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Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute Part I: The Principle of aut Dedere aut Judicare

Filip Andrei LARIU

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Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute
Part I: The Principle of *aut Dedere aut Judicare*

Filip Andrei LARIU[*],
University of Bucharest

Abstract: *The article is the first in a trilogy that analyses the interaction between immunities of state officials and the obligation to extradite or prosecute. It focuses on the principle of aut dedere aut judicare, defining its content and scope, identifying its sources and its relationship with state jurisdiction. The doctrinal and comparative legal research employed delineates the elements and components of the obligation to extradite or prosecute in order to better outline the exact mechanism in which immunities render it inoperable. The study first finds that the obligation to extradite or prosecute comprises of just one obligation in the alternative with two elements, rather than two distinct obligations. These elements are then comprehensively dissected. The different forms taken by the principle of aut dedere aut judicare in various sources are also being considered. Lastly, the article elaborates on the grounds for- and types of jurisdiction that are to be established when fulfilling the obligation to extradite or prosecute.*

Keywords: *obligation to extradite or prosecute, personal immunity, functional Immunity, international crimes*

[*] *Ph.D. candidate at the University of Bucharest, Romania. Filip is a graduate of Leiden University (LL.M in Public International Law) and of Babeș-Bolyai University (Bachelor of Laws). Currently, he is writing his PhD thesis in the field of International Humanitarian Law, analysing the legality of using the effects of climate change as a method of war. filiplariu@drept.unibuc.ro.* The opinions expressed in this paper are solely the author's and do not engage the institution he/she belongs to.

1. Introduction

In order to fight impunity for international crimes, States have developed a legal principle through which they try to ensure the punishment of all perpetrators, irrespective of where they have committed the alleged crimes. In the shape of an international obligation, the principle in question goes by the Latin maxim of *aut dedere aut judicare*, also called the obligation to extradite or prosecute ('OEP'). Appearing as a provision in different treaties, and arguably having reached the status of customary law, it essentially ensures that states cannot act as safe havens for the perpetrators of such crimes.

However, as is the case with most international obligations, there are certain limits to its application: obstacles, either legal or factual, which exclude the operation of the OEP in specific cases. Although mentioned by the International Law Commission ('ILC') in its Final Report,[1] the Commission avoided delving further into the subject of what circumstances actually exclude the operation of the aforementioned obligation. Nevertheless, the ILC has admitted the importance of such an analysis and summarily and non-exhaustively listed several possible circumstances: political offences, the political nature of a request for extradition, emergency situations, and *immunities*.[2]

In the span of three articles, we will focus solely on immunities. The trilogy sets from the premise that immunities act as a procedural barrier to the prosecution and extradition of persons who enjoy immunities under international law. As a result, such an obstacle may preclude the State from fulfilling an international obligation, namely that of extraditing or prosecuting the perpetrator. Since the consequences of such an interaction between immunities and the OEP have not been discussed in depth, there may be certain legal particularities that this apparent conflict may present on a closer look. In short, we will address the question whether immunities exclude the application of the obligation to extradite or prosecute and through what legal mechanism this is achieved. However, this question will be addressed through the prism of a potential conflict of norms. The following articles will try to find out whether there is a conflict between the obligation to extradite or prosecute and immunities, and in what way such a conflict can be solved within the framework of international law.

[1] ILC Final Report of the Working Group in the Obligation to extradite or prosecute (aut dedere aut judicare), 2014 YILC, Vol. II (Part Two).
[2] Ibidem, para. 35.

The importance of this question is twofold. On the one hand, it sheds more light on when immunities operate and when prosecution or extradition is required. This ensures a balance between fighting impunity and respecting State sovereignty. Secondly, clarifying these issues is of particular relevance for the field of international responsibility. A State may be confronted with two obligations simultaneously: to prosecute an individual *and* to observe their immunity. Should such a situation arise, the state in question must know how to navigate it effectively in order to avoid having its responsibility for breach of international obligations invoked by other States.

To answer the research question, this work follows a logical thread. In the first article, after defining the principle of *aut dedere aut judicare*, we first dissect it, identifying and analysing the scope and content of the OEP. We will also summarily observethe instances where this obligation appears in international treaties, to compare the different forms OEP clauses take. In a second article, the analysis will be structured on the dichotomy of functional and personal immunities. The two types of immunities will be discussed separately, observing in particular the influence each one has on the elements and components identified in the previous aticle. In the analysis of immunity *ratione personae* and *ratione materiae*, we will look both at domestic and international jurisprudence. Finally, after having identified the relevant elements of the OEP and of the obligation to observe immunities, the third article will look at how these interact with each other. The presented doctrinal theories, relevant case law and state practice will emphasise contradictory approaches on the matter. Where possible, we will try to reconcile these conflicting views, with the purpose of concluding with a coherent theory on when and how immunities preclude the operation of the obligation to extradite or prosecute.

With regard to the research methodology employed to answer the question, we mainly used doctrinal legal research. A great number of primary sources, particularly treaty provisions and case law, have been selected for commentary, and extensive legal literature on the subject was used to conduct a critical, qualitative analysis for the purpose of supporting our conclusions. Additionally, comparative research has also been used to a certain degree, especially when demonstrating state practice on a particular topic.

This first article does not aim to be a comprehensive study of the content, scope, and sources of the obligation to extradite or prosecute. There are a number of more extensive works that undertake an in-depth analysis of these matters.[1] Instead, the purpose of this introductory article is to set the general parameters for the discussion. Defining the principle of *aut dedere aut judicare,* recognising its content, establishing the limits of its scope, and identifying its sources is essential if we are to later study its interplay with immunities. It is particularly important to understand the nature of the obligation and its elements and components, so that one can observe precisely which of them the immunity renders inoperable and how exactly it manages to achieve that.

2. Content and Scope of the Obligation

The way in which the principle of *aut dedere aut judicare* has been defined in scholarly articles is as 'the alternative obligation of a state holding an alleged perpetrator of certain crimes to extradite him or to set in motion the procedure to prosecute him'.[2] Nevertheless, this seemingly clear and straightforward definition requires some additional analysis.

2.1. Two Obligations or one Obligation in the Alternative?

First, it must be established whether the OEP actually contains two separate obligations, namely to prosecute and to extradite respectively, or if it is the case of one single obligation in the alternative. The ILC in its commentary of Article 9 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind[3] makes it clear that it views the OEP as an obligation in the alternative, stating that:

> The custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial State may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other State or by prosecuting that individual in its national courts.[4]

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[1] Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute,* OUP, Oxford, 2018*;* Claire Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law,* Graduate Institute Publications, Geneva, 2009; Stoyan Minkov Panov, *The Obligation aut Dedere aut Judicare ('Extradite Or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation 'Extradite Or Prosecute,* University of Birmingham, Birmingham, 2016.

[2] Antonio Cassese et al, *The Oxford Companion to International Criminal Justice,* OUP, Oxford, 2009, p. 253.

[3] ILC Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996 YILC, Vol. II (Part Two), 17.

[4] Ibidem, p. 31.

Thus, the OEP does not contain two separate obligations, but rather has two distinct elements: extradition and prosecution.[1] The purpose of this is to avoid impunity, leaving it to the State holding the perpetrator to choose between the two alternatives.[2]

A similar perspective, albeit with some caveats, has been expressed in the *Belgium v Senegal case*[3] before the ICJ. The Court established that prosecution, or more precisely 'submission of the case for prosecution', is the principal obligation. Extradition is only an alternative option which, if chosen, would relieve the State of its obligation to prosecute.[4] Judge Tomka,[5] former President of the International Court of Justice, and Judge Donoghue[6] reinforced this view.

Domestic courts have also sided with the perspective of the ICJ. In *The Public Prosecutor v. Guus Kouwenhoven*,[7] the Dutch Court of Appeal, when assessing the obligations of the Government, did not consider extradition as a separate obligation. It found that the Government had acted lawfully when choosing not to opt for this alternative to prosecution.

2.2. Prosecution

Originally, the first element of the OEP was relatively straightforward, as the duty to prosecute. More recent *aut dedere aut judicare* treaty clauses, however, require States not to prosecute as such, but to 'submit' cases of alleged offences to the 'competent authorities for the purpose of prosecution'.[8] This would give the appearance of lowering the bar for States, since their obligation is not really to prosecute but simply to refer cases to the competent authorities. However, the wording simply has the purpose of aligning itself with the rights of the accused, most notably the presumption of innocence, in the context of a fair trial. Some authors have rightly shown that there is still a

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[1] See Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute*, OUP, Oxford, 2018;, p. 231.
[2] Antonio Cassese et al, *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, p. 253.
[3] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422.
[4] Ibidem, p. 456, para. 95.
[5] ILC Summary record of the 3148th meeting, 2012 YILC, Vol. I, at 147, para. 100.
[6] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422, p. 585, para. 3 (Declaration of Judge Donoghue).
[7] Supreme Court of the Netherlands, *The Public Prosecutor v. Guus Kouwenhoven*, Judgment of 21 April 2017, Case no. 20/001906-10.
[8] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 75; See e.g. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Art. 7(1); 2001 United Nations Convention against Transnational Organized Crime UNGA Res, A/RES/55/25 (2001), Art. 16(8); ILC Draft Articles on Crimes against Humanity, 2016 YILC, Vol. II (Part Two), p. 242, Art. 9. A more detailed analysis will appear in the third article of the trilogy.

duty to prosecute if the evidence points to the commission of the offence within the scope of the obligation.[1]

Coming back to the *Belgium v. Senegal case*,[2] we can identify a series of particularities that the Court found, concerning the duty to prosecute. Among others, there is a duty to conduct a preliminary inquiry as soon as the state had reasons to suspect the perpetrator of the crimes in question. Paragraph 86 provides that 'steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case'. In the same paragraph, the Court seemed to consider the latest acceptable time for the initiation of the investigation to be when the complaint is filed with the authorities. However, a request for extradition is not a requirement for the initiation of the investigation or the submission of the case to the competent authorities.[3]

An important observation that must be made is about the 'national treatment' standard. Derived from Paragraphs 83 to 86, it effectively entails, as one author put it, that 'although States have a choice in how to conduct their investigation, they must establish the relevant facts to the same standard as is applied in standard domestic cases'.[4] The lack of an international minimum standard for prosecution rightly gives rise to concerns that national authorities may choose not to prosecute certain perpetrators for political reasons. As a solution to this dilemma, some authors have suggested the application of a good faith assessment in order to establish if the state acts lawfully.[5]

2.3. Extradition

None of the sources encompassing the OEP contain a definition for extradition. The common usage of the word refers to it as the 'formal process by which a person is surrendered by one State to another'.[6] Such a procedure usually follows after having previously concluded a bilateral or multilateral treaty which contains the conditions for extradition: reciprocity, judicial review, etc.

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[1] Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", *Law and Contemporary Problems*, vol. 59, no. 4/1996, pp. 46-47. This will be discussed further in a future article.

[2] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422.

[3] Ibidem, at 456, paras. 94-5.

[4] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 76.

[5] Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists", in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, Oxford, 2004, p. 261.

[6] Mahmoud Cherif Bassiouni, *International extradition: United States law and practice*, OUP, Oxford, 2014, p. 2.

A problematic situation occurs when a State deports or otherwise informally surrenders the perpetrator to another State. That is to say, the former does not follow the procedure of an extradition *per se*. In such a case, does the first State fulfil its *aut dedere aut judicare* obligation? State practice seems to answer in the affirmative. For example, both Canada[1] and the US[2] have preferred denaturalisation and deportation to prosecuting or even formally extraditing alleged war criminals. In the *Barbie case*,[3] the French Supreme Court determined that the power to deport or expel is to be treated as coextensive with extradition.

Yet, there are nevertheless some issues with this approach. The purpose of the OEP is to limit impunity, making sure that no perpetrator of the specified crimes goes unpunished. However, unlike extradition, which is a judicial procedure that aims to ultimately achieve the prosecution of the perpetrator, deportations have no such finality. Although in practice the State to which a person is deported may initiate an investigation or prosecution on its own, the deportation procedure itself carries no such conditions.

Moreover, some authors also highlighted the human rights issues regarding the use of such an approach. Formal extradition provides important human rights guarantees that may be absent in other forms of rendition, such as the requirement for double criminality, respect for the principle of *non bis in idem*, and the principle of speciality. The European Court of Human Rights has also come in the defence of this view, establishing that a deportation carried out as a disguised extradition in order to circumvent the technicalities of extradition is contrary to Article 5 of the European Convention on Human Rights.[4]

2.4. A Third Alternative

Without going into details because this does not concern the object of this study, it is important to mention that in some instances, a third alternative, besides prosecution and extradition, is available. That alternative is the surrender of the suspect to a third State or an international organisation. This

[1] Mahmoud Cherif Bassiouni, *International Criminal Law: Enforcement*, Transnational Publishers, 1999, p. 243.
[2] Eric Lichtblau, "U.S. Seeks to Deport Bosnians Over War Crimes", The New York Times, 28 February 2015.
[3] Cour de Cassation, *The Prosecutor v. Klaus Barbie*, Judgment of 6 of October 1983, Case no. 83-93194.
[4] *Bozano v. France*, Judgment of 18 December 1986, [1986] EHRR 297, para. 60.

is especially relevant in the context of the creation of the International Criminal Court and the *ad hoc* international tribunals.[1]

3. Sources

Before presenting the different sources of the obligation to extradite or prosecute, it is important to point out that this section will only deal with treaty sources of the OEP. Although it could be argued that the principle *of aut dedere aut judicare* has reached customary international law status (at least regarding certain crimes),[2] there is no definitive agreement on the issue. The ambiguity is further aggravated because both the ICJ and the ILC have remained silent on the issue, which has prompted authors to presume that there might not be a crystallised custom around the OEP.[3] That being the case, an analysis on whether or not the OEP is customary international law is too extensive for the present study, and we would like to direct the reader to other articles that have gone more in depth trying to find an answer.[4]

We will present the main treaty sources of the OEP, focusing on the evolution of the language used in such clauses and pointing out the main differences between the various provisions that appear in multilateral treaties. The sources will be grouped around the types of crimes that states wanted to prevent and supress - first the core crimes, then other international crimes of importance, such as terrorism and torture.

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[1] ILC Report of the Working Group on the Obligation to Extradite or prosecute (aut dedere aut judicare) 2013 YILC, Vol. II (Part Two), p. 15, para. 33; See also ILC Final Report ILC Final Report of the Working Group in the Obligation to extradite or prosecute (aut dedere aut judicare), 2014 YILC, Vol. II (Part Two), p. 100, para. 35; Cassese, Antonio Cassese et al, *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, p. 254.

[2] Stoyan Minkov Panov, *The Obligation aut Dedere aut Judicare ('Extradite Or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation 'Extradite Or Prosecute*, University of Birmingham, Birmingham, 2016, p. 202.

[3] Mahmoud Cherif Bassiouni, Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Brill Nijhoff, Leiden, 1995, p. 43; See also Antonio Cassese et al, *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, p. 253; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 77.

[4] Claire Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law*, Graduate Institute Publications, Geneva, 2009; Stoyan Minkov Panov, *The Obligation aut Dedere aut Judicare ('Extradite Or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation 'Extradite Or Prosecute*, University of Birmingham, Birmingham, 2016.

3.1. Core International Crimes

3.1.1. The Geneva Conventions and Additional Protocol I

The main humanitarian law instruments regulating the conduct of an armed conflict also provide for the mandatory prosecution or extradition of persons suspected of certain war crimes:[1]

> 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 … [or] hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[2]

The scope of the obligation is limited to grave breaches of the Geneva Conventions.[3] Other war crimes which do not fall in this category are not covered by the OEP, yet states can still prosecute them under universal jurisdiction. The term 'hand such persons over', coupled with the condition for the state to have made out a *prima facie* case, essentially implies extradition.

A serious dilemma caused by the wording of the article is the relationship between the duty to prosecute and extradition, especially if it is 'alternative/equal or conditional/hierarchical', and to what extent the custodial state has a discretion to choose between the two options.[4]

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[1] 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 75 UNTS 31 (1949), Arts. 49-50; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85 (1949); Arts. 50-1; 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135 (1949), Arts. 129-30; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287 (1949), Arts. 146-7; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (1977), Arts. 11, 85-6 and 88.

[2] First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146.

[3] ICRC, Commentary on the First Geneva Convention, 1952, 363; ICRC Commentary on the Second Geneva Convention, 1960, 265; ICRC Commentary on the Third Geneva Convention, 1960, 623; ICRC Commentary on the Fourth Geneva Convention, 1952, 592; ICRC, Commentary on the First Geneva Convention, 2016, para. 2894; ICRC, Commentary on the Second Geneva Convention, 2017, para. 2969; ICRC, Commentary on the Third Geneva Convention, 2020, para. 5125.

[4] Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute*, OUP, Oxford, 2018, p. 232; Edward Wise, "The Obligation to Extradite or Prosecute", *Israel Law Review*, vol. 27, no. 1/1993, p. 268.

3.1.2. The Genocide Convention

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.[1]

The obligation included in the Genocide Convention is somewhat different from other similar treaties. First, the obligation to prosecute only applies to the state where the acts have been committed, and not in the state on the territory of which the suspect finds himself, as it is with most OEP clauses. Furthermore, Article 6 does not include the alternative of extradition. Instead, it is one of the few treaties to have the third alternative presented above: the handing over of a suspect to an international court or tribunal.

Nevertheless, some authors have argued that the provisions of the Genocide Convention ought to be interpreted as including a veritable obligation *aut dedere aut judicare*.[2]

3.1.3. Crimes against Humanity

There is currently no treaty covering crimes against humanity as such. However, the ILC has been working for some years on one, and its Draft Articles contain one of the most up-to-date and extensive clauses on the obligation to extradite or prosecute:

> The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.[3]

Article 10 includes the standard *aut dedere aut judicare* clause used in most modern treaties. It limits the territorial scope of its application to a perpetrator finding himself in the territory of a State party. It also excludes any terminological ambiguities by specifically including the terms 'prosecution' and 'extradition'. Furthermore, it incorporates the third alternative of surrender to an international court of tribunal. Lastly, it also covers the criterion of national standard, as discussed in the first part of the article.

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[1] 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, Art. 6.
[2] Lee Steven, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations", *Virginia Journal of International Law*, vol. 39, no. 2/1999, p. 460.
[3] ILC Draft Articles on Crimes against Humanity, 2016 YILC, Vol. II (Part Two), Art. 10.

3.2. Other International Crimes

Most multilateral treaties concerning crimes such as terrorism or torture use a variation, or even an identical version, of what is called 'The Hague Clause'. The term draws its name from the treaty it was first used in and encompasses the following:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.[1]

Almost identical to Article 10 of the ILC Draft Articles on Crimes against Humanity,[2] Article 7 of the Hague Convention is actually its precursor. It is the most widely used version of the clause,[3] being included in at least 15 other treaties.[4]

4. The Duty to Establish Jurisdiction

In the first section we have analysed the two elements of the obligation *aut dedere aut judicare*, namely the obligation to prosecute, and its alternative, extradition. However, for the OEP to have an effect, some additional, implied

[1] 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105, Art. 7.
[2] ILC Draft Articles on Crimes against Humanity, 2016 YILC, Vol. II (Part Two).
[3] For a more detailed analysis, see above the discussion around Art. 10 of the ILC Draft Articles on Crimes against Humanity, 2016 YILC, Vol. II (Part Two). The most notable difference is the exclusion from the Hague clause of the third alternative (handing the suspect over to an international court or tribunal).
[4] 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), 974 UNTS 177; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, 1035 UNTS 167; 1979 International Convention against the Taking of Hostages, 1316 UNTS 205; 1980 Convention on the Physical Protection of Nuclear Material, 1456 UNTS 101; 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85; 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 UNTS 221; 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 UNTS 210; 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 2163 UNTS 75; 1994 Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363; 1997 International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256; 1999 International Convention on the Suppression of Financing of Terrorism, 2178 UNTS 197; 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172; 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, 2245 UNTS 89; 2006 International Convention for the Protection of All Persons from Forced Disappearance, 2716 UNTS 3.

obligations need to be fulfilled. In order to avoid confusion with the two elements, we will refer to them as 'components'.

The first component of the OEP is the obligation on behalf of a State to adapt its domestic law to include the obligation to extradite or prosecute. This virtually means to provide the internal legal framework that would make the fulfilment of the obligation effective.

The second component, and the one more relevant for our discussion, is the obligation on behalf of States to establish 'jurisdiction under its domestic law in order to be able to detain, extradite, or put on trial an alleged offender found on its territory'.[1]

4.1. Grounds for Jurisdiction

The five grounds States usually use to establish jurisdiction are the principles of territoriality,[2] nationality,[3] passive personality,[4] protection,[5] and universality. The OEP, under the formula used in most treaties at least, does not grant importance to the nationality of the perpetrator, of the victim, or to the place where the crime occurred. The only relevant condition is that the perpetrator be on the territory that wishes to exercise its jurisdiction.[6]

When it comes to instances where immunities might apply, States generally use the principle of universality because there is no other link with the accused. The principle's focus is the gravity of the crime. The place where it occurs, the nationality of the perpetrator or of the victim are irrelevant.[7] States could therefore exercise their jurisdiction over the suspects without having to first prove another link between them.[8] It is important to note the term 'could'

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[1] Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute*, OUP, Oxford, 2018, p. 232; See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422, para. 75.

[2] With its two variants, subjective and objective, territoriality is the most commonly used basis for jurisdiction. It essentially extends the jurisdiction of a state over all offences which either originated (subjective territoriality) or are consummated (objective territoriality) in its territory. See Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 200.

[3] The jurisdiction of the state relies on the nationality of the perpetrator of the offence. Wherever it may occur, as long as the suspect has the nationality of the state that wishes to prosecute him, that state is deemed to have jurisdiction. See Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 202.

[4] A mirrored version of the nationality principle, the state will have jurisdiction if the victims of the offence are nationals of the state in question. See Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 206.

[5] This is a type of jurisdiction recognised in instances where the vital interests of a state are endangered. See Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 205.

[6] Notable exceptions are the Geneva Conventions. As indicated in the previous section, they do not include such a condition for the obligation to prosecute grave breaches.

[7] Stephen Macedo et al, *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, 2001, p. 28.

[8] Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 208.

in contrast with 'must'. When one speaks of universal jurisdiction, reference is made to the *possibility* of a State to exercise its jurisdiction, and not its obligation[1]. So apart from just a jurisdictional ground, universal jurisdiction can also become a tool for states to fight impunity.[2] Nevertheless, when the OEP comes into play, universality is limited to its function of a ground for jurisdiction and *must* be employed so that states would be able to prosecute. This particular form of universal jurisdiction exercised in relation to the obligation to extradite or prosecute has been called 'a quasi-jurisdiction'.[3] In a joint separate opinion to the *Arrest Warrant Case*,[4] Judges Higgins, Kooijmans and Buergenthal have argued that

> By the loose use of language, the [aut dedere aut judicare obligation in treaties] has come to be referred to as 'universal jurisdiction', though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.[5]

Either way, whether one considers such an instance to fall under universal jurisdiction or not, the results are virtually the same: the State must exercise its jurisdiction over a suspect that finds himself on its territory.

4.2. Types of Jurisdiction

The three types are prescriptive, adjudicative, and enforcement jurisdiction.[6] All three are required in some form or another when it comes to the obligation to extradite or prosecute.

The jurisdiction to prescribe, also named 'legislative jurisdiction' represents the ability of a State to regulate a certain conduct through the laws that it creates. As shown above, one of the components of the OEP is the duty on states to adapt their domestic law to include the obligation to extradite or prosecute. Prescriptive jurisdiction is therefore required to fulfil this first component. The more problematic element is the extraterritorial exercise of

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[1] The distinction between civil and criminal matters is also relevant when establishing universal jurisdiction., according to the ECHR, Al Adsani v. United Kingdom, Application no 35763/97, para 46; see also, Carmen Achimescu, *La notion de juridiction au sens de l'article 1 de la Convention européenne des droits de l'homme*, PHD thesis, p.79

[2] Filip Andrei Lariu, "Universal Jurisdiction as a tool to prosecute international crimes", *Caiete de Drept Penal*, no. 2/2021.

[3] Malcolm Shaw, International Law, 8th edition, Cambridge University Press, Cambridge, 2017, p. 504; James Crawford, *Brownlie's Principles of Public International Law*, 9th edition, OUP, Oxford, 2019, p. 454.

[4] *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), Merits, Judgment of 14 February 2002, [2002] ICJ Rep. 3.

[5] Ibidem, p. 75, para. 42 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

[6] Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 196; Cedric Ryngaert, "The concept of jurisdiction in international law", in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar, p. 54.

the prescriptive jurisdiction. The *Lotus case*[1] sheds some light on the issue, establishing that there needs to be a nexus between the state and the conduct it claims to regulate. Nevertheless, the PCIJ used a wide interpretation and found that, in principle, there is nothing in international law which would prohibit a state from exercising extraterritorial prescriptive jurisdiction.

Adjudicative jurisdiction entails the competence of a State's courts to try a case and is the most relevant type when it comes to the OEP. Since prosecution and extradition are essentially judicial processes, it is crucial that judicial organs have the required competence to execute these procedures.

The enforcement, or 'executive' jurisdiction is connected to the other two, and its role is basically to ensure that the prescriptive and adjudicative powers of the State are not left 'without teeth'. It entails 'the capacity to ensure or to compel compliance with legal rules'.[2] The 'compelling of compliance' may include, for example, keeping the perpetrator under arrest or enforcing a judicial decision against the perpetrator. Regarding the extraterritorial exercise of enforcement jurisdiction, the *Lotus case*[3] gives again some answers. Unlike prescriptive jurisdiction, enforcement jurisdiction cannot be exercised in the territory of another state without that State's consent.

5. Conclusions

Although seemingly straightforward, on a closer look the obligation *aut dedere aut jurdicare* has some particularities. Apart from its two elements, prosecution and extradition, the OEP has some 'hidden' components: issues that are not expressly provided for in treaties, but are implied and necessary if one wants the OEP to be effective. We focused in particular on the duty to exercise jurisdiction, touching both upon the types of jurisdiction and the grounds for exercising it.

In the next article, we will be analysing what immunities are, focusing primarily on personal and functional immunities of state officials, and how such immunities interact with the elements and components identified above.

[1] *SS Lotus (France v. Turkey)*, Merits, Judgment of 7 September 1927, PCIJ Rep. (Series A) no 10. See interpretation by Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 199.
[2] Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 197.
[3] *SS Lotus (France v. Turkey)*, Merits, Judgment of 7 September 1927, PCIJ Rep. (Series A) no 10.

Bibliography

Treaties & Other International Instruments
1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277;

1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 75 UNTS 31 (1949);

1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85 (1949);

1949 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135 (1949);

1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287 (1949);

1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105;

1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), 974 UNTS 177;

1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, 1035 UNTS 167;

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (1977);

1979 International Convention against the Taking of Hostages, 1316 UNTS 205;

1980 Convention on the Physical Protection of Nuclear Material, 1456 UNTS 101;

1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85;

1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 UNTS 221;

1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 UNTS 210;

1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 2163 UNTS 75;

1994 Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363;

1997 International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256;

1999 International Convention on the Suppression of Financing of Terrorism, 2178 UNTS 197;

1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172;

2001 United Nations Convention against Transnational Organized Crime UNGA Res, A/RES/55/25 (2001);

2005 International Convention for the Suppression of Acts of Nuclear Terrorism, 2245 UNTS 89;

2006 International Convention for the Protection of All Persons from Forced Disappearance, 2716 UNTS 3;

ICRC, Commentary on the First Geneva Convention, 1952;

ICRC, Commentary on the Second Geneva Convention, 1960;

ICRC, Commentary on the Third Geneva Convention, 1960;

ICRC, Commentary on the Fourth Geneva Convention, 1952;

ICRC, Commentary on the First Geneva Convention, 2016;

ICRC, Commentary on the Second Geneva Convention, 2017;

ICRC, Commentary on the Third Geneva Convention, 2020;

ILC Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996 YILC, vol. II (Part Two);

ILC Summary record of the 3148th meeting, 2012 YILC, vol. I;

ILC Report of the Working Group on the Obligation to Extradite or prosecute (aut dedere aut judicare) 2013 YILC, vol. II (Part Two);

ILC Final Report of the Working Group in the Obligation to extradite or prosecute (aut dedere aut judicare), 2014 YILC, vol. II (Part Two);

ILC Draft Articles on Crimes against Humanity, 2016 YILC, vol. II (Part Two);

Case Law

SS Lotus (France v. Turkey), Merits, Judgment of 7 September 1927, PCIJ Rep. (Series A) No 10;

Cour de Cassation, *The Prosecutor v. Klaus Barbie*, Judgment of 6 of October 1983, Case No. 83-93194;

Bozano v. France, Judgment of 18 December 1986, [1986] EHRR 297, para. 60;

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Merits, Judgment of 14 February 2002, [2002] ICJ Rep. 3

Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422;

Supreme Court of the Netherlands, *The Public Prosecutor v. Guus Kouwenhoven*, Judgment of 21 April 2017, Case No. 20/001906-10;

Books & Articles

Antonio Cassese et al, *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009;

Cedric Ryngaert, "The concept of jurisdiction in international law", in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar, 2015;

Claire Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law*, Graduate Institute Publications, Geneva, 2009;

Edward Wise, "The Obligation to Extradite or Prosecute", *Israel Law Review*, vol. 27, no. 1/1993;

Eric Lichtblau, "U.S. Seeks to Deport Bosnians Over War Crimes", *The New York Times*, 28 February 2015;

Filip Andrei Lariu, "Universal Jurisdiction as a tool to prosecute international crimes", *Caiete de Drept Penal*, no. 2/2021;

Gleider Hernandez, *International Law*, 1st edition, OUP, Oxford, 2019;

James Crawford, *Brownlie's Principles of Public International Law*, 9th edition, OUP, Oxford, 2019;

Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute*, OUP, Oxford, 2018;

Lee Steven, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations", *Virginia Journal of International Law*, vol. 39, no. 2/1999;

Mahmoud Cherif Bassiouni, Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Brill Nijhoff, Leiden, 1995;

Mahmoud Cherif Bassiouni, *International Criminal Law: Enforcement*, Transnational Publishers, 1999;

Mahmoud Cherif Bassiouni, *International extradition: United States law and practice*, OUP, Oxford, 2014;

Malcolm Shaw, *International Law*, 8th edition, Cambridge University Press, Cambridge, 2017;

Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", *Law and Contemporary Problems*, vol. 59, no. 4/1996;

Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019;

Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists", in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, Oxford, 2004;

Stephen Macedo et al, *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, 2001;

Stoyan Minkov Panov, *The Obligation aut Dedere aut Judicare ('Extradite Or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation 'Extradite Or Prosecute*, University of Birmingham, Birmingham, 2016.