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Summary record of the 2947th meeting

Topic:
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of making distinctions between primary and secondary rules because that might cause the Commission to make serious mistakes.

81. It emerged from paragraphs 106 to 108 of the second report that the Special Rapporteur had a rather clear idea of the probable content of the future draft articles. It would have been preferable for the other draft articles to have been submitted at the same time as draft article 1 because that would have facilitated the Commission's work. In other words, if the Commission had been able to consider the scope of the draft articles at the same time as such concepts as "extradition", "prosecution" and "jurisdiction", or if it had been able to undertake a clear and detailed analysis of the main obligation of *aut dedere aut judicare*, it would have been able to go to the very heart of the matter in a more comprehensive way. In that connection, he was not convinced by the arguments in favour of draft article 2 contained in paragraph 106. He was in favour of referring draft article 1 to the Drafting Committee.

The meeting rose at 1 p.m.

2947th MEETING

Friday, 3 August 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (concluded) (A/CN.4/577 and Add.1–2, sect. F, A/CN.4/579 and Add.1–4, A/CN.4/585)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. WISNUMURTI thanked the Special Rapporteur for his enlightening second report, contained in document A/CN.4/585, and for having summarized the main ideas contained in the preliminary report³⁵⁷ and the discussions held thereon in the Commission and Sixth Committee for the benefit of new members.

2. The second report raised a number of pertinent and difficult questions, the first of which was whether the obligation to extradite or prosecute had become part of

customary international law, or whether the legal source of the obligation included customary international law or general principles of law aside from treaties. He shared the Special Rapporteur's view that aside from international treaties, customary international law was also a legal source of the obligation insofar as it related to certain categories of crimes generally recognized as being subject to universal jurisdiction, such as genocide, crimes against humanity, war crimes and terrorism. He nevertheless felt that there was a need for further study of the question.

3. With regard to draft article 1, while he had no serious difficulty with the title, his preference would be for the title to read "Scope of the present articles". As for the text of the draft article, he concurred with the view that it would be better to delete the words "the establishment, content, operation and effects of". Those clusters constituted important aspects of the obligation to extradite or prosecute which would facilitate the Commission's future work on the draft articles and should therefore be taken up in the third report, rather than in the context of draft article 1. The word "alternative", in the phrase "alternative obligation of States to extradite or prosecute", was also redundant and could be deleted.

4. Like the Special Rapporteur, he favoured the use of the term "obligation" rather than "principle" in the draft articles, in line with the Commission's normal practice. He endorsed the view that draft articles on the obligation to extradite or prosecute should be limited to rules of a secondary character rather than principles of a primary nature. He also endorsed the statement in paragraph 85 of the report to the effect that the term "obligation" reflected the generally recognized character of *aut dedere aut judicare* as a secondary rule.

5. There was no straightforward answer to the question whether, in implementing the obligation, priority should be given by States to extradition or to prosecution. Various factors had to be taken into account by the custodial State before it took any decision to implement the obligation, such as the terms of an extradition treaty with the State requesting extradition, where such a treaty existed; the availability of sufficient *prima facie* evidence; the national interest of the custodial State and that of the requesting State; and the nature of the bilateral relations between the two States. For those reasons, there was strong justification for the view that States had freedom of choice between extradition and prosecution of the person concerned. In that connection, he was of the opinion that the custodial State had sufficient margin to refuse extradition if, in the context of the implementation of its obligation, it decided to prosecute the person, or when there was insufficient evidence on the basis of which the custodial State could implement its obligation to extradite or prosecute.

6. On the question of the "triple alternative", he agreed that there might be a possibility of parallel jurisdictional competences, not only on the part of the States concerned, but also of international criminal courts, as established in the Rome Statute of the International Criminal Court and supported by judicial practice. However, he stressed the need for caution: the Commission must look closely at the obligation to surrender persons to international criminal

³⁵⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

courts and decide whether it should be included in the draft articles as part of the concept of the obligation to extradite or prosecute, given that surrender to international criminal courts was an instance of *lex specialis*.

7. While he agreed that a clear distinction should be made between the concept of the obligation to extradite or prosecute and that of universal jurisdiction, and that the Commission should focus on the former, as also recommended by the Sixth Committee, he believed that universal jurisdiction should at some stage be included in the study. The Commission would have to consider it when addressing the different categories of crimes to be covered by the obligation to extradite or prosecute, which in his view primarily comprised international crimes subject to universal jurisdiction.

8. He supported the general thrust of the Special Rapporteur's plan for further development set out in paragraphs 105 to 116 of the second report. He agreed that the formulation of a future draft article 2 on the use of terms should remain open until the Commission had a comprehensive view of the draft articles. There seemed to be a general consensus that international treaties were a more generally recognized source of the obligation to extradite or prosecute. However, he would have to reserve his position on how that legal source was to be reflected in the formulation of a draft article along the lines of draft article X, as set out in paragraph 108 of the report, until the Commission had addressed another legal source, namely customary international law, at least with respect to certain international crimes which were subject to universal jurisdiction.

9. In conclusion, he endorsed the proposal to refer draft article 1 to the Drafting Committee.

10. Mr. KOLODKIN thanked the Special Rapporteur for his second report, which responded to some comments and summarized the key issues, taking into account the discussions held during the fifty-eighth session, and the views of States and the Sixth Committee as well as written submissions. The Special Rapporteur's efforts to take account as far as possible of the views of member States, however diverse they might sometimes be, were also praiseworthy. He endorsed the Special Rapporteur's proposal to recirculate the request for information addressed to States at the fifty-eighth session;³⁵⁸ perhaps more questions could be added in order to elicit more detailed comments along the lines of those submitted by the United States.

11. Additional information was required from States, not only relating to their practice, legislation and jurisprudence, but also regarding their views on the source of the obligation to extradite or prosecute. Otherwise it would be difficult to determine whether or to what extent the obligation to extradite or prosecute existed in customary international law. His initial reply to the question would be in the negative. Nonetheless, an academic answer would be inappropriate: information on the practice and *opinio juris* of a large number of States was necessary; the opinion of just one State, however eminent, would not suffice.

12. As had been observed, there were not enough international treaties containing such an obligation to demonstrate that it was a customary norm. On the contrary, it could be argued that States concluded a multitude of treaties in different areas precisely because there was no customary norm under international law and because the obligation to extradite or prosecute was a complex issue. States were willing to assume such an obligation only if it was enshrined in a treaty. That was why many States made extradition conditional upon the existence of a treaty. Moreover, for some States, such as the United States, a multilateral treaty on the prevention of a specific offence which contained a provision on extradition might not suffice—a special extradition treaty was required. Such practice was fairly widespread. In any case, the obligations of States under customary international law could not be admitted lightly; strong evidence in their favour was required.

13. Even stronger evidence was required to advance the theory of the peremptory nature of the obligation to extradite or prosecute. He would not dismiss that theory outright: by all means the Commission and the Special Rapporteur could analyse it. However, it would be wrong to infer the peremptory nature of the obligation on the basis of the peremptory nature of norms prohibiting, for example, crimes against the peace and security of mankind or crimes subject to universal jurisdiction. The nature of a secondary rule—and the obligation under consideration was a secondary rule—could not be deduced from the nature of a primary rule to which the secondary rule related; other criteria must be taken into consideration. In order to qualify as a peremptory norm, the obligation *aut dedere aut judicare* must comply with the criteria laid down in article 53 of the 1969 Vienna Convention.

14. While he agreed with the Special Rapporteur on the need to draw a clear distinction between universal jurisdiction and the obligation *aut dedere aut judicare*, he considered that the intellectual distinction or relationship between the two concepts should be dealt with in the reports, or in the commentaries to the draft articles, but not in the draft articles proper—leaving aside the question of the form that the final product should take. In his view, the presumption should be that when a State decided to extradite or prosecute, it already had the jurisdiction to do so. It was therefore not important whether such jurisdiction was universal or not. The draft articles must be based on the presumption of the existence in the State concerned of the jurisdiction necessary to extradite or prosecute a person, but there was no need to draft provisions on jurisdiction as such.

15. He also agreed with the Special Rapporteur on the need to draw a clear distinction between extradition and surrender to the International Criminal Court. However, the “triple alternative” should not be included in the draft articles. He did not believe that such an alternative was sufficiently widespread to warrant consideration by the Commission.

16. Due attention should be paid to the link between extradition and the principle of reciprocity, which the Special Rapporteur had not touched upon. Some States,

³⁵⁸ *Yearbook ... 2006*, vol. II (Part Two), p. 21, para. 30.

including the Russian Federation, could extradite on the basis of reciprocity as well as by virtue of treaties, without thereby considering themselves bound to extradite under customary international law. It could be that extradition and the obligation to extradite or prosecute were two different matters. The principle of reciprocity might be the basis for extradition, but not for the obligation to extradite or prosecute. Some further study of the question might therefore be necessary.

17. He supported much of what had been said regarding draft article 1. The reference to the obligation to extradite or prosecute as alternative in nature should be deleted; it would be more appropriate in the commentary. Likewise the reference to “the establishment, content, operation and effects of” the obligation should be deleted. Perhaps he had not sufficiently comprehended the Special Rapporteur’s comments on the time element, in paragraphs 79 to 81 of the report, to be able to understand the need for its inclusion in the draft article.

18. He was not convinced that the obligation applied simply to persons under the jurisdiction of a State. He did not see how it was possible to extradite a person who was under a State’s jurisdiction but not in its territory. He had mentioned earlier the presumption of the existence of jurisdiction; it might be more accurate to say that the existence of jurisdiction was a necessary precondition for a State’s decision to extradite or prosecute. However, it was a necessary, but not a sufficient condition: another necessary condition was the person’s presence in the territory of the State to which the request for extradition was addressed. That aspect of the matter also required further study.

19. He agreed that the obligation applied to natural persons only, although it had been suggested that some reference should be made to situations involving the criminal prosecution of legal persons. The concept of criminal responsibility and the criminal prosecution of legal persons was not found in all legal systems, and the inclusion of legal persons in the scope of the draft articles could lead to substantive problems.

20. Given that draft article 1 dealt with the scope of application, he suggested that some reference should be made in that draft article to the category or categories of crimes to which the draft articles applied, for instance crimes under international law or crimes against the peace and security of mankind. Perhaps that should be the subject of a separate paragraph in the draft article.

21. He shared the views of those who did not see that anything would be gained by the inclusion of the draft article X proposed in paragraph 108. Perhaps the Special Rapporteur had some further arguments to deploy in its favour.

22. In conclusion, he said he would be ready to continue work on draft article 1 in the Drafting Committee at the next session, on the basis of the discussions held during the current session and in the Sixth Committee, and in the light of the new draft articles to be proposed by the Special Rapporteur in his third report.

23. Mr. VALENCIA-OSPINA said he welcomed the opportunity to address the Commission for the first time on the topic of the obligation to extradite or prosecute. The second report provided an update on the discussions held during the fifty-eighth session and on the comments submitted in writing by Governments and made orally in the Sixth Committee. Both the reports drafted on the topic thus far were preliminary in nature—much of the second report was repetition—and invited the Commission to undertake a systematic study of the topic, which had been on the long-term agenda of the Commission since its first session, in 1949. He wished the Special Rapporteur every success in a task which was fraught with difficulties.

24. In view of the preliminary nature of the two reports, he would begin with a brief preliminary overview of how he perceived the origin, purpose and nature of the obligation *aut dedere aut judicare* and then make some general comments and suggestions on draft article 1.

25. The Latin maxim *aut dedere aut judicare* reflected a general principle of *jus gentium* and was a development of the term *aut dedere aut punire* (to extradite or to punish) originally formulated by Grotius.³⁵⁹ In the debate thus far, some members of the Commission had rendered “*judicare*” indiscriminately as “punish” (*punire*) and “prosecute” (*judicare*). For the purposes of the codification and progressive development of the topic, the maxim, as enshrined in modern positive law, recognized the existence not only of a principle but also, implicitly, of an international obligation. The old formulation *aut dedere aut punire* presumed the guilt of the alleged perpetrator of the offence, whereas *aut dedere aut judicare* rightly presumed the innocence of the person tried for the commission of an offence. That was the only way in which an obligation of that nature could be viewed in the modern world, in the light of the basic principles of criminal law and respect for due process.

26. The maxim had been incorporated in a large number of bilateral and multilateral treaties, many of which the Special Rapporteur had referred to in his reports. Its importance had also been recognized by the United Nations General Assembly, which had adopted many resolutions on the matter: since 1946 a number of General Assembly resolutions relating to war crimes and crimes against humanity had included a statement to the effect that the refusal of States to cooperate in the arrest, extradition, prosecution and punishment of persons guilty of war crimes and crimes against humanity was contrary to the purposes and principles of the Charter of the United Nations and the generally recognized norms of international law.

27. It was therefore only logical that the Commission must determine whether the obligation *aut dedere aut judicare* derived exclusively from the relevant international instruments and, in particular, treaties, or whether it was also a general obligation under customary international law. In that regard, the comments submitted by the United States, to which the Special Rapporteur intended

³⁵⁹ H. Grotius, *De Jure Belli Ac Pacis*, book II, chap. XXI, paras. III and IV (English translation by F. W. Kelsey), *The Law of War and Peace*, in J. B. Scott (ed.), *Classics of International Law*, Oxford, Clarendon, 1925, pp. 526–529.

to refer in his next report, were worthy of note. It should be recalled that the matter had been referred to the ICJ in the *Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States of America)* cases. In its orders of 14 April 1992, the Court had decided not to exercise its power to indicate provisional measures as requested by the Libyan Arab Jamahiriya. Although the Court itself had been silent concerning the obligation in question, two judges had confirmed in their dissenting opinions the existence of “the principle of customary international law *aut dedere aut judicare*” (dissenting opinion of Judge Weeramantry, p. 69), and of “a right recognized in international law and even considered by some jurists as *jus cogens*” (dissenting opinion of Judge Ajibola, p. 82). Naturally, those dissenting opinions were not a sufficient basis for accepting that to extradite or prosecute was a rule under customary international law; however, it was worth looking into the limits of those opinions in the light of State practice.

28. It seemed from the reports that, under the relevant provisions of most international instruments, States viewed extradition or prosecution as a right rather than an obligation. However, in order to establish the existence of such an obligation under customary international law, it must also be established that, in international efforts to combat crime, States considered the maxim not only as enshrining a right or power, but above all as a limitation, in accordance with the law, on the exercise of their sovereignty that could be inferred from their practice.

29. Aside from the foregoing, the importance of such an obligation was clear. On the one hand, the international community had a genuine interest in ensuring that under no circumstances should the perpetrator of an offence be exempt from criminal responsibility and find a safe haven where his crime would go unpunished. On the other hand, the maxim *aut dedere aut judicare*, insofar as it was binding, guaranteed greater legality, transparency and certainty in the exercise of international criminal justice.

30. In that connection, repeated practice, the consistency of its implementation, States’ discernible perception of the practice as a legal obligation, and the opinions of some judges and framers of treaties suggested that, at least for certain categories of crimes—those which on account of their gravity could be considered as subject to international law—the obligation in question was customary in nature. The position the Commission finally took on the question, which might possibly be the result of progressive development, would first warrant careful reflection.

31. The Special Rapporteur had described the obligation arising from *aut dedere aut judicare* as “alternative”. In other words, when seeking international cooperation in criminal matters, States had two options—to extradite or to prosecute—and possibly also the option to surrender the accused to an international criminal court (the “triple alternative”). Without entering into a debate as to whether the obligation related to conduct or result—a distinction not drawn by the Commission in article 12 of its draft articles on responsibility of States for internationally

wrongful acts³⁶⁰—it could be said that what was alternative was not the obligation *per se*, but rather its performance, the term used by the ICJ in its judgment in the *Gabčíkovo–Nagymaros Project* case. The performance of the obligation could be secured through one option or the other, and decided by the State on a case-by-case basis.

32. That did not mean that the State was required to choose one of the options. A State might be empowered to extradite a person but not have the jurisdiction to prosecute him or her. In that event, it would fulfil its obligation through extradition to another State. Irrespective of whether the maxim envisaged the “triple alternative”, for practical purposes there was also the option that the alleged culprit could be surrendered to an international court. The case might also arise where there was no basis for extradition under international law, and in such cases the obligation could be met only through prosecution, provided that the State had jurisdiction.

33. The obligation *aut dedere aut judicare* could thus be described in minimalist terms as a basic obligation under which, in the event of grave breaches of international law, States had limited options. First, they could extradite the alleged culprit or perhaps surrender him or her to an international court, on the basis of a treaty, reciprocity or another source. Secondly, they could prosecute the person in question where they had the necessary jurisdiction and decided in accordance with domestic legislation, not to extradite, or in the absence of any treaty establishing the particular conditions for extradition. If any of those methods was followed, the obligation was understood as having been fulfilled.

34. That might give rise to at least two problems. The first, as mentioned in the report, related to the nature of the offences to which such an obligation applied. If, as appeared to be the case, it applied only to categories of offences which, owing to their gravity, were considered to come under international law or be of international concern, the obligation *aut dedere aut judicare* would become a mere subcategory of universal jurisdiction. The second problem was to determine when and under what qualitative conditions it might be considered that the obligation had been fulfilled with respect to its second component, *judicare*. Faced with such complex questions as those, it would seem advisable that, in elaborating the draft articles, the Special Rapporteur should concentrate on identifying the category or categories of offence to which the obligation *aut dedere aut judicare* applied and determining how close was the connection between that obligation and universal jurisdiction, a connection which had already been recognized by the Institute of International Law.³⁶¹ He should also establish the criteria for determining the circumstances under which it could be claimed that the obligation had been met when the component chosen was *judicare*, and identify the situations in which the obligation could not be met through the application of the *judicare* component alone.

³⁶⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 27 and 54–57; see, in particular, page 55, paragraph (4) of the commentary.

³⁶¹ Institute of International Law, *Yearbook*, vol. 71, Part II, Session of Krakow (2005), Resolution III, “Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes”, Paris, Pedone, 2006, p. 297. See also *ibid.*, vol. 60, Part II, Session of Cambridge (1983), Resolution III, “New Problems of Extradition”, p. 305.

35. With regard to draft article 1, he endorsed the Spanish title “*Ámbito de aplicación*”, which was the form of words traditionally used in the Commission’s texts. The corresponding term in English, however, was simply “Scope”, not “Scope of application”. The words “of application” should, therefore, as pointed out by Ms. Escarameia, be deleted. The text of the draft article could also be simplified. The words “establishment, content, operation and effect” could be deleted, since they introduced a number of highly ambiguous elements that were not sufficiently specific to enable the scope of the draft articles to be determined in each concrete case. The choice of four different words suggested that the degree of obligation applicable to each under the draft articles would differ, depending on the time element. The time of operation and effects, however, was of little significance; what was important was the moment at which the obligation was established. In that connection, he drew attention to paragraph 1 of draft article 14 of the draft articles on responsibility of States for internationally wrongful acts entitled “Extension in time of the breach of an international obligation”, which read: “The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.”³⁶² Moreover, it was incongruous to bracket three concepts that referred to the temporal nature of the obligation—“establishment”, “operation” and “effect”—with the word “content”, which had nothing to do with the time factor. In any case, to use the word “content” was tautological, since the aim of the draft articles as a whole was to establish the content of the obligation *aut dedere aut judicare*. To say that draft article 1 applied to its own content was circular and added nothing to the reader’s understanding.

36. Lastly, the word “alternative” could also be deleted. The obligation *aut dedere aut judicare* was “alternative” only in the manner in which it might be fulfilled. To retain the word “alternative” in the text of the article as a description of the obligation could, therefore, give rise to the mistaken impression that the obligation itself, rather than compliance with it, was of an alternative nature. He hoped that a clearer form of words might be found, which would also incorporate the phrase “*aut dedere aut judicare*” in the wording of the draft article.

37. For the reasons given above, he was in favour of a simplified text along the lines suggested by Mr. Dugard early on in the debate and subsequently supported by Mr. Kamto and Mr. Wisnumurti. He suggested the following:

“Scope

“The present draft articles shall apply to the obligation of States to extradite or prosecute (*aut dedere aut judicare*) persons under their jurisdiction.”

He would support the proposal that the draft article should be referred to the Drafting Committee at the current session, on the understanding that it would be amended in the light of the points already made in the Commission’s discussion. If the elements more appropriately dealt with

in subsequent draft articles were removed, the simplified text would not be materially affected by later developments. The Drafting Committee should also ensure that the terminology used to translate the Latin maxim *aut dedere aut judicare* was harmonized in all the Commission’s official languages.

38. Mr. HASSOUNA said that the topic was both legally complex and of growing importance to the international community, since it reflected recent developments in international criminal law, the purpose of which was to deny impunity to persons suspected of having committed international crimes, by depriving them of safe havens.

39. As a new member, he was grateful to the Special Rapporteur for summarizing, in his second report, the content of the preliminary report and the discussion in the Commission and the Sixth Committee in 2006. Such a summary would greatly assist new members in formulating their views on the main issues, as would the compilation of comments and information received from Governments (A/CN.4/579 and Add.1–4) and the topical summary of the discussion held in the Sixth Committee (A/CN.4/577 and Add.1–2) helpfully prepared by the Secretariat. In his view, the Commission should not disregard the opinions of delegations to the Sixth Committee, as had been suggested by some members of the Commission. Such opinions reflected the official position of the very Member States of the United Nations that would eventually adopt or reject the product of the Commission’s work. While, as an independent body, the Commission was not bound by States’ opinions, it should take them into consideration as far as possible. In that connection, he was pleased to learn that the number of replies to the question posed in paragraph 30 of the Commission’s report on the work of its fifty-eighth session had grown over the past few months. The invitation to States to submit information should, however, be repeated in chapter III of the Commission’s report on its fifty-ninth session. Among the States that had replied, African and, to a lesser degree, Asian States were conspicuous by their absence. Given that they represented an important segment of the international community, it was regrettable to have been deprived of their views; he therefore hoped that more African and Asian States would respond shortly, particularly in view of the interest shown in the topic at the most recent meeting of AALCO, held in Cape Town in July 2007.

40. Turning to specific issues raised during the debate, he said that, with regard to the scope of the topic, he shared the views of those who believed that the Commission should focus on the issues directly relating to the obligation to extradite or prosecute and avoid related issues such as the technical aspects of extradition law or deportation procedures. While it should recognize the link between universal jurisdiction and the obligation to extradite or prosecute, the Commission should restrict itself to referring to their interrelationship and drawing a distinction between the two concepts. A further distinction should be drawn between extradition and surrender to an international criminal tribunal, which was a process governed by distinct legal rules. He would support the inclusion in the Commission’s work on the topic of an analysis of the relationship between the obligation to extradite or prosecute and other principles of international law, particularly

³⁶² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27.

State sovereignty—and the limitations on it—and human rights protection.

41. The fundamental question of the nature of the obligation to extradite or prosecute, and whether it had become a part of customary international law, required close scrutiny, in view of the divergent opinions that were apparent among States and legal scholars alike. In his view, the answer to the question whether there was an emerging customary source of that obligation, side by side with the accepted treaty-based source, could be ascertained mainly through existing State practice, particularly in relation to the most serious international crimes such as genocide, war crimes, crimes against humanity, torture and terrorist acts. As for the final form the Commission's work should take, he would favour a set of draft articles.

42. He wished to suggest a number of amendments to draft article 1. The word "establishment" should be replaced by a word such as "existence", and the term "operation" by the word "application". He would also favour the deletion of the word "alternative" in referring to the obligation to extradite or prosecute. Better still would be to redraft the article in more general terms so as to include all its existing elements without excluding other relevant ones.

43. There was a case for referring the draft article to the Drafting Committee. However, such a referral should, in his view, be deferred, for two reasons: first, on the practical grounds that the Drafting Committee would not be able to take up the matter until the next session; and, secondly, because draft article 1 needed to be considered in conjunction with future draft articles substantively connected with it, which the Special Rapporteur had promised to submit in the context of his third report.

44. Ms. JACOBSSON said that the Special Rapporteur's "road map" was well designed and carefully thought through. She welcomed his confirmation that the preliminary plan of action set out in the preliminary report would be retained for further work. She also appreciated his willingness to listen to the views of new members of the Commission.

45. The title of the topic clearly indicated that it was primarily the procedural aspects of the obligation to extradite or prosecute that would be addressed. However, as many other members had stressed, it was impossible to avoid also addressing the jurisdictional grounds for the obligation, and the way to identify those grounds was to consider the categories of crimes involved in order to establish whether procedural consequences flowed from given treaty obligations.

46. Both the title of the topic and draft article 1 referred to an obligation of States to prosecute or extradite, but, in her view, it could sometimes be a principle as well. Some treaties contained a limited and clearly defined obligation on States to prosecute or extradite, whereas others, such as the 1949 Geneva Conventions for the protection of war victims, also embodied the principle of universal jurisdiction. She accepted, however, the argument that the title should be retained for the time being: partly because the parallel question of a State's right, rather than obligation,

to prosecute and extradite needed to be discussed, and also because the current title did not exclude the existence of a principle. Moreover, the word "obligation" seemed more appropriate from a legal point of view for the purpose of the exercise.

47. The Special Rapporteur's premise was that universal jurisdiction and the obligation *aut dedere aut judicare* were separate bases for jurisdiction, even though there existed a relationship between them. She agreed with that assumption as a working hypothesis, but she was not yet convinced that it would always be possible to separate the two, particularly in the grey areas of serious breaches of international humanitarian law, torture and genocide. The principle of universal jurisdiction should therefore be analysed in order to establish whether it might correspond with the obligation *aut dedere aut judicare* and, if so, in what circumstances.

48. As for the question whether the so-called "triple alternative" should be considered by the Commission, she believed that it could not be totally disregarded. At the least, there needed to be an analysis and an explanation—on a juridical basis and also from a theoretical perspective—of whether surrender to international tribunals was legally different from the obligation *aut dedere aut judicare*—not least since the obligation to do so was most often treaty-based—and, if so, why and how. The situation was complicated by the different ways in which the word "surrender" was used. By contrast with its use in the Rome Statute of the International Criminal Court, the term as used in the European Arrest Warrant, introduced in 2002,³⁶³ really amounted to extradition. At one stage, some European courts had refused to "surrender"—or extradite—persons under the Warrant, but it seemed that this was no longer the case and, according to the European Commission, the European Arrest Warrant was now "a success": in 2006, nearly 6,900 arrest warrants had been issued, and in 1,200 cases the wanted person had been traced and arrested. The Warrant was not an *aut dedere aut judicare* procedure, properly speaking, since it focused on serious national crimes rather than international crime, but it had elements that were closely related to *aut dedere aut judicare*. It was no coincidence that it used the same term—"surrender"—as the Rome Statute of the International Criminal Court. It would be helpful if the Special Rapporteur could examine the differences and similarities between surrender and extradition, both because of its legal and political dimension and also in the light of extensive regional State practice. Her purpose in suggesting that course of action was to help narrow down the topic so as to focus on the nature of the core obligation.

49. She wholeheartedly agreed with the Special Rapporteur's contention that both the obligation to prosecute and the obligation to extradite should be subject to more detailed analysis, since their scope and the interpretation of the two concepts were not always clear, even under existing treaties. She therefore welcomed his intention to formulate draft rules on the concept, structure and

³⁶³ *Official Journal of the European Communities*, No. L. 190, 18 July 2002, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), pp. 1–18.

operation of the obligation. The division of the scope of application into three main elements—the time element, the substantive element and the personal element—was a good starting point. The time element—the “periods of establishment, operation and production of effects”—was important, particularly in situations where dual criminality was involved and States had different statutory limitations. As for the substantive element, the obligation either to prosecute or to extradite was, generally speaking, an obligation and not primarily a right, particularly if the obligation was applied in the context of universal jurisdiction. In that connection, she noted, in relation to the question whether the obligation to extradite was absolute or relative, that the conditional element—in the sense that the will of another sovereign State was involved and human rights obligations might intervene—did not diminish the force of the obligation.

50. Any legal procedure was subject to restraints. In the case of the obligation to extradite or prosecute, the primary restraint was the requirement of due process, which extended to the requirement that the extradition request should be based on juridical grounds. There were, however, other restraints, such as the risk that the person subject to the extradition request might suffer torture or the death penalty. The crucial issue was not so much the restraints that a State imposed on itself in setting up the conditions for extradition, as what happened if a State did not want to prosecute and was prevented from extraditing. In that connection, she noted that the report contained no reference to two elements of particular interest: diplomatic guarantees, and the political element, namely that a State might want to extradite for political reasons.

51. She concurred with the Special Rapporteur’s conclusion that the concept of jurisdiction should be understood in its broadest sense. There were close and multifaceted links between the establishment of jurisdiction and the possibility of extradition. The more restrictive a State’s basis for jurisdiction under domestic law—if, for example, the State based its jurisdiction solely on the principle of territoriality—the more likely it seemed to accept extradition in order to prevent impunity.

52. As for the legal source of the obligation, she noted that members of the Commission and delegates to the Sixth Committee had been cautious in their responses, with the exception of the United States, which had taken a firm position on the matter. She wondered whether an obligation to prosecute or to extradite could exist without any basis in a treaty, in other words, whether it could be based in customary law. She was inclined to think it could. True, extensive State practice developed under treaty commitments did not necessarily mean that such practice could be considered customary law, but it might, as Mr. Vargas Carreño had pointed out, be an indication of the existence or emergence of customary law. The question should be further analysed.

53. Draft article 1 should be simplified. In that connection, the wording suggested the day before by Mr. Kamto could be helpful. The Commission should await the next set of draft articles before referring draft article 1 to the Drafting Committee, thereby gaining a clearer picture of the situation as a whole.

54. Mr. HMOUD, after congratulating the Special Rapporteur on a thorough and balanced report, said that, over the years, bilateral and multilateral treaties relating to criminal law had laid down the principle or obligation to extradite or prosecute, the purpose of which was to deny the perpetrators of certain crimes a safe haven. The principle had become a standard legal tool to combat impunity with regard both to ordinary crimes under national law and to crimes affecting the international community as a whole, but it did not exist in a legal vacuum: it had to operate within the context of both national and international law. A State in whose territory the perpetrator of a crime was present could extradite such a perpetrator only if its national law did not criminalize the act committed, or it would prosecute the perpetrator only if it was under no international legal obligation to extradite. National and international law were thus both relevant.

55. That was why multilateral law-enforcement instruments had several integral obligations, including the obligation to extradite or prosecute. Such instruments usually defined the crime concerned and imposed on States parties the obligation to enact legislation to give effect to such a definition, among other obligations. They also, however, provided for jurisdiction, which could be mandatory in some cases and optional in others. That was crucial in terms of the obligation to extradite or prosecute, because, under such treaties, a State might choose not to exercise its option of jurisdiction over the crime, although, in that case, it had to extradite the accused to a requesting State that wished to exercise jurisdiction, as it was commonly entitled to do in treaties relating to organized crime, terrorism or attacks against United Nations personnel. It was the presence of the individual in that State or his or her being under its control that triggered the obligation, not the fact that he or she was under its jurisdiction. For that reason, the phrase “under their jurisdiction”, in draft article 1, should be amended, so that a State could prosecute the person concerned if it exercised jurisdiction over the offence or extradite him or her if it lacked such jurisdiction or did not exercise it.

56. The source of the obligation to extradite or prosecute was relevant in that connection. If there was no treaty providing for such an obligation, the requested State would need a legal basis to meet the extradition request. If its national law provided for jurisdiction over the crime, it might opt to prosecute, or to extradite if its internal law so permitted: several States had laws that authorized extradition in cases of dual criminality without benefit of a treaty. In such cases, however, prosecution or extradition became a right for the requested State, to be exercised under its national law, and not an obligation.

57. As for the question whether the principle of extradition or prosecution had a basis in customary international law, the principle was, as already stated, a tool with which to combat impunity. Yet in order to combat impunity, the international community must agree on the categories or types of crimes to which such a goal undeniably applied. The most serious crimes of concern to the international community as a whole were more limited in range than those covered by the bilateral and multilateral treaties which applied the principle *aut dedere aut judicare*; they included genocide, war crimes, crimes against humanity

and aggression, as was evident from the criminalization of such acts under the Rome Statute of the International Criminal Court, whose object and purpose was to put an end to impunity for the perpetrators. No State ever declared that it supported such crimes, or that it was willing to provide a safe haven for those who had committed them. Accordingly, combating those crimes was an obligation under customary international law.

58. But did the “prosecute or extradite” tool have the status of an obligation under customary law in the battle against such crimes? In recent years, as a reaction to the grave crimes committed by some individuals in various parts of the world, several offenders had been brought to justice in one way or another, or else States had been eager to extradite them in order to rid themselves of the political and moral burden of their presence. Some had been sent for trial before international tribunals, others had been returned to their home country for prosecution and some had been tried in national courts on the basis of universal jurisdiction. Yet there seemed to be no instance of their ever facing justice on the basis of a customary legal obligation to extradite or prosecute. Nevertheless, that should not deter the Commission from including in the scope of the articles the obligation to extradite or prosecute the perpetrators of the most serious crimes of international concern on a basis other than treaty law.

59. One argument advanced in favour of such an approach was that a State which was a party to a significant number of law-enforcement instruments embodying the obligation to extradite or prosecute became bound by such principle under customary international law and that the *opinio juris* condition had been met for that State. But that was a false argument which confused treaty obligations with customary law requirements. In fact, a State was bound by that principle under every treaty, subject to those treaties’ distinct conditions and in relation to different crimes. The “extradite or prosecute” tool did not exist in the abstract for that State and was not transformed into a customary obligation for it. For example, although the dozen or so sectoral conventions against terrorism contained an obligation to extradite or prosecute, each convention had its own provisions governing the bringing of charges, jurisdiction, definition of crimes, scope and judicial cooperation. Yet it could not be claimed that a State which was a party to all those conventions was under an abstract customary law obligation to prosecute or extradite terrorists, since for that State the principle *aut dedere aut judicare* was defined in each case by the specific treaty, which determined the content of the principle. However, under customary law the principle would be devoid of content.

60. In short, *aut dedere aut judicare* was an obligation incumbent on a State under its treaty law. It should also be an obligation under the draft articles in relation to the most serious crimes of international concern, such as genocide, war crimes, crimes against humanity and aggression, even if the obligation was not part of that State’s treaty obligations. It was also a right for the State in accordance with its national laws.

61. As an obligation, it had two components: prosecution and extradition. To describe it as an alternative obligation

was misleading and unnecessary. The word “alternative” should therefore be deleted from draft article 1.

62. As for the hierarchy within the obligation as between extradition or prosecution, there should be no doubt in the light of international practice and the normal interpretation of the legal texts that the obligation provided the requested State with a choice between exercising criminal jurisdiction under certain conditions or extraditing under other conditions. That was not, however, an absolute rule, since it was possible to find treaties providing for priority of jurisdiction between the States parties. For that reason, a State on whose territory a crime had been committed might have priority of jurisdiction under a certain treaty and could therefore demand that the requested State extradite the accused even though the latter State might also have criminal jurisdiction. While, as a general rule, the State on whose territory the accused was present had a choice, the relevant treaty should decide the priority or hierarchy.

63. Turning to the question of the relationship between universal jurisdiction and the principle *aut dedere aut judicare*, Mr. Hmoud gave it as his opinion that they were two entirely different things: the first was a matter of jurisdiction, the second was a legal process. In recent years, however, the measures taken to deny a safe haven to the perpetrators of the most serious crimes of concern to the international community had included resort to the universal jurisdiction of States. That trend had given rise to requests for the extradition of suspects, but on the basis of the concept of bringing the perpetrators to justice in the State exercising universal jurisdiction, rather than in implementation of an *aut dedere aut judicare* obligation *stricto sensu*. Nevertheless, the fact that the goal of denying impunity to perpetrators of crimes was common to both universal jurisdiction and the principle *aut dedere aut judicare* enabled the two issues to be linked. However, the link should be confined to the most serious crimes of concern to the international community. In other cases, a State could exercise universal jurisdiction only within the context of treaty provisions authorizing such jurisdiction, thereby applying the *aut dedere aut judicare* obligation.

64. It was hard to see how the Commission could fail to deal with the issue of the “triple alternative”, namely to extradite, prosecute or surrender the suspect to an international criminal tribunal. The creation of the international criminal court with its complementarity and extradition procedures, together with the operation of several international criminal tribunals, warranted consideration of that issue in the draft articles. Although several of those tribunals’ constituent instruments regulated the relationship between surrender to the tribunal and the obligation of a State party to extradite or prosecute, it was necessary to look into the legal situation that arose when such a relationship was not regulated by a treaty, or when there was a conflict between the State’s various international obligations.

65. In conclusion, he recommended that draft article 1 should be eventually referred to the Drafting Committee.

66. Mr. KAMTO said that Mr. Hmoud’s statement had shown that the question of the source of the obligation *aut*

dedere aut judicare still required clarification. Although he had no doubt that the Special Rapporteur would conduct extremely rigorous investigations to determine whether that obligation existed under customary international law outside the framework of treaty law, it seemed to him that if the Commission were to consider *aut dedere aut judicare* in the light of breaches of obligations owed to the international community as a whole or in relation to crimes against the peace and security of mankind, the source of the obligation could not be the same as for simple obligations under treaties that included an *aut dedere aut judicare* clause.

67. In that context, the Commission could either try to confirm the existence of such an obligation under customary international law—though he feared that such an investigation would produce a fairly meagre result, or, as suggested by Mr. Caflich, it could look for the source among the principles of international law, along with principles such as that of sovereignty, or else it could view it as an obligation closely linked to rules whose violation would constitute a breach of *jus cogens* or of a duty owed to the international community as a whole. The reason why he took that view was quite simply that it would be extremely difficult to demonstrate that States had applied the principle *aut dedere aut judicare* under customary law to past instances of genocide.

68. He also wished to point out, with respect to the linkage between *aut dedere aut judicare* and universal jurisdiction, that in the case of Hissène Habré, Senegal—the State on whose territory Habré was present—had claimed that it could not prosecute him because Senegalese law did not permit it and that the Constitution would have to be amended in order to make his prosecution possible. Belgium had requested Habré's extradition on the basis of universal jurisdiction, not on that of a bilateral extradition treaty between Belgium and Senegal.³⁶⁴ Universal jurisdiction and the obligation *aut dedere aut judicare* should not be confused; instead, the scope of each notion should be carefully delimited and any points of intersection identified.

69. Mr. COMISSÁRIO AFONSO congratulated the Special Rapporteur on an excellent second report on the obligation to extradite or prosecute which, together with the preliminary report, constituted a solid basis for tackling the substantive issues raised by the topic.

70. He agreed that the topic's aim should be to curtail the impunity of persons suspected of having committed serious crimes. In an era of globalization, the law was becoming increasingly internationalized, as was crime. At the same time, the moral values of humankind were increasingly shared by people all round the world and sovereign entities were cooperating, rather than competing, in the combating and punishment of heinous crimes. Thus the obligation *aut dedere aut judicare* translated the duty of States to act and cooperate in the defence of their common and universal interests. That partly explained the expansion of universality of suppression and jurisdiction, and also justified a pragmatic approach

to the issue under consideration. The Commission should therefore base its work on a very clear road map along the lines of that outlined by the Special Rapporteur in his preliminary report.

71. In that context, a discussion of the source of the obligation *aut dedere aut judicare* was important in order to provide the necessary legal foundations for its wider and, if possible, universal acceptance. Such acceptance could be achieved by affirming the dual nature of the obligation as a customary rule of international law, on the one hand, and as a treaty-based obligation, on the other. As Mr. Kamto had so eloquently argued at the previous meeting, the Commission must remember that *aut dedere aut judicare* had a variable legal status. He endorsed that position, which had been echoed by many other members, and also strongly supported the idea of determining categories of crimes as proposed in paragraph 20 of the preliminary report,³⁶⁵ although, of course, the Commission could change or adapt that categorization to fit its own purposes. Accordingly, the exercise should involve both the codification and the progressive development of international law, and should keep in mind the Commission's own draft code of crimes against the peace and security of mankind.

72. On draft article 1, he said that while he accepted its main thrust, greater economy with words would be advisable. It did not appear to be necessary to mention the defining elements of the concept *aut dedere aut judicare* under the heading of "scope"; a general and simple statement would suffice. No doubt the Drafting Committee could deal with that matter appropriately. In his view, paragraph 114 (d) of the second report provided a basis for the separate draft article, different from that on the use of terms, which would probably be required in order to define, clarify and pinpoint the concept of the obligation itself. In the past, defining the scope of a concept had sometimes proved a painful but nevertheless ultimately successful exercise, the topic of diplomatic protection being a case in point.

73. As to the substantive element discussed in paragraphs 82 to 93 of the report, he agreed that the term "obligation" was more appropriate than "principle" for codification purposes, but he saw no necessary incompatibility between the two terms.

74. The Commission should take the position that the obligation to extradite or prosecute most emphatically existed, even if there was disagreement as to the sources of that obligation. It should also affirm that the essence of the obligation resided in its alternative nature. The absence of that condition, or the introduction of an order of priority or other elements, would undermine the integrity and balance of the obligation. Similarly, it was necessary to exclude, or distinguish between, other concepts which were similar but different such as *primo judicare et deinde dedere* (prosecute first and extradite later) or the "triple alternative". Although the principle of complementarity as set out in the Rome Statute of the International Criminal Court served the important purpose of combating impunity, it should not be confused with *aut dedere*

³⁶⁴ See the opinion of the Dakar Court of Appeals of 25 November 2005.

³⁶⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

aut judicare. It could, however, be argued that the root cause might be the same. If a State was unwilling or unable to prosecute, it should surrender the alleged offender.

75. As to the personal element, the term “persons” would require definition in the draft article on the use of terms. In paragraph 108 the Special Rapporteur presented a provisional draft article X which was presumably a reminder of the principle *pacta sunt servanda*. In addition to that provision, the Commission should also contemplate situations beyond treaty obligations, in which, even in the absence of treaty law, States were duty bound to extradite or prosecute. The categorization of crimes might possibly take care of that concern.

76. He supported the referral of draft article 1 to the Drafting Committee.

77. Mr. VÁZQUEZ-BERMÚDEZ said that the obligation upon custodial States to extradite or prosecute alleged offenders who were in their territory constituted a formidable legal tool for securing justice, because it ensured that alleged offenders who were neither in the State where the crime had been committed, nor in a State that had a legal base for exercising criminal jurisdiction over the conduct or the offender, could be brought before a competent criminal court.

78. Although the legal theory regarding *aut dedere aut judicare* derived from Grotius³⁶⁶ and Vattel,³⁶⁷ more modern proponents, such as Gilbert Guillaume,³⁶⁸ claimed that the related precept of *aut dedere aut punire* could be traced further back to the Spanish legal writer Diego de Covarrubias y Leyva. The first international convention to include a provision on the obligation *aut dedere aut judicare* had been the International Convention for the Suppression of Counterfeiting Currency, adopted in Geneva in 1929. Following its inclusion in some subsequent international instruments, recognition of the obligation had become generalized with the entry into force of the 1970 Convention for the suppression of unlawful seizure of aircraft and a number of other conventions on cooperation in criminal matters. Since then, the international community had tended to include the obligation to extradite or to prosecute in practically all multilateral treaties concerning the suppression of certain crimes. Thus, the obligation *aut dedere aut judicare* was included as a necessary mechanism in all treaties on criminal matters.

79. The Special Rapporteur’s study of numerous multilateral and bilateral treaties containing that obligation would be a useful means of revealing evidence of *opinio juris* on the subject. Of course, in order for the Commission to decide whether *aut dedere aut judicare* was an obligation under customary law, that study would have to be rigorous and complemented by an analysis of national laws, State practice and existing case law.

³⁶⁶ See footnote 359 above.

³⁶⁷ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), English translation by C. G. Fenwick, Washington D.C., Carnegie Institution, 1916.

³⁶⁸ G. Guillaume, “Terrorisme et droit international”, *Collected Courses of the Hague Academy of International Law, 1989*, vol. 215 (1990), pp. 287–416.

80. Obviously, the Commission’s work consisted not only in codifying international law, but also in putting forward proposals *de lege ferenda* for the progressive development of international law. In addition, the Commission must base its deliberations on its own substantial achievements, such as the 1996 draft code of crimes against the peace and security of mankind,³⁶⁹ which elaborated on that obligation. In determining and defining the scope of *aut dedere aut judicare*, the Commission should clarify the links which might exist with the principle of universal jurisdiction and distinguish between the two concepts. The obligation should not cover ordinary crimes but only limited categories of offences, such as crimes against the peace and security of mankind, crimes under international law, and the most serious crimes of concern to the international community.

81. As for the content of the obligation, it seemed inappropriate to describe the obligation as an alternative between extradition and prosecution, because a State’s obligation to prosecute an alleged offender present in its territory arose only when it did not grant extradition. In other words, the custodial State’s refusal to allow extradition generated the obligation to prosecute the suspect present in its territory and to exercise its criminal jurisdiction. If, on the other hand, it complied with a request for extradition, it would have fulfilled its obligation *aut dedere aut judicare*.

82. On the other hand, he agreed with Mr. Gaja that if the custodial State possessed the basis for exercising jurisdiction and received a request for extradition, the obligation was instead an obligation *aut judicare aut dedere* and the obligation to prosecute would not then flow from a refusal to allow extradition. If the custodial State prosecuted the alleged offender, it would have honoured its obligation but if, for any reason, it decided not to prosecute, it must allow the suspect’s extradition.

83. If no request for extradition was submitted, the custodial State would meet the obligation *aut dedere aut judicare* if it prosecuted the alleged offender. The Commission itself had provided guidance in that respect in paragraph (7) of the commentary to article 9 of the draft code of crimes against the peace and security of mankind, where it stated:

In the absence of a request for extradition, the custodial State would have no choice but to submit the case to its national authorities for prosecution. This residual obligation is intended to ensure that alleged offenders will be prosecuted by a competent jurisdiction, *that is to say*, the custodial State, in the absence of an alternative national or international jurisdiction.³⁷⁰

Further, paragraph (2) of the commentary to article 9 stated that:

[t]he fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.³⁷¹

84. As some members had indicated, there were some factors which could influence compliance with the

³⁶⁹ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

³⁷⁰ *Ibid.*, p. 32.

³⁷¹ *Ibid.*, p. 31.

obligation, for example when the basic laws of the custodial State prohibited the extradition of its nationals, which would mean that it could not allow extradition, in which case it would have to fulfil the obligation by prosecuting the suspect. Basic human rights standards were also important. The laws of many States and international conventions on extradition provided, for example, that extradition was not obligatory if the statutory penalties in the requesting State included degrading treatment or the death sentence, but that if it was certain that no such penalties would apply, extradition could be granted. It was also important to take account of guarantees of due process. In addition, it might be necessary to set priorities in the event that there were two or more competing requests for extradition of the same alleged offender by two or more States.

85. Lastly, surrender to the International Criminal Court or other international criminal tribunals was something entirely distinct from the obligation to extradite or prosecute. Nevertheless, any interconnections that might arise when the two processes were being carried out should be addressed, even though article 90 of the Rome Statute of the International Criminal Court governed such situations.

86. Turning to the text of draft article 1, he agreed that it should be worded in a simpler and more direct fashion. The reference to the “establishment, content, operation and effects” of the obligation could be deleted, as those subjects would be developed in later articles. On the other hand, draft article 1 should make it clear at the outset that the State on which the obligation was incumbent was the custodial State, not simply all States in general, and that it applied not to persons under its jurisdiction but to alleged offenders. That would avert the problem of determining whether the person was under the jurisdiction of the State or in its territory. In the definition of the custodial State, it might be made clear whether the obligation applied only when the alleged offender was in the territory of the State or also when he or she was under the jurisdiction of the State, for example, in a ship flying the flag of that State or in similar situations.

87. In conclusion, he thanked the Special Rapporteur for his excellent work and encouraged him to continue in the same vein.

88. Mr. GALICKI (Special Rapporteur), summing up the debate on his second report on the obligation to extradite or prosecute (*aut dedere aut judicare*), expressed his sincere gratitude to all members of the Commission for their constructive and friendly criticism. His special thanks went to the newly elected members who had responded to his request for comments, not only on the second report, but also on the preliminary report.

89. He had included in the second report many difficult problems and questions that had arisen, for the purpose of obtaining answers and suggestions, both from the members of the Commission and, later, from the delegates to the Sixth Committee. Members of the Commission had offered a wide variety of views, remarks and suggestions during the debate both on the substance and on the formal aspects of the exercise, starting with the title and ending

with the choice of the final form to be given to the Commission’s work.

90. As to the title, the notion of an “obligation” seemed to prevail over that of a “principle”. Accordingly, he agreed that, at least for the present, the title should be retained as currently formulated. Indeed, an “obligation” *aut dedere aut judicare* seemed to provide safer ground for continuing further constructive analysis than did a “principle”. It did not, of course, exclude the possibility, and even the necessity, of considering the parallel question of the right of States to extradite or prosecute as a kind of a *sui generis* counterbalance to that obligation.

91. Some doubts had been expressed as to the use of the Latin formula “*aut dedere aut judicare*”, and particularly with regard to the “*judicare*” element, which did not precisely reflect the scope of the term “prosecute”. While he agreed with those remarks, he thought it premature at that stage to concentrate on the precise formulation of the terms. In the preliminary report, he had reviewed the various terms used at different periods of the development of the obligation, starting with Grotius’s famous phrase “*punire*”. The precise meaning and exact scope of the term “*judicare*”, which was the one now generally used, should be defined in the future draft article 2, “Use of terms”, as should the other terms as used for the purposes of the draft articles. The total elimination of the Latin origin of the obligation in question would not be appropriate, since it persisted both in legislative practice and in the doctrine.

92. The debate in the Commission had generally focused on three main problems: first, how to approach the topic from the standpoint of the sources of the obligation; second, what kind of interrelationship, if any, between the obligation *aut dedere aut judicare* and the concept of universal jurisdiction should be accepted for the purposes of the draft; and, third, how the limits of the obligation’s scope and of the application of the future draft should be established. Although those questions had already been posed at the previous session, members’ views had been significantly clarified during the debate at the current session.

93. As to the first question, although there was a general consensus that treaty provisions existed which could be considered an incontrovertible source of the obligation *aut dedere aut judicare*, there seemed to be a growing interest among members in the possibility of also recognizing a customary basis for the obligation, at least with regard to some categories of crimes such as the most serious crimes recognized under customary international law. He conceded that, in giving examples of such crimes, he had omitted crimes against the peace and security of mankind. But he was pleased to note that one member of the Commission had added that category to those which could be considered as a possible background for the application of the obligation.

94. At the previous session, members of the Commission had been much more cautious with regard to the question whether the obligation had a customary basis. Now, their attitude seemed generally more permissive, although he acknowledged the warnings from many

members that such a conclusion should be based only on a very solid analysis of the international, legislative and judicial practice of States. As one member had correctly stressed, for that purpose it was necessary to ascertain both the practice and *opinio juris* of a large number of States. Therefore, it seemed worthwhile to continue requesting States to provide information, either directly from Governments or through their delegates to the Sixth Committee, although the latter's contribution had been criticized by some members.

95. The growing number of responses to the request contained in Chapter III of the Commission's report on the work of its fifty-eighth session in 2006 justified a certain optimism as to the likelihood of sufficient representative information being received from States in time for inclusion in the third report, to be submitted in 2008.

96. As to the second question, concerning universal jurisdiction, an evolution could also be seen as compared to the position taken by members the previous year. Then, the prevailing opinion had been that the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction should be given very careful treatment, and that the distinction between universal jurisdiction and the obligation *aut dedere aut judicare* should be clearly drawn. During the current session, however, a more permissive approach had been taken by a large number of members. It had been suggested that the two institutions should be studied in parallel, and that universal jurisdiction needed to be analysed in order to determine whether and, if so, where, that basis for jurisdiction might overlap with the obligation *aut dedere aut judicare*. He agreed with those suggestions, especially in the light of the interesting conclusions referred to by one member and contained in the resolution adopted by the Institute of International Law in 2005 in Krakow, entitled "Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes".³⁷² A mutual relationship, and to some extent an interdependence, between universal jurisdiction and the obligation *aut dedere aut judicare* had been clearly revealed in that resolution. However, he was convinced that the main focus of the Commission's consideration should remain the obligation to extradite or prosecute and that it should not be dominated by the question of universal jurisdiction.

97. Coming to the third question, concerning the scope of application of the draft articles and, as some members had suggested, the scope of the obligation *aut dedere aut judicare*, he agreed with the view that the two components of the obligation should not be treated as alternatives, but that the interrelationship and interdependence of the two elements—*dedere* and *judicare*—should be carefully and thoroughly analysed, preferably in the third report, which would also consider the specific characteristics of both elements and the conditions necessary for their application. Taking into account the opinions expressed by most members of the Commission, he would consider withdrawing his initial proposal for a possible "triple alternative" and would instead try

to present and analyse possible specific situations relating to the surrender of persons to the International Criminal Court which might have an impact on the obligation *aut dedere aut judicare*. However, he was not fully convinced that the time element in the proposed draft article 1 dealing with the scope of application should be treated in a unified way, without any differentiation between the periods relating to the establishment, operation and effects of the obligation in question.

98. Many members had suggested referring draft article 1 to the Drafting Committee for further elaboration. In principle, he was not opposed to that suggestion, but for practical reasons he would suggest instead that it should be referred to the Drafting Committee along with some other draft articles which he was planning to present at the next session. A small group of draft articles could more easily be considered by the Drafting Committee, taking into account possible interdependences between them. He had made a number of substantive suggestions concerning such future articles in the final part of his second report, and they seemed to have been fairly favourably received by the members of the Commission.

99. In view of the very full participation in the debate and owing to time constraints, he had been able to touch only on the most important general problems and questions raised. He could assure members that all remarks, views and comments, positive as well as critical, had been carefully noted and would be taken into account in the next report. He wished to express once more his deep gratitude to all members of the Commission for their valuable assistance and friendly help in his work on the obligation *aut dedere aut judicare*, which, thanks to them, would be of a better standard and much more effective. He was equally grateful to the Secretariat for assisting him in gathering appropriate materials and in preparing his two reports.

100. The CHAIRPERSON said that if he heard no objection, he would take it that, as recommended by the Special Rapporteur, the Commission wished to leave draft article 1 in abeyance pending the submission of further draft articles at the next session.

It was so decided.

Expulsion of aliens (concluded)* (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

PROGRESS REPORT BY THE CHAIRPERSON
OF THE DRAFTING COMMITTEE

101. Mr. YAMADA (Chairperson of the Drafting Committee), introducing the third report of the Drafting Committee to the current session of the Commission, said that unlike the two previous reports, it was simply an oral progress report, and was devoted to the topic "Expulsion of aliens".

³⁷² Institute of International Law, *Yearbook*, vol. 71, Part II, Session of Krakow (2005), Resolution III, Paris, Pedone, 2006, p. 297.

* Resumed from the 2944th meeting.

102. At its 2926th meeting, the Commission had referred draft articles 1 and 2 proposed by the Special Rapporteur in his second report,³⁷³ as later revised, to the Drafting Committee. At its 2944th meeting, the Commission had also referred to the Drafting Committee draft articles 3 to 7, contained in the Special Rapporteur's third report (A/CN.4/581).

103. The Drafting Committee had held three meetings, on 26, 30 and 31 July 2007. While it had made good progress in its consideration of the draft articles, it had been unable to complete its work. Some of the articles that it had adopted had a bearing on the draft articles still to be considered. It had therefore been decided that the draft articles provisionally adopted thus far should remain in the Drafting Committee until it completed its work. That would afford it the flexibility to revisit all those draft articles once it had a full picture of the content of all the draft articles referred to it at the present session.

104. He wished to pay tribute to the Special Rapporteur, whose mastery of the subject, guidance and cooperation had greatly facilitated the Drafting Committee's work. He also thanked the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome.

105. The Drafting Committee had been able to make progress at three levels of generality. First, it had been able to reach agreement on several texts of parts of draft articles, including on the deletion of certain proposed texts. Secondly, it had decided to retain certain provisions in square brackets, on the understanding that it would examine them at a later stage in light of the treatment to be given to certain articles that had already been proposed or of whether the terms in question would be used in the draft articles at all. Thirdly, it had begun but been unable to complete discussion on some draft articles, although several alternative texts had been proposed.

106. Regarding the agreement reached on several texts of draft articles, including on the deletion of certain texts, the Drafting Committee had provisionally adopted texts of parts of draft articles 1 and 2, relating to scope and use of terms respectively. It would, however, revisit draft article 1, on scope, once it became clear how questions relating to expulsion of nationals, including questions of dual and multiple nationality, would be dealt with. With regard to draft article 2, the Drafting Committee had been able to reach agreement on the use of the terms "expulsion" and "alien" for the purposes of the draft articles. The definition of "expulsion" comprised a formal act (*acte juridique*) and conduct attributable to a State by which an alien was compelled to leave the territory of that State. The various elements would be further developed in the commentary, including the question of intention in the case of conduct consisting of an omission.

107. In view of the inclusion of conduct in the definition of expulsion, the Drafting Committee had not seen any reason for retaining the definition of "conduct" proposed by the Special Rapporteur in the light of the debate in plenary. The definition of "expulsion" did not include extradition

to another State or surrender to an international criminal court. The definition of "alien" omitted the phrase "except where the legislation of that State provides otherwise", which had been intended to safeguard the interests of those aliens who had acquired certain protected rights. That matter would be dealt with in the commentary. As the definition was linked with paragraph 2 of draft article 1, which was pending, the Drafting Committee might have to return to it later. In addition to deleting the definition of "conduct", the Drafting Committee had deleted the definition of "territory". It had been felt generally that the proposed definition might give rise to more problems than it solved. A more detailed description of the discussion on these issues would be given at the appropriate time.

108. The Drafting Committee had decided to place square brackets around draft article 1, paragraph 2. That provision, regarding aliens of particular relevance for the purposes of the draft articles, had a bearing on the definition of "alien" in draft article 2 and needed to be addressed at a later stage, once the Drafting Committee had decided further to clarify the scope of the draft articles through an inclusionary or exclusionary provision or a combination thereof. A new draft article addressing the exclusionary aspects of the matter had been proposed by the Special Rapporteur, but no definitive conclusions had been reached on it.

109. The Drafting Committee had also decided to examine the definition of "frontier" at a later stage when it would become clearer from the other draft articles whether such a definition was required. The understandings reached on texts or their deletion and on putting square brackets around certain provisions had been reflected in a conference room paper.³⁷⁴

110. Turning to provisions on which the Drafting Committee had been able to have some preliminary discussion without reaching a conclusive decision, he said, first, that in the light of the discussion on draft article 1, paragraph 2, the Special Rapporteur had proposed a new draft article which sought to exclude from the application of the draft those aliens whose departure from the territory of a State might be governed by special rules of international law. That provision was intended to cover aliens with special privileges and immunities and members of armed forces. The discussions in the Drafting Committee had resulted in alternative texts.

111. Secondly, the Drafting Committee had begun discussions on draft article 3, but had been unable to complete them owing to lack of time. The Special Rapporteur had proposed a text that sought, in part, to combine the original paragraphs 1 and 2. The texts proposed in relation to those draft articles on which discussions had been incomplete had been reflected in a conference room document, together with draft articles 4 to 7, which the Drafting Committee had not had an opportunity to discuss.

112. He hoped that the Commission would wish to take note of the progress made so far, which should assist the Drafting Committee in continuing its work on the topic at the following session.

³⁷³ Yearbook ... 2006, vol. II (Part One), document A/CN.4/573.

³⁷⁴ Unpublished.

113. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to take note of the progress report by the Chairperson of the Drafting Committee.

It was so decided.

Shared natural resources (concluded)* (A/CN.4/577 and Add.1–2, sect. A, A/CN.4/580, A/CN.4/L.717)

[Agenda item 2]

REPORT OF THE WORKING GROUP

114. Mr. CANDIOTI (Chairperson of the Working Group), introducing the report of the Working Group (A/CN.4/L.717), said that at its 2920th meeting, on 16 May 2007, the Commission had decided to establish a Working Group on shared natural resources to assist the Special Rapporteur in formulating a future work programme, taking into account the views expressed in the Commission on the Special Rapporteur's fourth report. The Working Group had held four meetings and had dealt with three issues, namely, the substance of the draft articles on the law of transboundary aquifers adopted on first reading;³⁷⁵ the final form that the draft articles should take; and issues involved in the consideration of oil and gas. Paragraphs 4 to 7 of the report of the Working Group reflected its deliberation on those matters.

115. It had been recognized that the draft articles adopted on first reading had already been submitted to States for comments. The comments made in the Working Group on the substance and form of the draft articles had been understood to be of an informal character, intended to assist the Special Rapporteur in considering future work on the topic. The Working Group had also exchanged views regarding the future consideration of shared oil and gas resources. It had been agreed, as a first step, that a questionnaire on State practice would be prepared for circulation to Governments. That measure would be accompanied by an effort by the Secretariat to identify expertise within the United Nations system to provide the necessary scientific and technical background information for further consideration of the subject. So far, preliminary contacts had been established with the United Nations Environment Programme (UNEP), whose Division of Technology, Industry and Economics was based in Paris, and with the United Nations Economic Commission for Europe.

116. It was his hope that the Commission would wish to take note of the report of the Working Group. He expressed appreciation to all the members of the Working Group for their useful contributions, to the Special Rapporteur for his diligence and helpful guidance, and to the Secretariat for its very efficient assistance to the Working Group.

* Resumed from the 2931st meeting.

³⁷⁵ For the text of the draft articles on the law of transboundary aquifers adopted on first reading by the Commission and the commentaries thereto, see *Yearbook ... 2006*, vol. II (Part Two), Chap. VI, sect. C, pp. 91 *et seq.*, paras. 75–76.

117. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to take note of the report of the Working Group on shared natural resources.

It was so decided.

The meeting rose at 12.50 p.m.

2948th MEETING

Monday, 6 August 2007, at 10.10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(Vice-Chairperson)

Present: Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Draft report of the Commission on the work of its fifty-ninth session

CHAPTER V. Shared natural resources (A/CN.4/L.709 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to consider chapter V of the draft report on shared natural resources.

A. Introduction (A/CN.4/L.709)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 11

Paragraphs 4 to 11 were adopted.

Paragraph 12

2. Ms. ESCARAMEIA proposed that the wording of the first sentence should be amended to read: "Pollution in relation to oil and natural gas stored in reservoir rock itself seemed to be minimal."

Paragraph 12, as amended, was adopted.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

Paragraph 15 was adopted, subject to a minor drafting change.