Aut dedere aut iudicare: an enabling principle of universal jurisdiction

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In international law, States have mechanisms for international judicial cooperation that, with the objective of protecting the highest values and principles of the International Community, are aimed at combating impunity for the most serious crimes against international law. Among these mechanisms is the principle of universal jurisdiction, so that the right (or obligation, if applicable), which can enable a State to exercise the universal principle is not only considered in the various international treaties or customary rules but also in that of the aut dedere aut iudicare principle. However, the principle of universal jurisdiction and the principle aut dedere aut iudicare are not the same and must not be confused. While both have a common goal (the fight against impunity), the aut dedere aut iudicare principle is one of the means through which the universal principle can be expressed.

***Keywords*:** International judicial cooperation, universal jurisdiction, aut dedere aut iudicare, impunity

Introduction

The need to activate mechanisms for the protection of persons before the commission of international crimes and the persecution and punishment of those who committed them arose particularly after World War II yet increased significantly after the 1990s. Much progress has been made since the obligation of *aut dedere aut iudicare* (seek, arrest and prosecute or, where appropriate, extradite), with more than 100 States currently adopting the necessary legislation to exercise universal jurisdiction regarding various criminal offences, fundamentally, war crimes, crimes against humanity and genocide, as well as those provided for in certain international treaties. Despite its expansion and gradual acceptance, the principle of *aut dedere aut iudicare* has not been without controversy. Not even the International Court of Justice (ICJ) has been able to shed light on this principle and to unmistakably advocate for its defense (as is demonstrated in the case related to the arrest warrant of April 11 2000, or confirmed, although indirectly, in the 2012 jurisdictional immunities case, among others). States, for their part, have also shown some concern about the institution of universal jurisdiction, especially due to its diffuse contours and the intrusions that, according to some, entails regarding the principle of non-interference (art. 2.7 UN Charter). In this respect, the idea that it is necessary to place limits on the exercise of universal jurisdiction and to link it to the existence of certain connections within the State whose courts aim to exercise it, has become widespread. Such a position has, in fact, been embraced by Spanish and Belgian legislatures, who seem very generous with the jurisdiction principle.

Therefore, clarifying the principle of universal jurisdiction under international law is essential to shed light on a mechanism whose ultimate goal is to protect human rights and to guarantee compensation for victims of international crimes.

Universal Jurisdiction Principle

There is no single definition of universal jurisdiction, and this was pointed out, for example, by the *ad hoc* ICJ judge Van Den Wyngaert in the Democratic Republic of the Congo v. Belgium arrest warrant case (ICJ 2001, Dissenting Opinion, para. 44 et seq.).[1] Nor is there a single term to refer to the principle of universal jurisdiction. Indeed, there are several definitions of the principle of universal jurisdiction, however, the Princeton Principles states:

> „Universal jurisdiction is understood as a criminal jurisdiction based exclusively on the nature of the crime, regardless of the place in which it was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim or any another link with the State that exercises that jurisdiction" (Princeton Project on Universal Jurisdiction, 2001).

In 2005, the Institute of International Law defined universal jurisdiction as the competence of a State to prosecute, and where appropriate to find guilty and punish those allegedly responsible [of a crime], regardless of the place of commission of the crime at issue and without regard to any link of nationality active or passive or to other criteria of jurisdiction recognized by international law (Institute of International Law, 2005). Also, within the scope of the European Union, a definition of universal jurisdiction has been offered:

> „The affirmation by a State of its jurisdiction over crimes allegedly committed in the territory of another State or by another State against its nationals or by another State where the alleged crime does not represent a direct threat to the vital interests of the State that its jurisdiction affirms" (European Union, 2009).

In summary, the principle of universal jurisdiction as the right, or obligation, of the internal courts of a State to investigate and prosecute, in its application of the *jus cogens* rules of international criminal law, to any person who has committed a serious crime that affects the interests of the international community as a whole, regardless of the nationality of the subject or the nationality of the victim or victims affected by the conduct of that subject, and regardless of the place of commission of crime (Vázquez, 2019, p. 53).

Along with the difficulty of its definition, the principle of universal jurisdiction faces a series of obstacles that have their origin not only in the state legislature, such as the links required for its exercise, the prescription of crimes, amnesty, immunity from jurisdiction or prohibition of crimes *in absentia*; but also in the judiciary, with judges exercising pseudo-legislative functions, more typical of the legislative power than of the judicial one; and, finally, we also find political obstacles that could well be summarized in the so-called *realpolitik* (Vázquez, 2019, pp. 325-438). In this sense, Tim Kluwen, who borrows the term *juridification* from Henry Kissinger, understands as such "the movement (…) to submit international politics to judicial procedures" so that, as happened with France, Belgium and Spain, "with international politics becoming more juridical, the juridical will be increasingly political. The states could (threaten to) use universal jurisdiction as a political tool or could be perceived as doing so in their relations with other States" (Kluwen, 2017, p. 32).

With the above mentioned difficulties, there are two principles that enable the exercise of the principle of universal jurisdiction:, the responsibility to protect[2] and the principle *aut dedere aut iudicare*, which is analyzed below.

The Principle *Aut Dedere Aut Iudicare*

The *aut dedere aut iudicare* principle[3] said Grocio in times, is "less attentive to the presumption of innocence (Remiro, 2013, p. 7), and arises as a result of international cooperation and state legal assistance in the face of impunity ("Extradition and prosecution constitute, in effect, alternative means to fight against Torture and Other Cruel or Inhuman or Degrading Treaties or Punishments of 1984")[4], ending "the inertia or inactivity of the States" (Rodríguez, 1978, p. 169) or "to prevent the inactivity of the State that may lead to impunity for the alleged perpetrators of the crime occurring in their territory" (Pigrau, 2009, p. 28) with absolute respect for the different sovereignty (hence the option to extradite). In this regard:

> "the effective application of the obligation to extradite or prosecute in the field of the most serious international crimes is presented, as well as a procedural tool capable of contributing to the achievement of two fundamental objectives for the consolidation of an international law based on the values of security and justice: the respect and protection of procedural guarantees and the eradication of impunity for the most serious human rights violations." And, in the absence of an international network of cooperation between the States against the paradise of impunity, the aut dedere aut iudicare principle can forge that much-needed network (Sosa, 2015, p. 173).

Origin and Historical Evolution

The background to the *aut dedere aut iudicare* principle is found in the *International Convention for the Suppression of Counterfeit Currency* of 1929, in the *Geneva Convention on the Prevention and Punishment of Terrorism* of 1937 and in the *Geneva Conventions* of 1949; but it is from the *Convention for the Suppression of the Illicit Seizure of Aircraft* concluded in The Hague in 1970 when a homogeneous clause was established in more than 70 international treaties that were concluded afterwards. Article 7 states:

> „The State Party in whose territory the alleged offender is found, if it does not proceed to extradition thereof, shall submit the case to his competent authorities for prosecution purposes, without exception and regardless of whether the crime was or was not committed in his territory."

Later, the International Law Commission in article 9 of the Draft Code of Crimes against the Peace and Security of Humanity of 1996 states:

> „There is an obligation to grant extradition or to prosecute: without prejudice to the jurisdiction of a criminal court, the State Party in whose territory the person who allegedly committed a crime provided for in articles 17 [genocide], 18 [crimes against humanity], 19 [crimes against personnel of the United Nationals and associated personnel] or 20 [war crimes] will grant the extradition of that person or prosecute them."[5]

This is an article that reveals the need for an "effective system of typification and prosecution of the so-called more serious crimes" (United Nations, 2016, p. 153), which leaves the possibility of cooperating at state level against the impunity of the most serious crimes with customary norms; that is, it leaves aside the *opinio iuris* and the practice of the States to give it the importance it deserves at the beginning of the *aut dedere aut iudicare*. In addition, as the International Law Commission itself points out, it is an article that *fills important gaps* because the obligation to extradite or prosecute has not been established in convention for crimes against humanity or for genocide, nor for those war crimes that are not framed among serious crimes or those that are not considered international (United Nations, 2016, p. 153).

Thus, taking into account the conventional origin of the *aut dedere aut iudicare* principle, part of the doctrine indicates that in the case of crimes against international law *stricto sensu* (that is, war crimes, crimes against humanity and genocide), that today we attend a "process of crystallization as a customary norm", either in its extraditing or prosecuting version and, even, in its strictest version, prosecuting or extraditing. The custom would be in a *status nascendi*, needing a general and uniform practice afterwards (Martín, 2001, p. 185) as seen in article 15 of the *United Nations Convention against Transnational Organized Crime* of 2000 and article 42 of the *United Nations Convention against Corruption* in 2003.

On the contrary, other authors (Remiro, 2007, pp. 491-516; Martínez, 2015, pp. 195-200; Sánchez, 2004, pp. 262-266) and some judicial resolutions (the Lockerbie case (Libya v. USA; Libya v. United Kingdom), Dissenting Opinion of judges Weeramantry and Ranjeva, 14 April 1992, ICJ Reports, p. 179; the case of the arrest warrant (Democratic Republic of the Congo v. Belgium), Precautionary Measures, 14 February 2002, pp. 230-231, para. 6; and TIPY, Blaskic case (IT-95-14), 29 October 1997, relatif à la requête de la République de Croatia aux fins d'examen de la décision de la Chambre de première Instance II, rendue le 18 juillet 1997, para. 29) understand that we are faced with a customary norm and this is demonstrated in the aforementioned article 9 of the Draft Code.

The application of *aut dedere aut iudicare* applies to the most serious international crimes such as genocide, crimes against humanity, crimes against United Nations personnel and associated personnel and war crimes. To that end, articles 8 and 10 state that states will apply jurisdiction to those crimes "whatever the place of commission of those crimes and their perpetrators" and that these crimes be included in the extradition treaties that are in force and in the future.

The Nature of aut dedere aut iudicare

Despite the fact that perpetrator(s) had already been treated under the title "Jurisdiction with respect to crimes committed outside the national territory," being one of the 14 subjects selected in a provisional list for the first session of the International Law Commission in 1949, and included in articles 8 and 9 of the Draft Code of crimes against the peace and security of humanity of 1996, this ended in 2014 with the approval of a final report in Chapter VI, "The obligation to extradite or prosecute (*aut dedere aut iudicare*)" during the 66th session of the International Law Commission (United Nations, 2016, p. 153). Also, in 2005, the International Law Commission included the obligation to extradite or judge in its work programme. Following reports by Special Rapporteur Zdzislaw Galicki (Docs A/CN.4/571, 7 June 2006; A/CN.4/585 and Corr. 1, 11 June 2007; A/CN.4/603, 10 June 2008)[6], some States, Russia (A/CN.4/599, 30 May 2008) and Belgium (A/CN.4/612, 26 March 2009), supported the idea that this principle was mandatory in the case of the most serious crimes:

> „The fundamental purpose of this principle is to ensure that those responsible for particularly serious crimes are subjected to justice, preventing the effective prosecution and punishment of those persons by a competent jurisdiction."[7]

According to Professor Ángel Sánchez, "Only by accepting the nomogenetic value of what states say, and not only of what they do, and admitting the possibility of deducing legal rules from the logical consequences that are tied to their conventional commitments and their declarations around values and interests essential of the International Community, the general virtuality of *aut dedere aut iudicare* can be accepted" (Sanchez, 2004, p. 266).

Thus, despite everything indicated here, there is a process of crystallization in a customary norm because, despite the abundant doctrine, the jurisprudence of the *ad hoc* tribunals and the International Criminal Court (ICC) and even the number of States that have ratified the various treaties where the principle and resolutions of the General Assembly and the Security Council are included, the truth is that the divergences of *state practice* prevents one from talking about a uniform or constant practice (Sosa, 2015, pp. 178-180). As professor Esperanza Orihuela points out:

> „The appreciation of the existence of the material element of the custom cannot forget the character and content of it or ignore the situations to which it will be applicable, which are, by the rest, which will have to be attended when appreciating its appearance. Much has changed the situation related to the repression of the most serious international crimes in recent decades, and possibly also the character of the norm that obliges to extradite or prosecute, but, in spite of everything, it is considered that the maximum aut dedere aut iudicare has not reached the status of customary norm" (2016, pp. 76-78).

Reluctantly, despite not facing a customary norm, today the situation is much better than a few years ago. Now, despite having established that we are not facing a customary norm, it is important to analyse whether we are facing a norm of jus cogens. According to the International Criminal Court, it will depend on the object and purpose of the treaty where the *aut dedere aut iudicare* clause has been included.

In the matter of issues related to the obligation to prosecute or extradite in (Belgium v. Senegal), and in relation to the *Convention against Torture and other cruel, inhuman or degrading treatment or punishment* in 1984, the ICJ indicated that we have "obligations *erga omnes* parties" due to the common interest of the States in which said obligations are fulfilled; each of the States may require another State to comply with the provisions of the treaty (ICJ Judgment, 20 July 2012, para. 67-70). Hence, in relation to those crimes against international law and its use of *ius cogens* that affect the fundamental interests of the International Community and that are included in international treaties that contain the clause *aut dedere aut iudicare*, States parties, and those that are not part of the State parties, must comply with the mandate. Having clarified the nature of jus cogens, there is an obligation to prosecute and the obligation to extradite.

The A*ut Dedere Aut Iudicare* Prciniple and the Principle of Universal Jurisdiction: Two Interwoven but Different Principles

There is no defined position per the doctrine as to whether this principle coincides with that of universal justice. Among the former are, for example, Special Rapporteur Doudou Thiam, who does not make any consideration in the reports of the International Law Commission, specifically, in the fourth and fifth reports to the Draft Code of Crimes. Among the latter we find Solé:

> „In any case, the norm aut dedere aut judicare should not be identified with the principle of universal jurisdiction, since it is only one of the ways to provide for the exercise of such jurisdiction, which may have also, as indicated, a basis derived exclusively from national law" (2009, p. 30).

Therefore, it is not the same and, therefore, the *aut dedere aut iudicare* principle and the principle of universal jurisdiction should not be confused. Although both principles share the same objective, as they are mechanisms for state cooperation to fight impunity, the *aut dedere aut iudicare* principle is understood as the vehicle that is offered to States in various international treaties to "ensure that judicial bodies enjoy the necessary competence to understand the criminal offence" through the exercise of universal jurisdiction. In addition, the *aut dedere aut iudicare*

principle is valid for all international crimes, while the universal principle is only predicated on serious crimes of international law, hence they concur with certain crimes (Martínez, 2015, pp. 222-223). In addition, as Carmen Vallejo points out, "its fundamental practical terrain [that of the *aut dedere aut iudicare* principle] is the scope of conventional international cooperation" (2015, p. 119). This also follows from the Report of the Council of the European Union:

> „This obligation, known as the obligation aut dedere aut judicare, is conceptually distinct from universal jurisdiction. The establishment of jurisdiction, universal or otherwise, is a logically prior step: a state must first vest its courts with competence to try given criminal behavior. It is only once such competence has been established that the question whether to prosecute the relevant behavior, or to extradite persons suspected of it, arises. Moreover, the obligation to submit a case to the prosecuting authorities or to extradite applies as much in respect of an underlying jurisdiction based on territoriality, nationality, passive personality, etc., as it does to universal jurisdiction. The obligation aut dedere aut judicare is nonetheless relevant to the question of universal jurisdiction, since such a provision compels a state party to exercise the underlying universal jurisdiction that it is also obliged to provide for by the treaty. In short, a state party to one of the treaties in question is not only bound to empower its criminal justice system to exercise universal jurisdiction but is further bound actually to exercise that jurisdiction by means of either considering prosecution or extraditing." (European Union, 2009, para. 11).

The following table, (Benavides, 2001, p. 36), shows the main differences between the principle of universal jurisdiction and the principle of *aut dedere aut iudicare.*

Table 1. Distinction between the principle of universal jurisdiction and the principle of aut dedere aut iudicare.

Universal jurisdiction	***Aut dedere aut iudicare***
Universal jurisdiction is a right	*Aut dedere aut iudicare* is an alternative obligation
Universal jurisdiction is a principle based in customary international law	*Aut dedere aut iudicare* is usually inserted as a clause in international conventions providing for judicial cooperation. Its customary status is doubtful
Universal jurisdiction is applied to a limited number of international crimes: piracy, slavery, war crimes, grave breaches, crimes against humanity and genocide	The *aut dedere aut iudicare* principle is contemplated in a large number of multilateral conventions, which codify some international crimes. There are more than 20 international crimes regulated by such conventions
Universal jurisdiction is an exceptional jurisdiction which can be exercised, under certain circumstances, by all the States	*Aut dedere aut iudicare*, as a clause, within multilateral treaties is only binding among the parties to such treaties

The first issue to note here is that there is no priority between the two obligations, thus, "The obligation to extradite or prosecute (*aut dedere aut iudicare*)" prepared by the Secretariat of the International Law Commission in 2010 (United Nations, 2010), up to four different formulae are identified that combine the prevalence of *aut dedere* with *aut punire* or vice versa (first, the formula contained in the *International Convention for the Suppression of the Counterfeiting of Currency* of 1929 that establishes extradition as mandatory and prosecution as optional; secondly, that represented by the conventions and regional extradition agreements, which establishes the obligation to extradite and if not, the obligation to prosecute; the third possibility is that established in the *Geneva Conventions* of 1949, which establishes the obligation to prosecute, regardless of any extradition request, which is considered as an option; and, finally, the formula of the *Convention for the Suppression of the Illicit Seizure of Aircraft* or Hague Convention of 1970 considers the option to extradite and if not, the obligation to prosecute, better known as the Hague formula); establishing, in any case, which is an *obligation imposed* on the "detaining State in whose territory the alleged offender is located", the latter must take *effective measures* to ensure that the said person is judged by its authorities or by the authorities of the State that is willing to prosecute him/her and have requested extradition. "The detaining State is in a unique position to ensure the application of the code, due to the presence of the alleged offender in its territory" (United Nations, 1996, p. 34). And when examining *effective measures* we are referring to the fact that both the State that stops and the State that requests extradition:

> „They have had to provide courts with sufficient competence to know the crimes that fall within the orbit of the aut dedere aut iudicare rule. In short, the States parties to an international instrument that contained the obligation to extradite or prosecute should incorporate the universal supplementary or subsidiary jurisdiction in their legal system, in order to comply with this alternative obligation" (Martínez, 2015, p. 221).

To effectively comply with the obligation to prosecute or extradite, the detaining State must have established the crimes and determined jurisdiction over those crimes, established an investigation and detention of the suspect, as well as submitted the matter to those persons who may initiate the proceedings. Criminal proceedings will not always be necessary to initiate, and to extradite another State with jurisdiction with the capacity to prosecute (United Nations, 2016, p. 161).

The establishment of universal subsidiary jurisdiction is also necessary to prosecute those detained in the territory of a State, unless the alleged perpetrator has some connection with the victim, in which case the competing principle of applying extra-territorial criminal law could be different, like the principle of nationality or the principle of protection.

Finally, the International Law Commission notes, we must consider the situation in which a state refuses to judge, refuses to extradite and even refuses to hand it over to an international tribunal as a breach of a norm of *ius cogens:*

> „It may lead to the responsibility of the refusing State that shelters to the extent that it is lending its territory to facilitate circumventing the action of international criminal justice and/or undermining the right of another State to prosecute the person it is protecting" (Collantes, 2004, p. 72).

Based on the Separate Opinion of ICJ Judge Abdulqawit A. Yusuf (Belgium v. Senegal) on the subject of the issues related to the obligation to pursue or extradite before the International Court of Justice (20 July 2012, paras. 19-22), there are two possible categories of formulae of *aut dedere aut iudicare*: those in which priority is given to extradition and those in which priority is given to prosecution.

***Aut Dedere*: Double Criminality and Non-Applicability of Crimes**

Extradition is an "act of sovereignty by virtue of which a State delivers to another the person that is presumed or declared responsible for a crime, in order to be tried in the requesting State" (Quintero and Morales, 2010, p. 172) and is an instrument of cooperation in the fight against impunity, as indicated by numerous international extradition treaties; see the Model Extradition Treaty (United Nations, 1990) that the requesting State could, in the exercise of the various jurisdictional titles, including the universal, exercise its competence.

> "Extradition can only be granted to a State that has jurisdiction, by any title, to prosecute and prosecute the alleged offender in compliance with an international legal obligation that binds the State in whose territory that person is located". And in no case may the obligation to extradite be replaced by expulsion, extraordinary delivery or any other method of sending a presumed person responsible for a crime to another State without the corresponding human rights protection conditions: principle of double criminality, ne bis in idem, nullum crime sine lege, specialty and non-extradition for reasons of ethnic, religious, national or political origin" (United Nations, 2016, p. 164).

Extradition normally entails the fulfilment of two prerequisites that are established in various internal laws: double criminality and non-applicability of the crime. With respect to the first requirement, double criminality is that the facts are considered a crime both in the legislation of the place where the alleged perpetrator is located, and in that of the State requesting extradition, not requiring an absolute identity of the type, it may become an *excessive limitation* to the exercise of universal jurisdiction in its fight against impunity. "The assessment of compliance with this requirement does not cease to respond to a unilateral judgment of the applicator, and its relationship with the requesting State may have a laminating effect," as we found in the Pinochet case, in which:

> "The decision of the Committee of the Appeal of the Lords, of March 24, 1999, shows the consequences that a perverse appreciation of the requirement of double criminality may entail for the exercise of criminal action in the State requesting extradition. The assessment made by the British lords of the requirement of double criminality referring to the moment of commission of the facts and not at the time of the extradition request, meant an excessive reduction with respect to the crimes of which the Spanish jurisdiction could have known if delivery was given to Spain. Thus, for example, the crimes of torture are reduced to those carried out after the date of entry into force of the British Criminal Justice Act of 1988" (Orihuela, 2016, pp. 139-140).

In fact, double criminality is considered a customary requirement taking into account the number of international conventions in which it is included. In addition, this is a requirement that is not present in international treaties but is imposed by internal regulations for the sake of state judicial cooperation. Although it is not necessary in the exercise of universal jurisdiction, it is mandatory in the event that the extradition of the alleged perpetrator is necessary to exercise it to the State that exercises it, that is, to the requesting State[8], so that it could become a limit or obstacle to the exercise of universal jurisdiction. However, we must not forget that when exercising extraterritorial actions, is the defence of interests that affect the entire community, as so it should be sufficient with the international recognition and incrimination in the internal law of the State that exercises the jurisdiction. One conclusion is that that the delivery of the alleged perpetrator to the International Criminal Court does not operate through this legal instrument nor is it conditional on double criminality" (Orihuela, 2016, pp. 140-141).

Non-applicability of the crime is the second requirement established by national laws. Despite the United Nations Convention of November 26, 1968, on the non-applicability of war crimes and crimes against humanity (even if its subjective scope is quite small, since only 44 States are parties and the internal laws established for this purpose are heterogeneous; Orihuela, 2016, pp. 141-142), nothing is stated in the Draft Code of crimes against the peace and security of humanity in 1996 concerning applicability. Thus, with the double criminality requirement, the heterogeneity with which this requirement is treated internally could result in a limitation of the exercise of universal jurisdiction.

The types of clauses that provide for the obligation to extradite (*aut dedere*) are those that were established in the Geneva Conventions of 1949. With them, priority is given to the State where the crime was committed and only if the State of detention denied the extradition or the victim was a national thereof, will there be the obligation to prosecute (among others: *The International Convention for the Suppression of the Counterfeiting of Currency* of 1922, article 9; *The African Union Convention to Prevent and Combat Corruption*, article 15; and *The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and the use of children in pornography*). With trial, extradition is avoided, however, if there is no request for extradition, the State where the alleged responsible party is located is not liable to prosecute.

> „It is not possible to generalize the interpretation that the obligation *aut dedere aut iudicare* contains the requirement of a request for withdrawal previously denied, although some treaties provide it specifically so, as it is seen, since it would be contrary to the spirit of the principle: prevent the inactivity of the State that may lead to impunity for the alleged perpetrators of the crime found in its territory" (Vallejo, 2015, p.124).

In this formulation of the *aut dedere aut iudicare* principle, we must now examine the links between extradition and the principle of universal jurisdiction. On the one hand, we will analyse the relationship between active extradition and the principle of universal jurisdiction, specifically pure universal jurisdiction, since it is through the *aut dedere aut iudicare* principle that the requesting State, in the exercise of various jurisdictional principles (personality principle active or passive, protection principle or universal principle), without having any connection with the criminal act, you can request the delivery of the presumed accused to prosecute him/her later.[9] The principle of non-extradition of nationals is sometimes included, being necessary in this case that the presumed responsible person is not in the State of which a person is a national.[10]

On the other hand, it is also necessary to analyse the relationship between passive extradition and universal jurisdiction; that is, the right that the State of *iudex deprehensionis* holds against a request for extradition of a third State or, even, of an international tribunal. In the case of a petition from a third State, if the detaining State does not grant the extradition, it has the obligation to prosecute, as long as it has jurisdiction over the crime or the person, which it will normally have through the principle of universal supplementary jurisdiction, as it is the State in whose territory is the person presumed responsible is to be found. That is why it is important to include universal jurisdiction in domestic legislation. Both in that case and in the case where there were several extradition requests made, the State where the presumed responsible party is located is free to grant it to that State that it deems most convenient, although technical-procedural aspects lead us to prefer the jurisdiction of the State where the events happened. "The draft articles approved at first reading recommended that the request of the State in whose territory the crime was committed be especially considered. On second reading, the Special Rapporteur

proposed that the possibility of including the priority of the request of the territorial State be considered in a specific provision. However, the Drafting Committee considered that the issue was not yet ripe for codification." In any case, the extradition of the alleged culprits is established in article 10 of the Project (United Nations, 1996, p. 35). Of course, when there is evidence that the request for extradition is aimed at obtaining impunity for the alleged perpetrator, it is also possible not to hand over the alleged perpetrator and prosecute him/her. In the second case, that is, in the case that the request comes from an international tribunal, extradition is not considered proper, and the State will be obliged to deliver it to the Court, a procedure faster than that of extradition that would also comply with the principle *aut dedere aut iudicare*.

Aut Iudicare

In the second category of international treaties indicated by Judge Yusuf, its clauses impose the obligation to prosecute, leaving extradition as a possible option and in others, as an obligation, if the State does not prosecute (*Geneva Conventions* of 1949; the *Convention for the Suppression of the Illicit Seizure of Aircraft or the Hague Convention* of 1970, article 7, para. one; and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1984, article 7). In these treaties, the State of *iudex apprehensionis* has the obligation to prosecute, although it can be released from such prosecution by granting extradition. "Extradition is, in this case, a liberating option of the obligation of the State that prefers to refrain from criminally prosecuting the alleged person responsible for torture arrested in its territory" (Remiro, 2013, p. 7). This was stated by the ICJ in the matter concerning the obligation to pursue or extradite case (Belgium v. Senegal):

> „Extradition is an option offered by the convention to the State, while prosecution is an international obligation established in the Convention, whose breach creates the State's responsibility for an illegal act." (ICJ Judgment, 20 July 2012, para. 95).

The State that has in its territory the alleged offender of a serious crime against international law, has the ipso facto obligation to prosecute. If an extradition request has been received and a decision is made not to extradite, the State must also prosecute. That is, in the event that the State has not received any request for extradition or has decided to trust its courts and prosecute it, it may do so regardless of where the crime was committed, as well as the nationality of the alleged perpetrator or the victim, through the exercise of universal jurisdiction. In the first of the cases in which the obligation to judge ipso facto is imposed, said obligation arises from the moment in which the presence of the alleged crime in the territory of the State is determined, regardless of any extradition request. In this case, the exercise of the principle of universal jurisdiction is an obligation for the State of detention. And in the event that an extradition request arrives, the State may, at its discretion, choose between prosecuting a case itself or extradition The clearest example is the clause contained in the Geneva Conventions of 1949. The International Criminal Court has indicated this in the matter of issues related to the obligation to prosecute or extradite (paras. 94-95), with respect to article 7 of the *Convention against the Torture* 1984:

> „It imposes on the State concerned the obligation to submit the case to its competent authorities for prosecution, regardless of the existence of a previous request for extradition of the suspect. (...). However, if the State in whose territory the suspect is located has received an extradition request in one of the cases provided for in the provisions of the Convention, it he may be released from his obligation to judge by accessing that request."

In the same vein, the Committee against Torture has indicated it in the case of Souleymane Guengueng et al. v. Senegal (ICJ Decision, 20 May 2006, para. 9.7):

> „The Committee (…) observes in this regard that the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of an extradition request. This alternative that is offered to the State Party under article 7 of the Convention exists only if such an extradition demand has been effectively formulated, and placed, in full, on the State Party in the situation of choosing between a) proceeding to that extradition or b) submitting the case to their own judicial authorities to initiate criminal proceedings, since the provision is intended to prevent impunity for any act of torture."

This has also been indicated by the International Law Commission, considering that extradition and prosecution are not two comparable alternatives. On the contrary, while extradition is an option, prosecution is an obligation whose breach may give rise to international responsibility on the part of the State (United Nations, 2016, p. 171). And that is how it is reflected in the comments of article 9 of the Draft Code of crimes against the peace and security of humanity. The State of detention has the obligation to take measures to ensure that this person is prosecuted by the national authorities of that State or by another State that indicates that he is willing to prosecute the case when requesting extradition (United Nations, 1996, p. 34).

However, the *iudex apprehensionis* State can also be given the option of refusing extradition for reasons contained in its national legislation or in the international treaty itself where the *aut dedere aut iudicare* is included. In such a case, the option to prosecute appears as a residual obligation and will be carried out through the principle of universal jurisdiction, so that a residual exercise of universal jurisdiction is also given, provided that the State has foreseen said principle among its jurisdictional titles of extraterritorial application of criminal law. An example of this second case is in the 1929 *International Convention for the Suppression of Counterfeiting Currency*.

Additionally, *aut iudicare,* according to professor Orihuela (2016, pp. 291-293), may be of two principles: self-executing and non-self-executing. The first are the *Geneva Conventions* of 1949 and its *Additional Protocol I* of 1977 that require States party to the treaty in whose territory the responsible party is found, have the option of delivering them to those States who have requested their extradition but lending special attention to the request of that State where the offense was committed; and all of this, regardless of whether the State party to the treaty has a jurisdictional title in its internal system that grants it jurisdiction, since the self-executing treaty does not need any internal norm for its application.

Finally, a non-self-executing treaty follows the formula of the aforementioned 1970 *Hague Convention*, or Hague formula, which states that: „The detaining State, if it does not grant extradition to another State, will be obliged to prosecute the person allegedly responsible, as long as it has the necessary effective measures to do so; and by necessary effective measures, we mean having the jurisdiction and jurisdiction to prosecute specific crimes." Abraham Martínez points out that the various international treaties that include the aut dedere aut iudicare principle include two possible actions that would be part of the prosecution: the exercise of criminal action or "exercise of the specific punitive claim aimed at the realization of jus puniendi" and the prosecution of the responsible perpetrator. In the first case, when a State is aware of the commission of a crime and the alleged perpetrator is in its territory, the Prosecutor's Office must request "the initiation of a criminal procedure, in order to obtain a judicial resolution that determines whether the defendant has committed or not said crime"

regardless of whether or not there is a conviction; in the second, „prosecution of the person responsible“, more concrete than the first, is to „submit the matter to the competent authorities without the need for criminal proceedings” (Martínez, 2015, pp. 203-204 and p. 208).

To this end, the State where the presumed responsible party is located must, among the various measures adopted, establish jurisdictional principles, including the principle of universal jurisdiction. And if you do not have such measures, Collantes points out that:

> „In continental countries it is possible to find that judges cannot exercise jurisdiction because domestic law lacks a mechanism to exercise jurisdiction over events in another State and/or because its internal criminal law does not typify the crimes against international law for which extradition is requested and which it should judge. Given this hypothesis, we must bear in mind that judicial action is an act of State, which as such is attributable to it. States as part of the International Community in which they are immersed are governed by international law and therefore could not rely on a defect in domestic law to dissociate themselves from the dilemma that the aut dedere aut iudicare principle would rise“ (2004, p. 72).

If this were not the case, that is, if the State of detention did not have jurisdiction, it would have the obligation to extradite one of those States that made the request (Pérez, 2012, p. 73) because “there is no obligation to judge who is not claimed by another State” (Remiro, 2013, p. 7). Or “one could also extradite the alleged perpetrator, according to the comments of the International Law Commission that add a third way, to an International Criminal Court, if future statutes permit.”[11]

At present, we would be talking about the International Criminal Court as long as it was a case that entered into the material, personal and temporary competence indicated by its Statute. This third alternative should serve as an inspiration in the drafting of the content of upcoming international treaties in the fight against crimes under the jurisdiction of international courts. This mention of international judicial bodies constitutes a manifestation of the adaptation of the *aut dedere aut iudicare* rule to the advances experienced by international criminal justice” (Orihuela, 2016, pp. 60-61 and p. 66).

Conclusion

In the international system, the exercise of the principle of universal jurisdiction is expressly included in a customary rule or treaty, or, implicitly through the principle *aut dedere aut iudicare*; a means which international treaties employ so that states can exercise universal jurisdiction without being confused with the universal jurisdiction principle. In relation to *aut dedere aut iudicare*, in order to know whether or not we are faced with a norm of *ius cogens* that implies an obligation for the States to exercise the principle of universal jurisdiction, the object and purpose of the treaty where the principle has been included and must be addressed by understanding that in the case of international treaties that regulate the most serious crimes of international law, it must be considered as such, giving rise to its breach of international responsibility (ICJ Judgment Belgium v. Senegal, Questions, 20 July 2012).

Concerning content, on the one hand, *aut dedere* may prevail in the State where the accused person is responsible and a State has the obligation to extradite so that another (applicant) can exercise its jurisdiction through any title, including universal jurisdiction, which also gives priority to the State of locus *delicti commissi*. Here, both double criminality and non-applicability of crimes (requirements to extradite) can become obstacles to the exercise of universal jurisdiction, although they are not conditions to exercise it and are not provided for in the treaties. On the other hand, the *aut iudicare* may also prevail.

The State of *iudex aprehensionis* has an *ipso facto* obligation to prosecute through the principle of universal jurisdiction. The state may preclude said obligation if it grants an extradition request, however, if we are faced with a self-executing obligation, the *iudex apprehension* state that has the obligation to prosecute will not need any internal norm to apply it; on the contrary, if we are faced with a non-self-executing obligation, the State must have effective measures to judge jurisdiction, including universal jurisdiction, and competence for the specific crime. If there are no such measures, then a State must extradite or ask the requesting State or an international tribunal to fulfil its obligation: *aut dedere aut punire*.

ENDNOTES

1. The principle of universal jurisdiction is also known as the principle of universal justice or universal principle, principle of international justice, principle of world or cosmopolitan law, principle of universal criminal justice or universal criminal law; and even professor Remiro Brotons refers to it as the principle of universal persecution. Now, as Manuel Ollé warns, when calling it the principle of international justice, it can be confused with the whole (Ollé Sesé, 2008, p. 95).
2. The principle of responsibility to protect, which has evolved over time, was outlined by the General Assembly in the Outcome Document of the 2005 World Summit, noting that “each State is responsible for protecting its population from genocide, war crimes , ethnic cleansing and crimes against humanity (…) through the adoption of appropriate and necessary measures (…) The international community should, as appropriate, encourage and help states to exercise that responsibility” (United Nations, 2005, para. 38). It is a concept that is oriented towards collective responsibility, among which the principle of universal jurisdiction has a place between the pillar of legal prevention that includes the international special courts and the International Criminal Court (United Nations, 2001, pp. 20 et seq.). Why not also include the exercise of universal jurisdiction there?
3. “In the most modern terminology” punishment “is replaced by” prosecution “as an alternative to extradition in order to better reflect the possibility that the alleged perpetrator of the infringement may be declared not guilty” (United Nations, 2016, p. 150).
4. ICJ Judgment (20 July 2012): *Matter questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, para. 50.
5. United Nations (1996, p. 34). In the comments to article 9, the ILC notes that the *aut dedere aut iudicare* principle is intended for genocide, crimes against humanity, crimes against United Nations personnel and associated personnel and war crimes; not so for the crime of aggression.
6. “Although there is a fairly widespread process in the sense that the relevant provisions of the treaties can now be considered the unquestionable source of the *aut dedere aut judicare* obligation, there seems to be a growing interest among members of the Commission in relation to the possibility of also recognizing the customary basis of that obligation, at least with respect to certain categories of crimes, for example the most serious crimes recognized under customary international law.” Even in 2011, in his fourth report (A/CN.4/648, 31 May 2011), he proposed a draft article on international custom as a source of the *aut dedere aut iudicare* principle, which stated: “Article 4. International custom as a source of the *aut*

dedere aut judicare obligation: 1. All States have the obligation to extradite or prosecute an alleged criminal if that obligation derives from customary norms of international law. 2. That obligation may proceed, 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 arise from any mandatory rule of general international law accepted and recognized by the international community of States (*ius cogens*), in the form of an international treaty or international custom that typifies any of the acts listed in the paragraph 2" (par. 95). This draft article was not well received.

7. It is important to note that when referring to article 9 to "the person who allegedly committed the crime", a person is being referred to "not on the basis of unproven claims, but of relevant factual information". However, due to the disparity of internal regulations regarding the sufficiency of the evidence or evidence that is necessary to prosecute a person, the detaining State must judge in accordance with its regulations, while in relation to whether the conditions or not to extradite, that is, whether or not there are "sufficient charges", as indicated by the Geneva Conventions, or if there is "a qualification of the crime for which extradition is requested and of an exposition of the constitutive actions or omissions of the alleged crime, including a reference to the time and place of commission", as the *Model Extradition Treaty* of December 14, 1990 points out, must be subject to the conditions of bilateral or multilateral treaties, without forgetting that: "The element of discretion in the exercise of the criminal action, under which an alleged criminal may be granted immunity from jurisdiction in exchange for providing evidence or help the prosecution of other persons whose criminal conduct is considered more serious, recognized in some legal regimes, is excluded with respect to the crimes included in the code" (United Nations, 1996, p. 34).
8. The exception is made up of crimes against humanity, the requirement of double criminality not being necessary: "Since it is an international legal good to protect against Crimes against Humanity, it is not required, in application of the principles that govern these crimes, that a State has an identical classification to that of another to proceed to the extradition of a person that a State pursues and requests, on the grounds of being accused of committing such crimes" (López Garrido, 2000, p. 33).
9. The general rule is that we are faced with the right to request extradition, with the exception being the *Geneva Conventions* of 1949 in which States have the obligation to request the extradition of the alleged perpetrators who are not already being submitted to national courts or International Failure to do so we would face an illegal international.
10. "In case of not being granted, it will mean that the person responsible is submitted to the rule of law of the State that has not granted it, upon request of the requesting State" (Martínez Alcañiz, 2015, pp. 203-204 and 208).
11. After the creation of the ICC and various international *ad hoc* tribunals, a State may decide not to extradite or prosecute and opt for "the third alternative": to deliver the alleged responsible party to an international tribunal that has jurisdiction" (United Nations, 2016, p. 165). This was pointed out, for example, in article 9 of the Draft Code of crimes against the peace and security of humanity, article 6 of the *Convention against torture and other cruel, inhuman or degrading treatment or punishment* of 1984 and in article 11 of the *International Convention for the Protection of All Persons from Enforced Disappearances* of 2006. This was also pointed out by judge Xue in the Belgium v. Senegal case (ICJ Separate Opinion, 20 July 2012, para. 42).

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The Impact- or Causality-Based Extraterritorial Obligation to Respect Human Rights: A Consistent and Humane Approach of the Inter-American Human Rights System

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The main bodies of the Inter-American Human Rights System, namely the Commission and the Court, have been much more consistent than their European counterpart when it comes to the basis of extraterritorial jurisdiction and the responsibility of States in relation to the duty to respect human rights. We find evidence of this in its consistent case law, as reflected in precautionary measures regarding the rights of Guantanamo detainees, merits reports in contentious-jurisdiction cases, and reports, among other precedents. In turn, the Inter-American Court of Human Rights has held that human rights standards apply outside of the borders of States, which are bound by their respective obligations in these areas. While there may be some controversy concerning extraterritorial positive human rights obligations, we posit that the Inter-American approach to extraterritorial obligations to respect human rights is the most consistent for the protection of human dignity. We provide a comparative legal analysis of the developments in Inter-American case law and how it could provide inspiration in other systems.

Keywords**:** extraterritorial obligations, international human rights law, Inter-American system of human rights, transboundary harm

Introduction

It is an undeniable reality that States often engage in conduct that negatively impacts the enjoyment and exercise of the human rights and liberties of individuals who are located outside of the territory of those States, just as they regretfully also perpetrate abuses within their borders. Accordingly, at first glance, one can be tempted to say that violations doubtlessly engage the responsibility of States regardless of where they commence or take place, as demanded by the respect of human rights in universal geographical terms, considering that their rationale, which is the protection of human dignity – contemporarily accepted as the foundation of international human rights law–, would require that they ought to be respected anywhere and everywhere.

Nevertheless, and in a baffling way, some international supervisory bodies and States have sometimes argued that negative obligations of States, namely the duty to respect or to refrain from negatively affecting or preventing the enjoyment of human rights, have a somewhat limited scope, which supposedly makes them operate only inside the borders of the State whose conduct is examined; and that, allegedly, such obligations exist extraterritorially, only in a truly exceptional manner. In this sense, the European Court of Human Rights has held in several cases, such as that of *Issa and others v. Turkey*, that:

> "[T]he concept of "jurisdiction" within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties […] In exceptional circumstances the acts of Contracting States performed outside