

Chapter VIII

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

A. Introduction

332. 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.¹³⁵⁷

333. From its fifty-eighth (2006) to its sixtieth (2008) sessions, the Commission received and considered three reports of the Special Rapporteur.¹³⁵⁸

334. 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.¹³⁵⁹ At the sixty-first session (2009), an open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) was established, and culminating from its discussion, a general framework for consideration of the topic, with the aim of specifying the issues to be addressed, was drawn up.¹³⁶⁰

B. Consideration of the topic at the present session

335. At the present session, the Commission reconstituted the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), which, in the absence of its chairperson, was chaired by Mr. Enrique Candioti.

336. At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report presented by the temporary Chairperson of the Working Group.

DISCUSSIONS OF THE WORKING GROUP

337. The Working Group held two meetings on 27 and 28 July 2010. It continued its discussions with the aim of specifying the issues to be addressed to further facilitate

the work of the Special Rapporteur. It had before it a survey of multilateral conventions which may be of relevance for the Commission’s work on the topic, prepared by the Secretariat (A/CN.4/630),¹³⁶¹ together with the general framework prepared by the Working Group in 2009.¹³⁶² The survey identified 61 multilateral instruments, at the universal and regional levels, that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. It proposed a description and a typology of the relevant instruments in light of these provisions, and examined the preparatory work of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also pointed out the differences and similarities between the reviewed provisions in different conventions and their evolution. Based on the survey, overall conclusions were offered in the survey as to: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions.

338. The Working Group also had before it a working paper prepared by the Special Rapporteur, entitled “Bases for discussion in the Working Group on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’ ” (A/CN.4/L.774), containing observations and suggestions, based on the general framework prepared in 2009 and further drawing upon the survey by the Secretariat. In particular, the Special Rapporteur drew attention to questions concerning: (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation to extradite or prosecute; (c) the content of the obligation to extradite or prosecute; and (d) the conditions for the triggering of the obligation to extradite or prosecute.

339. The Working Group affirmed the continuing relevance of the general framework agreed in 2009. It was recognized that the Secretariat’s survey had helped to elucidate aspects of the general framework and to clarify issues concerning the typology of treaty provisions, differences and similarities in the formulation of the obligation to extradite or prosecute in these provisions and their evolution, under the rubric “the legal bases of the obligation to extradite or prosecute” of the general framework.

¹³⁵⁷ 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).

¹³⁵⁸ 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.

¹³⁵⁹ At its 2988th meeting, on 31 July 2008; see also *Yearbook ... 2008*, vol. II (Part Two), para. 315.

¹³⁶⁰ For the proposed general framework prepared by the Working Group, see *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

¹³⁶¹ For the comments and information before the Commission at its fifty-ninth (2007), sixtieth (2008) and sixty-first (2009) sessions, see, respectively, *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/579 and Add.1–4, *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/599, and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/612.

¹³⁶² See footnote 1360 above.

It was also noted that, in seeking to cast light on the questions agreed upon in the general framework, the multilateral treaty practice on which the Secretariat's survey had focused needed to be complemented by a detailed consideration of other aspects of State practice (including but not limited to national legislation, case law and official statements of governmental representatives). In addition, it was pointed out that, as far as the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment, based on State practice, needed to be made of the extent to which that duty could elucidate, as a general rule or in

relation to specific crimes, work on the topic, including work in relation to the material scope, the content of the obligation to extradite or prosecute and the conditions for the triggering of that obligation.

340. Taking into account the practice of the Commission in the progressive development of international law and its codification, the Working Group reaffirmed that the general orientation of future reports of the Special Rapporteur should be towards presenting draft articles for consideration by the Commission, based on the general framework agreed in 2009.