

Chapter X

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

A. Introduction

290. 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.⁶⁵⁷

291. From its fifty-eighth (2006) to its sixtieth (2008) sessions, the Commission received and considered three reports of the Special Rapporteur.⁶⁵⁸

292. At its sixtieth session (2008), the Commission decided to establish a working group on the topic under the chairpersonship of Mr. Alain Pellet, with a mandate and membership to be determined at the sixty-first session.⁶⁵⁹ At the sixty-first session (2009), an open-ended Working Group was established, and from its discussions, a general framework for consideration of the topic, with the aim of specifying the issues to be addressed, was prepared.⁶⁶⁰ At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its Chairperson, was chaired by Mr. Enrique Candioti.⁶⁶¹

B. Consideration of the topic at the present session

293. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/648). The Commission considered the report at its 3111th to 3113th meetings and 3115th meeting, from 25 to 27 July and 29 July 2011.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS FOURTH REPORT

294. After recalling the background to the topic and its consideration thus far, including discussions of the Sixth

Committee during the sixty-fifth session of the General Assembly, the fourth report—building upon previous reports—sought to address the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom.

295. The Special Rapporteur, following suggestions from the 2010 Working Group, sought to underpin the consideration of the topic around the duty to cooperate in the fight against impunity, noting, more generally, that the duty to cooperate was well established as a principle of international law and could be found in numerous international instruments.⁶⁶² In international criminal law, the duty to cooperate had a positive overtone as exemplified in the preamble of the Rome Statute of the International Criminal Court of 1998, containing an affirmation that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, and, to contribute to the prevention of such crimes, a determination “to put an end to impunity for the perpetrators of these crimes”.

296. The fight against impunity for the perpetrators of serious crimes of concern to the international community as a whole was a fundamental policy achievable, on the one hand, through the establishment of international criminal tribunals and, on the other, through the exercise of jurisdiction by national courts. The Special Rapporteur stated that the duty to cooperate in the fight against impunity had already been considered as a customary rule by some States and in the doctrine.

297. To underscore that the duty to cooperate was overarching in the appreciation of the obligation to extradite or prosecute, the Special Rapporteur proposed to replace the former article 2 (Use of terms)⁶⁶³ with a new draft article 2 on the duty to cooperate.⁶⁶⁴

⁶⁵⁷ 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).

⁶⁵⁸ 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.

⁶⁵⁹ At its 2988th meeting, on 31 July 2008; see also *Yearbook ... 2008*, vol. II (Part Two), para. 315.

⁶⁶⁰ For the proposed general framework prepared by the Working Group, see *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

⁶⁶¹ At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the temporary Chairperson of the Working Group (see *Yearbook ... 2010*, vol. II (Part Two), pp. 191–192, paras. 337–340).

⁶⁶² See, for example, Article 1, paragraph 3, of the Charter of the United Nations; and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

⁶⁶³ *Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 318 and corresponding footnote. See also the third report of the Special Rapporteur, *ibid.*, vol. II (Part One), document A/CN.4/603, para. 121.

⁶⁶⁴ Draft article 2 read as follows:

“Duty to cooperate

“1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with competent international courts and tribunals, in the fight against impunity as it concerns crimes and offences of international concern.

“2. For this purpose, the States will apply, wherever and whenever appropriate, and in accordance with these draft articles, the principle to extradite or prosecute (*aut dedere aut judicare*).”

298. The Special Rapporteur reviewed the various sources of the obligation to extradite or prosecute, considering treaties first, drawing attention to a variety of possible classifications and differentiations, available in the doctrine, distinguishing such treaties.⁶⁶⁵

299. He recalled that he had previously proposed a draft article 3⁶⁶⁶ dealing with treaties as a source of the obligation to extradite or prosecute. In the light of the variety and differentiation of provisions concerning the obligation, the Special Rapporteur considered it useful to propose the addition of another paragraph to draft article 3 on the treaty as a source of the obligation to extradite or prosecute.⁶⁶⁷

300. The Special Rapporteur also analysed the obligation *aut dedere aut judicare* as a rule of customary international law, noting that its acceptance was gaining prominence at least in respect of certain crimes in the doctrinal writings of some legal scholars and was being acknowledged by some delegations in the debates of the Sixth Committee, particularly during the sixty-fourth session of the General Assembly (2009), while some others had called for further study by the Commission. The Special Rapporteur also pointed to written and oral pleadings of States before the International Court of Justice, in particular in respect of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.⁶⁶⁸

301. The Special Rapporteur also addressed the relevance of norms of *jus cogens* as a source of the obligation to extradite or prosecute as suggested by some commentators,

⁶⁶⁵ In M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute in International Law*, Dordrecht, Martinus Nijhoff, 1995 (substantive/procedural); Amnesty International, *Universal Jurisdiction: the Duty of States to Enact and Enforce Legislation*, London, September 2001 (chronological); Amnesty International, *International Law Commission: the Obligation to Extradite or Prosecute (aut dedere aut judicare)*, London, February 2009 (territorial); C. Mitchell, *Aut Dedere, aut Judicare: the Extradite or Prosecute Clause in International Law*, Geneva, Graduate Institute of International and Development Studies, 2009 (multilateral treaties/extradition treaties); and 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) (reproduced in *Yearbook ... 2010*, vol. II (Part One)) (chronological and substantive criteria: (a) the 1929 International Convention for the Suppression of Counterfeiting Currency, and other conventions following the same model; (b) the 1949 Geneva Conventions for the protection of war victims, and the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); (c) regional conventions on extradition; and (d) the 1970 Convention for the suppression of unlawful seizure of aircraft, and other conventions following the same model). See also Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support this Essential International Justice Tool*, London, October 2010 (dealing mainly with the question of universal jurisdiction).

⁶⁶⁶ *Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 319 and the corresponding footnote. See also the third report of the Special Rapporteur, *ibid.*, vol. II (Part One), document A/CN.4/603, para. 123.

⁶⁶⁷ Draft article 3, as amended, read as follows:

“Treaty as a source of the obligation to extradite or prosecute

“1. 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.

“2. Particular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party, in accordance with the treaty establishing such obligation and with general principles of international criminal law.”

⁶⁶⁸ See, for instance, International Court of Justice, document CR.2009/08, 6 April 2009, pp. 23–25 (available from www.icj-cij.org/files/case-related/144/144-20090406-ORA-01-01-BI.pdf).

noting that such connection arose from the assertion that there were certain prohibited acts which, if committed, would constitute serious breaches of obligations under peremptory norms of general international law and that consequently gave rise to an obligation on all States to prosecute or entertain civil suits against the perpetrators of such crimes when found on their territory. Moreover, States were prohibited from committing serious crimes of concern to the international community as a whole, and any international agreement between States to facilitate commission of such crimes would be void *ab initio*.

302. The Special Rapporteur noted that although there was no doubt that there were certain crimes in the realm of international criminal law whose prohibition had reached the status of *jus cogens* (such as the prohibition against torture), whether the obligation *aut dedere aut judicare* attendant to such peremptory norms also possessed the characteristics of *jus cogens* was a matter giving rise to difference of views in the doctrine.

303. Commenting on the categories of crimes associated with the obligation *aut dedere aut judicare*, the Special Rapporteur, observing that it was difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute, suggested that focus should rather be on identifying those particular categories of crimes which seemed to create such an obligation, because, *inter alia*, they were serious crimes of concern to the international community as a whole. He alluded to the importance of differentiating between ordinary criminal offences—criminalized under national laws of States—and heinous crimes variously described as international crimes, crimes of international concern, grave breaches, crimes against international humanitarian law, etc., and paying particular attention to the latter, partly because they possessed an international or particularly grave character.⁶⁶⁹ Among such crimes were (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

304. Having considered the various issues implicated, the Special Rapporteur proposed draft article 4 on international custom as a source of the obligation *aut dedere aut judicare*.⁶⁷⁰

305. In proposing the draft article, he noted that the list of crimes covered by paragraph 2 of that article was still open and subject to further consideration and discussion.

⁶⁶⁹ See, for example, article 9 of the draft Code of Crimes against the Peace and Security of Mankind and article 5 of the Rome Statute of the International Criminal Court.

⁶⁷⁰ Draft article 4 read as follows:

“International custom as a source of the obligation *aut dedere aut judicare*

“1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.

“2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

“3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2.”

2. SUMMARY OF THE DEBATE

(a) *General comments*

306. The Special Rapporteur was commended for helpfully embarking on an analysis of issues that substantively had a bearing on the topic. Members nevertheless acknowledged the difficulties presented by the topic, particularly as it had implications for other aspects of the law, including questions of prosecutorial discretion, questions of asylum, the law on extradition, the immunity of State officials from criminal jurisdiction, and peremptory norms of international law, as well as universal jurisdiction, thereby posing problems in terms of the direction to be taken and what needed to be achieved. The methodology to be adopted and the general approach to be taken were thus crucial in fleshing out the issues relevant to the topic.

307. In this connection, attention was drawn to the valuable work of the Working Group on *aut dedere aut judicare* in 2009 and 2010 and the continuing relevance of the proposed 2009 general framework for the Commission's consideration of the topic, prepared by the Working Group. Although the fourth report was useful in focusing on the treaties and custom as sources of the obligation, and indeed the consideration of the sources of the obligation remained a key aspect of the topic, the report had not fully addressed the issues so as to allow the Commission to draw informed conclusions on the direction to be taken on the topic. In particular, concerns were expressed about the draft articles as proposed and the analysis on which they were based. It was noted that the methodology of the Special Rapporteur in treating the main sources of international law, namely treaties and customary law, separately and proposing two separate draft articles therefore was conceptually problematic. The focus should be on the obligation to extradite or prosecute and on how treaties and custom evidenced the rule rather than on treaties or custom as the "source" of the obligation; there was no need for a draft article to demonstrate that there was a rule in a treaty or under custom. Indeed, there were other sources that would help to inform the nature, scope and content of the obligation.

(b) *Draft article 2. Duty to cooperate*

308. Some members doubted the relevance of the draft article as a whole, with a suggestion being made that it be transformed into hortatory preambular language. It was not entirely clear why it was subject of a self-standing obligation; the formulation begged questions, was not supportable in its current form and should be reconsidered once the implications of the duty to cooperate in the context of the topic were more clearly elaborated; more particularly, there ought to be an explanation of an explicit relationship between *aut dedere aut judicare* and the duty of States to cooperate with each other, as opposed to the duty to cooperate and the fight against impunity.

309. Some other members, however, underlined the importance of reflecting in some manner the duty to cooperate, or an obligation to cooperate as preferred by some, in the fight against impunity, it being recalled that this aspect was highlighted in the 2009 general framework and by the 2010 Working Group. It was stressed that the

duty to cooperate was already well established across various fields of international law. The key question to be answered was what it meant in the context of international criminal cooperation, assessing how far the political goal of the fight against impunity had crystallized into a specific legal obligation. Since the duty did not exist in a vacuum, what seemed essential was to provide a context for it in relation to the topic, as well as content in aspects such as prevention, prosecution, judicial assistance and law enforcement.

310. Commenting on the draft article as such, while acknowledging the emphasis on the "fight against impunity" in paragraph 1, several members pointed out that the phrase was imprecise, more suggestive of preambular language than of clear legal text for the operative part.

311. It was, however, pointed out that slogan-sounding language like "fight against impunity" was commonly and easily understood, and the use of simplified language had the advantage of making draft articles of the Commission accessible.

312. Some other members were also of the view that paragraph 1 was formulated cautiously and the use of qualifiers established unnecessary thresholds.

313. It was also noted that it was not clear why international courts and tribunals would be implicated, as paragraph 1 seemed to suggest, since the core aspects of the topic affected principally inter-State relations, including domestic courts. The point was nevertheless made that paragraph 1 could in fact be separated to deal with inter-State cooperation and then with cooperation with international courts and tribunals, as well as cooperation with the United Nations, on the basis of article 89 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

314. Some members were also of the view that the phrase "crimes and offences of international concern" in the paragraph was too ambiguous to offer any guidance on the types of crimes covered by the present topic. There was need for clarity, bearing in mind the principle *nullum crimen sine lege*.

315. For paragraph 2, it was noted that the phrase "wherever and whenever appropriate" had the potential of being construed widely, with negative consequences for inter-State relations. Moreover, its whole meaning was obscure, as at one level it seemed to denote a free-standing obligation to extradite or prosecute, without stating much as to what it entailed. However, some members were more favourable to the more general open-endedness implied by the language, considering it appropriate for a text that was intended to make propositions of general application.

(c) *Draft article 3. Treaty as a source of the obligation to extradite or prosecute*

316. A suggestion was made to delete the draft article in its entirety. Its paragraph 1 was considered superfluous; it was not evident how a reflection of *pacta sunt servanda* in the text helped to elucidate issues concerning the topic.

317. To some members, paragraph 2, although currently unclear, raised possibilities for further enquiry. It was not apparent, in providing that “[p]articular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party”, which State party was being referred to and it also raised the possibility that a State would invoke its internal law to justify non-compliance with an international obligation. Moreover, the reference to “general principles of international criminal law” seemed vague. If anything, it was these principles which had to be fleshed out for implementation. For example, it was suggested it might be useful to assess whether prosecutorial discretion was a general principle of criminal law relevant to the topic. The point was also made that the draft article ought to be addressing matters concerning both the conditions for extradition, including available limitations, and the conditions for prosecution, according them different treatment as they were different legal concepts.

318. It was also noted that while the Special Rapporteur had alluded to a variety of classification of treaties and differentiation of treaty provisions in the doctrine in his report in support of the draft article, there was no further analysis or application of such classification. It would have been helpful, for instance, to explore further whether such classification and differentiation provided some possible understanding of the qualifications, conditions, requirements and possible exceptions to extradition or prosecution provided for in the various treaties, including aspects of extradition law such as “double criminality” and the rule of “specialty”, as well as issues concerning the political offence exception and non-extradition of nationals.

319. The classification could also possibly have helped to show that many treaties which contain the obligation to extradite or prosecute articulated a general principle of law, or customary rule, or whether it had a bearing on the application of the obligation in respect of certain “core crimes”.

(d) *Draft article 4. International custom as a source of the obligation aut dedere aut judicare*

320. Some members viewed the article as problematic since it was not supported by the Special Rapporteur’s own analysis, having himself admitted that it was rather difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute, and its drafting was somewhat tentative.

321. Although paragraph 1 seemed unobjectionable in its terms, it presented a tautology and seemed to add little to the question of the obligation *aut dedere aut judicare*.

322. At the same time, it was recognized that the draft article seemed to address an issue central to the topic. In particular, paragraph 2, together with paragraph 3, had the potential to be elaborated into an important rule, although, as presently formulated, it was vague and obscure, and the drafting was weak. It was underlined that one of the key issues to be grappled with was the distinction between “core crimes” for the purposes of the topic and other crimes. The Special Rapporteur was encouraged to

undertake a more detailed study of the State practice and *opinio juris* and offer a firm view on which certain serious crimes of concern to the international community as a whole gave rise to an obligation to extradite or prosecute. Such an analysis could also consider such issues as whether the accumulation of treaties containing an obligation to extradite or prosecute meant that States accepted that there was a customary rule, or whether it meant that States believed that they were derogating from customary law. In making such a detailed analysis, there was no need for the Special Rapporteur to await the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite*.

323. Some members also recalled that the issues being raised had already been canvassed in the Commission, in particular in relation to its work culminating in the adoption of the 1996 draft Code of Crimes against the Peace and Security of Mankind. Draft article 9 thereof on the obligation to extradite or prosecute imposed an obligation on the State party in the territory of which an individual alleged to have committed a crime of genocide, crimes against humanity, crimes against the United Nations and associated personnel or war crimes is found to extradite or prosecute that individual.⁶⁷¹ Draft articles 3 and 4 could be reformulated, as a matter of progressive development, along the lines of draft article 9 of the draft Code.

324. It was thus suggested that there was a need to proceed cautiously, with an appropriate differentiation in the analysis between different categories of crimes, noting in that regard that some crimes may be subject to universal jurisdiction but not necessarily to the obligation to extradite or prosecute. Similarly, grave breaches were subject to the obligation *aut dedere aut judicare* but not all war crimes were subject to it.

325. In the first place, it might be easier to make an assessment of the customary nature of the obligation in respect of certain identified “core crimes” as opposed to finding a more general obligation. It was also recalled that crimes under international law constituted the most serious crimes that were of concern to the international community as a whole. Moreover, the current topic was inextricably linked to universal jurisdiction. Indeed, the current topic was artificially separated from the broader subject of universal jurisdiction, and the obligation to extradite or prosecute would not be implicated without jurisdiction. In respect of the draft Code, it was recognized that national courts would exercise jurisdiction in regard to draft article 9 under the principle of universal jurisdiction. Accordingly, further work could not meaningfully be done without addressing universal jurisdiction and the types of crimes implicated by it. In this context, it was suggested that in future reports the Special Rapporteur could consider more fully the relationship between *aut dedere aut judicare* and universal jurisdiction in order to assess whether this relationship had any bearing on draft articles to be prepared on the topic. Moreover, the suggestion was made that the present topic could be expanded to cover universal jurisdiction, taking into account the views of the Sixth Committee following a question in chapter III of the report of the Commission at the present session.

⁶⁷¹ *Yearbook ... 1996*, vol. II (Part Two), p. 30.

326. It was noted that the meaning of paragraph 3 was not entirely clear and begged questions; its mandatory language did not correspond to the doubts that the Special Rapporteur expressed in his report. For example, it was not clear whether it was intended to set out the obligation to extradite or prosecute as a peremptory norm or whether it was intended to include in the obligation crimes that violated such norms. The issues sought to be covered by the paragraph, including the still-tenuous link between crimes prohibited as constituting breaches of peremptory norms and the procedural consequences that ensued in relation to the obligation to extradite or prosecute, simply required to be teased out in an extensive analysis by the Special Rapporteur, building significantly on the comments made in his report on the views expressed in the doctrine.

(e) *Future work*

327. As to the future work on the present topic, the view was expressed that there was an inherent difficulty in the topic. It was even suggested that the Commission should not be hesitant to reflect on the possibility of suspending or terminating the consideration of the topic, as in the past it had done so with respect to other topics. Some other members, however, noted that the topic remained a viable and useful project for the Commission to pursue. Moreover, States were interested in the topic and were keen for progress. It was also recalled that this aspect had been a subject of discussion in the past and that the resulting preparation of the 2009 general framework pointed to the viability of the topic. Given that the Sixth Committee was dealing with a related item on the scope and application of the principle of universal jurisdiction, it was also suggested that this matter could be combined with the topic on the *aut dedere aut judicare* obligation. It was recognized, however, that there were different views on this matter in the Sixth Committee.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

328. The Special Rapporteur expressed his appreciation to members for their constructive, frank and critical comments, which would only serve as an encouragement to engage further in the complex issues brought about by the topic.

329. He agreed that the topic required an in-depth analysis of international norms—conventional and customary—as well as national regulations,

which—especially in recent years—were developing and changing significantly. On the proposed draft articles, he took note of the useful comments and suggestions made for improvement and assured the Commission that they would be taken into account in the future work. He affirmed, however, the importance of having a draft article on the duty to cooperate. He also stressed the importance of treaties as a source of the obligation, noting that extensive State practice could be an indication of the existence of a developing rule of customary law. Thus, if States became party to a large number of international treaties, all of which had a variation of the obligation to extradite or prosecute, there would seem to be strong evidence that States were willing to be bound by the obligation to extradite or prosecute and that pointed to the emergence of the obligation as custom.

330. The Special Rapporteur also recognized fully and supported the necessity of more precise identification of “core crimes”, for the purposes of the topic, viewing such an approach as more realistic and promising than an attempt to determine the existence of the obligation as a general customary rule. On the relationship between the obligation and *jus cogens*, he noted that even when the obligation to extradite or prosecute derived from the peremptory norm of general international law, such an obligation did not acquire automatically the status of a *jus cogens* norm. Clearly, the relationship between the obligation and *jus cogens* norms would require more elaboration in the future work of the Commission.

331. With regard to the possible expansion of the topic to cover universal jurisdiction, the Special Rapporteur recalled that in his preliminary report he had already suggested to continue a joint analysis of the present topic together with universal jurisdiction, but the Commission and the Sixth Committee were not favourably disposed to the idea. He conceded, however, that with increased attention to the question of universal jurisdiction such consideration might be inevitable in the future.

332. He associated himself with the general view in the Commission that there was no need to suspend the consideration of the topic, noting that any suspension could create a false impression that the Commission considered the topic to be inappropriate or not sufficiently mature for codification, or indeed that there were other reasons for not proceeding further.