Document:-
A/CN.4/2902

Summary record of the 2902nd meeting

Topic:
<multiple topics>

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

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 denominate 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.

[351] See footnote 8 above.

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

same regime. On the other hand, it could not be deemed to apply when successive treaties were in different regimes. In such cases, States bound by the treaty obligations should try instead to implement them in accordance with the principle of harmonization. The most important part of conclusion (26) was the final sentence, which stated that the substantive rights of treaty parties or third party beneficiaries should not be undermined by States in applying the *lex posterior* principle. Conclusion (27) indicated that, like the *lex specialis* presumption in conclusion (10), the *lex posterior* presumption did not always apply with respect to certain treaty provisions.

2. Conclusion (28) dealt with the settlement of disputes within and across regimes and emphasized the need for appropriate means of dispute settlement to be available. Its most significant contribution was that when the conflict concerned provisions in treaties that were not part of the same regime, the parties should pay special attention to the independence of the means of dispute settlement chosen. Conclusion (29) concerning *inter se* agreements, which were also covered by article 41 of the 1969 Vienna Convention, stated that such agreements were acceptable if they facilitated the more effective implementation of the treaty. Conclusion (30) emphasized the need for conflict clauses to be as specific as possible, something that was all the more important since practice showed that such clauses were often obscure.

3. Referring to conclusions 31 to 42 concerning hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations, he noted, with regard to conclusion (31), that the norms of international law were not exactly in a formal hierarchical relationship; the ICJ sometimes used fairly informal language when referring to that relationship. Conclusion (32) reproduced the provisions of article 53 of the 1969 Vienna Convention relating to *jus cogens* and conclusion (33) outlined the content of *jus cogens* by reproducing the commentary to articles 26 and 40 of the draft articles on State responsibility.[352] Conclusion (34) elucidated the meaning of Article 103 of the Charter of the United Nations and conclusion (35) emphasized that the scope of that article extended to binding decisions made by United Nations organs such as the Security Council. Conclusion (36) simply recalled that the Charter of the United Nations itself enjoyed a special character—on which it had not been deemed necessary to elaborate.

4. As to conclusion (37), he said the Study Group had clearly indicated that obligations *erga omnes*, strictly speaking, were characterized, not by a hierarchical relationship, but by the scope of their applicability: the Commission had decided that the Study Group should view obligations *erga omnes* in that light. When conclusions (37) to (39) were read together, they showed that obligations *erga omnes* took two forms in international practice. Conclusion (37) set out the definition of obligations *erga omnes* adopted by the Commission, namely, obligations whose breach concerned the international community as a whole, with every State being able to invoke the responsibility of the State violating such obligations. However, that conception of the obligations emerged very rarely in international practice, doctrine and case law. That was why conclusion (39) outlined other approaches to the concept of obligations *erga omnes*, namely obligations *erga omnes partes*. The conclusion also explained that issues of territorial status had frequently been addressed in *erga omnes* terms. Conclusion (38) indicated that while all obligations established by *jus cogens* norms had the character of obligations *erga omnes*, the reverse was not necessarily true. The category of obligations *erga omnes* was broader than that of *jus cogens* norms, hence the reference in conclusion (38) to the existence of two categories of obligations *erga omnes* that could not be included among *jus cogens* norms, namely, obligations under the principles and rules concerning the basic rights of the human person and obligations relating to the global commons.

5. The wording of conclusion (40) was a compromise among a number of viewpoints expressed by members of the Commission on the relationship between *jus cogens* and obligations under the Charter of the United Nations. Conclusion (41) stated that a rule conflicting with a norm of *jus cogens* became *ipso facto* void, while a rule conflicting with Article 103 of the Charter of the United Nations became inapplicable as a result of such conflict. Lastly, conclusion (42) reproduced the principle of harmonization laid out in conclusion (4), reformulating it to apply to the case of conflict between norms of international law, one of which was hierarchically superior to another. In such a case, the inferior norm should be interpreted in a manner consistent with the superior norm.

6. The conclusions reached by the Study Group concerned fundamental aspects of international law and were not in the nature of norms. They were intended to fuel the thinking on international law of academics, diplomats and, more generally, the United Nations community. The members of the Study Group suggested that the Commission should take note of the work it had done and endorse the conclusions it had reached. As to what should be done with the study contained in document A/CN.4/L.682 and Corr.1, on the one hand, and the conclusions, on the other, the members of the Study Group had put forward two ideas. The Sixth Committee could adopt a short resolution to which either the 42 conclusions or the report of the Study Group could be annexed, or else, in the general resolution on the work of the International Law Commission, it could take note of the work done by the Study Group, stressing the need to disseminate it broadly in academic and diplomatic circles.

7. Mr. ECONOMIDES explained that, as a member of the Study Group on fragmentation of international law, he obviously endorsed its work as a whole, even though he found some of its conclusions to be somewhat unsatisfactory. He drew the Commission's attention to a written proposal on the distinction between positive fragmentation and negative fragmentation which he had submitted to the Study Group on 11 July 2006,[353] but which had not been given sufficient consideration owing to lack of time. He thought it would be unfortunate for the Study Group not to take account of the distinction,

[352] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 84 and 112, respectively.

[353] Unofficial document; distributed to the members of the Commission.

which was made quite frequently in the literature and had proved quite useful in practice. Before defining the difference between positive and negative fragmentation, it was necessary to define fragmentation of international law. That phenomenon must not be confused with the simple development of a treaty rule. Instead it constituted the modification of an initial treaty rule by a new and quite different rule that applied in parallel to the first, but in a restrictive fashion. Fragmentation thus gave rise to specific derogations that were positive or negative in nature.

8. Positive fragmentation generally contributed to the strengthening of the international rule and, consequently, of international law. The same was true of modifications that confirmed or clarified the rule, made it more specific or developed it through the addition of new, and in principle enriching, elements. Positive fragmentation facilitated application of the treaty rule and ultimately served the purpose of the treaty better and more effectively. For example, when a simple international obligation of means in connection with environmental protection was elevated to the status of an obligation of result, that was obviously a case of positive fragmentation. In contrast, negative fragmentation generally weakened the treaty rule by excluding its application in certain cases, by limiting its scope or by lowering the level of protection it provided. While positive fragmentation gave a "plus" to the treaty rule and worked in the right direction, namely, in the sense of the object and purpose of the treaty, negative fragmentation went in the opposite sense, as it aimed to exclude the application of, limit or weaken the rule or one of its elements. In such a case, it was a "minus" that predominated. The PCIJ, in its 1928 judgment in the *Rights of Minorities in Upper Silesia (Minority Schools) case*, had made a clear distinction between positive and negative derogations.

9. Of the legal techniques within the law of treaties that had the effect of creating derogations, agreements *inter se* and *lex specialis* could work both ways and result in positive or negative fragmentation depending on their content, whereas reservations to treaties and the European Union's "disconnection clauses" operated exclusively in the direction of negative fragmentation. One point that all the techniques had in common was that they were based on special regimes that were by definition derogable and in principle took priority over the treaty provisions that they modified.

10. In a document specifically on fragmentation of international law, the Study Group and the Commission behind it could not ignore or fail to take sufficiently into account the distinction between positive and negative fragmentation, a distinction that was indisputably of practical interest and applicability. In order to be of some practical use and also to reflect the role played by the Commission, the Study Group's document must contain a recommendation on the distinction between positive and negative fragmentation that might be worded to read: "It is clear that States should encourage positive fragmentation, which is generally beneficial to international law, and discourage, as far as is possible, negative fragmentation, which has the opposite effect. In order to achieve this, States must examine the compatibility with the object and purpose of the treaty concerned of any derogation proposed that has a negative effect". That text or similar wording could be inserted, following a short introduction of the subject, after paragraph 9 of the report of the Study Group.

11. The CHAIRPERSON drew attention to paragraph 9 of document A/CN.4/L.702 and asked Mr. Economides whether the first sentence of the paragraph did not meet his concerns.

12. Mr. ECONOMIDES said that paragraph 9 contained a few scattered references to the positive and negative aspects of fragmentation of international law, but did not systematically or clearly explicate the problem, hence his proposal to add a paragraph 9 *bis* to follow paragraph 9.

13. Mr. MANSFIELD, supported by Mr. GALICKI, said the concerns expressed by Mr. Economides were understandable, but the viewpoint he had outlined had been discussed at length in the Study Group, including during its preparation of document A/CN.4/L.702. No member of the Study Group was completely satisfied with all aspects of that document, but it expressed a consensus. It would therefore be gratifying if Mr. Economides would not press for the inclusion of the addition he had proposed.

14. Mr. KATEKA, referring to what was to be done with document A/CN.4/L.702, said that it would be difficult for the Commission to endorse the conclusions contained therein before it had given substantive consideration to the report itself (A/CN.4/L.682 and Corr.1), which was not available in all languages. It should therefore simply take note of the document.

15. Mr. MOMTAZ, expressing his admiration for the Chairperson of the Study Group, all the Study Group's members and the remarkable work they had done, said that the 42 conclusions contained in the report would be of enormous value to diplomats, as well as to academics. On a minor point, it seemed to him that the reference in the first footnote to conclusion (38) to the prohibition of torture as an *erga omnes* obligation in the *Furundzija* case was wrong: as he recalled it, the judgement in that case referred to *jus cogens*.

16. As to the procedure to be followed, he endorsed the proposals made by the Chairperson of the Study Group.

17. Mr. KOSKENNIEMI (Chairperson of the Study Group on Fragmentation of International Law) said it was entirely possible that the judgement cited referred both to an *erga omnes* obligation and to *jus cogens*. He would do the necessary checking in consultation with Mr. Momtaz and correct the footnote accordingly.

18. Ms. ESCARAMEIA, referring to the proposal by Mr. Economides, said that his concerns could perhaps be allayed by the inclusion of a footnote to paragraph 9 citing the 1928 judgment of the PCIJ in the case concerning *Rights of Minorities in Upper Silesia (Minority Schools)* and indicating that, in that case, the Court had made a distinction between the positive and negative aspects of fragmentation of international law.

19. With regard to the report under consideration, she shared the admiration already expressed and commended the Chairperson of the Study Group on the work done. In order to do justice to that work, the Commission should recommend that the General Assembly adopt a brief resolution to which the report of the Study Group would be annexed.

20. Mr. ECONOMIDES said that, in a spirit of compromise, he would be satisfied with a footnote citing the judgment of the PCIJ and briefly summarizing his proposal.

21. Mr. KOSKENNIEMI (Chairperson of the Study Group on fragmentation of international law), referring to the proposal by Mr. Economides, said that the report of the Study Group had been adopted by consensus, a consensus joined by Mr. Economides himself in exchange for an amendment to paragraph 9. He was therefore surprised that, at the present stage, Mr. Economides was proposing that the report should be amended.

22. Mr. PELLET said that, except where a factual error had been made, the report of the Study Group should be left as it was.

23. Mr. ECONOMIDES, speaking on a point of order, said that he withdrew his proposal.

24. Mr. PELLET said that the results of the work of the Study Group on fragmentation of international law were truly impressive, but he was chagrined by the translation into French of the report (A/CN.4/L.702), which contained a number of egregious errors that must be corrected. For example, in conclusions (9) and (10), the word "law" was translated as "*loi*". On substance, he welcomed the fact that the Study Group had adopted a truly comprehensive approach, while being pragmatic and remaining neutral. It had been right to position itself "beyond good and evil" and to consider the fragmentation of international law as a fact of contemporary international law, without passing judgement. Any distinction between positive and negative aspects of that fragmentation was necessarily subjective and essentially political. The conclusions adopted by the Study Group and reproduced in document A/CN.4/L.702 were extremely interesting, even if some of them stated the obvious—but it could hardly have been otherwise.

25. Nevertheless, he disagreed with the Study Group on some points. For example, conclusion (10) on particular types of general law seemed to be missing a major point, since the Study Group failed to mention the law specific to international organizations. He found the last sentence in conclusion (28) to be incomprehensible and the explanation given by the Chairperson of the Study Group had only increased his confusion. Did the sentence refer to the situation that had arisen in the *Southern Bluefin Tuna Cases*? The first footnote to conclusion (31) was badly placed. The problem was not one of hierarchy and the means for the determination of rules of law were not the same as the means for the formation of rules of law.

26. The first sentence in conclusion (34) was worded strangely: the problem was one of sources and not of rules. The Charter of the United Nations placed itself in a superior position to other treaties. That confusion between rules and sources was also to be found in other conclusions, whereas it would have been extremely useful to distinguish between the two.

27. The explanations in conclusions (37) to (39) were very welcome, as it was important to eliminate the confusion between *erga omnes* rules and rules of *jus cogens* that had originated in the *Barcelona Traction* case, doctrine having wrongly followed the lead of the ICJ. The explanations were in the wrong place, however. *Jus cogens* involved a problem of hierarchy, whereas obligations *erga omnes* gave rise to a problem of the scope of the rule. Moreover, the two examples given at the end of conclusion (38) were not very illuminating, since the norms in question could claim to form part of *jus cogens*. The Study Group could, for example, have referred to the right of innocent passage, which was without doubt an obligation *erga omnes* and not one of *jus cogens*.

28. As to what should be done next with the report of the Study Group, the Commission could either endorse it or take note of it, the latter solution having the advantage of not polarizing the members of the Commission. He was prepared to endorse it and believed it would be illogical for the Commission not to do so while requesting the General Assembly to annex it to one of its resolutions. In any event, the outstanding work done by the Study Group seemed to him to be the start of what he had always ardently desired, namely, a restatement of public international law by the International Law Commission. In addition to its usual work, the Commission must embark on a long-term undertaking and the document under consideration seemed to be a perfect example of the first chapter of a future restatement.

29. Mr. MELESCANU said that the Study Group's conclusions were exceptionally important from the practical and theoretical standpoints. Its work was entirely based on the philosophy of the harmonization of the various systems and regimes of public international law. Without making any value judgement, the Study Group had endeavoured to understand the problem of fragmentation and how it should be dealt with to ensure that international law truly served its purpose.

30. He encouraged the members of the Commission to look closely at the conclusions he saw as crucial: (4) and (42), on hierarchy of norms and the principle of harmonization. The Commission should endorse the whole set of conclusions or at least take note of them with satisfaction, if some of its members had reservations. The General Assembly should do the same, in a separate resolution rather than in the general one in which it took note of the work of the Commission. Document A/CN.4/L.682 and Corr.1 deserved to be mentioned in the report of the Commission to the General Assembly and disseminated, for example, on the Commission's website.

31. Mr. DAOUDI pointed out that the reference in the second footnote to conclusion (38) to common article 1 of the 1949 Geneva Conventions should appear in one of the two footnotes to conclusion (37). That example had been cited in the context of obligations *erga omnes* which

gave all States the right to ensure respect for the rule. He requested that the mistake be corrected.

32. Mr. KAMTO, referring to Mr. Pellet's insistence on leaving the report as it stood, said that, when the Commission entrusted a study to a study group, it had to leave itself room to assess the resulting document before adopting it. In the footnote to paragraph 7 of its report, the Study Group cited a number of "particularly useful" works in the literature, suggesting that others were less useful, although many shed just as much light on the question of fragmentation. For example, under conclusion (1) (International law as a legal system), a major work on the issue had escaped mention: the article by Jean Combacau entitled "Droit international: bric-à-brac ou système?".[354] At the end of that conclusion, it was stated that the validity of norms could "date back to earlier or later moments in time". He wondered whether such a temporal distinction was necessary and, indeed, whether there was such a thing in international law as validity *ne varietur*. The concept of validity should be viewed in relation to *jus cogens*, since the emergence of a norm of *jus cogens* could invalidate a norm previously considered valid.

33. Lastly, he suspected that many of the questions raised were the result of the fact that the Study Group had neither defined the concept of fragmentation, if only in intellectual terms and in relation to the literature, nor explained what the Commission meant by fragmentation for the purposes of its work.

34. Mr. KEMICHA said he welcomed the fact that the Commission's work on fragmentation of international law had yielded tangible results, something which had not been a foregone conclusion given the fairly abstract nature of the topic. He thought the Commission should not only take note of the report, but also state that it was of excellent quality, in the hopes that the General Assembly would do the same. Mr. Pellet's suggestion about viewing the work as the cornerstone of a restatement of international law, an ambitious but stimulating project, was certainly worth considering.

35. The CHAIRPERSON suggested that, based on the general tendency of the comments made, the Commission should take note of the conclusions set out in the report of the Study Group and leave it to the Sixth Committee to decide how to handle the report.

It was so decided.

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*)

36. Mr. FOMBA said that three basic concepts lay at the heart of the topic: obligation, extradition and prosecution. Mr. Melescanu had suggested that a principle was involved, not an obligation, but the very title of the topic contradicted that view. Mr. Pellet had brought in the concept of "right", as in diplomatic protection, but those were two entirely different matters: the law relating to diplomatic protection and criminal law, which required a more rigorous approach. Everything depended on what was meant by the concepts he had mentioned: hence, they must be defined, all the more so as their interpretation might give rise to a number of questions. For example, one might ask whether the obligation was absolute or relative, whether it was an obligation of result or of means and whether its legal nature was conventional or customary. He wholeheartedly endorsed the analysis of that point by Mr. Momtaz and Mr. Kamto. It also had to be determined in what way extradition differed from transfer of prosecution to an international court according to the principle of complementarity (as with the International Criminal Court) or primacy (as with the international tribunals for the former Yugoslavia and Rwanda). In addition, mention should be made of the transfer of criminal prosecution in the interests of the smooth administration of justice from a requesting State to a requested State under article 21, paragraph 1 of the 1992 ECOWAS Convention on Mutual Assistance in Criminal Matters. One might also ask what the difference was between extradition and transfer of location in which a sentence was served. With regard to prosecution, one could ask what the foundations of jurisdiction to prosecute were or would be and what the links between universal jurisdiction and the obligation to extradite were or would be.

37. The basic premise was that punishment should be imposed for the commission of the most serious acts affecting the international community. The most effective means of doing so was to pursue and punish those responsible for such acts, wherever they might be. It would therefore seem logical to formulate and impose on States a general obligation to prevent impunity: a State that harboured an alleged perpetrator in its territory must prosecute that individual or extradite him if it could not or would not prosecute. But what legal reading should be given to the position of a territorial State: was it obliged to act or simply authorized or invited to do so? In order to answer that question, the following factors should be taken into account: the principle of State sovereignty, to be interpreted in the strict, absolute or relative sense; the constituent elements and degree of gravity of the criminal acts involved; the relevant legal regime, from the point of view of both international law and the domestic law of States; the current status of doctrine, State practice and jurisprudence; and the teleological reasoning criterion and the consequences to be drawn therefrom for the purposes of the codification and progressive development of international law. A thorough analysis of State practice and jurisprudence, both national and international, would enable the Commission better to answer those questions and to determine what final direction the work on the topic should take.

38. Mr. ECONOMIDES said that the Special Rapporteur should take maximum advantage of the draft code of crimes against the peace and security of mankind[355] and a number of other documents, such as the very recent reso-

[354] "Le système juridique", *Archives de philosophie du droit*, vol. 31, Paris, Sirey, 1986, pp. 85–105.

[355] *Yearbook … 1996*, vol. II (Part Two), p. 17, para. 50.

lution of the Institute of International Law on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes.[356] It would be useful for the Secretariat to prepare a document containing such texts and essential information on State practice on the topic under consideration.

39. Contrary to the view expressed in paragraph 55 of the report, he did not see a rule of *jus cogens* in the principle of *aut dedere aut judicare*, which was essentially a procedural rule. For the most serious crimes affecting the international community as a whole, it might even be a customary rule—that was a question the Special Rapporteur would have to look into carefully—but for other offences, it was simply a treaty norm.

40. As he had already indicated, he thought the Commission should give precedence to the third option aside from extradition and prosecution, namely, handing over an alleged perpetrator of a serious international crime to an international court such as the International Criminal Court. In his view, that was the best course to follow.

41. Unlike some members, he did not see as unduly ambitious the preliminary plan of action outlined by the Special Rapporteur. Nevertheless, the work should be done in stages, starting with a comprehensive comparative analysis of the relevant provisions, as suggested in paragraph (1) of the plan. The subject of paragraph (7) (content of the obligation) should likewise be given priority. As to the final product (para. 59), it was indeed premature to decide that now, but it would seem useful to work on the basis of draft articles, in line with the Commission's usual methods. The draft articles should seek to codify and develop constructively State practice concerning the principle of *aut dedere aut judicare*.

42. Mr. MANSFIELD thanked the Special Rapporteur for his highly stimulating and informative preliminary report, which provided an excellent basis for analysing the topic. He agreed with the idea that the focus of work should be sharply narrowed, but thought that the main point to be kept in mind was that the topic had a direct bearing on domestic criminal law. That was important for two reasons. First, because criminal law, which had direct implications for the liberty of the individual, was in most countries extremely precise as to both substance and procedure and it was interpreted by courts in a very strict manner. Second, because criminal law was primarily based on territorial jurisdiction and the extension of jurisdiction to crimes committed elsewhere usually required a precise modification of existing criminal law. Anyone who had been involved in the negotiation of an extradition treaty knew only too well the enormous amount of time and effort that had to be spent in ensuring that the offences for which extradition could be sought were also offences in the domestic criminal law of the countries concerned. Thus, the essential question could never be simply whether there was a general obligation to extradite or prosecute, but rather whether there was an obligation to extradite or prosecute for a precisely defined crime in precisely defined circumstances. In other words, unless a country's criminal law allowed extradition or prosecution for a particular international crime, no official of the executive branch, however well intentioned or highly ranked, was likely to have the power to secure that result.

43. Thus, if the Commission decided to examine the question whether there should be an obligation to extradite or prosecute for international crimes not already covered by existing multilateral treaties, including the Rome Statute of the International Criminal Court, it would have to define such crimes very precisely, so that, if they agreed, States could decide what specific modifications they needed to make to their criminal law. The same would be true, however, if the Commission decided to focus on whether there was a customary law obligation on States that were not parties to such treaties to extradite or prosecute for certain international crimes. There again, it would be necessary to define the crimes and circumstances reasonably precisely so that States could modify their criminal law accordingly if they acknowledged that such a customary law obligation existed.

44. For those reasons, he thought that the end product of the Commission's work would almost certainly need to be cast in the form of draft articles, since it was hard to see that guidelines of a general kind could provide a basis for effective and concerted State action in relation to extradition or prosecution of the alleged perpetrators of particular international crimes. Guidelines could perhaps be helpful in the interpretation of particular terms in existing treaties that were less than clear. It was possible that domestic courts might refer to them if the domestic legislation they were interpreting was unclear and they were seeking the legislative intent. But that was a relatively unlikely situation because considerable efforts would have been made to ensure that the domestic criminal law was clear, even if the international treaty to which it gave effect was less than clear. If there was found to be a real need to clarify some aspects of a treaty, the most effective way forward would be a precisely developed proposal for amendment to the relevant treaty for consideration by the parties.

45. Those comments were perhaps of particular relevance in respect of common law countries in which treaties were not self-executing, but he hoped they would nevertheless be useful for the direction of future work on the topic.

Responsibility of international organizations (*concluded*)[*] (A/CN.4/560, sect. C, A/CN.4/564/Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

Report of the Drafting Committee

46. Mr. KOLODKIN (Chairperson of the Drafting Committee), introducing the fifth and final report of the Drafting Committee on responsibility of international organizations, noted that the Drafting Committee had already reported to the plenary Commission during the first part of the session on its work on draft articles 17

[356] See footnote 335 above.

[*] Resumed from the 2895th meeting.

to 24. During the second part of the session (2895th meeting, above, para. 66), the plenary had referred to it the remaining draft articles proposed by the Special Rapporteur in the second chapter of his fourth report (A/CN.4/564 and Add.1–2), namely, draft articles 25 to 29 dealing with the responsibility of a State in connection with the act of an international organization. The Drafting Committee had considered the draft articles during two meetings, on 18 and 19 July 2006. He wished to thank the Special Rapporteur, Mr. Gaja, for his helpful explanations and suggestions and the members of the Drafting Committee and other members of the Commission who had participated in the Drafting Committee's work for their cooperation and valuable contributions.

47. Chapter IV of Part One of the draft articles on responsibility of States for internationally wrongful acts dealt with aid or assistance, direction or control and coercion by one State in the commission by another State of an internationally wrongful act.[357] It did not address such relationships between a State and an international organization, a gap now to be covered by draft articles 25 to 27 on responsibility of international organizations, which generally corresponded to articles 16 to 18 of the draft articles on State responsibility. Draft articles 28 and 29 were unique to the present topic and had no equivalent in the draft on State responsibility. New draft article 30, which had emerged from the Drafting Committee, corresponded to article 19 of the draft articles on State responsibility.

48. Draft article 25 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization) corresponded to article 16 of the draft articles on State responsibility. The text proposed in the Special Rapporteur's fourth report had been favourably received in the plenary and the Drafting Committee had therefore retained it without change. Two issues in particular had been raised in plenary. The first concerned the possible deletion of subparagraph (*b*) on the grounds that the draft article should also cover situations in which a State aided or assisted an international organization in breach of an obligation which bound only the organization. The Drafting Committee had been of the view that subparagraph (*b*) should be maintained in order to ensure consistency with the corresponding provision in the draft articles on State responsibility, as well as the text of draft article 12 dealing with aid or assistance by an international organization to a State or another international organization in the commission of an internationally wrongful act. The second issue raised in plenary was the need to differentiate between the notions of "aid" and "assistance" in the commission of an internationally wrongful act and the ordinary participation of a member State in the decision-making process of an international organization. Questions had also been raised as to whether aid or assistance could include conduct prior to as well as subsequent to the making of a decision. It had been agreed that the commentary was the proper place to make those clarifications. The Drafting Committee was of course aware that those questions could only be answered definitively by taking into account the relevant context. It had also been agreed that the commentary should make it clear that draft article 25 applied to States whether or not they were members of an international organization.

49. Draft article 26 (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization) corresponded to article 17 of the draft articles on State responsibility. There had been general agreement in plenary on the text proposed in the Special Rapporteur's fourth report and the Drafting Committee had therefore retained it without change. The observations made with respect to draft article 25, including the indications concerning the issues that should be addressed in the commentary, applied *mutatis mutandis* to draft article 26.

50. Draft article 27 (Coercion of an international organization by a State) corresponded to article 18 of the draft articles on State responsibility. The text proposed in the fourth report of the Special Rapporteur had been favourably received in plenary and the Drafting Committee had therefore retained the text without change. Some observations made with respect to draft article 25, including the indications concerning the issues that should be addressed in the commentary, applied *mutatis mutandis* to draft article 27.

51. Draft article 28 (International responsibility in case of provision of competence to an international organization) had no equivalent in the draft articles on State responsibility. The text proposed by the Special Rapporteur in his fourth report had raised a number of questions in plenary. Most of the concerns had related to paragraph 1, which the Drafting Committee had therefore decided to redraft. Some concerns had related to the scope of the draft article. Some members would have preferred a narrower scope, limiting it only to situations in which a State acted in bad faith or committed an abuse of rights. Other speakers, both in plenary and in the Drafting Committee, considered that the requirement of establishing intention on the part of a State was too high and not always possible to meet. Fairness to injured parties would require a formulation that would not condition the application of the draft article to the proof of intention and bad faith. The Drafting Committee had favoured that approach. It had also followed the suggestion made in plenary to use the term "circumvents" instead of the phrase "avoids compliance" that appeared in draft article 28, paragraph 1 (*a*) proposed by the Special Rapporteur. The commentary would clarify the point that the notion of "circumvention" did not necessarily imply a specific intention or bad faith on the part of the State concerned. There had been other comments in plenary that, while the notion of "transfer" of functions was appropriate for certain types of organizations, namely, integration organizations, it was misleading if applied to international organizations in general. The Drafting Committee had accordingly replaced the word "transferring" with "providing" in order to cover also cases in which an organization was entrusted with competences that had not been "transferred" to it by member States, which themselves did not possess them, but had empowered the organization with them. The commentary should adequately reflect that point.

[357] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 65–71, articles 16–19 and commentary thereto.

52. Paragraph 1, as redrafted, contained three new elements. First, a State member of an international organization must circumvent an international obligation. Secondly, the circumvention must be the result of that organization having been empowered with, or having had transferred to it, a certain competence. Thirdly, if the act that had been committed by the international organization had been committed by that State, it would have constituted a breach of an international obligation of that State. The third element related back to the first, but that had been necessary in order to make the paragraph, the sequence of events and the causal relationship clear. Thus, an act committed by an international organization might not constitute a wrongful act for that organization, even when it was a wrongful act of that State member of the organization, a point that had been further clarified in paragraph 2.

53. The text of paragraph 2 was the same as proposed by the Special Rapporteur. The Drafting Committee had considered the view expressed by some members in plenary that the paragraph should be deleted because only the State, and not the international organization, would be responsible in the situations dealt with in the draft article. The Drafting Committee had recognized that draft article 28 was mainly intended to cover situations in which the act might not be wrongful for the international organization, for example, because the latter was not bound by the obligation in question. It had nevertheless considered that paragraph 2 should be retained in order to make it clear that the State concerned was responsible whether or not the act was internationally wrongful for the organization.

54. Lastly, in view of the specificities of that draft article and of the new wording adopted, the Committee had changed the title, which now read "International responsibility in case of provision of competence to an international organization".

55. The Committee had redrafted draft article 29 (Responsibility of a State member of an international organization for the internationally wrongful act of that organization) to take account of the comments and suggestions made in plenary. The new text comprised two paragraphs.

56. In plenary, some members of the Commission had questioned the soundness of the negative formulation of the text proposed by the Special Rapporteur. The Drafting Committee had discussed at length the possible implications of the choice between a negative and a positive formulation and had finally decided to retain the positive formulation, which had been favoured by several members in plenary and was in line with the general approach taken in the draft articles on State responsibility. The majority of members of the Drafting Committee had considered that the choice between the two formulations was only a question of emphasis and that the positive formulation of the *chapeau* was more appropriate. Under the circumstances, it had also been suggested that the introductory words of paragraph 1 should be modified by introducing a "without prejudice" clause referring explicitly to draft articles 25 to 28. The Drafting Committee had decided to retain subparagraphs (*a*) and (*b*) of the text proposed by the Special Rapporteur, which dealt, respectively, with the acceptance by a State of international responsibility and with the situation in which a State had led the injured party to rely on its responsibility. The wording of subparagraph (*a*) had been shortened and simplified. The commentary would indicate that the acceptance of responsibility by a member State could occur prior or subsequently to the commission of the internationally wrongful act by the international organization and that, while such acceptance could be explicit or implicit, it needed to have effect *vis-à-vis* a third party and not only *vis-à-vis* the international organization. As to subparagraph (*b*), the Drafting Committee had been of the view that the conduct on the part of the State that had led to reliance by the injured party on its responsibility was not necessarily equivalent to implicit acceptance. Although the expression "injured party" might be perceived—at least in French—as giving the impression that an agreement existed, the Drafting Committee had in the end retained that wording, on the understanding that the commentary would clarify that it could refer to a State, an international organization or another person or entity. Based on comments made in plenary, the Drafting Committee had added a second paragraph that dealt with the character of the responsibility of a State under the draft article and provided that the responsibility of a State in accordance with paragraph 1 was presumed to be subsidiary. The commentary would explain that the State concerned could incur joint and several responsibility, depending on the nature and content of its acceptance or on the circumstances surrounding the conduct by which the State had led the injured party to rely on its responsibility. The title of the draft article had been retained with a minor drafting change.

57. Draft article 30 (Effect of this chapter) was the "without prejudice" clause that the Commission had requested the Drafting Committee to draft if it deemed it necessary or useful. The text followed, *mutatis mutandis*, the wording of draft article 19 on State responsibility.[358] However, the reference to the responsibility of "any other State" had been deleted, since the topic did not deal with State responsibility and the question of a State being responsible for an act of an international organization was addressed only in the chapter concerned. The draft article's function was to make it clear that the chapter dealt with the responsibility of a State for an act of an international organization and was without prejudice to the responsibility of the international organization that committed the act in question or to the responsibility of any other international organization, which might be addressed in other provisions on the topic.

58. The CHAIRPERSON invited the Commission to consider chapter (x) (Responsibility of a State in connection with the act of an international organization) of the draft articles on responsibility of international organizations (A/CN.4/L.687/Add.1 and Corr.1) article by article.

Article 25 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization)

Draft article 25 was adopted.

[358] *Ibid.*, p. 27.

Article 26 (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization)

Draft article 26 was adopted.

Article 27 (Coercion of an international organization by a State)

Draft article 27 was adopted.

Article 28 (International responsibility in case of provision of competence to an international organization)

59. The CHAIRPERSON, speaking as a member of the Commission, said that the word "*attribution*" ("provision") seemed inappropriate, as it failed to correspond to the idea of "transfer of competence" referred to during the consideration of the draft article.

60. Mr. KOLODKIN (Chairperson of the Drafting Committee) recalled the explanations he had given during his introduction of the report of the Drafting Committee with regard to the replacement of the word "transfer" by the word "provision".

Draft article 28 was adopted.

Article 29 (Responsibility of a State member of an international organization for the internationally wrongful act of that organization)

61. Mr. PELLET said that he had participated in the work of the Drafting Committee on draft article 29 and, although he did not oppose its adoption, he wished his reservations to be duly recorded. He was extremely pleased with the addition of paragraph 2, but thought that the commentary should state that the presumption in question was rebuttable, since there were cases when State responsibility could be joint or several. He found the wording of paragraph 1 to be dangerous, as it left the impression that there could be other cases in which a member State could be held responsible for an internationally wrongful act and it posed a grave threat to the security of legal relations. He would have greatly preferred either that the Commission should retain the initial negative formulation found in paragraph 96 of the Special Rapporteur's fourth report or that paragraph 96 should read: "A member State … is responsible … only in the case when …".

The meeting rose at 1 p.m.

2903rd MEETING

Wednesday, 2 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

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

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

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*).

2. Mr. GALICKI (Special Rapporteur) expressed his gratitude to members for their constructive and friendly criticism of his report, which, as previously noted, amounted to no more than a very preliminary set of initial observations concerning the substance of the topic, drawing attention to the most important points requiring further consideration, and including a general road map for the Commission's future work. He had deliberately raised a large number of potential areas of difficulty, with a view to obtaining suggestions for solutions both from the Commission and from the Sixth Committee. The members of the Commission had duly taken into account the preliminary nature of the report and their opinions would be of great value in the preparation of his next report, in which draft rules on the concept, structure and operation of the obligation *aut dedere aut judicare* would be gradually formulated.

3. A great variety of opinions had been expressed during the debate, relating to both substance and form. Some speakers had suggested that the title of the topic should be amended—by, for example, replacing the word "obligation" by the word "principle"—but, at least for the time being, the existing title should, in his view, be retained. The concept of an "obligation" *aut dedere aut judicare* seemed to provide a safer starting point for further analysis than would the concept of a "principle". That did not, of course, exclude the possibility—even perhaps the necessity, as suggested by some members—of considering the parallel question of a countervailing right of States to extradite or prosecute.

4. There had been fairly wide agreement that the scope of the work on the topic should be restricted, as far as possible, to the main issues directly relating to the obligation to extradite or prosecute and to the principal elements of that obligation, namely "*dedere*" and "*judicare*". He shared that view, especially with regard to the need for a very careful treatment of the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction, the distinction between which should be clearly drawn. In that connection, the definitions of universal jurisdiction and of the *aut dedere aut judicare* rule cited in the report should be treated as illustrative of one possible approach, and did not