

Document:-  
**A/CN.4/2945**

**Summary record of the 2945th meeting**

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61. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization) said that seminars and study days, as well as the annual joint meeting in New York, were useful tools for improving cooperation between AALCO and the Commission. In reply to a comment by Mr. Hassouna, he said that detailed information on the AALCO centres for arbitration could be found at its website, [www.aalco.int](http://www.aalco.int). The sixth such centre had been established in Nairobi following a decision taken at the organization's session held in Cape Town. As to the comment by Mr. Dugard, he said that the records of AALCO sessions contained all the comments of member States on the work of the Commission; he promised to send a copy of those records to every member of the Commission.

62. Mr. SINGH, joined by Mr. CANDIOTI, Mr. PERERA and Mr. WISNUMURTI, described the genesis of AALCO and drew attention to the importance and usefulness of its activities for the International Law Commission.

*The meeting rose at 1.10 p.m.*

## 2945th MEETING

*Tuesday, 31 July 2007, at 10.05 a.m.*

*Chairperson:* Mr. Ian BROWNLIE

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

### **The obligation to extradite or prosecute (*aut dedere aut judicare*)<sup>319</sup> (A/CN.4/577 and Add.1–2, sect. F, A/CN.4/579 and Add.1–4,<sup>320</sup> A/CN.4/585<sup>321</sup>)**

[Agenda item 6]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. GALICKI (Special Rapporteur), introducing his second report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/585), said that the report drew heavily on his preliminary report;<sup>322</sup> in places, the two were almost identical. There were three main reasons for such an approach. The first was that around half the members of the Commission had been replaced as a result of the election at the end of 2006. It

<sup>319</sup> For the history of the Commission's work on the topic, see *Yearbook ... 2006*, vol. II (Part Two), chapter XI.

<sup>320</sup> Reproduced in *Yearbook ... 2007*, vol. II (Part One).

<sup>321</sup> *Idem*.

<sup>322</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

therefore seemed worth recapitulating, for the benefit of new members, the main ideas set out in the preliminary report, together with a summary of the discussion in the Commission and later in the Sixth Committee. Secondly, it would be necessary to ascertain the views of the new members on the most controversial issues covered in the preliminary report before the Commission could proceed to a substantive elaboration of draft rules or articles. Lastly, there was undoubtedly a need for a wider response from States to the questions posed in paragraph 30 of the Commission's report to the General Assembly on the work of its fifty-eighth session.<sup>323</sup> At the time when the report had been finalized, only seven States had responded. That number had since risen to 21, but it still seemed necessary to repeat the request to States in order to obtain the fullest possible picture of States' internal regulations and international commitments concerning the obligation to extradite or prosecute.

2. The second report began with a preface and an introduction which briefly outlined the history of the Commission's work on the topic. Chapter I (paras. 9–72) dealt with a number of old and new aspects of the topic for the benefit of new members. Paragraphs 9 to 19 addressed some of the principal questions discussed during the fifty-eighth session. The first had been whether the obligation *aut dedere aut judicare* derived exclusively from international treaties specifically relating to it or whether it could be considered to be based also on existing, or emerging, principles of customary international law. The preliminary report had posed much the same question.

3. The second question had been whether there existed a sufficient customary basis for applying the obligation to extradite or prosecute to at least some categories of crime, for instance to the most serious crimes recognized under customary international law, such as war crimes, piracy, genocide and crimes against humanity. Thirdly, it had been asked whether it was generally acceptable to draw a distinction between the concept of the obligation to extradite or prosecute and the concept of universal criminal jurisdiction, and whether the Commission should embark on a consideration of the latter concept, and, if so, to what extent. The fourth question had been whether one of the alternative obligations—to extradite or to prosecute—should be given priority over the other, or whether both carried equal weight, and also to what extent the fulfilment of the one obligation released States from the other.

4. Another question had been whether there should be a third possibility, or “triple alternative”, involving the jurisdiction of international tribunals, since State practice was increasingly evolving in that direction. In Argentina, for example, Law 26.200 implementing the Rome Statute of the International Criminal Court included a provision under which Argentina was obliged to extradite or surrender persons suspected of crimes falling within the jurisdiction of the International Criminal Court or, failing that, to take all such measures as might be necessary to exercise its jurisdiction over that offence. Legislation recently enacted in Panama, Peru and Uruguay to implement the Rome Statute of the International Criminal Court also provided for the *aut dedere aut judicare* obligation.

<sup>323</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 21.

5. The last question had been whether the final product should take the form of draft articles, rules, principles, guidelines or recommendations, or whether it was too soon to reach a decision on the matter. Divergent views had been expressed on that and the other questions raised and he would therefore welcome a conclusive response from the newly elected Commission, which could also draw on the views expressed in the Sixth Committee. Thanks to the kind assistance of the Secretariat, those views were set out in paragraphs 21 to 39 of the report.

6. Paragraphs 40 to 60 contained the Special Rapporteur's concluding remarks concerning the debate in the Commission and the Sixth Committee on the preliminary report. Given the specific nature of that report, comments had largely focused on the main issues to be considered by the Commission and the Special Rapporteur in future work on the topic. Within those parameters, however, a great variety of opinions had been expressed with regard to both the substance and the presentation of the text, starting with its title and including the final form it should take.

7. The comments and information received from Governments in response to the Commission's request were summarized in paragraphs 61 to 72. The full replies appeared in document A/CN.4/579 and Add.1-4. The information received from States was set out in four clusters: (a) international treaties containing the obligation *aut dedere aut judicare*; (b) domestic legal regulations; (c) judicial practice; and (d) crimes or offences to which the principle was applied. Such an arrangement would make it easier to conduct any future comparative exercise. He wished once again to express his gratitude to the Secretariat for its assistance and cooperation in that regard. The four addenda to the document contained information which, owing to its late submission, would be considered in the third report.

8. Chapter II (paras. 73-116) contained the core of the work. It consisted, as was the Commission's tradition when it engaged in the process of codification and progressive development of a topic of international law, of a draft text—the final form of which was to be decided later—aimed at reflecting current international law and State practice in that field. Although the comments and information provided by States were still far from complete and did not yet constitute a solid basis for constructive conclusions, it already seemed quite feasible to formulate a provisional draft article on the scope of application of any future draft articles on the topic, the text of which would be the following:

**“Article 1. Scope of application**

“The present draft articles shall apply to the establishment, content, operation and effects of the alternative obligation of States to extradite or prosecute persons under their jurisdiction.”

9. Paragraphs 79 to 104 contained a short survey of the three main elements of the draft article and the problems that, in his view, might give rise to discussion in the Commission. Those elements were (a) the time element, namely the extent to which any draft articles should

concern themselves with the periods of establishment, operation and effects of the obligation *aut dedere aut judicare*; (b) the substantive element, namely the alternatives of extradition or prosecution; and (c) the personal element, namely what persons might be the subject of the obligation *aut dedere aut judicare*.

10. At least three separate periods of time, each possessing its own specific characteristics, relating respectively to the establishment, operation and effects of the obligation *aut dedere aut judicare*, needed to be reflected in the draft articles. With regard to the question of sources, the first of those periods was of paramount importance. For the Commission to conclude that the obligation was customary in nature, it needed to refer to State practice during the period at which the obligation was established.

11. With regard to the substantive element, the Commission would need to decide whether an obligation to extradite or prosecute existed; if so, to what extent; and whether it was absolute or relative (para. 89). Numerous questions might arise in that connection, three of which were discussed in paragraphs 90 to 92 of the report. The first was which of the alternative courses of action should have priority and whether States had the freedom to choose between extradition and prosecution. The second was whether a custodial State was entitled to refuse an extradition request if it was prepared to undertake a prosecution itself or if the arguments used in the extradition request were shown to be flawed or incompatible with the custodial State's legal system. The third question was whether the obligation *aut dedere aut judicare* included or excluded the possibility of any third choice. That question had particular importance in the light of the possibility of the parallel jurisdiction of the International Criminal Court on the basis of accession to the Rome Statute of the International Criminal Court.

12. Lastly, it should be remembered that the obligation to extradite or prosecute was not an abstract one but one which existed *vis-à-vis* specific natural persons. A further condition for natural persons to be covered by the obligation was that they should be under the jurisdiction of the States bound by the obligation. The term “under their jurisdiction” in draft article 1 meant both actual jurisdiction, which was effectively exercised, and potential jurisdiction that a State was entitled to establish over persons committing specific offences. Ultimately, the Commission would need to decide how far the concept of universal jurisdiction should play a role in the scope of the obligation *aut dedere aut judicare*. It would also, at a later stage, have to consider the question of the crimes and offences that would be covered by the obligation. For the time being, as indicated in paragraph 100 of the report, there seemed to be no need to include a direct reference to such crimes and offences in the text of draft article 1.

13. Paragraphs 105 to 116 contained specific suggestions and ideas for the subsequent draft articles. Thus draft article 2, which could be entitled “Use of terms”, should include a definition or description of the terms used for the purposes of the draft articles. The list of such terms remained open and its content would depend on needs perceived during the elaboration of other draft articles. It would probably include such terms as “jurisdiction”,

“prosecution”, “extradition” and “persons under jurisdiction”. Another draft article or articles might contain a more detailed description of the obligation *aut dedere aut judicare* and its constituent alternative elements.

14. Given the fairly wide consensus that international treaties were a generally recognized source of the obligation to extradite or prosecute, a draft article—referred to as draft article X in paragraph 108—might be formulated along the following lines: “Each State is obliged to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.” Such an article would, of course, be without prejudice to the recognition of international customary norms as a possible source of the criminalization of certain acts and of the obligation to extradite or prosecute.

15. Another source of interesting suggestions for possible subsequent draft articles was the draft code of crimes against the peace and security of mankind, adopted by the Commission in 1996.<sup>324</sup> The draft code incorporated the *aut dedere aut judicare* rule and, in the commentary, prepared the ground for possible further draft articles on the topic.<sup>325</sup> Paragraph 114 of the report contained four possible provisions, which, he stressed, were not formal proposals for draft articles. However, since they expressed views of the Commission, albeit in a different context, it seemed appropriate to bring them to the Commission’s attention for possible further consideration.

16. He wished to confirm that the preliminary plan of action set out in paragraph 61 of the preliminary report,<sup>326</sup> including the gathering and analysis of information concerning legislation, both international and national, judicial decisions and State practice and doctrine, remained the main road map for his further work. He was confident that, once further views and comments had been received from Governments, there should be a sufficient basis for the effective elaboration of draft articles.

17. Mr. DUGARD, after wishing the Special Rapporteur well with his difficult task, said that it had been wise to reproduce in the second report the ideas and concepts contained in the preliminary report. He feared, however, that the second report was weaker than its predecessor, since it tried to take into account the many doubts expressed in the Sixth Committee, which confused rather than clarified the discussion of the topic.

18. The Commission would need to decide how the topic should be approached. The report recognized that it involved a comparative study of legislation, judicial decisions, treaties and customary rules. The question was how the necessary information was to be obtained. The debate in the Sixth Committee had proved unhelpful in that regard, since it failed to address the questions raised by the Commission. Such a failure to provide information was, however, not surprising, since most delegates to the Sixth Committee if indeed they were lawyers at all, were international lawyers, and were not versed in the niceties of criminal law, criminal procedure or extradition law.

19. As for comments provided by Governments, he noted that of the 20 replies he had seen, six had come from Asia, 10 from Europe, two from Latin America, one from North America and only one from Africa. Such a sample was hardly representative and, in any case, the responses were not particularly helpful, since they consisted simply of an account of those States’ legislation and the treaties to which they were parties. What was needed from States was input from their criminal and extradition lawyers, rather than a mere list of treaties to which States were parties or details of legislative enactments and cases. The United Kingdom’s reply, for example, had provided a very inadequate account of British law, and most of the other States’ information had probably been equally incomplete. The general comments by the United States on the draft had, however, been particularly useful. While he disagreed with the cautious approach adopted by the Government of the United States, which argued that there was no customary rule and that a treaty must be in force before the obligation came into effect, at least its reply was a clear statement of principle and position and expressed some helpful ideas on the subject. It was important to pay heed to those comments.

20. Although the topic was not particularly difficult in itself, it was hard to decide how to approach it and determine its scope. For example, it was crucial to ascertain whether a customary rule or general principle existed and whether the obligation arose only in the event of a treaty, the view taken by the United States. Secondly, it was necessary to consider whether the rule applied only to international crimes or also to other crimes such as murder; and, if it applied only to international crimes—which was his own view—whether it applied to customary law crimes, such as genocide, war crimes and crimes against humanity, in other words the core crimes of the Rome Statute of the International Criminal Court, or whether it applied to treaty crimes, such as those characterized in the anti-terrorism conventions. Did it also apply to narcotic drugs and anti-counterfeiting conventions? Did it apply to both multilateral and bilateral treaties? In that connection, once again the United States had offered some helpful comments to the effect that it was opposed to finding that such an obligation existed in bilateral treaties.

21. Another important matter, which raised the whole issue of universal jurisdiction, was whether the obligation would come into play only if jurisdiction had first been established. The Commission could not ignore the subject of universal jurisdiction, any more than it could ignore other forms of extraterritorial jurisdiction, such as active or passive personality jurisdiction or protective jurisdiction. Naturally, it would be necessary to have regard to the fact that treaties differed in their jurisdictional rules; the Convention for the suppression of unlawful seizure of aircraft laid down limited jurisdictional rules, whereas the International Convention for the Suppression of Terrorist Bombings established much wider jurisdictional rules. It was, however, important to stress that the obligation *aut dedere aut judicare* arose only after jurisdiction had been established. In other words, it would be necessary to establish whether the custodial State had jurisdiction to prosecute and whether, if it decided not to do so, it had the competence to extradite.

<sup>324</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

<sup>325</sup> *Ibid.*, pp. 27–33 (draft articles 8–10 and the commentaries thereto).

<sup>326</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

22. Of course, there was no problem with territoriality, but all the other forms of extraterritorial jurisdiction would require some examination, as the United States had pointed out. One particular problem which the Commission would have to address if it looked at universal jurisdiction in isolation was the question that had arisen in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, namely, whether such jurisdiction came into play only when the person concerned was present in the territory of the State, or whether it also applied in cases in which the person was absent. The Commission did not really need to concern itself with that issue because, in the context of the obligation *aut dedere aut judicare*, it arose only when the person was present in the territory. It was important to stress that all anti-terrorism conventions gave jurisdiction where the person was present in the territory of the State, which meant that, in effect, the obligation *aut dedere aut judicare* came into operation only when the person was present in the territory.

23. It would then be necessary to study limitations on extradition. While most States refused to extradite in particular circumstances, for instance if the person was a political offender, the anti-terrorism conventions adopted a different approach. The Convention for the suppression of unlawful seizure of aircraft was silent on the subject, whereas the International Convention for the Suppression of Terrorist Bombings excluded exceptions for political offences. The Commission would also have to examine the question of whether a State was under an obligation to extradite a person to a State which had a judicial system falling short of the required standards, in other words where extradition would deny that person due process of law or protection of their human rights.

24. Nationality was another vexed question, as was shown by the current confrontation between the United Kingdom and the Russian Federation. He was personally of the opinion that the United Kingdom position took inadequate account of the fact that many States were constitutionally bound not to extradite their own nationals. Thus, although the European arrest warrant excluded nationality as a possible ground for refusing extradition, constitutional courts in countries such as the Czech Republic and Poland had declined to comply with the European arrest warrant when it affected one of their nationals.

25. Paragraph 14 of the second report referred to some of the practical difficulties encountered in the process of extradition which the Commission might have to scrutinize. In his view, it would be necessary to draw a line between the broad principles of extradition law and some of the more technical approaches. He therefore suggested that the Commission should return to the preliminary plan of action set out in paragraph 61 of the preliminary report, which provided a valuable basis for its work.

26. In his view, it would be advisable for the final product to take the form of draft articles. Although he basically agreed with the proposed draft article 1, the formulation, which referred to the establishment, content, operation and effects of the obligation, was inelegant, and unnecessarily cumbersome. He would prefer to say, quite

simply: "The present draft articles shall apply to the obligation of States to extradite or prosecute." He concurred with the Special Rapporteur that *aut dedere aut judicare* was an obligation, not a principle. Noting the reference to primary and secondary rules in paragraphs 59 and 85 of the second report, he again urged the Commission not to become too involved in distinctions between primary and secondary rules, given that it was uncertain whether reference was being made to the formulation of Roberto Ago<sup>327</sup> or that of H. L. A. Hart.<sup>328</sup> In addition, in draft article 1 he would favour omitting the word "alternative": as the Special Rapporteur conceded that there was uncertainty as to whether the obligation was conditional or alternative, it was probably unnecessary to engage in such a jurisprudential debate at the current stage. If the "triple alternative" were to be included, it should be dealt with in a separate codicil to the draft articles, but it should not be considered at the outset.

27. Lastly, the Special Rapporteur included the phrase "under their jurisdiction", but in paragraphs 96 to 97 of his second report, he suggested that the obligation *aut dedere aut judicare* came into being when a person was only potentially under the jurisdiction of the State. He personally disagreed, since his own position was that the person must be present and in the custody of the State. A State might exercise jurisdiction on grounds of territoriality, active or passive personality, the protective principle or universal jurisdiction, but only if the person was actually in its custody. It was hard to see how a State could be expected to extradite a person who was only potentially within its jurisdiction.

28. In conclusion, although *aut dedere aut judicare* was likely to be a difficult topic to deal with, because its scope was uncertain, he agreed with the Special Rapporteur's decision to prepare a set of draft articles on the subject. Given that it constituted a useful starting point, it would be more helpful to refer draft article 1 to the Drafting Committee than to a working group.

29. Ms. ESCARAMEIA commended the Special Rapporteur's second report, with its useful recapitulation of the previous year's debate on the topic in the Commission and in the Sixth Committee and analysis of Governments' comments. The comparatively large number of comments received since the finalization of the second report showed that States were interested in the subject.

30. Paragraph 77 of the report contained an interesting analysis of the three elements proposed in draft article 1 (the temporal, substantive and personal elements), which had been further clarified by the Special Rapporteur's presentation of his report. It would be better to entitle the draft article "scope of the draft articles", or simply "scope", rather than "scope of application", a title which might give the mistaken impression that the draft articles were restricted to the application of the *aut dedere aut judicare* obligation and did not deal with the question of sources or with other vital questions such as universal jurisdiction and the surrender of suspects to international criminal tribunals.

<sup>327</sup> See footnote 296 above.

<sup>328</sup> Hart, *op. cit.* (see footnote 284 above).

31. The time element related to the establishment, operation and production of effects of the obligation in question. While she endorsed the explanatory approach of the draft article, which offered a dynamic view of the whole procedure and showed that it was a process evolving over time, the use of the words “establishment” and “operation” was perplexing. “Establishment” was not a term commonly used in the context of an obligation; it seemed to relate more to a treaty obligation and would thus prejudice the issue of whether the obligation was sometimes of a customary nature.

32. In that connection, she concurred with the Special Rapporteur’s conclusion in paragraph 112 that the existence of generally binding rules of a customary nature could be inferred from the large number of treaties incorporating such an obligation. Her own view, stated at the previous session, that for certain types of crimes *aut dedere aut judicare* was a norm of customary law, had been confirmed by a number of studies, including one carried out by Amnesty International in 2001, which had examined the practice of 125 States with regard to universal jurisdiction,<sup>329</sup> and another conducted in the field of international humanitarian law by the ICRC in 2005.<sup>330</sup> Most of the legal literature considered that *opinio juris*, supported by intensive State practice, made it possible to establish that the obligation to extradite or prosecute was already an obligation of a customary nature with respect to certain crimes. Furthermore, the idea that it was not just a State’s right, but also its duty, to extradite or prosecute the perpetrators of crimes under international law was also gaining ground. For all those reasons she would prefer a reference to the “existence”, rather than the “establishment”, of the obligation.

33. In using the term “operation”, rather than, for instance, “exercise”, the Special Rapporteur was probably seeking to convey the idea of a process, rather than a one-off obligation, but “operation” was more appropriate to the context of a principle, whereas the term “exercise” would be more apt when referring to an obligation.

34. She wished to make five points in connection with the substantive question of the content of the obligation. First, the adjective “alternative” should be deleted, since it was unclear whether both parts of the obligation always carried equal weight, a question which that adjective prejudged. She believed that both parts carried equal force. Furthermore, the word “alternative” was redundant, the antithesis already being conveyed by the conjunction “or”.

35. Secondly, on the question whether *aut dedere aut judicare* was an obligation or a principle, the Special Rapporteur affirmed that the term “obligation” had greater force than “principle” and was more appropriate to the nature of a secondary rule. The notion of “principle” would, however, place the precept on a higher plane than a mere treaty obligation. It could also be argued that the “obligation” would constitute the operative aspect of the principle from which it arose.

36. Thirdly, she did not agree with the statement in paragraph 87 of the report that the obligation as a whole was conditional; in her view it took the form of a choice between prosecution or extradition. It was therefore unclear why so much stress was placed on the conditional nature of the obligation, although it might become important for the further development of the topic. Except when a specific treaty prescribed otherwise, the choice of whether to prosecute or extradite seemed to lie with the custodial State, bearing in mind that this State’s constitution might prohibit extradition on grounds of nationality or because of the likelihood of the extradited person being subjected to persecution for political or other reasons, the death sentence or life imprisonment. If the custodial State could not extradite, it was then under an obligation to prosecute; extradition was, however, not necessarily always the option that took precedence.

37. Fourthly, the obligation should exclude the obligation to surrender a suspect to an international criminal court or tribunal, because the considerations involved with respect to extradition and to surrender differed in nature. The relationship between requests for extradition and for surrender was regulated by the constituent instruments of the tribunals or courts in question. Accordingly, the Commission should not embark on a consideration of the “triple alternative”. If it did so, however, it should examine the question as a separate issue.

38. Lastly, with regard to the types of crimes to be covered by the draft articles, it would be useful to distinguish, as proposed in the preliminary report, between three categories of crimes: crimes under international law, crimes of international relevance, and ordinary crimes under national law. Different rules should apply to each category. When the crime fell into the first category, the grounds for refusing extradition must be subject to stricter limitations. Crimes under international law and crimes of international relevance should certainly be covered by the obligation to extradite or prosecute, and some ordinary crimes under national law should perhaps also be included.

39. She agreed with the Special Rapporteur that the personal element should be restricted to natural persons and that the concept of jurisdiction should be applied in its widest form. For that reason, the Commission’s consideration should encompass extraterritorial jurisdiction, active and passive personality, reasons of security and universal jurisdiction. While the concept of universal jurisdiction was distinct from that of *aut dedere aut judicare*, the two concepts appeared together in some instruments, for example in articles 8 and 9 of the draft code of crimes against the peace and security of mankind<sup>331</sup> and in the draft convention on jurisdiction with respect to crime prepared in 1935 by the Harvard Research in International Law.<sup>332</sup> The topic of universal jurisdiction was relevant only as a means for asserting national jurisdiction over a crime or determining which crimes should be subject to the obligation *aut dedere aut judicare* as serious

<sup>331</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50. (See footnote 324 above.)

<sup>332</sup> *Supplement to the A.J.I.L.*, vol. 29 (1935), Codification of International Law, Part II, “Draft convention on jurisdiction with respect to crime”, p. 435.

<sup>329</sup> *Universal Jurisdiction: The duty of States to enact and implement legislation* (IOR 53/003/2001–IOR 55/018/2001), September 2001.

<sup>330</sup> Henckaerts and Doswald-Beck, *op. cit.* (see footnote 283 above).

crimes under international law, a notion referred to in the 2001 Princeton Principles on Universal Jurisdiction.<sup>333</sup> As universal jurisdiction and the obligation *aut dedere aut judicare* were related but conceptually quite different, it would be wise to have a draft article spelling out the relationship and the distinction between them.

40. In chapter II, section B (Plan for further development), the Special Rapporteur proposed a draft article 2 on definitions, of which she was in favour, provided that the final decision concerning its content was left open until the end of the exercise. He had also suggested a draft article X on sources. Such a provision would be useful mainly in order to obviate the need for an additional requirement of executory measures, or even bilateral treaties, before a treaty obligation became effective. If a State was a party to a multilateral treaty, that in itself should be sufficient. Nevertheless, the language proposed could be read as excluding customary law as a source and asserting no more than the principle *pacta sunt servanda*, as if any doubts existed on that score. While an article on that subject would offer a means of countering objections such as those voiced in the comments of the United States, it should be redrafted in order to dispel the impression that it merely repeated article 26 of the 1969 Vienna Convention.

41. She endorsed the pertinence of the Special Rapporteur's preliminary plan of action as set out in the preliminary report,<sup>334</sup> but believed that it would require redrafting in the light of the debates at the current session in order to propose a structured approach to the topic, rather than merely providing a list of issues for consideration.

42. She was in favour of referring draft article 1 to the Drafting Committee.

43. Mr. PELLET endorsed Mr. Dugard's remarks concerning Governments' reactions in the Sixth Committee and in their written replies. He was troubled by the growing tendency of several special rapporteurs to allow themselves to be guided by States' positions. That approach would be understandable if any clear guidance could be deduced therefrom, but that was not generally the case. Determining the overall stance of Governments was more like divining the meaning of the Sibylline Oracle. Although the Commission should listen to the views of individual Governments when they had something to say, it should be able to forge ahead under its own steam and should not attempt to plot its course by reference to currents of thought that were all but unfathomable.

44. Although he should by rights have little to say concerning the first three parts of the second report, because in the main it recapitulated earlier instalments, the Special Rapporteur had given him a good excuse, by citing the maxim *repetitio est mater studiorum*, to summarize the reactions he had already expressed to the preliminary report at the Commission's meeting on 27 July 2006.<sup>335</sup>

<sup>333</sup> S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Princeton University, 2001.

<sup>334</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

<sup>335</sup> *Yearbook ... 2006*, vol. I, 2901st meeting, pp. 234–236, paras. 58–70.

45. He had principally wished to caution the Special Rapporteur against what he and Mr. Candioti had termed the "García Amador syndrome", in other words the temptation to encompass the whole range of international criminal law on the pretext that the subject under consideration touched on numerous other questions. It was very important to remain focused on what was a rather technical subject, whose scope should not be exaggerated.

46. In particular, the topic should not be seen as an opportunity to attempt to redefine or list for the umpteenth time crimes which might be covered by the obligation to extradite or punish. The Commission should confine itself to determining the categories which might *ipso jure* entail the application of the principle, even in the absence of treaties. He was somewhat reassured by the fact that in paragraph 55 of the second report the Special Rapporteur endorsed "proposals that such categories of specific crimes be identified", the emphasis being on categories, not crimes. It was important to identify criteria without attempting to set in stone a rapidly evolving area of law, bearing in mind that conservatism was a danger inherent in the codification and even the progressive development of international law. Once a standard had been embodied in an instrument, especially if the latter took the form of a convention, it became much more difficult for that standard to develop. By seeking to define a category or categories, a criterion or criteria, that danger was not completely banished, because the law would then become more rigid, but there was less likelihood of the frame being frozen: the film must run on and practice must be allowed to evolve. Although practice was moving in the right direction, there was still a considerable danger that necessary developments in practice might be halted by the codification exercise.

47. Another reason for not drawing up an unduly detailed list of offences that triggered the obligation to extradite or punish was that it was simply impossible. In addition to the categories of offences just mentioned, States could undertake to extradite or prosecute the alleged perpetrators of any other offence covered in a bilateral or multilateral treaty. One might object that this was a case of *leges speciales* and thus outside the scope of the topic, which concerned only cases in which there was no obligation to extradite or prosecute under any existing treaty. That, however, was not a sound objection, for the future draft must, first, aim to catalogue the categories in which the obligation to extradite or punish was incumbent *ipso jure* upon States, irrespective of whether a treaty on the matter existed—and such cases did exist, a point on which he vehemently disagreed with the United States. Secondly, it must also take account of the fact that while States could undertake by treaty to extradite or punish, that was not necessarily the end of the story. In fact, the draft could render great service, since many treaties enshrined only a commitment to extradite or prosecute without going into the modalities for fulfilling that commitment. It could thus establish rules applicable in situations that the parties had not foreseen when signing the treaty. It might also help in establishing priorities where States had potentially incompatible obligations by virtue of customary law or of their various treaty commitments to extradite or punish.

48. It was in respect of the hierarchy of priorities that the problem mentioned in paragraph 35 of the report arose most pointedly: the surrender of suspects to an international criminal tribunal. As some delegations in the Sixth Committee had remarked, and as indicated in paragraph 35 and by Ms. Escarameia, the question was governed by distinct legal rules. Nevertheless, the implementation of the obligation to extradite or prosecute could be blocked if surrender to an international criminal court took priority over *aut dedere aut judicare*. The problem was complicated still further by the fact that for States for whom the obligation arose by virtue of bilateral relations, the statute of the international criminal court concerned could be *res inter alios acta*. All such hypotheses must be envisaged in the future draft.

49. Still on the categories of offences that entailed *ipso jure*, and without specific provision therefore in a treaty, the application of the obligation to extradite or prosecute, he noted that in the report the Special Rapporteur envisaged all possible categories except the one that he himself regarded as the most obvious, namely, crimes against the peace and security of mankind. That omission was all the more surprising and unfortunate in that, first of all, it concerned one of the Commission's real achievements, namely the adoption in 1996 of the draft code of crimes against the peace and security of mankind,<sup>336</sup> and that, secondly, those crimes were perhaps the sole crimes, but certainly the hard core of crimes, to which the principle *aut dedere aut judicare* applied *ipso jure*. Lastly, the draft code clearly established the obligation to extradite or punish. Admittedly, the Special Rapporteur devoted two paragraphs of his report to the draft code but, in drawing a distinction between crimes which entailed *ipso jure* the obligation to extradite or prosecute and other crimes, he never once entertained the possibility that the first category might simply consist of crimes against the peace and security of mankind.

50. His second general remark was that paragraph 26 of the report cited the view "that the principle *aut dedere aut judicare* was not part of customary international law and ... certainly did not belong to *jus cogens*". While the first assertion was totally wrong, at least regarding certain categories of crimes, the second merited further consideration. It certainly showed that some States were not well disposed towards extending the obligation to extradite or prosecute to any crimes other than those against the peace and security of mankind. His initial, perhaps erroneous, impression was that the prohibition on perpetrating a crime against the peace and security of mankind was part of *jus cogens*. If that was so, then it was by no means evident that the obligation either to punish or to extradite was not also a peremptory norm. That question needed to be resolved, and fairly quickly, for if *aut dedere aut judicare* could in some cases be considered a peremptory norm, the Commission must ask whether there were also cases in which the norm applied but was not peremptory.

51. His last general point concerned the relationship of the topic with that of universal jurisdiction, a point which seemed to cause the Special Rapporteur understandable unease. He himself would have preferred the topic of universal jurisdiction to be placed on the Commission's agenda, but since the Commission had chosen otherwise, it was necessary to abide by that decision and not to confuse the two. In paragraph 103, the Special Rapporteur was extremely cautious in his statement that "to some extent" the crimes or offences that "could, or should", be covered by the obligation to extradite or punish "would fall" among the crimes subject to universal jurisdiction. To what extent? What were the links between the two questions? The Commission would have to provide an answer sooner rather than later.

52. In principle he found nothing to criticize in draft article 1, other than the infelicitous use of the word "*fonctionnement*" in French, although the word "operation" in English did seem much better. He entirely agreed with the Special Rapporteur and Mr. Dugard that one should speak of a "principle" rather than an obligation.

53. On the explanations given for draft article 1, whose referral to the Drafting Committee he supported, one could hardly quarrel with the comment in paragraph 95 to the effect that the extradition of legal persons would be, to say the least, a difficult proposition. However, it might be useful to say so explicitly in draft article 1. For example, the text might state that if a legal person committed or was complicit in a crime that fell into one or more of the categories that brought the principle *aut dedere aut judicare* into play, consequences would ensue. If the crime was a breach of *jus cogens* or a crime against the peace and security of mankind, a substitute principle for *aut dedere aut judicare* should be found.

54. In paragraph 96, the Special Rapporteur said that the phrase "under their jurisdiction" did not mean that a natural person must be physically present in the territory of a given State or "in the hands" of that State. What, then, did it mean? Paragraph 97 seemed to imply that States must prosecute such persons *in absentia*. He personally was not in principle opposed to trial *in absentia*, but agreed with the comments by Mr. Dugard and Ms. Escarameia on the subject. One could not *dedere* (give) what one did not *habere* (have). "Under the jurisdiction of" thus had to mean "in the territory or under the control of".

55. Lastly, he did not understand what use the Special Rapporteur was intending to make of the distinction between three types of jurisdiction described as "extraterritorial" in paragraph 98.

56. In conclusion, he admitted to being a surgeon rather than an anaesthetist, having the tiresome habit of not lulling Special Rapporteurs into a false sense of security by lavishing praise on them. As a special rapporteur himself, he was only too well aware of what a thankless task it was. Anyone who accepted the job of special rapporteur and acquitted himself or herself of the task conscientiously deserved the Commission's gratitude. That was certainly true of Mr. Galicki.

<sup>336</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

**Responsibility of international organizations (concluded)\* (A/CN.4/577 and Add.1–2, sect. B, A/CN.4/582, A/CN.4/583, A/CN.4/720)**

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

57. Mr. YAMADA (Chairperson of the Drafting Committee) introduced the titles and texts of draft articles 31 to 45 [44]\*\* adopted by the Drafting Committee, as contained in document A/CN.4/L.720, which read:

**RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS**

PART TWO

**CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION**

CHAPTER I

**GENERAL PRINCIPLES**

*Draft article 31. Legal consequences of an internationally wrongful act*

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

*Draft article 32. Continued duty of performance*

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

*Draft article 33. Cessation and non-repetition*

The international organization responsible for the internationally wrongful act is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

*Draft article 34. Reparation*

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

*Draft article 35. Irrelevance of the rules of the organization*

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.
2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.

*Draft article 36. Scope of international obligations set out in this Part*

1. The obligations of the responsible international organization set out in this Part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

\* Resumed from the 2938th meeting.

\*\* The draft article numbers between square brackets correspond to the draft article numbers as proposed by the Special Rapporteur.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

CHAPTER II

**REPARATION FOR INJURY**

*Draft article 37. Forms of reparation*

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

*Draft article 38. Restitution*

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

*Draft article 39. Compensation*

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

*Draft article 40. Satisfaction*

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

*Draft article 41. Interest*

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

*Draft article 42. Contribution to the injury*

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

*Draft article 43.<sup>337</sup> Ensuring the effective performance of the obligation of reparation*

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under the present chapter.

<sup>337</sup> The following text was proposed, discussed and supported by some members: "The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under the present chapter."

## CHAPTER III

**SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW***Draft article 44 [43]. Application of this chapter*

1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

*Draft article 45 [44]. Particular consequences of a serious breach of an obligation under this chapter*

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 44 [43].

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 44 [43], nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

58. At its 2935th meeting, on 12 July 2007, the Commission had referred 14 draft articles proposed by the Special Rapporteur in his fifth report, namely draft articles 31 to 44, to the Drafting Committee. At its 2938th meeting, on 18 July 2007, the Commission had also referred to the Drafting Committee a supplementary draft article proposed by the Special Rapporteur, taking into account a written proposal by a member of the Commission and the debate in plenary. In five meetings, held on 18, 19, 20 and 25 July 2007, the Drafting Committee had successfully completed its consideration of all the draft articles referred to it. He wished to pay tribute to the Special Rapporteur, Mr. Giorgio Gaja, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome.

59. The 15 draft articles before the Commission, draft articles 31 to 45 [44], formed Part Two of the draft, concerning the content of the international responsibility of an international organization, in other words the legal consequences for a responsible international organization arising from the new legal relationship that ensued from the commission of an internationally wrongful act.

60. Part Two comprised three chapters. Chapter I, consisting of draft articles 31 to 36, set forth a series of general principles. Chapter II, entitled “Reparation for injury” and comprising draft articles 37 to 43, addressed the various forms of reparation and their interrelationship, including the implications of the contribution of the victim to the injury. Chapter III, comprising draft articles 44 [43] and 45 [44], focused on a particular category of legal consequences: those arising from serious breaches of obligations under peremptory norms of general international law. The draft articles corresponded to draft articles 28 to 41 on responsibility of States for internationally wrongful

acts.<sup>338</sup> However, draft article 43 was new and had no corresponding provision in the draft articles on responsibility of States.

61. The Drafting Committee had made no changes to the text proposed by the Special Rapporteur for draft articles 31 to 34, which corresponded to draft articles 28 to 31 of the draft on responsibility of States.

62. Draft article 31 set out the general parameters for the operation of Part Two, linking it to Part One, which had already been provisionally adopted. Draft article 32 addressed the continued duty of performance. While a breach of an obligation under general international law would not as such affect the underlying obligation, the commentary would indicate that there were situations in which the duty of continuing performance could cease. That could be the case in treaty relations, when a material breach of a bilateral treaty might cause the injured international organization to terminate the treaty. It had been suggested in plenary that an explicit proviso to that effect should be incorporated in draft article 32, but the Drafting Committee had deemed it sufficient to explain the matter in the commentary.

63. Draft article 33, on cessation and non-repetition, addressed two separate but interrelated matters arising from the breach of an international obligation, which, however, were not *per se* legal consequences of such a breach, namely cessation of the wrongful act and assurances and guarantees of non-repetition. Those matters were addressed in subparagraphs (a) and (b), respectively. It had been pointed out in plenary, and acknowledged in the Drafting Committee, that the specificities of the decision-making processes of the responsible international organizations might make it difficult to envisage a situation in which an offer of assurances and guarantees of non-repetition by an international organization might be applicable. The commentary would draw attention to that question. While practice in the area concerned mostly States, the Drafting Committee had not seen any merit in providing for a different rule in respect of international organizations.

64. Draft article 34 laid down the legal principle stated in the *Chorzów Factory* case that “any breach of an engagement involves an obligation to make reparation” [p. 29], and that in that respect the responsible organization must endeavour to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” [p. 47]. The Drafting Committee had acknowledged the paucity of relevant practice, most of it being related to settlement of disputes concerning employment and contractual relationships. That, however, had not been considered to be a sufficient reason to depart from the well-established principle. The Drafting Committee had also acknowledged that it might be worthwhile to highlight in the commentary the peculiarity that might arise in respect of international organizations where full reparation might be contingent upon the extent of involvement of the international organization and its members.

<sup>338</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 28–29 and pp. 87–116.

65. Draft article 35, which largely corresponded to draft article 32 of the draft on responsibility of States,<sup>339</sup> had been a source of detailed discussion in the Drafting Committee. It dealt with the irrelevance of the rules of the organization. In particular, the discussion had focused on the proviso proposed by the Special Rapporteur that was intended to cover the special situation of international organizations where their rules could themselves be the basis of a breach of an international obligation. It would be recalled that draft article 4 defined rules of the organization as including, in particular: the constituent instruments; decisions, resolutions and other acts of the organization taken in accordance with those instruments; and established practice of the organization. Moreover, under draft article 8, a breach of an international obligation was contemplated where there had been a breach of an obligation established by a rule of the organization. It had therefore been necessary to address the situation where the rules of the organization might have a bearing on responsibility as it related especially to members of the organization.

66. A number of issues had been raised by the proviso, in particular, whether the proviso was itself necessary, whether it was sufficiently clear, and whether it would apply to situations contemplated in draft articles 44 [43] and 45 [44]. The concern of those who had had doubts about the proviso had centred mainly on its seemingly broad scope. It had been feared that it would be used by the responsible organization to obviate the consequences that could arise as a result of a breach of an international obligation, in particular in respect of serious breaches of obligations under peremptory norms of general international law. However, it had been clearly understood in the Drafting Committee that the proviso had a more limited scope: it applied in relation to members of the organization and did not apply to obligations towards the international community as a whole.

67. As to whether the proviso was sufficiently clear, there had been some concern that it seemed to prevail over the main rule. It had been suggested that it should be uncoupled from the main rule and that the main rule, namely non-reliance on rules of the organization as justification, should be given greater prominence. Accordingly, it had been agreed that the main rule should be reflected separately, as paragraph 1 of draft article 35. In other words, the responsible organization could not rely on its rules as justification for failure to comply with its obligations under Part Two of the draft. The reference to “pertinent” rules had been deleted, as it was unnecessary. The present formulation followed more closely the language of the corresponding article in the draft on responsibility of States.

68. As to the proviso itself, it had been suggested that, if captured in a separate paragraph, it should take the form of a “notwithstanding” clause, so as to state that, notwithstanding the main rule contained in paragraph 1 of draft article 35, the rules could provide otherwise in respect of the responsibility of the organization towards one or more of its members. Its formulation as a “notwithstanding” clause had, however, posed a number of difficulties. It

remained unclear, particularly as a result of the combination of “notwithstanding” and “may provide otherwise”, and it seemed to affect the basic rule. Ultimately, it had been considered appropriate to formulate the proviso as a “without prejudice” clause. Paragraph 2 of draft article 35 thus provided that: “Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.” The commentary would have more to say regarding the consequences of a breach of an international obligation arising from a breach of a rule of the international organization *vis-à-vis* non-members. In addition, draft article 35 had a bearing on any provision that might be formulated in future on *lex specialis*.

69. The final draft article in the chapter, concerning the scope of the international obligations set out in that Part, had also been a source of considerable debate. Draft article 36 corresponded to draft article 33 of the draft articles on responsibility of States.<sup>340</sup>

70. The initial problem had been whether there was any justification for specifying that the obligations set out in Part Two were owed only to other organizations, States or the international community as a whole, and not to any other person or entity. It had been argued that the likelihood of obligations of a responsible organization affecting other persons or entities was greater than in the case of a responsible State, with which the draft articles on responsibility of States had been concerned.

71. However, it had been recalled that the scheme under Part Two did not exclude the possible situation in which an internationally wrongful act might involve legal consequences with regard to relations between an international organization responsible for that act and persons or entities other than a State or an international organization. After all, article 1 of the draft articles provided that the draft articles applied to the international responsibility of an international organization for an act that was wrongful under international law. The only limitation consisted in the fact that Part Two did not apply to obligations concerning reparation to the extent that such obligations might arise towards or be invoked by a person or entity other than a State or an international organization. The right of such person or entity other than a State or international organization, as pointed out in paragraph 2 of draft article 36 proposed by the Special Rapporteur, was not thereby prejudiced. That understanding had contributed to an agreement that there was no need to change paragraph 1.

72. That, however, had resulted in the transfer of some concerns to paragraph 2. In particular, it had been suggested that paragraph 2, which had a corresponding provision in article 33 of the draft articles on responsibility of States, was unclear and might occasion misinterpretation by judicial bodies to the effect that the articles had nothing to do with the rights of persons or entities other than States or international organizations. At any rate, the phrase “which may accrue” seemed to cast doubt as to the existence of the right of the person or entity other than a State or international organization.

<sup>339</sup> *Ibid.*, pp. 28 and 94.

<sup>340</sup> *Ibid.*

73. It had also been pointed out that there was an asymmetry between paragraphs 1 and 2. Whereas paragraph 1 addressed “obligations”, paragraph 2 referred to “rights”: paragraph 2 ought therefore to be recast to conform with the language of paragraph 1.

74. It had been confirmed that “may accrue” was a reference to the contingency of a direct claim arising, rather than an expression of doubt regarding the existence of such a right.

75. After extensive discussion, it had been suggested that paragraph 2 of draft article 36 should be reformulated to read: “This Part is without prejudice to any right of a person or entity other than a State or an international organization, arising from the international responsibility of an international organization.”

76. While initially there had been differing views as to whether that language broadened or narrowed the scope of the original formulation, ultimately there had seemed to be some general understanding that, in substance, the two options were the same.

77. However, different conclusions had been drawn from such an understanding. One group had felt that it was necessary to maintain the integrity and consistency between the texts on responsibility of States and on international responsibility of international organizations. In the interests of ensuring certainty and predictability in legal interpretation, the Commission would be hard pressed to find a justification for any departure from the language used in the draft articles on responsibility of States, even if such a change was only of a drafting nature. In other words, it would be difficult to explain the more direct language, when in fact the draft articles on responsibility of States did not seek to downplay the rights of persons and entities other than States and when no evolution had taken place. That group had considered it important to retain the text provided by the Special Rapporteur. It had been clearly understood that the commentary would reflect the nuanced differences between the role of persons and entities in respect of responsibility of States and of responsibility of international organizations.

78. The other group had been of the view that the more direct language of the alternative text had been clearer and conveyed the import of the paragraph in better terms. The situation regarding responsibility of States was not entirely similar to that regarding responsibility of international organizations. The fact that “rules of the organization” were part of international law created a different situation justifying the use of more direct language. That situation presented broader prospects for the assertion of rights relating to persons or entities other than States or international organizations in the realm of international responsibility of international organizations. That group had been in favour of changing the text, on the understanding that the commentary would indicate that the use of different language was not intended to change the substance of the text from the corresponding paragraph in the draft articles on responsibility of States.

79. In the final analysis, a straw vote had been cast, the results of which indicated a preference for the retention of the language proposed by the Special Rapporteur.

80. Turning to the draft articles comprising Chapter II of Part Two, he said that the chapter, which dealt with reparation for injury, contained seven draft articles, namely draft articles 37 to 43. Draft articles 37 to 42 corresponded to draft articles 34 to 40 on responsibility of States for internationally wrongful acts. The Drafting Committee had not made any changes to those draft articles as proposed by the Special Rapporteur, other than a minor correction in draft article 41. As to draft article 43, it was an amended version of the supplementary draft article referred to the Drafting Committee on 18 July 2007.

81. Draft article 37 introduced the various forms of reparation for injury caused by an internationally wrongful act. Since there was no reason to consider that the obligation to provide reparation should apply differently to States and to international organizations, nothing seemed to justify a departure in the current draft from the generic language used in draft article 34 on responsibility of States. Draft article 37 thus described restitution, compensation and satisfaction, either singly or in combination, as the various forms of reparation for an injury caused by the wrongful act of a responsible international organization.

82. Draft article 38 set out restitution as the first form of reparation owed by a responsible international organization. As with the other forms of reparation, the practice concerning international organizations in that regard was limited. However, instances that could be found in practice confirmed the applicability to international organizations of the obligation to make restitution. Comments made in plenary as to the drafting of the provision had not been prompted by any specificity that the situation of international organizations would present in that respect. Accordingly, the Drafting Committee had retained for draft article 38 the wording of draft article 35 on responsibility of States,<sup>341</sup> with the usual replacement of “State” by “international organization”.

83. The Drafting Committee had come to the same conclusion in respect of draft article 39, dealing with compensation. The Special Rapporteur had pointed out that the suggestion made in plenary that a choice between restitution and compensation should be offered to the injured party would be more properly addressed in Part Three of the draft, on the implementation of responsibility. There was actually a provision to that effect in draft article 43, paragraph 2 (b), on responsibility of States.<sup>342</sup>

84. Draft article 40 laid down the obligation to give satisfaction and detailed its various possible forms and conditions for its exercise. Unlike draft articles 37 to 39, it had given rise to an extensive debate in the Drafting Committee. As had been pointed out in plenary, satisfaction might well appear as a form of reparation more frequently resorted to by international organizations than restitution or compensation; at the same time, it raised some specific issues which the Drafting Committee had carefully considered.

85. It would be recalled that some members of the Commission had expressed doubts as to the need to

<sup>341</sup> *Ibid.*, pp. 28 and 96.

<sup>342</sup> *Ibid.*, pp. 29 and 119.

maintain the reference to a “formal apology” in draft article 40, paragraph 2, as well as to the mention of satisfaction in a humiliating form in paragraph 3. They had argued, especially in respect of the latter point, that considerations which applied to States in that regard were of doubtful relevance as far as international organizations were concerned. In any event, for an injured party to make a claim in respect of a humiliating form of satisfaction would be, according to one view, an abuse of rights, making it unnecessary to retain an express reference in the draft article. Arguably, a situation where a responsible international organization would be humiliated in giving satisfaction was not likely to occur often in practice. However, the Drafting Committee had felt that the possibility of such a humiliation could not be excluded. It had also considered that the deletion of the relevant language in paragraph 3 could have the undesirable effect of implying that even a humiliating form of satisfaction could be required from the responsible organization.

86. In the course of the discussion on draft article 40, paragraph 3, it had also been suggested that the words “or its organs” should be added after “responsible international organization”, so as to take account of the limited composition and specific powers of some organs which would be particularly targeted by a request for a humiliating form of satisfaction. Such a situation would, however, necessarily affect the responsible organization through its organs, and thus did not require a specific addition to the provision.

87. The possibility of adding the words “or its members” at the end of draft article 40, paragraph 3, had attracted more support within the Drafting Committee, as it had appeared to make the prospect of a humiliating form of satisfaction a more realistic one. One could for instance think of a peacekeeping force whose acts would be attributed to the United Nations and, if wrongful, entail its international responsibility. The injured party might request that the organization should give some form of satisfaction humiliating to the State providing the force. In such a case, the legal personality of the organization would not be affected, as the obligation to give satisfaction would still rest with it, and not with the State. The State, however, could be indirectly humiliated in being specifically targeted by the injured party.

88. While they had agreed that such a case might well occur in practice, several members of the Drafting Committee had considered that the suggested addition to draft article 40, paragraph 3, would put too much emphasis on member States in a situation where the international organization was responsible and obliged to give satisfaction. In practical terms, the organization would be expected to consult with its member States and opt for a form of satisfaction that would be humiliating neither for it nor for them.

89. Following a straw vote, it had been decided to retain draft article 40 in the formulation initially proposed by the Special Rapporteur, on the understanding that the commentary would address the issue of member States being humiliated by a specific form of satisfaction requested from the organization.

90. Draft article 41 dealt with the interest on any principal sum, due in order to ensure full reparation. It had been suggested in plenary that a proviso should be added to paragraph 2, stating that the injured party might waive the interest or stop it from running at any time before the obligation to pay was fulfilled. The possibility of a waiver was not confined to the payment of interest, as it was indeed not infrequent in practice that an injured party did not require full reparation. Moreover, it should be noted that the issue of waiver of a claim was addressed in Part Three of the draft articles on responsibility of States. The Drafting Committee had adopted draft article 41 unmodified, except for the replacement of “payable” by “due” in the first sentence, in order to align the text with that of draft article 38 on responsibility of States.<sup>343</sup>

91. Draft article 42 related to the contribution to the injury. It would be recalled that some comments had been made in plenary to the effect that some general guidance should be given regarding the distribution of responsibility according to certain categorical distinctions. Arguably, the responsibility of an international organization for a recommendation should be limited, compared to that of a State acting on the basis of that recommendation. However, that was not an issue dealt with in draft article 42, which was concerned with the contribution of the victim to the injury caused by the internationally wrongful act.

92. Two other issues raised in plenary had also been addressed during the discussion on draft article 42 in the Drafting Committee. First, it had been confirmed that the phrase “wilful or negligent” applied to the omission as well as to the action of the injured party. Secondly, the Special Rapporteur had indicated his willingness to specify in the commentary that draft article 42 was without prejudice to the duty of the victim of the internationally wrongful act to mitigate damage.

93. Comments similar to those previously made in relation to draft article 36 had been voiced during the discussion on draft article 42 in the Drafting Committee. It had been recalled, for instance, that draft article 1 of the draft on diplomatic protection<sup>344</sup> considered the natural or legal person as directly injured by the internationally wrongful act, whereas draft article 42 referred only to any person or entity “in relation to whom reparation is sought”. That limitation had seemed to some members all the more difficult to accept given that some of the most frequent issues arising in practice concerned breaches of labour contracts within international organizations. In such cases, the contribution of the victim to the injury could play a predominant role.

94. The Drafting Committee had felt nonetheless that any modification to draft article 42 in that respect would not be consistent with decisions previously made regarding the scope of the draft articles. The commentary to the draft article would make an explanatory reference to the draft articles on diplomatic protection, in order to clarify the different conceptual approaches adopted in that text and in the current draft respectively. It had already been acknowledged that the draft should cover only the

<sup>343</sup> *Ibid.*, pp. 29 and 107.

<sup>344</sup> *Yearbook ... 2006*, vol. II (Part Two), pp. 26 *et seq.*, para. 50.

responsibility of an international organization towards a State or another international organization, and the obligations stemming therefrom. That did not mean that persons or entities other than States and international organizations could not be considered as injured under other rules of international law.

95. Draft article 43 was an amended version of the supplementary draft article referred to the Drafting Committee on 18 July 2007. It would be recalled that the initial proposal made in plenary had been modified before it was sent to the Drafting Committee, with the inclusion of a reference to the rules of the organization. In plenary, while some members of the Commission had considered that member States of an international organization were obliged under general international law to provide the organization with the means to effectively provide reparation, others had been of the view that no such obligation existed outside the rules of the responsible organization. For that reason, they had considered that there was no need to add to the draft articles a provision imposing on States the obligation embodied in the supplementary draft article.

96. The Drafting Committee had held an extensive discussion on the supplementary draft article. According to one view, the text proposed by the Special Rapporteur could be read as affirming that member States were bound by the obligation contemplated by the provision unless the rules of the organization provided otherwise. In order to clarify the relationship between the organization and its members in that regard, it had been suggested that the phrase “in accordance with” should be replaced by “according to”, “under” or “following the rules of the organization”. Notwithstanding potential problems of translation, it had been considered that “in accordance with” was a standard phrase, making it sufficiently clear that member States must abide by the rules of the organization.

97. It had been agreed that the phrase “in accordance with the rules of the organization” should be placed between the words “take” and “all appropriate measures”. That shift would go along with the broadly shared view that the obligation contemplated by draft article 43 originated in the rules of the organization. The commentary would also make it clear that, even if the rules of the organization did not contain any express provision to that effect, they encapsulated a general obligation of cooperation. In compliance with that obligation of cooperation, member States would have to consider giving the organization the means for fulfilling its obligation of reparation.

98. Several members of the Drafting Committee had expressed concern that the supplementary draft article placed the onus on member States. According to that view, the obligation contemplated in draft article 43 should be worded in a way that would bind the international organization rather than its members. The following text had been proposed: “The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under the present chapter.”

99. For its proponents, that was a more appropriate text for a set of draft articles devoted to the responsibility of international organizations; it could also prompt international organizations to adapt their internal rules in order to meet their obligations under Part Two.

100. Whereas the view had been expressed that the two provisions were complementary and could actually be combined in a single draft article, several members of the Drafting Committee had considered that the provision stressing the obligation of the international organization differed in subject matter from that embodied in the proposed supplementary draft article. The view had also been expressed that the proposal made in the Drafting Committee would state an obligation without specifying how it was to be fulfilled. The commentary could make it clear that the responsible international organization should strive to develop rules in order to meet its obligations towards injured parties.

101. Given the variety of views expressed on that issue, the Drafting Committee had resolved to adopt the text of the supplementary draft article as amended in the course of its debate, accompanied by a footnote to the draft article which would reproduce the alternative proposal as one supported by some of its members. The differences of views would also be reflected in the commentary to the draft article.

102. He also wished to draw attention to a minor editing amendment to draft article 43: the words “the present chapter” should be replaced by “this chapter”, for the sake of consistency with the other draft articles.

103. With regard to the placement of the draft article, it had been agreed that it should be located at the end of Chapter II as it related to all the obligations of reparation, and that it should be entitled “Ensuring the effective performance of the obligation of reparation”.

104. The last chapter in Part Two, namely Chapter III, consisted of two draft articles dealing with serious breaches of obligations under peremptory norms of general international law. Those draft articles, which corresponded to draft articles 43 and 44 as originally proposed by the Special Rapporteur, had been renumbered after the inclusion of a new draft article 43 at the end of Chapter II.

105. Draft article 44 [43] defined the parameters of application of Chapter III. In plenary, doubts had been expressed regarding the necessity of distinguishing a specific category of breaches of obligations of *jus cogens* by international organizations. There was, however, broad agreement within the Commission as well as in the replies by States to the question raised in Chapter III of the Commission’s 2006 report on the work of its fifty-eighth session.<sup>345</sup> As there appeared to be no reason to differentiate in that respect between the situation of a State and that of an international organization, draft article 44 [43] provided for the applicability of Chapter III of Part Two to breaches by international organizations of obligations under peremptory norms of general international law.

<sup>345</sup> *Ibid.*, para. 28.

106. Draft article 45 [44] set out particular consequences of a serious breach within the meaning of draft article 44 [43]. As could be clearly inferred from its paragraph 3, it was not the purpose of draft article 45 [44] to provide an exhaustive description of all the particular consequences entailed by a serious breach by an international organization of an obligation under *jus cogens*. Some specific rules might indeed entail resort by States and international organizations to further consequences other than those stated in draft article 45, paragraphs 1 and 2. Those provisions should be interpreted as laying down general consequences applying as a minimum in case of serious breach by an international organization of an obligation of *jus cogens*.

107. The level of generality of the draft article, combined with the “without prejudice” clause embodied in paragraph 3, made it unnecessary to include in the provision the additions suggested in plenary. It would also be odd to extend to international organizations obligations that had not been contemplated in the corresponding article on responsibility of States, namely draft article 41.<sup>346</sup>

108. The suggestion had been made in plenary to extend to subjects other than States and international organizations the obligations set out in paragraphs 1 and 2 of draft article 45 [44], namely the obligation to cooperate to bring the breach to an end as well as the duty not to recognize the situation as lawful and not to render aid or assistance in maintaining it. That suggestion, which raised issues similar to those addressed in relation to draft articles 36 and 42, had also been considered by the Drafting Committee. Again, it had appeared that an express reference in the draft article to other subjects would substantially affect the scope of the text, which dealt with obligations of international organizations towards States and other international organizations. Nevertheless, the commentary to draft article 45 [44] would make it clear that the particular consequences contemplated in paragraphs 1 and 2 were without prejudice to the obligations that other entities might have in the event of a serious breach by an international organization of an obligation under a peremptory norm of general international law.

109. The commentary to draft article 45 [44] would also state in clear terms that the obligation to cooperate to bring such a breach to an end should not be understood as requiring from international organizations any action outside their competences and functions, as defined by their constituent instruments or other pertinent rules.

110. In concluding his introduction of the second report of the Drafting Committee, he commended draft articles 31 to 45 [44] contained in the report for adoption by the Commission on first reading.

111. The CHAIRPERSON invited the Commission to adopt the titles and texts of draft articles 31 to 45 [44].

Draft articles 31 to 42

*Draft articles 31 to 42 were adopted.*

<sup>346</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 29 and 113–114.

Draft article 43

112. Mr. GALICKI asked whether draft article 43 was to be adopted with or without the accompanying footnote.

113. The CHAIRPERSON confirmed that the footnote was an integral part of the text to be adopted.

*Draft article 43, as orally amended by the Chairperson of the Drafting Committee, was adopted.*

Draft articles 44 [43] and 45 [44]

*Draft articles 44 [43] and 45 [44] were adopted.*

*The titles and texts of draft articles 31 to 45 [44] on responsibility of international organizations, as a whole, as orally amended, were adopted on first reading.*

*The meeting rose at 12.55 p.m.*

## 2946th MEETING

*Thursday, 2 August 2007, at 10.05 a.m.*

*Chairperson:* Mr. Ian BROWNLIE

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

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

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

[Agenda item 6]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the second report of the Special Rapporteur on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/585).

2. Mr. McRAE thanked the Special Rapporteur for providing the new members with an opportunity to comment on his preliminary views and for reviewing in his second report the substance of the debate in the Commission and the comments made by Governments.

3. One might have thought that the topic was self-contained, and yet, as the Special Rapporteur had shown, it raised broader questions, such as its link with universal