Chapter IX

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

A. Introduction

203. 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. Zdzislaw Galicki as Special Rapporteur.[330]

204. The Special Rapporteur submitted four reports. The Commission received and considered the preliminary report at its fifty-eighth session (2006), the second report at its fifty-ninth session (2007), the third report at its sixtieth session (2008) and the fourth report at its sixty-third session (2011).[331]

205. At the sixty-first session (2009), an open-ended Working Group was established under the chairpersonship of Mr. Alain Pellet[332] and, from its discussions, a proposed general framework for consideration of the topic, specifying the issues to be addressed by the Special Rapporteur, was prepared.[333] At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its Chairperson, was chaired by Mr. Enrique Candioti.[334]

B. Consideration of the topic at the present session

206. At the present session, the Commission decided to establish an open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairpersonship of Mr. Kriangsak Kittichaisaree. The Working Group was to evaluate progress of work on this topic in the Commission and to explore possible future options for the Commission to take. At this juncture, no Special Rapporteur was appointed in place of Mr. Zdzislaw Galicki, who was no longer a member of the Commission.

207. At its 3152nd meeting, on 30 July 2012, the Commission took note of the oral report of the Chairperson of the Working Group.

Discussions of the Working Group

208. The Working Group held five meetings: four regularly scheduled meetings on 25 and 31 May and on 3 and 16 July and, after the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case of 20 July 2012,[335] a specially convened meeting on 24 July 2012.

209. The Working Group exchanged views on and made a general assessment of the topic as a whole against the context of the debate on the topic in the Sixth Committee of the General Assembly. It proceeded on the basis of four informal working papers prepared by its Chairperson dated 22 May, 30 May, 25 June and 12 July 2012, respectively.

(a) *Major issues facing the topic*

210. Some members considered it necessary to have a clearer picture of the issues arising under the topic. In that connection, several possibilities were suggested:

(*a*) *Harmonization*: Given the complex field of multilateral treaties containing the obligation to extradite or prosecute, it was suggested that the Commission might find it useful to harmonize the multilateral treaty regimes. However, it was noted that the obligation to extradite or prosecute operated differently across treaty regimes, as may be seen in the Secretariat's survey of multilateral conventions which may be of relevance for the topic.[336] As such, any attempt at harmonization would be a less than meaningful exercise. If the goal was to elaborate draft articles, there did not seem much to be gained from elaborating draft articles as there were so many existing provisions in multilateral treaties;

(*b*) *Interpretation, application and implementation*: It was also suggested that it was possible for the Commission to make an assessment of the actual interpretation, application and implementation of extradite-or-prosecute clauses in particular situations, such as the one

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[330] At its 2865th meeting, on 4 August 2005 (*Yearbook … 2005*, vol. II (Part Two), 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 at its fifty-sixth session (2004), on the basis of the proposal annexed to that year's report (*Yearbook ... 2004*, vol. II (Part Two), paras. 362−363).

[331] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report); *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585 (second report); *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603 (third report); and *Yearbook … 2011*, vol. II (Part One), A/CN.4/648 (fourth report).

[332] During its sixtieth session, 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, with a mandate and membership to be determined at the sixty-first session (see *Yearbook … 2008*, vol. II (Part Two), para. 315, and *Yearbook ... 2009*, vol. II (Part Two), para. 198).

[333] For the proposed general framework prepared by the Working Group, see *Yearbook ... 2009*, vol. II (Part Two), para. 204.

[334] 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), paras. 336−340).

[335] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

[336] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/630.

before the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case. However, it was argued, such situations typically concerned application of the law to specific facts, which was not something the Commission could usefully study. Moreover, there did not appear to be any serious systemic problem in the existing treaty regimes that required clarification by the Commission; at least, none was identified in the syllabus on the topic[337] or in the previous reports of the Special Rapporteur;[338]

(*c*) *Progressive development of international law and its codification*: It was suggested that, in considering the topic, the Commission might pursue a systematic survey and analysis of State practice to see if there existed a customary rule reflecting a general obligation to extradite or prosecute for certain crimes or whether such an obligation was a general principle of law. If no such norm existed, the Commission could say as much. If such a norm did exist, then draft articles would indicate the nature and scope of that norm, as well as the crimes to which it applied. It was also suggested that the focus could be on core crimes under international law (genocide, war crimes, crimes against humanity, etc.) and on their relationship with the obligation to extradite or prosecute, so as to fill any lacuna in the law on individual criminal responsibility. However, the utility of such an endeavour was doubted by some other members. In respect of core crimes in international law, such as genocide, crimes against humanity and grave breaches of international humanitarian law, it was argued that such an exercise would be futile, since the Commission had already completed, in 1996, the draft Code of Crimes against the Peace and Security of Mankind.[339] Article 9 of the draft Code already contains an obligation to extradite or prosecute for the core crimes. According to that view, if the Commission were to look beyond the core crimes and postulate a general obligation to cover a wider range of crimes, such an approach would compel the Commission to delve into the general consideration of extradition law, as well as broad matters concerning the exercise of prosecutorial discretion, and practice in those areas varied considerably, thereby raising doubts about the existence of such a general obligation.

211. It was suggested by some members that the main stumbling block in the way of progress on the topic had been the absence of basic research on whether the obligation had attained customary law status. That was a preliminary matter to be addressed and resolved and had implications for any approach to be taken. It was also observed that, when the Commission was elaborating the draft Code of Crimes against the Peace and Security of Mankind, in 1996, its adoption of draft articles 8 and 9 appeared to have been driven by the need for an effective system of criminalization and prosecution rather than an assessment of actual State practice and *opinio juris*. It was an open question, then, whether draft articles 8 and 9 would be applied only to States parties to the draft Code or to all States.[340] It was also recalled that, when the Commission was dealing with the draft Code it had been understood that the inclusion of certain crimes in the draft Code did not affect the status of other crimes under international law; neither did it in any way preclude further developments of that important area of law.[341] In that connection, it was seen as important by some members to analyse the evolution of the law since 1996. Some members viewed the distinction between core crimes and other crimes under international law as significant. Also singled out was the importance of addressing, in the context of the topic, the duty to cooperate in combating impunity, so as to determine exactly how the scope of the duty, particularly in the light of its formulation in various instruments, bears on the obligation.

212. There was consensus that, in general, the topic before the Commission concerned the obligation to extradite or prosecute and not (*a*) the extradition practices of States or an obligation to extradite, or (*b*) the obligation to prosecute, *per se*.

213. Lastly, there was also general consensus that exploring the possibility of the obligation to extradite or prosecute as a general principle of international law would not advance the work on the topic any further than the avenue of customary international law.

(b) *Relationship with universal jurisdiction*

214. On the relationship between the topic and universal jurisdiction, some members emphasized that an analysis of universal jurisdiction would inevitably have to be undertaken in the consideration of the topic, in view of the close relationship between the two, although the Commission would not address universal jurisdiction as the central theme of the topic. It was pointed out by certain members that universal jurisdiction was itself a subject requiring codification, and that, for a meaningful product to emerge from the Commission, the consideration of universal jurisdiction would have to be an important component part of the exercise or even the central question to be considered. Some members drew attention to the ongoing work on the scope and application of the principle of universal jurisdiction being undertaken in the context of the Sixth Committee of the General Assembly. It was considered appropriate for the Commission to delink the topic from universal jurisdiction insofar as the obligation to extradite or prosecute did not depend on universal jurisdiction. It was also noted that the Commission could proceed with an analysis of the role of universal jurisdiction *vis-à-vis* the obligation to extradite or prosecute without awaiting the finalization of the work of the Sixth Committee on universal jurisdiction.

(c) *Feasibility of the topic*

215. Some members acknowledged the importance attached by States to the topic, it being perceived as useful not only from a practical standpoint in that it would help resolve problems encountered by States in implementing the obligation to extradite or prosecute, but also because the obligation played a key coordinating role between the national and international systems in the overall architecture of international criminal justice.

[337] *Yearbook ... 2004*, vol. II (Part Two), annex, pp. 123–126.

[338] See footnote 331 above.

[339] *Yearbook ... 1996*, vol. II (Part Two), para. 50.

[340] *Yearbook ... 1994*, vol. II (Part Two), para. 142.

[341] *Yearbook ... 1996*, vol. II (Part Two), para. 46.

216. In that connection, it was noted by some members that any absence of a determination on the customary law nature of the obligation would not pose insurmountable difficulties in the further consideration of the topic. It was suggested that the focus, taking both progressive development of international law and its codification into account, could be on the obligation to extradite or prosecute as evidenced especially in multilateral treaties, including the material scope and the content of the obligation, the relationship between the obligation and other principles, the conditions for the triggering of the obligation, the implementation of the obligation, as well as the relationship between the obligation and the surrender of the alleged offender to a competent international criminal tribunal. It was also suggested that the work to be carried out focus on practical implementation of the obligation.

217. Some other members stressed the importance of proceeding with caution. Attention was drawn to the general background of the work already done on the topic since its inclusion in the programme of work of the Commission, pointing to its complexity as a justification for not taking any hasty decisions at that stage on the appointment of a new Special Rapporteur and on whether and how to proceed with the topic. The relevance of treaties and customary international law in the consideration of the topic was highlighted. Insofar as treaties were concerned, the typology of treaties in the Secretariat's survey of multilateral conventions that may be of relevance for the topic[342] was viewed as useful. However, it was considered prudent to study carefully the decision of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case before taking any definitive positions. Some members recalled that a determination of the customary nature of the obligation was only part of the issue, as the relationship between the obligation to extradite or prosecute and other principles, such as *nullum crimen sine lege* and *nulla poena sine lege*, should also be addressed, as suggested in the proposed general framework for the Commission's consideration of the topic, prepared by the Working Group in 2009.[343]

218. It was also pointed out that the proposed general framework, together with the Secretariat's survey, remained useful to the work by the Commission on the topic.

219. Lastly, it was suggested by some members that the Commission terminate its work on the topic since, in their opinion, that was an area of law to which the Commission could not presently make substantial contributions.

(d) *Judgment of the International Court of Justice in the* Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) *case*

220. The International Court of Justice rendered its judgment in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case in the afternoon of Friday, 20 July 2012, when the Working Group was supposed to have already concluded its substantive work during this session and reported to the plenary. The Working Group conducted a preliminary review of the judgment on 24 July 2012, at a meeting specially convened for that purpose. It was recognized that an in-depth analysis would be required to assess fully its implications for the topic.

(e) *Way forward*

221. The Working Group requested that its Chairperson prepare a working paper, to be considered at the sixty-fifth session of the Commission, reviewing the various perspectives in relation to the topic in the light of the judgment of the International Court of Justice of 20 July 2012, any further developments, as well as the comments made in the Working Group and the debate of the Sixth Committee. The Working Group, on the basis of its discussions at the sixty-fifth session, will submit concrete suggestions for the consideration of the Commission.

[342] See footnote 336 above.

[343] See footnote 333 above.