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Summary record of the 2901st meeting

Topic:
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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.

4. Although an investigation of the relationship between universal jurisdiction and the obligation to extradite or prosecute was important and was indeed included in the preliminary plan of action, he was not sure that the description of universal jurisdiction put forward by an authoritative non-governmental organization and quoted in paragraph 19 should form the basis of the Commission's work. The recent debate surrounding questions such as the amendment of the Belgian legislation in that sphere ought to be borne in mind. Moreover, the existence of the principle of the universality of suppression and its interrelationship with the principle of the universality of jurisdiction seemed to require further elucidation. Even if the principle of the universality of suppression existed in international law (the Special Rapporteur neither defined it nor provided any examples of doctrine or practice in support of its existence), it was far from clear what place that principle should have in the consideration of the topic and it was mentioned only in passing in item (10) of the preliminary plan of action.

5. In the last sentence of paragraph 14 of the report, the Special Rapporteur had listed numerous obstacles to the effectiveness of prosecution systems which, in his opinion, were not appropriate to crimes under international law. They included statutes of limitation, immunities and prohibitions of retroactive criminal prosecution of conduct that had been deemed criminal under international law at the time that it occurred. Caution should be exercised when lumping together such disparate phenomena. The offences to which they applied were not enumerated and he was not convinced that *all* the so-called "obstacles" mentioned in that sentence would in fact be inappropriate when it came to the prosecution of all the crimes not specified in the report. Further analysis would help to shed light on that question.

6. In that context, he could not pass over the statement made at the previous meeting by Mr. Dugard, who had said, *inter alia*, that the decision of the ICJ in the *Armed Activities on the Territory of the Congo (New Application: 2002)* case undermined the Court's decision in the *Arrest Warrant* case in that the Court, in its more recent decision, had at last recognized the existence of rules of *jus cogens*. Although Mr. Dugard was more familiar than most with the *Armed Activities on the Territory of the Congo (New Application: 2002)* case, his assertion seemed too bold. The interrelationship between peremptory norms and norms regarding immunity was not so simple. For example, in the *Al-Adsani* case, the European Court of Human Rights had recognized that the prohibition of torture was a peremptory norm, but that had not prevented it from affirming the availability of immunity in its decision. Similarly, in June 2006, the Lords of Appeal of the United Kingdom House of Lords, in the *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Another* case, had upheld the reasoning of the decision of the ICJ in the *Arrest Warrant* case in favour of immunity. The forthcoming decision of the European Court of Human Rights in the *Association S.O.S Attentats and de Boëry v. France* case should represent a landmark in that respect.

7. When considering the relationship between universal jurisdiction and the obligation to extradite or prosecute, it

would also be desirable to examine whether the range of crimes subject to universal jurisdiction coincided with the range of crimes to which the obligation to extradite or to prosecute applied. On the one hand, some treaties which laid down that obligation did not necessarily provide for the implementation of universal jurisdiction. On the other hand, if the obligation *aut dedere aut judicare* existed under customary international law, in that case it would hardly cover all the crimes to which that obligation extended under international treaties. As had already been suggested, further work on the topic ought to be confined to certain crimes, such as the first two categories listed in paragraph 20 of the report.

8. The issues of international criminal jurisdiction and the so-called "triple alternative", namely extradition, prosecution or surrender to an international court, should be excluded from the Commission's field of study. The Rome Statute of the International Criminal Court did not distinguish between extradition and surrender; a suspect was not extradited but surrendered to the International Criminal Court. That distinction was of great significance for many States. Moreover, suspects were likewise surrendered to the special courts set up by the United Nations Security Council, not extradited to them.

9. A more important point was that the various international or mixed international/domestic courts varied widely, each being based on a *lex specialis*. It was therefore not possible to speak of the existence of a general international legal obligation *vis-à-vis* such bodies.

10. The preliminary plan of action seemed acceptable, but would need to be revised as the work progressed. For example, the issues to be considered under item (9) (b) could scarcely be examined in isolation from those referred to in item (10). He looked forward to the next report on the subject.

11. Mr. MELESCANU said he wished to underscore the importance of the impeccable logic behind Mr. Kolodkin's argument. If the source of the rule was to be found in treaties, the Commission should not set about codifying something which had already been codified, but if the source was customary law, the drafting of a set of articles could be contemplated. Not wishing to discourage the Special Rapporteur, he noted that the Commission could, however, adopt the less rigid position that the obligation to extradite or prosecute had its source in some international treaties which were not universally applicable; if that were so, the customary effect of those treaties on States' conduct could be studied. State practice ought to be investigated further, because it would be quite feasible to draw up a set of draft articles, even if the principal source of the rule consisted of certain treaty provisions.

12. Mr. Sreenivasa RAO said that the preliminary report presented a broader spectrum of issues than would normally have been regarded as relevant for the purpose of considering the obligation to extradite or prosecute as a principle of international law. The broader picture was perhaps needed because extradition was no longer based solely on bilateral treaties, with international criminal jurisdiction also becoming a basis for the obligation. The report referred to a variety of sources offering most

interesting possibilities for further work on the subject. As the Special Rapporteur was also intending to request information with regard to State practice and national legislation, the Commission would have to be careful not to lose its way amidst the wealth of material. At the same time, it should likewise pay due heed to human rights and humanitarian considerations.

13. The obligation to extradite or prosecute was a general principle or broad policy guideline, the aim of which was to avoid the development and maintenance of safe havens for criminals. Nevertheless, States' criminal jurisdiction was primarily based on the principles of territoriality and nationality, and those principles in turn conditioned the execution of the scheme of extradition. But there were other important factors which had customarily conditioned compliance with any request for extradition, the first of them being the fact that there was no obligation to consider extradition in the absence of an agreement on that subject. Secondly, there was a need to make a *prima facie* case for the involvement of the accused in the commission of a crime. The type of evidence deemed sufficient or adequate was an issue of enormous practical significance and could vary from one jurisdiction to another, from case to case and over a period of time. Furthermore, the crime in question should meet the test of double criminality; in other words, the broad set of facts and the conduct in question must be regarded, at the time that conduct had taken place, as a crime not only according to the law of the requesting State, but also according to that of the requested State.

14. Extradition was conditional upon the requested State receiving assurances and being satisfied that the accused would receive a fair trial and would not be discriminated against or persecuted on account of his race, religion or political opinion. In other words, human rights safeguards must be respected.

15. After the preliminary legal hurdles had been cleared in the national courts of the requested State, the fate of a request for extradition was ultimately subject to a political test, in that it depended on a final decision taken at the discretion of the attorney-general, the minister for foreign affairs or the Head of State. That decision could not be challenged. Those features of extradition treaties were universally recognized in the national laws of all countries. Extradition had always been considered to be a legal matter with a political aspect. In the final analysis, considerations of reciprocity, an appreciation of the political circumstances affecting the requesting and requested States and the promotion of human rights all came into play.

16. In the past, refusal of a request for extradition had not automatically resulted in the requested State being placed under any further obligation to prosecute the accused, as most States had based their criminal jurisdiction on the principle of the territoriality of the crime or the nationality of the offender. More recently, the requested State was generally under an obligation to exercise extraterritorial jurisdiction in order to prosecute the accused, where such exercise had been provided for in treaties of extradition and made subject to limitations or conditions. At all events, the effective exercise of extraterritorial jurisdiction

was dependent upon equally effective judicial assistance and cooperation between the States concerned. Hence, extradition treaties were often accompanied by treaties of mutual judicial assistance.

17. The duty to prosecute when extradition was refused amounted to no more than a duty to submit the case to the competent authorities, without undue delay, for the purpose of prosecution. To that end, the prosecutor had to determine the suitability of the case for prosecution. If, in the opinion of the prosecutor's office, the case was not worth submitting to the court, no further action could be taken.

18. Once the accused had been brought before the court either in the requesting or in the requested State, all the principles of normal criminal law would apply, namely that the accused was innocent unless proven guilty, that he had the right to cross-examination, the right to counsel and the right to remain silent. Another important principle was that of double jeopardy: a person who had been tried and sentenced could not be tried again for the same offence in any other jurisdiction as long as the prosecution had been genuine and not of dubious judicial propriety. That being so, he requested clarification of the statement in paragraph 49 of the report which indicated that a State might prosecute and sentence an offender on its territory and then extradite or surrender that person to the territory of another State for enforcement of the judgement. Once a person had been tried and sentenced, he would normally serve his sentence in the State in which he had been prosecuted; if, however, another State wished to prosecute him for another offence, he could be extradited, subject to the agreement of both States, and would then be expected to return to the former State after serving his sentence in the latter, in order to serve the remainder of his sentence. The Special Rapporteur should be aware that he was venturing into a field where there was already an abundance of State practice and court rulings, and that he would have to tread carefully in order to identify the appropriate principles.

19. There would be no point in considering whether the obligation to extradite or prosecute was a principle of customary international law unless the Commission examined the question in greater detail in order to ascertain whether there were conflicting practices, with a view to subsequently endeavouring to promote uniformity of practice.

20. The final question was that of the "triple alternative". He personally believed that the obligation to extradite or prosecute was a principle operating within the realm of national law and bilateral relations, whereas international criminal jurisdiction was evolving in the context of universal criminal jurisdiction and was subject to the principle of complementarity. Recourse to international criminal jurisdiction was permissible only when States were unable or unwilling to prosecute. He therefore did not consider that three alternative tiers were automatically available. Furthermore, when the Commission had considered the issue of international criminal jurisdiction, the question of which jurisdiction should have priority in the event of State A and the prosecutor of the International Criminal Court submitting concurrent requests for

extradition had been the subject of serious disagreement in the Drafting Committee. All that only went to show that the Special Rapporteur would need to adopt a flexible approach, focusing on practice rather than on theory. The Commission should develop general principles and harmonize the subject as far as possible. The preliminary plan of action contained in the report was excellent, and the debate had already pointed to some promising lines of investigation, as well as some pitfalls which should be avoided.

21. Mr. KABATSI, responding to Mr. Sreenivasa Rao's comment regarding paragraph 49 of the report, said that paragraph 49 raised another issue. If a State had tried, convicted and sentenced an individual and then extradited him to another State to serve his sentence, that was a case neither of *dedere* nor of *judicare* and was outside the scope of the topic. It concerned the treatment of convicted persons, but the topic's centre of gravity was the holding of a trial in the country where the offender was present, in another country or at an international tribunal. Once the trial had ended, the problem was no longer one of extradition.

22. Mr. Sreenivasa RAO said that was entirely correct. If, for example, a French national was tried and sentenced in another country, agreements could exist between that country and France whereby, after the sentence was pronounced, he could return to France to serve his sentence. That was a separate matter altogether and did not fall within the scope of the topic.

23. Mr. RODRÍGUEZ CEDEÑO said that just as the Special Rapporteur's well-reasoned and interesting report was preliminary in nature, so too, would be his own remarks. The topic was without doubt an important one, closely related as it was to the commission of international crimes, their punishment, the elimination of impunity and international peace and security. The report revealed the topic's complexity and difficulty as well as the need for its scope to be strictly delimited. The work of codification would not be easy, and it would be premature to decide what final form the work on which the Commission was embarking would take. Careful consideration should be given to State practice, reflected not only in specific cases but also in domestic legislation, treaties and other bilateral and multilateral agreements.

24. The Commission's first task, a difficult one, would be to define the obligation and determine its nature and scope. That would call for the consideration of essential related subjects such as extradition as an institution of international law, international criminal jurisdiction and universal jurisdiction. He personally thought that one should speak, not of a principle, but rather of an obligation to extradite or prosecute, a legal obligation that was fundamentally treaty-based, although that did not exclude the possibility that, in relation to certain crimes, it might have its sources in custom. It was a single legal obligation that took the form of alternatives, options available to the State apprehending or detaining a person alleged to have committed an international crime.

25. The obligation was quite clear when a State committed itself through an international treaty to extraditing

or prosecuting such a person. Important and well-known instruments containing such obligations included the 1970 Convention for the suppression of unlawful seizure of aircraft, the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation, the 1979 International Convention against the taking of hostages and the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents. Regional instruments setting out the obligation, although not always in the same manner, included the European Convention on the suppression of terrorism, concluded at Strasbourg in January 1977 and the 1971 Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance.

26. If the treaty-based source of the obligation was quite evident, its source in custom was less apparent. It was not easy to conclude that there was a general rule of customary international law to that effect. But that led to a question that was part of the delimitation of the topic, namely, to which crimes the obligation might apply. In his view, the definition of the obligation must be restricted to a specific category of international crimes, those of major international concern, such as crimes of extreme gravity, crimes against humanity or those affecting the interests of the international community. While the obligation could undoubtedly relate to other offences, including non-international crimes that also had an international impact, the strict definition that the Commission should be seeking must be limited to the aforementioned category of crimes. The Rome Statute of the International Criminal Court listed as crimes over which the Court had jurisdiction genocide, crimes against humanity, war crimes and aggression, subject to the latter crime being defined by the States parties. That Court's jurisdiction would evolve, however, since the Review Conferences provided for in the Statute would permit the future inclusion of other crimes such as terrorism, drug trafficking and crimes against United Nations personnel. Those were the crimes of greatest international concern and those to which the obligation should refer.

27. While the obligation was single, it comprised two alternatives. The question was whether the State could fulfil the obligation in all cases, including for offences other than those of international concern. Extradition was subject to certain prerequisites, including the provision of guarantees that the human rights and physical integrity of the person accused would be respected, and evidence of his or her criminal involvement. An interesting recent Latin American case that he commended to the Special Rapporteur's attention involved the extradition of an alleged terrorist Luis Posada Carriles, accused of downing a Cuban airliner in 1976. The accused was currently under detention in the United States, but Cuba and the Bolivarian Republic of Venezuela had requested his extradition. Interestingly enough, the United States was charging him not with involvement in terrorism but with immigration offences.

28. Additional aspects of the question had also to be taken into account in identifying the obligation, such as dual nationality and the prohibition on extradition of

nationals of the extraditing State. The obligation to prosecute a suspect raised equally complex questions. It must be borne in mind that a court exercised jurisdiction based on its material, personal, territorial and temporal competence. If the offence in question was not an international crime, it might not be characterized in the domestic legislation of the State that had arrested or detained the individual. It might also happen that the individual alleged to have committed the offence was not subject to its domestic law; and temporal issues might also arise.

29. If a State was unable to extradite because it could not meet the necessary prerequisites, and was likewise unable to prosecute the person, would it be violating the obligation to extradite or prosecute? That question also entailed careful consideration of the nature of the obligation. Was it an obligation of result, that must inexorably be fulfilled by the State, or an obligation of conduct, requiring the State to do everything possible to extradite or prosecute the individual concerned?

30. A third alternative had likewise been mooted, namely handing the individual over to an international criminal jurisdiction such as the International Criminal Court. That, however, constituted surrender, rather than extradition in the strict sense of the term. As was indicated in paragraph 54 of the report, the jurisdiction of the International Criminal Court was complementary to national jurisdiction, not an alternative to it. That complementarity was a fundamental aspect of the Court's competence, enabling it to exercise its jurisdiction when a State would not or could not do so.

31. In conclusion, he reiterated that the topic was extremely complex and that its scope should be strictly delimited. The Special Rapporteur seemed to be heading in the right direction. The Commission should not venture too far into the field of international criminal law; its first task must be to define the obligation, its scope, object and nature, together with the exceptions thereto. He wished the Special Rapporteur every success in that endeavour.

32. Mr. GAJA said that the Special Rapporteur's very useful preliminary report served as an excellent starting point for the examination of the topic, laying out a number of questions that were directly or indirectly related to the obligation to extradite or prosecute. The preliminary plan of action in the report outlined 10 points that covered a great deal of ground. Among the various issues raised in the report, he would attempt at the present stage to identify only those that would have to be dealt with by the Commission in its consideration of the topic.

33. He endorsed the Special Rapporteur's proposal to carry out a comprehensive comparative analysis of the treaty-based sources of the obligations to extradite or prosecute, even though the conditions and elements of those obligations were to a large extent similar. The Convention for the suppression of unlawful acts against the safety of civil aviation could be taken as an example for considering problems relating to the treaty-based obligations to extradite or prosecute. In article 5, paragraph 1, the Convention required certain States to "take such measures as may be necessary to establish"

their jurisdiction over the offences, including the State in whose territory the offence had been committed and the State in which the aircraft was registered. In the *Lockerbie* case, for example, those States had been, respectively, the United Kingdom and the United States. The Convention then identified another State that had the obligation to exercise jurisdiction: the State in whose territory the alleged offender was present if "it does not extradite him ... to any of the States mentioned" in the previous paragraph. Thus, a State which was not among those listed in article 5, paragraph 1, but in whose territory the alleged offender was present, was under only a subsidiary obligation that was conditional on the absence of extradition towards one of the States enjoying priority jurisdiction.

34. An obligation to extradite might arise under the combined provisions of the treaty concerning the crime in question—in the case of the example the Montreal Convention—and other treaty obligations relating to extradition between the States concerned. Extradition could also take place in the absence of a treaty. Whether there was an obligation to extradite depended mainly on the treaties existing between the parties and on the relevant circumstances.

35. A number of important questions regarding extradition had been raised, for example, what kind of evidence was required for granting extradition and what effect the risk of infringement of human rights in the State of destination might have. They were questions of a more general nature, however, which also arose in situations where there was no obligation to exercise jurisdiction on the basis of a treaty clause providing for extradition or prosecution. If those questions were addressed, the scope of the topic would be widened to encompass many issues relating to extradition, whether or not they affected the obligation of prosecution.

36. What was specific to the topic was that, failing extradition, an obligation to prosecute arose. That brought in a first set of questions relating to the condition triggering the obligation. Extradition presupposed that a State requested it or, more rarely, accepted that the alleged offender should be sent to its territory. If none of the States having priority jurisdiction requested extradition or accepted the offer thereof, the question arose whether the obligation to prosecute was triggered. One might answer in the affirmative, since otherwise the crime would go unpunished. But that was a matter of interpretation of the individual treaty. The Commission could only provide some general guidelines for the interpretation of treaty provisions pertaining to international criminal law.

37. Assuming that the obligation to prosecute was triggered and that the State on whose territory the alleged offender was present was under an obligation to prosecute, that obligation necessarily involved the exercise of criminal jurisdiction on the part of the territorial State, which might or might not already have jurisdiction over the crime under general international law. It would certainly have jurisdiction under the treaty, and would even have an obligation to exercise it. If the only link with the crime consisted in the presence of

the alleged offender, one could speak of an exercise of universal jurisdiction. Clearly, such exercise would be lawful with regard to the other parties to the treaty, but one might query whether it would be lawful with regard to States not parties to the treaty. That was the point at which the topic under consideration confronted the question of the existence under general international law of universal jurisdiction over the crime. There again, however, a question of a general nature arose, one which would be more appropriately studied in another context, that of universality of criminal jurisdiction—an option discussed, and subsequently dismissed, by the Planning Group at the previous session.

38. Turning to the content of the obligation, he noted that treaties generally described what the obligation to prosecute comprised. Various issues could nevertheless arise, for instance in relation to the possible lack of evidence for prosecution in the hands of the State in the territory of which the alleged offender was present. There again, the Commission could provide guidelines for the interpretation of individual treaties. If, for example, as the Libyan Arab Jamahiriya had maintained in the *Lockerbie* case, the State had not been given the necessary evidence, how could it be expected to prosecute the alleged offenders?

39. Treaties providing an obligation to extradite or prosecute suffered from some gaps that the Commission should consider. One related to the execution of penalties that the State had inflicted: the treaties in question went no further than the prosecution and possibly sentencing stages. Another gap was the lack of a system for monitoring the way in which the obligation to prosecute was fulfilled. Needless to say, additional obligations in those areas would make the obligation to prosecute or extradite more meaningful, and some proposals could be made to that end.

40. So far, he had considered the obligations to extradite or prosecute that arose under several specific treaties. It would certainly be part of the scope of the topic also to examine whether similar obligations existed under general international law, and, if so, for which crimes. The question would not be whether there was an obligation for States to prosecute a certain crime, an obligation to exercise criminal jurisdiction that might or might not be universal. An obligation to extradite or prosecute under a customary rule would have to be based on a two-tier system similar to that established in treaties: in other words, a system whereby certain States were given priority jurisdiction and others had an obligation to exercise jurisdiction if the alleged offender was not extradited to a State having priority jurisdiction.

41. Whether or not such a system already existed according to general international law, it would be interesting to examine whether it could be outlined as a matter of progressive development. Paragraph 3 (d) of the resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, adopted in 2005 at its Krakow session by the Institute of International Law, contained a suggestion which the Commission should take into consideration, to the effect that

[a]ny State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.³³⁷

42. In sum, the Commission should concentrate only on the issues that specifically concerned the obligation to extradite or prosecute. It could provide a series of guidelines relating to the interpretation of treaties on international criminal law which set forth the obligation to extradite or prosecute, make some suggestions concerning the major gaps in treaties containing such clauses—particularly with regard to enforcement—and consider the question of an obligation to extradite or prosecute beyond the application of existing treaties as a matter of progressive development. Should the Commission prefer to extend the study to areas that were not specifically related to the obligation to extradite or prosecute, such as matters of extradition or of universal jurisdiction, the title of the topic should be modified accordingly.

43. Mr. Sreenivasa RAO said that, while Mr. Gaja's assertion that treaties did not regulate all matters relating to extradition and prosecution was correct, any apparent gaps were, in his view, regulated in national law and practice: hence the importance of harmonizing national laws.

44. Mr. YAMADA commended the Special Rapporteur's excellent preliminary report. His perception of the development of the obligation to extradite or prosecute as reflected in treaty law since 1970 was that the international community had decided to suppress, through international cooperation, certain categories of grave offences by obliging States to make such offences punishable by severe penalties. In order to deprive an offender of a safe haven, it had established a network that made it possible to try to punish offenders wherever they might be. The procedural backup for that network was the obligation to extradite or prosecute.

45. It followed from the above that the scope of the offences or crimes concerned must be limited to those which in the view of the international community needed to be suppressed through international cooperation. Accordingly, he had some reservations about widening the scope to include ordinary crimes under national law. Such crimes could be included if the Commission were dealing solely with extradition, but not if, as was the case, it was considering a regime for which extradition and prosecution formed a whole.

46. The Special Rapporteur sought advice on the link between universal jurisdiction and the obligation to extradite or prosecute. His own initial reaction was that a State would be required to establish its universal jurisdiction in cases both of extradition and of prosecution. Thus, further study on the link was needed.

³³⁷ See footnote 335 above.

47. Draft article 9 of the draft code of crimes against the peace and security of mankind, adopted by the Commission in 1996, provided that “the State Party … shall extradite or prosecute”.³³⁸ Thus, there clearly existed an obligation to prosecute. On the other hand, as the Special Rapporteur pointed out in paragraph 16 of his report, the first of the sectoral conventions against terrorism which incorporated the obligation to extradite or prosecute had a more guarded formulation in respect of prosecution. Article 7 of the Convention for the suppression of unlawful seizure of aircraft provided that “[t]he Contracting State … shall … be obliged … to submit the case to its competent authorities for the purpose of prosecution”. The obligation was to submit the case for the purpose of prosecution, but there was no obligation to prosecute. That formulation had been adopted in a great many conventions concluded subsequently.

48. Having taken part in the negotiation of the Convention for the suppression of unlawful seizure of aircraft, which had been a follow-up to the 1963 Convention on offences and certain other acts committed on board aircraft, he wished to recall the legislative history of that formulation. On 31 March 1970, while the drafts for the Convention for the suppression of unlawful seizure of aircraft were being prepared, a Japan Airlines domestic flight had been hijacked and diverted to Pyongyang by nine members of the so-called Japan Red Army. The Democratic People’s Republic of Korea had immediately returned the crew and the aircraft, but had accorded the offenders asylum. Four of them were still in that country; three had since died. Two had been arrested and tried in Japan, to which they had secretly returned, and were now serving their sentences. Owing to that incident, preparations for the new convention had been accelerated and a diplomatic conference hurriedly convened in The Hague, chaired by Mr. Willem Riphagen, subsequently a member of the Commission and one of its Special Rapporteurs on State responsibility.

49. Article 7 had been negotiated in The Hague. Many Governments had had difficulty in accepting the obligation to prosecute because independence of the prosecution was a cardinal principle embodied in their domestic criminal procedures. The United States Administration could accept the obligation to bring the offence of hijacking before a grand jury, but it was the grand jury that decided whether to prosecute an offender. In Japan, where criminal procedures were based on the continental system of law, the Administration could only commit the police to submitting the case to a district prosecutor’s office, which had the final say on whether to prosecute an offender. While procedural systems might differ, common law countries and other European countries had had the same problem. That was the reason for the rather weak language of article 7 in respect of prosecution. While it was his understanding that this basic principle remained unchanged in the domestic legislation of major legal systems, it would be useful for the Special Rapporteur to look into that matter.

50. Extradition required the exhaustion of elaborate procedures. In practice, offenders were often handed

over to the requesting State through the less cumbersome procedure of deportation. A study of that practice might also be relevant to the Commission’s work. It might indicate that the obligation to extradite or prosecute played only a relative role in the suppression of international crimes.

51. With those comments, he supported the preliminary plan proposed by the Special Rapporteur in paragraph 61 of his report.

52. Mr. DAOUDI said that the preliminary report on the obligation to extradite or prosecute dealt cautiously but thoroughly with a difficult and sensitive subject. He fully agreed with Mr. Momtaz and Mr. Sreenivasa Rao that it was vital to concentrate on the purpose of the study, which was to reduce cases of impunity to a minimum. The “extradite or prosecute” rule was connected with other rules of international treaty law or of customary international law. It could not be a customary rule, for in that case States would be under an obligation to extradite any individual who was accused of having committed a crime of any kind, irrespective of the existence of an extradition treaty. But that was far from being the case in international practice. Nor was it a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice, because it was not recognized in the national legislation of all or even a majority of States.

53. In reality, the existence of such an obligation was always associated with the existence of a treaty norm or a customary international norm characterizing certain offences as, for instance, crimes against peace, crimes under international law or war crimes. It was in that light that the reference to customary international law in the dissenting opinions of five judges of the ICJ in the two *Lockerbie* cases, cited in paragraph 55 of the report, should be construed. The customary rule in those cases was that set forth in the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation, which defined any act endangering the safety of civil aviation as an offence.

54. Those crimes should therefore be classified and a distinction drawn between those with which the principle of extradition or prosecution was associated and those which had been made subject to universal jurisdiction so that the accused could be tried by international courts, or by the State under whose authority the alleged perpetrators of the crime in question fell.

55. He concurred with Ms. Escarameia that human rights must also be borne in mind when studying the topic, since it was essential to ensure that the choice between extradition and prosecution was predicated on the ability of a State to guarantee its courts’ respect for the fundamental right of the accused to a fair trial.

56. As a number of other members had pointed out, the current trend was to transfer senior Government officials accused of international crimes to special courts for trial. That raised the question of the immunity of Heads of State or Government, ministers for foreign affairs and other Government officials. In 2002, the ICJ had found

³³⁸ See footnote 325 above.

that the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo was immune from criminal jurisdiction (*Arrest Warrant* case). It would therefore be wise to ponder whether senior Government officials also enjoyed such immunity when faced with prosecution pursuant to Security Council resolutions under Chapter VII of the Charter of the United Nations. The Special Rapporteur should look into that sensitive issue.

57. The Special Rapporteur should also investigate modern international practice in order to determine what rules the international community would be ready to follow and approve either in the form of binding norms or as a “soft law” instrument. It was, however, indeed too early to decide what form the final product of the Commission’s study should take.

58. Mr. PELLET said he was somewhat hesitant to take the floor on the Special Rapporteur’s preliminary report, not because it concerned an important and stimulating subject with which he was not very familiar, but because it was difficult to formulate general or substantive observations on a report that was indeed very preliminary and addressed only some of the problems, and perhaps not even the most important ones, posed by that difficult topic.

59. The Special Rapporteur’s preliminary remarks on the subject, delivered in the Working Group on the long-term programme of work and annexed to the Commission’s report on the work of its fifty-sixth session,³³⁹ was the basis of the preliminary report, even though the Special Rapporteur’s thoughts did not seem to have progressed very far from what had been a very promising starting point. The report posed the same questions without seeking to resolve them—although admittedly that had not been the Special Rapporteur’s intention—and suffered from the same omissions.

60. One of the major differences between the two documents was the importance the Special Rapporteur attached in his report to universal jurisdiction and its relation to the principle *aut dedere aut judicare*. While he had no doubt that the two concepts were related, he agreed with Mr. Kamto that that relationship was not brought out clearly in the report. The two concepts did not seem to occupy the same ground: universal jurisdiction was on a higher level than *aut dedere aut judicare*. It was one of many reasons, and probably not one of the most important ones, that enabled the forum State to establish its criminal jurisdiction independently of the usual bases for jurisdiction such as nationality, territoriality or sometimes even public service considerations. In other words, when an offence was committed on the territory of a foreign State, the State on whose territory the alleged offender found himself—the forum State—had the right to try that person, even if there was no link between it and the person in question or his victim. That was the most logical and realistic definition of universal jurisdiction. It might be noted in passing that, in one extreme and, to his mind, misguided conception of universal jurisdiction, any State could even in some cases try the perpetrators of certain offences *in absentia*, one example being the Belgian Act

of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 8 June 1977,³⁴⁰ which, happily, the 2002 judgment of the ICJ in the *Arrest Warrant* case had at least set to rights, however deplorable that judgment was for other reasons.

61. It was unfortunate that the Commission had chosen (a choice to which he would return) to place the principle or obligation of *aut dedere aut judicare* on its agenda, rather than that of universal jurisdiction, a subject which was easier to define, more topical and probably more important. That, however, was no reason for the Commission to muddle the two subjects. The decision had been taken to take up the one rather than the other, and it was important to stick to that choice. Ultimately, it would be wiser to consider that universal jurisdiction, which was only one possible basis for State jurisdiction in criminal matters, had no greater claim to be part of the subject than all the other bases for that jurisdiction, be they treaties or customary rules.

62. More generally, he considered that the topic under consideration posed tremendous risks, and that if the Commission was not careful it might find itself saddled with a catch-all topic which would compel it to codify or, even worse, to progressively develop all the fashionable subjects raised in the context of international criminal law. It was essential not to yield to that temptation, because otherwise the Special Rapporteur would become the Mr. Francisco García Amador³⁴¹ of the topic of criminal responsibility for individuals in international law. Like that other Special Rapporteur, Mr. Galicki was in danger of bringing his courage and talents to bear on very diverse and controversial problems which would lead nowhere; the Commission would eventually find itself in a cul-de-sac and would have to abandon the idea of codification. To cite one example, at the previous meeting Mr. Dugard had alerted the Special Rapporteur to the transgressions of the ICJ with regard to terrorism and the immunity of Government leaders and had urged him to rectify the shortcomings of the *Yerodia* judgment in the *Arrest Warrant* case. By and large, he agreed with Mr. Dugard, although personally he drew completely different conclusions for the subject under study. Unlike Mr. Dugard, he considered it essential not to use the codification of *aut dedere aut judicare* as an excuse for a quixotic attack on substantive norms applicable to terrorism, torture or the immunity of senior Government officials. He did not think that the title of the topic needed to be altered, as had been suggested earlier. On the contrary, the Commission should confine itself strictly to the topic, subject to a decision on whether the notion of “obligation” or of “principle” was more appropriate.

63. One of the first things that the Special Rapporteur should do would be to make it abundantly clear what issues he would not be covering. Candidates for exclusion were extremely numerous. In particular, he should not focus on the origin of international offences which might give rise to the principle of *aut dedere aut judicare*. Just

³³⁹ *ILM*, vol. 38 (1999), p. 921.

³⁴⁰ First Special Rapporteur of the Commission on the topic of State responsibility (1956–1961).

as the codification of the law of responsibility had got off the ground thanks only to Roberto Ago's brilliant intuition that the Commission should limit itself to secondary rules relating to internationally wrongful acts of States, without addressing the content of those acts,³⁴² in the same way, the Special Rapporteur should reinvent a theory of secondary or general rules or adapt for the purposes of his own topic those on which the Commission had based itself to codify the law of responsibility. That was perhaps what the Special Rapporteur had had in mind when, in item 9 (e) of his preliminary plan, set out in paragraph 61 of the report, he envisaged paying special attention to the position of the obligation in question in the hierarchy of norms of international law by distinguishing between secondary and primary rules.

64. He had three comments in that regard. First, he did not see why it should be a question of hierarchy: secondary rules were not hierarchically superior or inferior to primary rules, they were of different nature. Second, the questions should not be tackled at the end of a study, as the Special Rapporteur seemed to intend. On the contrary, it was an initial question of the highest priority. Third, for the reasons he had just cited, it was perfectly clear that the focus should be placed exclusively on codifying secondary rules, not primary ones. That did not mean that the material on which the Special Rapporteur and the Commission would have to draw should remain abstract, and he approved the choice of information that the Special Rapporteur proposed to request, as enumerated in paragraph 60, apart from the reference to universal jurisdiction in subparagraph (e). Once that information had been collected and analysed, the Commission must derive from it general principles applicable in all circumstances, taking care not to be unduly specific by defining the origin and scope of the obligation to extradite or prosecute offence by offence or crime by crime. He disagreed with Mr. Rodríguez Cedeño on that point. That said, the Commission might have to distinguish, for particular purposes, between the various crimes in question at one or the other of the two main levels of the study—which were the existence or non-existence of an obligation—and, once it had been determined whether there was or was not an obligation to extradite or prosecute, the modalities for the application of the principle, on which Mr. Sreenivasa Rao and Mr. Daoudi had made a number of interesting remarks, although he was not 100 per cent in agreement with them.

65. At the previous meeting, Mr. Melescanu had initiated a useful and interesting debate on the question whether the Commission should speak of a principle or of an obligation to extradite or prosecute. There was no unambiguous answer to that question. It was uncontested that when a treaty contained such a provision, it was necessary to refer to "obligation", but there was no reason why that might not perhaps also apply in the absence of a treaty, for example in the case of universal jurisdiction or crimes against the peace and security of mankind—which strangely enough, no one had spoken of in those terms—or of crimes committed in the context of serious violations

by States of obligations stemming from peremptory norms of general international law. Many members had very set ideas on the question. He envied them their certainty, which he did not share. As he saw it, the Commission did not have the necessary data to take a decision on that fundamental question at the current stage. The Special Rapporteur would no doubt provide such information in a later report.

66. Unlike Mr. Melescanu, he was not convinced of the impeccable logic of Mr. Kolodkin's line of reasoning regarding the relation between treaties and customary law. Clearly, some treaties included the obligation for the parties to extradite or prosecute, but no treaty codified or specified the general conditions for the implementation of that obligation. The Commission found itself in a situation not unlike the one with which it had had to deal in connection with the most-favoured-nation clause. Many treaties had such a clause. Using that basic material, the Commission had sought, in draft articles to which it would be well advised to refer, to derive a general framework for the principle itself. Similarly, in paragraph 41 of the report, the Special Rapporteur seemed to endorse the view of authors who considered that the fact that many treaties included the *aut dedere aut judicare* clause was proof that the latter was a customary norm. However, such clauses were very diverse, and it was therefore difficult to take that line of reasoning. Indeed, it could just as easily be argued that since States included such a clause in treaties, the principle was not a customary norm. In any case, he insisted on the parallel with the draft articles on the most-favoured-nation clause,³⁴³ the exercise closest to the current study—which, admittedly, was not necessarily a very auspicious precedent, given their fate until now.³⁴⁴

67. Once the Commission determined what the general principles were that permitted it to speak either of an obligation or of a non-obligatory principle, the question would arise of the modalities for implementing the principle. However, irrespective of whether there was an obligation to extradite or punish, some problems would present themselves in the same way. If a State was not under such an obligation but needed to decide whether it could extradite or punish, were there any legal impediments, in particular with regard to nationality? That question had been left virtually untouched in the report, although fortunately it had been raised by a number of members.

68. In that regard, he disagreed with the methodological approach taken by Mr. Melescanu, who at the previous meeting had focused on the problems that dual or multiple nationality might pose. While such problems did arise, they were of secondary importance compared to the far more important question of whether a rule of general international law existed which forbade a State to extradite one of its nationals, or another rule that allowed a State to refuse to do so. In the context of the present topic, it would be sufficient to reply to that fundamental question, and it would be preferable, for the case of dual or multiple nationality, to refer to the general rules

³⁴² *Yearbook ... 1970*, vol. II, document A/CN.4/233, p. 178–179, paras. 9–11 and p. 185, para. 24.

³⁴³ *Yearbook ... 1978*, vol. II (Part Two), p. 16.

³⁴⁴ See General Assembly decision 46/416 of 9 December 1991.

applicable in that area. It was important not to yield to the temptation to address the numerous collateral rules which were related to the topic in one form or another but were not necessarily part of it. The Commission had to go to the heart of the matter, or else it would share the fate of Mr. García Amador.

69. Another question which needed to be addressed but on which the preliminary report maintained a surprising or perhaps cautious silence, although the 2004 study had invoked it,³⁴⁵ was the impact of the proliferation of international criminal jurisdictions on the obligation or principle *aut dedere aut judicare*, on which Mr. Melescanu and Mr. Kamto had raised interesting points. Mr. Melescanu had argued that the possibility of transferring the alleged perpetrator of an international crime to an international criminal jurisdiction constituted an exception to the *aut dedere aut judicare* principle rather than a new aspect of that alternative. He personally thought that a more nuanced reply was needed. If, as was the case with the International Criminal Court, international criminal jurisdiction was only subsidiary, then that was not an exception, but an alternative. If, on the other hand, international jurisdiction took precedence, as in the case of the international tribunals for the former Yugoslavia and for Rwanda, it was an exception, or a circumstance excluding the application of the rule, at least when certain conditions were met.

70. The issues which he had just touched upon, and to which others had already alluded, were at least as important as, if not more important than, those set out in the preliminary plan of action in paragraph 61 of the report. In conclusion, he wished the Special Rapporteur good luck with a useful but difficult topic and warned him to guard against the malady to which Mr. García Amador had succumbed.

71. Mr. CANDIOTI endorsed Mr. Pellet's warning against that malady, which should perhaps be referred to as the García Amador virus or syndrome: the Commission, increasingly infected by it, had been speaking of extradition, impunity, immunity and universal jurisdiction, but seldom about the obligation to extradite or prosecute, which was a very simple obligation. It was not that there was one obligation to extradite and another to prosecute. The obligation *aut dedere aut judicare* contained in treaties in the classic sense was the obligation to prosecute when extradition had not taken place. It was not an alternative but a conditional obligation. If the Commission did not take that as its starting point, there was a real danger of falling into the García Amador trap. The Commission must first define the obligation in the traditional sense, namely that if a State that was obligated to extradite failed to do so, it must prosecute certain, although not all, crimes. The second important limitation concerned what crimes should be included, and he agreed with those who argued that the first chapter should cover crimes which affected the international community as a whole, namely the serious breaches covered by the 2001 draft articles on responsibility of States for internationally wrongful acts.³⁴⁶

Fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/560, sect. H, A/CN.4/L.682 and Corr.1 and Add.1,³⁴⁷ A/CN.4/L.702)

[Agenda item 11]

REPORT OF THE STUDY GROUP

72. Mr. KOSKENNIEMI (Chairperson of the Study Group), introducing the report of the Study Group of the International Law Commission contained in document A/CN.4/L.702, said that he would begin by saying a few words about the structure of the study and its various parts, their relationship to each other and the standpoint from which the Study Group had decided to deal with the topic. He would then briefly summarize the contents of the bulky background document (A/CN.4/L.682 and Corr.1). The third part of his introduction would cover document A/CN.4/L.702, which contained the 42 conclusions which the Study Group had adopted in the course of its discussions, and which were based on document A/CN.4/L.682/Add.1 which had been submitted to it for this purpose. Lastly, he would say a few words about what action the Study Group advised the Commission to take, bearing in mind that the Commission had not dealt with the topic of fragmentation in its usual fashion and that some discussion on how to proceed would be useful.

73. The aspect of the work which had been most puzzling to outside observers had been the relationship between the two outcome documents produced by the Study Group. The fact that there were two documents had been discussed during the fifty-seventh session, and the Commission had endorsed the Study Group's suggestion that two documents—one a "relatively large analytical study", the other "a condensed set of conclusions"—should be produced, as was explained in paragraph 2 of document A/CN.4/L.702.

74. The shorter document was in a sense an executive summary of the larger one. It had been adopted word for word by the Study Group, whereas he himself had compiled the larger document, which was a background study, produced with the help of individual reports by members of the Study Group. The background study had served as the basis for the shorter document, and should be regarded as an annex thereto.

75. The section presenting the background of the report showed that the Study Group had taken as its starting point the view that fragmentation was a natural development of long-standing tendencies in international law. It saw fragmentation as dealing with the functional differentiation of various aspects of international cooperation and the growing autonomy, and greater professionalization and institutionalization, of such fields as human rights law, trade law, the law of the sea and international criminal law. Fragmentation was thus to be regarded not as a technical problem but as one feature of the expansion and diversification of international law—its penetration into

³⁴⁵ See footnote 339 above.

³⁴⁶ See footnote 8 above.

³⁴⁷ Mimeographed; available on the Commission's website. The final text will be reproduced in an annex to *Yearbook ... 2006*, vol. II (Part One).

new areas of international life—reflecting developments at the domestic level. Although fragmentation was a largely positive phenomenon, the Study Group recognized that it occasionally gave rise to problems in legal practice. Indeed, it was for that reason that the topic had been taken up by the General Assembly and, subsequently, by the Commission. The Study Group's task had been to see how those problems could be alleviated. At the same time, the problems were not crucial to the international order and, as the Study Group had been at pains to establish, they could be dealt with by means of techniques, mechanisms, arguments and practice that had long existed in international law.

76. It should be emphasized that the Study Group had concerned itself not with institutional but with substantive fragmentation. It had not sought to determine which institutions should have competence to deal with which kinds of problems, nor had it considered the question of institutional proliferation or the possible problems arising from duplication. It had thus been able to look at fragmentation from the perspective of normative conflicts. The question underlying both documents before the Commission was what approach should be taken to normative conflicts—including conflicts between individual rules, between rules and principles, among treaties, between treaties and customary rules, among regimes or among aspects of international law, such as human rights law or trade law—when they arose. In that connection, the Study Group had taken care always to bear in mind the 1969 Vienna Convention, which was, as it were, a toolbox containing the tools, in the form of existing practices, for dealing with normative conflicts.

77. The bulk of the Study Group's work was contained in document A/CN.4/L.682 and Corr.1, which had been compiled on the basis of five individual studies written by members of the Group. The studies, all on topics determined by the Commission itself, related to the application of the *lex specialis* rule and the notion of self-contained regimes; the issue of successive treaties, which was governed by article 30 of the 1969 Vienna Convention; the issue of *inter se* agreements (governed by article 41 of the 1969 Vienna Convention); the use of other obligations in the interpretation of a treaty (art. 31, para. 3 (c), of the 1969 Vienna Convention); and the question of hierarchies: *jus cogens* and obligations *erga omnes* in the light of Article 103 of the Charter of the United Nations.

78. Briefly, the studies had considered a number of existing problems in the field of legal practice and made interesting proposals on how they could be tackled. He would consider the problems under four headings. The first concerned *lex specialis* and self-contained regimes. The 1969 Vienna Convention viewed normative conflicts from the perspective of the speciality in relation to the generality of the conflicting rules, in accordance with the phrase *lex specialis derogat legi generali*, which was a widely accepted and widely used principle of interpretation and conflict resolution in international law. The study, after considering a broad range of cases illustrating how the *lex specialis* rule had been used, had reached two main conclusions: first, the application of *lex specialis* did not permanently invalidate the more general rule but almost always took for granted that the *lex generalis* provided

the background for the interpretation of the *lex specialis*. Second, there was a wide variety of ways in which the *lex specialis* could relate to the *lex generalis*. The general rule might simply be set aside; alternatively, the special rule might merely provide for implementation of the general rule, or else it might update or interpret it. The variety was such that the relationships could not be condensed into a general theory of *lex specialis*. The study provided a number of examples of how *lex specialis* functioned, as in the *Gabčíkovo–Nagymaros Project* case, with regard to which the ICJ had stated directly that the 1977 Treaty concerning the construction and operation of the Gabčíkovo–Nagymaros system of locks³⁴⁸ between the parties continued to cover the matter as a whole. The Court had found no need to look into the relationship between the parties, because it was “governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*” (para. 132 of the judgment). In that case, the relationship between *lex specialis* and *lex generalis* had been left unclear: the general international law on navigable waterways was not extinguished but was overshadowed by the *lex specialis*. Another case (*Brannigan and McBride*), from the European Court of Human Rights, illustrated the relationship between the right, under article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to an effective remedy and the special right to have one's detention speedily dealt with under article 5, paragraph 4, of the same Convention. It was, however, clear that the special rule did not extinguish the general rule and that whatever practice the Court had developed under article 13 applied against the background of article 5.

79. The second set of problems related to the much-discussed question of self-contained regimes. Following a meticulous analysis of practice, the Study Group felt it was in a position to state bluntly that the term “self-contained regime” was a misnomer: no regime existed in a void. All legal rules, of whatever nature, were linked to the normative world around them in innumerable ways. The study illustrated three ways in which every self-contained regime was a part of general international law. First, any such regime derived its binding force and validity from general international law, even when its specific substance derogated from the provisions of the general law; the specific substance became meaningful only by reference to the general law. Thus the Montreal Protocol on Substances that Deplete the Ozone Layer contained a type of dispute settlement, a so-called “non-compliance system”, which was specific to the Protocol. To that extent, it was self-contained. Any consideration of where its roots lay and what its limits were, however, showed that the Protocol was a treaty governed by the 1969 Vienna Convention; its binding force received its validity only by reference to that Convention.

80. Secondly, since a self-contained regime—such as the WTO regime, a human rights regime or a specific river regime—was, by definition, limited to its own subject matter, any problems outside the ambit of the regime had to be resolved through general international law. For example, in 2000, the Appellate Body of WTO had heard a case (*Korea—Measures Affecting Government Procurement*) in which the issue of the application of customary

³⁴⁸ United Nations, *Treaty Series*, vol. 1109, No. 17134, p. 235.

international law within the WTO system had arisen. Faced with a question not regulated by the covered treaties of WTO, the Appellate Body, far from taking refuge in the fact that the WTO regime contained no rule on the matter, had specifically stated that “[c]ustomary international law applies generally to the economic relations between WTO members” (para. 7.65 of the WTO report). Self-contained regimes constantly had to refer to such general rules. No regime had a rule on what constituted a State, for example, and had to rely on the definition of a State accepted in general international law and perhaps, the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States.

81. Thirdly, if a special regime failed, general international law immediately became applicable. That assumption lay behind every regime. For example, a State responsibility regime might contain a particular system of countermeasures; if they failed to work, a situation might be reached in which it became clear that general rules on responsibility of States for internationally wrongful acts and liability would become applicable.

82. The third set of problems related to the *lex posterior* rule and *inter se* agreements, in relation to conflicts between successive treaty norms, which were largely regulated by articles 30 and 41 of the 1969 Vienna Convention. No problem generally arose where the conflict in question was between successive treaties concluded by the same parties, since in that case *lex posterior* applied, the reasonable assumption being that the parties had intended to abrogate the earlier treaty through the later one. The only significant problem arose in relation to article 30, paragraph 4, of the 1969 Vienna Convention, which provided for a situation in which a State had concluded agreements with different parties. In that case, *lex posterior* was not automatically applicable. He drew attention to the concern felt by Special Rapporteurs for the 1969 Vienna Convention, especially Sir Gerald Fitzmaurice and Sir Humphrey Waldock,³⁴⁹ at the fact that, ultimately, a State that had concluded two incompatible agreements apparently had the power to choose which treaty to fulfil. There was no general solution to the dilemma, which Fitzmaurice had termed the “right of election”.³⁵⁰ States sometimes tried to deal with the difficulty by including conflict clauses in treaties, a number of examples of which were given in the study. Unfortunately, such clauses were not necessarily effective, since they themselves were often not clear as to what they provided. As for *inter se* agreements—agreements between a limited number of parties—the provisions of article 41 of the 1969 Vienna Convention were entirely appropriate, since they encouraged the parties to make agreements that furthered the object and purpose of the treaty but limited their scope so that the treaty was not undermined.

83. The third topic concerned hierarchies and the relative importance of Article 103 of the Charter of the United Nations, *jus cogens* and obligations *erga omnes*. The study contained many examples of practice in relation

to Article 103, particularly the statement in the *Lockerbie* case, which had expanded the scope of Article 103 to include also Security Council resolutions. A more recent example had been the case concerning *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, in which the Court of First Instance of the European Communities had set out the relationship between Security Council resolutions and *jus cogens* norms. The study contained an interesting treatment of the topic, but, naturally, no position was taken. The study also dealt briefly with *jus cogens*, with particular reference to how the Commission had previously tackled it, in the context of responsibility of States for internationally wrongful acts and obligations *erga omnes*. The Study Group had, as far as possible, followed the Commission’s own understanding and language.

84. The final topic studied in the report of the Study Group concerned article 31, paragraph 3 (c), of the 1969 Vienna Convention. The theme had become a popular one and the two cases highlighted and discussed in the study were the *Oil Platforms* case heard by the ICJ and the recent *European Communities—Biotechnical Products* case in the WTO Panel, which involved two very different treatments of article 31, paragraph 3 (c). The Study Group’s report concluded with a number of suggestions—for which he alone was responsible—as to how the Commission might deal with the various problems, discrepancies and innovations that emerged from the practice.

85. Document A/CN.4/L.702 contained the Study Group’s conclusions formulated on the basis of the study. The Study Group did not suggest that the Commission should adopt those conclusions as its own; rather, the Commission should take note of the report and endorse the Study Group’s conclusions in a general way. In chapters corresponding to those of document A/CN.4/L.682 and Corr.1, the Study Group set out a number of propositions. Conclusion (1) stated, with a clarity in which he took some pleasure, that there was a meaningful relationship between the various rules and principles of international law, which formed a legal system and came into play when normative conflicts arose. Conclusion (2) set out the relationships concerned: that contained in the situation in which two rules applied simultaneously, with one assisting in the interpretation of the other; and that contained in the situation of straightforward conflict where one overruled the other. The most obvious significant example of the latter was *jus cogens*, where the subsidiary rule was not only overruled but invalidated. Conclusion (3) made the point that the 1969 Vienna Convention covered that area exhaustively. Conclusion (4) referred to a predominant feature of international case law, namely the principle of harmonization. Whenever courts or tribunals came up against a problem that appeared to be one of normative conflict, they attempted, first of all, to read the provisions as being compatible with each other; and the Study Group endorsed that process.

86. Conclusion (5) stated and expanded on the principle *lex specialis derogat legi generali*. Conclusion (6) noted that the presumption expressed by the maxim did not apply automatically, but depended on the context.

³⁴⁹ See *Yearbook ... 1963*, vol. II, second report of Sir Humphrey Waldock (A/CN.4/156 and Add.1–3), pp. 53–61, commentary to draft article 14.

³⁵⁰ *Yearbook ... 1958*, vol. II, third report of G. G. Fitzmaurice (A/CN.4/115), p. 42, para. 85.

Conclusion (7) explained why the presumption existed in the first place, the answer being that special law was more concrete and thus gave easier access to the intention of the parties. It also took better account of the features of the situation in which it was to be applied. Conclusion (9) set out the principle that general law was not automatically extinguished by the application of the special law but remained in the background. The example given was that of the Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, in which human rights law remained in the background to the application of the law of armed conflict, the *lex specialis* in that case. Conclusion (10) listed four situations in which *lex specialis* might be inappropriate.

87. Conclusions 11 to 16 covered special (self-contained) regimes, emphasizing the fact that, however “self-contained” a regime was, it was always linked with general international law in various ways. He drew particular attention to conclusion (12), which had a didactic purpose: it pointed out that international lawyers gave the term “self-contained regime” three different meanings. The first was its definition *stricto sensu*, used by the Commission in the draft articles on responsibility of States for internationally wrongful acts.³⁵¹ The non-compliance mechanism under the Montreal Protocol on Substances that Deplete the Ozone Layer, referred to earlier, was an example of such a regime. The term was, however, also often used in a wider sense, meaning a set of rules dealing with a particular subject matter. In the very first case heard by the PCIJ, the SS “Wimbledon” case, the Court had characterized the regime of the Kiel Canal as being a self-contained regime in respect both of its primary and of its secondary rules: in other words, by reference both to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) and to the general law on navigable waterways. Thirdly, the term might denote all the rules and principles regulating certain problem areas, such as “law of the sea”, “humanitarian law”, “human rights law”, “environmental law” or “trade law”.

88. Conclusion 17 to 23 dealt with article 31, paragraph (c), of the 1969 Vienna Convention, which required the interpreter of a treaty to integrate it into the system of international law, as defined in the Study Group’s conclusion (1). Conclusion (18) defined interpretation as integration in the system. Conclusions (19) to (21) dealt with different aspects of such systemic integration. Conclusion (19) drew attention to two presumptions: first, that, in interpreting a treaty, the parties always referred to customary international law and general principles of law when they had not specifically opted out from that position. The presumption in question was based on the *Georges Pinson* case and the practice of the WTO Appellate Body, as well as on legal reasoning. The second presumption was based on the *Right of passage over Indian Territory*, in which the ICJ had held that, when States entered into treaty obligations, they did not intend to act inconsistently with the generally recognized principles of international law. Both assumptions were merely reformulations of the idea of systemic integration. Conclusion (20) concerned the way in which treaty obligations were integrated with

custom and general principles of law. Conclusion (21) dealt with the application of other treaty rules under article 31, paragraph 3 (c). Conclusions (22) and (23) dealt with inter-temporality, which had been most exhaustively dealt with by the Special Rapporteurs during the *travaux préparatoires* of the 1969 Vienna Convention, in the course of which the idea of systemic integration had never been questioned by the Commission, although different formulations of the provision had been put forward. Conclusions (22) and (23) related to the classic approach to dealing with the problem.

89. In view of the late hour, the Chairperson of the Study Group would complete his presentation at the Commission’s next meeting.

The meeting rose at 1.05 p.m.

2902nd MEETING

Friday, 28 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, 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.

Fragmentation of international law: difficulties arising from the diversification and expansion of international law (*concluded*) (A/CN.4/560, sect. H, A/CN.4/L.682 and Corr.1 and Add.1, A/CN.4/L.702)

[Agenda item 11]

REPORT OF THE STUDY GROUP (*concluded*)

1. Mr. KOSKENNIEMI (Chairperson of the Study Group on fragmentation of international law), continuing with his introduction of the report of the Study Group (A/CN.4/L.702), outlined conclusions 24 to 30, which dealt with conflicts between successive norms. Conclusion (24) reproduced the principle laid down in article 30 of the 1969 Vienna Convention, according to which, in the event of a conflict between successive norms, the later law superseded the earlier law. Conclusion (25) identified the limits of that principle and indicated that there was no general rule that could resolve conflicts when a State was a party to two incompatible treaties. It referred the reader to conclusions (26) and (27), which contained some innovative components and cited in general terms cases when the *lex posterior* principle did not automatically apply. Conclusion (26) started out by saying that the *lex posterior* principle was at its strongest with respect to conflicts between successive norms that formed part of the

³⁵¹ See footnote 8 above.