VII. THE OBLIGATION TO EXTRADITE OR PROSECUTE (AUT DEDERE AUT JUDICARE)

A. BACKGROUND

195. The topic “Obligation to Extradite or Prosecute (aut dedere aut judicare)” had been listed under the planned topics since the first session of the International Law Commission in 1949, but found its place only when it was addressed briefly in Article 8 and 9 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. These articles set out minimum contours of the principle of aut dedere aut judicare and the linked principle of universal jurisdiction.

196. At its fifty-sixth session (2004), the International Law Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic “Obligation to Extradite or Prosecute (aut dedere aut judicare)” for inclusion in its long-term programme of work. 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. At its 2865th meeting, held on 4 August 2005, the Commission considered the selection of a new topic for inclusion in the Commission’s current programme of work and decided to include the topic “Obligation to Extradite or Prosecute (aut dedere aut judicare)” on its agenda, and appointed Mr. Zdzislaw Galicki as Special Rapporteur for this topic.

197. The Commission at its fifty-eighth session (2006) considered the preliminary report of the Special Rapporteur. The text report gave a detailed account of five subsections of this topic, namely, (i) universality of suppression and universality of jurisdiction, (ii) universal jurisdiction and the obligation to extradite or prosecute, (iii) sources of the obligation to extradite or prosecute, Scope pf the obligation to extradite or prosecute, and (v) Methodological questions to be addressed while dealing with this topic. It also contained a general plan of action on future work by the Commission on this topic.

198. The expression “aut dedere aut judicare” is the modern adaptation of phrase used by Grotius: “aut dedere aut punire” (either extradite or punish). This principle has been explained and its rationale defined in the 1996 Draft Code of Crimes against Peace and Security of Mankind as:

“The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted wither by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition…”

199. At its fifty-ninth session (2007), the Commission had second report of the Special Rapporteur, which contained draft article on scope of application, as well as a proposed

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1 A/51/10, chap. II, 1996 Draft Code of Crimes, commentary on Article 9, para. 3.
plan of action further development. The focus of the report was on four main issues, namely; (i) the question of the source of the obligation to extradite and prosecute; (ii) the problem of the relationship between this obligation ad the concept of universal jurisdiction, and how it should be reflected in the draft; (iii) the issue of the scope of the said obligation; and (iv) the question of surrender of an alleged offender to an international criminal conduct.

200. Draft Article 1 on scope of application, was also discussed, wherein the provision contained three elements like time element, substantive element and personal element. The time element referred to the different periods in which the obligation was established, operated and produced its effects. Under substantive element, the existence and scope of obligation to extradite or prosecute, needs to be established. Personal element refers to alleged offenders under the jurisdiction of the States concerned, which raised the issue of the relationship of the obligation with the concept of universal jurisdiction.

B. CONSIDERATION OF THE TOPIC AT THE SIXTIETH SESSION OF THE INTERNATIONAL LAW COMMISSION

201. At the sixtieth session, the Commission considered the third report on obligation to extradite or prosecute (aut dedere aut judicare) prepared by the Special Rapporteur. The report discussed about the comments made by the member States on specific questions raised by the Commission and also proposed change in draft Article 1 and 2. The Commission received comments from twenty-one countries and six Member States of AALCO has sent their comments.

202. The comments received from member States proposed that the under draft Article 1 on scope of application, the obligation to extradite or prosecute need not necessarily be a “legal” obligation. The Special Rapporteur indicated that in the light of the comments received, the nature of the obligation will not be “legal” and this provision would be elaborately studied. The expression “persons under jurisdiction” was also favoured to be included in this article. The inclusion of such expression was intended to affirm that obligation arose only when an alleged offender was present on their territory of the State and that it was contingent to a request of extradition.

203. Under draft Article 2 on Use of terms, a list of terms were proposed by the Special Rapporteur to be defined by the Commission like “extradition”, “prosecution”, “jurisdiction”, and “persons under jurisdiction”. However, upon a study on the comments received by member States on this draft Article it was stated that he would consider the possibility of including the expressions “persons”, “persons under jurisdiction” and “universal jurisdiction” among those requiring a definition by the Commission. However,

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3 A/CN.4/603.
4 The following Member States of AALCO has sent their comments on specific issues. They include; (i) Japan, (ii) Qatar, (iii) Thailand, (iv) Lebanon, (v) Sri Lanka and (vi) Kuwait.
5 Article 1: Scope of Application – “The present draft articles shall apply to the establishment, content, operation and effects of the (legal (deleted)) obligation of States to extradite or prosecute persons [under their jurisdiction] [present in the territory of the custodial State] [under the control of custodial State].
he suggested that this provision should remain open until end of the exercise, as to give opportunity to add other definitions and descriptions whenever necessary.

204. On draft Article 3 on Treaty as a source of the obligation to extradite or prosecute, was based upon a general consensus that international treaties are a generally recognized source of the obligation to extradite or prosecute. Inclusion of this provision in international treaties and a compilation of such treaties would be a beginning of confirming such an obligation as appropriate customary norm. The Special Rapporteur recalled a doctrinal statement that: “If a State accedes to a large number of international treaties, all of which have a variation of the aut dedere aut judicare principle, there is a strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law.” Upon general consensus it was agreed that its commentary should contain examples of the various treaties containing the obligation to extradite or prosecute.

205. In general, the customary character of the obligation was debated upon since certain delegations observed that the obligation to extradite or prosecute was only based on treaties and therefore cannot be considered to have a customary character. The other view opined that this obligation has attained customary status at least for most serious international crimes, or that it would soon attain such status in respect of such crimes. It was suggested to include a non-exhaustive list of crimes covered by the obligation limiting such list to concept of “crimes against the peace and security of mankind” or referring to the interests of the international community as a whole. Considering the inter-linkage between obligation to extradite or prosecute (aut dedere aut judicare) and universal jurisdiction principle, it was observed that the Commission should clearly distinguish the two notions and that the universal jurisdiction should be dealt with in the future draft articles only to the extent necessary for the study of the obligation to extradite or prosecute.

C. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

206. A list of specific issues have been included by the Commission, for receiving comments from the member States that are of particular interest to the Commission. These issues are:

1. International treaties by which a State is bound, containing the principle of universal jurisdiction in criminal matters, is it connected with the obligation aut dedere aut judicare?
2. Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation aut dedere aut judicare?
3. Judicial practice of a State reflecting the application of the principle of universal jurisdiction in criminal matters; is it connected with the obligation aut dedere aut judicare?
4. Crimes or offences to which the principles of universal jurisdiction in criminal matters is applied in the legislation and practice of a State; is it connected with the obligation aut dedere aut judicare?

207. The Commission has sought information on the following issues from the member States:

1. Whether the State has authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality;
2. Whether the State has authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals;
3. Whether the State considers the obligation to extradite or prosecute as an obligation under customary international law and if do to what extent.

208. On the future work programme, the Special Rapporteur stated that the fourth report of the Commission would deal with main substantive issues arising from the topic, such as sources of the obligation to extradite or prosecute and its content and scope.