



ТРИБУНА МОЛОДОГО ВЧЕНОГО

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DOI <https://doi.org/10.32782/yuv.v3.2023.24>**S. Kosianenko,**PhD student at the Department of International Law and European law
National University "Odesa Law Academy"**THE WORK OF THE INTERNATIONAL LAW
COMMISSION ON THE TOPIC
"THE OBLIGATION TO EXTRADITE OR PROSECUTE
(AUT DEDERE AUT JUDICARE)"**

Formulation of the problem. The threat of international and transnational crime 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. Therefore, the progressive development of the rules relating to 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)[1].

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 [2, para. 2]. In 2004 the ILC decided to return to the topic it first identified for study in 1949 and to include the issue "obligation to extradite or prosecute (*aut dedere aut judicare*)" as part of its long-term program of work. The Working Group on the Long-term programme of work considered the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" met the relevant criteria, namely "that this topic is precise and presents a theoretical and practical utility in terms of codification and progressive development of international law" [3, para. 362]. In 2005 the ILC agreed to include the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and the General Assembly by its Resolution 60/22 of 23 November 2005 endorsed that decision [4, para. 5].

During the decade (from "Preliminary Remarks" in 2004 to the Final Report of 2014) the ILC worked on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" facing various complex legal and political issues.

Analysis of recent research and publications. There are a number of scientific works on the *aut dedere aut*

judicare principle carried out by such authors 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. In the Ukrainian doctrine of international law, this 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, for example, in the works of V. Bortnytska, O. Vynogradova, S. Vykhryst, V. Hrebennyuk, N. Dryomina-Volok N., M. Pashkovsky, A. Pidhorodynska, M. Svistulenko, and others. There are no separate monographic studies devoted to the principle of *aut dedere aut judicare* in Ukraine. Therefore, issues related to the principle of *aut dedere aut judicare* and, in particular, regarding the work of the UN International Law Commission on the topic “the obligation to extradite or prosecute” deserve further in-depth study.

The purpose of the article is to consider based on the study of official documents developed by the ILC the phased work of this body on the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)”.

The purpose of the work requires consideration of the following issues: incorporation of the *aut dedere aut judicare* rule in the draft Code of Crimes against the Peace and Security of Mankind, made by the Commission; review of the content of the four reports of the Special rapporteur Zdzislaw Galicki (the preliminary report (2006), the second report (2007), the third report (2008) and the Fourth report (2011)); analysis of the Working Group 2013 report; analysis of the Final report of 2014 on the topic under consideration; identification of a number of issues related to the principle of “aut dedere aut judicare”, relevant for further study.

Main text. During its fifty-seventh session (2005), the ILC included the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” in its program of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur. It should be emphasized that after the ILC in 1949 included the topic on the obligation to extradite or prosecute in the list of planned topics, only in 1996 the provisions of the principle *aut dedere aut judicare* were briefly considered in the Article 8 and Article 9 of the draft Code of Crimes against the Peace and Security of Mankind of 1996. In these articles, minimum contours of the principle of *aut dedere aut judicare* were indicated, as well as the related principle of universal jurisdiction [2, paras. 1–2].

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 [2, para. 10].



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 [2, para. 11].

The Special Rapporteur Mr. Zdzislaw 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” [3, p. 317]. 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 [3, p. 317–318].

The Special Rapporteur Mr. Zdzislaw Galicki submitted four reports on the topic under consideration: the preliminary report (2006), the second report (2007), the third report (2008) and the fourth report (2011).

Let’s briefly consider the main content of each of the reports.

The Preliminary report (2006) [2] 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.

It should be emphasized 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 the *aut dedere aut judicare* principle [2, para. 3].

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*)” [6, para. 6]. Pursuant to this 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 [7, p. 21].

The second report (2007) of the Special Rapporteur was closely related to the preliminary report submitted 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 [8, para. 8]. 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” [8, para. 18].

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 before it comments and information received



from Governments in relation to this topic [9]. The General Assembly, in resolution 62/66 of 6 December 2007, invited Governments to provide to the Commission information on practice regarding this topic [10, para. 4]. Through Resolution 62/66, the invitation to states was expanded to cover additional 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?” [7, p. 22].

In 2008, the Special Rapporteur Mr. Zdzislaw Galicki submitted 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” [11, para. 1]. The Committee, on the basis of the third report of the Special Rapporteur, also discussed the issue of the connection of the *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 [9].

In 2009, the Commission considered the latest views and comments received from governments [12]. In 2009 at the sixty-first session of the ILC, an open-

ended Working Group was established under the chairmanship of Mr. Alain Pellet [13, para. 147]. During this session, the chairman of the Working Group presented his oral report [14, para. 4].

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 [14, para. 5].

The ILC reconstituted the Working Group at the sixty-second session (2010) and entrusted it with the leadership of Mr. Enrique Candioti in the absence of its Chairman [5, p. 129]. 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 [9].

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 [14, p. 192]. 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 [14, p. 192].

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. 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 [9]. In its resolution 65/26 (2010), the General Assembly requested that the Commission give priority to the examination of this topic, among others [15, para. 6].

In 2011, the Commission considered the Special Rapporteur’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* [14]. 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 [16, para. 8].

After Mr. Galitsky was no longer a member of the Commission in 2011, no more Special Rapporteur was appointed [13, 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 Mr. Kriangsak Kittichaisaree. The task of the group was to evaluate the progress of work on the topic and study possible future options for the Commission [9]. Special attention of the group was given to the judgment of the ICJ in the *Belgium v. Senegal* case (2012) [5, p. 129].

The Chairman Mr. Kriangsak 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 [13, p. 128].

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 [13, para. 149]. 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” [13, p. 125]. Based on the 2013 report, the working group developed its final report.

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 [9].

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 [9].

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*)” [17, para. 39].

In its resolution 69/118 (2014), the General Assembly expressed its appreciation to 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” [18, para 2 (c)]; took “note of the final report on the topic” and encouraged “its widest possible dissemination” [18, para. 3].

Conclusions and prospects for further research. The evolution of the *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.

The article considered the following main documents that were presented before the ILC on the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)”: preliminary remarks of 2004, four reports of the Special Rapporteur Mr. Zdzislaw Galicki (2006, 2007, 2008, 2011), the report of

the Working Group of 2013, the final report of the Working Group of 2014.

On the one hand, international practice has seen the appearance of a significant number of treaties containing an *aut dedere aut judicare* clause, and also it is possible to recognise the existence of customary norms of international law regarding the obligation to extradite or prosecute in relation to certain core international crimes. On the other hand, a decade of study of the stated topic of the ILC has not produced any substantive results, such as draft articles on the obligation to extradite or prosecute. For this, the political will of the states was not enough.

The question of applying the *aut dedere aut judicare* principle continues to have its theoretical and practical significance in terms of encouraging international cooperation in combating international crimes effectively and in ending impunity. Many questions related to this principle deserve further attention: reservations that states may make in order to limit the scope of obligation to extradite or prosecute; development and specifics of national legislation, including constitutional, criminal or criminal procedural provisions relating to the obligation to extradite or prosecute; a list of crimes that are covered by the principle of *aut dedere aut judicare*; relationship between *aut dedere aut judicare* principle and universal jurisdiction; obstacles at the international and national levels regarding the effective implementation of the *dedere aut judicare* principle.

It was determined that international and transnational crimes today pose an unprecedented threat to international security in general and to the national security of states in particular. Among the efforts made by states at the national and international levels to eliminate impunity for these crimes, the obligation to extradite or prosecute



is of significant practical importance. Therefore, the study of international norms related to the application of the principle of *aut dedere aut judicare* is extremely important. It has been established that the evolution of the *aut dedere aut judicare* principle from the time of Grotius to the present testifies to the effectiveness of this tool in the fight against international crime, as well as to the undeniable development of international law in this area. The article, based on the study of official documents developed by the International Law Commission, examines the phased work of this body on the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” from 2004-2014.

The author paid special attention to the issue of the inclusion of *aut dedere aut judicare* provisions in the draft Code of Crimes against the Peace and Security of Mankind, developed by the Commission in 1996. Four reports of the Special Rapporteur Mr. Zdzislaw Galicki were considered: the preliminary report (2006), the second report (2007), the third report (2008) and the fourth report (2011) on the “Obligation to extradite or prosecute (*aut dedere aut judicare*)”. The report of the Working Group, which was presented to the International Law Commission in 2013 and became the basis for the final report of 2014 on the topic “Obligation to issue or prosecute (*aut dedere aut judicare*)», was considered. It was concluded that the study of the International Law Commission on the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” for ten years did not yield significant results, such as, for example, draft articles. The political will of the states was not enough for this. A number of relevant issues for further study related to the principle “*aut dedere aut judicare*” are outlined.

Key words: the obligation to extradite or prosecute, *aut dedere*

aut judicare principle, International Law Commission, Working Group on the obligation to extradite or prosecute, international cooperation to fight crime and impunity.

Кос'яненко С. Робота Комісії міжнародного права за темою «Зобов'язання видавати або здійснювати судові переслідування (*aut dedere aut judicare*)»

Визначено, що міжнародні та транснаціональні злочини на сьогодні становлять безпрецедентну загрозу міжнародній безпеці загалом та національній безпеці держав, зокрема. Серед зусиль, що приймаються державами на національному та міжнародному рівнях та спрямовані на усунення безкарності за ці злочини, важливе практичне значення має зобов'язання щодо видачі або судового переслідування. Тому дослідження міжнародно-правових норм, пов'язаних із застосуванням принципу *aut dedere aut judicare* є надзвичайно важливим. Встановлено, що еволюція принципу *aut dedere aut judicare* з часів Гроція і до сьогодні свідчить про ефективність цього інструменту в боротьбі з міжнародною злочинністю, а також про незаперечний розвиток міжнародного права в цій сфері. У статті на основі вивчення офіційних документів, розроблених Комісією міжнародного права ООН, розглянуто поетапну роботу цього органу над темою «Зобов'язання видавати або здійснювати судові переслідування (*aut dedere aut judicare*)» протягом 2004-2014 рр.

Окрему увагу автором приділено питанню включення положень *aut dedere aut judicare* до проєкту Кодексу злочинів проти миру та безпеки людства, розробленого Комісією у 1996 р. Розглянуто чотири доповіді Спеціального доповідача пана Здзіслава Галіцького:



попередню доповідь (2006), другу доповідь (2007), третю доповідь (2008) і четверту доповідь (2011) за темою «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)». Розглянуто доповідь Робочої групи, яка була представлена Комісії міжнародного права у 2013 році та стала основою для фінального звіту 2014 р. по темі «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)». Зроблено висновок, що вивчення Комісією міжнародного права теми «Зобов'язання видавати або здійснювати судове переслідування (*aut dedere aut judicare*)» протягом десяти років не дало суттєвих результатів, таких як, до прикладу, як проекти статей. Для цього не вистачило політичної волі держав. Окреслено низку актуальних для подальшого вивчення питань, пов'язаних із принципом *aut dedere aut judicare*.

Ключові слова: зобов'язання видавати або здійснювати судове переслідування, принцип *aut dedere aut judicare*, екстрадиція, Комісія міжнародного права ООН, Робоча група із зобов'язання видавати або здійснювати судове переслідування, міжнародне співробітництво у боротьбі зі злочинністю та безкарністю.

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