

## Chapter IX

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

#### A. Introduction

194. 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>872</sup>

195. From its fifty-eighth (2006) to its sixtieth (2008) sessions, the Commission received and considered three reports of the Special Rapporteur.<sup>873</sup>

196. At its sixtieth session (2008), the Commission decided to establish a Working Group on the topic under the chairpersonship of Mr. Alain Pellet, the mandate and membership of which would be determined at the sixty-first session.<sup>874</sup>

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

197. At the current session, the Commission had before it comments and information received from Governments (A/CN.4/612).<sup>875</sup>

198. Pursuant to the decision taken at its sixtieth session,<sup>876</sup> the Commission established, at its 3011th meeting, on 27 May 2009, an open-ended Working Group on this topic under the chairpersonship of Mr. Alain Pellet.

199. At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report presented by the Chairperson of the Working Group.

#### 1. DISCUSSIONS OF THE WORKING GROUP

200. The Working Group held three meetings on 28 May, and on 29 and 30 July 2009. At its first meeting, the

Working Group had before it an informal paper prepared by the Special Rapporteur, which contained a summary of the debate in the Commission at its sixtieth session and in the Sixth Committee during the sixty-third session of the General Assembly, together with a list of questions to be considered by the Working Group. The Special Rapporteur subsequently prepared, for the Working Group, a paper containing an annotated list of some of the questions and issues that had been raised. Members of the Working Group had also been given copies of a report by Amnesty International, dated February 2009, entitled: “International Law Commission: the obligation to extradite or prosecute (*aut dedere aut judicare*)”.

201. The Working Group agreed that its mandate would be to draw up a general framework for consideration of the topic, with the aim of specifying the issues to be addressed and establishing an order of priority. With regard to methodology for approaching the topic, emphasis was placed on the importance of taking into account national legislation and decisions, and the possibility was raised of drawing on the work of certain academic institutions or NGOs.

202. Following discussions of the Working Group, its Chairperson introduced a document containing a proposed general framework for the Commission’s consideration of the topic. In the light of the comments and suggestions made by members of the Working Group, the Chairperson—with the assistance of the Secretariat—prepared a revised version of the document (see section B.2 below). The revised version consisted of an outline setting out, as comprehensively as possible, the questions to be considered, without assigning any order of priority. The general categories under which the questions were grouped were somewhat dissimilar in nature.<sup>877</sup> While the first two sections of the general framework concerned the general issues pertaining to the topic, the subsequent sections concerned the legal regime governing the obligation to extradite or prosecute. The general framework did not take a position on whether treaties constituted the exclusive source of the obligation to extradite or prosecute, or whether that obligation also existed under customary law. Moreover, the general framework should not be considered as providing a definitive answer as to how general the Commission’s approach should be in its consideration of the topic. It was understood, however, that the work on the topic would not include detailed consideration of extradition law or the principles of international criminal law.

203. The aim of the general framework is to facilitate the work of the Special Rapporteur in the preparation of

<sup>872</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>873</sup> Preliminary report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571; second report: *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585; and third report: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603.

<sup>874</sup> At its 2988th meeting, on 31 July 2008; see also *Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 315.

<sup>875</sup> For the comments and information before the Commission at its fifty-ninth (2007) and sixtieth (2008) session, see, respectively, *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/579 and Add.1–4, and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/599.

<sup>876</sup> See paragraph 196 above.

<sup>877</sup> Particularly in the case of section (d) of the general framework.

his future reports, and it would be for the Special Rapporteur to determine the exact order of the questions to be considered, as well as the structure of, and linkage between, his planned draft articles on the various aspects of the topic.

2. PROPOSED GENERAL FRAMEWORK FOR THE COMMISSION'S CONSIDERATION OF THE TOPIC "THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)", PREPARED BY THE WORKING GROUP

204. The proposed general framework reads as follows:

*List of questions/issues to be addressed*

(a) The legal bases of the obligation to extradite or prosecute

(i) the obligation to extradite or prosecute and the duty to cooperate in the fight against impunity;

(ii) the obligation to extradite or prosecute in existing treaties: typology of treaty provisions; differences and similarities between those provisions, and their evolution (cf. conventions on terrorism);

(iii) whether and to what extent the obligation to extradite or prosecute has a basis in customary international law;\*

(iv) whether the obligation to extradite or prosecute is inextricably linked with certain particular "customary crimes" (for example, piracy);\*

(v) whether regional principles relating to the obligation to extradite or prosecute may be identified.\*

(b) The material scope of the obligation to extradite or prosecute

Identification of the categories of crimes (for example crimes under international law; crimes against the peace and security of mankind; crimes of international concern; other serious crimes) covered by the obligation to extradite or prosecute according to conventional and/or customary international law:

(i) whether the recognition of an offence as an international crime is a sufficient basis for the existence of an obligation to extradite or prosecute under customary international law;\*

(ii) if not, what is/are the distinctive criterion/criteria? Relevance of the *jus cogens* character of a rule criminalizing certain conduct?\*

(iii) whether and to what extent the obligation also exists in relation to crimes under domestic laws.

\* It might be that a final determination on these questions will only be possible at a later stage, in particular after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. It might also be advisable to examine the customary nature of the obligation in relation to specific crimes.

(c) The content of the obligation to extradite or prosecute

(i) definition of the two elements; meaning of the obligation to prosecute; steps that need to be taken in order for prosecution to be considered "sufficient"; question of timeliness of prosecution;

(ii) whether the order of the two elements matters;

(iii) whether one element has priority over the other—power of free appreciation (*pouvoir discrétionnaire*) of the requested State?

(d) Relationship between the obligation to extradite or prosecute and other principles

(i) the obligation to extradite or prosecute and the principle of universal jurisdiction (does one necessarily imply the other?);

(ii) the obligation to extradite or prosecute and the general question of "titles" to exercise jurisdiction (territoriality, nationality);

(iii) the obligation to extradite or prosecute and the principles of *nullum crimen sine lege* and *nulla poena sine lege*;\*\*

(iv) the obligation to extradite or prosecute and the principle *non bis in idem* (double jeopardy);\*\*

(v) the obligation to extradite or prosecute and the principle of non-extradition of nationals;\*\*

(vi) what happens in case of conflicting principles (for example non-extradition of nationals versus no indictment in national law? obstacles to prosecute versus risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged); constitutional limitations.\*\*

(e) Conditions for the triggering of the obligation to extradite or prosecute

(i) presence of the alleged offender in the territory of the State;

(ii) State's jurisdiction over the crime concerned;

(iii) existence of a request for extradition (degree of formalism required); relations with the right to expel foreigners;

(iv) existence/consequences of a previous request for extradition that had been rejected;

(v) standard of proof (to what extent must the request for extradition be substantiated);

(vi) existence of circumstances that might exclude the operation of the obligation (for example, political offences or political nature of a request for extradition, emergency situations, immunities).

\*\* This issue might also need to be addressed in relation to the implementation of the obligation to extradite or prosecute (f).

(f) The implementation of the obligation to extradite or prosecute

(i) respective roles of the judiciary and the executive;

(ii) how to reconcile the obligation to extradite or prosecute with the discretion of the prosecuting authorities;

(iii) whether the availability of evidence affects the operation of the obligation;

(iv) how to deal with multiple requests for extradition;

(v) guarantees in case of extradition;

(vi) whether the alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution; or possibilities of other restrictions to freedom;

(vii) control of the implementation of the obligation;

(viii) consequences of non-compliance with the obligation to extradite or prosecute.

(g) The relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal (the “third alternative”)

(i) to what extent the “third” alternative has an impact on the other two.