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THE OBLIGATION TO EXTRADITE OR PROSECUTE AND UNIVERSAL JURISDICTION

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Кос'яненко С.О. Зобов'язання видавати або здійснювати судове переслідування та універсальна юрисдикція.

У статті розглядається співвідношення між принципом *aut dedere aut judicare* та універсальною юрисдикцією в міжнародному кримінальному праві. Встановлено, що співробітництво держав у боротьбі з міжнародною злочинністю передбачає, серед іншого, вирішення питання про здійснення кримінальної юрисдикції, у тому числі універсальної, а також реалізації принципу *aut dedere aut judicare*. Забезпечення універсальної юрисдикції є важливим елементом судового переслідування підозрюваних у вчиненні злочинів, що викликають занепокоєння всього міжнародного співтовариства, особливо у випадках, коли ймовірний злочинець не переслідувався на території держави вчинення злочину. Було встановлено, що кожна держава визначає сферу своєї кримінальної юрисдикції (включаючи універсальну юрисдикцію), і кожна держава самостійно визначає сферу дії свого кримінального права. Держави зобов'язані виконувати свої міжнародні зобов'язання, зокрема утримуватись від втручання у внутрішні справи інших держав, та виконувати зобов'язання щодо судового переслідування чи екстрадиції. Зроблено висновок про важливість розмежування між концепціями універсальної юрисдикції та *aut dedere aut judicare*. Універсальна юрисдикція застосовується у разі відсутності іншого зв'язку з державою (територіальності, національності, захисту або іншої правової підстави). Зобов'язання *aut dedere aut judicare* передбачає передачу справи компетентним органам для судового переслідування або екстрадиції, а не встановлення юрисдикції. Для виконання зобов'язання *aut dedere aut judicare*, держава повинна заздалегідь прийняти закони, які криміналізують певну поведінку. Зобов'язання *aut dedere aut judicare* стосується не лише тяжких злочинів, вчинених іноземцем проти іноземця за кордоном. Зобов'язання *aut dedere aut judicare* не обмежується ситуаціями, в яких для судового переслідування або екстрадиції вимагається застосування універсальної юрисдикції.

Ключові слова: принцип *aut dedere aut judicare*, юрисдикція, універсальна юрисдикція, міжнародні злочини, співпраця держав у боротьбі зі злочинністю.

Kosianenko S.O. Universal jurisdiction and the obligation to extradite or prosecute.

The article is devoted to the question of the relationship between the *aut dedere aut judicare* principle and concepts of universal jurisdiction in international criminal law. 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. 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. It was determined that each state defines the scope of its criminal jurisdiction (including universal jurisdiction) and each state is responsible for determining the scope of its criminal law. States are required to conform to their international obligations, including refraining from interfering in the internal affairs of other states and implementing obligations on prosecution or extradition. A conclusion was made about the importance of distinguishing the concepts of universal jurisdiction and *aut dedere aut judicare*. Universal jurisdiction applies when there is no other connection to the state (territoriality, nationality, 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. An *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.

Key words: *aut dedere aut judicare* clause, jurisdiction, universal jurisdiction, international crimes, cooperation between states in the fight against crime.

Formulation of the problem. 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. Establishing jurisdiction is “a logical prior step” to the implementation of an 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 [1, § 24].

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 [2, p. 315]. The relationship between the principle of universal jurisdiction and *aut dedere aut judicare* principle in international criminal law deserves special attention, in light of the importance of this issue from both a theoretical and practical standpoint.

Analysis of recent research and publications. The concept of jurisdiction in general and universal jurisdiction, in particular, was studied by M.Ch. Bassiouni, A.H. Butler, J. Brownlie, G. Verle, N. Zelinska, N. Dryomina-Volok, M. Akhurst, I.I. Lukashuk, M. Pashkovsky, R. O’Keefe, A. Cassese, K. Rendal, L. Reidems and others. *Aut dedere aut judicare* principle has been extensively researched by authors such as M. Bassiouni, A. Caligiuri, R. Cryer, K.S. Gallant, G. Gilbert, M.R. Mattarolo, S. Mitchell, M. Plachta, P. Scharf, C. Tiribelli, E. Wise and others. However, the issues of the relationship between the universal jurisdiction and obligations *aut dedere aut judicare* in international criminal law have not been systematically and conceptually studied.

The purpose of the article is to consider the relationship between the concepts of universal jurisdiction and *aut dedere aut judicare* in international criminal law, as well as to reveal the difference between them.

Main text. 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 [3, 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 [4, p. 281].

As a rule, together with the universal principle, the «*aut dedere aut judicare*» principle applies, notes S.M. Vykhrist [5, 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” [6, 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 on any other legal or policy bases [6, 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 [7, p. 48]. Crimes of this nature threaten the peace and security of mankind as a whole, as they are detrimental to the interest of the global community as a whole.

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 by definition 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 [8, 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 universal jurisdiction applies are crimes under international law [8, 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 WWII, such as the IMT, IMTFE, ICTY, ICTR and ICC embody the very essence of *aut dedere aut judicare* with respect to *jus cogens* crimes [6, 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 [9, 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 [8, p. 61]. 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 [8, p. 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' [10].

Convention on the Prevention and Punishment of the Crime of Genocide 1948 [11] 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...".

Geneva Convention (III) relative to the Treatment of Prisoners of War in Article '129 – Penal sanctions' establishes [12]: "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...".

Several international instruments, such as the very 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 [1, § 24].

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 [13, p. 340].

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 [14, § 226].

O'Keefe Roger 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" [15, p. 827]. 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. O'Keefe Roger 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 [15, 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 [15, p. 828].

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 [15, p. 828].

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 already 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 [13, 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 [13, p. 342].

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) [16, 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 [16, 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” [6, p. 152]. 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* [6, p. 152-153]. According to M. Cherif Bassiouni, 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 by states and international adjudicating bodies to the application of this theory”, “an international convention should be elaborated” [6, p. 155].

Conclusions. In order to carry out an obligation to extradite or prosecute an accused criminal who is present in the territory of a nation, 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.

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.

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.

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