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**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION  
ON THE WORK OF ITS SIXTIETH SESSION**

**Rapporteur: Ms. Paula ESCARAMEIA**

**CHAPTER XI**

**THE OBLIGATION TO EXTRADITE OR PROSECUTE**  
*(aut dedere aut judicare)*

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## **A. Introduction**

1. 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.<sup>1</sup>
2. At its fifty-eighth (2006) and fifty-ninth (2007) sessions, the Commission received and considered the preliminary and second reports of the Special Rapporteur.<sup>2</sup>

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

3. 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>3</sup> The Commission considered the report at its 2984th to ... th meetings, from 24 to ... July 2008.

### **1. Introduction by the Special Rapporteur of his third report**

4. 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 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.

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<sup>1</sup> At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth session, Supplement No. 10* (A/60/10), 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 (*Official Records of the General Assembly, Fifty-ninth session, Supplement No. 10* (A/59/10), paras. 362-363).

<sup>2</sup> Respectively, A/CN.4/571 and A/CN.4/585 and Corr.1.

<sup>3</sup> For the comments and information before the Commission at its fifty-ninth session, see A/CN.4/579 and Add.1-4.

5. 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>4</sup> had been favourably received by the Commission. In the new version of this draft article,<sup>5</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”).

6. As regards draft article 2,<sup>6</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

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<sup>4</sup> A/CN.4/585, para. 76. For the text of that draft article, see also *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 10 (A/59/10)*, para. 350, note 563.

<sup>5</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>6</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.

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 Vienna Convention on the Law of Treaties or the United Nations Convention on Jurisdictional Immunities of States and Their Property.

7. Draft article 3,<sup>7</sup> which had been suggested in the second report and was not opposed either in the Commission or in the Sixth Committee, reflected the rather 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.

8. 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.

9. 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 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 of implementation of the Rome Statute of the International Criminal Court.

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<sup>7</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.