. First, as evidenced by state practice, it is only concerned with core international crimes such as genocide, crimes against humanity or war crimes» [256, p. 1115]. «A second fundamental limit comes from the declarations in which prominent states have strongly opposed affording a customary nature to the obligation to extradite or prosecute due to concern over incompatibility with domestic provisions regarding extradition and state jurisdiction. This opposition is overcome, however, by limiting the ascription of a customary status to the obligation as 'a rule', that is, to the obligation as conceived independently of the implementation system to which it is generally associated and which provides obligations concerning both extradition and state jurisdiction. In other words, the existence of a customary obligation to extradite or prosecute can be asserted only if it leaves the discretionary nature of extradition and state jurisdiction unaffected. Thirdly, the customary obligation does not imply any automatic obligation to extradite or prosecute. As the obligation to extradite or prosecute does in most of the treaties embodying it, it only requires the custodial state to submit the case to the competent authorities for the purpose of extradition or prosecution» [256, p. 1116-1117].

As noted earlier, numerous authors state that there is no customary obligation to extradite or prosecute. Let's consider this position in more detail.

According to J. Murphy, «this general rule does not apply, and the duty to prosecute or extradite only arises where it is expressly stated in the conventions» [205, p. 62], [151, p. 293]. As L. Reydams points out, «where there is a treaty obligation and the transnational fugitive offender is found on the territory of a

State, then that State must extradite or prosecute» [237, p. 61-68], [151, p. 293]. According to Reydams, «while extradition itself is premised on the basis of some formal agreement and, that in the absence of a treaty, it is only a moral obligation arising out of the comity of nations, then the better view is that the principle *aut dedere aut judicare* still only applies, at present, when expressly formulated in multilateral conventions on international criminal law» [237, p. 80]. G. Gilbert argues that it «may be that the provision in a particular treaty has become declaratory of customary international law with regard to the relevant crime, but there is no generic duty in international law, at least so far, of *aut dedere aut judicare»* [151, p. 294].

Some scholars note that «close scrutiny of the wording and voting record gives rise to doubts, and the majority of State practice, particularly on amnesties, speaks against an existing customary duty to prosecute international crimes» [122, p .60].

M. Scharf emphasized that «in the case of UN Declaration on Territorial Asylum (1967), according to the historic record of this resolution, [t]he majority of members stressed that the draft declaration under consideration was not intended to propound legal norms or to change existing rules of international law, but to lay down broad humanitarian and moral principles upon which states might rely in seeking to unify their practices relating to asylum». According to M. Scharf, «this language suggests that, from the outset, the UNGA resolutions and other non-binding international instruments concerning the prosecution of crimes against humanity were meant to be aspirational only, and not intended to create any legal duties. In addition to this contrary legislative history, the trouble with an approach to proving the existence of customary international law that focuses so heavily on words in non-binding legal instruments is «that it is grown like a flower in a hot-house and that it is anything but sure that such creatures will survive in the much rougher climate of actual State practice» [202, p. 751].

A. Caligiuri criticized the position of the Special Rapporteur Z. Galicki, set out in the Preliminary report, that «the rules of the Draft Code of Crimes against

Peace and Security of Mankind of 1996 are an expression of a codification of customary law». A. Caligiuri agreed with Z. Galicki that Articles 8 and 9 of the Draft Code of 1996 «were the result of a codification exercise of customary international law» [86, p. 262]. However, a criticism was raised regarding the typology of crimes for the punishment of which the *aut dedere aut judicare* obligation had to be applied. The 1996 Draft Code concerned only international crimes (war crimes, crimes against humanity, and genocide), and said nothing about the application of the obligation in question to other crimes, such as transnational crimes. According to A. Caligiuri, the reference to the Rome Statute as a crystallization of an alleged customary rule that contains the obligation in question is the result of miscalculation by the Special Rapporteur. Indeed, the Statute of the ICC does not provide for the application of the *aut dedere aut judicare* obligation by the contracting states, but only affirms a generic principle according to which contracting states have the primary responsibility of punishing perpetrators of international crimes. «In the light of this, the assertion that the rules of the 1996 Draft Code are an expression of a codification of customary law lacks any legal basis», − noted A. Caligiuri [86, p. 262].

G. Mettraux, considering the question of the existence of customary international law regarding the obligation to cooperate in the investigation or prosecution of crimes against humanity, concluded that «customary international law does not yet seem to provide for a general obligation of states to cooperate with other states or jurisdictions in the investigation and prosecutions of crimes against humanity». According G. Mettraux, «GA Resolutions as well as the terms of the UN Charter make it abundantly clear that co-operation among relevant actors in the pursuit of accountability for crimes against humanity is strongly encouraged by the international community so that a state would act in a manner consistent with its international obligations were it to provide cooperation and assistance to others in the pursuit of accountability for crimes against humanity. Outside the context of obligations arising from a treaty or a resolution of the Security Council, states appear to have provided such co-operation and assistance on a voluntary basis rather than out of a sense of legal obligation» [201, p. 106].

According to S. van Raphaël, «the main reason why states reject the idea of a customary obligation to extradite or prosecute is the fear that their courts will be obliged, in cases of non-extradition, to try the suspect even if he or she has no connection with the crime» [256, p. 1106].

«The practice of granting amnesty or asylum to those who commit crimes against humanity, rather than prosecuting or extraditing them, is widespread. Algeria, Angola, Argentina, Brazil, Cambodia, Chile, Columbia, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, UN Peru, Sierra Leone, South Africa, Togo, and Uruguay as part of a peace arrangement granted amnesty to members of the former regime that committed international crimes within their respective borders» [202, p. 751].

«In addition to amnesty (which immunizes the perpetrator from domestic prosecution), exile and asylum in a foreign country (which puts the perpetrator out of the jurisdictional reach of domestic prosecution by the State whose nationals committed the crime or in whose territory the crimes occurred) is often used to induce regime change, with the blessing and involvement of significant States and the UN. Peace negotiators call this the «Napoleonic Option», in reference to the treatment of French emperor Napoleon Bonaparte who, after his defeat at Waterloo in 1815 was exiled to St Helena rather than face trial or execution» [202, p. 751].

A number of authors emphasize that «a duty to prosecute or extradite does not automatically resolve the scope of criminal jurisdiction to be exercised by States, in particular third States. Crimes that are considered to be subjects to the principle of extradition or prosecution are subjects to permissive ‘universal jurisdiction’ by States. An argument of mandatory ‘universal jurisdiction’ (due to the *jus cogens* status of the crimes or otherwise) would in fact result in most States being in constant breach of the obligation, which brings into question whether State practice does indeed indicate the existence of such a custom» [124, p. 61].

«The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) in its Final report noted that the International Court of Justice in

Belgium v. Senegal ruled that it had no jurisdiction to entertain Belgium's claims relating to Senegal's alleged breaches of obligations under customary international law» [226, p. 422]. Thus, «an opportunity has yet to arise for the Court to determine the customary international law status or otherwise of the obligation to extradite or prosecute» [176, p. 5].

«It may be recalled also that in 2011 the Special Rapporteur Galicki, in his Fourth Report, proposed the following draft article:

«Article 4

International custom as a source of the obligation *aut dedere aut judicare*

1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.

2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2» [142].

«However, the draft article was not well received either in the Commission or the Sixth Committee. There was general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes» [172].

It should be noted that the issue concerning the customary character of the obligation *autdedere aut judicare* is rarely addressed by international and national judicial practice.

«In the *Belgium v Senegal* case, conserning the UN Convention against torture and other cruel, inhumanr degrading treatment or punishment, the International Court of Justice has held that the fundamental criminal definition of torture has passed into customary international law and is now a *jus cogens* crime» [226]. The Court stated that «parties to the treaty are required to exercise universal jurisdiction over torture or extradite the alleged offender» [226] but «did not address whether non-party states are so required under customary international law» [183, p. 516].

K. Gallant emphasizes that «state practice of exercising universal jurisdiction, outside of a treaty requirement, is very sparse. There have not been many prosecutions of persons for war crimes, crimes against humanity, or genocide on a universal basis. It is even harder to see that many states have exercised authority pursuant to universal jurisdiction because of a belief that such exercise is required (as opposed to merely permitted) by customary international law. Practice is similarly sparse with regard to a purported extradite or try (*aut dedere aut judicare*) requirement in customary international law» [183, p. 516-517].

According to M. Zgonec-Rožej and *J.* Foakes, «the state practice demonstrates that there is no clear answer to the question whether the obligation to extradite or prosecute for core crimes under international law has become part of customary international law. States' implementation of this obligation seems to be primarily based on treaties to which they are parties. It is thus questionable whether state practice beyond treaties is sufficient to meet the requirements prescribed for the formation of customary international law» [283, p. 5].

A. Caligiuri points out that «states show no consistent trends on the existence of a customary rule that expresses the *aut dedere aut judicare* obligation» [86, p. 262]. «Some states perceive the obligation in question as arising mainly from convention sources, although some argue that a customary rule is being formed in connection with repression of some of the most serious international and transnational crimes» [86, p. 3], [263], [264], [175].

Considering the question about «the existence of an obligation to extradite or prosecute under customary international law, attention should be paid to the question of the role of treaties in the formation of a custom.

E. Wise and M. Cherif Bassiouni took the position that «the *aut dedere aut judicare* obligation as a rule of general international law was not a result of the traditional process of custom. Multilateral and bilateral treaties affirm the customary nature of the obligation to extradite or prosecute» [79]. «This is the doctrinal conception of the formation of customary law based on the idea that treaties are 'the preferred indicators' of the existence of general international rules. Based on this logic, the conclusion and ratification of a growing number of treaties that embodies an *aut dedere aut judicare* clause should be evidence of the formation of a customary rule of similar content» [86, p. 264].

«At the Sixth Committee of the 61st Session of the UN General Assembly, the representative of China noted thatmany treaties concluded in recent years contain obligations to extradite or prosecute in connection with certain crimes. Given the universality of these treaties, at least in certain areas, such as the fight against terrorism, extradition and prosecution obligations are «gradually obtaining universal acceptance of the international community» [253, p. 264].

According to Enache-Brown Colleen, «it is reasonable to assert that if a state has signed and ratified a significant number of treaties containing the *aut dedere aut judicare* formula, then that state has demonstrated through this practice that *aut dedere aut judicare* is a customary norm. The state, through the act of signing related international agreements, articulates the belief that *aut dedere aut judicare* is an accepted norm and that it is the most effective way of preventing certain forms of conduct. This belief satisfies the requirement of *opinio juris* when establishing customary norms. If a state accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law. By agreeing to the formula of *aut dedere aut judicare* in multiple treaties that are concerned with international offenses, a state has indicated that with respect to international offenses it believes that the best way to ensure compliance is to impose such an obligation» [135, p. 629].

«Treaties manifest a certain conception of the legal obligation of contracting states (*opinio juris*), in a given sector, contributing to the birth of one or more rules of customary law, especially if they are instruments with a universal or almost universal character» [86, p. 265]. «Therefore, if treaties in question receive an increasing number of participants, it will have the effect that the conduct of non-contracting states will be in a minority or even absent, and their counter-weight will become irrelevant when determining the existence of a customary rule contrary to the rules of those treaties» [86, p. 265].

However, «a customary obligation which arises from several conventions would be somewhat generic. Indeed, this custom would result from a process of abstraction and generalization of treaty rules that adopt different models of the *aut dedere aut judicare* obligation» [86, p. 265].

«The possibility that a treaty generates a customary rule was recognized by the International Court of Justice in its judgment on the North Sea Continental Shelf case» [155, p. 41], «where it stated that it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. The Court established» [155, p. 41] «strict criteria to govern the possibility that one or more 'almost universal' rules of a treaty may create law for non-contracting states, and thereby become rules of general international law» [86, p. 265].

In practice, it is quite rare to encounter a treaty which is at the origin of the process of formation of a customary rule. It should be noted that «generally, a state does not sign a treaty with the intention to activate the process of creating a new customary rule. In other words, the fact that a contracting state undertakes to apply the rules of the treaty does not mean that state practice should be ascribed as an objective element of custom. The same argument may be assumed for the *opinio juris* of the contracting state, which is only the manifestation of the conviction to apply the rules of a treaty and does not express an opinion on compulsory behaviour within the international community» [86, p. 266].

A. Caligiuri noted that «many treaties containing the *aut dedere aut judicare* obligation did not receive a broad number of ratifications or accessions, considered a key element by the International Court of Justice when evaluating a treaty as the basis for the creation of a new customary rule. The same considerations apply to those conventions, such as the Geneva Conventions of 1949 and the Protocol I of 1977, which although ratified by an increasing number of states, are often disregarded by these states when implementing their basic obligations. These cases also fail to comply with the ICJ criterion for the emergence of a new custom, where large number of treaty ratifications must be matched by treaty application by the contracting states» [86, p. 266].

K. Gallant says that «although treaty practice requiring states to adopt extradite or prosecute jurisdiction for treaty crimes is widespread, it is difficult, however, to say that these treaties create a customary international law requirement of «extradite or prosecute» even for the core international crimes, except some war crimes» [183, p. 517]. For example, regarding the «grave breaches» provisions of the 1949 Geneva Conventions. «Grave breaches apply to the most important of the rules of international armed conflict relating to the protection of persons in war laid down in the Conventions. However, war crimes as defined in customary international law today include a much broader category of acts, including atrocities in non-international armed conflict and some non-atrocity crimes. As a result, the near-universal acceptance of the Geneva Conventions cannot be treated as requiring states to create extradite-or-prosecute jurisdiction as a matter of customary law for crimes not specified as «grave breaches» in the treaty» [183, p. 517]. The fact that, in most cases, «states fail either to prosecute or to extradite perpetrators of grave breaches of the Geneva Conventions weakens the claim of the obligations to prosecute or to extradite perpetrators of grave breaches to customary law status, writes judge Th. Meron» [200, p. 61].

According to A. Caligiuri, «the formation of new customary law affects only the definition of *aut dedere aut judicare* general obligation, without indicating the operational limitations and normative environments of this obligation. States, although considering the *aut dedere aut judicare* principle as a customary obligation, are ready to apply it only in terms permitted by their domestic laws. Thus, a distinction should be made between the obligation as a repressive ‘system’ that would be imposed on the states only on a treaty basis and the obligation as a ‘rule’ that would be customary in nature but with generic normative content» [86, p. 203].

For now, there are no clear answers as to whether or not an obligation *aut dedere aut judicare* with respect to international crimes falls within international customary law.

To justify the existence of a customary obligation to extradite or prosecute the following primary arguments are used: UN General Assembly resolutions (these resolutions emphasize the importance of combating international crimes and seeking justice); the gravity of international crimes (these offences are so egregious that they must not go unpunished and that states have a duty to hold the perpetrators accountable); the existence of an international community (*civitas maxima*) (this concept refers to the idea that international law applies universally to all members of the international community; there should be no safe havens for criminals, and states should cooperate in bringing offenders to justice, regardless of where the crimes were committed or the nationality of the perpetrators); the customary nature of the obligation to extradite or prosecute is confirmed by the fact that the obligation *aut dedere aut judicare* is the result not of a traditional process of custom formation, but through the adoption of multilateral and bilateral treaties containing this clause; state practice can take the form of state statements (i.e. *opinio juris* may be confirmed in verbal statements of the state).

The main arguments against the existence of a customary obligation to extradite or prosecute are as follows:

- the absence of consistent state practice or *opinio juris* to support the view of the customary nature of an obligation to extradite or prosecute;

- the principle of *aut dedere aut judicare* applies only when it is expressly formulated in multilateral conventions on international criminal law;

- extradition in the absence of a treaty is only a moral obligation;

- an obligation to prosecute or extradite does not automatically resolve the question of the scope of state criminal jurisdiction;

- core crimes have the status of *jus cogens* and violate the customary international law, which provides for universal jurisdiction over them, but this is not the ground for the assertion of the existence of the customary rule of *aut dedere aut judicare;*

- existing state practice on amnesty, exile and asylum indicates that there is no existing customary duty to prosecute international crimes;

- preparatory documents for international documents, for example the UN Declaration on Territorial Asylum (1967), testify to the absence of states' desire to adopt international legal norms, but only to establish moral principles on which states can rely;

- fear on the part of the states that their courts will be obliged, in cases of refusal of extradition, to try the suspected even if there is no connection with the crime; the lack of a clear position by the International Law Commission on the existence of a customary international law obligation to extradite or prosecute.

In our view, with respect to specific categories of international crimes, obligation *aut dedere aut judicare* arises not only from the provisions of specific international treaties, but also from customary international norms.

2.3. National legislation as a source of the obligation to extradite or prosecute

«States are united in the fact that the perpetrators of international crimes should not go unpunished. At the same time, states seek to retain their discretionary powers over both extradition and jurisdiction. This situation is the result of a conflict of interests: the desire for repression of core international crimes versus the reluctance to surrender a suspect to states that do not have a similar judicial and political system, combined with the reluctance to prosecute those suspected for certain political reasons» [256, p. 1106]. There is a necessity to defend the interests of the international community simultaneously with the protection of state sovereignty, taking into consideration the interests of persons involved in criminal prosecution. One of the legal instruments that contributes to the achievement of such goals is the principle of *aut dedere aut judicare*. This principle ensures the fight against impunity for the commission of criminal offenses (in particular, the most serious international crimes) and is implemented at the international and national levels. The effective implementation of the principle of *aut dedere aut judicare* is possible through the fulfillment by the state of its international legal obligations in combination with compliance with the obligations to carry out prosecution or extradition under national law.

As noted by a number of authors, «national prosecutions are not only the primary vehicle for the enforcement of international crimes, they are also often considered a preferable option – in political, sociological, practical, and legitimacy terms – to international prosecutions» [123, p. 54]. Therefore, highlighting the issue of the role of national legislation and state practice in implementing the *aut dedere aut judicare principle* has significant theoretical and applied significance.

This subsection will reveal the position of the UN International Law Commission on the role of national legislation and state practice in implementing the obligation to extradite or prosecute; the practice of individual states regarding the legal establishment of the obligation to issue or prosecute was considered; the measures that states must follow at the national level in order to effectively implement the principle of aut dedere aut judicare are defined.

It should be noted that «during the drafting of UNGA Resolution 3074 (XXVIII), despite agreeing with the idea of the obligation to prosecute or extradite in connection with genocide, crime against humanity or war crime, many states, however less, explicitly or implicitly asserted that the fulfilment of this obligation should be considered within the framework of the light of their national legislation» [256, p. 1106-1107].

According to M. Plachta, «it seems to be obvious that the main stream of considerations concerning the obligation to extradite or prosecute goes through the norms and practice of international law» [232, p. 317]. At the same time, as Plachta notes, «efforts towards optimalization of the regulatory mechanism rooted in the principle *aut dedere aut judicare* may be undertaken either on the international level or on the domestic level» [219, p. 332]. «Internal criminal, and even constitutional regulations should be taken here into consideration on equal level with international legal norms and practices, - Z. Galicki points out» [232, p. 317]. As O. Butkevych pointed out, «the issue of compliance and fulfillment by the state of its international obligations is related to the legislative regulation of the entry into force of international treaties for it» [10, p. 347].

«The effective fulfillment of the obligation to extradite or prosecute requires undertaking necessary national measures to criminalize the relevant offences, establish jurisdiction over the offences and the person present in the territory of the State, investigate or undertake primary inquiry, apprehend the suspect, and submit the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extradition, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect» [174].

«One of the main measures that states must take to implement the principle of *aut dedere aut judicare* is to establish jurisdiction over the relevant offense and the person who (allegedly) committed the offence» [37, p. 271]. According to C. Mitchell, «the vast majority of recent treaties that include an *aut dedere aut judicare* clause oblige States to take such measures as may be necessary to establish jurisdiction over the offences in the circumstances where the alleged offender is present and it does not extradite him or her» [204].

«The Geneva Conventions require a state party to enact the legislation necessary to provide effective penal sanctions for persons committing, or ordering the commission of, any of the grave breaches of the conventions. A state party must search for alleged offenders, and, regardless of their nationality, bring them before its own courts. Although the obligation to extradite or prosecute is limited to grave breaches, the states parties are required to take measures to suppress all acts contrary to the conventions other than grave breaches» [94], [95], [96], [97]. «Similarly, the 1996 Draft Code requires states to take the necessary measures to establish their jurisdiction over genocide, crimes against humanity, war crimes, and crimes against the UN and associated personnel, irrespective of where or by whom they were committed. The obligation to establish extraterritorial jurisdiction in certain circumstances is also imposed in the 1970 Hague Convention, and other subsequent conventions, including the Torture Convention» [105], [283, p. 8].

G. Goodwin-Gill emphasizes that «States generally (and specifically in the case of parties to treaties dealing with serious crimes of international concern) ought therefore to adopt the necessary legislative and other measures to ensure that jurisdiction is clearly established, (1) in regard to international crimes and to serious crimes of international concern, and (2) over any person alleged to have committed such a crime who is present in state territory, irrespective of the nationality of the person concerned or the place in which the crime was committed. States ought to ensure further that (3) appropriate mechanisms are in place, competent (4) to conduct the necessary preliminary enquiry into the facts, in co-operation where appropriate with other states or with international organizations, (5) to determine whether a sufficient case has been made out for the purpose of extradition or prosecution, (6) to determine whether a 'protection obstacle' stands in the way of submitting the accused to another jurisdiction, and if so, (7) *in lieu* of extradition, to initiate either prosecution before the local courts, or the surrender of the person concerned to a competent international tribunal» [152, p. 222].

Generally, «States have used one or more of the following methods to allow for the prosecution of foreigners for international crimes. The methods are grounded on the following:

a) on the legislation which directly implements particular conventions or treaties. This involves separate legislation for each convention, promulgated in order to comply with the obligation to ensure jurisdiction contained in the particular conventions. Each separate piece of legislation will include the necessary provisions to give it extra-territorial effect [202];

b) «on the «blanket» norm or provision, which is often found in the State's Penal Code, that does not refer to a particular convention or crime but rather establishes universal or extra-territorial jurisdiction over a class of crimes» [202];

c) «on the situation when a State's constitution allows for direct incorporation of international law, either conventional or customary. A number of States have indicated that they do have jurisdiction to enable prosecution in default of extradition under an *aut dedere aut judicare* obligation by referring to this method of incorporation. This view is certainly not without controversy. In its detailed report on universal jurisdiction, Amnesty International points out that while this view may on occasion be enough to allow courts to exercise universal jurisdiction over crimes under international law, it is not always clear whether such provisions incorporate only the substantive criminal law provisions of treaties, or also the procedural ones, such as the need for jurisdiction to prosecute an offender for an act that occurred elsewhere» [202].

On the example of some states, we will consider cases of enshrining provisions in national legislation that provide for either extradition or prosecution.

«The Criminal Code of Azerbaijan» [118] provides that «citizens or foreigners who have committed crimes against the peace and mankind, war crimes, terrorism, hostage-taking, torture, piracy and also other crimes, including those contained in treaties to which Azerbaijan is a party, shall be punished, irrespective of a place of committing a crime. The Code appears to contain a provision stating that if they are not extradited, a criminal proceeding shall be instituted» [178, p. 11].

Articles 12 (3) of the Code states: «Citizens of the Azerbaijan Republic, foreigners and persons without the citizenship, who have committed crimes against the peace and mankind's, war crimes, terrorism, financing of terrorism, stealing of an air ship, capture of hostages, torture, a sea piracy, illegal circulation of narcotics and psychotropic substances, manufacturing or sale of false money, attack on persons or the organizations using the international protection, the crimes connected to radioactive materials, and also other crimes, punish of which stipulated in international agreements to which the Azerbaijan Republic is a party, shall be instituted to criminal liability and punishment under the Present Code, irrespective of a place of committing a crime» [118].

Article 13 (3) stipulates: «If the persons, who have committed a crime outside of limits of the Azerbaijan Republic, shall not distributed out to the foreign state, and this action (action or inaction) is admitted as a crime according to the present Code, they shall be instituted to criminal proceedings in the Azerbaijan Republic» [118].

«In Finland, the Penal Code» [218] «provides for the duty to try or extradite as long as the conduct, committed outside of Finland, is punishable by imprisonment for more than six months and if the state in whose territory the offence was committed has requested that charges be brought in a Finnish court or that the offender be extradited because of the offence, but the extradition request has not been granted. The aut *dedere aut judicare* principle does not seem to be limited to crimes under international law» [178, p. 14].

«Section 8 (626/1996) of the Code provides: «Other offence committed outside of Finland Finnish law applies to such an offence committed outside of Finland for which a sentence of imprisonment of more than six months may be imposed under Finnish law, if the state in whose territory the offence was committed has requested that charges be brought in a Finnish court or that the perpetrator be extradited because of the offence, but the request has not been granted» [218].

The Penal Code of Estonia [217] «includes a provision stating that when a foreign offender who allegedly committed a crime abroad is not extradited, he or she must be held accountable before national courts «if such act constitutes a criminal offence pursuant to the penal law of Estonia and is punishable at the place of commission of the act, or if no penal power is applicable at the place of commission of the act». The provision appears to apply to all crimes, without exception» [178, p. 14].

Article 7 is worth consideration. Applicability of penal law by reason of person concerned provides:

«The penal law of Estonia applies to an act committed outside the territory of Estonia if such act constitutes a criminal offence pursuant to the penal law of

Estonia and is punishable at the place of commission of the act, or if no penal power is applicable at the place of commission of the act and if:

1) the act is committed against a citizen of Estonia or a legal person registered in Estonia;

2) the offender is a citizen of Estonia at the time of commission of the act or becomes a citizen of Estonia after the commission of the act, or if the offender is an alien who has been detained in Estonia and is not extradited» [217].

«The Criminal Code of Bosnia and Herzegovina» [117] «provides for the duty to prosecute a non-citizen who has committed abroad a crime against a foreign state or other non-citizen, as long as the crime is punishable by no less than five years' imprisonment under the law of the place of perpetration of the crime and extradition has not been granted. This provision is not limited to crimes under international law» [178, p. 11-12].

Article 12 is worth consideration. Applicability of the Criminal legislation of Bosnia and Herzegovina to Offences Perpetrated outside the Territory of Bosnia and Herzegovina provides: «(5) In the cases referred to in paragraphs 2 and 3 of this Article, the criminal legislation of Bosnia and Herzegovina shall be applied only if the perpetrator of the criminal offence is found within the territory of Bosnia and Herzegovina, or has been extradited to it, while in the case referred to in paragraph 4 of this Article, only if the perpetrator is found within the territory of Bosnia and Herzegovina and is not extradited to another state» [330].

The Criminal Code of The Former Yugoslav Republic of Macedonia [119] includes «*aut dedere aut judicare* provision for all kinds of crimes, as long as the conduct committed abroad by a foreigner found in Macedonia is punishable with a five-year imprisonment term or a more severe punishment» [178, p. 15].

Article 119 is worth consideration. The article on the topic *Application of the criminal legislature to a foreigner who commits a crime abroad* states:

«(1) The criminal legislature is applicable also to a foreigner who commits a crime outside the territory of the Republic of Macedonia but directed against it or against its citizen, also when this does not concern crimes listed in article 117, if he finds himself on the territory of the Republic of Macedonia or is extradited.

(2) The criminal legislature is also applicable to a foreigner who commits a crime abroad, against a foreign country or a foreigner, who according to that legislature may be sentenced to five years of imprisonment or to a more severe punishment, when he finds himself on the territory of the Republic of Macedonia, and when he is not extradited to the foreign country. If not otherwise determined by this Code, in such a case the court may not pronounce a punishment more severe than the punishment that is prescribed by law of the country in which the crime was committed» [119].

«The 2008 Act on the Punishment on Crimes under the Jurisdiction of the ICC of the Republic of Korea, seems to implicitly incorporate the obligation regarding genocide, crimes against humanity and war crimes. Article 3 stipulates: This Act shall be also applied to a foreigner, who is present in the territory of the Republic of Korea after having committed any crime against humanity, etc. outside the Republic of Korea» [178, p. 15].

«The Penal Code of Portugal» [267] provides «the duty to prosecute if a foreigner is found within Portugal and his or her extradition request or an European arrest order is denied. The Penal Code applies to all crimes, save those contained in the Act implementing the Rome Statute – in which case the triple alternative applies» [178, p. 16-17].

«The Criminal Code of Ukrainein Art. 10 (2) provides that «foreign nationals or stateless persons residing in the territory of Ukraine who have committed crimes outside Ukraine may be extradited to a foreign state for criminal prosecution and committal for trial» [120].

Part 3 of Art. 10 enshrines the provision according to which «Ukraine may take over criminal proceedings in which the judiciary of a foreign state has not passed a sentence against citizens of Ukraine and foreign nationals residing in the territory of Ukraine who have committed crimes outside Ukraine, but who cannot be extradited to a foreign state or their extradition was denied, provided the act in connection with which the transfer of criminal proceedings has been requested is deemed a crime under this Code» [120].

The issue of the consequences of the state not adopting the relevant national criminal legislation regarding the establishment of jurisdiction over persons who have committed criminal offenses and jurisdiction over relevant criminal offenses, which is considered an obstacle to the realization of the principle of *aut dedere aut judicare*, deserves special attention.

The state's failure to adopt the necessary criminal legislation to establish jurisdiction over a person who has committed a certain crime, if this is provided for in a convention (to which this state is a party), constitutes a violation of the state's international obligations under such a convention and entails international responsibility.

For instance, «in the Decision of the Committee Against Torture under Article 22 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (2001)» [126], the complainants claimed to be victims of a violation by Senegal of article 5, paragraph 2, and article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (para. 1.1).

«The complainants pointed out that, in its ruling of 20 March 2001, the Court of Cassation stated that «article 79 of the Constitution [which stipulates that international treaties are directly applicable within the Senegalese legal order and can accordingly be invoked directly before Senegalese courts] cannot apply when compliance with the Convention requires prior legislative measures to be taken by Senegal» and «article 669 of the Code of Criminal Procedure [which enumerates the cases in which proceedings can be brought against foreigners in Senegal for acts committed abroad] has not been amended». They also noted that, while the State party has adopted legislation to include the crime of torture in its Criminal Code in accordance with Article 4 of the Convention, it has not adopted any legislation relating to Article 5, paragraph 2, despite the fact that this provision is the «cornerstone» of the Convention, referring in this connection to the travaux préparatoires (para. 3.2)» [126].

The Committee concluded that «Senegal violated Article 5, paragraph 2, and Article 7 of the Convention (para. 9.12). In accordance with Article 5, paragraph 2, of the Convention, the State party is obliged to adopt the necessary measures, including legislative measures, to establish its jurisdiction over the acts referred to in the present communication. Moreover, under Article 7 of the Convention, the State party is obliged to submit the present case to its competent authorities for the purpose of prosecution or, failing that, since Belgium has made an extradition request, to comply with that request, or, should the case arise, with any other extradition request made by another State, in accordance with the Convention (para. 9.10)» [126].

Here is a brief overview of the case's circumstances.

Between 1982 and 1990, during which period Hissène Habré was President of Chad, the complainants were purportedly tortured by agents of the Chadian State answerable directly to President Hissène Habré. The acts of torture committed during this period formed the subject of a report by the National Commission of Inquiry established by the Chadian Ministry of Justice; according to that report 40,000 political murders and systematic acts of torture were committed by the Habré regime (para. 2.1). The complainants have submitted to the Committee a detailed description of the torture and other forms of ill-treatment that they claim suffered. Moreover, the relatives of two of them, Valentin Neatobet Bidi and Ramadane Souleymane, have disappeared. On the basis of developments in international law and the case law of various international bodies, the complainants consider this equivalent to torture and other inhuman and degrading treatment, both for the disappeared persons and, in particular, for their relations (para. 2.2). After being ousted in December 1990, Hissène Habré took refuge in Senegal. In January 2000, the complainants lodged a complaint against him with an examining magistrate in Dakar. On 3 February 2000, the examining magistrate charged Hissène Habré with being an accomplice to acts of torture, placed him under house arrest and opened an inquiry against a person or persons unknown for crimes against humanity (para. 2.3).

On 4 July 2000, the Indictment Division dismissed the charge against Hissène Habré and the related proceedings on the grounds of lack of jurisdiction, affirming that «Senegalese courts cannot take cognizance of acts of torture committed by a foreigner outside Senegalese territory, regardless of the nationality of the victims: the wording of article 669 of the Code of Criminal Procedure excludes any such jurisdiction» (para. 2.5)» [226].

«Following this ruling, the Special Rapporteurs on the question of torture and on the independence of judges and lawyers of the United Nations Commission on Human Rights expressed their concerns in a press release dated 2 August 2000. According to the press release, «the Special Rapporteur on the independence of judges and lawyers, Mr. Dato Param Cumaraswamy, and the Special Rapporteur on the question of torture, Sir Nigel Rodley, have expressed their concern to the Government of Senegal over the circumstances surrounding the recent dismissal of charges against Hissène Habré, the former President of Chad. The Special Rapporteurs reminded the Government of Senegal of its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which it is party. They also drew its attention to the resolution adopted by the Commission on Human Rights on the question of torture (resolution 2000/43), in which the Commission stressed the general responsibility of all States to examine all allegations of torture and to ensure that those who encourage, order, tolerate or perpetrate such acts be held responsible and severely punished» [126].

«On 7 July 2000, the complainants filed an appeal with Senegal's Court of Cassation against the ruling of the Indictment Division, calling for the proceedings against Hissène Habré to be reopened (para. 2.6). On 20 March 2001, the Senegalese Court of Cassation confirmed the ruling of the Indictment Division, stating inter alia that «no procedural text confers on Senegalese courts a universal jurisdiction to prosecute and judge, if they are found on the territory of the Republic, presumed perpetrators of or accomplices in acts [of torture] … when these acts have been committed outside Senegal by foreigners; the presence in

Senegal of Hissène Habré cannot in itself justify the proceedings brought against him» (para. 2.7)» [126].

«On 19 September 2005, a Belgian judge issued an international arrest warrant against Hissène Habré, charging him with genocide, crimes against humanity, war crimes, torture and other serious violations of international humanitarian law. On the same date, Belgium made an extradition request to Senegal, citing, inter alia, the Convention against Torture (para. 2.8). On 25 November 2005, the Indictment Division of the Dakar Court of Appeal stated that it lacked jurisdiction to rule on the extradition request. The Senegalese Minister for Foreign Affairs stated that Hissène Habré would remain in Senegal and that, following a discussion between the Presidents of Senegal and Nigeria, it had been agreed that the case would be brought to the attention of the next Summit of Heads of State and Government of the African Union (para. 2.10). In 2006, the Assembly of the African Union decided to set up a committee of eminent African jurists, who would be appointed by the Chairman of the African Union in consultation with the Chairman of the African Union Commission, to consider all aspects and implications of the Hissène Habré case and the possible options for his trial (para. 2.11)» [92].

It is essential to mark that in case «when a state fails to comply – or is unable to fulfill – its treaty obligations regarding the application of the *aut dedere aut judicare* clause, the international community may intervene in promoting the repressive action and assuring the fight against impunity. However, the international community can intervene in favouring the repression of certain crimes only if there is no correct functioning of the treaty mechanisms of repression of these crimes. In these circumstances, even the intervention of a regional organization is justified. This intervention will aim to prevent the impunity of perpetrators of international crimes, although it must be related to a statutory aim of the organization» [86, p. 271].

Thus, in the above mentioned *Habré case*, «the African Union has overcome the impasse that occurred in the application of the UN Convention against Torture of 1984 by Senegal, replacing the power of the Senegal's Government with its own and making a choice between *dedere and judicare* to enforce the treaty obligation subscribed by its member state. Senegal's President referred the matter to the African Union seeking a decision on how *Habré*should be tried. A Committee of Eminent African Jurists recommended Senegal to prosecute Habre on behalf of Africa» [229, p. 36-42]. However, «in 2009, Belgium filed an application with the International Court of Justice arguing that Senegal had violated the obligation to prosecute or extradite under the 1984 UN Convention against Torture and customary international law rules by rejecting extradition on several occasions, in whose it affirmed, among other things, 'a State cannot divest itself of its international obligations by handing a matter over to a regional organization» [86, p. 272].

Attention should be paid to A. Cassese's fair remark that the adoption of legislation alone is not enough. «Some multilateral treaties on international crimes require contracting states to pass legislation *to establish* criminal jurisdiction (i.e. to provide for the applicability of the relevant criminal prohibition) on certain specific grounds. The best illustration of this category of treaties may be found in the 1984 UN Torture Convention, whose Article 5(1) obliges each contracting state to 'take such measures as may be necessary to establish [their] jurisdiction' over acts of torture (or over participation or complicity in torture) on the basis of the principles of territoriality, active nationality, and conditional universality (but subject to the principle *aut dedere aut judicare).* Other multilateral treaties on international crimes, in particular those prohibiting terrorist acts, adopt the same pattern as the 1984 UN Torture Convention and oblige contracting states to adopt specific jurisdictional grounds» [88, p. 284]. Clearly, «these conventions aim to prevent impunity and deter specific offences by guaranteeing that there is always a state that has jurisdiction over such offences. Nonetheless, to ensure the most effective repression of international crimes, it may be not sufficient merely to oblige contracting states to provide for the applicability of the relevant criminal prohibition on the basis of specific grounds of jurisdiction. This is particularly so if one considers that, in some states, prosecutors are not always obliged to institute criminal proceedings if faced with a *notitia criminis*; that is, if they become cognizant of the perpetration of a crime, but rather enjoy discretionary powers. A state may, then, fully comply with its international obligation by adopting the required criminal legislation, but nonetheless fail to bring to justice alleged perpetrators of international crimes» [88, p. 285].

According to A. Cassese, «the most effective means of preventing international crimes and avoiding impunity is «the imposition of an international obligation to prosecute alleged perpetrators. This fact is all the more true if one takes into account the practical consequences stemming from such an international obligation. First, if a state is internationally duty-bound to prosecute and punish the alleged authors of international crimes, it may not enact national laws or conclude international agreements granting amnesty for such crimes without breaching international commitments and incurring international responsibility. Indeed, it would be appropriate for other states having jurisdiction over those crimes to refuse to recognize the validity of the state's national legislation and transactions, and to initiate their own proceedings against the alleged perpetrators. Second, the existence of an international obligation to exercise criminal jurisdiction has a considerable impact on those states where prosecutors enjoy discretionary powers as to the initiation of investigations and prosecution. In such states, the aforementioned international obligation would make judicial penal action by prosecutors mandatory. It follows that a state under such an obligation will incur international responsibility if a complaint about an international crime is lodged with one of its prosecutors, or the prosecutor in any way is made cognizant of the commission of any such crime, and on account of his/her general discretionary powers, the prosecutor fails to commence investigation or institute proceedings. Third, there may be rules of international law establishing an international obligation to prosecute on the basis of legal grounds not already envisaged by national systems; for instance, universality. If this is the case, such rules may have a self-executing character as far as jurisdictional grounds for penal action are concerned: this occurs where national legislation does contain a provision expressly referring back to international law; that is, providing that national courts may exercise jurisdiction on any legal ground (e.g. universality) provided for in an international treaty» [88, p. 285].

Thus, international law, as one of its aims, provides for proper interstate cooperation with a view to improving the national prosecution for international crimes. In addition to treaty and customary (at least for the most serious international crimes) enshrining the principle of *aut dedere aut judicare*, national criminal law constitutes an important source of obligation to extradite or prosecute. The effective implementation of the principle of *aut dedere aut judicare* in each specific case will depend on the state's fulfillment of both its international obligations and the implementation of the necessary measures (in particular, regarding the establishment of jurisdiction over criminal offenses and offenders) defined in national legislation concerning extradition and prosecution.

2.4. The scope of the obligation to extradite or prosecute

It is necessary to start with the question 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» [80, p. 488]. «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 goals that compel the practice of surrendering fugitives? Extradition, after all, is not an end in itself» [80, p. 488-489].

«All the difficulties concerning the scope of application and the contents of an obligation envisaged by various formulas in which this principle appears notwithstanding, the validity of the system based on *aut dedere aut judicare* has been confirmed not only in numerous international instruments, but also in domestic jurisprudence in many states» [220, p. 74].

For example, «the Inter American Court of Human Rights in *Case* of *Goiburú*et al. *v. Paraguay»* [162] explained the scope of the *aut dedere aut judicare* obligation regarding the terms of the American Convention on Human Rights by concluding that: «the States Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case by the prosecution and, if applicable, the punishment of those responsible. Furthermore, based on these principles, a State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case in their territory» [178, p. 24].

The Austrian Supreme Court held that where the extradition of a national has been refused «the right to prosecute must, as a general rule and without prejudice to the continued existence of the right to prosecute of the State in whose territory the offence has been committed, be offered to the home State of the offender» [73, p. 134], [220, p. 75]. On some occasions, «the principle *aut dedere aut judicare* is relied upon to demonstrate that it works «both ways». In the Pesachovitz case where an extradition request was submitted to the Israeli authorities under the European Convention on Extradition, the court assuming that Israel is obligated to do one of two things: either to extradite Pesachovitz or to punish him decided to order the extradition of the fugitive on the grounds that prosecution was precluded under Israeli law» [220, p. 75].

«Given the differences in the provisions in the various treaties, the precise content of the obligation to extradite or prosecute has to be assessed on a case-by-case basis. The relevant provisions imposing this obligation must be read in connection with the rules relating to the criminalization of the offences, the establishment of jurisdiction, the search for and arrest of alleged offenders, the investigation, rules on cooperation in criminal matters and the regime of extradition» [283, p. 6]. «As regards the content of any emerging rule of customary international law, the practice is not yet clear enough to enable a conclusion to be drawn» [283, p. 6].

Establishing the scope, that is the range of crimes covered by the obligation, is an important practical issue.

«The duty to 'extradite or prosecute' is inextricably linked to the nature of the criminal act» [214, p. 30]. «Although from theoretical point of view, any criminal activity may be deemed to hurt the interests of States, it would be practically impossible to prosecute any primarily domestic crimes abroad» [214, p. 9-10]. «It is hard to claim that there is a free standing version of the 'extradite or prosecute' obligation to all crimes in international law» [214, p. 5].

There are over seventy conventions in international criminal law that contain an alternative to *aut dedere aut judicare*. Therefore, participating States are required to criminalize the offense in question and establish jurisdiction over it. Most transnational crimes do not raise questions regarding the criminal prosecution of the suspect, as well as bringing him to criminal responsibility. A more complex situation arises in case of violations of *jus cogens* crimes.

«The ILC final report observed that there are important gaps in the present convention regime governing the obligation to prosecute or extradite that need to be closed. These gaps concern crimes against humanity, war crimes other than grave breaches thereof and war-crimes in non-international armed conflicts. The ILC was of the opinion that the international regime regarding genocide could be strengthened beyond the rudimentary regime under the 1948 Genocide convention. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), the ICJ held that article VI of the Genocide convention obligates contracting parties to institute and exercise territorial criminal jurisdiction and to co-operate with an 'international penal tribunal' under certain circumstances» [76, p. 208].

«Following the Court's decision in Questions relating to prosecution or extradition (Belgium v. Senegal), which held that the prohibition of torture is a *jus cogens*norm, the formula of the obligation to extradite or prosecute, outlined in the Convention against Torture, can be used as a model for prosecution or extradition of other serious crimes under international law, including genocide, war crimes and crimes against humanity.

The Convention against Torture contains an *aut dedere aut judicare* clause. The *aut dedere aut judicare* obligation related to the *jus cogens* prohibition of torture has acquired customary status and can be invoked even in the absence of a treaty provision.

As far as grave breaches of the Geneva Conventions are concerned, the threshold for the prosecution test of the *aut dedere aut judicare* obligation is to initiate judicial proceedings before the judicial authorities of the State where the alleged perpetrator is sought for and apprehended. As soon as the person is apprehended by the authorities of the custodial State, the same State is under a duty «to ensure that the person concerned is…prosecuted with dispatch. The articles 49 of the Geneva Convention I, 50 of the Geneva Convention II, 129 of the Geneva Convention III, and 146 of the Geneva Convention IVare based on three fundaments: the obligation to enact special legislation for suppressing breaches of the Conventions, a duty to search for any alleged violator, and an obligation to try such person, or, if the Party prefers, to transfer the person to another State concerned. No reservations have been made with regard to these common provisions» [214, p. 79-102].

«While R. Kress doubts the customary nature of the obligation *aut dedere aut judicare* in respect of war crimes committed in non-international armed conflicts as a *fait accomplit»* [122, p. 109-110]; another commentator, C. Maierhofer, argues that customary international law has developed to that effect. C. Maierhofer highlights that «especially since the mid-1990s and the case law concerning crimes committed during the Rwandan genocide, a non-international armed conflict, the obligation *aut dedere aut judicare* in respect of war crimes has attained customary status» [122, p. 373].

M. Zgonec-Rožej and J. Foakes pointed out that «there is no treaty-based obligation *aut dedere aut judicare* for genocide, crimes against humanity and, except in the case of grave breaches, for serious violations of the laws and customs applicable in armed conflicts of an international or non-international character» [283, p. 3].

«In the context of the peculiarities of genocide, one must add that the customary regime applicable to the domestic suppression of genocide is not identical to that of the Genocide Convention since the former municipal enforcement system, unlike the Genocide Convention, allows for universal jurisdiction, a principle of jurisdiction which does not require any nexus between the forum State and the crime, and which is not defined neither by treaty law nor by customary international law» [252, p. 326].

«There is a scholarly opinion that the obligation *aut dedere aut judicare* has acquired customary status with regard to a limited circle of core crimes, *i.e.* genocide, crimes against humanity and war crimes. This conclusion was mainly reached on the basis of various State declarations and votes in international *fora* that concerned the prosecution of severe crimes and recall a State's obligation not to let the offenders of crimes pursuant to international law get away without punishment» [256, p. 1099-1102]. «If this approach is followed, it means that every State is under an obligation to submit a case concerning an alleged offender of crimes pursuant to international law to its competent authorities for the purpose of prosecution or extradition. In other words, when it comes to such severe crimes, each State is obliged to institute an investigation, and where warranted, to prosecute or extradite the alleged offender» [122, p. 374].

According to S. Panov, «core crimes, in particular genocide, grave breaches of the Geneva Conventions, crimes against humanity, including the prohibition of torture, directly and inherently afflict most damage on the international society. This type of criminal behaviour threatens the society of humankind responds through international criminal law. The universal character of the obligation to prosecute denotes the interest of all States to close down the impunity for such core crimes, related to the *erga omnes* nature of the obligation *aut dedere aut judicare*. In this sense, the primacy of prosecution and the subsidiary role of extradition may reflect the role of the obligation to prosecute core crimes as the «trustee of the fundamental values of the international community» [194, p. 567]. The nature of the criminal conduct afflicting the international society as a whole is what distinguished such core crimes from the other two types of internationally-related crimes which trigger the obligation *aut dedere aut judicare* in various forms as each State shares an inherent equal interest to prosecute core crimes [214, p. 77].

«The customary *aut dedere aut judicare* obligation has formed or crystallized for core crimes or some *jus cogens* prohibitions such as torture, genocide, grave breaches of international humanitarian law, including war crimes, and crimes against humanity. As regards the offences against the safety of civil aviation and hijacking, terrorism-related activities, international drug trafficking, and crimes against UN personnel, the evidence is mixed and it might be more appropriate to conclude that an emerging custom of the obligation extradite-or-prosecute for the said crimes is forming» [214, p. 5-6]. Consequently, «two main types of the obligation may be identified depending on the crime triggering the duty: first, an obligation with an emphasis on the duty to prosecute for core crimes of international law such as genocide, torture, grave violations of international humanitarian law and crimes against humanity; and, second, an either-or disjunctive obligation with no exact preference for extradition or prosecution for transnational crimes such as hijacking of the civil aviation and terrorism-related activities» [214, p. 3].

E. Mack, examining the question of whether there is an obligation in customary international law «to extradite or prosecute persons accused of crimes against humanity, comes to the conclusion that «the lack of draft articles devoted to the obligation to extradite means that the gaps in the enforcement of egregious international criminal offences, such as crimes against humanity, remain» [196, p. 97]. Additionally, the inconsistency, fluctuation, and discrepancy in State practice, and lack of *opinio juris* demonstrates that no obligation yet exists as a matter of customary international law. Therefore, in order to help close the enforcement gaps, an effort to establish a Convention on crimes against humanity should include an obligation to extradite or prosecute imposed on State parties» [196, p. 97].

«The *aut dedere aut judicare rule* is important for the suppression of transnational organized crimes. In these types of crimes, more than in others (and unlike in the case of core crimes), cooperation by States is more forthcoming. The entire repressive regime, in fact, heavily relies on cooperation obligations which occasionally may only apply to transnational crimes involving an organized criminal groupand on other duties emanating from legal instruments intended to curb such crimes.This is probably because States perceive that these crimes cannot be localised, but have trans-boundary aspects and effects which can haunt them in the near future. States also tend to protect reciprocity by complying with the requests of other States because they know that they can and probably will be in the same situation of such other States one day or another» [252, p. 123].

«In terms of jurisdiction, transnational crimes trigger more limited extra-territorial jurisdiction in comparison to the universal core crimes. Transnational crime treaties create *subsidiary universality* which is applicable once extradition of the relator does not take place, based on the presence of the accused on the territory of the custodial State. Hence, the jurisdictional bases indicate the preference for extradition or, at least, equal weight of the extradition and prosecution prongs» [214, p. 91].

A. Nollkaemper pointed out, that «The Hague formula, found in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and replicated in multiple widely ratified conventions dealing with transnational crimes, is not explicit in giving priority to one of the two alternatives of prosecution or extradition» [214, p. 90-91]. Some scholars believe that «a preference is to be given to extradition which follows the determination of non-forum States with greater interest to request the transfer of the relator for the purpose of prosecution»

[256, p. 1112].

«The obligation of states to prosecute persons guilty of crimes, the prohibition of which is established at the international legal level, depending on the legal status of the prohibition norm and the nature of the act, may have a different scope of implementation. The enforcement mechanism in any case is the exercise of criminal jurisdiction, the principles of which may be subject to correlation with the nature of the crime» [23, p. 92].

«According to the authors of the book «In An Introduction to International Criminal Law and Procedure», beyond treaty obligations, genocide, crimes against humanity and, at least in part, war crimes are also criminalized in customary international law. Some national prosecutions have taken place, but these are rare and actual State practice does not support the position that States have a general duty to prosecute international crimes. In legal commentaries, it has been suggested that a duty to prosecute or extradite nevertheless exists in customary international law; if correct, the duty would bind States regardless of whether they are parties to the relevant treaty. The claim is sometimes made by reference to a particular crime, but sometimes by reference to all international crimes» [123, p. 59].

We embrace the position that «the applicable scope of crimes under the obligation to extradite or prosecute should include at least two categories, namely, international offences and transnational crimes. The obligation, as a means to end impunity and to ensure that all crimes are punished, should certainly cover international offences and transnational crimes of the most serious nature including war crimes, crimes against humanity, genocide, torture and terrorist crimes. In some cases, certain crimes under domestic law should also be included in the scope of application under this obligation. Indeed, crimes under domestic laws fall primarily under the extradition treaty as applicable targets, but some crimes under domestic law cause significant harm to the State and the public interest of the people, and the degree of harm might be no less than that of international crimes. Some traditional arguments for refusing to extradite have in fact constituted serious impediments to the punishment of the offences mentioned above. Therefore, if the obligation of a State to extradite or prosecute is established against these offences, it will help to ensure that the offenders receive due punishment, thus restoring law and order in the state and upholding justice for the people» [253].

2.4.1. Meaning of the obligation to prosecute

«The role of the prosecution is crucial because actions by States to put perpetrators of certain international crimes to trial by ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law» [214, p. 41].

«Both the treaty-based bodies and those created by the Commission on Human Rights, especially the thematic bodies and the special rapporteurs, have systematically urged States to enforce the rule of «prosecute or extradite. What has always been considered essential in such cases is the fact that investigation and prosecution serve as a deterrent against future violations. For instance, in l99l when the Working Group Forced Disappearance of person of the UN Commission on Human Rights presented a report on its work over the previous ten years, it identified impunity as the principal factor contributing to enforced disappearances» [197, p. 88].

The question «whether and to what extent there exists a duty to prosecute on the part of third states is of supreme legal and practical relevance» [277, p. 63].

«The conventions use various formulations to describe the obligation to prosecute, including to try, to bring before their own courts and to submit the case to its competent authorities for the purpose of prosecution» [262].

«J. Wouters noted that «the international duty to prosecute only applies to the state on whose territory the *ordinary* crime has been committed. However, once the threshold of an international law crime has been crossed, states have an international legal obligation to prosecute not only those crimes committed on their own territory, but also those crimes committed on another state's territory» [180]. The sixth recital of the Rome Statute's Preamble recalls that «it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes» [180]. «Although the Rome Statute does not contain clarification on the scope of the application of such a duty» [36, p. 213].

«As stated by Antonio Cassese, Paola Gaeta and John R.W.D. Jones in their commentary on the Rome Statute, the said recital addresses itself primarily to the State on whose territory international crimes have been committed and to the State of nationality of the alleged offender. However, they add: «At the same time, it is possible that the Statute also provides an impetus for other States to prosecute an alleged offender on the basis of other jurisdictional principles, in particular the universality principle» [180].

«The ICJ applied a factual approach to determining whether the obligation to prosecute is satisfied: starting with the timely preliminary inquiry and ending with the submission of the case to the relevant judicial authorities, who still retain the power to review the case at pre-trial level; a definition incorporating and respecting the different penal procedures of each State. Additionally, proceedings relating to the implementation of the obligation to prosecute should be undertaken without delay, as soon as possible, in particular once the first complaint has been filed against the suspect» [174], [226]. «The timeliness of the prosecution must be such that it does not lead to injustice; hence, necessary actions must be undertaken within a reasonable time limit» [174], [226].

«The ICJ held in the *Belgium v. Senegal* case that a state's failure to adopt the necessary legislation to implement the Torture Convention interferes with that state's obligation to prosecute. The obligation for the state to criminalize torture and to establish its jurisdiction over it must be implemented by the state concerned as soon as it is bound by the convention thereby equipping itself with the necessary legal tools to prosecute this type of offence» [226], [283, p. 8].

According to G. Goodwin-Gill, «the obligation to prosecute would seem to entail the obligation also to conduct a preliminary enquiry into the facts, to co-operate, and to exchange information with other states or international organizations having a recognized interest in the matter or the offender, as well as obligations generally relating to process, impartiality, and so forth» [152, p. 220].

A. Caligiuri pointed out that «contracting states are affected by several factors in the choice of prosecution: existence of appropriate titles of jurisdiction within their criminal legal system (for example, not all states provide for universal jurisdiction); compliance with national procedural rules to conduct criminal proceedings (need for sufficient evidence to undertake proceedings; effects of amnesty laws on proceedings; and need for the presence of the accused in proceedings); and compliance with the customary rules on immunity of state officials from foreign criminal jurisdiction» [86, p. 259].

K. Gallant notes that «*Extradite or prosecute* is a slogan which must be examined carefully. It does not mean that the suspect must be put on trial if not extradited» [183, p. 506]. «Most of the treaties only require that the matter be submitted to national authorities for prosecution» [166], [164], [105]. This means there must be a jurisdictional scheme in the state «allowing for prosecution on the basis of universal jurisdiction. The treaties often place an obligation on states to decide on how to proceed using the same standards as cases of similar severity or gravity. The state will actually try the suspect only if the investigation reveals evidence that would justify bringing the case to trial under its substantive and procedural criminal law for crimes of similar seriousness» [183, p. 506].

Thus, the obligation to prosecute, however, «does not necessarily imply that proceedings will be undertaken, and still less that the alleged offender will be punished» [262]. «The ICJ in *Belgium v. Senegal* held that the obligation ‘to submit the case to the competent authorities’ may or may not result in the institution of proceedings, depending on the evidence available against the suspect» [226]. Thus, «if there is insufficient evidence, the state is not obliged to prosecute the alleged offender; nor, of course, does the obligation to prosecute entail an obligation to punish in the absence of a conviction» [283, p. 9]. «The competent authorities decide whether to initiate proceedings, in the same manner as they would for any alleged offence of a serious nature under the law of the State concerned (paras. 90, 94)» [174].

S. Murphy, Special Rapporteur in his second report on crimes against humanity noted, that «although regularly termed the obligation to extradite or «to prosecute», the obligation imposed by the Convention on the suppression of unlawful seizure of aircraft is to submit the case to prosecution, meaning to submit the matter to prosecutorial authorities who may or may not seek an indictment. If the competent authorities determine that there is insufficient evidence of guilt, then the accused need not be indicted, nor stand trial or face punishment. The *travaux préparatoires* of the Convention indicate that the formula established «the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution» [254], [247].

C. Mitchell emphasized on this occasion, that «the obligation to «prosecute»«generally is not to prosecute, as such, but rather to submit the case to a State's competent authorities for the purpose of prosecution». This nuance appeared first in the Hague Convention and all multilateral conventions (and most regional conventions) subsequent to that treaty retain the same nuance. The distinction was inserted into the Hague Convention as it was considered that an absolute obligation to prosecute a hijacker may be repugnant to those States that wanted to preserve the traditional right or discretion of States, there being concern that there may be exceptional instances where humanitarian reasons or lack of evidence would not justify bringing a prosecution. Thus, although spoken of as an obligation to prosecute, the duty is in reality to submit the case to the relevant prosecutorial authorities, which are then to consider whether or not to prosecute» [204].

It’s important to highlight that «the varying language of the treaties implies that the requirement for prosecution differs among them. There is also a difference in that some treaties involve crimes generally considered matters of universal jurisdiction in customary international law, while others do not» [183, p. 504].

For instance, the International Court of Justice has held that the Convention against Torture «requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect» [226]. This applies «whether or not the case or the actor or the events had any connection with any state party to the treaty at the time of the act. This effectively makes «extradite or prosecute» jurisdiction under the treaty into a requirement that the state exercise primary universal jurisdiction» [183, p. 504].

«There are two reasons for applying the Convention in this way» [183, p. 504]. First, «treaty language requires that as soon as the state of refuge discovers that a torture suspect is in its territory, it must begin a preliminary investigation into the matter» [226]. Second, «torture is a customary international law crime and is among the most reprehended of all crimes» [226]. «One point of the Torture Convention is to ensure that all known suspects have their cases investigated and brought to trial, if the facts justify this under the standards of the state of refuge for other crimes of similar seriousness» [183, p. 504].

It should be noted that «the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance have sentence which provides that, in situations where the State party’s jurisdiction is based solely on the presence of the alleged offender, the standards of evidence required for prosecution and conviction shall be no less stringent than the standards which apply in other States that have jurisdiction (for example, jurisdiction based on territoriality or nationality). This sentence seeks to ensure that alleged offenders are not prosecuted by a third State on the basis of insufficient or inadequate evidence. According to some writers, if the evidence in the third State is insufficient, and the territorial or national State is not able or willing to supply the necessary evidence, the third State should extradite the alleged offender where possible to a jurisdiction where the evidence exists, or should delay proceedings in order to negotiate a solution with the concerned States. A practical difficulty with such an obligation, however, is the assumption that prosecutors and judges in a State party can readily ascertain and apply the standards of evidence required for prosecution and conviction that apply in other States parties having jurisdiction over the matter» [246].

«The Hague Convention for the Suppression of Unlawful Seizure of Aircraft» [105] has language making it clear that the state where the accused is found must prosecute whenever it does not extradite. «[I]f the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft», the provision requiring prosecution applies if there is no extradition» [183, p. 504].

K. Gallant draws attention to that fact, that «there is less general agreement on the customary law status of the crimes in treaties other than the Geneva Conventions and the Torture Convention. Some or all of these treaties might be read to obligate states to prosecute or extradite only after a request for extradition is received. The reason, however, would probably not be because of the similarity or differences of the language of these treaties, which were all written before the ICJ gave its interpretation of the Torture Convention. The real question would likely be whether the parties to the treaties had considered these crimes as so serious that they would create an *erga omnes* obligation to each other, so that any could complain about a failure to prosecute, even if it did not have a special interest in the case involved» [183, p. 505].

G. Werle noted that «the Inter-American Court in *Velázquez Rodriguez case»* [163] had decided that «a state has a legal duty to prevent human rights violations, seriously investigate evidence of such violations, identify those responsible, impose suitable penalties and ensure suitable restitution to the victims. Under this interpretation of human rights instruments, which has since been affirmed by the

European Court of Human Rights and the UN Human Rights Committee, the duty to prosecute follows from the duty of states to guarantee human rights and ensure effective legal protection. An important instrument for guaranteeing human rights is the criminalization of their violation. Therefore, in the interests of effective legal protection and the duty to guarantee human rights, Conventions entail a duty to prosecute on the part of the state of commission, though it is limited *ratione personae* to the state parties» [277, p. 63].

Along with the obligation to prosecute, the obligation to investigate should also be distinguished.

The obligation to investigate according to the ICJ «consists of several elements» [174]. As a general rule, «the obligation to investigate must be interpreted in light of the object and purpose of the applicable treaty, which is to make more effective the fight against impunity. The obligation is intended to corroborate the suspicions regarding the person in question. The starting point is the establishment of the relevant facts, which is an essential stage in the process of the fight against impunity. As soon as the authorities have reason to suspect that a person present in their territory may be responsible for acts subject to the obligation to extradite or prosecute, they must investigate. The preliminary inquiry must be immediately initiated. This point is reached, at the latest, when the first complaint is filed against the person, at which stage the establishment of the facts becomes imperative» [174].

However, «simply questioning the suspect in order to establish his/her identity and inform him/her of the charges cannot be regarded as performance of the obligation to conduct a preliminary inquiry. The inquiry is to be conducted by the authorities who have the task of drawing up a case file and collecting facts and evidence (for example, documents and witness statements relating to the events at issue and to the suspect's possible involvement). These authorities are those of the State where the alleged crime was committed or of any other State where complaints have been filed in relation to the case. In order to fulfill its obligation to conduct a preliminary inquiry, the State in whose territory the suspect is present should seek cooperation of the authorities of the aforementioned States. An inquiry taking place on the basis of universal jurisdiction must be conducted according to the same standards in terms of evidence as when the State has jurisdiction by virtue of a link with the case in question» [174].

It should be noted that «compliance with the obligation to prosecute may be complicated by a number of practical problems. Such problems may arise due to a lack of goodwill on the part of the requested State. Furthermore, the impunity of an offender and the frustration of justice should be viewed as a result of their inability to break with the rule of non-extradition of nationals, on the one hand, and to overcome difficulties inherently involved in prosecuting and punishing offenders for crimes committed abroad, on the other hand. Admittedly, in some instances the requested country may be unwilling or unable, because of legal or other reasons, to prosecute its national whose extradition has been requested by another state. Moreover, even when the requested state institutes criminal proceedings, problems may arise. At the least, the refusal to extradite may strain relations between the requesting and the requested states. Furthermore, the former may believe, and the facts may in some instances support this belief, that the latter will inadequately pursue the prosecution, with the result that the accused will be acquitted or will receive a too lenient sentence» [220, p. 79], [244, p. 151-152].

«For instance, in 1938, the United States Secretary of State Hull complained that «such punishment as has been inflicted upon nationals of other countries in the own lands for offenses committed in the United States has, in general, been much lighter than the offenses committed appeared to warrant, and in many cases no punishment at all has been inflicted and the trials held have resulted in acquittals». Much earlier, it was declared that since a government has not substantial interest in punishing crimes committed in the territory of another state, prosecution and trial in such cases will be conducted in a «careless, indifferent and intermittent manner» [220, p. 79].

«Even where the competent authorities of the requested state have instituted criminal proceedings against the national of that country whose extradition was refused, frequently they cannot to carry them out because to pursue their investigation they need evidence which, obviously, can only be found in the territory of the requesting state where the offence was committed. The latter, however, is either not in a position or unwilling to put such evidence at the disposal of the requested state. Worse still, the problem may not always be satisfactorily corrected through the use of mutual (legal) assistance for it may be precluded on the grounds of *order public*, especially where the state seeking such an assistance exercises its own inherent criminal jurisdiction over an offence. Even to the extent that seeking evidence abroad is legally possible, that operation creates three types of problems: first, bringing witnesses from distant countries imposes a heavy financial burden on both them and the accused, not to mention serious practical difficulties; second, some evidence are not available at all, such as the viewing of the scene of the crime; third, if the evidence were taken abroad the court might have troubles to use them at the trial due to possible procedural restrictions on such evidence. To overcome the latter impediment, the law of evidence would have to be substantially changed, especially in the common law countries» [220, p. 79-80].

According to M. Plachta, «the *judicare* option should be interpreted in functional and not strictly legal (*legalistic*) terms. Consequently, the meaning of this alternative should not be limited to two stages of the criminal process, i.e. prosecution and trial. The requested state should be allowed to fulfill its obligation under the rule *aut dedere aut judicare* by undertaking to enforce the final sentence imposed on the offender whose extradition was requested. This rule should, therefore, be supplemented by a new clause: a*ut dedere aut poenam persequi»* [221, p. 191-193], [220, p. 85].

«International Law Commission in its Final Report on the obligation to extradite or prosecute noted that the preference for prosecution under universal jurisdiction to extradition to a state with a traditional claim to authority is recent. Before World War II, a great deal of scholars favored extradition to the place of commission for crimes considered offenses against all nations and peoples. As a result, the International Law Commission Final Report on the Obligation to Extradite or Prosecute» [176] is somewhat equivocal. «When it speaks of the requirement to prosecute on a universal jurisdiction basis, whether or not there has been a request for extradition, the Commission is rather careful to limit its specific discussion to torture and other crimes which are «covered by peremptory norms (*jus cogens*), such as genocide, crimes against humanity, and serious war crimes» (para. 15). It points out there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict (para. 14)» [183, p. 505-506]. «The ILC was encouraging the creation of a Torture Convention-type extradite- or-prosecute treaty regime for these crimes. It has sent a Draft Convention on Crimes against Humanity» [128] «containing such provisions to the UN General Assembly for consideration» [183, p. 506].

K. Gallant points out that «here is no real answer to the question of whether states have *erga omnes* obligations to each other concerning many other treaties using the Hague Hijacking Convention/Torture Convention-type language, so that they have obligations to prosecute alleged offenders in their territories even without a request for extradition from a state with a special interest in a case. Depending on the nature of the crimes involved, the answer may well vary among treaties with very similar language» [183, p. 506].

Thus, the obligation to prosecute is considered to be one of the mechanisms in international law designed to combat impunity, as well as to prevent and deter further serious violations of international law.

The requirements for states to comply with the obligation to prosecute have evolved over time. As evidenced by the practice, the fulfillment of the obligation to prosecute is conditioned by the performance of a number of actions: to conduct a preliminary inquiry, to submit the case to the relevant judicial authorities for prosecution, to fulfillment of requirements regarding the timeliness of prosecution, to adopt the necessary legislation in order to criminalize certain types of conduct, to implement the relevant criminal jurisdiction, to co-operate and to exchange information with other states or international organizations.

The requirements for the obligation to prosecute vary from treaty to treaty depending in particular on the type of international crime covered by the treaty. There are options when a state's jurisdiction is based solely on the presence of an alleged offender regardless of whether extradition has been requested, or the state should prosecute if extradition has been refused.

Fulfillment of the obligation to prosecute is dependable upon the availability and compliance with national substantive and procedural norms regarding the conduct of criminal proceedings, in particular, regarding the availability of sufficient evidence for the initiation of proceedings, provisions on amnesty or asylum, the need for the presence of the accused in the proceedings, provisions on the immunity of public officials from foreign criminal jurisdiction, etc. In the absence of sufficient evidence, the state is not obliged to prosecute the alleged violator.

The obligation to prosecute based on the universal jurisdiction, whether or not extradition has been requested, is limited to certain crimes that fall within the category of *jus cogens*, such as torture, genocide, crimes against humanity and serious war crimes. There is an acknowledgment of the insufficiency of international conventions similar to the Torture Convention that would encompass the *aut dedere aut judicare* obligation for most crimes against humanity, war crimes other than serious violations, and war crimes which take place in non-international armed conflicts.

2.4.2. Meaning of the obligation to extradite

«Extradition constitutes only one, albeit the most important, aspect of the broader spectrum of mutual legal assistance between states in criminal matters» [136, p. 327]. «The institution of extradition has gone through a long evolutionary path of development - from the times of slave ownership to the current period of development of international law and international relations, although in the modern sense it began to take shape mainly from the 17th century. The relevance of this institute is determined by the need for urgent measures to combat crime, as well as the implementation of a system of treaties between states on the provision of legal assistance in criminal cases. Extradition of persons belongs to those institutions of international law that are on the border of international and domestic law. The institution of extradition contains both international legal norms and norms of national criminal and criminal procedural law. This is what determines its complex character» [13, p. 386], [2, p. 144-151], [48, p. 20-28], [51, p. 208-214].

«A number of interpretations of specific aspects of extradition have led to a number of interpretations of extradition itself. Extradition is traditionally defined in international law as the surrender of an individual suspected, accused or convicted of a crime by the State within whose territory or effective control the individual is found to the State under whose laws the individual is alleged to have committed or have been convicted of a crime» [214, p. 96]. As M. Cherif Bassiouni noted, «extradition is a means by which states enable their criminal justice systems to make sure that the purposes to be served are not frustrated by the ability of putative wrongdoers to flee the jurisdiction and obtain asylum in another state» [179, p. 489]. «Extradition is an important proof that a State is exercising its sovereignty, namely to carry the independent judicial process over its territorial jurisdiction» [153, p. 10].

Obligation to extradite should be regarded in the light of such main aspects:

- the legal basis for extradition,
- grounds for the refusals in extradition,
- ensuring human rights during the extradition process, and
- due process of law in extradition proceedings.

It is worth considering each of these elements further.

«The formation of the legal basis for extradition, on the one hand, contributed to a significant deepening of cooperation between states in matters of stopping crimes that encroach on the international and national legal order, ensuring the inevitability of responsibility and punishment of criminals, and on the other hand, it ensured the formation of agreed rules and principles regulating extradition (specialization, double criminality, etc.) and which guarantee the rights of the individual in connection with extradition» [4, p. 136].

«The legal basis of extradition, which regulates providing legal assistance between states, includes international and national legislation, namely, international multilateral and bilateral extradition treaties» [137], «international multilateral and bilateral agreements on mutual legal assistance in criminal matters» [138], «international agreements on combating certain types of crimes», [102], [273], [104], [58, p. 145], [5, p. 132], [53, p. 131]. In the absence of a treaty, most states do not consider extradition to be a mandatory obligation. However, even if there is a treaty between the requesting and requested state, the requested state has a certain degree of discretion in this matter, since it uses the right to refuse extradition if there are appropriate grounds. It should be also noted that decisions of the international and regional courts and national judicial bodies play an essential role in solving extradition issues.

Reflecting on the legal nature of extradition, I. Shearer noted that «the fathers of international law did not dispute the efficacy of the practice of extradition but differed as to whether a legal or merely a moral obligation to surrender criminals existed. H. Grotius took the former view and held that the State of refuge should either punish the criminal itself or hand him back to the State seeking his return; according to H. Grotius, therefore, the strict legal basis was not so much a duty to deliver up the fugitive criminal as a disjunctive duty to punish, either by prosecuting in the asylum State or by surrendering him to be tried in the State where the crime was committed. E. Vattel appeared to consider extradition a clear legal duty, at least in the case of serious crimes and between states on terms of amity. These views were supported broadly by J. Heineccius, J. Burlamaqui, T. Rutherford, P. Schmelzing and Chancellor Kent» [249, p. 23-24], [28, 176].

«On the other hand, respectable proponents of the opposing viewpoint were not lacking. Samuel vonPufendorf regarded extradition as a matter of imperfect obligation only, which was required to be confirmed and regulated by special compact in order to secure the force of international law. In this view he was joined by Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermaier and Heffter» [249, p. 24]. According to I. Shearer, «the practice of States has overhelmingly reflected the latter point of view. The general practice of States confirms the observation that extradition is not looked upon as an absolute international duty, and that if a State wishes to ensure that it secures the return of its own criminals it must enter into treaties with other States» [249, p. 25].

«The Supreme Court of the United States definitely laid down in 1840 that no obligation to extradite existed apart from that imposed by treaty. The same attitude has been taken by the British courts. In 1815 the law officers advised that without statutory warrant no person might be surrendered to a foreign State. Since that time British practice has fairly consistently maintained that no power to extradite existed apart from statute at all events the Extradition. The practice of the civil law countries has demonstrated a greater willingness to grant extradition in the absence of treaties but in a few instances has the view been espoused that extradition in such circumstances was based on anything more than mere politeness» [249, p. 24-26].

«In the Lockerbie Case (1992) eleven judges, both concurring and dissenting, supported the proposition that as a matter of general or customary international law, every state has the sovereign right *not* to extradite» [152, p. 212].

For instance, «the conventions that require compliance with the 'Hague formula', although favouring the extradition process» [105], never impose an obligation to extradite. «An obligation to extradite can only arise if the two states involved are bound by an extradition treaty – recalled by the Convention – imposing extradition. Only in this case does the requesting state have the right to be granted the extradition, in accordance with the conditions set by the invoked extradition treaty. However, it must be stressed that the obligation to extradite does not arise because of the existence of the *aut dedere aut judicare* clause, but is a part of another treaty regime to which the cited convention refers. In such a circumstance, the obligation to extradite imposed by the extradition treaty does not find a further guarantee for its implementation in the convention that recalls it. Indeed, the requested state remains free to opt for prosecution» [86, p. 250].

Likewise, general international law contains no limitations on the State's freedom to extradite, except for «those fundamental human rights that can be considered as part of *jus cogens*. Whether, beyond that bar, extradition is admissible in the absence of a treaty is decided solely under domestic law. While the common law countries are prevented from extraditing in the absence of a treaty, most civil law countries do grant extradition without treaty on the basis of reciprocity and according to the rules of their national extradition acts» [136, p. 329].

«The conventions differ in the mechanisms they establish to provide a legal basis for extradition of the relevant offences. A number of conventions establish a system by which the relevant offence shall be deemed to be included as an extraditable offence in any existing extradition treaty between states parties, and states undertake to include the offence as an extraditable offence in every future extradition treaty to be concluded among them» [262]. «They also provide that states parties that make extradition conditional on the existence of a treaty may consider the relevant convention as the legal basis of extradition and states parties that do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves. It follows that these conventions do not contain an obligation to extradite, but they operate a *renvoi* to extradition treaties, which would provide the legal basis for extradition, but may also provide by themselves, in certain circumstances, such legal basis» [262], [283, p. 10].

The ILC found that «various conventions differed regarding the *obligation* to extradite and the *option* to extradite. Moreover, the common Articles 49, 50, 129 and 146 of the 1949 Geneva conventions clearly illustrate the obligation (each state party shall bring persons − regardless of their nationality − alleged to have committed, or have ordered to be committed, grave breaches to those conventions, regardless of their nationality, before its own courts) and the option (may also, if it prefers hand such persons over for trial to another member state concerned). The ILC final report emphasized that the problems caused by the fact that the *option* between prosecuting or extraditing not carrying the same weight, needed to be clarified as state responsibility could become an issue. This was because all member states to a convention have a legal interest in invoking the international responsibility of another member state for being in breach of its obligation to extradite or prosecute» [76, p. 209].

Consider, for example, obligation to extradite individuals suspected of committing crimes against humanity. There is some uncertainty regarding the existence under international law of a general obligation to extradite individuals suspected of committing crimes against humanity. «The 1968 Convention on the non-applicability of statutory limitations calls upon States parties to take steps with a view to making possible extradition for the crime without expressly providing for an obligation to extradite» [201, p. 92]. Article III of the Convention states: «The States Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons referred to in article II of this Convention» [109].

«The International Conference on the Great Lakes Region Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes, and Crimes Against Humanity and all forms of Discrimination of 29 November 2006» [222] provides for the outline of a regional regime of extradition in relation to international crimes. Article 14 (1) *Legal Basis for Extradition* states: «Crimes within the field of application of this Protocol shall be extraditable. Member States shall include these crimes in any extradition treaty applicable to them» [109].

«Beyond these instruments, no international treaty specifically addresses the question of extradition in relation to crimes against humanity. Academic literature is conflicting on the question of the customary status of an obligation to extradite individuals suspected of crimes against humanity» [201, p. 92].

Thus, customary international law still does not contain a general obligation to extradite a person who is suspected of committing crimes against humanity. A state's failure to extradite such a person, however, may be interpreted as failure of that state to fulfill its obligation to punish crimes against humanity.

«The framework of international co-operation in the suppression of crime consists very largely of binding international commitments, whether of a bilateral or a multilateral nature. The viability of these instruments is of the utmost importance in extradition law and practice. Just as divergent rules and confusing procedures resulting from such a large number of instruments have prompted a number of international bodies at various times to canvass the possibility of concluding a single convention or a model code of extradition, so too the need for a common obligation to give extradition would be well served by a single instrument having world-wide application. All such attempts, however, have so far met with no success» [249, p. 23].

«Most of the conventions specify that extradition is subject to the conditions provided by the law of the requested state, which means that the requested state has the right to refuse extradition of an individual on the basis of the provisions of its domestic legislation» [256, p. 11]. «The legal assistance is not provided if its provision may harm the sovereignty or security of the state or contradicts the basic principles of its legislation» [29, p. 118]. «The states therefore retain certain discretion in the extradition process» [256, p. 11].

The grounds for refusal of an extradition request aimed at «justifying the decision in the requested state include, among others, the following: the double criminality rule; rule of speciality; *non bis in idem* (or prohibition of *double jeopardy)*; *aut dedere aut judicare* clause, non-extradition of nationals; protection against political discrimination; amnesty or pardon to the requested person; the application of life imprisonment» [41, p. 142-154].

The grounds for refusal of an extradition request «ensuring compliance with due process of extradition and international legal guarantees of human rights include the following: if extradited persons face death penalty, ensuring their right to life; protection from torture, cruel, inhuman or degrading treatment and punishment; observance of guarantees of the rights and freedoms of persons during arrest and detention for extradition» [56, p. 50-55], [57, p. 40-46], [30, p. 15].

«Issues of guaranteeing human rights in criminal proceedings deserve special attention» [15, p. 12]. «International standards of the functioning of criminal justice, aimed at achieving the dual goal of the criminal process: punishment of the guilty and protection of human rights. At the same time, human rights standards dominate the overall set of procedural standards for the functioning of justice» [32, p. 3]. International human rights standards must be rigorously enforced to combat impunity, and the accountability process is not compromised by whether a person has committed the alleged crime or not. As a result of implementing the *aut dedere aut judicare principle*, human rights guaranteed at the international and national levels should not be violated.

«The principle of respect for fundamental human rights and freedoms as a basic principle of international law is gaining more and more importance in connection with the general recognition that one of the main functions of the state is to ensure compliance with human rights, including as the foundation of international relations» [25, p. 613].Thus, the principle *aut dedere aut judicare*, on the one hand, contributes to the struggle of the international community against international crime, on the other hand, serves humanitarian purposes to ensure fundamental human rights.

«The right to due process of law in the system of international legal protection of human rights during extradition can be defined as the principle according to which a person involved in the extradition process has the right to full compliance with all established international legal standards of human rights» [44, p. 186]. «To protect the rights of a person subject to extradition, it is necessary to ensure the legality of the application of detention and arrest; compliance with the terms of detention and keeping a person in custody; the possibility to appeal against unjustified detention, detention, detention periods; compensation for damage caused by illegal arrest, detention. The habeas corpus procedure in the institution of extradition gives anyone deprived of liberty as a result of arrest or detention for the purpose of extradition the right to initiate proceedings in which the court without delay determines the legality of the detention and decides on release if the detention is unlawful» [44, p. 186].

«The right of a person involved in the extradition procedure to «a fair trial» is a complex set of principles and rules that are implemented by ensuring those rights and obligations that are part of its content and are provided for by international legal acts and norms of domestic legislation. One of the effective tools for the protection of human rights in the institution of extradition is the possibility of refusing extradition, if the person was convicted *in absentia* in the requesting state, did not have sufficient opportunity to provide defense and will not have the opportunity to conduct a retrial in his presence, as this is contrary to concepts of a fair trial» [44, p. 187], [52, p. 287].

«Some conventions include specific provisions relating to the extradition process. For example, the Geneva Conventions specify that the option of extradition to another state is subject to the condition that that state 'has made out a prima facie case» [94], [95], [96], [97]. Many conventions specify that the offences shall be treated, for the purpose of extradition between states parties, as if they had been committed not only in the place in which they occurred but also in the territories of the states required to establish their jurisdiction in accordance with such conventions» [262]. The Geneva Conventions regime and the 1996 Draft Code recommend that particular consideration should be given to the request of the state in whose territory the alleged offence has occurred» [130], [283, p. 11].

«The fact that states have reserved the right not to extradite in certain circumstances is a major obstacle to any construction of an obligation to extradite.Since some states do not permit extradition of their nationals, or of persons suspected of political crimes, the Torture Convention includes the obligation to prosecute as a fallback option» [79, p.16]. «Moreover, certain states may not allow for the extradition of persons in the absence of an extradition treaty.

Also Article 8(2) of the Torture Convention may speak against such an obligation, as it provides that '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 consider this Convention as the legal basis for extradition in respect of such offences (emphasis added).' It also provides that Extradition shall be subject to the other conditions provided by the law of the requested State. In this light, it can be concluded that Article 8 'did not make extradition itself mandatory or automatic» [206, p. 511].

2.5. The relationship between the obligation to prosecute and the obligation to extradite

One of the most sensitive issues to be addressed in determining the function of the *aut dedere aut judicare* clause is «to ascertain the amount of freedom that a contracting state has in implementing the two options: does it have full freedom to choose or is the choice of the state influenced to prioritize one of the options?» [86, p. 246], [192, p. 160-161].

«Conventions that contain an *aut dedere aut judicare* clause, although they require contracting states to contribute to the fight against impunity, do not always provide a clear legal framework within which states must operate» [86, p. 259]. «Provisions containing the obligation to extradite or prosecute in multilateral conventions vary considerably in their formulation, content and scope. This is particularly so in terms of the conditions imposed on States with respect to extradition and prosecution and the relationship between these two courses of action» [176]. Thus, «the relationship between the obligation to prosecute and the obligation to extradite, and thus the contents and meaning of the *aut dedere aut judicare principle*, differs between treaties» [206, p. 504].

It should be noted that «the difference between the conventions is based on the specificity of the crimes and the appropriateness of the forum to prosecute and try alleged offenders. When a crime is of concern to the international community as a whole, the custodial state appears to have the freedom to choose between extradition and prosecution. Conversely, where the interests to be protected do not exceed those of the state, it seems reasonable to give priority to extradition to the more interested state rather than to prosecution in the custodial state» [256, p.7].

M. Cherif Bassiouni drew attention to the fact that «there is also much question as to whether the duty to prosecute or extradite is in the disjunctive or in the conjunctive, which of the two has priority over the other and under what circumstances, and, finally, whether implicit conditions of effectiveness and fairness exist with respect to the duty to prosecute and with respect to extradition leading to prosecution» [81, p. 66]. According to G. Gilbert, regardless, of the precise scope of the duty, a much more important question is to determine how to apply the duty. Is it co-existent or disjunctive? If it is disjunctive, then the primary response must be to extradite and, where that is not carried out, only then would the supplementary duty to prosecute arise. As Gilbert noted that «disjunctive approach would seem to be the approach envisaged in relation to the United Nations multilateral conventions. There is still a preference for the crime to be dealt with where it occurred» [151, p. 294].

2.5.1. Priority of extradition

«In a number of conventions, the '*Primo dedere secundo judicare'* model has been fixed» [86, p. 252]. «This construction of the relationship between the obligation to prosecute and the obligation to extradite is to give priority to extradition. According to this variant, prosecution is only an obligation if an extradition request has previously been denied» [256, p. 1111], [206, p. 505], [283, p. 7]. «This model requires that two obligations be addressed to the contracting states, although such obligations are not alternatives» [86, p. 252]. «Treaties that fall in this category usually apply to ordinary crimes with an international nexus» [256, p. 1111], [206, p. 505], [283, p. 7].

In general, «treaties of this category are modelled on the basis of the

International Convention for the Suppression of Counterfeiting Currency of 1929» [168]. Article 9 of the above-mentioned Convention provides: «Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country. The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence» [168].

«Treaties with similar provisions include the following conventions: Convention for the Suppression of the Illicit Traffic in Dangerous Drugs» (1936) [101], «Convention for the Prevention and Punishment of Terrorism (1937)» [100], «Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1950» [102], «Single Convention on Narcotic Drugs (1961)» [250], «Convention on Psychotropic Substances (1971)» [108], [206, p. 505] and «Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the event of armed conflict (1999)» [245].

«The '*Primo dedere secundo judicare'* model has received broad consent, particularly in the context of regional organizations, where its success seems to be related to common legal traditions between the member states» [86, p. 253]. For example, this model is reflected in the following conventions adopted within the Council of Europe: «European Convention on the Suppression of Terrorism (1977)» [139]; «Convention on Cybercrime (2001)» [107].

«The following conventions have been adopted on the African continent, which contain an *aut dedere aut judicare* clause and strengthen the priority of extradition: OAU Convention for the Elimination of Mercenarism in Africa (1977)» [209]; «OAU Convention on the Prevention and Combating of Terrorism (1999)» [210]; «SADC Protocol Against Corruption (2001)» [242]; «AU Convention on Preventing and Combating Corruption (2003)» [72].

«The model under consideration is characterized by two aspects. First, it does not oblige states to create jurisdiction over persons committing these crimes. Second, even if national law of the custodial state has established jurisdiction, the obligation to initiate proceedings is only triggered by a request for extradition, and the custodial state cannot extradite the person 'for some reason which has no connection with the offence'. Although this model does recognize to some extent a shared responsibility, − in that both states may prosecute − the entitlements are not of equal weight. Extradition, not prosecution, is the primary instrument through which objectives of the treaties are to be achieved» [206, p. 505].

A. Caligiuri singles out the following characteristic features of such approach to the relationship between the two options in *aut dedere aut judicare* clause: «the facilitation of extradition procedures, narrowing the grounds on which extradition may be refused. For example, some texts provide that contracting states should not consider treaty crimes as political offences; a state is not obliged to prosecute an alleged offender who is located in its territory if it has not received a request for extradition. The obligation to prosecute the person in custody would arise from the required state only if the latter refuses extradition» [86, p. 253].

«In the *Martínez de Perón* case, the National Court of Spain (Audiencia Nacional), while rejecting an extradition request made by Argentina against an alleged perpetrator of imprisonment, enforced disappearances and torture in the period between 1 July 1974 and 24 March 1976, stated the if an extradition is not granted, Spain was obliged to submit the case to its own competent authorities for the purpose of prosecution» [263, p. 28].

The formulation of this model is supported by the *preparatory travaux* of the conventions, according to which the state *loci delicti commissi* is primarily concerned with bringing the offender to justice, whereas the state in which the alleged offender has found refuge has a secondary interest in prosecuting.As a practical matter, the drafters of these conventions appreciated the fact that state *loci delicti commissi* could conduct investigations and collect evidence more easily, ensuring a more effective fight against impunity. Thus, «these conventions create a solidarity system that does not rely on the idea that treaty crime in itself poses a threat to peaceful coexistence of the contracting states.Rather, it is a phenomenon in which states decide to cooperate closely in criminal matters in order to achieve greater integration between their legal systems as members of the same regional organization» [86, p. 253].

It should be noted that conventions that give priority to extradition, «also provide that prosecution arises only if the alleged offender has the nationality of the requested state or if this state is competent to try the alleged offender. The mechanism for the punishment of offenders is based on the idea that the state in whose territory the crime was committed will request extradition of the offender who has fled to another country and that extradition would, in principle, be granted. A state, however, may be unable to extradite in some cases, for example, if the offender is its own national, and the obligation to prosecute is thus provided as an alternative» [262], [283, p. 7].

Thus, in the model that favors extradition over prosecution, a person may only be prosecuted if the state refuses to extradite the individual. This construction confirms the position that the state should first decide whether extradition is possible.

2.5.2. Priority of prosecution

In this model the obligation to prosecute has priority, and the obligation to extradite can be regarded only as an option.

A number of international treaties impose obligations to prosecute whenever an alleged offender is on the territory of a state: «the obligation arises as soon as that presence is discovered, regardless of any request for extradition. It is only when such a request is made that the alternative course of action – extradition – becomes available to the state. The emphasis is on the prosecution of the alleged offender: extradition is available to facilitate the prosecution in the most appropriate forum.

Thus, the Geneva Conventions (and Additional Protocol I) require that states must prosecute alleged offenders, regardless of their nationality, but may also, if they prefer, hand them over for trial to another state party concerned» [94], [95], [96], [97].

Thus, «the four Geneva Conventions of 1949» [94], [95], [96], [97] provide the following.

«Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting party has made out a prima facie case. A. Nollkaemper noted that this type of provision has not been replicated in later treaties» [262], [206, p. 507].

«The Article 9 of the 1996 Draft Code does not give priority to either course of action but gives the custodial state discretion to decide whether to transfer the individual to another jurisdiction for trial in response to a request received for extradition or to try the alleged offender in its national courts» [130]. «The obligation to prosecute, however, arises independently from any request for extradition» [283, p. 6].

«This model contains a clearer priority for prosecution compared to extradition. States may decide not to prosecute, and extradite persons to another state. But there is no obligation to extradite, even if a state for any reason would not prosecute. There thus is no question of an alternative obligation − there is only an obligation to prosecute with an option to release oneself from the obligation by extradition. This construction appears to be justified by the idea that, given the nature of the prohibited conduct with respect to which the obligation to extradite or prosecute is imposed, all states have an equal interest in prosecution. It is therefore said that the formula *prosequi vel dedere* seems to be more suitable than *aut dedere aut judicare*: this ‘reflects that states bound by this obligation have a free choice between prosecution and extradition, while emphasis is put on prosecution. Extradition appears only as a means at the disposal of the custodial state for complying with its obligation to prosecute» [256, p. 1113-1114], [206, p. 507].

M. Zgonec-Rožej and J. Foakes draw attention to the fact that «the terms of the provisions embodying the obligation to extradite or prosecute modelled on the so-called 'Hague formula', which was developed in the Convention for the Suppression of Unlawful Seizure of Aircraft (the 1970 Hague Convention), are less clear. This formula combines the options of extradition and prosecution by providing that the state party in the territory of which the alleged offender is found is obliged to submit the case to its competent authorities for the purpose of prosecution if it does not extradite the alleged offender» [105]. «This formula requires states parties to assert jurisdiction over the prohibited conduct even in the absence of any link between the state party and such conduct (universal jurisdiction). The ambiguous clause 'if it does not extradite him' raises the question whether the obligation to prosecute arises once a suspect is found or only once the request for extradition is submitted and not granted» [283, p. 6].

«This question has been considered by the ICJ in the dispute between Belgium and Senegal in the context of the Torture Convention, which incorporates the Hague formula» [283, p. 6]. «In 2009, Belgium took Senegal to the ICJ, alleging that it had failed to comply with its obligations under the UN Convention on Torture to prosecute H. Habré for acts including crimes of torture and crimes against humanity or to extradite him to Belgium to face trial there. The ICJ held that under the Torture Convention the obligation to prosecute arises irrespective of the existence of a prior request for the extradition of the suspect. The ICJ explained: If the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the

Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State» [226, p .456].

A. Caligiuri, referring to the above interpretation of the ICJ in *Belgium* v. *Senegal* case, noted that «for a long time, there were some arguments that the two options had equal weight, which would oblige the forum state to comply with two specific obligations defined at treaty level» [86, p. 249]. However, «although *judicare* and *dedere* are designed as two alternatives which both support the purpose of the conventions, which is the fight against impunity, as is apparent from their *travaux preparatoires*, the state in whose territory the alleged offender is present has a unique obligation, the obligation to prosecute» [226, p. 456].

K. Gallant pointed out that «it is not clear how many true cases of *aut judicare* jurisdiction are prosecuted pursuant to treaty obligations by states which have no connection to the suspected offender, victim, or crime other than the presence of the suspected offender on the territory of the state, and the inability or unwillingness to extradite to a state with a connection that would support a traditional ground of jurisdiction. The International Committee of the Red Cross study of Customary International Humanitarian Law contains a number of cases in which war crimes and crimes against humanity have been prosecuted by states other than the territorial state or the state of defendant's nationality. In most of these cases, it is not clear from the reports if extradition was ever offered to or requested by the states with territorial or nationality jurisdiction. Many of the cases are post-World War II cases. At the time of the acts during World War II (at the time of the trials), there were no relevant treaties with extradite or prosecute provisions» [183, p. 514].

«One case of true *aut judicare* jurisdiction was that of Mohammed Ali Hamadei, convicted in a West German court of murder for participating in hijacking a United States-registered TWA airliner and taking it to Lebanon, where the hijackers killed a US military member on board the plane» [182, p. 515]. «M. Hamadei was arrested in West Germany, a state with no other relevant connection to the case. West Germany refused to extradite him to the United States and chose to prosecute him pursuant to its domestic law and its obligation under the *aut dedere aut judicare* provision of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and then-effective United States-West German Extradition Treaty» [271]. «The United States, West Germany, and Lebanon were all parties to the Hague Convention when the killing occurred. M. Hamadei was convicted and served nearly nineteen years of a life sentence. He was paroled at the end of 2005, over the objection of the United States. In this case, at least, no greater sentence was given than could have been given in the United States, though German courts do not always follow this rule in subsidiary universal jurisdiction cases» [183, p. 115].

«If the content of the *aut dedere aut judicare* clause is examined in view of the system of the international responsibility of states, according to the International Court of Justice, the forum state is held internationally liable for the violation of the clause only because it has not complied with the obligation of prosecution. In other words, the clause does not express two alternative obligations, but two alternative options. In this system, the option to extradite appears as a cause of exemption from international responsibility for failure to implement the international obligation to prosecute» [86, p. 249].

2.5.3. Alternative obligations

According to the next approach, «on the one hand, states are under certain conditions obliged to establish jurisdiction. On the other hand, prosecution and extradition are equal obligations. The obligation of a custodial state is not contingent on a prior request for extradition» [206, p. 505], [262].

There is a pure and simple '*aut dedere aut judicare* model', which states that the state of the *forum deprehensionis* has complete freedom of choice to meet one of the two options: prosecute or extradite the alleged offender found in its territory. The state fulfils its convention commitments if it acts in one way or another, without elaborating the reasons that prompted it to make a particular choice. «The state, by reason of the absolute freedom it has in implementing one of the two options, is supposed to be oriented to select the solution most compatible with its national legal system. However, this model only works on the assumption that bilateral relations exist between states. In particular, if the forum state does not receive any request for extradition, it cannot make a choice between the two options. In this hypothesis that state is a subject to the obligation to *judicare,* which will be exercised on the basis of the jurisdictional criteria listed in or allowed by the convention of reference. This obligation to prosecute arises as soon as the presence of the alleged offender in the territory of the state concerned is ascertained. The first formulation of this model has occurred with The Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970)» [105], [86, p. 247].

«This clause – known as *the Hague formula* – is unanimously acknowledged as the model for most contemporary multilateral conventions for the suppression of specific offences such as terrorist offences (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)» [103, p. 974], «Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973)» [111, p. 167], «International Convention against the Taking of Hostages (1979)» [165, p. 206], «Convention on the Physical Protection of Nuclear Material (1979)» [110], «SAARC Regional Convention on Suppression of Terrorism (1987)» [240], «Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)» [104], «Convention on the Safety of United Nations and Associated Personnel (1994)» [113], «International Convention for the Suppression of Terrorist Bombings (1997)» [169], «International Convention for the Suppression of the Financing of Terrorism (1999)» [170], «International Convention for the Suppression of Acts of Nuclear Terrorism (2005)» [167], «ASEAN Convention on Counter-Terrorism (2007)» [71], «Convention for the Suppression of Unlawful Acts against the International Civil Aviation (2010))»

[114]; «torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)» [98], «Inter-American Convention to Prevent and Punish Torture (1985) [161]; *forced disappearance of persons* (Inter-American Convention on Forced Disappearance of Persons (1994)» [160], and «mercenarism (International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989)» [164]. «The wording of the provision suggests a clear alternative for the state in whose territory the alleged offender is present» [86, p. 248].

«Under such treaties, states are to take measures to establish its jurisdiction over the offence in case of a link of territoriality or nationality. A State in which an alleged offender is present likewise shall establish jurisdiction over the offence if it does not extradite to any of the states with a link based on territoriality or nationality» [262]. «If a custodial state does not extradite, it has to act itself and submit the case to its competent authorities for the purpose of prosecution» [206, p. 506].

«The explanation of the difference with the approach of the priority of extradition lies in the different nature of the crimes covered by these treaties» [256, p. 1111, 1112], [206, p. 506] which are supposed to be more serious crimes. «The significance attached to actual prosecution means that, on the one hand, states have an affirmative obligation to establish jurisdiction» [70] and that, «on the other hand, the prosecution should not be made dependent on a decision of a state to request extradition» [135, p. 626]. «In this respect, it can be said that this construction provides for alternative obligations to extradite or prosecute» [256, p. 1089, 1111], [206, p. 506].

The Commission recommended «that States consider the Hague formula in undertaking to close any gaps in the existing conventional regime» [247]. «Special Rapporteur Z. Galicki in his preliminary report» [173] «raised the possibility to fulfill both parts of the obligation to extradite or prosecute, for example, by prosecuting, trying and sentencing an offender and then extraditing or surrendering the offender to another State for the purpose of enforcing the judgment» [174].

A. Nollkaemper noted that «it is somewhat unclear whether treaties in this category indeed reject a primary entitlement of the territorial state, however. M. Cherif Bassiouni and Wise infer from the *travaux preparatoires* of the 1970 Hague Convention that the obligation to prosecute was meant as a residual obligation, that was necessary because an absolute obligation to extradite could not be realized in this Convention, since that would require the extradition of nationals and also foreclose the possibility of political asylum in cases in which it might be thought appropriate. The obligation to prosecute when extradition is refused was a fall-back option» [79, p. 16], [206, p. 506]. «Arguably, outside these narrow situations, the state requesting extradition would retain a primary position. The text of the Torture Convention is not clear on this point and appears to support alternative obligations. A. Nollkaemper noted that the open question is whether the custodial state is obliged to extradite if it cannot itself prosecute» [206, p. 506-507].

«According to A. Nollkaemper, even if the custodial state's obligation to prosecute has priority, this does not say anything on the legal obligations of that state if it does not prosecute» [206, p. 510].

«An affirmative answer to the question whether a custodial state is or should be obligated to extradite if it does not itself prosecute can be reached when we read the relationship between the two alternatives in the light of the aim of the Convention: to ensure that crimes of torture do not go unpunished. The Committee against Torture found that The alternative [of extradition] available to the State party under article 7 of the Convention exists only when a request for extradition has been made and puts the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished» [91], [206, p. 510].

«A. Boulesbaa argues that 'the fact that no prosecution ensues does not automatically mean that a duty to extradite arises, provided the State has made a bona fide submission of the case to the authorities who have, in the end, decided not to prosecute» [61, p. 207]. «One may infer that when no such bone fide submission is made, a duty to extradite may arise» [91], [206, p. 510].

From the point of view of G. Gilbert, «if trial in the requested State is to be a full alternative to extradition, then, on present law, a new United Nations multilateral convention will have to provide for universal jurisdiction expressly – a co-existent analysis of the duty to extradite or prosecute does not exist in practice, so international legislation is needed. Terrorism per se is not a universal crime as yet, the multilateral and regional conventions merely outlaw aspects of terrorism. Otherwise, there would be no need to include a universal jurisdiction clause in each new convention; those clauses are not declaratory of some principle of customary international law that holds that politically or ideologically motivated offenders are subject to prosecution in whichever State they are apprehended. However, on a purely *quid pro quo* basis, if extradition is to be refused to the State of dispute in a case involving a politically or ideologically motivated offender, then trial ought to take place in the requested State. To the extent that the fugitive has 'chosen' the requested State, he has voluntarily submitted himself to its jurisdiction, rather than that of the State of the dispute» [151, p. 296]. «Without such a convention, which would have to receive wide international support, there can be no progress beyond what already exists; that is, the possibility of trial in the requested State only as a last resort in a limited number of specified cases. To go beyond that minimal understanding of *aut dedere, aut judicare*, there would need to be a new, widely accepted convention, concluded under the auspices of the United Nations» [151, p. 297-298].

It can be concluded that as part of the fight against fugitives, extradition remains a common tool. At the same time, the obligation to prosecute those who are refused extradition increases the effectiveness of international law in combating crime. The model of alternative obligations is enshrines at the 1970 Hague Convention for the suppression of Unlawful Seizure of Aircraft and has been used in a number of treaties.

2.6. Option of surrender to international criminal tribunal or a hybrid tribunal («third alternative»)

«The International Law Commission, analyzing various aspects of the obligation to extradite or prosecute (*aut dedere aut judicare*), presented the concept of the «third option» («triple alternative»), considering a possibility of parallel jurisdictional competence to be exercised not only by interested States, but also by international criminal courts» [232], [173, p. 315], [115] or «a competent court whose jurisdiction the State concerned has recognized» [172], [232].

This *aut dedere aut judicare* model allows States Parties to transfer an alleged offender to a competent international (hybrid) criminal court or tribunal (without resorting to extradition or prosecution). Such a scenario of interaction between the state on the territory of which the alleged offender is located and the relevant body of international criminal justice will ensure the achievement of the main function of the principle of *aut dedere aut judicare* - the fight against impunity for committed international crimes. However, the above model regarding the *aut dedere aut judicare* obligation raises a number of questions regarding its practical application.

«The idea of satisfying the State party’s obligation by surrendering the alleged offender to an international court or tribunal (sometimes referred to as a «third alternative» or as part of the «triple alternative») has arisen in conjunction with the establishment of the ICC and other international and special courts and tribunals» [246].

«Although the world vowed after the Second World War never again to allow atrocities to occur, they continue to be committed in many places around the world and domestic prosecutions are far apart. Indeed, the international criminal jurisdictions are an answer to the impunity that generally exists domestically» [123, p. 54]. According to M. Buromenskiy, «international criminal law jurisdiction was addedto national and extraterritorial jurisdiction because they did not fully ensure the tasks of combating international organized crime» [54, p. 450].

As Guy S. Goodwin-Gill pointed out, «prosecution of extraterritorial offences may pose both practical and political difficulties. In such circumstances, the custodial state may be able to satisfy its obligations by resort to an internationally acceptable alternative, such as surrender of the person concerned to the jurisdiction of a competent international tribunal» [152, p. 222].

«The phrase «international criminal tribunal» used in such a formulation is intended to encompass not only the ICC, but also *ad hoc* international criminal tribunals and special courts or tribunals that combine international and national law. The phrase «whose jurisdiction it has recognized» would appear to be unnecessary, although it implicitly acknowledges that not all States have accepted the jurisdiction of the same international criminal tribunals and therefore that the capacity to surrender to such tribunals will vary by State» [246].

«One of the earliest examples of such «third choice» is in the Convention for the Creation of an International Criminal Court (1937)» [99]. «The Court was intended to be established for the trial of persons accused of an offence dealt with in the Convention for the Prevention and Punishment of Terrorism.In accordance with the provisions of Article 2 of the first Convention, the persons accused could be prosecuted either by a State before its own courts, or extradited to the State entitled to demand extradition, or committed for trial to the ICC» [232], [275, p. 316]. Unfortunately, «the two conventions were never ratified, although their conclusion was hailed as a significant step‘*ouvrant des voies nouvelles au droit punal international*» [86, p. 254]. «In accordance with the Statute of the ICC of 1998, the possibility of choosing between two alternatives is provided in relation to the person who committed the offense. The Statute gives a choice between exercising jurisdiction over an offender by the State itself or having him surrendered to the jurisdiction of the ICC» [232], [275, p. 316].

«The triple option was expressly included in the 1996 Draft code of crimes against the peace and security of mankind, adopted by the ILC, with respect to other crimes under international law. The Draft Code sets out the *aut dedere aut judicare* obligation in its Article 9, as follows: «Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual» [130], [178, p. 10]. «An explanation of a third alternative is provided in the ILC's commentary to that article. In that case, a state would fulfill its obligations under international law either by extraditing the alleged offender who is found in its territory to another state, surrendering him or her to an international criminal court or prosecuting that person before its own courts» [178, p. 10].

«The 2006 International Convention for the Protection of All Persons from Enforced Disappearance» [166] explicitly states for three alternatives for states [178, p. 10]. Article 11 reads as follows:

«The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution» [166].

«The model with a 'third option' is accepted by the African Charter on Democracy, Elections and Governance of 2007» [59]. «In the case of unconstitutional changes of government, the Charter establishes, among other things, a system of sanctions against individuals responsible for the commission of such acts (Article 25). In particular, the Charter provides a legal framework that allows to determine individual criminal responsibility. In fact, it is stated that Contracting States 'shall bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition' (Article 25, para. 9), but also that '[p]erpetrators of unconstitutional change of government may … be tried before the competent court of the Union' (Article 25, para. 5)» [86, p. 255-256].

«The Working Group on the Obligation to Extradite or Prosecute in its 2013 report noted, that with the establishment of the International Criminal Court and various *ad hoc* international criminal tribunals, there is now the possibility that a State faced with an obligation to extradite or prosecute an accused person might have recourse to a third alternative – that of surrendering the suspect to a competent international criminal tribunal» [174], [124].

«In dissenting opinion in *Belgium v. Senegal*, Judge Xue opines» [226] «that had Senegal surrendered the alleged offender to an international tribunal constituted by the African Union to try him, they would not have breached their obligation to prosecute under article 7 of the Convention against Torture, because such a tribunal would have been created to fulfill the purpose of the Convention, and this is not prohibited by the Convention itself or by State practice. Of course, if «a different intention appears from the treaty or is otherwise established» so as not to permit the surrender of an alleged offender to an international criminal tribunal, such surrender would not discharge the obligation of the States parties to the treaty to extradite or prosecute the person under their respective domestic legal systems» [174], [234].

«A number of States have provided a third alternative when enacting legislation implementing the Rome Statute of the ICC or other criminal law. In the case of surrenders to the ICC, a duty for states parties to surrender persons is not an alternative. Sometimes the enacted or draft legislation provide clearly for the obligation to extradite or prosecute, while at other times the *aut dedere aut judicare* rule appears to be optional» [178, p. 17].

Below are a few examples to consider.

«Argentina ratified the Statute of the ICC in November 2000 and adopted an Implementation Law in December 2006. The Law introduces into domestic legislation the crimes falling under ICC jurisdiction by means of renvoi to the Statute. In terms of cooperation with the ICC, the Law establishes mechanisms for an open and efficient relationship with the Court in case of arrests and surrender of persons, as well as requests for assistance and preliminary rulings» [63]. The Law Implementing the Rome Statute contains a provision under the title «aut dedere aut judicare principle», which provides as follows: «[w]hen a person suspected of having committed a crime defined in this law is found in the territory of the Republic or in any place under its jurisdiction and it does not extradite or surrender him or her to the International Criminal Court, the Argentine Republic shall take all measures as may be necessary to exercise its jurisdiction with regard to such an offense» [178, p. 17]. «The triple alternative set out in this law is applicable to genocide, crimes against humanity and war crimes, as defined by the law. The Federal Criminal Procedural Code already encompassed a dual alternative as early as 1885» [178, p. 18].

«Brazil ratified the Rome Statute the 20th of June 2002.On the 23rd of September, 2008, a draft implementation bill, including both complementarity and cooperation provisions, was submitted to the *Câmara dos Deputados*, the lower house of the National Congress in Brazil. The *Comissão de Constitução e Justiça e de Cidadania* (Constitutional, Justice and Citizenship Committee) approved the text unanimously in 2009 but it has yet to pass the Plenary in the Lower House, after which it will be discussed in the *Senado Federal* (Federal Senate). However, somehow the implementation process lost its momentum, and to date there have been no further reports on progress» [84].

«The Bill implementing the Rome Statute in Brazil provides that when a foreigner suspected of genocide, crimes against humanity or war crimes is found in its territory Brazilian law will apply, unless an extradition request by a state or a surrender to the ICC is granted» [178, p. 18].

«Croatia signed the Rome Statute on 12 October 1998, and ratified on 21 May 2001» [121]. «The 2003 Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law of Croatia includes a wording which may imply the duty to try before Croatian national courts whenever a trial before the ICC or any other foreign court is not taking place. Article 10(2) provides, suggesting the triple option, that: «In addition to the crimes specified in the foregoing paragraph, other crimes shall also be prosecuted in the Republic of

Croatia, regardless of the place where they were committed or the nationality of the suspect, if the suspect is arrested in or extradited to the Republic of Croatia and the criminal procedure has not been conducted before the ICC or before a court of another state, or if the respective suspect for one reason or another cannot be tried before the ICC or a court of the state where the crime was committed, a court of the state of the suspect's residence or another competent court from which a fair trial can be expected» [282].

«In France, the *Projet de Loi* implementing the Rome Statute, adopted by Senate in June 2008, also contains a triple alternative regarding genocide, crimes against humanity and war crimes» [178, p. 19].

«The Penal Code of Switzerland» [266] «may be a good example of the evolution from the dual alternative, regarding those crimes punishment of which is required in an international convention to which Switzerland is a party, towards the triple alternative, as stated in a draft amendment to the Penal Code. The draft amendment has been adopted by the Federal Council, with regard to genocide, crimes against humanity and war crimes. The draft legislation, if enacted, will establish the duty to try a suspect before national courts in those cases of crimes committed abroad – regardless of the nationality of the alleged perpetrator or the victim - when the suspect is found in Switzerland and is neither extradited to another state nor surrendered to an international criminal court whose jurisdiction Switzerland has recognized» [178, p. 20].

It should be noted that «in the silence of the conventions, the state in whose territory the alleged offender is present, although it has full freedom to choose between the three alternatives, could be bound by a very clear choice – to deliver the alleged criminal to the international tribunal whose jurisdiction it has recognized – if the Statute of this tribunal impose it. Be that as it may, under contemporary international law, the forum state has a real choice between three alternatives only when treaty crimes can be configured as war crimes, crimes against humanity or genocide. This conclusion is deduced from the practice, which shows that, to this day, the creation of international criminal tribunals has occurred only to repress international crimes» [86, p. 256].

Thus, if there is appropriate treaty provisions, the principle of *aut dedere aut judicare* provides for the implementation of a third alternative (along with extradition and prosecution before the state's own courts), namely, the state in whose territory the alleged offender is located may be able to satisfy its obligations through the transfer such person to an international criminal court or tribunal».

«Currently, such international conventions - the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the 2007 African Charter on Democracy, Elections and Government» [270, p. 217], «the Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes, which was opened for signature in January 2024 and signed on February 2024 in The Hague (Netherlands) - enshrine a mechanism that allows states parties to choose between three options: prosecution, extradition or transfer to an international criminal court. The 1996 Draft code of crimes against peace and security of mankind also enshrines the «triple» choice model proposed by the International Law Commission» [35, p. 687-689].

It should be noted that the Ljubljana – The Hague Conventionis the first major treaty in the field of international criminal law, adopted after the Rome Statute, which harmonizes legal and jurisdictional issues of combating international crimes and protecting the rights of victims. Continuing the ideology of the Convention against Transnational Organized Crimeand the Convention against Corruption, the Ljubljana − the Hague Convention reflects the main narratives of international cooperation regarding the detention, arrest, extradition and punishment of persons guilty of international crimes in accordance with UN General Assembly Resolution 3074 (XXVIII)» [40, p. 8-9].

Thus, the activities of international criminal courts and tribunals have significantly influenced and continue to influence the formation of international criminal law and its institutions and principles (especially, the principle of *aut* *dedere aut judicare*) and contribute to changes in national criminal justice systems in order to combat impunity and protect human rights. A state's fulfillment of its international legal obligations in accordance with the *aut dedere aut judicare* principle and according to the suggested *triple alternative* model is defined by the position of such a state concerning cooperation with the bodies of international criminal justice and involves the implementation of appropriate changes to domestic legislation.

One of the most difficult issues when applying the principle of aut dedere aut judicare is the question of the priority between three possible alternatives: extradition, prosecution or transfer to an international criminal court or tribunal.

CHAPTER 3.
RELATIONSHIP BETWEEN THE OBLIGATION TO EXTRADITE OR PROSECUTE AND OTHER PRINCIPLES

3.1. Universal jurisdiction and the obligation to extradite or prosecute

«Cooperation between states in the fight against international crimes involves, among other things, solving the issue of the exercise of national criminal jurisdiction, including universal jurisdiction, as well as the implementation of the *aut dedere aut judicare* principle. The Working Group on the Obligation to extradite or prosecute in its report of 2013 admitted that establishing jurisdiction is «a logical prior step» to the implementation of the obligation to extradite or prosecute an alleged offender present in the territory of a state. A duty to extradite or prosecute would necessarily reflect the exercise of universal jurisdiction when the crime was allegedly committed abroad without any connection to the forum state» [174], [176].

Essentially, the extent of national criminal jurisdiction is within each state's sovereign power to determine as a product of state authority. Each state is fundamentally free to establish the area of applicability and the scope of its own criminal law. In doing so, states must abide by international obligations, which function in two main ways. On the one hand, the expansion of national criminal jurisdiction is restricted by international law.

«Under international law, the state may only extend its criminal jurisdiction to matters with which it can show some connection, for example through the site of the conduct in question, the nationality of the perpetrator or victim, or the protected interest involved. On the other hand, it may be required to extend its national criminal jurisdiction – for example, because of an international duty to prosecute» [277, p. 60].

G. Werle pointed out, that «the specific international obligations attached to national criminal jurisdiction may be more clearly defined in two steps. The first step is to determine the extent of national criminal jurisdiction for crimes under international law. In the second step, it must be asked if an additional duty exists to prosecute and punish international crimes. In this context, the admissibility of alternative models in dealing with crimes under international law must be determined» [277, p. 60].

«Special Rapporteur Z. Galicki of the International Law Commission on the topic «The obligation to extradite or prosecute (aut dedere aut judicare)» saw it as inevitable that when analyzing various aspects of the applicability of the obligation to extradite or prosecute, it is important to consider the issue of the principle of universality, which was enshrined in Article 7 of the Hague Convention of 1970 and later reflected in the Rome Statute of the International Criminal Court of 1998» [232], [173].

«In accordance with the principle of universality, any state is entitled to apply its criminal law to crimes committed abroad, by foreigners, and against foreigners. The principle of universality was first proclaimed in international customary law in the 17th century in relation to piracy» [89, p. 308]. «The reason for such a departure from the classical principles of territoriality and nationality was the need for a joint fight against a certain type of crime that affected all states. Therefore, universal jurisdiction was based on the general interest of all states. Each state realized that by bringing a person suspected of piracy to court, it thereby protects not only its own interests, but also the interests of other states» [24, p. 281].

«Exercising universal criminal jurisdiction is one of the possible legal means to combat impunity although it is the most controversial applicability of criminal jurisdiction» [127, p. 372].

As a rule, «together with the universal principle, the «*aut dedere aut judicare*» principle applies, notes S. M. Vykhrist» [12, p. 13]. In M. Cherif Bassiouni's opinion, «universal jurisdiction complements *aut dedere aut judicare* in that whenever a state does not extradite and proceeds to prosecute it may need to rely on universality» [83, p. 97]. M. Cherif Bassiouni suggests that «in the era of globalization, international compensation is necessary to combat crime, whether international crimes or domestic crime, and the only way by which this is achievable is through the obligation to prosecute or extradite and where appropriate to punish persons accused, charged or convicted of a criminal offense, whether it be international or domestic. To implement such a policy requires the closing of certain jurisdictional gaps consistent-with the preservation of the international legal order and respect for and observance of international human rights law. The closing of such gaps is through universal jurisdiction. Thus, one way of reaching the recognition of universal jurisdiction is through the obligation of *aut dedere aut judicare.* This does not, however, diminish the recognition of universal jurisdiction as *actio populares* or any other legal or policy bases» [83, p. 150-151].

«It is important to consider that universal jurisdiction − *quasi delicta juris gentium* − applies to a limited number of crimes for which any State, even absent a personal or territorial link with the offence, is entitled to try the offender» [243, p. 48]. Crimes of this nature threaten the peace and security of mankind as a whole. As M. Cherif Bassiouni pointed out, «certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and they shock the conscience of humanity» [81, p. 69].

«When particular acts become a concern of the world's legal system, and states adopt a multilateral treaty to define a specific activity as criminal, this act of agreement forwards the notion that a particular offense is generally punishable, and that the perpetrator has become, like the pirate, *hostis humani generis.* This universal consensus lends credence to a state's claim that it is prosecuting an individual (or extraditing to a country that will prosecute) on the basis of inherent jurisdiction. In this sense, «the courts of a particular nation act in the interest of the international community or the respective treaty membership, as instruments of the decentralized enforcement of international law» [279, p. 186], 135, p. 622].

According to G. Werle, «crimes under international law are directed against the interests of the international community as a whole. It follows from this universal nature of international crimes that the international community is empowered to prosecute and punish these crimes regardless of who committed them or against whom they were committed. Every legal system may defend itself with criminal sanctions against attacks on its elementary values» [277, p. 58].

G. Werle emphasizes that «it is not only the power to prosecute on the part of the international community as a whole that arises from the nature of crimes under international law and their direct affiliation with the international legal order. Every country is allowed to prosecute criminals in all cases without restriction; it is not important where the conduct in question took place, who the victims were, or whether any other link with the prosecuting state can be established. The authority to punish derives here from the crime itself (criminal jurisdiction is based solely on the nature of the crime). The effects of acts directed against the most important interests of the community of nations are not limited to the domestic realm of the state where the crime was committed. International crimes are not domestic matters. As regards the prosecution of international crimes, the limits international law sets on the expansion of national criminal jurisdiction, particularly the prohibition on interference, are not affected. Thus, the principle of universal jurisdiction applies to crime under international law» [277, p. 59].

G. Werle rightly notes that «the range of crimes that may be prosecuted under universal jurisdiction extends beyond crimes under international law. For example, worldwide authority has long been recognized under customary law to punish piracy and slave trade. Universal jurisdiction also applies to torture. In other words, universal jurisdiction applies to all crimes under international law, but not all crimes to which univeral jurisdiction applies are crimes under international law» [277, p. 59].

M. Cherif Bassiouni drew attention to the issue of the application of universal jurisdiction over crimes of *jus cogens*. Bassiouni pointed out «that, «*jus cogens* crimes require the application of universal jurisdiction when other means of carrying out the obligations deriving from *aut dedere aut judicare* have proven ineffective». In fact, it could be argued that the establishment of international investigative and judicial organs since World War II, such as: the International

Military Tribunal, The International Military Tribunal for the Far East, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the *International Criminal Court*embody the very essence of *aut dedere aut judicare* with respect *to jus cogens* crimes» [83, p. 149].

«The legal literature discloses that the following international crimes *are jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*. This legal basis consists of the following: (1) international pronouncements, or what can be called international *opinio juris,* reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes» [81, p. 68].

«One of the important issues that deserve attention in the context of the topic under consideration is the question of the existence of an international obligation to prosecute an international crime. According to G. Werle, international law not only allows the international community and the states to prosecute international crimes through universal jurisdiction, but even obligates them to do so under certain circumstances. Customary international law today recognizes that the state in which a crime under international law is committed has a duty to prosecute. This duty also exists under treaty law for genocide and war crimes in international armed conflicts» [277, p. 61-62].

«The Preamble to the ICC Statute stipulates that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. The States Parties to the Statute, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes» [239].

«Convention on the Prevention and Punishment of the Crime of Genocide 1948» [112] in Article IV establishes: «Persons committing genocide… shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals». Article V states: «The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide…» [112].

«Geneva Convention (III) relative to the Treatment of Prisoners of War in Article 129 – Penal sanctions establishes The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article» [96]:

«Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case...» [96].

«The Geneva Conventions provide a salient example of the expanded nature of universal jurisdiction, in the sense that all signatories to the Conventions are implicated in the prosecution or extradition of a perpetrator of specific international crimes. If a state does not wish to prosecute the alleged offender, then the Conventions leave open the option of extraditing the individual to a state that will prosecute.The agreement of signatories to the Conventions to enact the legislation necessary to provide effective domestic jurisdiction underlines the consensus among nations with respect to the universally condemned nature of the crimes» [135, p. 622].

«Several international instruments, such as the widely ratified four Geneva Conventions of 1949 and the Convention against Torture, require the exercise of universal jurisdiction over the offences covered by these instruments, or, alternatively to extradite alleged offenders to another State for the purpose of prosecution» [174], [124].

«Another important issue to consider is the distinction between the concepts of universal jurisdiction and the obligation *aut dedere aut judicare.* Universal jurisdiction and *aut dedere aut judicare* are two important related, but conceptually distinct, rules of international law» [216, p. 340], [64].

«International Law Commission expressed a general preference for drawing a clear distinction between the concepts of the obligation to extradite or prosecute and that of universal criminal jurisdiction. It was recalled that the Commission had decided to focus on the former and not the latter, even if for some crimes the two concepts existed simultaneously» [231].

«R. O'Keefe writes about the «mistaken conflation of a state party's obligation to empower its courts to take cases on the basis of universality and its logically subsequent obligation to submit such cases to the prosecuting authorities or to extradite the suspect to a state party that will».It may well be that the historical origins of the two obligations, at least as they have existed in national law, are intertwined, but they differ. Roger O'Keefe notes that the grave breaches provisions «efface this cardinal distinction». The author points out two undesirable consequences that can be identification between the obligation to establish universal jurisdiction and the obligation to prosecute or extradite in the context of grave breaches» [208, p. 827].

«First, it tends to obscure the crucial fact that, whether it arises under the 1949 Geneva Conventions or under virtually any of the later international criminal conventions, the obligation to prosecute or extradite is not limited to situations where the underlying jurisdiction to be exercised is universal. Rather, the obligation *aut dedere aut judicare* is as much applicable when the underlying jurisdiction is based on territoriality, nationality, passive personality, the protective principle or any other basis of criminal jurisdiction provided for in the treaty in question» [208, p. 827].]

«Secondly, overlooking the distinction between jurisdiction and prosecution clauses − or in the context of the grave breaches regime, the distinction between the two distinct obligations subsumed into the same provision, namely the obligation to vest the courts with universal jurisdiction and the obligation *aut dedere aut judicare* − can lead to the mistaken conclusion that the exercise *in absentia* of the universal jurisdiction mandated by the relevant treaty is impermissible» [208, p. 828].

Of course, there can be no obligation to extradite someone if a decision was made not to prosecute unless that person is within reach of the requested state. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. «These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario* so as to exclude a voluntary exercise of a universal jurisdiction» [208, p. 829]. «There is no rule of *conventional international law* to the effect that universal jurisdiction *in absentia* is prohibited» [280, p. 170-172].

V. den Wyngaert noted, that «in order to assess the «permissibility» of universal jurisdiction for international crimes, it is important to distinguish between jurisdiction clauses and prosecution (*aut dedere aut judicare*) clauses in international criminal law conventions» [68]. According to V. den Wyngaert, «the jurisdiction clauses in Conventions usually oblige States to provide extraterritorial jurisdiction, but do not exclude States from exercising jurisdiction under their national laws. Even where they do not provide universal jurisdiction, they do not exclude it either, nor do they require States to refrain from providing this form of jurisdiction under their domestic law. The standard formulation of this idea is that «[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with national law». This formula can be found in a host of

Conventions, including the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Art. 4, para. 3) and the 1984 Convention against Torture (Art. 5. para. 3)» [68].

«The obligation *aut dedere aut judicare* presupposes that the state has already passed laws that criminalize certain conduct. The rule of *aut dedere aut judicare* applies to specific conduct if jurisdiction has already been approved by the state over such conduct. If a state did not declare the applicability of its criminal law to a specific crime, the case related to the commission of such a crime could not be referred to the competent authorities for prosecution or extradition. Thus, the principle of universal jurisdiction serves as a basis for establishing a state's jurisdiction over a given crime, on the basis of which the *aut dedere aut judicare* obligation can ultimately lead to the prosecution or extradition of the offender» [216, p. 341-342].

«Another important point in the distinction between the two concepts concerns the nature of crimes. As R. Pedretti pointed out, the obligation *aut dedere aut judicare* applies not only when the state's jurisdiction has been established on the basis of universality. This obligation also applies on the basis of other recognized grounds of jurisdiction. If a state may otherwise exercise jurisdiction, universal jurisdiction may not necessarily apply in fulfilling the obligation to extradite or prosecute. A State is obliged to refer the case to the competent authorities for prosecution or extradition if the crime is alleged to have been committed on its territory by or against one of its nationals. The obligation *aut dedere aut judicare* is thus not limited to serious crimes committed abroad by a foreigner against a foreigner» [216, p. 342].

According to R. Pedretti, «the obligation *aut dedere aut judicare* presumes that the State has already passed laws, which criminalise the given conduct and empower its courts to entertain judicial proceedings. Logically, the rule relating to *aut dedere aut judicare* applies subsequently to the State's assertion of jurisdiction over a specific behaviour. If a State had not asserted the applicability of its criminal law to a particular crime, the case relating to the commission of such an offence could not be submitted to the competent authorities for the purpose of prosecution or extradition. The principle of universal jurisdiction thus serves as a ground for establishing the State's jurisdiction over a given crime based on which the obligation *aut dedere aut judicare* might ultimately lead to the prosecution or extradition of the offender. This has also been affirmed in a decision of the ICJ in the Hissène Habré case where it stated that «the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry . . . and for submitting the case to its competent authorities for the purpose of prosecution.» The obligation *aut dedere aut judicare* is thus regarded as applying subsequent to the State's establishment of jurisdiction based on universality» [216, p. 341-342].

Confirmation of the distinction between the two concepts under analysis can be detected in the judicial practice of states.

«In the Netherlands, the Hague Court of Appeals, in the case of an Afghan citizen accused of violation of the laws and customs of the war, referred to the «*adagium aut dedere aut punire*» in order to reject the claim that the court lacked jurisdiction. The court also concluded that, in the case, the exercise of the obligation to extradite or prosecute implies the exercise of universal jurisdiction. The above leads to the fact that the defence plea as described under a) in relation with the lack of jurisdiction should be rejected. The court of appeal again underlines that – also in view of the *adagio aut dedere aut punier* – in the present case it concerns the exercise of secondary universal jurisdiction. And the interest of the presence of suspects in the territory of the prosecuting state is also underlined in the explanatory memorandum to the International Crime Act (para. 5.4.4.)» [178, p. 27].

«In Peru, the Constitutional Court recalled that all states are permitted to exercise universal jurisdiction regarding crimes under international law and ordinary crimes of international concern. According to the Constitutional Court torture and enforced disappearances are subject to universal jurisdiction based on the obligation to extradite or prosecute, as well as corruption – as stated in Article

V of the Inter-American Convention against Corruption» [178, p. 27].

«In Spain, the Supreme Court overruled in 2007 a first instance preliminary judgment by a lower court and declared that Spain had jurisdiction to try non-Spaniards alleged responsible of smuggling migrants found on the high seas. According to the Supreme Court Spain may exercise universal jurisdiction over those foreigners alleged responsible of smuggling immigrants, even if found on the high seas, based on provisions contained in the Organic Law of the Judiciary and the 1982 Convention on the Law of the Sea. The Supreme Court also recalled that states are under the duty to enact implementing legislation with regard to crimes under international law, including the *aut dedere aut judicare principle»* [178, p. 27].

Amnesty International explained the difference between the two concepts as follows.

«Universal jurisdiction is the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests. This rule is now part of customary international law, although it is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law (such as genocide, crimes against humanity and war crimes), ordinary crimes of international concern (such as hostage-taking and hijacking of aircraft) and ordinary crimes under national law (such as murder, assault and kidnapping)» [178, p. 7-8].

«Under the related *aut dedere aut judicare* (extradite or prosecute) rule, a state may not provide a safe haven for a person suspected of certain categories of crimes. Instead, it is required either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime. As a practical matter, when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court» [178, p. 8].

M. Cherif Bassiouni writes that «universal jurisdiction resembles a checkerboard». Some conventions recognize, and some national practices of states demonstrate existence of universal jurisdiction, however, it is «uneven and inconsistent». What truly advanced the recognition and application of universal jurisdiction has been the acceptance of the maxim *aut dedere aut judicare.* The duty to prosecute or extradite and, where appropriate, to punish persons accused of or convicted of international crimes, particularly *jus cogens* crimes because of their heinous nature and disruptive impact on peace and security, necessarily leads to the recognition of universal jurisdiction as a means of achieving the goals of *aut dedere aut judicare»* [83, p. 152-153]. In order to avoid negative consequences and increase the positive consequences of the orderly and effective application of universal jurisdiction, «it is indispensable to arrive at norms regulating the resort bystates and international adjudicating bodies to the application of this theory», «an international convention should be elaborated» [83, p .155].

«An analysis of the activities of states in the field of combating international crimes and bringing criminals to justice, especially in armed conflicts, indicates the low efficiency of the use of national intrastate mechanisms in this area in general and the application of the principle of universal jurisdiction in particular. Particularly low effectiveness of bringing international criminals in power to justice, who have a significant impact on the national judicial system» [3, p. 43].

According to M. Cherif Bassiouni, «national legislation and national judicial practice is presently insufficient to establish an international customary practice with respect to universal jurisdiction. But, that limited practice combined with the large number of states that have extraterritorial criminal jurisdiction that also reaches persons accused of international crimes may constitute a sufficient legal basis to conclude that there exists at least a duty to prosecute or extradite, and, where appropriate, to punish persons accused, charged or convicted of international crimes. If that proposition is accepted, then it follows that when available jurisdictional means are ineffective, universal jurisdiction should apply» [83, p. 150].

«In the context of the issue under consideration, attention should be paid to the national legislation of Ukraine regarding universal jurisdiction. This issue is important for Ukraine. Following Russia's full-scale invasion of Ukraine in 2022, a number of countries, including Estonia, Spain, Lithuania, Germany, Poland, France and Sweden, launched war crimes investigations under universal jurisdiction» [49].

V. Pylypenko rightly notes that «the significance of armed aggression and a full-scale war against Ukraine is related «to the immediate danger to the European region, the general threat to peace, humanitarian, economic, political and social considerations - aggression undermines the modern international legal order, which is based on the generally recognized principles of international law, the UN Charter, the Final Act of the Conference on Security and Cooperation in Europe and other international legal acts» [46].

«The exceptional brutality of Russia's aggression has forced other countries to launch their own investigations into international crimes in Ukraine and contribute to the implementation of justice. This became possible thanks to the implementation of the principle of universal jurisdiction in the national legislations of these states. Likewise, Ukraine, over time, thanks to the introduction of universal jurisdiction, would be able to prosecute international criminals for serious international crimes such as genocide, war crimes and crimes against humanity. In particular, in relation to persons who have committed such crimes against citizens of Ukraine in other states» [49].

«According to the Part 1 of Article 8 of the Criminal Code of Ukraine («The operation of the law on criminal liability with regard to offences committed by foreign nationals or stateless persons outside Ukraine»), «Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code» [120].

However, as M. Pashkovsky notes, «the problem lies in the interpretation of the phrase «in cases provided for by international treaties»; in this way a question arises: which treaties, what exactobligations of the state?» [45]. «It is problematic for Ukraine to prosecute all war crimes from the existing norm of universal criminal jurisdiction in the Criminal Code of Ukraine. These are, for example, the use of people as human shields, sexual violence as an independent crime, crimes against cultural objects, crimes against humanitarian missions, such as shelling of evacuation buses. They have not yet been criminalized in Ukraine» [45]. A corresponding draft law containing provisions on universal jurisdiction was developed, but to date it has not been adopted.

Thus, «in order to carry out an obligation to extradite or prosecute an accused criminal who is present in the territory of a state, jurisdiction must be established. Providing universal jurisdiction is an important element of prosecuting alleged perpetrators of crimes of international concern, especially when the alleged perpetrator is not prosecuted in the territory where the crime was committed» [191, p. 616].

«It is the prerogative of each state to determine the scope of its criminal jurisdiction (including universal jurisdiction) and each state is responsible for determining the scope of its criminal law. Furthermore, states are required to conform to their international obligations, including refraining from interfering in the internal affairs of other states and implementing certain international obligations, such as those regarding prosecutions or extraditions in particular regarding to the offences of international concern» [191, p. 617].

«In international criminal law, it is critical to distinguish between the concepts of universal jurisdiction and *aut dedere aut judicare*. Universal jurisdiction applies when there is no other connection to the state (territoriality, nationality, passive personality, the protective principle or any other basis). *Aut dedere aut judicare* obligation entails the transfer of the case to the competent authorities for prosecution or extradition, not the establishment of jurisdiction. In order to fulfill the obligation *aut dedere aut judicare*, the state must already have passed laws criminalizing certain acts. An obligation *aut dedere aut judicare* does not only refer to serious crimes committed by a foreigner against a foreigner abroad. Thus, *aut dedere aut judicare* obligation is not limited to situations in which a universal jurisdiction is required to be applied for the prosecution or extradition of an individual» [191, 617].

3.2. The *aut dedere aut judicare* principle and *erga omnes* obligations

The application of the *aut dedere aut judicare*principle raises a number of intricate questions in the theory and practice of international law. One of these issues concerns to the breach of *erga omnes* obligations.

The concept of obligations *erga omnes* refers to obligations of a general nature that a state has not just with regard to another state or states but with regard to the entire international community. «In the Barcelona Traction case, the International Court of Justice stated, that an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-a-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States (prohibition of acts of aggression and genocide, principles and norms relating to basic human rights,). In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*» [75]. «Since this dictum in the Barcelona Traction case, the International Court of Justice has repeatedly referred to the notion of obligations *erga omnes»* [140].

«The recognition of the importance of the *erga omnes* principle is a serious basis for the preservation of general international law. In the absence of effective international legal organizational mechanisms, the maintenance of the world legal order by the actions of individual states on the basis of erga omnes is the only possibility of preservation of the achieved level of international law» [7, p. 15]. The obligations of states of an *erga omnes* character arise, for instance, from the prohibition of acts of aggression and genocide, as well as from the principles and norms relating to basic human rights.

In the meantime, «the existence of *erga omnes* obligations, their nature and applicability continue to cause debate among international lawyers» [43, p. 162].

It should be pointed out about the relationship between *jus cogens* norms and*erga omnes* obligations. Such a ratio can be defined as follows. «The character of *jus cogens* testifies to the «weight» or special meaning of norms, and the obligation *erga omnes* reflects the «scope» of procedural significance. *Jus cogens* norms necessarily have the «scope» of erga omnes, while not all *erga omnes* obligations have the «weight» of *jus cogens»* [31, p. 147]. «*Jus cogens* refers to the legal status that certain international crimes reach and *obligatio erga omnes* pertains to the legal implications arising out of certain crime's characterization as *jus cogens*. Thus, these two concepts are different from each other» [81, p. 63].

During the discussion of the topic of the *dedere aut judicare* principle in the UN International Law Commission, «the issue of the impact of the *aut dedere aut judicare* principle on international responsibility when it concerned *erga omnes* obligations or *jus cogens* norms such as the prohibition of torture was raised. In this regard, it was proposed to analyze the questions in respect of whom there is an obligation *erga omnes*, who can request extradition, or who has a legitimate interest in invoking the international responsibility of a State for violating its «obligation to prosecute or extradite» [172].

«Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) noted that this question is related to the interpretation of specific conventional norms» [172], [176]. According to «the Final report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) the statements made by the International Court of Justice in Belgium v. Senegal in this regard must be considered within the specific context of that particular case. The

Court interpreted the object and purpose of the Convention against Torture as giving rise to «obligations *erga omnes partes*», in which each State Party has a common interest in ensuring that such obligations are met. As a result, each State Party may bring a claim regarding the cessation of an alleged violation by another State Party. According to the Working Group's interpretation, the Court was expressing that as long as States were signatories to the Convention against Torture, they shared a collective interest in preventing torture acts and ensuring that individuals responsible for such acts were not shielded from accountability. A number of other treaties may also be consistent with *erga omnes* obligations, even if they do not involve *jus cogens* norms. All States Parties may have a legal interest in invoking the international responsibility of a State Party for failing to fulfill its obligation to extradite or prosecute» [172], [176].

According to G. Matthew, «The ICJ's reasoning with regard to obligations *erga omnes partes* gives rise to two implications for extradite or prosecute obligations: protection of a common interest and ICJ's treatment of Article 5(2) CAT (*Convention* Against Torture). Thus, first, having established that Belgium had standing to bring its claim against Senegal, the ICJ's judgment portrays Belgium as exclusively protecting a «common interest» in the *H. Habré Case*. Second, the ICJ's interpretation of the CAT's object and purpose as the protection of a «common interest» influenced its subsequent interpretation and the «nature and meaning» of the obligation to extradite or prosecute under Article 7, as well as the type of jurisdiction arising out of this obligation under Article 5(2) of the CAT» [198, p. 139]. Having determined the admissibility of Belgium's claim, the ICJ, throughout its judgment, described jurisdiction in Article 5(2) of the CAT as «universal jurisdiction». In particular, the ICJ noted that the «obligation to establish universal jurisdiction» under Article 5(2) is a «necessary condition» for fulfilling the obligations to undertake a preliminary inquiry under Article 6(2) and to submit the case to its authorities for prosecution under Article 7(1).The purpose of these obligations, in the ICJ's opinion, is to «enable proceedings to be brought against the suspect, in the absence of his extradition» and to «achieve the purpose» of the CAT, which is «to make more effective the struggle against torture by avoiding impunity for the perpetrators.»In the words of the ICJ, «[t]he Convention against Torture thus brings together 150 states which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction» [229], [198, p. 139-141].

There is a position, «that the prohibition of certain crimes under international law, including genocide, crimes against humanity and war crimes, derive their authority from a peremptory norm (*jus cogens*) from which no derogation is ever permitted, and a violation of such a norm gives rise to a corresponding obligation *erga omnes* – an obligation owed by states to the international community as a whole – either to institute criminal proceedings or to extradite the suspect to another competent state» [79, p. 52], [152, p. 213, 220], [283, p. 3].

For instance, «M. Cherif Bassiouni has argued that the obligation to extradite or prosecute has acquired a customary status with respect to core international crimes. Bassiouni derived such a status from the claimed *erga omnes* and *jus cogens* nature of the prohibitions on those crimes» [79, p. 52]. «This view relies on the Trial Chamber's conclusion in the *Furundžija* case in the International Criminal Tribunal for the former Yugoslavia (ICTY) that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction» [158].

According to I. Bantekas and S. Nash, «it is very likely that the principle *aut dedere aut judicare* constitutes an obligation *erga omnes* arising from the status of the offences to which it is applied, as being universal crimes» [81, p. 63], [74, p. 92]. N. Dryomina-Volok noted that «the obligation *aut dedere aut judicare* regarding *jus cogens* crimes has acquired the character of *obligatio erga omnes*. Within the framework of the concept of *jus cogens* crimes, it means the mandatory involvement of the criminal jurisdictional mechanism in relation to persons suspected of committing such crimes, and is an important element of anti-criminal international legal cooperation of states. This corresponds to the legal nature of *jus cogens* crimes and is determined by the essence of the obligation *erga omnes»* [23, p. 96].

G. Goodwin-Gill pointed out that «in the case of international crimes arising from a rule of *jus cogens*, the legal implications appear quite imperative. Every state is entitled *erga omnes* to exercise jurisdiction and is equally obligated *erga omnes* either to initiate criminal proceedings or to surrender the alleged offender to another state. International crimes, «by their very nature», create an obligation *erga omnes* to either extradite to another competent state, prosecute in one's own court, or surrender to the competent international tribunal. It is the combination of *jus cogens* and *erga omnes* that makes prosecution an unavoidable matter of duty» [152, p. 220].

«The *erga omnes* quality of the obligation in regard to international crimes is hardly open to objection. As regards to Judge Weeramantry's dissenting opinion in East Timor, the performance of an obligation *erga omnes* includes compliance not only with the particular directions or prohibitions it may contain, but also with its 'underlying norms or principles» [156, p. 139], [152, p. 220].

The above point of view «is criticized by the argument that the *erga omnes* and*jus cogens* nature of the prohibitions do not as such give rise to the formation of customary international law and do not imply the recognition of a customary nature for the obligation to extradite or prosecute» [256, p. 1092], [283, p. 3].

For instance, «R. van Steenberghe argued, that the position of M. Cherif Bassiouni conserning the existing of the customary status of the obligation to extradite or prosecute for core international crimesseems untenable, for two main reasons. The *erga omnes* and *jus cogens* concepts do not as such lead to the formation of any source of international law, including custom. According to R. van Steenberghe, the *jus cogens* concept admittedly entails legal consequences which may affect the formation of a source of international law, such as invalidating international conventions, and imposes a specific requirement in order for a particular source to be qualified as *jus cogens* (Art. 53 of the 1969 Vienna

Convention on the Law of Treaties (VCLT)). This does not however mean that it can as such lead to the formation of a source of international law» [256, p. 1092]. R. van Steenberghe claims that «*erga omnes* and *jus cogens* concepts relate to fields of international law that are technically alien to individual criminal responsibility. The *erga omnes* concept plays a role in the law of state responsibility while the *jus cogens* one relates to both this law as well as treaty law. Consequences attached to both concepts in these fields of law could hardly be interpreted as implying the recognition of a customary nature to the obligation to extradite or prosecute with respect to core international crimes.With respect to treaty law, the *jus cogens* nature of the prohibitions on those crimes would only compel states not to conclude treaties which would allow them to commit such crimes (Arts 53 and 64 VCLT).With respect to the law of state responsibility, one must firstly note that the application of this law would necessarily imply that the crime amounts to the wrongful conduct of a state. Moreover, the most relevant consequences of both concepts in that field are only to allow third states to ask for reparation or the cessation of the crime when it is ongoing, in the interest of the victim state, (Art. 48 of the ILC's Articles on State Responsibility) or to require third states not to recognize the violation of the prohibition on such a crime and to cooperate to put an end to it (Art. 41 of the ILC's Articles on State Responsibility). In particular, one must emphasize that, according to the ILC commentaries on the Articles on State Responsibility, the latter non-recognition and cooperation obligations are not intended to have any effect with respect to the prosecution of individuals (UN Doc. A/56/10, 2001)» [256, p. 1092].

R. van Steenberghe also pointed out that «it seems difficult to argue for a non-treaty based obligation to extradite or prosecute grounded upon another source than customary law, in particular, the general principles of international law proposed by well known scholars, in order to overcome problems due to the lack of state material conduct in the formation of customary law in the fields of human rights and humanitarian law» [256, p. 1092]. Regarding the *Furundžija* case, R. van Steenberghe noted that it is true that the «Tribunal drew some related conclusions from the *jus cogens* prohibition against torture on the question of the prosecution of those persons responsible for such a crime. However, it referred only to a *right* (and not an obligation) to prosecute or extradite» [256, p. 1092].

Thus, «it is important to differentiate between obligations pertaining to individual states and those pertaining to the whole international community» [189, p. 181]. Due to their nature, the latter involve the interests of all states, thereby providing legal protection for all states in case of their violations. In order to fulfill an *erga omnes* obligation, it is necessary to comply not only with the specific prohibitions contained within it but also with the fundamental principles that govern its implementation; in particular, this applies to the *aut dedere aut judicare* principle.

The application of *erga omnes* obligations in combating international crimes raises a number of important questions in practice. One such question is whether *erga omnes* status should be recognized for the *aut dedere aut judicare* obligation. The prohibition of crimes arising from *jus cogens* norms (for instance, genocide, apartheid, or racial discrimination) is recognized as an *erga omnes* obligation. However, recognition of the obligation to extradite or prosecute for *jus cogens* crimes as an *erga omnes* obligation is debatable.

On the one hand, in international practice, one can find confirmation of the position that in the case of commissions of international crimes that reach the level of *jus cogens*, states are obligated to prosecute or extradite the perpetrators in accordance with their international obligations and such an obligation has acquired the character of *erga omnes*. On the other hand, the prohibition of the commission of certain crimes should not necessarily equal the obligation of states to take specific procedural actions.

3.3. The *aut dedere aut judicare* principle and *jus cogens* violations

«The *aut dedere aut judicare* principle is intertwined with many other concepts of international law in the implementation process. In this regard, the interaction of the concepts of *aut dedere aut judicare* with the concept of *jus cogens* deserves special attention» [190, p. 196].

«The existence of *jus cogens* as part of modern international law is not seriously contested. Nevertheless, there remains a debate over the precise contours, contents, and effects of *jus cogens*. The International Law Commission noted that while states have often agreed that the specific norms qualified as *jus cogens*, the dispute has often related to the effect of the *jus cogens* norms on other rules of international law» [176], in particular, on the principle of *aut dedere aut judicare.*

«The reasons and consequences of the imperativeization of international law reflect the general awareness of the wrongness of the state's unconditional priority to determine which international legal norms should be implemented into national law. Such a change in emphasis affected not only the international legal space − it had a significant impact on national jurisdictional regimes, in particular, in terms of the application of universal jurisdiction and the effect of the principle «*aut dedere aut judicare*» [21, p. 362].

«The development of the concept of *jus cogens* norms, which evolved over a long period, can be called one of the most complex theoretical and legal processes» [21, p. 233], [22, p. 140]. As M. Gnatovskyy emphasizes, «until now, as well as immediately after the adoption of the 1969 Vienna Convention on the Law of Treaties, the concept of *jus cogens*, which is universal in its design, paradoxically does not enjoy the full acceptance of the entire international community» [14, p. 642].

«Since the inception of the modern State system three and a half centuries ago, international law has been based on notions of consent. Under this concept of *jus dispositivum*, States were bound only to treaties to which they had acceded and to those rules of customary international law to which they had acquiesced. The concept of *jus cogens*, in contrast, is based in part on natural law principles that «prevail over and invalidate international agreements and other rules of international law in conflict with them» [202, p. 752].

«The *jus cogens* norm is a norm of international law, which, due to its importance and worldwide recognition, has acquired the highest imperative status. Norms of *jus cogens* are not a separate source of international law, but a special status of certain of its norms. The status of *jus cogens* means the impossibility of changing or canceling the norm by the subjects of the law and the general obligation to comply with its disposition. It is clear from the meaning of the word «status» that it must be achieved» [21, p. 18-21].

«There cannot be a «law» higher than universal human values − this thesis is the basis of the *jus cogens* doctrine as a modern value-oriented international legal concept. No norm of either international or national law can hierarchically stand at a higher level than *jus cogens* norms» [21, p. 8], [9, p. 173].

«In spite of not using the term itself, the *jus cogens* concept was applied for the first time by the US Military Tribunal at Nuremberg, which declared that the alleged treaty between Germany and Vichy France that authorized the use of French prisoners of war in German armaments was invalid under international law as as *contra bonos mores»* [202, p. 752]. Discussions at the International Law Commission, which codified the concept of *jus cogens* in Art. 53 of the Vienna Convention on the Law of Treaties, reflect the opinion that the phenomenon of Nazi Germany made a purely contractual concept of international law insufficient for the modern era. Consequently, the ILC opined that a treaty which aims to promote slavery or genocide, or to prepare for aggression, must be declared void» [202, p. 752].

«In *Nulyarimma v. Thompson* (1999) case the Federal Court of Australia has found that «the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) which gives rise to an inviolable obligation *erga omnes*» [207]. «Well-known cases confirming the existence of the practice of referring to the imperative nature of norms are *R. v. Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte* (1999)» [228]; «*Ferrini v. Federal Republic of Germany* (2004)» [259] and others. «It is extremely important that the International Court of Justice changed its formal approach and directly referred to *jus cogens* norms in its decisions» [55, p. 135-136]. In the case of

Armed Activities on the Territory of the Congo» [67, p. 6], the Court allowed itself the following formulation:

«…the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties» (para 64). Finally, the Court deems it necessary to recall that the mere fact that rights and obligations erga omnes or peremptory norms of general international law (jus cogens) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties (para 125)» [67, p. 6].

The list of imperative norms in modern international law is not clearly defined. According to established practice, «most of the recognized *jus cogens* norms reflect the desire to protect a person from serious violations, for instance, norms prohibiting aggression, genocide, apartheid, slavery, slave trade, torture, racial discrimination, crimes against humanity, basic norms of international humanitarian law applied in armed conflict»·[89, p. 202-203], [81, p. 63-74], [141, p. 35-40] «To prove the *jus cogens* status of a specific international legal norm, it is appropriate to refer to the decisions of international judicial institutions, primarily the International Court of Justice, as well as to the decisions of national and international courts» [24, p. 235-236].

It should be noted, that «the theory of national criminal law of many legal systems of the world and the doctrine of international criminal law deal with both concepts: *jus cogens* and *erga omnes*. The positions of specialists in criminal law differ significantly on this issue. The main subject of discussion is how an international crime reaches the status of violation of *jus cogens* norms. As for the consequences of recognizing an international *jus cogens* crime, the key question is whether it imposes *erga omnes* obligations on states or simply gives them certain rights to prosecute those who have committed such crimes. This key question of whether *obligatio erga omnes* really corresponds to the content of the Latin word *obligatio* or whether it is denatured in international law to the level of defining only the existence of a *right* and not a legal obligation, still does not have an unequivocal answer either in international law or in the doctrine of international criminal law» [24, p. 278], [81, p. 65].

«There is a position according to which the international law concept *of jus cogens* (meaning 'peremptory norms') may also create a duty to extradite or prosecute. This point of view is supported, for instance, by such commentators as C. Ford, L. Sadat and A. D'Amato» [202, p. 752]. «The rationale for this position is as follows. Under the concept of *jus cogens*, states are prohibited from committing crimes against humanity, and an international agreement between states that facilitates the commission of such crimes would be invalid from the outset. Therefore, the next logical step is that the concept of *jus cogens* also gives rise to a duty to extradite or prosecute those who have committed crimes against humanity» [202, p. 752].

According to M. Cherif Bassiouni, «the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law» [81, p. 65]. «International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of «obedience to superior orders» (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under «states of emergency», and universal jurisdiction over perpetrators of such crimes» [81, p.63].

N. Dryomina-Volok pointed out, that «provisions of the International

Convention for the Protection of All Persons from Enforced Disappearance (2006) regarding the principle of «*aut dedere aut judicare*» not only confirm the existence of this obligation, but also quite meaningfully regulate its implementation. Refusal of extradition turns the right to exercise universal jurisdiction into an obligation to refer this case to its competent authorities for criminal prosecution, i.e. universal jurisdiction (in the narrow sense) becomes the obligation of the participating state if the alleged perpetrator of the crime of enforced disappearance is on its territory. It is very important that the International Convention for the Protection of All Persons from Enforced Disappearance, which concerns, among other offenses, actions that «under certain circumstances stipulated in international law» are considered as «crimes against humanity», i.e. *jus cogens* crime, creates for the parties obligation to take the necessary measures to establish its competence in accordance with the principle of *aut dedere aut judicare*, which provides as an alternative the transfer of the alleged offender to an international criminal court whose jurisdiction it recognizes» [24, p. 311-312].

In 1998, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia concluded the *Furundzija case* that despite the existence of any treaty, persons suspected of torture are obliged to be extradited or tried because the prohibition of torture is based on *jus cogens* nature: «Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign states, and on the other hand bar states from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for states' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes» [158].

The position according to which the international law concept of *jus cogens* creates a duty to extradite or prosecute is controversial and rejected by a number of scholars.

According to C. Soler, «the *aut dedere aut judicare* rule is not, *per se* (in and of itself), *jus cogens»* [252, p. 331]. C. Soler gives an example with «the principle of self-determination of peoples. The ICJ in the East Timor case» [156, p. 90] «has declared that the rights of peoples to self-determination is an *erga omnes* right, but does not go on to declare that a corollary of such right is the direct acquisition of *jus cogens* status. Instead, it acknowledges that the right of peoples to self-determination is irreproachable whereas the principle of 'the better view seems to be that the duty does not have *jus cogens* status» [252, 331].

M. Scharf emphasizes that «scholars who recognize that the concept *of jus cogens* creates a duty to extradite or prosecute, fail to take into consideration the fact that although j*us cogens* has natural law underpinnings, the concept is also related to customary law. According to Art. 53 VCLT (Vienna Convention on the Law of Treaties), a rule will qualify as j*us cogens* only if it is accepted by the international community of States as a whole as a norm from which no derogation is permitted. *Jus cogens* norms are selected and just narrow subset of the norms recognized as customary international law. As with ordinary customary international law, j*us cogens* norms are formed through widespread State practice and recognition, but unlike ordinary customary international law, a State cannot avoid application of a *jus cogens* norm by being a *persistent objector* during its formation» [202, p. 753]. While there is no question that the international community has accepted that the prohibition of committing crimes against humanity qualifies as a j*us cogens* norm, this does not mean that the associated duty to prosecute has simultaneously attained an equivalent status. In fact, there is strong evidence to the contrary. Not only have there been numerous instances of States providing amnesty and asylum to the leaders accused of crimes against humanity, but, even more telling, there have been no protests from States when such amnesty or asylum has been offered. Moreover, there has been widespread judicial recognition, including by the ICJ, that the j*us cogens* nature of crimes against humanity does not prevent accused perpetrators of successfully asserting head-of-State immunity to avoid criminal or civil liability in the domestic courts of foreign countries (Case concerning the Arrest Warrant of 11 April 2000)» [68]. Because «*jus cogens*, as a peremptory norm, would by definition supersede the customary international law doctrine of head-of-State immunity where the two come into conflict, the only way to reconcile this case law is to conclude that the duty to prosecute has not attained j*us cogens* status» [202, p. 753].

M. Scharf concluded that «as compared to the substantive rule of law prohibiting States from entering into international agreements that facilitate the commission of crimes against humanity, the procedural obligation of third parties to extradite/prosecute the perpetrators of such crimes after their commission constitutes a far greater intrusion into a State's internal sovereignty, with far less justification. Thus, it is sensible that such an encroachment would require the State's consent through the carefully negotiated provisions of a treaty, such as the Geneva Conventions, the Convention on the Prevention and Punishment of the Crime of Genocide, which would narrowly define the applicable circumstances and perhaps, like the Rome Statute, provide escape clauses permitting States to disregard the obligation to prosecute when strict enforcement would frustrate greater interests of international peace and justice» [202, p. 753].

Thus, «the question of whether there exists a general *aut dedere* obligation for all international crimes is disputed and a 'more accepted suggestion is that such an obligation exists in relation to *jus cogens* crimes» [201, p. 92]. It should be noted that first of all, the question of whether an international crime reaches the status of violation of *jus cogens* norms is debatable. It is important to realize that the norms of *jus cogens* are recognized as rules of customary international law and thus should be shaped by the common practices of states. The confirmation that a certain international norm has reached the status of *jus cogens* should be sought in the decisions of international courts and tribunals, as well as national courts. The application of the principle of *aut dedere aut judicare* is a consequence of the recognition of an international *jus cogens* crime. The mere fact that a particular rule has acquired the status of *jus cogens* automatically does not mean that its related duty to prosecute has also gained that status. There are examples of states granting amnesty, or asylum, to individuals who have committed *jus cogens* crimes.

CONCLUSION

As a result of the conducted research, the solution of the scientific task, which is crucial for science and practice, has been achieved, and the following conclusions have been reached:

1. It is proposed to consider the principle of *aut dedere aut judicare* through the prism of three aspects. First, through the prism of protection of the interests of the international community (preventing impunity for committed international crimes and ensuring international order). Secondly, through the prism of protection of the interests of a state (requesting and requested) regarding the extradition, criminal prosecutions and criminal jurisdiction (in particular, universal jurisdiction). Thirdly, through the prism of protection of the rights and interests of persons subject to prosecution or extradition. These three directions do not conflict with each other, as they share a common objective − to punish international and transnational crimes on the grounds defined in international and national law and to prevent impunity for committed crimes.

2. The *aut dedere aut judicare* principle establishes either the obligation to extradite the alleged offender or to transfer the case to the competent authorities of the requested state for prosecution or to surrender an alleged offender to a competent international (hybrid) criminal court or tribunal in order of ensuring international order, protection of the interests of a requesting and requested states and ensuring rights of persons involved in criminal proceedings.

3. The *aut dedere aut judicare* principle have evolved over time, and the purpose and essence of the principle have changed as well: starting with Grotius' understanding of protecting the interests of another state (sovereign), it was recognized that human rights must be protected during the extradition process, as well as ensuring that a fair trial is conducted and that the interests of the international community are protected. The evolution of the *aut dedere aut judicare* principle demonstrates the undeniable development of international law in this area.

4. The following stages of the development of the principle of *aut dedere aut judicare*, taking into account the evolution of the doctrine and practice of international criminal law, can be determined: the period of the initial general contours of the principle of impunity, which were formulated in the works of such authors as F. Vitoria, G. Grotius and E. Vattel (16-18th centuries) (G. Grotius first introduced the phrase *aut dedere aut punire* and considered this duty as part of state responsibility; extradition, like other forms of interstate cooperation, was mostly based on mutual self-interest of sovereigns); the period of active development of extradition and origins of the customary obligation to apprehend or punish alleged perpetrators of certain crimes (18-to the middle of the 20th century); the period after 1945 to 90s of the 20th century (the emergence of the international criminal tribunals *ad hoc*, the development of universal jurisdiction and inclusion of the *aut dedere aut judicare* clause in international multilateral and bilateral treaties on combating international crimes); the period from the 90s of the 20th century to the present (the work of the UN International Law Commission on the topic of the obligation to extradite or prosecute and the recognition of this principle as an important tool in the fight against impunity for committed international crimes; the emergence of a permanent body of international criminal justice and other international and specialized courts and tribunals, which led to the emergence of a «third alternative» as a model *of aut dedere aut judicare* obligation).

5. The following main documents provided by the International Law Commission as a result of work on the topic of «Obligation to Extradite or Prosecute (*aut dedere aut judicare*)» have been examined: Preliminary remarks «The Obligation to Extradite or Prosecute («*aut dedere aut judicare»*) in International Law» (2004) by Special Rapporteur Z. Galicki; four reports of the Special Rapporteur Z. Galicki on the obligation to extradite or prosecute(*aut dedere aut judicare*) (the Preliminary report of 2006, the Second report of 2007, the Third report of 2008, the Fourth report of 2011); the Report of the Working Group on the Obligation to extraditeor prosecute (*aut dedere aut judicare*) (2013);

the Final report of the Working Group on the Obligation to extraditeor prosecute (*aut dedere aut judicare*) (2014). A decade of study of the topic «Obligation to Extradite or Prosecute (*aut dedere aut judicare*)» of the ILC has not produced substantive results, such as draft articles on the obligation to extradite or prosecute. For this, the political will of the states was not enough. Meanwhile, the research conducted by the ILC is of great value to scientists as well as law enforcement officials.

6. The principle of *aut dedere aut judicare* is reflected in numerous conventions aimed at combating international and transnational crimes. It has been established that such conventions are of different types: relate to both international crimes and ordinary crimes; universal and regional conventions (international humanitarian law treaties, treaties against genocide, enslavement, piracy, the hijacking of aircraft, drug trafficking, terrorism and others), as well as bilateral extradition treaties; substantive treaties and procedural conventions.

Conventions containing the *aut dedere aut judicare* clause can be divided into three main groups, depending on the relationship between the obligations to extradite and prosecute. The first group of treaties includes provisions that impose an obligation to extradite, and criminal prosecution is an obligation only in case of refusal to extradite. Therefore, in this case, priority is given to extradition. The second group of conventions includes provisions that impose an obligation to prosecute, whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition. Extradition is also a possible option in this case. The obligation to prosecute can be absolute if no request for extradition has been received. The third group of treaties contains provisions which provide for a clear alternative for the state in whose territory the alleged offender is located. The state, because of the absolute freedom it has in the implementation of one of the two options, should be oriented to choose the solution most compatible with its national legal system.

7. For now, there are no clear answers as to whether or not an obligation *autdedere aut judicare* with respect to international crimes falls within

international customary law. To justify the existence of a customary obligation to extradite or prosecute the following primary arguments are used:

− UN General Assembly resolutions (these resolutions emphasize the importance of combating international crimes and seeking justice);

− the gravity of international crimes (these offences are so egregious that they must not go unpunished and that states have a duty to hold the perpetrators accountable);

− the existence of an international community (*civitas maxima*) (this concept refers to the idea that international law applies universally to all members of the international community; there should be no safe havens for criminals, and states should cooperate in bringing offenders to justice, regardless of where the crimes were committed or the nationality of the perpetrators);

− the customary nature of the obligation to extradite or prosecute is confirmed by the fact that the obligation *aut dedere aut judicare* is the result not of a traditional process of custom formation, but through the adoption of multilateral and bilateral treaties containing this clause;

− state practice can take the form of state statements (i.e. *opinio juris* may be confirmed in verbal statements of the state).

7. As a result of the conducted analysis, the following arguments against a customary obligation to extradite or prosecute can be identified:

− the absence of consistent state practice or *opinio juris* to support the view of the customary nature of an obligation to extradite or prosecute;

− the principle of *aut dedere aut judicare* applies only when it is expressly formulated in multilateral conventions on international criminal law;

− extradition in the absence of a treaty is only a moral obligation;

− an obligation to prosecute or extradite does not automatically resolve the question of the scope of state criminal jurisdiction;

− core crimes have the status of *jus cogens* and violate the customary international law, which provides for universal jurisdiction over them, but this is not the ground for the assertion of the existence of the customary rule of *aut dedere* *aut judicare;*

− existing state practice on amnesty, exile and asylum indicates that there is no existing customary duty to prosecute international crimes;

− preparatory documents for international documents, for example the UN Declaration on Territorial Asylum (1967), testify to the absence of states' desire to adopt international legal norms, but only to establish moral principles on which states can rely;

− fear on the part of the states that their courts will be obliged, in cases of refusal of extradition, to try the suspected even if there is no connection with the crime;

− the lack of a clear position by the International Law Commission on the existence of a customary international law obligation to extradite or prosecute.

It has been concluded that the obligation *aut dedere aut judicare* arises not only from the provisions of international treaties, but also from customary international norms, particularly with respect to certain categories of international crimes, for example, *jus cogens* crimes. The *aut dedere aut judicare* obligation related to the *jus cogens* prohibition of torture has acquired customary status and can be invoked even in the absence of a treaty provision.

8. It has been shown that national criminal law constitutes an important source of the obligation to extradite or prosecute. The effective implementation of the principle of *aut dedere aut judicare* in each specific case will depend on the state's fulfillment of both its international obligations and the implementation of the necessary measures (in particular, regarding the establishment of jurisdiction over criminal offenses and offenders) defined in national legislation concerning extradition and prosecution.

9. The conclusion has been reached that the *aut dedere aut judicare* obligation is tied to the nature of the criminal offense. Any criminal activity can be considered harmful to the interests of states, however, any domestic crime committed abroad is almost impossible to prosecute. International law does not recognize the existence of an obligation to «extradite or prosecute» for all crimes.

Due to the differences in the provisions of the various treaties, it is necessary to determine case by case the precise content of the obligation to extradite or prosecute.

The fulfillment of the obligation to prosecute is conditioned by the number of actions: to conduct a preliminary inquiry, to submit the case to the relevant judicial authorities for prosecution, to fulfillment of requirements regarding the timeliness of prosecution, to adopt the necessary legislation in order to criminalize certain types of conduct, to implement the relevant criminal jurisdiction, to co-operate and to exchange information with other states or international organizations. The requirements for the obligation to prosecute vary from treaty to treaty depending in particular on the type of international crime covered by the treaty. Fulfilment of the obligation to prosecute depends on the availability and compliance with national substantive and procedural norms regarding the conduct of criminal proceedings, in particular, regarding the availability of sufficient evidence for the initiation of proceedings, provisions on amnesty or asylum, the need for the presence of the accused in the proceedings, provisions on the immunity of public officials from foreign criminal jurisdiction, etc. In the absence of sufficient evidence, the state is not obliged to prosecute the alleged violator.

10. There are three constructions of the relationship between the two obligations (to extradite or prosecute) set forth in the principle of *aut dedere aut judicare.* In a construction that favors extradition over prosecution, a person may only be prosecuted if the state refuses to extradite the individual. This construction confirms the position that the state should first decide whether extradition is possible. In a construction that favors prosecution over extradition, a duty to initiate prosecution exists whenever a suspected offender is present on a state's territory, regardless of any extradition request. It is only when such a request is submitted that the state has the option of pursuing the alternative course of action, which is extradition. According to an alternative approach (*aut dedere aut judicare*«pure model»), obligations of prosecution and extradition of a suspected criminal found on the territory of the state are equal and a state has full freedom to

choose between them. It has been shown that the content of the obligation to extradite or prosecute depends on the provisions of the treaties concluded between the parties and on the circumstances of each case. The decision to extradite or prosecute should be made by the state in accordance with its domestic laws and international legal obligations, with a focus on combating crime, preventing impunity, and upholding individual rights.

11. It has been found that in case of appropriate treaty provisions, the principle of *aut dedere aut judicare* provides for the implementation of the third alternative (along with extradition and prosecution before the state's own courts), namely, the state in whose territory the alleged offender is located may be able to satisfy its obligations through the transfer such person to an international criminal court or tribunal. Currently, such international conventions - the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the 2007 African Charter on Democracy, Elections and Government, the Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes, which was opened for signature in January 2024 and signed on February 2024 in The Hague (Netherlands) - enshrine a mechanism that allows states parties to choose between three options: prosecution, extradition or transfer to an international criminal court. The 1996 Draft code of crimes against the peace and security of mankind also enshrines the «triple» choice model proposed by the International Law Commission.

12. It is critical to distinguish between the concepts of universal jurisdiction and *aut dedere aut judicare*. Universal jurisdiction applies when there is no other connection to the state (territoriality, nationality, passive personality, the protective principle or any other basis). *Aut dedere aut judicare* obligation entails the transfer of proceedings to the competent authorities for prosecution or extradition, not the establishment of jurisdiction. In order to fulfill the obligation *aut dedere aut judicare*, the state must already have passed laws criminalizing certain acts. *Aut dedere aut judicare* obligation is not limited to situations in which a universal

jurisdiction is required to be applied for the prosecution or extradition of an individual.

13. The prohibition of crimes arising from *jus cogens* norms is recognized as an *erga omnes* obligation. However, recognition of the obligation to extradite or prosecute for *jus cogens* crimes as an *erga omnes* obligation is debatable. On the one hand, in international practice, one can find confirmation of the position that in the case of commissions of international crimes that reach the level of *jus cogens*, states are obligated to prosecute or extradite the perpetrators in accordance with their international obligations and such an obligation has acquired the character of *erga omnes*. On the other hand, the prohibition of the commission of certain crimes should not necessarily equal the obligation of states to take specific procedural actions. The mere fact that a particular rule has acquired the status of *jus cogens* automatically does not mean that its related duty to prosecute has also gained that status. There are examples of states granting amnesty, or asylum, to individuals who have committed *jus cogens* crimes.

BIBLIOGRAPHY

1. Антонович М. Відповідальність за порушення прав людини і міжнародного гуманітарного права в умовах гібридної війни. Від теорії міжнародного права до практики захисту прав людини. Liber Amicorum до 60-річчя проф. В.В. Мицика : моногр. / авт. кол.; за ред. О.В. Задорожнього та О.Р. Поєдинок. Київ; Одесса: Фенікс, 2016. С. 673-689.

2. Бадалова Т. Г. Сутність екстрадиції як різновиду міжнародної правової допомоги у кримінальному провадженні (на прикладі Дніпропетровської області). *Дніпров. наук. часопис публіч. упр., психології, права.* 2022. № 3. С. 144-151.

3. Базов О. В. Універсальна юрисдикція в діяльності міжнародних кримінальних судів. *Юридична Україна*. 2020. № 10. С. 42-47.

4. Бичківський О. П. Екстрадиція: поняття, сутність, роль і значення. *Вісник Запорізького університету*. 2006. № 2. С. 135-147.

5. Бойко І. І. Інститут екстрадиції: правове регулювання, допустимість застосування примусу, тенденції розвитку. *Науковий вісник Ужгородського національного університету. Серія : Право*. 2017. Вип. 44(2). С. 131-135.

6. Бортницька В.В. Спрощений порядок видачі осіб з України. Дис. … юрид. канд. наук: 12.00.09 «Кримінальний процес та криміналістика; судова експертиза; оперативно-розшукова діяльність». Харків, 2020. 210 с.

7. Буроменський М. В. Міжнародне право на тлі викликів XXI століття. Актуальні проблеми сучасного міжнародного права: зб. наук. ст. за матеріалами І Харк. міжнар.-прав. читань, присвяч. пам’яті проф. М. В. Яновського і В. С. Семенова, Харків, 27 листоп. 2015 р.: у 2 ч. Харків, 2015. Ч. 1. С. 5-17.

8. Буткевич В. Г. Агресія Росії проти України – не тільки зухвалий виклик світовій спільноті. Українська революція гідності, агресія РФ і міжнародне право колективна монографія / упоряд. О. Задорожній. Київ :

К.І.С, 2014. С. 355–469.

9. Буткевич В. Г., Мицик В. В., Задорожній О. В. Міжнародне право. Основи теорії: Підручник / За ред. В. Г. Буткевича. Київ: Либідь, 2002. 606 с.

10. Буткевич О. Міжнародне право в Конституції України: історія, теорія та практика. Від теорії міжнародного права до практики захисту прав людини. Liber Amicorum до 60-річчя проф. В.В. Мицика: моногр. / авт. кол.;за ред. О.В. Задорожнього та О.Р. Поєдинок. Київ; Одесса: Фенікс, 2016. С. 347-369.

11. Василенко В. А. Збройна агресія Росії проти України: реалії та правова модель відповідальності держави-агресора. Українська революція гідності, агресія РФ і міжнародне право : колективна монографія / упоряд. О. Задорожній. Київ : К.І.С, 2014. С. 875–890.

12. Вихрист С. М. Видача осіб в аспекті співвідношення міжнародного та національного права. Автореф. дис. ... канд. юрид. наук: 12.00.11. Харків, 2003. 17 с.

13. Войціховський А. В. Міжнародне право: підручник. МВС України, Харків. нац. ун-т внутр. справ. Харків, 2020. 544 с.

14. Гнатовський М. Теоретичні засади міжнародного гуманітарного права та їхнє відображення у практиці міжнародних судових установ. Від теорії міжнародного права до практики захисту прав людини. Liber Amicorum до 60-річчя проф. В.В. Мицика : моногр. / авт. кол.;за ред. О.В. Задорожнього та О.Р. Поєдинок. Київ; Одесса: Фенікс, 2016. С. 626-649.

15. Гутник В. В. Право на захист у міжнародних кримінальних судах: доктрина та практика: монографія; за наук. ред. проф. М. В. Буроменського. Львів; Харків; Одеса : Фенікс, 2018. 439 с.

16. Денисов В. Н. Вольф. Юридична енциклопедія: В 6 т. /Редкол.: Ю. С. Шемшученко (голова редкол.) та ін. К.: «Укр. енцикл.», 1998. URL:https://leksika.com.ua/18080318/legal/volf

17. Договір між Україною та Королівством Таїланд про взаємну правову допомогу у кримінальних справах 2017. URL: https://zakon.rada.gov.ua/laws/show/764_001-17#Text

18. Договір між Україною та Республікою Казахстан про екстрадицію 2018. URL: https://zakon.rada.gov.ua/laws/show/582-20#Text

19. Дрьоміна-Волок Н. В. Імперативізація міжнародного права і становлення концепції расової дискримінації як jus cogens delict: монографія. Одеса: Юрид. літ., 2014. 392 с.

20. Дрьоміна-Волок Н. В. Концепція расової дискримінації у міжнародному праві. Дис. … д-ра юрид. наук.: 12 .00.11 «Міжнародне право». Одеса, 2015. 531 с.

21. Дрьоміна-Волок Н. В. Концепція расової дискримінації у міжнародному анти дискримінаційному праві: монографія. Одеса: Юридична література, 2015. 539 с.

22. Дрьоміна-Волок Н. В. Міжнародне право у пошуку ефективного юрисдикційного механізму в боротьбі з безкарністю дискримінаційних злочинів *jus cogens.* Від теорії міжнародного права до практики захисту прав людини. Liber Amicorum до 60-річчя проф. В.В. Мицика : моногр. / авт. кол.;за ред. О.В. Задорожнього та О.Р. Поєдинок. Київ; Одесса: Фенікс, 2016. С. 138-154.

23. Дрьоміна-Волок Н. В. Дотримання принципу «видай або суди» як *obligatio erga omnes* щодо злочинів *jus cogens*. *Актуальні проблеми держави і права*. 2013. Вип. 70. С. 90–97.

24. Дрьоміна-Волок Н. В. Імперативізація міжнародного права і становлення концепції расової дискримінації як jus cogens delict: монографія. Одеса: Юрид. літ., 2014. 392 с.

25. Задорожній О. Порушення принципу поваги основних прав і свобод людини агресією РФ на Сході України. Сучасні проблеми міжнародного права. LiberAmicorum до 60-річчя проф. М.В. Буроменського : моногр. / авт.кол.; за ред. В.М. Репецького та В.В. Гутника. Львів; Одеса : Фенікс,

2017. С. 613.

26. Задоя К. П. Зміцнення співробітництва між Україною та Міжнародним кримінальним судом: національний вимір. *Вісник кримінального судочинства*. 2017. № 4. С. 27-34.

27. Зелінська Н. А. Міжнародно-правова концепція міжнародного злочину. Дис. … доктора юрид. наук: 12.00.11. Київ, 2007. 486 с.

28. Зелінська Н. А. Морально-політичні фактори формування права притулку і інституту екстрадиції в міжнародному праві: історична ретроспектива. *Актуальні проблеми держави і права : зб. наук. праць*. 2011. Вип. 58. С. 175-185.

29. Зубарева А. Особливості застосування договорів про правову допомогу. Міжнародне право у світі динамічних змін: контури майбутнього міжнародного правопорядку: колект. монографія / наук. ред.: В. Репецький, І. Земан, В. Гутник; Львів. нац. ун-т ім. Івана Франка, Ф-т міжнар. відносин. Львів: ЛНУ імені ІванаФранка; Дрогобич: Коло, 2021. С. 106-129.

30. Зуєв В. В. Кримінальні процесуальні гарантії прав особи при міжнародному співробітництві під час кримінального провадження. Автореф. дис. ... канд. юрид. наук : 12.00.09. Харків, 2015. 20 с.

31. Київець О. В. Феноменологія норм міжнародного права через призму їх ієрархії. *Наукові записки Інституту законодавства Верховної Ради України.* 2011. № 3(6). С. 143-148.

32.Ківалов С. В. Передмова. Боротьба зі злочинністю та права людини : зб. наук. статей / за ред. М. П. Орзіха, В. М. Дрьоміна. О. : Фенікс, 2006.

33. Конвенція проти катувань та інших жорстоких, нелюдських або принижуючих гідність видів поводження і покарання 1984 р. URL: https://zakon.rada.gov.ua/laws/show/995_085#Text.

34. Короткий Т., Хендель Н. «Вічна криза» міжнародного права. Від теорії міжнародного права до практики захисту прав людини. Liber Amicorum до 60-річчя проф. В.В. Мицика : моногр. / авт. кол.; за ред. О.В. Задорожнього та О.Р. Поєдинок. Київ; Одесса: Фенікс, 2016. С. 17-44.

35. Кос'яненко С. О. «Третя альтернатива» за зобов'язанням видавати або здійснювати судове переслідування (*aut dedere au tjudicare*). *Юридичний науковий електронний журнал.* 2024. № 1. С. 687-689. URL: http://www.lsej.org.ua/1_2024/166.pdf. DOI https://doi.org/10.32782/2524-0374/2024-1/164.

36. Кос'яненко С.О. Зобов'язання здійснювати судове переслідування як складова принципу aut *dedere aut judicare*. *Global Society in Formation of New Security System and World Order: Proceedings of the 2nd International Scientific and Practical.* Internet Conference. July 27-28. 2023. Dnipro, Ukraine. P. 213–215. URL: http://www.wayscience.com/wp-content/uploads/2023/08/Conference-Proceedings-July-27-28-2023.pdf

37. Кос'яненко С. О. Національне законодавство як джерело зобов'язання видавати або здійснювати судове переслідування (*autdedereautjudicare*). *Науковий вісник Ужгородського національного університету. Серія: Право*. 2024. Вип. 81. Частина 3. С. 269-274. URL: https://visnyk-juris-uzhnu.com/wp-content/uploads/2024/03/81_part-3.pdf/. DOI https://doi.org/10.24144/2307-3322.2024.81.3.40.

38. Кримінальний кодекс України 2001. URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text

39. Кулеба Д. Захист національних інтересів України, прав і свобод її громадян на тимчасово окупованих територіях в діяльності постійного представника України при Раді Європи. *Український часопис міжнародного права.*2019. № 2. С. 40-42.

40. Міжнародне співробітництво у кримінальному провадженні / В.В.Зуєв, І.В.Гловюк, А.В.Підгородинська, А.С.Степаненко, В. О. Туляков, О. В. Малахова); за ред. В. О.Тулякова. Електрон. вид. Одеса: Національний університет «Одеська юридична академія», 2022.

41. Міжнародне співробітництво у сфері правосуддя : підручник. / Тертишник В. М. та ін.; за заг. ред. д.ю.н. проф. В.М. Тертишника та докт. наук держ. упр., професора В.В. Ченцова. Київ : Алерта, 2021.

42. Мін'юст: Підписано Любляно-Гаазьку Конвенцію. URL:https://www.kmu.gov.ua/news/miniust-pidpysano-liubliano-haazku-konventsiiu

43. Нігреєва О.О. Види зобов’язань *ergaomnes* у сучасному міжнародному праві. *Вісник Південного регіонального центру Національної академії правових наук України*. 2020. № 22. Р. 162-170.

44. Нестеренко С. С. Міжнародно-правовий захист прав людини при здійсненні екстрадиції. Дис... канд. юрид. наук : 12.00.11. Одеса, 2010. 226 с.

45. Пашковський М. Універсальна кримінальна юрисдикція в Україні. 5 листопада 2022 р.URL: https://yur-gazeta.com/interview/universalna-kriminalna-yurisdikciya-v-ukrayini.html

46. Пилипенко В. П. Воєнні злочини за Римським статутом Міжнародного кримінального суду: питання теорії та практики. Дис. … д-ра юрид. наук.: 12 .00.11 «Міжнародне право». Одеса, 2024. 465 с.

47. Підгородинська А. В. Визнання та виконання рішень іноземних судів та міжнародних судових органів при перейнятті кримінального провадження. *Південноукраїнський правничий часопис*. 2015. № 2. С. 190–193.

48. Попко В. В. Видача особи (екстрадиція) у транснаціональному кримінальному праві. *Evropský politický a právní diskurz*. 2019. Vol. 6. Is. 3. P. 20-28.

49. Свиридова Д., Третьяков М. Чому Україні необхідно впровадити принцип універсальної юрисдикції. 5 травня 2022 р. URL: https://pravo.ua/chomu-ukraini-neobkhidno-vprovadyty-pryntsyp-universalnoi-iurysdyktsii/

50. Свистуленко М. П. Екстрадиція в правовій системі України: основні кримінально-правові аспекти. Дис... канд. юрид. наук: 12.00.08. Київ, 2005. 237 с.

51. Сенченко Н. М., КравченкоВ. Я. Окремі аспекти теорії та практики екстрадиції. *Київський часопис права.* 2022. № 3. С. 208-214.

52. Сливич І. І. Заочне провадження як відповідь на сучасні проблеми у сфері міжнародної правової допомоги у кримінальних справах. *Державаіправо. Юридичніiполітичнінауки*. 2013. Вип. 61. С. 285-289.

53. Слободзян А. П. Міжнародні стандарти інституту видачі особи (екстрадиції) як джерело українського судочинства. *Науковий вісник Міжнародного гуманітарного університету. Серія : Юриспруденція*. 2014. Вип. 10-2(2). С.130-132.

54. Столярський О. В. Особливості застосування міжнародної кримінально-правової юрисдикції: доктринальні підходи професора М. В. Буроменського та інших вчених. Сучасні проблемиміжнародного права. LiberAmicorum до 60-річчя проф. М.В. Буроменського : моногр. / авт.кол.; за ред. В. М. Репецького та В. В. Гутника. Львів; Одеса: Фенікс, 2017. С.450-462.

55. Теорія та практика міжнародного кримінального права : підручник / Зелінська Н. А., Андрейченко С. С., Дрьоміна-Волок Н. В., Коваль Д. О.; за ред. проф. Зелінської Н. А. Одеса: Фенікс, 2017. 582 с.

56. Толочко О. Гуманізація процедури екстрадиції осіб, які вчинили кримінальні правопорушення. *Вісник Національної академії прокуратури України*. 2013. № 2. С. 50-55

57. Трофименко, В. М., Зуєв В. В. Забезпечення прав особи під час прийняття рішення про її видачу. Питання боротьби зі злочинністю: зб. наук. праць. 2020. Вип. 40. С. 40-46

58. Чорноус Ю. М. Видача особи (екстрадиція) у кримінальному провадженні щодо злочинів міжнародного характеру. *Вісниккримінальногосудочинства*. 2015. № 1. С. 143-150.

59. African Charter on Democracy, Elections and Governance 2007. URL: http://archive.ipu.org/idd-e/afr_charter.pdf

60. Agreement between Poland and Egypt on legal assistance in criminal matters, transfer of sentenced persons and extradition 1992. URL: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19940340128

61. Ahcene Boulesbaa. The U.N. Convention on Torture and the Prospects for Enforcement. Martinus Nijhoff Publishers, 1999. 366 p.

62. Akehurst M. A Modem Introduction to International Law. 6th ed. London: Harper Collins Academic, 1991. 320 p.

63. Alejandro E. Alvarez. The Implementation of the ICC Statute in Argentina. *Journal of International Criminal Justice*. 2007. Vol. 5. Issue 2. URL: https://academic.oup.com/jicj/article-abstract/5/2/480/869762

64. Amnesty International. Universal Jurisdiction: The duty to enact and implement legislation, AI Index: IOR 53/002-018/2001, September 2001. URL: https://www.amnesty.org/en/documents/ior53/017/2001/en/

65. Analytical Guide to the Work of the International Law Commission. Obligation to extradite or prosecute (*aut dedere aut judicare*). URL: https://legal.un.org/Ilc/guide/7_6.shtml

66. Andreichenko S., Kosianenko S. The fight against impunity in international criminal law (through the prism of the aut dedere aut judicare obligation). Європейські орієнтири розвитку України в умовах війни та глобальних викликів XXI століття: синергія наукових, освітніх та технологічних рішень : у 2 т. : матеріали Міжнар. наук.- практ. конф. (м. Одеса, 19 травня 2023 р.) / за заг. ред. С. В. Ківалова. Одеса : Видавництво «Юридика», 2023. Т. 1. С. 309-312.

67. Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment. I.C.J. Reports 2006.

68. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium). Judgment. 2002. ICJ Rep 3.

69. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium). Judgment of 14 February 2002. Separate opinion of President Guillaume. URL: https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-01-EN.pdf

70. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002. Dissenting opinion of Judge Van den Wyngaert. URL: https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-09-EN.pdf

71. ASEAN Convention on Counter-Terrorism 2007. URL: https://asean.org/wp-content/uploads/2021/01/ACCT.pdf

72. AU Convention on Preventing and Combating Corruption 2003. URL: https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf

73. Austrian Supreme Court. Service of Summons in Criminal Proceedings. 21 February 1961. I.L.R. 1969. Vol. 38. P. 133.

74. Bantekas I., Nash S. International Criminal Law. Third edition. Taylor & Francis e-Library, 2009. 594 p.

75. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Judgment of 5 February 1970. ICJ Reports. 1970. P. 3.

76. Barriea G. Synopsis of the International Law Commission's Final report on the Obligation to Extradite or Prosecute. *South African Yearbook of International Law*. 2016. Vol. 46. P. 203-214.

77. Bases for discussion in the Working Group on the topic «The obligation to extradite or prosecute (aut dedere aut judicare)», paper prepared by Mr. Zdzislaw Galicki, Special Rapporteur. A/CN.4/L.774. URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2010_v2_p1.pdf

78. Bassiouni M. C. *Crimes against humanity in International Criminal Law*. Boston: Martinus-Nijhoff, 1992. 872 p.

79. Bassiouni M. C., Wise E. M. *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*. Dordrecht: Martinus Nijhoff, 1995. 340 p.

80. Bassiouni M. Cherif. International extradition : United States law and practice. Sixth edition. Oxford University Press, 2014. 1296 p.

81. Bassiouni M. Cherif. International Crimes: Jus Cogens and Obligatio

Erga Omnes. *Law and Contemporary Problems*. 1996. Vol. 59 (4). P. 63-74.

82. Bassiouni M. Cherif. International Extradition: United States Law and Practice. 3rd ed. Dobbs Ferry, Oceana, 1996. 967 p.

83. Bassiouni M. Cherif. Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice. *Virginia Journal of International Law*. 2001. Vol. 42. P. 81-162.

84. Brazil and the Rome Statute. URL: https://www.pgaction.org/ilhr/rome-statute/brazil.html

85. Byers M. Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective. *Michigan Journal of International Law.* 1995. Vol. 17. Issue 1. P. 109-180.

86. Caligiuri A. Governing International Cooperation in Criminal Matters: The Role of the *aut dedere aut judicare* Principle. *International Criminal Law Review*. 2018. № 18 (2). P. 244-274.

87. Cançado Trindade A.A. Rehabilitation Of Victims: Reflections On Some Issues Raised In The Case Belgium Versus Senegal (2012). Adjudicated By The International Court Of Justice. 2013, 151 p. URL: http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_xl_curso_derecho_internacional_2013_antonio_augusto_cancado_trindade.pdf

88. Cassese A., Gaeta P. Cassese's International Criminal Law. Third Edition. OUP Oxford, 2013. 414 p.

89. Cassese A. International Law. 2-nd ed. OUP Oxford, 2005. 558 p.

90. Cheneval F. Der präsumtiv vernünftige Konsens der Menschen und Völker Christian Wolffs Theorie der civitas maxima. *Archives for Philosophy of Law and Social Philosophy.* 1999. Vol. 85. No. 4. P. 563-580.

91. Committee against Torture. Communication No. 181/2001. Suleymane Guengueng et al. v. Senegal. Decision of 17 May 2006. UN Doc. CAT/C/36/D/181/2001.

92. Committee against Torture. Communications ns. 1/1988, 2/1988 and 3/1988. Decision of 23.11.1989. Official Records of the General Assembly. 45th Session. Supplement n. 44. Doc. A/45/44. Annex V.

93. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. URL: https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949

94. Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. URL: https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/state-parties?activeTab=undefined

95. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. URL: https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949?activeTab=undefined

96. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. URL: https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949?activeTab=1949GCs-APs-and-commentaries

97. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.URL: https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=1949GCs-APs-and-commentaries

98. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984. URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading

99. Convention for the Creation of an International Criminal Court 1937. URL: https://legal.un.org/avl/pdf/ls/RM/LoN_Convention_for_ICC.pdf

100. Convention for the Prevention and Punishment of Terrorism 1937. URL: https://www.loc.gov/item/2021667893/

101. Convention for the Suppression of the Illicit Traffic in Dangerous Drugs 1936. League of Nations, Treaty Series. Vol. 198. P. 301.

102. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1950. United Nations. Treaty Series, 96, 27.

103. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971. United Nations. Treaty Series. Vol. 974. P. 177.

104. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988. URL: https://treaties.un.org/doc/db/terrorism/conv8-english.pdf

105. Convention for the Suppression of Unlawful Seizure of Aircraft 1970. United Nations. Treaty Series. Vol. 860. P. 105.

106. Convention of Private International Law 1928 (Bustamante Code). OAS. Treaty Series, 23.

107. Convention on Cybercrime 2001. ETS No. 185. URL: https://rm.coe.int/1680081561

108. Convention on Psychotropic Substances 1971. United Nations. Treaty Series. Vol. 1019. P. 175.

109. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968. URL: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf >

110. Convention on the Physical Protection of Nuclear Material 1979. URL: https://www-pub.iaea.org/MTCD/Publications/PDF/Pub615web.pdf

111. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents 1973. United Nations. Treaty Series. Vol. 1035. P. 167.

112. Convention on the Prevention and Punishment of the Crime of Genocide 1948. URL: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

113. Convention on the Safety of United Nations and Associated Personnel 1994. URL: https://www.un.org/law/cod/safety.htm

114. Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation. Done at Beijing on 10 September 2010. URL: https://www.icao.int/secretariat/legal/list%20of%20parties/beijing_conv_en.pdf

115. Council of Europe, Extradition, European Standards: Explanatory notes on the Council of Europe convention and protocol and minimum standards protecting persons subject to transnational criminal proceedings (Council of Europe Publishing, Strasbourg, 2006). URL: https://rm.coe.int/extradition-european-standards-explanatory-notes-on-the-council-of-eur/16804924cc

116. Court of Justice of the European Union (Grand Chamber). Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra. Case C-182/15, 6 September 2016. URL: curia.europa.eu/juris/liste.jsf?num=C-182/15.

117. Criminal Code of Bosnia and Herzegovina 2003. URL: https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/005%20-%20Criminal%20Code,%20Criminal%20Procedure%20Codes%20and%20Criminal%20Sanctions/Criminal%20Codes/FBH/FBH%20CRIMINAL%20CODE%2036-03.pdf

118. Criminal Code of the Azerbaijan Republic 1999. URL: https://adsdatabase.ohchr.org/IssueLibrary/AZERBAIJAN_Criminal%20Code.pdf

119. Criminal Code of the Republic of Macedonia 1996. URL: https://vlada.mk/sites/default/files/dokumenti/zakoni/criminal_code.pdf

120. Criminal Code of Ukraine 2001. Official translation. URL: https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text

121. Croatia and the Rome Statute. URL: https://www.pgaction.org/ilhr/rome-statute/croatia.html

122. Cryer R. Prosecuting International Crimes: Selectivity and the International Criminal Law Regime. Cambridge Studies in International and Comparative Law, CUP, Cambridge, 2005. 392 p.

123. Cryer R., Friman H., Robinson D., Wilmshurst E. In An Introduction to International Criminal Law and Procedure. Cambridge: Cambridge University Pres, 2007. 477 p.

124. Cryer R., Robinson D.,Vasiliev, S. *An Introduction to International Criminal Law and Procedure* (4th ed.). Cambridge: Cambridge University Press, 2019. 640 p.

125. Danilenko G.M. Law-Making in the International Community. Dordrecht: Martinus Nijhoff, 1993. 343 p.

126. Decision of the Committee Against Torture under Article 22 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (2001). Communication 18/2001. 19 May 2006, UN Doc. No. CAT/C/36/D/181/2001. URL: https://documents-dds-ny.un.org/doc/UNDOC/DER/G06/422/21/PDF/G0642221.pdf?OpenElement

127. Diajeng Wulan Christiane. Why We Need Erga Omnes Character for Obligations to Combat Impunity for International Crimes? URL: https://jurnal.unpad.ac.id/pjih/article/view/14257/7040

128. Draft articles on Prevention and Punishment of Crimes Against Humanity 2019. URL: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf

129. Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996. Commentary to Article 8. International Law Commission. Report of the International Law Commission on the Work of its Forty-Eighth Session. U.N. Doc. A/51/10 (1996) URL: untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf

130. Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996). Yearbook of the International Law Commission. 1996. Vol. II. Part Two.

131. Economic and Social Council. Commission On Human Rights. Sixty-first session Item 17 of the provisional agenda. Promotion And Protection Of Human Rights. Impunity. Report of the independent expert to update the Set of

principles to combat impunity, Diane Orentlicher. 8 February 2005. E/CN.4/2005/102/Add.1. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement

132. Economic and Social Council. Commission On Human Rights. Sixty-first session Item 17 of the provisional agenda. Promotion And Protection Of Human Rights. Impunity18 February 2005.E/CN.4/2005/102.

133. ECOWAS. Convention on Extradition 1994. URL: http://65.52.131.71/bndgtcp/opac_css/daril/A-P1-8-94.pdf

134. Edelenbos C. Human Rights Violations: A Duty to Prosecute? *Leiden Journal of International Law*.1994. Vol. 7. P. 5-21.

135. Enache-Brown Clleen, Fried Ari. Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law. *McGill Law Journal*. 1998. Vol. 43. P. 613-633.

136. Encyclopedia of public international law : vol. II E-I - East African Community to Italy-United States Air Transport Arbitration (1965). R. Bernhardt. Amsterdam: North-Holland, 1995. 1510 p.

137. European Convention on Extradition 1957. ETS No. 24 URL: https://rm.coe.int/1680064587

138. European Convention on Mutual Assistance in Criminal Matters 1959. ETS No. 30. URL: https://rm.coe.int/16800656ce

139. European Convention on the Suppression of Terrorism 1977. ETS No. 90. URL: https://www.refworld.org/docid/3ae6b38914.html

140. First report on State responsibility, by Mr. James Crawford, Special Rapporteur. A/CN.4/490 and Add. 1–7. URL: https://legal.un.org/ilc/documentation/english/a_cn4_490.pdf

141. Formation and evidence of customary international law. Elements in the previous work of the International Law Commission that could be particularly relevant to the topic: Memorandum by the Secretariat. Sixty-fifth session of International Law Commission of the General Assembly of the United Nations (Geneva, 5 May — 7 June and 8 July — 9 August 2013). UN Doc. A/CN.4/659

142. Fourth report on the obligation to extradite or prosecute (aut dedere aut judicare) by Zdzislaw Galicki, Special Rapporteur. A/CN.4/648. URL: https://legal.un.org/ilc/documentation/english/a_cn4_648.pdf

143. General Assembly. Resolution 60/22 of 23 November 2005. Report of the International Law Commission on the work of its fifty-seventh session. A/RES/60/22. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/488/86/PDF/N0548886.pdf?OpenElement

144. General Assembly. Resolution 61/34 of 4 December 2006. Report of the International Law Commission on the work of its fifty-eighth session. A/RES/61/34. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/496/47/PDF/N0649647.pdf?OpenElement

145. General Assembly. Resolution 62/66 of 6 December 2007. Report of the International Law Commission on the work of its fifty-ninth session. A/RES/62/66 URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/467/73/PDF/N0746773.pdf?OpenElement

146. General Assembly. Resolution 65/26 of 6 December 2010. Report of the International Law Commission on the work of its sixty-second session. A/RES/65/26. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/514/10/PDF/N1051410.pdf?OpenElement

147. General Assembly. Resolution 66/98 of 9 December 2011. Report of the International Law Commission on the work of its sixty-third session. A/RES/66/98. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/464/70/PDF/N1146470.pdf?OpenElement

148. General Assembly. Resolution 69/118 of 10 December 2014. Report of the International Law Commission on the work of its sixty-sixth session. A/RES/69/118. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/687/33/PDF/N1468733.pdf?OpenElement

149. General Assembly. Sixty-seventh session. Resolution 67/1 of 30 November 2012. Declaration of the High-level Meeting of the General Assembly

on the Rule of Law at the National and International Levels. A/RES/67/1. URL: https://regnet.anu.edu.au/sites/default/files/files/ROL/A-RES-67-1(1).pdf

150. General Assembly. Sixty-sixth session. Sixth Committee. Summary record of the 26th meeting. 7 December 2011. A/C.6/66/SR.26. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/574/38/PDF/N1157438.pdf?OpenElement

151. Gilbert G. Responding to International Crime. Martinus Nijhoff Publishers Leiden / Boston, 2006. 489 p.

152. Goodwin-Gill, Guy S. Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute. In *The Reality of International Law: Essays in Honour of Ian Brownlie*. Oxford: Clarendon, 1999.P. 199-224.

153. Howard Andrew. Thesis. Legal Analysis Of The Case Concerning The Obligation ToProsecute Or Extradite Before The International CourtOf Justice (Belgium V. Senegal) : A Case Study. 2014.

154. Hugo Grotius. The Rights of War and Peace. Book II. Natural law and enlightenment classics. General Editor K. Haakonssen. Liberty Fund, Inc., 2005. 1183 p.

155. ICJ. North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark). 20 February 1969. I.C.J. Reports 1969. P. 41.

156. ICJ. Portugal v. Australia (East Timor case). 30 June 1995. ICJ Rep. 1995. P. 90

157. ICTY. Appeals Chamber. Prosecutor v. Tihomir Blaskic. Judgement of 29 October 1997. URL: https://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html.

158. ICTY. Trial Chamber, Prosecutor v. Anto Furundzija. Judgment of 10 December 1998. URL: http://www.un.org/icty/furundzija/trialc2/judgement/index.htm.

159. Inter-American Convention on Extradition 1981. URL: https://www.oas.org/juridico/english/treaties/b-

47.html#:~:text=The%20States%20Parties%20bind%20themselves,penalty%20involving%20deprivation%20of%20liberty.

160. Inter-American Convention on Forced Disappearance of Persons 1994. URL:http://www.oas.org/juridico/english/treaties/a-60.html

161. Inter-American Convention to Prevent and Punish Torture 1985. URL: https://humanrightscommitments.ca/wp-content/uploads/2019/03/Inter-American-Convention-to-Prevent-and-Punish-Torture-.pdf

162. Inter-American Court of Human Rights. Case of Goiburú et al. v. Paraguay. Judgment of 22 September 2006 (Merits, Reparations and Costs). URL: https://www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf

163. Inter-American Court of Human Rights. Case of Velásquez-Rodríguez v. Honduras. Judgment of 29 July 1988. Merits. URL: https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf

164. International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989. URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-against-recruitment-use-financing-and

165. International Convention Against the Taking of Hostages 1979. United Nations. Treaty Series. Vol. 1983. P. 206.

166. International Convention for the Protection of All Persons from Enforced Disappearance 2006. URL: https://treaties.un.org/doc/publication/ctc/ch_iv_16.pdf

167. International Convention for the Suppression of Acts of Nuclear Terrorism 2005. URL: https://treaties.un.org/doc/source/RecentTexts/English_18_15.pdf

168. International Convention for the suppression of counterfeiting currency 1929. United Nations. Treaty Series. Vol. 1911. P. 418-418.

169. International Convention for the Suppression of Terrorist Bombings 1997. URL: https://www.unodc.org/documents/treaties/Special/1997%20International%20Convention%20for%20the%20Suppression%20of%20Terrorist.pdf

170. International Convention for the Suppression of the Financing of Terrorism 1999. URL: https://treaties.un.org/doc/db/terrorism/english-18-11.pdf

171. International Court of Justice. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Judgment of 20 July 2012. URL: https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf

172. International Law Commission Sixty-sixth session. Geneva, 5 May-6 June and 7 July-8 August 2014. Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions. Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session, prepared by the Secretariat A/CN.4/666. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/226/81/PDF/N1422681.pdf?OpenElement

173. International Law Commission. Fifty-eighth session. Geneva, 1 May-9 June and 3 July-11 August 2006. Preliminary report on the obligation to extradite or prosecute («aut dedere aut judicare») / by Zdzislaw Galicki, Special Rapporteur. A/CN.4/571. URL: https://digitallibrary.un.org/record/578129?ln=en

174. International Law Commission. Sixty-fifth session Geneva, 6 May–7 June and 8 July–9 August 2013. Report of the Working Group on the Obligation to extradite or prosecute (*aut dedere aut judicare*). A/CN.4/L.829. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G13/619/66/PDF/G1361966.pdf?OpenElement

175. International Law Commission. Sixty-first session Geneva, 4 May-5 June and 6 July-7 August 2009. The obligation to extradite or prosecute (aut dedere aut judicare). Comments and information received from Governments. A/CN.4/612. URL: https://digitallibrary.un.org/record/657472?ln=en

176. International Law Commission. Sixty-sixth session. Geneva, 5 May–6 June and 7 July–8 August 2014. Final report Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*). A/CN.4/L.844. URL: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/044/18/PDF/G1404418.pdf?OpenElement

177. International Law Commission. Summaries of the Work of the International Law Commission. Obligation to extradite or prosecute (*aut dedere aut judicare*). URL: https://legal.un.org/ilc/summaries/7_6.shtml

178. International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*). Amnesty International Publications, 2009. 104 p. URL: https://www.amnesty.org/en/wp-content/uploads/2021/07/ior400012009en.pdf

179. Introduction to International Criminal Law. Second Revised Edition. Edited by M. Cherif Bassiouni. Martinus Nijhoff: Leiden, Boston, 2014. 1122 p.

180. Jan Wouters. The Obligation to Prosecute International Law Crimes. 2005/ URL: https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf

181. Kelly M. J. Cheating justice by cheating death: the doctrinal collision for prosecuting foreign terrorists – passage of *aut dedere aut judicare* into customary law & refusal to extradite based on the death penalty. *Arizona Journal of International and Comparative Law*. 2003. Vol. 20 (3). P. 491-532.

182. Kennedy D. Stein T., Rubin A. The Extradition of Mohammed Hamadei. *Harvard International Law Journal*. 1990. Vol. 31 (1). P. 5-35.

183. Kenneth S. Gallant. International Criminal Jurisdiction - Whose Law Must We Obey? Oxford University Press, 2022. 775 p.

184. Kittichaisaree K. The Obligation to Extradite or Prosecute. OUP Oxford, 2018. 369 p.

185. Kolb R. The Exercise of Criminal Jurisdiction over International Terrorists. In: Bianchi A (ed) Enforcing International Law Norms Against Terrorism. HP, Oxford and Portland, Oregon, USA, 2004. P. 227–281.

186. Kosianenko S. *A civitas maxima* through the prism of the *aut dedere aut judicare* principle. *Recent Advances in Global Science*: *Proceedings of the 3rd International Scientific and Practical Conference*. September 16-18, 2023. Vilnius, Lithuania. P. 86-89. URL: https://archive.interconf.center/index.php/conference-proceeding/issue/view/16-18.09.2023/180

187. Kosianenko S. International custom as a source of the obligation to extradite or prosecute. *Knowledge, Education, Law, Management*. 2023. № 5 (57). P. 182-186. URL: https://kelmczasopisma.com/ua/viewpdf/11025DOI https://doi.org/10.51647/kelm.2023.5.30.

188. Kosianenko S. International treaties as sources of the obligation to extradite or prosecute. *European Political and Law Discourse*. 2023. Vol. 10. Issue 4. P. 68−75. URL: https://eppd13.cz/wp-content/uploads/2023/2023-10-4/06.pdf

189. Kosianenko S. The *aut dedere aut judicare* principle and *erga omnes* obligations. Collection of abstracts. VII International scientific and practical conference «Scientific Research: Theoretical Foundations and Practical Applications», January 24-26, 2024. Vienna, Austria, International Scientific Unity. 2024. P. 179-182. URL: https://isu-conference.com/wp-content/uploads/2024/01/Scientific_research_theoretical_foundations_and_practical_applications.pdf.

190. Kosianenko S. The *aut dedere aut judicare principle* and *jus cogens violations*. International scientific conference «Scientific innovations in law amidst the impact of the Russian-Ukrainian war on the legal system» : conference proceedings (February 7–8, 2024. Riga, the Republic of Latvia). Riga, Latvia : Baltija Publishing, 2024. P. 196-198.URL: http://www.baltijapublishing.lv/omp/index.php/bp/catalog/download/436/11728/24527-1?inline=1 DOI https://doi.org/10.30525/978-9934-26-409-2-45.

191. Kosianenko S. The obligation to extradite or prosecute and universal jurisdiction. *Аналітично-порівняльне правознавство*. 2023. № 5. P. 612-617. URL: https://app-journal.in.ua/wp-content/uploads/2023/11/112.pdf DOI https://doi.org/10.24144/2788-6018.2023.05.110.

192. Kosianenko S. The relationship between the obligations to extradite and prosecute under the *aut dedere aut judicare* clause. Актуальні проблеми юридичної науки. Політико-правові передумови європейської та євроатлантичної інтеграції України: збірник тез Міжнародної науково-практичної конференції «Двадцять другі осінні юридичні читання» (м.

Хмельницький, 13 жовтня 2023 року), Хмельницький університет управління та права імені Леоніда Юзькова, 2023. Р. 160-161.

193. Kosianenko S. The work of the International Law Commission on the topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)». *Юридичний вісник*. 2023. № 3. С. 188−196. DOI https://doi.org/10.32782/yuv.v3.2023.24. URL: http://yurvisnyk.in.ua/v3_2023/24.pdf

194. Kress C. Universal Jurisdiction over International Crimes and the Institut de Droit International. *Journal of International Criminal Justice*. 2006. Vol. 4(3). P. 561-585.

195. Ling Y. State Sovereignty and International Criminal Law, Norway: Torkel Opsahl Academic EPublisher, 2012. 281 p.

196. Mack E. Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity? *Minesota Journal of International Law*. 2015. Vol. 24(1). P. 73-100.

197. Mattarollo R. Impunity and international law. *Revue québécoise de droit international*, 1998. Vol. 11(1). P. 81-94. URL: https://www.sqdi.org/wp-content/uploads/11.1_-_mattarollo.pdf

198. Matthew G. Unraveling the Confused Relationship Between Treaty Obligations to Extradite or Prosecute and «Universal Jurisdiction» in the Light of the Habre Case. *Harvard International Law Journal.* 2018. Vol. 59. № 1. P. 125-196.

199. Mendelson M. The Formation of Customary International Law. *Recueil des cours de l'Académie de droit international de la Haye*. 1988. Vol. 272. P. 155–410.

200. Meron T. Human Rights and Humanitarian Norms as Customary Law Oxford: Clarendon, 1989. 280 p.

201. Mettraux G. International Crimes: Law and Practice: Volume II: Crimes Against Humanity. Oxford University Press, 2020. 960 p.

202. Michael P. Scharf. Aut dedere aut judicare. *Max Planck Encyclopedia of Public International Law*. Rudiger Wolfurm (ed), 2012. P. 749-754.

203. Military and Puramilitary Activities in und against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986. P. 14.

204. Mitchell C. Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law. Graduate Institute Publications, 2011. 155 p. URL: https://books.openedition.org/iheid/301.

205. Murphy John F. Punishing International Terrorists. First Edition. Rowman & Littlefield Publishers, 1985. 152 p.

206. Nollkaemper A. Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in Belgium v. Senegal. *Journal of International Dispute Settlement. 2013. Vol.* 4(3). P. 501-519. https://doi.org/10.1093/jnlids/idt025

207. Nulyarimma v. Thompson (1192, 1 September 1999) / Federal Court of Australia.

208. O'Keefe R. The Grave Breaches Regime and Universal Jurisdiction. *Journal of International Criminal Justice.* 2009. Vol. 7. P. 811–831 URL: https://ssrn.com/abstract=3496592 or http://dx.doi.org/10.2139/ssrn.3496592

209. OAU Convention for the Elimination of Mercenarism in Africa 1977. URL: https://au.int/sites/default/files/treaties/37287-treaty-0009_-_oau_convention_for_the_elimination_of_mercenarism_in_africa_e.pdf

210. OAU Convention on the Prevention and Combating of Terrorism 1999. URL: https://au.int/sites/default/files/treaties/37289-treaty-0020_-_oau_convention_on_the_prevention_and_combating_of_terrorism_e.pdf

211. Onuf N. G. Civitas Maxima: Wolff, Vattel and the Fate of Republicanism. *The American Journal of International Law*. 1994. Vol. 88, No. 2 (Apr., 1994). P. 280-303.

212. Orentlicher D.F. Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime. *The Yale Law Journal*. 1991. Vol. 100. P. 2537-2615.

213. Pagden A. Gentili, Vitoria, and the Fabrication of a 'Natural Law of Nations', in Benedict Kingsbury, and Benjamin Straumann (eds). *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire.* Oxford, 2010. P. 340-362. URL: https://doi.org/10.1093/acprof:oso/9780199599875.003.0016

214. Panov S. M. The obligation *aut dedere aut judicare* ('extradite or prosecute') in international law: scope, content, sources and applicability of the obligation 'extradite or prosecute'. University of Birmingham, 2016. 385 p.

215. Parliamentary Assembly of the Council of Europe, «*Consequences of Russian aggression against Ukraine: the role and response of the Council of Europe*», Resolution 2433 (2022), 27 April 2022. URL: pace.coe.int/en/files/30017/html ; UNGA. Eleventh emergency special session. *Aggression against Ukraine*. Resolution ES-11/1, 2 March 2022. URL: digitallibrary.un.org/record/3965290?ln=en

216. Pedretti R. Immunity of Heads of State and State Officials for International Crimes. Leiden; Boston: Brill Nijhoff, 2015. 488 p.

217. Penal Code of Estonia 2001. URL: https://www.riigiteataja.ee/en/eli/522012015002/consolide

218. Penal Code of Finland 39/1889. URL: https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf

219. Plachta M. Aut Dedere Aut Judicare: An Overview of Modes of Implementation and Approaches. *Maastricht Journal of European and Comparative Law*. 1999. Vol. 6. No. 4. P. 331-365.

220. Plachta M. Contemporary problems of extradition: human rights, grounds for refusal and the principle *aut dedere aut judicare*. Resource Material Series, 2001. No. 57. P. 64-86.

221. Plachta M. Transfer of prisoners under international instruments and domestic legislation : a comparative study. Max-Planck-Institut für Ausländisches und Internationales Strafrecht, Freiburg im Breisgau, 1993. 565 p.

222. Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination. 2006. URL: https://icglr.org/wp-content/uploads/2022/11/protocol_for_the_prevention_of_the_crime_of_genocide__war_crimes_and_crimes_against_humanity_and_all_forms_of_discrimination.pdf

223. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment. I.C.J. Reports 1998. P. 9.

224. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom). Order of 14 April 1992. Request for the indication of Provisional Measures. Dissenting Opinion of Judge Weeramantry. P. 50-71. URL: https://www.icj-cij.org/sites/default/files/case-related/88/088-19920414-ORD-01-07-EN.pdf

225. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom). Order of 14 April 1992. Request for the indication of Provisional Measures. Dissenting Opinion of Judge Ajibola. P. 78-94. URL: https://www.icj-cij.org/sites/default/files/case-related/88/088-19920414-ORD-01-09-EN.pdf

226. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Judgment. I.C.J. Reports 2012. P. 422.

227. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Dissenting opinion of Judge Judge Xue. URL: https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-06-EN.pdf

228. Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3). 2000.

229. Report of the Committee of Eminent African Jurists on The Case of Hissene Habre, 2006. URL:

https://thehagueinstituteforglobaljustice.org/files/legacy/justice/habre/ceja_repor0506.pdf

230. Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996). A/51/10. Draft Code Of Crimes Against The Peace And Security Of Mankind. Article 9. Commentary. URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf

231. Report of the International Law Commission. Fifty-eighth session (1 May-9 June and 3 July-11 August 2006). A/61/10. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/636/20/PDF/G0663620.pdf?OpenElement

232. Report of the International Law Commission. Fifty-sixth session (3 May-4 June and 5 July-6 August 2004). General Assembly Official Records. Fifty-ninth session. Supplement No. 10 (A/59/10). Annex. The obligation to extradite or prosecute («aut dedere aut judicare») in international law. Preliminary remarks by Zdzislaw Galicki. URL: https://legal.un.org/ilc/documentation/english/reports/a_59_10.pdf

233. Report of the International Law Commission. Seventy-first session 29 April–7 June and 8 July–9 August 2019. General Assembly Official Records. Seventy-fourth Session. Supplement No. 10 (A/74/10). URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/243/93/PDF/G1924393.pdf?OpenElement

234. Report of the International Law Commission. Sixty-fifth session (6 May–7 June and 8 July–9 August 2013). General Assembly Official Records. Sixty-eighth session. Supplement No. 10 (A/68/10). URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/480/25/PDF/N1348025.pdf?OpenElement

235. Report of the International Law Commission. Sixty-sixth session (5 May–6 June and 7 July–8 August 2014). General Assembly. Official Records. Sixty- sixth session. Supplement No. 10 (A/69/10). Chapter VI The obligation to extradite or prosecute (*aut dedere aut judicare*). P. 129-152. URL: https://www.legal-tools.org/doc/f9e7cd/pdf/

236. Report of the International Law Commission. Sixty-sixth session (5 May–6 June and 7 July–8 August 2014). General Assembly. Official Records.

Sixty-sixth session. Supplement No. 10 (A/69/10). Annex. Jus Cogens (Mr. Dire D. Tladi). URL: https://www.legal-tools.org/doc/f9e7cd/pdf/

237. Reydams L. Universal Jurisdiction: International and Municipal Legal. Perspectives. Oxford: Oxford University Press, 2003, 258 p.

238. Roht-Arriaza N. State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law. *California Law Review*. 1990. Vol. 78 (2). P. 449-513.

239. Rome Statute of the International Criminal Court 1998. URL: https://ihl-databases.icrc.org/en/ihl-treaties/icc-statute-1998

240. SAARC Regional Convention on Suppression of Terrorism 1987. URL: https://treaties.un.org/doc/db/terrorism/conv18-english.pdf

241. Sadat L. Exile, Amnesty and International Law. *Notre DameRev.* 2006. Vol. 81. P. 955-1036.

242. SADC Protocol Against Corruption 2001. URL: https://www.sadc.int/sites/default/files/2021-11/Protocol_Against_Corruption2001.pdf

243. Schabas W. An Introduction to the International Criminal Court. 5th Edition, Cambridge University Press, 2017. 612 p.

244. Scharf M. P. The Jury Is Still Out on the Need for an International Criminal Court. Duke Journal of Comparative & International Law. 1991. Vol. 1. P.135-168.

245. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999. URL: https://unesdoc.unesco.org/ark:/48223/pf0000130696

246. Second report on crimes against humanity / by Sean D. Murphy, Special Rapporteur . URL: https://digitallibrary.un.org/record/827603.

247. Second report on crimes against humanity. By Sean D. Murphy, Special Rapporteur, 2016. A/CN.4/690. URL: https://digitallibrary.un.org/record/827603

248. Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur. A/CN.4/585. URL:

https://legal.un.org/ilc/documentation/english/a_cn4_585.pdf

249. Shearer I. A. Extradition in International Law. Manchester: Manchester University Press; Dobbs Ferry: Oceana Publications Inc., 1971. 283 p.

250. Single Convention on Narcotic Drugs 1961. United Nations. Treaty Series. Vol. 520. P. 151.

251. Slavery Convention, 25 September 1926. URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/slavery-convention

252. Soler C. The Global Prosecution of Core Crimes under International Law. The Hague, T.M.C. ASSER PRESS, 2019. 695 p.

253. Statement by Mr. Wang Chen at the Sixth Committee of the 61st Session of the UN General Assembly on Item 78: Report of the International Law Commission on the work of its fifty-eighth session (Effects of Armed Conflicts on Treaties, the Obligation to Extradite or Prosecute, Fragmentation of International Law) http://un.china-mission.gov.cn/eng/chinaandun/legalaffairs/sixthcommittee1/200611/t20061101_8412149.htm

254. Statement of Chairman Gilbert Guillaume (delegate from France). International Civil Aviation Organization Legal Committee, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft. Doc. 8877-LC/161. 13th meeting, 3 Mar. 1970, 17th Sess. Montreal, 9 Feb.-11 Mar. 1970.

255. Steps forward for international law in Ljubljana and Paris, 2023. URL: https://civitas-maxima.org/steps-forward-for-international-law-in-ljubljana-and-paris/.

256. Steenberghe van Raphaël. The Obligation to Extradite or Prosecute: Clarifying Its Nature. Journal of International Criminal Justice. 2011. Vol. 9. P. 1089-1116.

257. Suganami H. Grotius and International Equality. In Bull H., Kingsbury B. and Roberts A. (eds). *Hugo Grotius and International Relations*. OUP, 1990. 331 p.

258. Suleymane Guengueng et autres v. Sénégal, Communication No. 181/2001, CAT/C/36/D/181/2001 of 19 May 2006.

259. Supreme Court of Cassation of Italy. Ferrini v. Germany. Appeal decision, Case no 5044/04, ILDC 19

260. The League of Arab States Convention on the Extradition 1952. URL: https://haqqi.s3.eu-north-1.amazonaws.com/2014-04/HRIDRL0142_ArabCriminalExtradition_.pdf

261. The Ljubljana - the Hague Convention is scheduled to be open for signature in the first quarter of 2024, after the final revision of the text. URL: https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention.pdf

262. The obligation to extradite or prosecute (*aut dedere aut judicare*). Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)». A/CN.4/630. URL: ttps://legal.un.org/ilc/documentation/english/a_cn4_630.pdf

263. The obligation to extradite or prosecute (aut dedere aut judicare): comments and information received from Governments (Chile; Ireland; Lebanon; Mexico; Slovenia; Sweden; Tunisia), 2007. A/CN.4/579/Add.1

264. The obligation to extradite or prosecute (aut dedere aut judicare): comments and information received from Governments: addendum. (United States; Latvia; Serbia; Sri Lanka), 2007. A/CN.4/579/Add.2

265. The obligation to extradite or prosecute (aut dedere aut judicare): comments and information received from Governments (Argentina; Belgium; Canada; South Africa; Yemen), 2009. A/CN.4/612.

266. The Penal Code of Switzerland. URL: http://www.admin.ch/ch/f/rs/311_0/index.html

267. The Portuguese Penal Code. URL: https://wfrtds.org/wp-content/uploads/2021/02/Portugal-Criminal-Code-2006-EN.pdf

268. The United Nations Principles to Combat Impunity: A Commentary. Oxford University Press, 2018. URL: https://centerforunreform.org/biblio/the-united-nations-principles-to-combat-impunity-a-commentary/

269. Third report on the obligation to extradite or prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur. A/CN.4/603. URL: https://digitallibrary.un.org/record/632212?ln=en

270. Tijanić J. *Aut dedere aut judicare* in international and domestic law. Conference Paper, 2022. URL: https://www.researchgate.net/publication/361254640_Aut_dedere_aut_judicare_in_international_and_domestic_law

271. Treaty between the United States of America and the Federal Republic of Germany concerning extradition 1978. URL: https://www.un-ilibrary.org/content/books/9789210454391s003-c003

272. UN Commission on Human Rights. Resolution 2003/72: Impunity. 25 April 2003. E/CN.4/RES/2003/72. URL: https://www.refworld.org/docid/43f3134e3.html

273. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. United Nations. Treaty Series. Vol. 1582. P. 95.

274. United Nations Model Treaty on Extradition. UN Doc. A/RES/45/116. URL: https://digitallibrary.un.org/record/105573?ln=en

275. United Nations. Report of the International Law Commission. Fifty-sixth session (3 May-4 June and 5 July-6 August 2004). General Assembly Official Records. Fifty-ninth session. Supplement No. 10 (A/59/10). URL: https://legal.un.org/ilc/documentation/english/reports/a_59_10.pdf

276. Vattel Emer. The Law of Nations (LF ed.). Indianapolis: Liberty Fund, 1797. 500 p.

277. Werle G. Principles of International Criminal Law. The Hague: T.M.C. Asser Press, 2005. 488 p.

278. Wise E.M. Extradition: the hypothesis of a *civitas maxima* and the maxim *aut dedere aut judicare*. *International Review of Penal Law*. 1991. Vol. 62.

P. 109–134.

279. Wolfram R. The Decentralized Prosecution of International Offenses Through National Courts. *Israel YB.H.R.* 1995. Vol. 24. P.183.

280. World Court Digest. Formerly Fontes Iuris Gentium. Volume 4. 2001–2005. Prepared by Petra Minnerop, Karin Oellers-Frahm, Frank Schorkopf, Christian Walter, Annette Weerth. Springer-Verlag Berlin – Heidelberg – New York., 2009. 935 p.

281. Year book of the international law commission. Documents of the fifty-ninth session. 2007. Volume II Part One. A/CN.4/SER.A/2007/Add.l (Part 1). The obligation to extradite or prosecute (*aut dedere aut judicare*). Comments and observations received from Governments. Document A/CN.4/579 and Add.1–4. P. 67-108. URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2007_v2_p1.pdf

282. Zakon of primjeni statuta međunarodnog kaznenog suda i progonu za kaznena djela protiv međunarodnog ratnog i humanitarnog prava 2003. URL: https://www.zakon.hr/z/466/Zakon-o-primjeni-statuta-me%C4%91unarodnog-kaznenog-suda-i-progonu-za-kaznena-djela--protiv-me%C4%91unarodnog-ratnog-i-humanitarnog-prava#google_vignette

283. Zgonec-Rožej M., Foakes J. International Criminals: Extradite or Prosecute? 2013, 16 p. URL: www.chathamhouse.org.

APPENDIX 1

LIST OF PUBLISHED SCIENTIFIC WORKS ON THE TOPIC OF THE THESIS

Articles in scientific publications included in the list of scientific specialized publications of Ukraine

1. Kosianenko S. The work of the International Law Commission on the topic «The obligation to extradite or prosecute (*aut dedere aut judicare*)». *Юридичний вісник*. 2023. № 3. С. 188−196. URL: http://yurvisnyk.in.ua/v3_2023/24.pdf/. DOI https://doi.org/10.32782/yuv.v3.2023.24.

2. Kosianenko S. The obligation to extradite or prosecute and universal jurisdiction. *Аналітично-порівняльне правознавство*. 2023. № 5. P. 612-617. URL: https://app-journal.in.ua/wp-content/uploads/2023/11/112.pdf. DOI: https://doi.org/10.24144/2788-6018.2023.05.110.

3. Кос'яненко С. О. Національне законодавство як джерело зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*). *Науковий вісник Ужгородського національного університету. Серія: Право*. 2024. Вип. 81. Частина 3. С. 269-274. URL: https://visnyk-juris-uzhnu.com/wp-content/uploads/2024/03/81_part-3.pdf/. DOI https://doi.org/10.24144/2307-3322.2024.81.3.40.

4. Кос'яненко С. О. «Третя альтернатива» за зобов'язанням видавати або здійснювати судове переслідування (*aut dedere aut judicare*). *Юридичний науковий електронний журнал.* 2024. № 1. С. 687-689. URL: http://www.lsej.org.ua/1_2024/166.pdf. DOI https://doi.org/10.32782/2524-0374/2024-1/164.

Publication in foreign journals

5. Kosianenko S. International treaties as sources of the obligation to extradite or prosecute. *European Political and Law Discourse*. 2023. N 10. Issue

4. P. 68−75. URL: https://eppd13.cz/wp-content/uploads/2023/2023-10-4/06.pdf. DOI: 10.46340/eppd.2023.10.4.4.

6. Kosianenko S. International custom as a source of the obligation to extradite or prosecute. *Knowledge, Education, Law, Management*. 2023. N 5 (57). P. 182-186. URL: https://kelmczasopisma.com/ua/viewpdf/11025. DOI https://doi.org/10.51647/kelm.2023.5.30.

Publications certifying the approbation of the thesis and additionally reflecting the scientific results of the thesis

7. Andreichenko S., Kosianenko S. The fight against impunity in international criminal law (through the prism of the aut dedere aut judicare obligation. Європейські орієнтири розвитку України в умовах війни та глобальних викликів XXI століття: синергія наукових, освітніх та технологічних рішень : у 2 т. : матеріали Міжнар. наук.- практ. конф. (м. Одеса, 19 травня 2023 р.) / за заг. ред. С. В. Ківалова. Одеса : Видавництво «Юридика», 2023. Т. 1. С. 309-312. (Особистий внесок здобувача – 0,06 д.а.).

8. Кос'яненко С. О. Зобов'язання здійснювати судове переслідування як складова принципу *autdedereautjudicare*. *Global Society in Formation of New Security System and World Order: Proceedings of the 2nd International Scientific and Practical* Internet Conference. July 27-28, 2023. Dnipro, Ukraine. P. 213−215. URL: http://www.wayscience.com/wp-content/uploads/2023/08/Conference-Proceedings-July-27-28-2023.pdf.

9. Kosianenko S. *A civitas maxima* through the prism of the *aut dedere aut judicare* principle. *Recent Advances in Global Science*: *Proceedings of the 3rd International Scientific and Practical Conference*. September 16-18, 2023. Vilnius, Lithuania. P. 86-89. URL: https://archive.interconf.center/index.php/conference-proceeding/issue/view/16-18.09.2023/180.

10. Kosianenko S. The relationship between the obligations to extradite and prosecute under the *aut dedere aut judicare* clause. Актуальні проблеми юридичної науки. Політико-правові передумови європейської та

євроатлантичної інтеграції України: збірник тез Міжнародної науково-практичної конференції «Двадцять другі осінні юридичні читання» (м. Хмельницький, 13 жовтня 2023 року), Хмельницький університет управління та права імені Леоніда Юзькова, 2023. Р. 160-161.

11. Kosianenko S. The *aut dedere aut judicare* principle and *erga omnes* obligations. Collection of abstracts. VII International scientific and practical conference «Scientific Research: Theoretical Foundations and Practical Applications», January 24-26, 2024. Vienna, Austria, International Scientific Unity. 2024. P. 179-182. URL: https://isu-conference.com/wp-content/uploads/2024/01/Scientific_research_theoretical_foundations_and_practical_applications.pdf.

12. Kosianenko S. The *aut dedere aut judicare principle* and *jus cogens violations*. International scientific conference «Scientific innovations in law amidst the impact of the Russian-Ukrainian war on the legal system» : conference proceedings (February 7–8, 2024. Riga, the Republic of Latvia). Riga, Latvia : Baltija Publishing, 2024. P. 196-198.URL: http://www.baltijapublishing.lv/omp/index.php/bp/catalog/download/436/11728/24527-1?inline=1 DOI https://doi.org/10.30525/978-9934-26-409-2-45.

APPENDIX 2

«ЗАТВЕРДЖУЮ»
Ректор Національного університету
«Одеська юридична академія»
____________Олег ТОДОЩАК

АКТ
про впровадження результатів дисертаційного дослідження аспіранта кафедри міжнародного та європейського права Національного університету «Одеська юридична академія» Кос'яненко Сергія Олеговича на тему: «Принцип *aut dedere aut judicare* у міжнародному праві» в навчальну та науково-дослідну діяльність Національного університету «Одеська юридична академія»

Комісія у складі: *голови* – проректора з наукової роботи Національного університету «Одеська юридична академія», професора М.Р. Аракеляна, *членів комісії* – проректора з навчальної роботи Національного університету «Одеська юридична академія», професора Г.О. Ульянової, начальника навчально-методичного відділу Національного університету «Одеська юридична академія» Л.В. Кузнецової, декана факультету судового та міжнародного права Національного університету «Одеська юридична академія», доцента Б.В. Фасія, завідувача кафедри міжнародного та європейського права, професора Х.Н. Бехруза, склала цей акт про те, що результати дисертаційного дослідження Кос'яненко Сергія Олеговича на тему «Принцип *aut dedere aut judicare* у міжнародному праві», на здобуття наукового ступеня доктора філософії за спеціальністю 081 «Право» використовується у навчальному процесі Національного університету «Одеська юридична академія» при викладанні навчальних дисциплін

«Міжнародне право», «Міжнародне кримінальне право», а також у науково-дослідній роботі студентів, аспірантів, науковців.

Так, були враховані положення дисертації, зокрема, щодо:

- доцільноті вивчення принципу *aut dedere aut judicare* крізь призму трьох взаємопов'язаних аспектів: по-перше, захисту інтересів міжнародної спільноти (запобігання безкарності за вчинені міжнародні злочини та забезпечення міжнародного порядку); по-друге, захисту інтересів держави (запитуючої та запитуваної) у контексті здійснення екстрадиції, кримінального переслідування та кримінальної юрисдикції (зокрема, універсальної юрисдикції) та; по-третє, захисту прав та інтересів осіб, які підлягають кримінальному переслідуванню чи екстрадиції;

-діяльності Комісії міжнародного права над темою «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)». За результатами роботи КМП ООН над цією темою були представлені такі основні документи: Попередні зауваження "Зобов'язання видавати або здійснювати судове переслідування ("*aut dedere aut judicare*") у міжнародному праві", представлені Спеціальним доповідачем Здзіславом Галицьким (2004); чотири доповіді Спеціального доповідача Здзіслава Галицького по темі «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)» (Попередній звіт 2006 р., Другий звіт 2007 р., Третій звіт 2008 р., Четвертий звіт 2011 р.), Звіт Робочої групи щодо зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*) (2013), Остаточна доповідь Робочої групи щодо зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*) (2014). Десятиліття роботи КМП ООН над темою «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)» не принесло суттєвих результатів, до прикладу, проєктів статей про зобов'язання видавати або здійснювати судове переслідування;

- характеристики джерел зобов'язання видавати або здійснювати судове переслідування з метою визначення характеру та обсягу зобов'язання *aut* *dedere aut judicare* у міжнародному праві. Зобов'язання *aut dedere aut judicare* випливає не лише з положень конкретних міжнародних договорів, але й із звичаєвих норм міжнародного права, принаймні щодо окремих категорій міжнародних злочинів, а саме щодо злочинів *jus cogens*. Ефективна реалізація принципу *aut dedere aut judicare* у кожному конкретному випадку залежатиме від виконання державою як своїх міжнародних зобов'язань, так і реалізації необхідних заходів (зокрема щодо встановлення юрисдикції над кримінальними правопорушеннями та правопорушниками), визначених у національному законодавстві з питань екстрадиції та кримінального переслідування;

- змісту та класифікації міжнародних конвенцій, спрямованих на боротьбу з міжнародними та транснаціональними злочинами, що містять положення *aut dedere aut judicare*. Такі конвенції класифіковано за трьома основними групами взалежності від співвідношення між зобов'язанням видачі та зобов'язанням здійснювати судове переслідування. Перша група договорів містить положення, які покладають зобов'язання щодо видачі, а зобов'язання судового переслідування виникає лише у випадку відмови від екстрадиції. Друга група конвенцій включає положення, які покладають зобов'язання здійснювати судове переслідування у разі, коли підозрюваний правопорушник перебуває на території держави-учасниці, незалежно від того, чи запитує інша держава-учасниця екстрадицію. Третя група договорів містить положення, які передбачають альтернативу для держави, на території якої знаходиться передбачуваний правопорушник;

- змісту трьох основних конструкцій співвідношення між двома зобов'язаннями (видавати або здійснювати судове переслідування), закріпленими принципом *aut dedere aut judicare* (пріоритет екстрадиції, пріоритет судового переслідування, альтернативність);

- необхідності проведення відмежування між принципом *aut dedere aut judicare* та принципом універсальної юрисдикції. Універсальна юрисдикція застосовується за відсутності іншого зв'язку з державою (територіальність, громадянство чи інша підстава); зобов'язання *aut dedere aut judicare* передбачає передачу справи компетентним органам для судового переслідування чи екстрадиції, а не встановлення юрисдикції. Для виконання зобов'язання *aut dedere aut judicare*, держава повинна прийняти закони, що криміналізують певну поведінку. Зобов'язання *aut dedere aut judicare* не обмежується ситуаціями, які потребують застосування універсальної юрисдикції для судового переслідування чи екстрадиції особи;

Результати дослідження Кос'яненко Сергія Олеговича відображаються у науково-практичних і навчально-методичних матеріалах для слухачів магістратури та аспірантури, де в якості джерел рекомендовані до використання у навчальному процесі наступні наукові публікації:

Kosianenko S. The work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". *Юридичний вісник*. 2023. № 3. С. 188–196. DOI https://doi.org/10.32782/yuv.v3.2023.24 URL: http://yurvisnyk.in.ua/v3_2023/24.pdf

Kosianenko S. The obligation to extradite or prosecute and universal jurisdiction. *Аналітично-порівняльне правознавство*. 2023. № 5. С. 612-617. DOI https://doi.org/10.24144/2788-6018.2023.05.110 URL: https://app-journal.in.ua/wp-content/uploads/2023/10/APP_05_2023_FINAL.pdf

Kosianenko S. International treaties as sources of the obligation to extradite or prosecute. *European Political and Law Discourse*. 2023. Vol. 10. Issue 4. P. 68–75. DOI: 10.46340/eppd.2023.10.4.4 URL: https://eppd13.cz/wp-content/uploads/2023/2023-10-4/06.pdf

Andreichenko S., Kosianenko S. The fight against impunity in international criminal law (through the prism of the aut dedere aut judicare obligation). Європейські орієнтири розвитку України в умовах війни та глобальних викликів XXI століття: синергія наукових, освітніх та технологічних рішень : у 2 т. : матеріали Міжнар. наук.- практ. конф. (м. Одеса, 19 травня 2023 р.) / за заг. ред. С. В. Ківалова. Одеса : Видавництво «Юридика», 2023. Т. 1. С.

309-312.

Кос'яненко С.О. Зобов'язання здійснювати судове переслідування як складова принципу aut *dedere aut judicare. Global Society in Formation of New Security System and World Order: Proceedings of the 2nd International Scientific and Practical.* Internet Conference. July 27-28. 2023. Dnipro, Ukraine. P. 213–215. URL: http://www.wayscience.com/wp-content/uploads/2023/08/Conference-Proceedings-July-27-28-2023.pdf

Kosianenko S. The relationship between the obligations to extradite and prosecute under the *aut dedere aut judicare* clause. Актуальні проблеми юридичної науки. Політико-правові передумови європейської та євроатлантичної інтеграції України: збірник тез Міжнародної науково-практичної конференції «Двадцять другі осінні юридичні читання» (м. Хмельницький, 13 жовтня 2023 року). Хмельницький: Хмельницький університет управління та права імені Леоніда Юзькова, 2023. P. 160-161.

Використання зазначених результатів дозволило більш повно та ґрунтовано викласти матеріали вказаних навчальних курсів та надати здобувачам Національного університету «Одеська юридична академія» відомості про сучасні міжнародно-правові відносини щодо змісту, сутності, обсягу та особливості застосування принципу *aut dedere aut judicare* у міжнародному праві.

Голова комісії: Мінас АРАКЕЛЯН

Члени комісії:

Галина УЛЬЯНОВА

Людмила КУЗНЕЦОВА

Богдан ФАСІЙ

Хашматулла БЕХРУЗ