

## Chapter XI

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

#### A. Introduction

312. The Commission, at its fifty-seventh session (2005), decided to include the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” in its programme of work and appointed Mr. Zdzisław Galicki as Special Rapporteur.<sup>629</sup>

313. At its fifty-eighth (2006) and fifty-ninth (2007) sessions, the Commission received and considered the preliminary<sup>630</sup> and second reports<sup>631</sup> of the Special Rapporteur.

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

314. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/603), as well as comments and information received from Governments (A/CN.4/599).<sup>632</sup> The Commission considered the report at its 2984th, 2987th and 2988th meetings, on 24, 30 and 31 July 2008.

315. At its 2988th meeting, on 31 July 2008, the Commission decided to establish a working group on the topic under the Chairpersonship of Mr. Alain Pellet. The mandate and membership of the working group would be determined at the next session.

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

316. The Special Rapporteur indicated that his third report aimed at continuing the process of formulation of questions addressed both to States and to members of the Commission on the most essential aspects of the topic, in order for him to draw final conclusions on the main question of whether the obligation to extradite or prosecute exists under customary international law. In this regard, the Special Rapporteur suggested that the Commission should renew its request for Governments to provide their comments and information on this topic.

317. Turning to the draft articles contained in the third report, the Special Rapporteur recalled that draft article 1,

as proposed in the second report,<sup>633</sup> had been favourably received by the Commission. In the new version of this draft article,<sup>634</sup> the Special Rapporteur had taken into account the comments of the Commission and the Sixth Committee: thus, the adjective “alternative” had been replaced with “legal” to emphasize the legal character of the obligation, and three alternative wordings were suggested for the final phrase of the provision. The Special Rapporteur, however, had doubts as to the opportunity to delete the enumeration of the phases of formulation and application of the obligation (“establishment, content, operation and effects”).

318. As regards draft article 2,<sup>635</sup> the Special Rapporteur proposed, in his report, four expressions that could be defined in the draft articles, but he invited the Commission to suggest other possible terms to be included in that provision. In his view, draft article 2 should remain open until the end of the work of the Commission on the topic. The bracketed phrase in paragraph 2 of this draft article (which extended the “without prejudice” clause to “other international instruments”) mirrored similar provisions in treaties based on drafts elaborated by the Commission, such as the 1969 Vienna Convention or the United Nations Convention on Jurisdictional Immunities of States and their Property.

319. Draft article 3,<sup>636</sup> which had been suggested in the second report and had not been opposed either in the Commission or in the Sixth Committee, reflected the rather

<sup>633</sup> *Ibid.*, document A/CN.4/585, p. 76, para. 76. For the text of that draft article, see also *Yearbook ... 2007*, vol. II (Part Two), p. 94, para. 350, footnote 490.

<sup>634</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 legal obligation of States to extradite or prosecute persons [under their jurisdiction] [present in the territory of the custodial State] [under the control of the custodial State].”

<sup>635</sup> Draft article 2 reads as follows:

“*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.”

<sup>636</sup> Draft article 3 reads as follows:

“*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.”

<sup>629</sup> At its 2865th meeting, on 4 August 2005, *Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 500. The General Assembly, in paragraph 5 of resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-sixth session (2004), on the basis of the proposal annexed to that year’s report, *Yearbook ... 2004*, vol. II (Part Two), p. 120, paras. 362–363.

<sup>630</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

<sup>631</sup> *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585.

<sup>632</sup> *Ibid.*, document A/CN.4/579 and Add.1–4, for the comments and information before the Commission at its fifty-ninth session.

general consensus as to the fact that international treaties are a recognized source of the obligation to extradite or prosecute. The Special Rapporteur noted that the increasing number of treaties containing this obligation could be an indication of State practice and lead to the beginning of the formulation of an appropriate customary norm.

320. The Special Rapporteur reiterated that future draft articles on this topic could draw inspiration from the draft code of crimes against the peace and security of mankind adopted by the Commission in 1996.<sup>637</sup>

321. The Special Rapporteur concluded by recalling that various initial questions on the topic remained unresolved. He thought that the Commission should find a compromise solution on how to address the problem of the mutual relationship between the obligation *aut dedere aut judicare* and the principle of universal jurisdiction. As to the third element of the so-called “triple alternative” (consisting of the surrender of the alleged offender to a competent international criminal tribunal), he was of the view that a total rejection of the question was premature and that consideration should be given to recent domestic laws implementing the Rome Statute of the International Criminal Court.

## 2. SUMMARY OF THE DEBATE

### (a) General comments

322. Some members commented on the methodology used in the third report. The Special Rapporteur was encouraged to actively engage in an analysis of the main questions arising from the subject and make specific proposals for the Commission to move ahead with the consideration of the topic, without awaiting comments and information from Governments. In so doing, the Special Rapporteur was invited to rely on the rich State practice and legal literature in the field.

323. Some members said that they abstained from commenting on the substantive issues that had already been addressed in previous reports, although it was noted that doubts persisted about various core questions arising from the topic. Some other members indicated their wish to comment on the report the following year.

### (b) Comments on the draft articles proposed by the Special Rapporteur

324. With respect to draft article 1 proposed by the Special Rapporteur, some members considered that it was unnecessary to qualify the obligation to extradite or prosecute as being “legal”. These members also suggested that the last phrase of the provision should mirror the wording of article 1 of the European Convention on Human Rights (“within their jurisdiction”). It was proposed that the title of the article be modified to “Scope”. Different views were expressed as to the opportunity to make explicit reference, in the text of the provision, to the “establishment, content, operation and effects” of the obligation. It was also indicated that the provision needed to be further elaborated by the Special Rapporteur.

325. As for draft article 2, the list of terms proposed by the Special Rapporteur received some support, although it was suggested that the concepts of “persons” and “persons under jurisdiction” should be defined separately, and that the expression “universal jurisdiction” should also be included in that list. The view was expressed that paragraph 2 was unnecessary, given the proviso contained in paragraph 1 (“For the purposes of the present draft articles”).

326. It was indicated that the idea behind draft article 3, namely that treaties constitute a source of the obligation to extradite or prosecute, did not raise any controversy; according to one view, it was nevertheless important to state the principle explicitly in the draft articles to confirm that any treaty could constitute a direct source of the obligation without any need for additional legislative grounds. The Special Rapporteur was called to examine, in his commentary to this provision, the treaties that contain the obligation to extradite or prosecute. It was noted that the main question to be addressed remained that of the possible customary character of the obligation.

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

327. It was suggested that, in his subsequent report, the Special Rapporteur should continue to address general substantive issues and propose concrete articles relating to the obligation to extradite or prosecute, such as the question of its source (customary law, general principle of law), its relationship with universal jurisdiction, crimes that would be subject to the obligation (in particular, serious crimes under international law), and the so-called “triple alternative”. The view was expressed that the Special Rapporteur, after having provided evidence of the customary character of the obligation, should proceed with the study of those substantive issues. The Special Rapporteur could thereafter undertake an examination of procedural questions, such as the possible grounds for denying extradition, the guarantees in case of extradition or how to deal with simultaneous requests for extradition. Other pending questions mentioned in the debate were the following: whether it would be advisable to propose a working definition of what is intended by the obligation to extradite or prosecute; how the two terms of the obligation concretely operated; whether the obligation could apply when the person is not present on the territory of the State concerned; and whether the obligation was triggered by a request for extradition.

328. According to another view, it might prove more expedient for the Commission to examine the elements of the obligation to extradite or prosecute independently from its source. It was therefore suggested that the Commission should consider, first, the conditions for the triggering of the obligation to prosecute, including the presence of the alleged offender on the territory of the State, the existence of a request for extradition that had been rejected, the State’s jurisdiction over the crime concerned, etc. The Commission could then turn to the content of the obligation to prosecute and address issues such as how to reconcile that obligation with the discretion of the judicial power to prosecute, whether the availability of evidence affected the operation of the obligation, whether

<sup>637</sup> See footnote 626 above.

the alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution, etc. In this manner, the Commission would provide States with a useful set of rules based on practice.

### 3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

329. The Special Rapporteur noted that some members had focused their comments on the methodology adopted in his third report. Although he reiterated his remark that only a few States had provided their answers to the questions asked by the Commission, he agreed with the need to secure a more expeditious and independent approach to the topic.

330. With regard to draft article 1, as proposed in his third report, the Special Rapporteur indicated that he would review the text in light of the comments received, thus deleting the reference to the “legal” character of the obligation, which was considered redundant, and modifying the title. Members also seemed to favour the use of the expression “persons under their jurisdiction” in this provision. The debates had further shown that some members considered that the obligation arose only when the alleged offender was present on the territory of the State and that it was contingent to a request of extradition. The Special Rapporteur observed that divergent opinions had been expressed on the opportunity to refer to the phases of the obligation in

the text of the draft article. Moreover, according to him, certain substantive issues required further consideration, in particular the determination of the exact nature and content of the obligation to extradite or prosecute and of the crimes that may be covered by this obligation.

331. Turning to draft article 2, the Special Rapporteur stated that he would consider the possibility of including the expressions “persons”, “persons under jurisdiction” and “universal jurisdiction” among those requiring a definition by the Commission. As to draft article 3, he agreed with the view that its commentary should contain examples of the various treaties containing the obligation to extradite or prosecute.

332. With regard to the future work of the Commission on the topic, the Special Rapporteur announced that his fourth report would focus on the main substantive issues arising from the topic, such as the sources of the obligation to extradite or prosecute, and its content and scope. In so doing, he would make reference to the previous work of the Commission on the draft code of crimes against the peace and security of mankind. As to the systematic structure of future provisions, he took note of the suggestion made by some members that the Commission make specific proposals on relevant procedural issues, such as the conditions for the triggering of the obligation to extradite or prosecute.