

## Chapter IX

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

#### A. Introduction

345. The Commission, at its fifty-sixth session (2004), decided to include the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” in its long-term programme of work.<sup>486</sup> During its fifty-seventh session (2005), the Commission, at its 2865th meeting, on 4 August 2005, decided to include the topic in its current programme of work and appointed Mr. Zdzisław Galicki as Special Rapporteur for the topic.<sup>487</sup> 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.

346. At its fifty-eighth session (2006), the Commission received and considered the preliminary report of the Special Rapporteur.<sup>488</sup>

#### B. Consideration of the topic at the present session

347. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/585 and Corr.1), as well as comments and information received from Governments (A/CN.4/579 and Add.1–4). The Commission considered the report at its 2945th to 2947th meetings, from 31 July to 3 August 2007.

##### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SECOND REPORT

348. The Special Rapporteur observed that his second report summarized the main ideas and concepts presented in the preliminary report, in order to seek the views of the new Commission on the most controversial issues regarding this topic. He confirmed that the preliminary plan of action, contained in his preliminary report,<sup>489</sup> remained the main road map for his further work on the topic.

349. Among the main questions raised during the debate at the previous session, and on which the Special Rapporteur would welcome the views of the Commission, were the following: whether the source of the obligation *aut dedere aut judicare* was purely conventional or was also to be found in customary international law, at least for some categories of crimes (such as war crimes,

piracy, genocide and crimes against humanity); whether a clear distinction should be made between the obligation to extradite or prosecute and universal jurisdiction, and whether the latter should be considered in the context of this topic (and, if so, to what extent); whether the two alternative elements of the obligation to extradite or prosecute should be given equal footing, or whether one of them should have priority; whether the Commission should consider the so-called “triple alternative”, consisting of the surrender of the alleged offender to a competent international criminal tribunal; and what should be the form of the final product of the Commission’s work on the topic. The Special Rapporteur noted that a great variety of opinions had been expressed on these issues last year at the Commission and at the Sixth Committee.

350. The Special Rapporteur was however in a position, already at this stage, to present one draft article regarding the scope of application of the future draft articles on the obligation to extradite or prosecute.<sup>490</sup> The proposed provision contained three elements that would need to be dealt with by the Commission. With regard to the time element referred to in this provision, the draft articles would have to take into account the different periods in which the obligation was established, operated and produced its effects; the question of the source of the obligation was connected to the first period. With regard to the substantive element, the Commission would have to establish the existence and scope of the obligation to extradite or prosecute, thus determining *inter alia* whether one part of the alternative should have priority over the other, to what extent the custodial State has a margin of discretion in refusing a request for extradition, and whether the obligation includes the possibility of surrender to an international criminal tribunal. Finally, with regard to the personal element, the provision referred to alleged offenders under the jurisdiction of the States concerned, which raised the issue, also to be considered by the Commission, of the relationship of the obligation with the concept of universal jurisdiction. Together with the personal element, the Commission would also have to identify the crimes and offences covered by this obligation.

351. The Special Rapporteur also proposed a plan for further development and shared his ideas on articles to be drafted in the future. He indicated, in particular, that one draft article should contain a definition of the terms used, and that a further draft article (or set of draft articles) should be devoted to a description of the obligation

<sup>486</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 120, paras. 362–363. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year’s report of the Commission. 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.

<sup>487</sup> *Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 500.

<sup>488</sup> *Yearbook ... 2006*, vol. II (Part One), A/CN.4/571.

<sup>489</sup> *Ibid.*, p. 259, para. 61.

<sup>490</sup> Draft article 1 reads as follows:

##### “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.”

to extradite or prosecute and its constitutive elements. The Special Rapporteur also envisaged a draft article that would provide that: "Each State is obliged 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." Other draft articles should take inspiration from the draft code of crimes against the peace and security of mankind adopted by the Commission at its forty-eighth session, in 1996.<sup>491</sup>

352. The Special Rapporteur finally indicated the need to reiterate, at the present session, the request made for Governments to provide information on their legislation and practice with regard to the obligation to extradite or prosecute.

## 2. SUMMARY OF THE DEBATE

### (a) *General comments*

353. In their general comments, members of the Commission dealt, in particular, with the source of the obligation to extradite or prosecute, its relationship with universal jurisdiction, the scope of the obligation and its two constitutive elements, and the question of surrender of an alleged offender to an international criminal tribunal (the so-called "triple alternative" suggested by the Special Rapporteur).

354. The view was expressed that the question of the source of the obligation to extradite or prosecute was central to the present topic and should be the object of rigorous analysis by the Commission, particularly given the position taken by some Governments in their comments. While acknowledging that the obligation to extradite or prosecute was often treaty-based, some members were of the view that it also had customary status, at least as far as crimes under international law were concerned. The question remained, however, whether this obligation was to apply only to certain crimes under customary international law or would also extend to other crimes provided for under international treaties, and whether it would also apply to ordinary crimes. According to some members, the Commission should focus on the identification of the crimes that are subject to the obligation to extradite or prosecute. Some other members considered that the Commission should not attempt to establish a list of such crimes (which would have the effect of hampering the progressive development of international law in this field), but should rather identify criteria allowing to determine those categories of crimes in relation to which States are *ipso jure* bound by that obligation. In this regard, it was suggested that the Commission should refer to the concept of "crimes against the peace and security of mankind" elaborated in its 1996 draft code. Some members noted that the Commission should also consider the question whether the obligation to extradite or prosecute could derive from a peremptory norm of general international law (*jus cogens*).

355. It was further pointed out by some members that, in any event, the future draft should aim at regulating both those cases in which States were bound by the obligation

to extradite or prosecute under customary international law, and the problems that arose in the context of one or more treaties imposing such an obligation. Some other members, however, cautioned against limiting the recommendations of the Commission to treaty law.

356. Some members stressed that, although the obligation to extradite or prosecute and universal jurisdiction shared the same objective (namely, to combat impunity by depriving the persons accused of certain crimes of "safe havens"), they should be distinguished from one another. Universal jurisdiction, which the Commission had decided not to include as a topic in its agenda, should therefore be considered only insofar as it related directly to the present topic. It was noted, in this regard, that the obligation to extradite or prosecute would only arise after the State concerned had established its jurisdiction and, in any event, if the person was present on the territory, or was under the control, of that State. Some other members pointed out that the custodial State often acquired jurisdiction only as a consequence of not extraditing the alleged offender. According to one view, the obligation *aut dedere aut judicare* was incumbent upon States for those crimes subject to universal jurisdiction. The proposal was made that the relationship between the obligation to extradite or prosecute and universal jurisdiction be addressed in a specific provision.

357. With respect to the scope of the obligation, different views were expressed as to the two elements "to extradite" and "to prosecute", and their mutual relationship. According to some members, the custodial State had the power to decide, notably on the basis of its domestic legislation, which part of the obligation it would execute. Some other members noted that the obligation to extradite or prosecute may arise in different scenarios, which the Commission should take into account since they could be relevant for the determination of the scope of the obligation. Some members thought that to present the obligation as an alternative would tend to obscure its nature.

358. With regard to the first part of the obligation, it was observed that, while the Commission would need to examine limitations on extradition (such as those concerning political offences, the nationals of the custodial State, or the case where specific safeguards for the protection of the rights of the individual would not be guaranteed by the State requesting extradition), it should be cautious not to embark into an analysis of the technical aspects of extradition law. The Commission would also need to determine the precise meaning of the part of the obligation referred to as "*judicare*".

359. As regards the so-called "triple alternative", some members indicated that the surrender to an international criminal tribunal should not be dealt with in the present context, since it was submitted to different conditions, and posed different problems, from those arising from extradition. Some other members, however, observed that the Commission should address certain issues that were connected to the present topic; it was noted, for instance, that the duty for a State to surrender an individual to an international tribunal could paralyse the obligation to extradite or prosecute and that it should therefore be examined in the draft articles. Some members noted

<sup>491</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

that the constituent instruments of some international tribunals deal with the question of concurrent requests for extradition and for surrender to the international tribunal.

(b) *Comments on draft article 1 proposed by the Special Rapporteur*

360. While some members found draft article 1 proposed by the Special Rapporteur to be acceptable in principle, other members pointed out that it was difficult for the Commission to take a position on the scope of the draft articles without knowing the views of the Special Rapporteur on subsequent issues, including that of the source of the obligation to extradite or prosecute. Some members supported the reference to the different time periods relating to this obligation, but criticized the terminology used in the provision (“establishment, content, operation and effects” of the obligation). Some other members suggested the deletion of this reference, favouring a simplified formulation of the provision. It was also considered that the adjective “alternative” should be deleted since the alternative character of the obligation was a matter that the Commission would examine at a later stage. Some members shared the Special Rapporteur’s view that the obligation to extradite or prosecute only existed in connection with natural persons; according to one view, the situation of legal persons involved in the commission of crimes should nonetheless be further explored. Divergent opinions remained as to whether the Commission should refer to *aut dedere aut judicare* as an “obligation” or a “principle”. A view was expressed that the word “jurisdiction” at the end of draft article 1 be replaced by “present in their territories or under their control”. This is to clarify that the custodial State may not have criminal jurisdiction over the alleged offender.

(c) *Comments on the future work of the Commission on the topic*

361. The plan for further development delineated in the second report was favourably received by some members. In particular, the Special Rapporteur’s intention to follow the preliminary plan of action was supported, but it was also indicated that the said plan should be further elaborated to present a clear structure of the work ahead. Some members agreed with the suggestions made by the Special Rapporteur as to possible articles to be drafted in the future, especially concerning the scope of the obligation to extradite or prosecute. The view was expressed, however, that the wording of the provision that referred to those cases in which the obligation is provided for by a treaty could be seen as a restatement of the principle *pacta sunt servanda* and should be carefully reviewed.

362. Support was also expressed for the proposal that the Special Rapporteur present a systematic survey of the relevant international treaties in the field. Some members observed, however, that consideration of the present topic by the Commission required, in addition to a study of treaties and customary international law, a comparative analysis of national legislation and judicial decisions (including, as appropriate, the relevant opinions expressed by individual judges at the ICJ). Although several States had replied to the request for information made by the Commission at the previous session, the debates in the

Sixth Committee and the comments received from Governments had not provided a sufficient basis to proceed. Some members suggested that the request be repeated at the current session. The view was expressed that the Special Rapporteur and the Commission should nonetheless approach the topic on an independent basis, taking into account comments made by States. According to some members, the Commission should not hesitate, if it saw it fit, to make proposals for the progressive development of international law in the field.

363. On the question of the final form, some members manifested their support to the formulation of a set of draft articles.

3. SPECIAL RAPporteur’S CONCLUDING REMARKS

364. The Special Rapporteur initially observed that the debate in the Commission had confirmed his view that the reference to an “obligation” to extradite or prosecute and to the Latin maxim “*aut dedere aut judicare*” in the title of the present topic should be retained.

365. He further noted that the debate had focused on three main issues, namely: (a) the question of the source of the obligation to extradite or prosecute; (b) the problem of the relationship between this obligation and the concept of universal jurisdiction, and how it should be reflected in the draft; and (c) the issue of the scope of the said obligation. In his opinion, the different interventions had clarified the views of the Commission on the topic.

366. As regards the first issue mentioned above, the view that treaties constituted a source of the obligation to extradite or prosecute had gathered general consensus, but it had also been suggested that the Commission should explore the possible customary status of the obligation, at least with respect to some categories of crimes (such as crimes under international law). The Special Rapporteur noted that several members had expressed their opinion on this possibility, and he agreed that any position taken by the Commission would need to be based on a thorough analysis of treaties, national legislation and judicial decisions. For this purpose, it was appropriate that the Commission continue to request the assistance of Governments in collecting the relevant information.

367. With regard to the second issue, the Special Rapporteur observed that some members had suggested that the concept of universal jurisdiction be examined by the Commission to determine its relationship with the obligation to extradite or prosecute. He agreed with this suggestion, as well as with the view that the work of the Commission should in any event remain focused on the obligation *aut dedere aut judicare*.

368. As regards the third issue, the Special Rapporteur concurred with the opinion of those members who had pointed out that the obligation to extradite or prosecute should not be described as an alternative one; he also agreed that the mutual relationship and interdependence between the two elements of this obligation (*dedere* and *judicare*) should be carefully considered by the Commission. The Special Rapporteur reiterated his conviction that the establishment, operation and effects of the

obligation to extradite or prosecute should be the object of separate analysis. He further indicated that, in light of the comments made, he would refrain from examining further the so-called “triple alternative”, instead concentrating on those hypotheses in which the surrender of an individual to an international criminal tribunal could

have an impact on the obligation to extradite or prosecute. As to draft article 1 proposed in his second report, the Special Rapporteur suggested that it be referred to the Drafting Committee at the next session, together with other draft provisions he would be presenting in due course.