# THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

[Agenda item 7]

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## Third report on the obligation to extradite or prosecute (*aut dedere aut judicare*), by Mr. Zdzislaw Galicki, Special Rapporteur

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## CONTENTS

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| Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948) | United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277. |
| European Convention on Extradition (Paris, 13 December 1957) | *Ibid.*, vol. 359, No. 5146, p. 273. |
| Convention on offences and certain other acts committed on board aircraft (Tokyo, 14 September 1963) | *Ibid.*, vol. 704, No. 10106, p. 219. |
| Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) | *Ibid.*, vol. 1155, No. 18232, p. 331. |
| Convention for the suppression of unlawful seizure of aircraft (The Hague, 16 December 1970) | *Ibid.*, vol. 860, No. 12325, p. 105. |
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| Additional Protocol to the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (Islamabad, 6 January 2004) | *Ibid.*, p. 250. |
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# Introduction

1. The present report is the third report on the obligation to extradite or prosecute (*aut dedere aut judicare*) presented by the Special Rapporteur. It is aimed at continuing the process undertaken in the preliminary report of 2006[1] and the second report, of 2007,[2] which is to formulate questions addressed both to States and to the members of the International Law Commission concerning the most essential aspects of the topic. These questions, which to

[1] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571.

[2] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585.

some extent have been repeated each year, are intended to enable the Special Rapporteur to draw some final conclusions regarding the main problem of this exercise, namely, whether the obligation *aut dedere aut judicare* exists as a matter of customary international law.

2. Although a fully convincing answer to this question cannot be found yet at this stage, the results of this research seem now to be much more promising than at the beginning, when some voices expressing doubts about existence of the said obligation could be heard (see paras. 60 and 61 below). The topic itself requires a wide analysis of various instruments, such as treaties and their *travaux preparatoires*, jurisprudence, national legislation and doctrine.

## Chapter I

## The follow-up to the second report of the Special Rapporteur

3. The second report, presented by the Special Rapporteur during the fifty-ninth session of the International Law Commission, in 2007, was in fact closely connected to the preliminary report presented to the Commission in 2006. Readers could even find that certain fragments of both reports were almost identical. There were, however, at least three reasons justifying such repetitions.

4. The first one derived from the simple fact that around half the members of the Commission had been replaced as a result of the election held by the General Assembly at the end of 2006. Therefore, it was worthwhile to recapitulate in the second report, for the benefit of newly elected members, the main ideas and concepts presented by the Special Rapporteur in the preliminary report, together with a summary of the discussion which had subsequently taken place first in the Commission, and later in the Sixth Committee.

5. Secondly, as mentioned in paragraph 3 of the second report,[3] it appeared to be necessary to obtain the views of the new members of the Commission on the most controversial matters covered in the preliminary report before proceeding to a substantive elaboration of possible draft rules or articles concerning the obligation to extradite or prosecute.

6. Finally, there was the unquestioned need for a wider response to be obtained from States on the issues identified by the Commission in the relevant part of its 2006 report.[4] Unfortunately, only seven States had responded to this request and had transmitted their comments and opinions concerning those issues at the moment the Special Rapporteur finalized the second report. Consequently, only those seven comments and opinions could be considered in the second report. Subsequently, the number of comments, opinions and information has increased to about 20, but the repetition of the request to States still seemed, as it seems now, necessary to obtain, as far as possible, a full and actual picture of States' internal regulations and international commitments concerning the obligation to extradite or prosecute.

[3] *Ibid.*, p. 68, para. 3.

[4] *Yearbook … 2006*, vol. II (Part Two), p. 21, paras. 30 and 31.

### A. Consideration of the topic at the fifty-ninth session of the International Law Commission

#### 1. Specific nature of the second report

7. The second report,[5] consisted of a preface, an introduction and two chapters. The preface and the introduction were of an introductory character, recounting briefly the history of the topic in the work of the International Law Commission. The Special Rapporteur now feels free from repeating this history once again.

8. Chapter I of the second report expressed—already in its title—the intention of the Special Rapporteur to address some old and new questions concerning the topic to newly elected members of the Commission, and to have the preliminary report revisited.

9. Consequently, two sections of this chapter of the second report concentrated on the reconsideration of the topic at the fifty-eighth session of the International Law Commission in 2006 and the identification of specific issues on which comments of States were of particular interest to the Commission. It is worth recalling that during the debate in the Commission at its 2006 session, some important questions had already been raised, such as:[6]

(*a*) Is the obligation *aut dedere aut judicare* derived exclusively from international treaties formulating it, or can it be considered also to be based on an already existing, or just emerging, principle of international customary law?[7]

(*b*) Can we find a sufficient customary basis for the application of the said obligation at least to some categories of crimes, for instance, to the most serious crimes recognized under international customary law, such as war crimes, piracy, genocide and crimes against humanity?

[5] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585.

[6] *Yearbook … 2006*, vol. II (Part Two), chap. XI, sect. B.2, p. 172, paras. 220–229.

[7] A similar request was already made in the preliminary report, in which the members of the Commission were asked "to find a generally acceptable answer to the question of whether the legal source of the obligation to extradite or prosecute should be limited to the treaties which are binding the States concerned, or be extended to appropriate customary norms or general principles of law" (see *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571, p. 266, para. 40).

(*c*) Is it generally acceptable to draw a clear distinction between the concepts of the obligation to extradite or prosecute and that of universal criminal jurisdiction, or perhaps should the Commission embark—in connection with the obligation *aut dedere aut judicare*—on a consideration of the question of universal jurisdiction, at least to some extent, and if so, to what extent?

(*d*) Which part of the alternative obligation to extradite or prosecute should have priority in the process of fulfilling this obligation, or should both parts be treated by States on equal level? And, consequently, to what extent does fulfilment of one part of the said alternative obligation make the State concerned free from fulfilling another part?

(*e*) Should the concept of "triple alternative", involving also the jurisdiction of international tribunals, be totally excluded from our considerations, or—on the basis of a developing practice of States—should it be included as a possible, at least in some cases, third path?

(*f*) Should a final product of the work of the Commission on the topic in question, whenever it is going to be elaborated, take the form of draft articles, rules, principles, guidelines or recommendations, or is it still too early to decide about it?

10. Since not all of these questions obtained concurring answers from the members of the Commission in 2006, it was of great importance for the Special Rapporteur to receive a more decisive response in 2007 from the newly elected Commission.

11. The substantive contents of this response could be also enriched with the views and opinions of the delegations in the Sixth Committee, which have been summarized—thanks to the kind assistance of the Secretariat—in section C of chapter I of the second report and in section C of chapter I of the present report. The Special Rapporteur retained in both cases the systematic arrangement of these sections, together with the subheadings, as introduced by the Secretariat.

12. It has to be stressed that, despite the discussion on these questions during two sessions of the International Law Commission and two sessions of the Sixth Committee, all problems raised above still seem to be open for further consideration.

13. As the members of the Commission may recall, the Special Rapporteur decided to give, in section D of chapter I of the second report,[8] his personal concluding remarks concerning the debate on the preliminary report which had taken place in 2006 in the Commission and in the Sixth Committee. The Special Rapporteur noticed that, taking into account the specific nature of the preliminary report, the comments of the members of the Commission and of the Sixth Committee had concentrated, in general, on the main issues to be considered by the Commission and by the Special Rapporteur in their future work on the topic.

14. There was a great variety of opinions, remarks and suggestions expressed by the members of the Commission and the Sixth Committee during the debate on the topic, dealing with both the substance and the formal side of this exercise, starting with its very title and ending on the choice of the final form of the work of the Commission in this field. A detailed presentation of those opinions, remarks and suggestions, as well as their assessment by the Special Rapporteur, was contained in paragraphs 40 to 60 of the second report.

15. Section E of chapter I of the second report, and section B of chapter I of the present report, contain a summarized presentation of comments and information received from Governments in response to the request addressed to them in the report of the International Law Commission on its fifty-eighth session. These responses have been compiled by the Secretariat in document A/CN.4/579.[9]

16. It has to be stressed that materials received from States were organized by the Secretariat in a transparent manner, in four clusters of information, in accordance with the order of questions formulated earlier in the report of the Commission. Section B of this chapter below follows the same organization: (*a*) international treaties containing the obligation *aut dedere aut judicare*; (*b*) domestic legal regulations; (*c*) judicial practice; and (*d*) crimes or offences.

17. This organization has made it much easier, for the Commission and the Special Rapporteur, to perform now and in the future any comparative exercise necessary for further elaboration of the topic. The Special Rapporteur would like to express, once again, his gratitude to the Secretariat for its kind assistance and cooperation. The comments and information contained in *Yearbook … 2007*, vol. II (Part One), document A/CN.4/579 and Add. 1–4, because of their delayed presentation by States, could not be considered by the Special Rapporteur in his second report. Therefore, they only have been considered and analysed in the present report (see paras. 57–87 below).

18. Chapter II of the second report[10] brought us to the core of the work performed traditionally by the Commission over each substantial topic elaborated by the Commission in the process of the codification and progressive development of international law. It contains a formulation of draft articles, rules, principles, guidelines or recommendations—whatever form is chosen by the Commission—which is intended to reflect the actual status quo of international law and of the practice of States in a given area of international relations.

19. During the preparation of the second report, the Special Rapporteur was of the opinion that, although the comments and information delivered by States were still far from being complete and from giving a solid and definite basis for constructive conclusions, it was possible,

[8] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585.

[9] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/579 and Add.1–4.

[10] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585.

already at that stage, to formulate provisionally a draft article concerning the scope of application of future draft articles on the obligation to extradite or prosecute. Section A of chapter II of the second report was intended to deal with this task.

20. Consequently, in paragraph 76 of the second report,[11] taking into account considerations evoked in the preliminary report, as well as in the second report, the Special Rapporteur suggested that the first article be formulated in the following way:

"*Article 1. Scope of application*

"The present draft articles shall apply to the establishment, content, operation and effects of the alternative obligation of States to extradite or prosecute persons under their jurisdiction."

21. In paragraphs 79 to 104 of the second report,[12] the Special Rapporteur gave a short survey of three main elements proposed in draft article 1 and tried to identify principal problems connected to them which, in his opinion, could become a subject of discussion by the members of the Commission. They were:

(*a*) The time element: extension of the application of the future draft articles to the periods of establishment, operation and production of effects of the obligation in question;

(*b*) The substantive element: a specific alternative obligation of States to extradite or prosecute;

(*c*) The personal element: the persons against whom the above-mentioned obligation of States may be exercised.

22. As was stressed in paragraph 80 of the second report,[13] there are at least three specific periods of time connected with the establishment, operation and effects of the obligation *aut dedere aut judicare*, each possessing its own particular characteristic, which should be reflected later in the draft articles. Furthermore, particularly as it concerns the period of establishment of the obligation to extradite or prosecute, a matter of paramount importance seems to be the question of sources from which this obligation may derive. Then, if ever a customary way of formulation of the said obligation is going to be finally accepted, the practice of States required for such formulation has to be considered in the context of the period of time necessary for a sufficient development of such practice.

23. With reference to the substantive element, as was noted in paragraph 89 of the second report,[14] the Commission has to decide whether and to what extent an obligation to extradite or prosecute exists and whether it is an absolute or a relative one. There are numerous questions which may appear in connection with the said alternative. Three of them have been raised in paragraphs 90 to 92 of the second report:[15]

(*a*) Which part of the alternative should have a priority in the practice of exercising this obligation by States, or do States have freedom of choice between the extradition and the prosecution of the persons concerned?

(*b*) Does the custodial State which receives the extradition request have a sufficient margin of discretion to refuse it when it is ready to enforce its own means of prosecution in the case, or when the arguments of the extradition request appear to be wrong and contrary to the legal system of the custodial State?

(*c*) Does the obligation *aut dedere aut judicare* include or exclude a possibility of a third choice? This question has a special importance, in particular in the light of the alternative competence of the International Criminal Court established on the basis of the Rome Statute of 1998.

24. Finally, considering the third, personal element of the proposed draft article 1, it is necessary to remember, as was stressed in paragraph 94 of the second report,[16] that the obligation of States to extradite or prosecute is not an abstract one, but is always connected with necessary activities to be undertaken by States *vis-à-vis* particular natural persons. The choice to make between extradition or prosecution in a given case has to be addressed to defined persons.

25. A further condition for natural persons to be covered under the obligation *aut dedere aut judicare* is that they should be under the jurisdiction of States bound by this obligation. The term "under their jurisdiction", proposed in draft article 1, means both actual jurisdiction that is effectively exercised and potential jurisdiction that a State is entitled to establish over persons committing particular offences. At a later stage, the Commission will have to decide precisely to what extent the concept of universal jurisdiction should be used for a final description of the scope of the obligation *aut dedere aut judicare*.

26. Together with the personal element, it will be impossible to avoid considering at a later stage the question of crimes and offences, to which the substantive obligation is going to extend, committed by the persons concerned (or, at least which those persons are suspected or accused of having committed). However, as was stated in paragraph 100 of the second report,[17] the Special Rapporteur is of the opinion that, for the purposes of elaboration of the provision dealing with the scope of application of the draft articles on the obligation *aut dedere aut judicare*, it does not seem to be essential to include any direct remark concerning those crimes or offences in the actual text of draft article 1.

27. Section B of chapter II of the second report was entitled "Plan for further development". It was the specific part of the report in which the Special Rapporteur wanted to share with the members of the Commission his ideas and concepts concerning other draft articles, following the initial one. These ideas and concepts remain actual matters for the purposes of the present report.

[11] *Ibid.*, p. 76, para. 76.

[12] *Ibid.*, p. 76–79, paras. 79–104.

[13] *Ibid.*, p. 76, para. 80.

[14] *Ibid.*, p. 77, para. 89.

[15] *Ibid.*, p. 77, para. 90–92.

[16] *Ibid.*, p. 77, para. 94.

[17] *Ibid.*, p. 78, para. 100.

28. It seemed rather indisputable that the next draft article to be elaborated, which could be entitled "Use of terms", should include a definition or description of the terms used for the purposes of the draft articles. The list of such terms should remain open and its content depends on particular needs which may appear in the process of elaboration of other draft articles. Proposals given in the second report by the Special Rapporteur were limited, for instance, to such terms as "jurisdiction", "prosecution", "extradition" or "persons under jurisdiction". They have served, however, as a useful basis for draft article 3 proposed in the present report.

29. As was noted in paragraph 107 of the second report,[18] another draft article, or even a set of draft articles, that may already be foreseen, could be connected with a more detailed description of the principal obligation *aut dedere aut judicare*, as well as of its alternative elements.

30. Taking into account that there is a rather general consensus as to the fact that international treaties are treated as a generally recognized source of the obligation to extradite or prosecute, it seems possible—at the beginning—to formulate in the future a draft article stating, "Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party". Such an article would be, of course, without any prejudice to the recognition of international customary norms as a possible source of criminalization of certain acts, and as a source of the obligation to extradite or to prosecute, to be exercised by States, at least towards the offenders committing such crimes.

31. Finally, as was noted in paragraphs 113 and 114 of the second report,[19] another source of interesting suggestions concerning the formulation of subsequent draft articles may be found in the draft Code of Crimes against the Peace and Security of Mankind, which was adopted by the Commission in 1996.[20] That Code incorporated the *aut dedere aut judicare* rule and, in explanations accompanying the rule, gave *sui generis* directives for possible further draft articles on the obligation to extradite or prosecute.

32. Four of these quasi-rules were presented in paragraph 114 of the second report. However, the Special Rapporteur had already stressed that those rules were not yet formally included as proposals for draft articles. As they have been evoked earlier by the Commission, although in a different context, the Special Rapporteur just saw a reason to bring them again to the attention of the members of the Commission. Although they are not actually repeated in the present report, the Special Rapporteur plans to return to them at an appropriate time and place.

33. In his introduction of the second report on the obligation to extradite or prosecute before the Commission, the Special Rapporteur confirmed that the "preliminary plan of action" formulated in 10 main points in the preliminary report[21] remained the main road map for his further work, including the continued analysis of highly informative materials concerning legislation (international and national), judicial decisions, practice of States and doctrine, collected with the kind assistance of the Secretariat. The Special Rapporteur was convinced that those elements, together with the further opinions and comments from Governments, should create a sufficient background for the effective elaboration of subsequent draft articles. Those expectations of the Special Rapporteur remain valid in the context of the present report, although the slow flow of the said opinions and comments from States affects the progress of the work in a rather negative way.

### 2. Summary of the debate in the Commission

34. It was the intention of the Special Rapporteur to include in the second report as many difficult problems and questions as possible, with the purpose of obtaining answers and suggestions, first from the members of the Commission and later from the members of the Sixth Committee. As a result of that approach, a great variety of views, opinions, remarks and suggestions was expressed by the members of the Commission during the debate on the topic, dealing with both the substance and the formal side of this exercise, starting with its very title and ending with the choice of the final form of the work of the Commission in this field.

35. As regards the title, among the members of the Commission, the concept of "obligation" seems to prevail over the "principle" to extradite or prosecute. Consequently, the Special Rapporteur shares the opinion that, at least at this stage, the title as it is now formulated should be retained. As already noted by the Special Rapporteur in 2006, the concept of the "obligation" *aut dedere aut judicare* seems to be a safer ground for continuing further constructive analysis than the concept of "principle". It does not exclude, of course, the possibility, and even a necessity, to consider the parallel question of the right of States to extradite or prosecute as a kind of *sui generis* counterbalance to the said obligation.

36. There were some doubts expressed by the members as to the use of the Latin formula "*aut dedere aut judicare*", especially as concerns the term "*judicare*", which does not reflect precisely the scope of the term "prosecute". The Special Rapporteur agrees with these remarks, though at this stage, he considers it rather premature to concentrate on the precise formulation of terms. Already in his preliminary report,[22] the Special Rapporteur gave a review of various terms used in different periods of development of the said obligation, starting with Grotius's phrase "*punire*".

37. It seems that a more precise meaning and exact scope of the term "*judicare*", which is mostly used now, should be defined, together with other terms, for the purposes of the draft articles, in the future draft article 2 ("Use of terms"). It also seems that the total elimination of the Latin origin of the obligation in question would not be appropriate since it is still retained in both the legislative practice and the doctrine.

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[18] *Ibid.*, p. 79, para. 107.

[19] *Ibid.*, p. 80, paras. 113 and 114.

[20] *Yearbook … 1996*, vol. II (Part Two), p. 30, art. 9 (Obligation to extradite or prosecute).

[21] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571, p. 269, para. 61.

[22] *Ibid.*, p. 262, paras. 5 *et seq.*

38. The debate in the Commission during its fifty-ninth session, in 2007, revolved generally around three main problems,[23] although not all the members expressed concurring opinions in respect of these questions:

(*a*) How to approach the topic from the point of view of the sources of the obligation concerned;

(*b*) What kind of mutual relationship—if it is supposed that such a relationship exists—between the obligation *aut dedere aut judicare* and the concept of universal jurisdiction should be accepted for the purposes of draft articles on the obligation to extradite or prosecute;

(*c*) How the limits of the scope of the said obligation—and those of the application of future draft articles—should be established.

39. The Special Rapporteur notes with satisfaction that, although the questions listed above had already been posed during the debate at the fifty-eighth session, in 2006, there was a significant clarification of views expressed by members of the Commission during the fifty-ninth session, in 2007.

40. On the first question, although there is rather general consent that appropriate treaty provisions may at present be considered as the unquestioned source of the obligation *aut dedere aut judicare*, there seems to be a growing interest among the members of the Commission concerning a possibility of recognizing also a customary basis for the said obligation, at least in respect of some categories of crimes, for instance, the most serious crimes recognized under international customary law.

41. The Special Rapporteur agrees that, when giving some examples of such crimes, he omitted a category of "crimes against the peace and security of mankind". On the other hand, he feels satisfied with the fact that a number of members of the Commission added this category to those which could be considered as a possible background for the application of the obligation in question, without prejudice, of course, to the final results of such consideration.

42. During the 2006 session, the opinions expressed by the members of the Commission were much more cautious concerning the possibility of a customary basis for the said obligation. In 2007, their attitude to this problem seemed to be generally more permissive, although the Special Rapporteur agrees with warnings expressed by many members that such a conclusion should be based only on a very solid analysis of the international, legislative and judicial practice of States.

43. It was also stressed during the fifty-ninth session that for this purpose it was necessary to know both the practice and *opinio juris* of a large number of States. Therefore, the idea of continuing to request States to deliver appropriate information—either directly or through States' representatives in the Sixth Committee—seems to be accepted, though this last channel was criticized by some members.

44. The number of opinions and comments concerning the preliminary report, sent by States over a period of more than one year, is still rather small, but is growing slowly, giving rise to some optimism that this source will eventually yield information that is sufficiently voluminous and representative to allow some constructive conclusions to be drawn in subsequent reports.

45. As to the second question, concerning universal jurisdiction, a specific evolution may also be noticed in comparison with the position taken last year by the members of the Commission. While at the fifty-eighth session of the Commission, the prevailing opinion, as noted by the Special Rapporteur in his second report, was that there should be a very careful treatment of the mutual relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction, and that the distinction between universal jurisdiction and the obligation *aut dedere aut judicare* should be clearly drawn, during the fifty-ninth session a more permissive approach was taken by a large number of members.

46. It was suggested that these two institutions should be analysed in parallel. It was also stated, for instance, that universal jurisdiction had to be analysed in order to see whether and where that basis for jurisdiction might overlap with the obligation *aut dedere aut judicare*.

47. The Special Rapporteur agrees with these suggestions, especially in the light of interesting conclusions, contained in the resolution adopted by the Institute of International Law in Cracow, Poland, in 2005 on universal criminal jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes.[24] A mutual relationship and—to some extent—an interdependence between universal jurisdiction and the obligation *aut dedere aut judicare* was rather clearly shown in that resolution.

48. However, the Special Rapporteur is convinced that the main current of further consideration should remain connected with the obligation to extradite or prosecute and should not be dominated in any case by the question of universal jurisdiction.

49. With regard to the third question, concerning, as the Special Rapporteur proposed in draft article 1, the scope of application of the draft articles and, as some members suggested, the scope of the obligation "*aut dedere aut judicare*", the Special Rapporteur could agree with the suggestion that the said obligation should not be treated as an alternative one and that the mutual relationship and interdependence between the two elements of this obligation—"*dedere*" and "*judicare*"—should be carefully and thoroughly analysed in the future.[25] As was suggested by some members, specific characteristics of both elements and conditions necessary for their application should be also considered.

[23] *Yearbook … 2007*, vol. II (Part Two), p. 88, para. 365.

[24] *Yearbook of the Institute of International Law*, p. 297.

[25] However, the Special Rapporteur would like to recall here that one of the best doctrinal specialists in the topic in question, Professor Edward M. Wise, in his well-known essay on the obligation to extradite or prosecute, starts with the statement: "This paper is concerned with the alternative obligation to extradite or prosecute contained in multilateral treaties requiring suppression of 'international offenses'." See Wise, "The obligation to extradite or prosecute", pp. 268–287.

50. Taking into account prevailing opinions expressed by the members of the Commission, the Special Rapporteur will consider withdrawing his initial concept of a possible "triple alternative", and will rather try to present and analyse possible particular situations connected with the surrender of persons to the International Criminal Court, which may have an impact on the obligation *aut dedere aut judicare*.

51. However, as concerns another disputable question, the Special Rapporteur is not fully convinced that "the time element" of the proposed draft article 1, dealing with the scope of application, should be treated in a comprehensive way, without any differentiation between the periods connected with the establishment, operation and effects of the obligation in question.

52. Numerous members of the Commission suggested referring draft article 1 to the Drafting Committee for further elaboration. The Special Rapporteur was not opposed in principle to this suggestion. However, for practical reasons, he would suggest that draft article 1 be referred together with other draft articles which are going to be presented later. The draft articles could be more easily considered by the Drafting Committee as a set, taking into account possible interdependence among them. Substantive suggestions concerning such future articles were given by the Special Rapporteur in chapter II of his second report, and it seems that they were rather positively evaluated by the members of the Commission.

53. Since the debate on the obligation to extradite or prosecute was attended by numerous members of the International Law Commission, the Special Rapporteur, in his concluding remarks presented to the Commission,[26] was able to address only the most general and most important problems and questions raised by the participants. Nevertheless, he can assure the members that all other remarks, opinions, views and comments—positive as well as critical—have been carefully noted and taken into account in the preparation of the present report.

## B. Specific issues on which comments of States would be of particular interest to the Commission: comments and information received from Governments

54. The Commission included in chapter III of the report on its fifty-ninth session, as usual, a list of specific issues on which comments from States would be of particular interest. The obligation to extradite or prosecute (*aut dedere aut judicare*) was among the issues identified.[27]

55. To a great extent, the questions raised in this context were analogous to those formulated during the fifty-eighth session, in 2006.[28] The Commission declared that it would welcome any information that Governments might wish to provide concerning their legislation and practice, particularly the more contemporary, with regard to this topic. If possible, such information should concern:

(*a*) International treaties by which a State is bound, containing the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

(*b*) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

(*c*) Judicial practice of a State reflecting the application of the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

(*d*) Crimes or offences to which the principle of universal jurisdiction in criminal matters is applied in the legislation and practice of a State; is it connected with the obligation *aut dedere aut judicare*?

56. Furthermore, the Commission added in 2007 that it would also appreciate information on the following:[29]

(*a*) whether the State has authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality;

(*b*) whether the State has authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals;

(*c*) whether the State considers the obligation to extradite or prosecute as an obligation under customary international law and if so to what extent.

Finally, the Commission said that it would welcome any further information and views that Governments might consider relevant to the topic.

57. Unfortunately, with the exception of the written information received from States during the fifty-ninth session of the Commission that responded to the questions formulated in the preliminary report of 2006, there was practically no written response from States to the questions formulated in paragraph 20 of the second report in 2007. The list of States which have delivered written information in response to the questions formulated in either report (in most cases the preliminary report only) includes the following:

(*a*) Austria, Croatia, Japan, Monaco, Qatar, Thailand and United Kingdom of Great Britain and Northern Ireland (reflected in A/CN.4/579);

(*b*) Chile, Ireland, Kuwait, Latvia, Lebanon, Mexico, Poland, Serbia, Slovenia, Sri Lanka, Sweden, Tunisia and the United States of America.

58. The information from the seven States mentioned in (*a*) above was considered by the Special Rapporteur in his second report.[30] The information sent by the remaining

[26] *Yearbook … 2007*, vol. II (Part Two), pp. 88–89, paras. 364–368.

[27] *Ibid.*, p. 6, paras. 31–33.

[28] *Yearbook … 2006*, vol. II (Part Two), p. 21, para. 30.

[29] *Yearbook … 2007*, vol. II (Part Two), p. 14, para. 32.

[30] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585, pp. 74–76, paras. 61–72.

13 States, mentioned in *(b)* above, in the period between April and July 2007 (in response to the questions formulated in the preliminary report), could not be taken into account in the second report and will be used in the present report.

59. Although the questions addressed to States in both reports dealt with rather particular issues, the possibility of presenting more general observations concerning the topic was of course not excluded. In practice, this opportunity was used only by one State, the United States.

60. In its general comments, the United States stated its belief that "its practice, and that of other countries, reinforces the view that there is not a sufficient basis in customary international law or State practice to formulate draft articles that would extend an obligation to extradite or prosecute beyond binding international legal instruments that contain such obligations".[31]

61. The United States added that it "does not believe that there is a general obligation under customary international law to extradite or prosecute individuals for offences not covered by international agreements containing such an obligation. Rather, the United States believes that States only undertake such obligations by joining binding international legal instruments that contain extradite or prosecute provisions and that those obligations only extend to other States that are parties to such instruments".[32]

62. Although some States, through their delegates in the Sixth Committee or in their written comments, expressed some doubts about the customary basis for a legal obligation *aut dedere aut judicare*, such a decisive rejection *a priori* of a possibility to look for a customary background to the said principle, even as applicable to a limited group of offences, was generally not supported by other States.

### 1. International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation

63. All 13 responding States conveyed a list of multilateral and bilateral[33] treaties establishing the obligation *aut dedere aut judicare*, except Sweden, which saw no need to list in its submission each international treaty containing the principle *aut dedere aut judicare*. The lists of multilateral treaties, both universal and regional,[34] followed the list of treaties and conventions mentioned by the Special Rapporteur in his preliminary report.[35] In addition, Chile mentioned two multilateral treaties concerning specific offences in view of their special relevance.[36]

64. Slovenia and Sri Lanka mentioned that they made no reservation to relevant multilateral treaties which limit the application of the obligation *aut dedere aut judicare*.

65. Mexico noted that, in signing the Convention on Extradition and in acceding to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, it had made reservations, but that those reservations did not affect the provisions setting out the obligation to extradite or prosecute in the multilateral treaties to which it was a party.

66. The United States noted that it had not made reservations to limit the application of the obligation to extradite or prosecute *per se*. When becoming a party to conventions, the United States had taken the position that the extradition obligations within the conventions applied only to expand the bases for extradition with countries with which the United States had bilateral extradition treaties.

67. Poland mentioned that it had made two declarations to the European Convention on Extradition concerning non-extradition of its own nationals.

68. Chile, Kuwait, Latvia, Lebanon, Mexico, Poland, Serbia, Slovenia, Sri Lanka and Tunisia listed bilateral treaties containing the obligation *aut dedere aut judicare*. Mostly, they were extradition treaties, although Kuwait and Tunisia mentioned also agreements on legal assistance and legal relations. Serbia stressed that the bilateral treaties did not specifically regulate matters related to extradition or prosecution. However, a number of them stated, as a reason to refuse extradition, the jurisdictional competence of the requested State to prosecute, and provided that, in the case when criminal proceedings had already been initiated for the same offence, the extradition request would be declined.

### 2. Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*)

69. Some Governments mentioned that international treaties were applicable with no need for national regulations, in some cases directly (Chile) and in other cases following the hierarchy of legislation imposed by the State's constitution (Latvia, Mexico, Serbia and Slovenia).

70. Latvia, Lebanon, Mexico, Poland, Serbia, Slovenia, Sweden and Tunisia mentioned rules from their penal codes and codes of criminal procedures relating to the crimes and to the procedure of the extradition, as well as the cases when the extradition should be accepted or refused and providing who was the competent authority to make such decisions.

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[31] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/579 and Add.1–4, sect. A, p. 85, para. 1.

[32] *Ibid.*, p. 85, para. 2.

[33] Kuwait mentioned only bilateral agreements.

[34] Ireland, Latvia, Poland and Slovenia mentioned European conventions; Sri Lanka mentioned conventions elaborated within the South Asian Association for Regional Cooperation; and Mexico and Chile mentioned the Convention on Extradition signed in Montevideo in 1933.

[35] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571, pp. 265–266, paras. 35–39.

[36] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the United Nations Convention against Transnational Organized Crime and its Protocols (General Assembly resolution 55/25).

71. Latvia, Lebanon, Poland, Serbia, Slovenia, Sweden and Tunisia established different regimes depending on whether the person whose extradition was requested was a national or not. Sweden stressed that it had different regimes regarding extradition, depending on the country to which a person was subject to the extradition.

72. The obligation to prosecute is closely linked to the refusal of the extradition, for example, in Ireland, where the obligation to extradite is considered paramount, recourse to prosecution is considered only when the extradition of an Irish citizen is not permitted because of the absence of reciprocal agreements.

73. In Serbia, in the case when the request for extradition is refused, the criminal legislation of the State provides for prosecution so that the foreigner can be held criminally liable and can face punishment. The criminal legislation of Serbia and the principle of universality will be applied only if no foreign country has requested the extradition of a foreigner or if the extradition request has been refused.

74. In Sweden, a prosecutor is involved in the extradition procedures and will be informed if a request is refused. In that case, the provisions of Swedish legislation and preliminary investigation and prosecution could be applicable in order to fulfil the obligation deriving from the principle *aut dedere aut judicare*.

75. Latvia, Mexico, Poland, Slovenia, Sweden and Tunisia established the rule of double criminality in the conditions to extradite. The offence must exist in accordance with their law and the law of the requesting State.

76. Mexico mentioned that all its extradition proceedings were conducted on the basis of bilateral treaties or of the Extradition Act and that, up to the present, it had not received any extradition request based on a multilateral treaty.

77. Sweden noted that there were additional situations, according to its penal code, where crimes committed outside Swedish territory were to be adjudged according to Swedish law and by a Swedish court, and in such cases, the law did not impose any requirement of double criminality.

78. Ireland mentioned its International Criminal Court Act of 2006, which provided for the surrender of individuals to the International Criminal Court for the prosecution of offences within the jurisdiction of the Court, and the International War Crimes Tribunal Act of 1998, which provided for the surrender of individuals where requested by an "international tribunal".

79. Poland noted that the final decision on the application of a foreign State for extradition was taken by the Minister of Justice and that only a ruling in which the court determined inadmissibility of extradition was binding on the Minister.

80. Sri Lanka recalled the Extradition Act No. 08 of 1977, which provided the basic legal regime to deal with requests for the extradition of offenders received from designated Commonwealth countries or treaty States. In addition, appropriate provisions amending that Act were mentioned, including the enabling legislations introduced to give effect to international treaties relating to the suppression of serious international crimes which contained the obligation to extradite or prosecute.

81. While Tunisia mentioned that its Code of Criminal Procedure recognized the active personality principle, the passive personality principle and the objective territoriality principle, Serbia noted that its criminal legislation applied the active personality principle.

82. Kuwait mentioned that the international agreements by which the Government had become bound constituted applicable legislation on the basis of which rulings were to be handed down by the courts and provisions of which were to be applied in all matters relating to extradition.[37]

83. The United States noted that it had no domestic legal provisions concerning the obligation to extradite or prosecute.

### 3. Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*

84. Ireland, Latvia, Mexico and Slovenia have stated that there is not judicial practice reflecting the obligation *aut dedere aut judicare*.

85. Chile and Sri Lanka[38] mentioned cases where the judicial practice reflected the application of the obligation *aut dedere aut judicare*. The two cases presented by Chile concerned the refusal of extradition requests.

86. Serbia noted that its judicial practice allowed for the extradition of foreigners provided all requirements for it had been met. In the previous 10 years, extradition requests had been denied only in very few instances and mainly because nationals of Serbia were involved. When that was the case, the said individuals had not been prosecuted in Serbia since their offences had not fulfilled the conditions required to consider them as offences under international instruments providing for the obligation to extradite or prosecute.

87. The United States mentioned that its judicial practice was consistent with the understanding that the obligation to extradite or prosecute is tethered firmly to international conventions, giving one case as an example.[39]

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[37] For instance, concerning such matters as the cases in which extradition is compulsory, the cases in which it is not permissible, and the conditions that must be fulfilled for an offence to be extraditable.

[38] In the Supreme Court in Colombo, in the judgment on *Ekanayake v. Attorney General* (SLR 1988 (1), p 46), the following international conventions which contain the obligation to extradite or prosecute were taken into consideration: (*a*) the Convention on Offences and Certain Other Acts committed on Board Aircraft; (*b*) the Convention for the Suppression of Unlawful Seizure of Aircraft and (*c*) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

[39] In *United States of America v. Yousef*, 327 F.3d 56 (2d Cir. 2003), a United States court of appeals held that the Montreal Convention created "a jurisdictional agreement among contracting States to extradite or prosecute offenders who commit the acts proscribed by the treaty" (p. 96).

88. The Special Rapporteur is convinced that the judicial practice of States may serve as one of the principal sources to confirm the developing customary background for the obligation *aut dedere aut judicare*. Although, within the written information submitted by States, one may find a relatively small amount of examples of judicial authorities applying the said principle in practice, there is a growing number of such cases reported by other sources. For instance:

(*a*) The Inter-American Court of Human Rights, in its ruling in the case of *Goiburú et al. v. Paraguay*, Judgment of September 22, 2006 (Merits, Reparations and Costs),[40] stated as follows:

132. Hence, extradition is an important instrument to this end. The Court therefore deems it pertinent to declare that the States Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case, by the prosecution and, if applicable, the punishment of those responsible. Furthermore, based on these principles, a State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case on their territory.

(*b*) The Guatemala Constitutional Court decided, on 12 December 2007, not to grant two extradition requests made by an investigating judge of Spain, because, in its view, Spain could not exercise universal jurisdiction in the case. The case in Spain, known as the *Ríos Montt* case, is mainly based on the alleged genocide of the Mayan population in Guatemala during the armed conflict and the killings committed in the Spanish embassy in Guatemala City by Guatemalan officials. The Constitutional Court stated, among other reasons for its decision, that the Convention on the Prevention and Punishment of the Crime of Genocide did not provide for universal jurisdiction by a third State without prior consent of the territorial State, Guatemala. However, the ruling contains a positive statement on the obligation to prosecute or extradite. The Court recalls, three times, that it is a duty of Guatemala to extradite or prosecute. The positive assertion by the Court, which does not seem to be based on any conventional provision nor any treaty, is quoted as a basis for such a statement. The Court simply refers to it as a rule or obligation;[41]

(*c*) The ruling by the National Court of Spain, rendered on 28 April 2008, gives another very fresh example of the appearance of the principle *aut dedere aut judicare* in the judicial acts. The National Court, in a first preliminary ruling, subject to appeal, found that the extradition request by Argentina to investigate María Estela Martínez de Perón (third wife of Juan Perón, and his widow) for a case of enforced disappearance and another case of imprisonment and torture, both committed in 1975, might not be conceded. The main reasons cited by the Court were the lack of jurisdiction by Argentina and the applicability of statutory limitations to the crimes committed in 1975. The Court found that those crimes were not widespread or systematic and therefore did not amount to crimes against humanity (to which the prohibition of statute of limitations does apply, according to the Court). In addition, the Court, while interpreting the extradition treaty between Spain and Argentina, asserted that if an extradition request is denied, the State where the suspect is found is under the obligation to try him or her before national courts. However, the Court also added a new and so far unknown condition: the trial before national courts may only take place if so required by the requesting State (in this case, Argentina).

89. The three judicial acts mentioned above, adopted after the beginning of our exercise concerning the obligation to extradite or prosecute, may create a good stimulation for further research in this direction, as they show that not only treaties, but also other sources may be treated as a basis for this obligation.

### 4. Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State

90. Chile, Slovenia and Poland mentioned that the obligation *aut dedere aut judicare* applies to all offences. In

[40] Inter-American Court of Human Rights, Series C, no. 153; available at www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf (accessed 21 November 2013).

[41] See Guatemala, Constitutional Court, 2008. Furthermore, in the recent pronouncement (Spain, Audiencia Nacional, Juzgado Central de Instrucción Uno, D. Previas 331/1999) by Investigating Judge Santiago Pedraz Gómez, in charge of the *Ríos Montt* case in Madrid, he not only regrets the lack of cooperation in the investigations by Guatemalan authorities but makes a number of valuable statements of a legal nature, particularly on the customary and conventional nature of the *aut dedere aut judicare* principle, as well as its applicability to all *jus cogens* crimes:

> "In the course of the investigation of the crimes (genocide, tortures, assassinations) the Kingdom of Spain requested of the Guatemalan authorities judicial collaboration by way of timely and appropriate rogatory commissions. Not one of these has been carried out, in spite of multiple attempts on the part of Spain to obtain said collaboration. The Guatemalan State has demonstrated a clear dilatory attitude, not only by the delays in moving the process forward, but also by claiming "problems" with signatures, footnotes, the financial resources of those charged.
>
> "…
>
> "At the same time, with this decision, the Constitutional Court lets it be known that the State of Guatemala assumes full responsibility for violating its international obligations and its own national laws, by ignoring the *erga omnes* (universally applicable) international obligation *aut dedere aut judicare* (extradite or prosecute) recognized by most authoritative doctrine since it was established in the XVII century by Grotius and, today, incorporated into both customary and conventional International Law and International Criminal Law. It bears noting that, beyond its application in customary International Criminal Law, conventional (treaty-based) International Law such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment..., the requirement to extradite or prosecute is obligatory, and mentioned repeatedly.
>
> "In spite of this obligation *erga omnes*, applicable to all international crimes that are *jus cogens* in nature, like those here charged, the highest Guatemalan court says or insinuates nothing about the full effect of these laws and of the obligation of its courts to execute them, and thus Guatemala incurs in a flagrant violation of its international obligations as a State.
>
> "...
>
> "Genocide is a crime under International Law. Therefore, its prosecution becomes obligatory for all the members of the international community. In its ruling, the Constitutional Court of Guatemala characterizes what took place against the Mayan people as a political crime, in the same way it considers the other crimes being investigated.
>
> "...
>
> "Consequently, it becomes even more necessary that the Spanish judicial system continue to investigate these crimes ... as it is clear that Guatemalan cooperation will not be forthcoming in the process against those presumed to be criminally responsible, by denying the request for their extradition, in violation of the already cited *aut dedere aut judicare* obligation."

the case of Chile, there are no limitations in national legislation that would prevent its application to certain crimes or offences. In Slovenia, it applies to all crimes proscribed in the Penal Code, including crimes which derive from international humanitarian law and international treaties. In Poland, its application is connected with the commission of any crimes or offences covered by international treaties binding on the Poland.

91. Ireland made a cross-reference to information given on the topic of domestic legislation.

92. In Mexico, according to the Judicial Authority Organization Act, individuals who commit federal crimes can be extradited, and crimes provided for in international treaties are federal crimes, which are heard by federal criminal judges.

93. As noted at the beginning of the present section B, the comments and information discussed in this section are those received in written form from a limited number of States. Consequently, a wider reaction of States to the questions formulated in the reports of the International Law Commission could be found in practice mostly in the observations presented by the delegates to the Sixth Committee of the General Assembly during its sixty-second session.

## C. Discussion on the obligation to extradite or prosecute held in the Sixth Committee during the sixty-second session of the General Assembly

94. The present section is based, as was the corresponding section of the second report, on the topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly.[42] The Special Rapporteur decided to retain, as before, the systematic arrangement of the material employed in the topical summary, including the subtitles applied by the Secretariat, thanks to which the presentation of Member States' views and opinions is much more clear and transparent. Because of a lack of written observations received from States in response to the request contained in chapter III of the 2007 report (see para. 54 above), the opinions expressed by delegations in the Sixth Committee gained special importance as a means of discerning the views of States and their practice in relation to the topic in question.

### 1. General remarks

95. During the sixty-second session of the General Assembly, in 2007, at the meetings of the Sixth Committee, some delegations emphasized that the obligation to extradite or prosecute was aimed at combating impunity, by ensuring that persons accused of certain crimes would be denied safe haven and be brought to trial for their criminal acts. It was noted that the application of that obligation should not compromise the jurisdiction of States or affect the immunity of State officials from criminal prosecution.

96. Some delegations welcomed the plan for further development of the topic proposed by the Special Rapporteur. Support was expressed for the idea that the Commission conduct a systematic survey of international treaties, national legislation and judicial decisions relevant to the obligation to extradite or prosecute, based on the information obtained from Governments. According to some delegations, the Commission should carry out the survey on a priority basis, before proceeding to the drafting of any articles on the topic. A number of delegations provided, during the debates, information on their laws and practice in the field, as requested by the Commission.

97. While it was pointed out that the Commission should examine the different modalities of the obligation to extradite or prosecute in international treaties, the view was expressed that, if the obligation only existed under conventional law, draft articles on the topic might not be appropriate.[43]

### 2. Customary character of the obligation

98. Some delegations expressed the view that the obligation to extradite or prosecute was based only on treaties and did not have a customary character. Some other delegations considered that the obligation had acquired customary status, at least for the most serious international crimes, or that it would soon attain such status in respect of such crimes.[44] It was argued that the jurisdiction entrusted to international criminal tribunals to try certain serious international crimes provided evidence of the emerging customary status of the obligation to extradite or prosecute for those crimes.[45] Some delegations emphasized that the question should be settled through an examination of the relevant State practice and supported further study of the issue by the Commission.[46] In

[42] See document A/CN.4/588, paras. 161–173. The Special Rapporteur would like to express, once again, his gratitude to the Secretariat for its very active assistance in collecting and systematizing materials necessary for the preparation of this report.

[43] See, for instance, the statement by the representative of the United States (*Official Records of the General Assembly, Sixty-second Session*, Sixth Committee, 22nd meeting, A/C.6/62/SR.22, para. 91).

[44] An interesting opinion was expressed by the representative of China, who said that "[w]hile the obligation to extradite or prosecute was basically a treaty obligation, it might also become an obligation under customary international law if the crime to which it was applied was a crime under the customary law universally acknowledged by the international community. The crimes covered by that obligation should be primarily international crimes, transnational crimes endangering the common interest of the international community under international law, and serious crimes endangering the national and public interest, under domestic law. Thought might be given to including in the draft articles a non-exhaustive list of such crimes" (*ibid.*, para. 62).

[45] For instance, the representative of Sweden, speaking on behalf of the Nordic Countries, stated that there were grounds to claim that the obligation to extradite or prosecute was acquiring customary status with regard to crimes such as genocide, crimes against humanity, war crimes, torture and terrorist crime. The Commission had concluded in its 1996 draft Code of Crimes against the Peace and Security of Mankind that genocide, crimes against humanity and war crimes would fall under the obligation *aut dedere aut judicare*. The importance of the practical commitment of States to ending impunity for these crimes was also reflected in the Rome Statute of the International Criminal Court, which built on the principle of complementarity (*ibid.*, para. 33).

[46] Such a suggestion was made by the representative of Argentina, who said that the customary law character of the principle would need to be shown on a case-by-case basis, according to the type of crime involved. While there existed an *opinio juris* with regard to the most serious crimes, namely genocide, crimes against humanity and war crimes, that did not warrant any conclusion as to the application to such crimes of the principle in question or of a universal jurisdiction (*ibid.*, 22nd meeting, A/C.6/62/SR.22, para. 58).

general, it may be said that in comparison with the reaction of States to the preliminary report of 2006, a critical approach of States to the idea of a possible customary basis for the obligation *aut dedere aut judicare* has been to some extent relaxed.

### 3. Crimes covered by the obligation

99. Some delegations suggested that the Commission should establish a non-exhaustive list of crimes covered by the obligation (see footnote 44 above). Among the offences that could be included in such a list, delegations mentioned genocide, war crimes, crimes against humanity and torture, as well as terrorism and corruption.

100. Other delegations supported the proposal that the Commission limit itself to a determination of criteria for the identification of the crimes subject to the obligation (using, for instance, the concept of "crimes against the peace and security of mankind" or referring to the interests of the international community as a whole).

### 4. Scope and content of the obligation

101. According to some delegations, the definition of the scope of the obligation should remain at the centre of the study by the Commission. It was indicated that the obligation arose for the State when the alleged offender was located on its territory.

102. It was also noted that, in case of concurring jurisdictions, priority should be given to the exercise of jurisdiction by the State on the territory of which the crime was committed or by that of the nationality of the alleged offender. Support was expressed for the Commission to examine, within the present topic, the scope and conditions of the obligation to prosecute, as well as the conditions of extradition (including under domestic law). Specific questions were also raised for further consideration by the Commission, such as the nature of the territorial link required to establish the applicability of the obligation.

103. Some delegations considered that the content of the obligation to extradite or prosecute, and in particular the relationship between the two options contained therein, should be interpreted in the context of each convention providing for that obligation.

104. It was suggested that, in studying the scope and content of the obligation, the Commission should consider in particular the relationship between the options to extradite and to prosecute. Some delegations emphasized the alternative character of the obligation, noting, for example, that the custodial State had discretion to decide which part of the obligation it would execute. Other delegations pointed to the conditional nature of the obligation or noted that the option of extradition took precedence over that of prosecution.

### 5. Relationship with universal jurisdiction

105. Some delegations emphasized the link between the obligation to extradite or prosecute and the principle of universality (pointing, in particular, to their common purpose), suggesting that the Commission should not exclude *a priori* the existence of such a link. Other delegations rejected the existence of such a link or considered that it was not substantial.

106. In that regard, some delegations were of the view that the concept of universal jurisdiction should not be the focus of the present study. While some delegations encouraged the Commission to analyse its relationship with the obligation to extradite or prosecute (either in a separate provision or in the commentary to the future draft articles), other delegations opposed that proposal. It was also argued that the Commission should clearly distinguish the two notions and that universal jurisdiction should be dealt with in the future draft articles only to the extent necessary for the study of the obligation to extradite or prosecute. The view was expressed that extending universal jurisdiction could be an effective way to implement the obligation to extradite or prosecute; it was indicated, in that regard, that, in order to have the possibility to choose between the two options of *aut dedere aut judicare*, the State should ensure that it had jurisdiction over the relevant offences.

### 6. Surrender of suspects to international criminal tribunals

107. Some delegations welcomed the decision of the Special Rapporteur to refrain from examining further the so-called "triple alternative" (i.e., the surrender of the alleged offender to an international criminal tribunal).[47] Other delegations, however, continued to believe that the "triple alternative" raised particular issues that should be considered within the present topic. It was noted that States must, in any event, meet their obligations with respect to international criminal jurisdiction.

### 7. Draft article 1 proposed by the Special Rapporteur

108. Some delegations welcomed draft article 1 proposed by the Special Rapporteur. It was noted, however, that the provision raised a number of issues still to be addressed by the Commission and that it required further clarification. The references made therein to the "alternative" character of the obligation and to different time periods relating to the obligation were criticized by some delegations.[48] A call was made for a further examination of the condition that the alleged offender be "under the jurisdiction" of the State; it was suggested, in that regard, that the draft articles should refer to persons present in the territory of the custodial State or under its control.

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[47] See, for instance, the statement by the representative of the United Kingdom, who welcomed the said decision of the Special Rapporteur and recalled that the surrender of individuals to international criminal courts was governed by a distinct set of treaty arrangements and legal rules (*ibid.*, 24th meeting, A/C.6/62/SR.24, para. 63). A similar opinion was expressed by the representative of France, who said that her delegation approved of the decision of the Special Rapporteur to refrain from examining further the so-called "triple alternative", the surrender of an individual to an international criminal tribunal, in view of the special treaty rules applicable in that area (*ibid.*, 20th meeting, A/C.6/62/SR.20, para. 12).

[48] The representative of Mexico affirmed that the obligation deriving from the principle *aut dedere aut judicare* was not alternative but conditional. He therefore suggested that draft article 1 be redrafted to eliminate that alternative characteristic (*ibid.*, 24th meeting, A/C.6/62/SR.24, para. 9).

8. Final outcome of the work of the Commission

109. Some delegations indicated that they were flexible as to the final form of the outcome of the Commission's work. Some delegations pointed out that a decision on the matter would depend on the results of the Commission's subsequent examination of the topic. Generally, it was apparent that all delegations wanted to avoid prejudging the final form of the work of the Commission on the topic in question. Simultaneously, this leaves more freedom to the Commission as to the final decision in this matter.

## Chapter II

## Draft rules on the obligation to extradite or prosecute

110. Although neither the Commission nor the Sixth Committee decided about the formal shape of the exercise on the obligation to extradite or prosecute, it seems that both of them have expressed a rather positive attitude to the proposal made by the Special Rapporteur in his second report to elaborate draft articles on the obligation *aut dedere aut judicare*, including a proposal to formulate a few initial draft articles, starting with draft article 1 on the scope of application.

111. The formulation of the results of the work of the Commission on the obligation to extradite or prosecute in draft articles is without prejudice to a final decision of the Commission as to the kind of international instrument in which such draft articles should be incorporated (annex to a resolution, declaration, draft convention, etc.).

### A. Article 1: Scope of application of the draft articles

112. Draft article 1, which has been quoted in paragraph 20 above, has got, in general, a positive evaluation by the members of the Commission and by the delegates in the Sixth Committee, though some remarks concerning its improvements have been made (see paras. 52 and 108 above).

113. Taking into account opinions expressed in the Commission and the Sixth Committee, the Special Rapporteur is ready to delete from the proposed text of the said article the adjective "alternative" (before "obligation"), although, as can be seen from footnote 25 above, the said adjective is used in the doctrinal description of the obligation to extradite or prosecute.

114. Another element of draft article 1 which caused some discussion was the enumeration of phases of formulation and application of the obligation in question ("establishment, content, operation and effects"). Here the Special Rapporteur is ready for further discussion as to the total elimination of this enumeration or its replacement by another formula (e.g., "formulation and application").

115. Finally, the personal element in draft article 1 ("persons under their jurisdiction") has met also with some criticism. There were proposals to replace this formula with others, such as "persons present in the territory of the custodial State" or "persons under the control of custodial State". It seems that this question may be the subject of further discussion, though the Special Rapporteur would rather favour his original proposal.

116. Taking into account comments made by the members of the Commission and delegates in the Sixth Committee, and the opinions of States, the Special Rapporteur would like at this stage to keep the discussion open and to propose an "alternative type" version of draft article 1:

"*Article 1. Scope of application*

"The present draft articles shall apply to the establishment, content, operation and effects of the legal obligation of States to extradite or prosecute persons [under their jurisdiction] [present in the territory of the custodial State] [under the control of custodial State]."

117. Instead of the criticized concept of "alternative" obligation, the Special Rapporteur would like to suggest the addition of "legal" before the "obligation", to stress the necessity of basing the said obligation on legal background and not to treat it as an obligation of moral or political nature. Considering the principle *aut dedere aut judicare* as a fundamental element of the suppression of criminality or as a limitation of power-based diplomacy, though justified to some extent, may create a tendency towards increasing its moral or political importance while diminishing its legal value.

118. The Special Rapporteur has some doubts concerning the suggested elimination of the listing of various phases in which the obligation in question may appear (establishment, content, operation and effects). It is possible, of course, to replace them by a shorter description (e.g. formulation and application), but it may cause some difficulties in the process of formulating draft rules applicable to the more detailed phases of appearance of the obligation *aut dedere aut judicare*. This question, however, has to be decided by the Commission as soon as possible, since it is a precondition for the further systematization of future draft rules.

### B. Article 2: Use of terms

119. This article seems to be necessary to avoid misunderstandings and unnecessary repetitions in the process of formulating draft rules concerning the obligation to extradite or prosecute. Although the Special Rapporteur made some suggestions in the second report concerning the terms to be used in the draft articles which could require more detailed definitions, there was a rather weak response as to the possible catalogue of such terms. There was, however, no opposition to such an article and a rather positive approach to this concept.

120. As an example of such terms, the Special Rapporteur mentioned in the second report "extradition", "prosecution", "jurisdiction" and "persons". In connection with the last one, it will be probably useful to add some closer description of "crimes" and "offences" within the "scope of application" of the draft articles. The Special Rapporteur is still convinced that draft article 2 should remain open until the end of the exercise, as to give the opportunity to add other definitions and descriptions whenever necessary.

121. Meanwhile, the only part of draft article 2 which can be suggested now without any doubt would be as follows:

"*Article 2. Use of terms*

"1. For the purposes of the present draft articles:

(*a*) "extradition" means..... ;

(*b*) "prosecution" means ..... ;

(*c*) "jurisdiction" means..... ;

(*d*) "persons under jurisdiction" means ..... ;

.....

"2. The provisions of paragraph 1 regarding the use of terms in the present draft articles are without prejudice to the use of those terms or to the meanings which may be given to them [in other international instruments or] in the internal law of any State."

122. The members of the Commission are kindly requested to propose other terms which—in their opinion—should be specifically defined in draft article 2 for the purposes of the present draft articles. The bracketed part of paragraph 2 of draft article 2 follows various forms that similar articles take in international treaties (drafts of which were elaborated by the Commission).[49] The Special Rapporteur is of the opinion that, taking into account numerous international treaties which are connected with the obligation *aut dedere aut judicare*, draft article 2—apart from "the internal law of any State"—should extend its "without prejudice" clause also to "other international instruments".

### C. Article 3: Treaty as a source of the obligation to extradite or prosecute

123. Draft article 3 proposed in the present report deals with the treaties as a source of the obligation to extradite or prosecute. This suggestion was made by the Special Rapporteur already in the second report, and since it was not opposed either in the Commission or in the Sixth Committee, it seems that the text of draft article 3 could be as follows:

"*Article 3. Treaty as a source of the obligation to extradite or prosecute*

"Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party."

124. There is a rather general consensus as to the fact that international treaties are a generally recognized source of the obligation to extradite or prosecute. The number of international treaties containing the obligation *aut dedere aut judicare* is growing every year. That formulation alone cannot serve as sufficient background for the codification of a generally binding customary rule, but the development of international practice based on the growing number of treaties establishing and confirming such an obligation may lead at least to the beginning of the formulation of an appropriate customary norm.

125. The Special Rapporteur would like to recall here a doctrinal statement: "If a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law."[50]

[49] For instance, the 1969 Vienna Convention on the Law of Treaties deals only with "the internal law of any State" (art. 2, para. 2), while the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 extends the "without prejudice" clause also to "other international instruments" (art. 2, para. 3).

[50] Enache-Brown and Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law", p. 629.

## Chapter III

## Conclusions

126. The present report on the obligation to extradite or prosecute, as noted at the beginning, is closely connected with its two predecessors—the preliminary report of 2006 and the second report of 2007. Reading carefully all three reports, it is easy to notice the sequence of presented problems and their continuation in subsequent reports. Such a connected approach, even with some repetitions, seems to be suitable for reaching a final result in the form of draft rules truly reflecting existing legal reality. This reality is also changing, even during the not-so-long period of our exercise, as can be noticed, for instance, in the growing number of national legal acts and judicial decisions dealing with the matter concerned. This creates and develops legal practice, which is a crucial element for establishing and accepting emerging customary norms. And proving the existence of a customary basis for the obligation *aut dedere aut judicare* is precisely the main purpose of our endeavour. It seems that during the last three years a growing degree of acceptability for these efforts can be noticed on behalf of States.

127. Among the initial questions which still remain unsolved, appears the problem of the mutual relationship between the obligation *aut dedere aut judicare* and the principle of universal jurisdiction. Despite the efforts

to obtain some convincing opinions from States—especially on the basis of the questions added in paragraph 20 of the second report—the response from States was, first of all, highly insufficient as far as the number of answers obtained is concerned, and secondly, not convincing because of the significant differentiation among those answers (see paras. 45–48, 107 and 108 above). Finally, it seems that, in our exercise, we should avoid any exaggeration in presenting problems connected with universal jurisdiction. On the other hand, it is impossible to eliminate or even marginalize the question of universal jurisdiction whenever and wherever it appears in connection with the fulfilment of the obligation to extradite or prosecute. The compromise solution should be elaborated and it depends to a great extent on the positive reaction of States to the request formulated in this area by the Commission.

128. Another important problem—as yet unresolved—exists in connection with the decision undertaken by the Special Rapporteur in the second report to refrain from examining further the so-called "triple alternative", which means the surrender of the alleged offender to an international criminal tribunal. Although many States supported this decision, it seems that a total rejection of this question could be slightly premature.

129. It may be recalled here that, on 9 January 2007, the act implementing the Rome Statute in Argentina was issued in the *Boletín Oficial de la República Argentina* (Official Gazette), which includes a provision on the *aut dedere aut judicare* obligation closely connected with the question of surrender. It reads as follows:

**Article 4.**

*The aut dedere aut judicare principle*

Where a person suspected of having committed a crime as defined in this Act is in the territory of the Argentine Republic or in a place subject to its jurisdiction and that person is not extradited or handed over to the International Criminal Court, the Argentine Republic shall take all necessary steps to exercise its jurisdiction with respect to that crime.[51]

130. Some laws recently enacted in Uruguay, Panama and Peru to implement the Rome Statute also provide for the *aut dedere aut judicare* obligation in the context of the institution of surrender. There is an impression that the "triple alternative" is still alive and closely related to the obligation to extradite or prosecute.

131. Concluding these considerations, the Special Rapporteur would like to request both the members of the Commission and the delegates in the Sixth Committee to respond openly to all questions and problems raised in this report, or in the second report and even in the preliminary report. That will make it possible to continue and complete our joint work on the draft articles on the obligation to extradite or prosecute. The positive effects of this work seem to be more and more important for the international community of States facing growing threats from national and international crime.

[51] *Boletín Oficial de la República Argentina*, año CXV, no. 31069, 9 January 2007, Act No. 26200 implementing the Rome Statute (adopted by Act No. 25390 and ratified on 16 January 2001) of the International Criminal Court. General provisions. General penalties and principles. Offenses against the administration of justice by the International Crimi-nal Court. Relations with the International Criminal Court. Ratified on 13 December 2006, *de facto* promulgation on 5 January 2007.