

Chapter XI

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

A. Introduction

212. The Commission, at its fifty-sixth session (2004), identified the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” for inclusion in its long-term programme of work.⁹⁶⁰ A brief syllabus describing the possible overall structure and approach to the topic was annexed to the report of the Commission to the General Assembly on the work of its fifty-sixth session.⁹⁶¹ The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission’s report concerning its long-term programme of work.

213. During its fifty-seventh session (2005), the Commission decided, at its 2865th meeting, on 4 August 2005, to include the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” in its current programme of work, and to appoint Mr. Zdzisław Galicki as Special Rapporteur for the topic.⁹⁶² The General Assembly, in paragraph 5 of its resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

214. At the present session, the Commission had the preliminary report of the Special Rapporteur (A/CN.4/571) before it. The Commission considered the report at its 2899th to 2903rd meetings, from 25 July to 2 August 2006.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR

215. The Special Rapporteur observed that his report contained a preliminary set of observations concerning the substance of the topic, marking the most important points for further consideration and including a preliminary plan of action for the future work on the topic. While it was premature to take a decision, it was useful to receive an indication from the Commission as to the possible final form of the work on the topic.

216. A key question to be considered was whether the obligation derived exclusively from the relevant treaty or whether it also reflected a general obligation under customary international law, at least with respect to specific international offences. He noted that there was no consensus in the doctrine, although a growing number of scholars supported the concept of an international legal obligation “*aut dedere aut judicare*” as a general duty based not only on the provisions of particular international treaties, but also on generally binding customary norms, at least as it

concerned certain categories of crimes. In addition, it was suggested that an analysis of the link between the principle of universal jurisdiction in criminal matters and the principle *aut dedere aut judicare* should be undertaken.

217. As regards the scope of the obligation to extradite or prosecute, the Special Rapporteur noted that it was constructed in the alternative, giving a State the choice to decide which part of the obligation it was going to fulfil. It was presumed that after fulfilling a part of the obligation—either *dedere* or *judicare*—the State was released from fulfilling the other part.

218. The Special Rapporteur recalled that, while the obligation to extradite or prosecute was traditionally formulated in the alternative, there was the possibility of a “triple alternative”, which contemplated the existence of a jurisdictional competence to be exercised by an international criminal tribunal.

219. As regards methodology, the Special Rapporteur stated his intention to proceed in future reports to formulate draft rules concerning the concept, structure and operation of the obligation *aut dedere aut judicare*. It was also necessary to undertake a thorough analysis of the practice of States in the area, and to compile a complete list of relevant treaty provisions reflecting the obligation. He proposed that the Commission could address a written request to Member States for information concerning their contemporary practice.

2. SUMMARY OF THE DEBATE

220. The Commission welcomed the preliminary report, including the proposed preliminary plan of action. It was suggested that the scope of the topic should be limited to the objective of the obligation, namely to reduce cases of impunity for persons suspected of having committed international crimes by depriving them of “safe havens”. It was proposed that the topic could be further limited to particular categories of crimes, such as those which were particularly grave and threatened the international community as a whole. It was also suggested that a distinction be drawn between crimes under international law (defined in treaty instruments), and crimes recognized under international customary law, such as war crimes, genocide and crimes against humanity. There was general support for excluding from the scope of the study crimes that were solely foreseen under national laws.

221. In addition, it was observed that a more limited form of the obligation existed in regard to treaty crimes. For example, it was noted that many treaties, including the sectoral conventions for the suppression of international terrorism, contained a more guarded formulation, namely to submit the case to the competent authorities

⁹⁶⁰ *Yearbook ... 2004*, vol. II (Part Two), p. 120, paras. 362–363.

⁹⁶¹ *Ibid.*, Annex, pp. 123–126.

⁹⁶² *Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 500.

“for the purpose of prosecution”, as opposed to an obligation “to prosecute”. It was recalled that Governments typically resisted accepting an obligation “to prosecute” since the independence of prosecution was a cardinal principle in their national criminal procedures.

222. It was suggested that the Commission focus on gaps in existing treaties, such as the execution of penalties and the lack of a monitoring system with regard to compliance with the obligation to prosecute. As regards the question of the existence of a customary obligation to extradite or prosecute, it was suggested that any such obligation would have to be based on a two-tier system as in existing treaties, whereby certain States were given priority jurisdiction and other States would be obliged to exercise jurisdiction if the alleged offender was not extradited to a State having that priority jurisdiction.

223. Concerning the obligation to extradite, it was pointed out that whether such an obligation existed depended on the treaties in place between the parties and on the circumstances. In addition, since crimes were typically defined very precisely in domestic laws, the question had to be whether there was an obligation to extradite or prosecute for a precisely defined crime in precisely defined circumstances. It was also noted that most of the complex issues in extradition were solved pragmatically. Some members considered that the obligation to extradite or prosecute had acquired a customary status, at least as far as crimes under international law were concerned. Further, some considered that the procedure of deportation was relevant to the topic.

224. It was proposed that the Commission could consider the practical difficulties encountered in the process of extradition, including: problems of the sufficiency of evidence; the existence of outdated bilateral and multilateral treaties and national laws allowing multiple grounds for refusal; limitations on the extradition of nationals; and the failure to recognize specific safeguards for the protection of the rights of the extradited individual, particularly in situations where extradition could expose the individual to torture, the death penalty or even life imprisonment. It was also recalled that in the situation of international crimes some of the limitations on extradition were inapplicable.

225. Others cautioned against considering the technical aspects of extradition law. What was specific to the topic and the precise meaning of the Latin maxim “*aut dedere aut judicare*” was that, failing an extradition, an obligation to prosecute arose. The focus, therefore, should be on the conditions for triggering the obligation to prosecute. The view was expressed that the Commission should not deal with all the collateral rules on the subject, which were linked to it but not necessarily part of it. It was also proposed that the focus should be limited to the elaboration of secondary rules.

226. A general preference was expressed for drawing a clear distinction between the concepts of the obligation to extradite or prosecute and that of universal criminal jurisdiction. It was recalled that the Commission had decided to focus on the former and not the latter, even if for some crimes the two concepts existed simultaneously. It was

pointed out that the topic did not necessarily require a study in extraterritorial criminal jurisdiction. If the Commission were nonetheless to embark on a consideration of the concept of universal jurisdiction, it was suggested that the different kinds of universal jurisdiction, particularly whether it was permissive or compulsory, be considered. It was also deemed worth contemplating whether such jurisdiction could only be exercised when the person was present in a particular State or whether any State could request the extradition of a person from another State on grounds of universal jurisdiction.

227. It was also suggested that the topic not include the “triple” alternative, involving the concurrent jurisdiction of an international tribunal, since the existing tribunals had their own *lex specialis* rules. According to another opinion, it would be necessary to favour that third path insofar as possible.

228. It was suggested that the Special Rapporteur undertake a systematic study of State practice, focusing on contemporary practice, including national jurisprudence.

229. On the question of the final form, while it was recognized that it was premature to consider the matter, a preference was expressed for the eventual formulation of a set of draft articles, although it was noted that if the Commission were to conclude that the obligation existed only under international treaties, then a draft of a recommendatory nature would be more appropriate.

3. SPECIAL RAPporteur’S CONCLUDING REMARKS

230. The Special Rapporteur noted that a range of views had been expressed during the debate. In particular, he referred to the general consensus in the Commission that the scope of the topic be limited as far as possible so as to concentrate on the issues directly connected with the obligation to extradite or prosecute, as well as on an analysis of the principal elements of the obligation, i.e. “*dedere*” and “*judicare*”. He supported such an approach especially with regard to drawing a clear distinction between the obligation to extradite or prosecute and the principle of universal jurisdiction, and taking a cautious approach to the existence of a “triple alternative” in the context of the jurisdiction of international criminal tribunals.

231. With regard to the issue of limiting the source of the obligation only to treaties, or extending it to customary norms or general principles of law, the Special Rapporteur noted that the Commission had opted for a cautious approach: recognizing the treaty basis of the obligation while expressing some reservations about the existence of a general customary obligation to extradite or prosecute applicable to all offences under criminal law. Support existed instead for recognizing such a customary basis in the context of certain categories of crimes in the context of which the concept of universal jurisdiction, as well as the principle *aut dedere aut judicare*, had already received general recognition among States. The Special Rapporteur expressed support for such an approach, although without prejudice to the possibility of developing general rules applicable to all crimes. He further recalled the suggestions that special attention be given to the applicability of international human rights law. Furthermore, he agreed

with the suggestion that the focus of the whole exercise be on the elaboration of secondary rules. The Special Rapporteur also agreed with the recommendation that both international and national judicial decisions should be considered.

232. As regards the title of the topic, he recalled the references in the debate to the “principle” of *aut dedere*

aut judicare, but expressed a preference for retaining the existing reference to “obligation”. As to the eventual form of the Commission’s work on the topic, the Special Rapporteur noted that preliminary support existed for the formulation of draft articles. Accordingly, he announced his intention to proceed in future reports with the formulation of draft rules on the concept, structure and operation of the obligation *aut dedere aut judicare*.