



General Assembly

Distr.
LIMITED

A/CN.4/L.714
31 July 2007

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Fifty-ninth session
Geneva, 7 May-8 June and 9 July-10 August 2007

**DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS FIFTY-NINTH SESSION**

Rapporteur: Mr. Ernest PETRIČ

CHAPTER IX

THE OBLIGATION TO EXTRADITE OR PROSECUTE

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A. Introduction

1. The Commission, at its fifty-sixth session (2004), decided to include the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” in its long-term programme of work.¹ During its fifty-seventh session, the Commission, at its 2865th meeting, on 4 August 2005, decided to include the topic in its current programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur for the topic.² The General Assembly, in paragraph 5 of its resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work.

2. At its fifty-eighth session, the Commission received and considered the preliminary report of the Special Rapporteur.³

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/585 and Corr.1), as well as comments and information received from Governments (A/CN.4/579 and Add.1-4). The Commission considered the report at its 2945th to 2947th meetings, from 31 July to 3 August 2007.

1. Introduction by the Special Rapporteur

4. The Special Rapporteur observed that his second report recapitulated the main ideas and concepts presented in the preliminary report, in order to seek the views of the new Commission

¹ See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362-363. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year’s report of the Commission. The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission’s report concerning its long-term programme of work.

² *Ibid.*, *Sixtieth Session, Supplement No. 10* (A/60/10), para. 500.

³ A/CN.4/571.

on the most controversial issues regarding this topic. He confirmed that the preliminary plan of action, contained in his preliminary report,⁴ remained the main road map for his further work on the topic.

5. Among the main questions raised during the debate at the previous session, and on which the Special Rapporteur would welcome the views of the Commission, were the following: whether the source of the obligation *aut dedere aut judicare* was purely conventional or was also to be found in customary international law, at least for some categories of crimes (such as war crimes, piracy, genocide and crimes against humanity); whether a clear distinction should be made between the obligation to extradite or prosecute and universal jurisdiction, and whether the latter should be considered in the context of this topic (and, if so, to what extent); whether the two alternative elements of the obligation to extradite or prosecute should be given equal footing, or whether one of them should have priority; whether the Commission should consider the so-called “triple alternative”, consisting of the surrender of the individual to a competent international criminal tribunal; and what should be the form of the final product of the Commission’s work on the topic. The Special Rapporteur noted that a great variety of opinions had been expressed on these issues last year at the Commission and at the Sixth Committee.

6. The Special Rapporteur was however in a position, already at this stage, to present one draft article regarding the scope of application of the future draft articles on the obligation to extradite or prosecute.⁵ The proposed provision contained three elements that would need to be dealt with by the Commission. With regard to the time element referred to in this provision, the draft articles would have to take into account the different periods in which the obligation was established, operated and produced its effects; the question of the source of the obligation was

⁴ A/CN.4/571, para. 61.

⁵ Draft article 1 reads as follows:

Scope of application

The present draft articles shall apply to the establishment, content, operation and effects of the alternative obligation of States to extradite or prosecute persons under their jurisdiction.

connected to the first period. With regard to the substantive element, the Commission would have to establish the existence and scope of the obligation to extradite or prosecute, thus determining *inter alia* whether one part of the alternative should have priority over the other, to what extent the custodial State has a margin of discretion in refusing a request for extradition, and whether the obligation includes the possibility of surrender to an international criminal tribunal. Finally, with regard to the personal element, the provision referred to persons under the jurisdiction of the States concerned, which raised the issue, also to be considered by the Commission, of the relationship of the obligation with the concept of universal jurisdiction. Together with the personal element, the Commission would also have to identify the crimes and offences covered by this obligation.

7. The Special Rapporteur also proposed a plan for further development and shared his ideas on articles to be drafted in the future. He indicated, in particular, that one draft article should contain a definition of the terms used, and that a further draft article (or set of draft articles) should be devoted to a description of the obligation to extradite or prosecute and its constitutive elements. The Special Rapporteur also envisaged a draft article that would provide that: "Each State is obliged 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." Other draft articles should take inspiration from the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996.

8. The Special Rapporteur finally indicated the need to reiterate, at the present session, the request made for Governments to provide information on their legislation and practice with regard to the obligation to extradite or prosecute.
