Document:-
A/CN.4/2900

Summary record of the 2900th meeting

Topic:
The obligation to extradite or prosecute (*aut dedere aut judicare*)

Extract from the Yearbook of the International Law Commission:-
2006, **vol. I**

would be possible to find a solid foundation in generally accepted customary norms. Some promising examples stemming from States' legislative, executive and judicial practice were cited in paragraphs 44 to 46 of the report, together with the celebrated statement of the Government of Belgium that "Belgium recalls that it is bound by the general legal principle *aut dedere aut judicare*, pursuant to the rules governing competence of its courts". A more extensive collation of such practice would first be necessary if the Commission were to codify the principle effectively.

64. Chapter IV of the report dealt with the scope of the obligation to extradite or prosecute which, in general, could be seen as allowing a State a choice between which of the two parts of the obligation it was going to fulfil. It was presumed that after fulfilling one part of that composite obligation—either *dedere* or *judicare*—the State was free not to fulfil the other part. It was, however, possible, that a State might wish to fulfil both parts of the obligation. For example, after establishing its jurisdiction, prosecuting, putting on trial and sentencing an offender, a State might decide to extradite or surrender that person to another State, also entitled to establish its jurisdiction, for the purpose of enforcing the sentence.

65. As paragraph 50 of the report showed, the description of the obligation in question differed significantly in detail from one convention to another. Its development could be traced from the Convention for the suppression of unlawful seizure of aircraft, opened for signature at The Hague on 16 December 1970, through to later conventions dealing with terrorist offences and other crimes of international concern. Although the traditional possibility offered was that of either extraditing or prosecuting, in the draft code of crimes against the peace and security of mankind, the Commission had introduced a third, *sui generis* possibility, a "triple alternative" allowing for parallel jurisdictional competence to be exercised not only by interested States but also by international criminal courts.[326] That constituted a significant step in the development of the principle *aut dedere aut judicare*, although an even earlier example of such a threefold choice was to be found in the convention for the creation of an international criminal court, which had been opened for signature at Geneva on 16 November 1937 but which, unfortunately, had never entered into force.[327]

66. Chapter V of the report discussed some vital methodological questions. Without prejudice to the final form of the Commission's work on the topic, it would be useful to formulate some rules concerning the concept, structure and operation of the principle *aut dedere aut judicare*, to take account of the views of members of the Commission and of information and suggestions from Member States in the Sixth Committee. As stated in paragraph 60 of the report, the Commission could address a written request for information to States concerning their recent practice with regard to the topic. Any further information that Governments considered to be of relevance would be gratefully received by the Commission and the Special Rapporteur. That paragraph went on to list five areas that would be of particular interest.

67. The last part of the report contained a preliminary plan of action which should be treated as a very general road map for the Commission's future work in that field. As the driver, he—the Special Rapporteur—would be pleased to receive any suggestions for corrections, changes and improvements, including suggestions for short cuts along the way. Paragraph 61 of the report contained a set of detailed suggestions regarding the 10 main tasks which would have to be completed under that plan. While he was aware that the plan was far from perfect, he trusted that, with the assistance of the Commission, he would be able to proceed satisfactorily on that basis.

Organization of work of the session (*concluded*)

[Agenda item 1]

68. Mr. GAJA (Chairperson of the Planning Group) announced that the Planning Group would be composed of Mr. Addo, Mr. Candioti, Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus,Mr. Pellet, Mr. Sreenivasa Rao, Mr. Valencia-Ospina and Mr. Yamada, with Ms. Xue, *ex officio*.

The meeting rose at 1 p.m.

2900th MEETING

Wednesday, 26 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (*continued*) (A/CN.4/571)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to consider the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/571) introduced the previous day by the Special Rapporteur, Mr. Galicki.

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[326] See *Yearbook … 1996*, vol. II (Part Two), articles 8, 9 and 10 and commentary thereto, pp. 27–33.

[327] League of Nations, document C.547(1)M.384(1)1937.V, reproduced in United Nations, *Historical Survey of International Criminal Jurisdiction—Memorandum submitted by the Secretary-General* (Sales No.: 1949.V.8), p. 88, appendix 8.

2. Ms. ESCARAMEIA said that she had several comments to make on the preliminary report.

3. First of all, with regard to the title, the Special Rapporteur, after reviewing a number of possibilities, asked in paragraph 30 whether it would be preferable to retain the most common translation of *judicare*, namely, to prosecute, or whether it should be replaced by "try" or "adjudicate". In her view, it would be best to use the word which covered the largest number of situations, in particular those prior to the commencement of prosecution, for example, the start of an investigation. If "try" or "adjudicate" did not have a broader meaning than "prosecute", then the latter should be retained.

4. One problem which had arisen concerned the relationship between the principle *aut dedere aut judicare* and universal jurisdiction, including that of the International Criminal Court. The Special Rapporteur took up the question in the introduction and in chapters II, III and IV. It was important to make it clear that the concepts were quite distinct. The Special Rapporteur gave a definition of *aut dedere aut judicare* in paragraph 10 and of universal jurisdiction in paragraph 19. The problem stemmed in part from the fact that a number of treaties dealt with both concepts at the same time and sometimes even provided for referral to the International Criminal Court. The Special Rapporteur cited articles 8 and 9 of the draft code of crimes against the peace and security of mankind,[328] which also addressed the two concepts at the same time. The 1935 Harvard Research Draft Convention had done so as well.[329] Although, in the case of universal jurisdiction, it was possible to prosecute the perpetrators of a much larger number of offences and, conversely, a country which established its universal jurisdiction could request extradition in many more cases, the two concepts were still different and it should be made clear that universal jurisdiction was not part of the topic.

5. Another practical problem related to the sufficiency of the evidence on which the obligation *aut dedere aut judicare* was based. The Special Rapporteur indicated that difficulties had been encountered in practice with the actual application of the principle, which was often found in outdated bilateral or multilateral conventions or treaties or national laws that did not take new developments into account. In that connection, she endorsed the resolution which had been adopted on 1 September 1983 by the Institute of International Law and which provided in part I, paragraph 2, that States should be encouraged to agree on a system of extradition and in part IV, paragraph 1, cited in paragraph 12 of the report, that the rule *aut judicare aut dedere* should be strengthened and amplified and it should provide for detailed methods of legal assistance.[330] Problems arose when outdated laws still in force allowed many obsolete grounds for refusing to extradite which it should not be possible to invoke in connection with international crimes, such as the immunity of State officials. Moreover, some of those laws did not provide for the safeguards which persons who were extradited should enjoy, although it was important for them to do so, the contemporary view being that extradition must be refused if there was a risk that the extradited person might be tortured or executed or might not receive a fair trial.

6. In paragraph 20 of his preliminary report, the Special Rapporteur referred to three categories of crimes. She thought that, for the first category at least (crimes under international law), special rules were needed because very few grounds should be allowed for refusing extradition and almost none at all in the case of very serious offences. In the latter case, if a State did not extradite, it had to prosecute.

7. The Special Rapporteur considered the question whether the principle *aut dedere aut judicare* came only under treaty law or whether it was also a part of customary international law. In her view, for certain crimes, it clearly came under customary law. That was the conclusion reached in the two main studies carried out on the topic since the adoption of the draft code of crimes against the peace and security of mankind, one in 2005 by the International Committee of the Red Cross on war crimes in customary international humanitarian law[331] and the other, a very comprehensive 2001 study by Amnesty International on the practice of 125 States.[332] The Special Rapporteur noted that most of the doctrine also took that position, the many treaties to which States were parties having demonstrated the existence of a general intention (*opinio juris*), which, together with the considerable practice of States in the area, demonstrated the existence of a custom. Moreover, the study of practice suggested that there was a tendency to consider that there was even an obligation to extradite or prosecute in the case of crimes under international law.

8. With regard to the sources of the obligation, it was vital to look at the current practice of States, which was evolving very rapidly. She therefore endorsed the Special Rapporteur's intention to examine not only international treaties, international custom and general principles of law, but also national legislation and State practice. However, account must also be taken of the practical experience of entities and individuals involved in extradition procedures, such as national courts, lawyers who had pleaded extradition cases in the courts, and non-governmental organizations.

9. On the relationship between the obligation to extradite or prosecute and other areas of international law, it might be necessary to give more attention to human rights. That was particularly important in referring to the grounds for refusing to extradite or prosecute, such as immunity or safeguards which the accused individuals must be afforded, as well as situations in which there was an obligation to extradite under customary international law. Consideration should also be given to the protection provided under a number of international instruments

[328] *Yearbook … 1996*, vol. II (Part Two), pp. 27–32.

[329] *Supplement to the AJIL* (see footnote 286 above), Part I "Extradition", p. 15 *et seq.*, and Part II, "Jurisdiction with Respect to Crime", p. 435 *et seq.*

[330] *Tableau des résolutions adoptées (1957–1991)*, Paris, Pedone, 1992, p. 161.

[331] See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, vol. I (Rules) and Vol. II (Practice)*, Cambridge University Press, 2005.

[332] *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation* (IOR 53/002/2001), 31 August 2001 (available on Amnesty International's website, www.amnesty.org).

and customary international law with regard to the various aspects of the practical application of *aut dedere aut judicare*. The Special Rapporteur touched on the question briefly in point (10) of his preliminary plan of action, but the relation between that principle and human rights should be taken up separately and in greater depth.

10. In paragraph 59 of the report, the Special Rapporteur stated that it would be premature to take a decision on the final form of the work on the topic and that it would be useful to hear the opinions of the other members of the Commission. She was in favour of draft articles, since the abundance of practice would be conducive to an exercise of codification and progressive development.

11. The issues raised under points (8) to (10) of the preliminary plan of action had not been discussed in the report; the Special Rapporteur should clarify them later. The question raised in point (10) must be dealt with in a very practical manner, and not abstractly.

12. Mr. MOMTAZ said that the topic under consideration was very much a matter of current concern. There was clearly a great deal of interest in international crimes and international methods for trying and punishing offenders, as shown not only by the abundant and interesting production of doctrine, but also and above all by the work on universal jurisdiction which had been carried out since 2000 by prestigious institutions and which also touched on the topic, particularly that of the International Committee of the Red Cross referred to by Ms. Escarameia, that of the International Law Association in 2000,[333] that of Princeton University under Mr. Cherif Bassiouni, which had led to the Princeton Principles, adopted in 2001,[334] and especially that of the Institute of International Law, including the resolution it had adopted in Krakow in 2005.[335] That material was useful to the Commission in that it lay the groundwork, but it also meant that the Commission had to raise the bar even higher. He was convinced that the Special Rapporteur would be up to the task, as his preliminary report had so strikingly shown.

13. Turning to the report itself, he welcomed the Special Rapporteur's proposal in paragraph 61 for a "preliminary plan of action", which would undoubtedly help the Commission to clarify the various aspects of what was a very complex topic. Points (4) and (5) of the plan addressed the crucial and interdependent questions whether the obligation *aut dedere aut judicare* was rooted in customary norms and, if so, how it could be reconciled with the at times contradictory requirements of the institution of universal jurisdiction, which clearly had a foundation in customary law.

14. With regard to the first question, the Special Rapporteur rightly asked in paragraph 6 whether the obligation *aut dedere aut judicare* could have a basis in customary law, "at least with respect to specific international offences". That raised the issue of what distinction should be drawn between the various crimes. In his own view, it was necessary to distinguish between crimes under international law, i.e. crimes defined by treaty instruments, and international crimes, which had a foundation in customary law. The latter—war crimes, the crime of genocide and crimes against humanity—were special on account of their extremely serious nature and were usually regarded as being prejudicial to the international community as a whole. They were sometimes defined in treaty instruments ratified by virtually all States and had sometimes been codified in customary law; the International Criminal Court and *ad hoc* tribunals had jurisdiction to deal with them. It was in the case of such crimes that the question raised by the Special Rapporteur took on particular importance. In other words, the issue was whether, above and beyond any treaty framework, States were required by customary law to extradite or prosecute persons present in their territory who had been accused of having committed such crimes. Clearly, the question deserved to be considered in greater depth; a systematic study of State practice was needed.

15. The second question related to the practice of States whose legislation permitted the courts to exercise universal jurisdiction with regard to persons suspected of having committed such international crimes who were present in their territory. More specifically, assuming that the obligation *aut dedere aut judicare* had a foundation in customary law, could the State in whose territory the person accused of an international crime was present invoke its universal jurisdiction to refuse to extradite? In such a case, was it possible to reverse the order of priority that the alternative obligation established and to allow the State to refuse extradition so that it could try the accused offender in its courts? In view of practice, it seemed that extradition could be refused in certain cases, for example, as noted by Ms. Escarameia, on the basis of international human rights law. Also of relevance were bilateral extradition treaties and, in particular, the Model Treaty on Extradition adopted by the General Assembly in resolution 45/116 of 14 December 1990, which made express provision for cases in which the consequence of extradition might be the impunity of the person who was the subject of a request for extradition. According to article 3 of the Model Treaty, extradition was not granted "[i]f the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty". One such reason should be the immunity of political leaders. The Second Additional Protocol of 17 March 1978 to the European Convention on Extradition of 13 December 1957 also provided for such an exception. It might also be worth considering whether extradition could be refused on the ground that the accused risked being deprived of a fair trial and whether such a refusal could be invoked independently of any treaty relation between the States concerned. An answer to that question likewise required a detailed examination of State practice.

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[333] International Law Association, *Report of the Sixty-ninth Conference, held in London, 25–29 July 2000*, Committee on International Human Rights Law and Practice, "Final report on the exercise of universal jurisdiction in respect of gross human rights offences", pp. 403–442.

[334] M. C. Bassiouni, "Universal jurisdiction for international crimes: historical perspectives and contemporary practice", *Virginia Journal of International Law*, vol. 42 (2001–2002), pp. 81–162. See also S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Princeton University, 2001.

[335] Institute of International Law, *Yearbook*, vol. 71, Part II, Session of Krakow 2005—Second Part, resolution III, Paris, Pedone, 2005, p. 297.

16. Recent practice showed that States which permitted their criminal courts to exercise universal jurisdiction usually preferred to give priority to the courts of the State in whose territory the crime had been committed; in other words, they preferred that their courts did not exercise the universal jurisdiction which they had been granted. The obligation *aut dedere aut judicare* therefore appeared to take precedence over universal jurisdiction. In a decision along those lines taken on 10 February 2005, Germany's Federal Prosecutor's Office had preferred not to apply, in *Center for Constitutional Rights et al.* v. *Donald Rumsfeld et al.*, the German Code of International Criminal Law adopted on 26 June 2002 which granted German courts universal jurisdiction, referring to the subsidiary nature of universal jurisdiction. A study of State practice should enable the Commission to determine whether or not that was an isolated case and whether the obligation *aut dedere aut judicare* did in fact take precedence over universal jurisdiction.

17. With regard to point (10) of the preliminary plan of action, which dealt with the relationship between the obligation *aut dedere aut judicare* and principles such as the sovereignty of States, human rights protection and the universal suppression of certain crimes, recent practice had demonstrated that the importance which the international community now attached to the international protection of human rights and action to combat impunity for international crimes was likely to encourage the exercise of universal jurisdiction in cases where respect for the sovereignty of States would probably favour impunity.

18. The CHAIRPERSON, speaking as a member of the Commission, said he was certain that the Special Rapporteur would take account of the problem Mr. Momtaz had raised of the subsidiary nature of universal jurisdiction in relation to the principle *aut dedere aut judicare*.

19. Mr. MELESCANU said that the question of the obligation to extradite or prosecute was very old, but it had recently become a matter of enormous practical importance as a result of globalization, one of the consequences of which was the free movement of goods and persons, including criminals. The Commission should not seek to control that phenomenon, but should nevertheless attempt to adopt rules to prevent the principle of immunity or universal jurisdiction from being used to ensure the impunity of persons responsible for acts with a bearing on the foundations of international law. Just the day before, the President of the ICJ had expressed the view that the international community should give priority attention to the relationship between immunity and impunity.

20. The Commission should first analyse the evolution of the principle *aut dedere aut judicare* at the international level, but without focusing on the background, with a view not only to the codification of the principle based on State practice, but also to its progressive development. He agreed with the course of action proposed by the Special Rapporteur in chapters V and VI of the report ("Methodological questions" and "Preliminary plan of action"), but the Commission should adopt a broader approach that took account of recent developments. It could not be restricted to the *aut dedere aut judicare* alternative because that principle now included a third pillar at the international level, namely, the possibility and indeed the obligation for States to use international courts. That shift to international courts was not a new aspect of the principle *aut dedere aut judicare*, but, rather, an exception whose impact should be looked into. The jurisdiction of international courts had itself changed fundamentally. Created in the past by victorious countries to try the war crimes of defeated countries, such bodies now dealt with international crimes.

21. In his opinion, the title of the topic should not refer to an obligation because at issue was the right of a State to choose between two possibilities: extradition or prosecution. It would be better to refer to a principle and to decide how it was applicable in State practice. It was possible to speak of the obligation to extradite for certain categories of crimes, such as non-compliance with international obligations, but then that obligation would have to be expressly accepted by States in bilateral or multilateral agreements. It could not derive from a principle of customary law.

22. One question that had not been raised in the report or by other members of the Commission was that of dual nationality and the customary principle in accordance with which States did not extradite their own nationals except in cases expressly provided for in bilateral or multilateral agreements. He had been involved in the case of a Romanian who had also had the nationality of another country in whose territory he had committed very serious offences and which had thus requested his extradition. The Romanian judicial authorities had considered that, in the absence of a bilateral extradition agreement, they could not extradite. The question was interesting from the theoretical point of view, but also from a practical one, given the current growing tendency of countries—in Europe, at any rate—to tolerate dual or even triple nationality. Perhaps the Special Rapporteur should be asked to consider the question of European nationality.

23. The debate in the Commission on the obligation to extradite or prosecute was at a preliminary stage and now was an excellent time to express ideas and make comments. The Commission should then analyse State practice, particularly contemporary examples. He supported the Special Rapporteur's proposal in paragraph 60 to ask States for information on the subject. On the basis of such practice, the Commission could then begin analysing matters requiring its attention.

24. Mr. PELLET said that Mr. Melescanu's comments were very interesting, but it would be a bad idea to take up the question of European nationality, which did not exist, as he had already pointed out in connection with diplomatic protection. European citizenship had nothing to do with the topic under consideration.

25. Mr. Sreenivasa RAO said that, in his view, the question of dual nationality was important in connection with extradition because it was a fact that many States did not extradite their nationals. However, most of the problems which arose in that regard could be resolved because States which refused to extradite their nationals had extraterritorial jurisdiction and could therefore prosecute the person concerned themselves. There was thus no impunity.

26. The CHAIRPERSON suggested that Mr. Sreenivasa Rao should make his preliminary study on the question of extraterritoriality available to the Special Rapporteur.

27. Mr. KAMTO said that, although the distinction Mr. Melescanu had drawn between obligation and principle was important, he wondered what the purpose of the rule would be if *aut dedere aut judicare* was regarded as a principle. The stating of a rule implied the existence of an obligation. Without an obligation, it was difficult to see the purpose of the rule or the point of the study.

28. Mr. CANDIOTI said that he had also found Mr. Melescanu's comments to be relevant. In particular, the title raised the problem of the delimitation of a broad topic which covered international criminal law, international procedural law, extradition and international crimes, among other things. The *aut dedere aut judicare* alternative had been referred to as a single obligation, but in reality there were two obligations: to extradite and, if a State did not do so, to prosecute. However, Mr. Momtaz had referred to the right to extradite or prosecute and Mr. Melescanu had spoken of a principle. That raised a number of questions which needed to be clarified.

29. Mr. PELLET said that he did not see why the topic would be less important if the "extradite or prosecute" alternative was regarded as a right rather than as an obligation. On the contrary, it would be useful to consider what the consequences would be of the choice of a State which had the option of exercising that right or not. Diplomatic protection was a right, too, not an obligation, and, yet, as everyone knew, it had been the subject of important work.

30. Mr. ECONOMIDES said that he agreed with Mr. Sreenivasa Rao's comment on dual nationality: the problem did not arise because a State which did not extradite would itself try the person concerned. What was of interest was that there were two obligations—to extradite or to prosecute—which were neither equally strong nor of the same nature. One—the obligation to extradite—was weak because exceptions were permitted (for example, if there was a risk that human rights would not be respected or in the case of dual nationality), whereas the other—the obligation to prosecute—was strong because it did not allow any exceptions. The problem was that, when a court tried a national, it usually imposed a less severe or even token penalty. Hence, the Commission should give preference to the third option, which was to surrender the person concerned to an international court such as the International Criminal Court.

31. Mr. MOMTAZ said that it would be better not to speak of two obligations, but only of one: the obligation of the State to reduce impunity, a goal which could be achieved through either extradition or trial. A State might choose the latter to avoid the problems to which the former gave rise. The Commission should not lose sight of the purpose of the institution, which was to reduce impunity for international crimes.

32. Mr. CHEE thanked the Special Rapporteur for taking on the topic of the obligation to extradite or prosecute and commended him on the excellent work he had carried out in his preliminary report. He noted with interest the comments concerning the evolution of the principle "extradite or prosecute" from the phrase used by Grotius—*aut dedere aut punire* ("either extradite or punish")—to *aut dedere aut judicare*, which appeared in article 7 of the draft Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, adopted by the General Assembly on 14 December 1973 in its resolution 3166 (XXVIII).

33. In his view, the third category of crimes listed in paragraph 20 of the Special Rapporteur's preliminary report, namely, ordinary crimes under national law, should not be subject to universal jurisdiction; such crimes were primarily a matter for the State concerned.

34. Noting that, in paragraph 23 of his report, the Special Rapporteur distinguished between the right and the obligation of a State to extradite or prosecute, he referred to the sources of that obligation and said that, with regard to international treaties, some of the items on the list in paragraph 36 should be explained in greater detail if they were to be included in the category of international crimes. For example, the expression "environmental protection" was very vague and did not make him think of the concept of crime at all. It would also be better to refer to "international trafficking in drugs" rather than to "drug offences". "Mercenarism", i.e. the use of paid soldiers, according to the original meaning of the term, had not always been considered a crime and was not necessarily a crime today, as the example of the Swiss Guards at the Vatican showed.

35. The two lists of international treaties establishing universal jurisdiction or the obligation to extradite or prosecute, one drawn up by the Special Rapporteur and the other by Amnesty International, constituted a sufficient corpus of international criminal law. He agreed with the Special Rapporteur's comment that a careful and thorough evaluation of possible customary grounds for the obligation *aut dedere aut judicare* was necessary for a definition of the legal nature of that obligation. He also agreed with the idea of extending the analysis of the sources of the obligation to extradite or prosecute to national legislation and the practice of States.

36. The question whether the final result of the Commission's work should take the form of a binding or soft law instrument would depend on how much time and energy the Special Rapporteur was prepared to spend on it. It would also need to be borne in mind that the principle *aut dedere aut judicare* was embodied not only in many international treaties, but also in international customary norms, the ICJ having noted in the *Military and Paramilitary Activities in and against Nicaragua* case of 1986 that the two could coexist.

37. He drew the attention of the members of the Commission to the valuable contribution INTERPOL had made to activities relating to the extradition or prosecution of international criminals.

38. Mr. DUGARD, thanking the Special Rapporteur for his excellent preliminary report, which paved the way for an interesting examination of the topic, said that, in view of its importance, the Commission should from the start set itself the goal of drawing up draft articles for a convention. The Special Rapporteur had been very ambitious in going beyond the obligation *aut dedere aut judicare* to deal with questions such as extraterritorial criminal jurisdiction, especially universal jurisdiction, the relationship between *aut dedere aut judicare* and the International Criminal Court, and complex issues of international criminal law. Noting that the Special Rapporteur referred frequently to the draft code of crimes against the peace and security of mankind, which had been adopted by the Commission in 1996 and had since been overtaken by the Rome Statute of the International Criminal Court and other texts, he said that the Special Rapporteur should not feel bound by the earlier work of the Commission on those subjects.

39. As he saw it, the main problem with the topic was its breadth and he feared that the Special Rapporteur had been a bit too ambitious. For example, he raised the question of the application of the principle *aut dedere aut judicare* to international criminal courts and, in particular, the International Criminal Court. He then addressed the question of the bases for the exercise of universal jurisdiction in a very broad manner. That was most relevant because it related to both the "*dedere*" aspect, i.e. the jurisdiction of the requesting State, and the "*judicare*" aspect, i.e. the jurisdiction of the custodial State. Personally, he was afraid that that might result in the Commission examining such questions as territoriality, active and passive personality and the principle of protection as the bases for jurisdiction, in addition to universal jurisdiction. The aim was, however, not to conduct a study of extraterritorial criminal jurisdiction. The Special Rapporteur also took up the question of defences against extradition, for example, by raising exceptions to the *dedere* obligation, such as non-extradition by the State of its nationals and the political offence exception, to which the principle of double incrimination could also be added, and referred to the sufficiency of evidence, i.e. the level of evidence required to institute criminal proceedings or grant a request for extradition. All those questions were very interesting for scholars of international criminal law, but the Special Rapporteur would do well to narrow his study by limiting it to international crimes and should exclude the third category of crimes referred to in paragraph 20 of his report, namely, "ordinary crimes under national law, such as murder, abduction, assault and rape". In that way, the Commission would not have to deal with exceptions for political offences, nationality or the bases for the exercise of extraterritorial criminal jurisdiction, apart from universal jurisdiction. Nor should the Special Rapporteur consider such technical questions as the sufficiency of evidence or the surrender of a suspect to international courts such as the International Criminal Court, contrary to what he stated in paragraphs 52 and 61 of his report.

40. Referring to a number of points which he regarded as essential, he said that the Special Rapporteur should consider the question whether *aut dedere aut judicare* was a general rule of customary international law, given that, as noted in paragraph 40 of the report, there was no consensus on the question in the doctrine. It should also be made clear that there were limits on the principle *aut dedere aut judicare*. Grotius had taken the position that there was a general obligation to extradite or to punish because he had placed himself in the context of *civitas maxima*, but, in the modern day view, it was important to know which international crimes were being taken into account. A careful distinction should also be made, as the Special Rapporteur had done, between the application of the principle in the case of treaties and in the case of core crimes. Further, it should be specified that the obligation *aut dedere aut judicare* was not applicable when the requesting State did not respect human rights. Then there was the question of immunity. Many thought that the ICJ had been wrong when, in the *Arrest Warrant* case, it had rejected Belgium's argument that the principle of immunity should not be applicable to the alleged perpetrators of core crimes—crimes of genocide or crimes against humanity. At the time, the Court had not been prepared to accept the principle of *jus cogens*, but, when it had subsequently ruled on the dispute between the Democratic Republic of the Congo and Rwanda (*Armed Activities on the Territory of the Congo (New Application: 2002)*), it had to a large extent retracted its earlier position, and he hoped that the Commission would follow suit. It was also necessary to decide whether the political offence exception should be applicable in cases of crimes covered by treaties; in his opinion, it should not be. In the *Pinochet* case, the British House of Lords had held that extradition could be granted only in respect of a crime which was recognized as such in domestic law at the time it had been committed. The decision had been wrong from the point of view of international law, although it might be explicable in terms of British law. That important issue must also be addressed. Noting that the Special Rapporteur planned to examine universal jurisdiction in detail, he suggested that he should look at the different kinds of universal jurisdiction, including the question whether it was "permissive" or binding. Lastly, as pointed out by several members of the Commission, it would be necessary to determine whether the obligation *aut dedere aut judicare* was applicable to crimes of terrorism. He called on the Special Rapporteur to exercise caution, given the very sensitive nature of the question. Until an international convention against terrorism had been adopted, it was worth bearing in mind that one country's terrorist might be another country's freedom fighter.

41. In view of the abundance and wealth of sources of relevance to the topic, he hoped that the Secretariat would provide the Special Rapporteur with all the necessary assistance, just as it had done in the past with the preparation of its very useful studies. The preliminary bibliography which appeared at the end of the Special Rapporteur's report was very interesting, but it should also include the most prestigious journals of international law, such as the *International Criminal Law Review*, the *International Criminal Justice Journal* and the *International Legal Forum*.

42. Mr. KAMTO, commending the Special Rapporteur on the caution he had shown in choosing to prepare a preliminary report on the obligation to extradite or prosecute in order to outline his idea of the topic, said that his comments were designed to help the Special Rapporteur consider a number of questions in greater depth. To begin with, he noted that the principle *aut dedere aut judicare*, a

classic institution of cooperation in international criminal justice, was so well established that some scholars did not hesitate to conclude that it was an international customary norm, although there did not seem to be unanimity in that regard. The Special Rapporteur himself was prudent when he acknowledged in paragraph 42 of his report that "[a] careful and thorough evaluation of possible customary grounds for the obligation" was necessary. One of the most important questions which the Commission would have to answer was to which international crimes the principle *aut dedere aut judicare* was, or should be, applicable. That was not a simple question because the scope of the rule could vary depending on whether a customary rule or a principle stemming from purely progressive development was involved and on whether the crimes in question were breaches of obligations of *jus cogens*, such as the crime of genocide, torture or crimes against humanity, or ordinary international crimes. At the current stage, he wondered whether it might not be necessary to improve on the distinction referred to by Mr. Momtaz between international crimes and crimes under international law by distinguishing between the most serious crimes and the many ordinary crimes listed in various international conventions. In that connection, he agreed with the opinion of a number of members of the Commission that the crimes referred to in the Rome Statute of the International Criminal Court could now constitute a core of crimes for which the principle *aut dedere aut judicare* would have a basis in customary law. The idea of improving on the distinction between the various crimes had arisen because crimes that did not fall within the category of those provided for by the Rome Statute, such as torture in the *Furundzija* and *Al-Adsani* cases, had subsequently been regarded as constituting a violation of norms of *jus cogens*.

43. With regard to the relationship between universal jurisdiction and the obligation to extradite or prosecute, he noted that the Special Rapporteur stressed in paragraphs 16 to 34 of his report that, during the consideration of the draft code of crimes against the peace and security of mankind, adopted in 1996, doctrine and the Commission itself had supported the idea of a close link between universal jurisdiction and the obligation to extradite or prosecute. However, the nature of that relationship was not yet clear at the current stage of work and future reports should probably specify whether it was a relationship of dependence, in the sense that the obligation *aut dedere aut judicare* was determined by universal jurisdiction. A link unquestionably existed between the two principles; that said, universal jurisdiction was not a precondition for invoking the *aut dedere aut judicare* rule, but merely the legal basis of the right to request that a given State should fulfil that duty. That said, universal jurisdiction and the obligation to extradite or prosecute clearly constituted two distinct and independent principles.

44. Within the context of the topic, it should be possible to apply the principle *aut dedere aut judicare* not only on the basis of the rule of universal jurisdiction, but also as a function of the nature of the crime in question. In that case, extradition or prosecution would become an obligation which would be enforceable not only as between States able to try a given case (jurisdiction) under their domestic legislation, but also under international law, which gave a State jurisdiction to try the case. In other words, according to that line of reasoning, it was not jurisdiction that was the basis for the principle; rather, it was the type of crime which determined jurisdiction and justified the invocation of the principle. That made it possible to provide indirectly for the problem of a conflict between the principle *aut dedere aut judicare* and sovereignty of States. The *Hissène Habré* case was very instructive in that regard and should be given close attention.[336]

45. The principle *aut dedere aut judicare* involved a dual obligation, namely, the obligation to extradite and the obligation to prosecute. He wondered whether they were alternative or cumulative. If they were alternative, the application of one of the obligations would depend on the other and prosecution would then depend on the choice not to extradite. The order in which the obligations were set out in the expression *aut dedere aut judicare* was perhaps not immaterial. In the case of obligations that could give rise to a cumulative application, it seemed that such application had been envisaged at the time, but had fortunately not survived because it would have been contrary to a number of fundamental principles of international law, such as the principle of *non bis in idem*, and international law had ultimately adopted the principle of the residual jurisdiction of the ICJ in relation to national courts.

46. The question of qualitative criteria to be taken into account in the application of the principle *aut dedere aut judicare* was closely linked to the previous one in that the qualitative criterion could determine what priority to be given to one obligation in relation to another. The principle *aut dedere aut judicare* must be applied taking into account fundamental obligations for the protection of human rights. As stressed by a number of speakers, and Mr. Dugard in particular, it was important to ensure that extradition was not carried out towards a country in which human rights violations might be committed. The case law of the ICJ also showed that a criminal must be prosecuted and tried according to a fair procedure. In other words, it was not sufficient for a State to promise to prosecute and try or for it to have jurisdiction to do so: it must also be able to guarantee that the exercise of its jurisdiction was effective and beyond reproach. In the *Lockerbie* case, it was because the Libyan Arab Jamahiriya, the United States and the United Kingdom had each argued that it alone was able to guarantee a fair trial for the persons responsible for carrying out the bombing of the Pan Am aircraft that the three countries had eventually agreed that the trial would be held in The Hague before a special military court which had applied Scottish law. That was an interesting precedent, although the case did not answer the question whether a State had priority for choosing to try and refusing to extradite or whether the States that requested extradition would have priority on the grounds that the other State was not able to guarantee a fair trial, i.e. which of the two obligations contained in the principle *aut dedere aut judicare* took precedence. The Special Rapporteur should explore that area in his future reports.

47. Mr. MOMTAZ thanked Mr. Kamto for accepting the distinction between crimes under international law based on treaties and international crimes. However, Mr. Kamto had gone beyond that distinction when he had said that international crimes could be linked to the concept of *jus cogens* and that acts classified as crimes, such as

[336] See footnote 247 above.

torture, were acts which violated the rules of *jus cogens*. The idea that torture was a violation of a rule of *jus cogens* might find justification in the decision of the International Tribunal for the Former Yugoslavia in the *Furundzija* case or in the decision of the European Court of Human Rights in the *Al-Adsani* case. However, if account was taken of practice, an isolated act of torture had never led to the exercise of universal jurisdiction. Only an act of torture committed in the framework of a deliberate, systematic policy could be considered to be a crime against humanity and to give rise to universal jurisdiction, as in the *Hissène Habré* case. He drew Mr. Kamto's attention in that regard to a communication of the Committee against Torture dated 19 May 2006, in which the Committee had taken the position that the absence of an extradition treaty between Senegal and Belgium and shortcomings in Senegal's criminal law and criminal procedure should not prevent Hissène Habré's extradition to Belgium.

48. Mr. MELESCANU said that Mr. Kamto's idea that it might be possible to try a person and then extradite him to an international court was dangerous and contrary to the fundamental principle of criminal law of *non bis in idem*, pursuant to which no one could be tried twice for the same crime.

49. Mr. KAMTO said that there was some misunderstanding because the point he had made was precisely that such a possibility, which had been considered at an earlier time, was contrary to the principle of *non bis in idem*.

The meeting rose at 12.55 p.m.

2901st MEETING

Thursday, 27 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (*continued*) (A/CN.4/571)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KOLODKIN said that, as the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*) comprised a set of initial observations on issues to which the Commission should turn its attention in the course of its work on the topic, he would confine his remarks to just a few comments.

2. Paragraph 40 of the report touched on the crucial question whether the legal source of the obligation to extradite or prosecute should be limited to the treaties binding the States concerned or should be extended to appropriate customary norms or general principles of law. The operative term was "obligation", because if the point at issue were merely the right or possibility to extradite or prosecute, it would hardly be appropriate for the Commission to address the matter, given that its mandate consisted in the progressive development and codification of international law. In fact, the question of the nature or status of the obligation to extradite or prosecute was decisive, because on it would depend, to a significant extent, the answer to the question raised in paragraph 59 of the report, namely the form that the final product of the Commission's work on the topic should take. If the Commission's analysis revealed that the obligation to extradite or prosecute, even if only in respect of certain crimes, derived from a customary norm of general international law, it would have ample grounds for codification, together with possible elements of progressive development of international law, in the form, for instance, of draft articles. If, however, the Commission were to conclude that such an obligation stemmed exclusively from international treaties, then it would be possible to envisage only some sort of draft recommendatory instrument, along the lines, for instance, of guiding principles. Accordingly, it scarcely seemed possible at the current stage to decide on the form that the final product would take.

3. Turning to the chapter of the report on sources of the obligation to extradite or prosecute, he said he was not convinced of the justification for two separate sections B (International custom and general principles of law) and C (National legislation and practice of States); nor did he share the conviction expressed by the Special Rapporteur in paragraph 48 of the report that the sources of the obligation should include general principles of law, national legislation and judicial decisions, and not just treaties and customary rules. While national legislation and State practice were extremely important, they should be regarded not as independent sources of the obligation, but as evidence of the existence (or absence) of the corresponding customary norms of international law or general principles of law. Moreover, general principles of law could presumably also take the form of customary norms of international law. He would not therefore regard national legislation and State practice as an independent source of the obligation in question and consequently would not make them the subject of a separate section of that chapter. Furthermore, section B provided virtually no evidence that general principles of law could be a source of the obligation to extradite or prosecute. In point of fact, it merely considered custom. Similarly, section C did not mention national judicial decisions or provide any examples thereof, and the sole reference to non-legislative practice was that made in paragraph 46 to the Belgian reservation to the 1999 International Convention for the Suppression of the Financing of Terrorism. He therefore had serious doubts about the contents of paragraph 48 and would appreciate further clarification from the Special Rapporteur.