

Document:-
A/CN.4/2946

Summary record of the 2946th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2007, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

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 41.³⁴⁶

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.

³⁴⁶ 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. Caflisch, 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

jurisdiction and with the jurisdiction of international criminal tribunals. There was thus a risk that the scope of the topic would expand out of control; that was probably what Mr. Dugard had had in mind at the previous meeting, when he had suggested that the Commission should return to the plan of action contained at the end of the preliminary report. In his own view, the success of the work on the topic would depend on the way in which the Special Rapporteur was able to confine it and ensure that it dealt with related areas only to the extent necessary. For example, as some members of the Commission and delegations to the Sixth Committee had commented, there was no need to provide a full treatment of the principle of universal jurisdiction, although some degree of overlap was inevitable. The same applied for the question raised by the Special Rapporteur on the “triple alternative”: in principle, he should focus on the obligation to extradite or prosecute and should leave aside the possibility of surrendering the alleged offender to the International Criminal Court or another international criminal tribunal, but it was not so easy to compartmentalize the issue. Was an obligation to extradite fulfilled if the person concerned had been surrendered to an international tribunal? The Special Rapporteur had to address that question, but, once again, care must be taken not to enlarge the scope of the topic too much, because, as Mr. Pellet had pointed out at the previous meeting, the issue involved the relationship between treaties and, if a customary obligation was being considered, the issue was that of the relationship between treaties and customary international law.

4. The main question raised by the consideration of the topic, in any case as a starting point for any treatment of the issue, was whether the obligation to extradite or prosecute was found only in treaties or whether it also existed in customary international law. If it did, its scope would have to be determined. The Special Rapporteur recognized in paragraph 40 of his preliminary report³⁴⁷ that this was one of the crucial problems which the Commission must resolve. In fact, its resolution would affect the Commission’s approach to the treatment of the topic and the content of the draft articles.

5. The three members of the Commission who had spoken after the Special Rapporteur at the previous meeting had taken the view that, at least to some extent, the obligation to extradite or prosecute existed in customary international law and they seemed to think that work on the topic should proceed on that basis. However, the Commission should be more explicit and open on that point. For those members, although the Special Rapporteur made frequent reference to customary international law in his reports, it was unclear where he stood. In paragraph 40 of the preliminary report, the Special Rapporteur noted that a growing number of scholars supported the view that the obligation to extradite or prosecute was based on a customary international obligation and, in paragraph 109 of his second report, he cautiously stated that the development of international practice based on the growing number of treaties establishing and confirming such an obligation might lead at least to the beginning of the formulation of an appropriate customary rule. As he

saw it, the Special Rapporteur was justified in his caution. However, the proposition in the footnote to paragraph 109 of his second report, according to which the fact alone that a State entered into treaties containing obligations to extradite or prosecute was strong evidence that it intended to be bound by that principle of customary international law, went too far. The Special Rapporteur seemed to be leaning towards that view when he said, in paragraph 112 of his second report, that the growing quantity of such obligations accepted by States under treaties could be considered justification for the change of quality of those obligations—from purely treaty obligations to customary rules. However, the Commission’s work could not rest on that analysis: quantity was important, but showed only a frequent practice and did not necessarily of itself constitute an *opinio juris*. The Commission should not base itself solely on the content of treaties, but also on national legislation and evidence of actual compliance. If the Commission was to be credible, the identification of an obligation in customary international law to extradite or prosecute had to be built on rigorous analysis. One State at least, setting out a carefully considered argument, had taken the view that such an obligation had no source in customary law; regardless of whether there was agreement on that assertion, it had to be taken into account.

6. The growing number of treaties containing the obligation to extradite or prosecute was an important starting point, as the Special Rapporteur had said, but it was only a starting point. The Commission must also consider domestic law: for example, how many States had included in their legislation the obligation to extradite or prosecute independently of corresponding treaty obligations? How was the obligation, whatever its source, actually fulfilled? The Special Rapporteur was right in indicating that, to continue its work, the Commission needed more responses from Governments. As had been suggested in the Commission and in the Sixth Committee, the most appropriate place to begin looking for a customary law obligation was in the area of serious international crimes. Consequently, the Special Rapporteur should consider whether States’ obligations with respect to such crimes required action to ensure prosecution, either through direct prosecution of the alleged offender or through extradition to another State.

7. Clarification of whether there was an obligation to extradite or prosecute in customary international law would help settle a number of other issues raised by the Special Rapporteur. On the question of rights, to which reference was made in paragraph 88 of the second report, if the obligation was based only on treaty law, then the other States parties might also have the correlative right to demand the fulfilment of treaty obligations. On the other hand, if it was an obligation under customary law, the existence of correlative rights was a much more complicated question and answers were far less obvious.

8. The same applied to the questions raised by the Special Rapporteur in paragraphs 91 and 92 on priority between the obligation to extradite and the obligation to prosecute and on whether States had discretion to choose between the two, as well as on whether the obligation was conditional or alternative, the reply to which was in large part contingent on whether the obligation was deemed to

³⁴⁷ Yearbook ... 2006, vol. II (Part One), document A/CN.4/571.

be based primarily on a treaty or on customary law. The scope of draft article 1 likewise depended on clarification of that question. In paragraph 81, the Special Rapporteur recognized that the sources of the obligation to extradite or prosecute were paramount with respect to the establishment of the obligation. He agreed, but that was also true for the content, operation and effects of the obligation. Hence the need to know whether draft article 1 applied to both a treaty-based regime and a regime based on customary law or only to a treaty-based regime. Before referring draft article 1 to the Drafting Committee, the Commission should wait until the Special Rapporteur had submitted other draft articles that would help provide clarification on that point.

9. The CHAIRPERSON, speaking as a member of the Commission, said that he fully agreed that there was a need to distinguish clearly between what was presented as being a matter of customary law and what was enunciated simply as practice, but was not necessarily representative of *opinio juris*. The whole area of criminal jurisdiction and extradition was particularly complex, precisely in the context of the sources of the law and the extent to which a principle of customary law could be said to have emerged.

10. It would also be difficult to avoid the question of progressive development. If the Commission deemed it necessary to formulate proposals *de lege ferenda*, it should do so because that was not beyond its mandate.

11. It seemed very difficult to decide whether the obligation to extradite or prosecute was an obligation or several obligations under international law without dealing with certain corollaries, in particular the question whether universal jurisdiction constituted a lawful basis for prosecution. Universal jurisdiction should be exercised only if guarantees of due process, including the presence of witnesses and the existence of evidence, were observed; that was not always the case.

12. Mr. DUGARD said that he agreed entirely with Mr. McRae that it was very difficult to be certain whether the obligation to extradite or prosecute was based on customary law or not. Even Bassiouni and Wise,³⁴⁸ the authors of the leading work on the subject, disagreed on the subject. However, as the Chairperson had just pointed out, the Commission had the opportunity to engage in progressive development. Thus, priority should not be given to verifying the existence of a customary obligation to prosecute or extradite before embarking on codification; instead, the Commission should choose between progressive development and an approach which would blur the line between progressive development and codification.

13. Mr. GAJA said that he appreciated the care with which the Special Rapporteur had laid the basis for his work, although it might delay his analysis of the subject. The study contained in the second report was clearly valuable and showed the great attention which the Special Rapporteur had given to the variety of comments made in both the Commission and the Sixth Committee. It was

perhaps understandable, however, that he should be somewhat impatient to see how the Special Rapporteur would reply to some of those comments.

14. Having had the opportunity to speak on the topic at the previous session, he would confine himself to recalling the general thrust of the comments he had made. At the outset of a discussion on *aut dedere aut judicare*, it made sense to refer to various issues which might be connected to the topic, such as the scope of universal jurisdiction or the limits to extradition. However, it should be clear that those issues would have to be addressed only insofar as they were directly relevant. To contribute to defining what was relevant, it might be useful to describe the system underlying *aut dedere aut judicare*: according to a treaty or perhaps a rule of general international law, one or more States enjoyed priority jurisdiction with regard to a certain crime. They would also be under an obligation to prosecute the alleged offender, but only if the offender was present in their territory, since trial in the absence of the offender would be of little use and would also raise the question of how the rights of the accused would be respected. Hence, if the alleged offender was in the territory of another State, in order to exercise its priority jurisdiction, a State would have to request extradition from the State in whose territory the offender was present. That State would probably not be one of those that had priority jurisdiction; otherwise, it would have exercised it. The requested State might be under an obligation to extradite the alleged offender, but, even when there was a treaty or a rule of general international law prescribing extradition for the crime, there might be provision for exceptions. Thus, the rules on extradition and the related exceptions were important, but only indirectly relevant to the obligation for the requested State to prosecute, and they should not be included in the Commission's study.

15. The obligation to prosecute arose only if the requested State did not extradite. In that case, the rule giving priority to the requesting State in the exercise of jurisdiction no longer applied. The requested State might have jurisdiction for the crime irrespective of *aut dedere aut judicare*. However, when that obligation applied, the requested State necessarily had jurisdiction, at least under a treaty providing for *aut dedere aut judicare*, and it even had the obligation to exercise that jurisdiction.

16. The existence of the universal jurisdiction of the requested State was not a precondition. Even if the requested State did not have jurisdiction for the crime, it acquired it on the basis of *aut dedere aut judicare* and it would have an obligation to exercise it.

17. Another scenario was possible: State A, in whose territory the alleged offender was present, was under an obligation to prosecute, but State B requested extradition. If State A acceded to that request, it could be deemed to have fulfilled its obligation to prosecute because it had made it possible for a willing State to do so. That scenario could be described as *aut judicare aut dedere*, since extradition was merely a modality for complying with the obligation to prosecute.

18. Several conclusions could be drawn from his brief description of the legal institution of *aut dedere aut*

³⁴⁸ M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht, Martinus Nijhoff, 1995.

judicare. First, the road map outlined in paragraph 61 of the preliminary report³⁴⁹ should be made more precise to enable the Commission to focus on issues that were directly relevant. Secondly, with regard to draft article 1, the word “alternative” should be deleted because, although the formulation of the obligation suggested that there was an alternative, it would be misleading to say that the requested State always had a choice. In many cases under international law, the requested State was under an obligation to extradite and only in the second scenario which he had just described—*aut judicare aut dedere*—did the requested State have an actual alternative because it could use extradition as a way of complying with its obligation.

19. Thirdly, it was pointless to ask whether the requested State would have jurisdiction irrespective of *aut dedere aut judicare*. As noted by other members of the Commission, the obligation to prosecute, whether under a treaty or under international law, was triggered by the presence of the alleged offender in the territory of the requested State and the latter’s refusal to extradite to a State that had priority jurisdiction.

20. Mr. FOMBA, referring to the question of the link between the principle of universal jurisdiction and the obligation to extradite or prosecute, said that, in order to know whether the two should be dealt with together or separately, it was important to identify what, *de jure* or *de facto*, linked or distinguished them from the point of view of substance. In any case, the Commission had before it a two-sided obligation that was formulated not in a cumulative, but in an alternative manner. The second aspect of the obligation—the obligation to prosecute—raised the question of jurisdiction for prosecution, hence the need to compare the two institutions and to determine their objective, their content, their legal foundation and the way in which they actually operated or should operate.

21. The principle of universal jurisdiction was designed to ensure that punishment for certain particularly serious crimes was inescapable. It recognized that the courts of all States were entitled to try acts committed abroad, regardless of where they had been committed or the nationality of the offender or the victim, and it was based on both customary law and treaty law. It could reasonably be asserted that, in accordance with general international law, States could invoke universal jurisdiction for certain particularly serious crimes. It was also the case that, in accordance with international treaty law, several instruments defining international offences provided for a system of universal jurisdiction.

22. The obligation *aut dedere aut judicare*, which was meant to prevent impunity, was an essential element of the system of State jurisdiction and cooperation in criminal matters. That alternative obligation, which could also be called a conditional obligation in the sense that the implementation of one of the terms was subordinate to the non-implementation of the other, was usually treaty-based. However, it could reasonably be argued that crimes against the peace and security of mankind came under customary law.

23. To conclude on that point, it could be asserted, first, that the two elements—universal jurisdiction and *aut dedere aut judicare*—had the same objective; secondly, that the objective was of particular importance and of an absolute nature for the category of crimes against the peace and security of mankind; thirdly, that it was only logical that the exercise of universal jurisdiction should have priority; and, fourthly, that, otherwise, and solely residually, the obligation to extradite should be established as a rule. In that connection, he did not clearly understand what the Special Rapporteur meant by the word “simultaneous”, which he used in paragraph 104 of his second report in connection with the Princeton Principles on Universal Jurisdiction.³⁵⁰ Did he mean that the obligation to extradite or prosecute was applicable to both “serious crimes” and “other crimes” or that it was applicable at the same time as universal jurisdiction? In the latter case, it would be an odd assertion, given that a person could not be tried and extradited at the same time.

24. He had no objection to the preliminary formulation of a draft article on scope, since the text proposed by the Special Rapporteur seemed at first glance to move in the right direction by indicating the essential aspects to be covered. The terminology employed was perhaps not perfect because the use of terms such as “establishment” or “operation” could create difficulties. The words “alternative obligation” might prejudge the reply to the question whether there was a cumulative obligation (para. 90 of the report) and he therefore proposed the following wording: “The present draft articles shall apply to the definition, scope and implementation of the obligation to extradite or prosecute.”

25. The Special Rapporteur was right to give detailed consideration to the question of the reciprocal effects of the two terms of the obligation from the dual point of view of form and content and to speak of “obligation” rather than “principle”. On the question whether a State could refuse extradition when it “is ready to enforce its own means of prosecution” (para. 91), the answer would appear to be that it could, subject to questions of priority between the requesting State and the requested State, because that was part of the logic according to which a State which did not extradite was under an obligation to try. That logic also meant that a State could refuse to extradite if it considered that the request for extradition was unjustified or incompatible with its domestic law, subject to that presumption being well founded and to guarantees of protection and effectiveness.

26. With regard to the existence of a “triple alternative”, he said that it was of little importance whether it was the State that tried, provided that there was no parody of justice, or the International Criminal Court. The important thing was to prevent impunity. Accordingly, the principle of complementarity, which raised the question of competition between national courts and the International Criminal Court, was applicable and the problem thus arose in different terms depending on whether surrender to the International Criminal Court had priority. If it did, the obligation *aut dedere aut judicare* should not come into play.

³⁴⁹ Yearbook ... 2006, vol. II (Part One), document A/CN.4/571.

³⁵⁰ Macedo, *op. cit.* (see footnote 333 above).

27. As to the scope *ratione personae* of the obligation, although it was clear that it concerned natural persons, further consideration should be given to whether it also applied to legal persons. He agreed with the Special Rapporteur on the meaning of the words “under their jurisdiction” in paragraph 96 of the report. As to the scope *ratione materiae* of the obligation, the Commission should not redefine the crimes, but should focus instead on the relevant categories of crimes on the basis of an irrefutable criterion, such as the particular seriousness of a crime, or crimes against the peace and security of mankind.

28. On the approach to be followed, a draft article 2 on use of terms was in fact necessary and even indispensable, although it was difficult at the current stage of work to provide a comprehensive list of terms for definition. However, it was clear that, despite their possible ramifications, three key concepts, namely, “obligation”, “extradite” and “prosecute”, were included in the current wording of draft article 1. With regard to the main obligation, several articles would in fact be necessary before it could be defined in detail.

29. Draft article X (para. 108) was useful, although it merely stated an obvious fact of international law. In addition, its scope was limited, since it did not answer the important question of the customary nature or basis of the obligation. He also endorsed the idea of systematically studying all international treaties in order to have a sounder foundation. The instructions provided by the Commission in the 1996 draft code of crimes against the peace and security of mankind³⁵¹ were of some use, but the Commission should consider whether and to what extent they should be further clarified or supplemented. The preliminary plan of action should remain the road map because a consideration of the essential aspects it contained would certainly help the work advance. He was in favour of referring draft article 1 to the Drafting Committee.

30. The CHAIRPERSON, speaking as a member of the Commission, said that it seemed unhelpful to refer to treaty law in the context of the topic under consideration. What would be the point of recommendations concerning the obligation *aut dedere aut judicare* that were based on treaty law? They would simply be tautological and serve no purpose. Instead, the Commission should either produce recommendations based on the principles of general international law or customary international law or it should make proposals with a view to the progressive development of law. It had never occurred to him that the “obligation” of a State to extradite or prosecute could be exercised, so to speak, on its own, independently of the application of other rules of international law, especially rules governing the existence of a legitimate basis for the exercise of that jurisdiction.

31. Mr. KAMTO, referring to the scope of the topic, said that it might have been wiser to take a closer look at the meaning of the part of the title that was in Latin. Other Latin expressions were used to describe the obligation to extradite or prosecute, such as *aut dedere aut punire* or *aut dedere aut prosequi*, the latter being preferred by

many authors because it reflected the obligation to prosecute and not necessarily the obligation to punish. In any case, the current title could be retained because the word *judicare* automatically implied *prosequi* and might lead to *punire*. He did not think that there were any good reasons not to include the obligation to surrender or transfer to an international court, at least at the current stage of work, bearing in mind in particular that the jurisdiction of the International Criminal Court was in principle subsidiary, or complementary, to that of national courts. As the State had initial jurisdiction, as a matter of principle, for trying crimes under article 5 of the Rome Statute of the International Criminal Court, it could be seen that the obligation *aut dedere aut judicare* was also applicable in such a case. In any event, the topic could not be defined well unless an effort was made to set it apart from related concepts, such as transfer or universal jurisdiction.

32. With regard to the origin—or source—of the obligation *aut dedere aut judicare*, he broadly agreed with the views expressed by Mr. McRae and Mr. Gaja. The Special Rapporteur had rightly stressed in paragraph 81 of his second report that it was a matter of paramount importance to decide whether the obligation was only treaty-based or whether it was also based on customary law. The treaty origin of the obligation was clear, whereas the question of its foundation in customary law was still the subject of heated discussions in international criminal law, as Mr. Dugard had recalled. Assuming that such an obligation existed in customary law, it still had to be ascertained whether the obligation existed prior to the emergence, in international law, of certain categories of offences whose commission was either a violation of a peremptory norm of international law or one of the most serious crimes covered by the Rome Statute of the International Criminal Court. If the emergence of *aut dedere aut judicare* as a principle or, more exactly, as an obligation in customary law was concomitant with or subsequent to the appearance of that category of offences, was it in that case an obligation in customary law or a principle which derived logically from the peremptory nature of those norms? Even if it was teleological, since the final objective was to combat impunity, as Mr. Fomba had rightly recalled, was it not precisely because those were *jus cogens* obligations and were thus particularly serious crimes for the international law that the State was under an obligation to try or prosecute? In that case, would the obligation still be a norm of customary origin or would it be a peremptory norm, as viewed from its other side?

33. Assuming that the obligation *aut dedere aut judicare* was linked to that category of offences, it would be a derived norm rather than a customary norm. Accordingly, the obligation *aut dedere aut judicare* would then clearly be tied in with the question of universal jurisdiction, which the Special Rapporteur might consider in greater depth in his future reports, and would thus be limited in its scope—apart from cases in which it was treaty-based—to that type of offence, which would need to be examined. If it was assumed that the obligation *aut dedere aut judicare* was a norm which did not originate in a treaty and that it was linked to that category of *jus cogens* obligations, i.e. offences resulting from the violation of norms of *jus cogens*, it would then have the character of a peremptory

³⁵¹ Yearbook ... 1996, vol. II (Part Two), p. 17, para. 50.

norm. In other words, the obligation *aut dedere aut judicare* might have a variable legal status in international law depending on the nature of the offence in question.

34. The implementation of the obligation raised the question of jurisdiction. As noted by Mr. Dugard, that obligation applied only when the jurisdiction of the custodial State was established. In that sense, *aut dedere aut judicare* was an obligation derived from a peremptory norm or a customary norm, or even a treaty norm, and was exercised on the basis of territorial jurisdiction. Conversely, it could be asked whether a State could be bound by such an obligation when the alleged offender was not in its territory. In actual fact, the implementation of the obligation presupposed, at least in principle, a dual jurisdiction: that of the custodial State, but also that of the State to which the alleged offender might be extradited when the custodial State did not want to exercise the *judicare* or when the State to which the person must be extradited had priority. The question then arose whether the *dedere* could apply in the absence of an express request by the State to which the custodial State could extradite. Must extradition be automatic when it was based on customary law, provided that the custodial State considered that it did not have jurisdiction to try, as had been suggested in the context of the *Hissène Habré* case, for example?

35. The whole point of those questions became clear in paragraphs 89 to 92 of the report. To consider that the obligation was alternative, i.e. that the custodial State had the choice between extraditing or trying, was tantamount to acknowledging that it could extradite, including to a State which had not made an express request. Otherwise, could the custodial State have an obligation to give priority to extradition? Could it choose to give preference or priority to its willingness to try rather than extradite? And what happened if it did not want to try the person and the other State did not want to either? What would the custodial State be required to do? He hoped that on the basis of his observations, the Special Rapporteur would consider the topic in greater depth and move ahead in the direction mapped out in his preliminary report.

36. With regard to draft article 1, it did not seem very wise to explain in detail the content of the obligation. It would be enough to delete the words “the establishment, content, operation and effects” because that was what the Special Rapporteur must clarify as he proceeded with his work on the topic. To say that the present articles applied to the obligation of States to extradite or prosecute persons under their jurisdiction would also avoid taking the risk of leaving out some aspects of the obligation under consideration. Notwithstanding those comments, he was not opposed to referring the draft article to the Drafting Committee.

37. Mr. CAFLISCH said that the second report on the obligation to extradite or prosecute contained a useful clarification of questions linked to the definition of the topic and stressed the need to avoid delving into related areas of international law or insisting on limitations so strict that there would be nothing much left to say. If the topic was confined to the treaty-based origins of the precept of *aut dedere aut judicare*, its sole interest would be to describe the operation of that obligation when it was

expressly provided for, whereas there was every reason to consider that the precept was one of the rules of general international law, provided, of course, that the Commission drew the necessary conclusions and undertook to define it and delimit its scope. If the precept was regarded as a rule of general international law, clearly, it was necessary to speak of “obligation” and not “principle”.

38. One boundary which must be drawn to narrow down the topic was to distinguish it from the surrender of suspects to international criminal tribunals, which was another matter entirely. What was involved was not extradition, since the criminal jurisdiction of one State was not substituted for that of another, but the involvement of an international body established by the community of States. Moreover, conditions of surrender varied from one international criminal tribunal to another. Sometimes, surrender must take place as soon as the suspect was apprehended, although the international tribunal could return the suspect to the custodial State if it deemed that the case was not sufficiently important (the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda) and, sometimes, the obligation to surrender did not apply unless the custodial State or the State to which the suspect had been extradited did not or could not prosecute and try (the International Criminal Court). Hence, the question of surrender to international criminal tribunals could hardly be included in the obligation to try or extradite.

39. The topic before the Commission was closely linked to the question of universal jurisdiction, as shown by the resolution on universal jurisdiction in criminal matters adopted by the Institute of International Law in 2005.³⁵² Paragraph 2 of that text established a link between universal jurisdiction and the obligation to try or extradite, stating that, although universal jurisdiction was primarily based on customary international law, “[i]t can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person”. The topic under consideration was thus closely related to the issue of universal jurisdiction and, consequently, to reply to the question asked by the Special Rapporteur in paragraph 74 of his second report, special attention did in fact have to be paid to that link. The issue of universal jurisdiction was similar to the obligation to extradite or prosecute in its objective, which was to prevent persons suspected of having committed serious offences of concern to the international community as a whole from evading punishment. Hence, the Commission should define those categories of serious offences with all necessary caution and retain those which it had become customary to refer to as “international crimes”, namely, war crimes and crimes against humanity and genocide, as well as serious human rights violations which did not come under that first category and, perhaps also in that case, other acts covered by conventions which provided for the obligation to try or surrender the suspect. It could thus be seen that customary law did play a certain role in the topic after all.

³⁵² Institute of International Law, *Yearbook*, vol. 71, Part II, Session of Krakow (2005), Resolution III, Paris, Pedone, 2006, p. 297.

40. Once the consideration of questions related to the definition of the obligation *aut dedere aut judicare* was completed, it would be necessary to identify the cases in which the rule could not be applied. The first such case involved a national of the custodial State. Contrary to the view of the Monegasque authorities (para. 67 of the second report), the alternative obligation was not really applicable in that case because the custodial State did not have a choice: it must prosecute and try, and could not extradite unless domestic law so allowed. The rule *aut dedere aut judicare* was also not applicable if the extradition of the suspect might have serious consequences for that person's human rights, in particular with regard to the right to life and the prohibition of torture. Nor was the rule applicable if the custodial State itself did not have criminal jurisdiction in the matter. In that case, there was no alternative obligation and only the obligation to extradite remained, where applicable. That situation should remain the exception because, to the extent that the Commission confined itself to essential categories of crimes, the rule of universal jurisdiction (and hence the jurisdiction of the custodial State) would be applicable. Lastly, the obligation *aut dedere aut judicare* would not be applicable if the State requesting extradition did not have jurisdiction because, in such a case, the suspect might slip through the net. The custodial State could no longer try the suspect because it had extradited him, and the State which had obtained his extradition could not try him either because its courts did not have jurisdiction. The jurisdiction of the requesting State could stem from the place of the offence, active or passive personality, the principle of protection or the principle of universal jurisdiction, in the case of an offence under the categories referred to earlier—additional proof of the links between the precept under consideration and the concept of universal jurisdiction.

41. As to the questions in abeyance referred to in paragraphs 77 to 116 of the second report, he had no objection in principle to the Special Rapporteur's proposals, although the wording of paragraph 115 needed to be qualified. It was not enough for another State, when requesting extradition, to declare itself ready to prosecute and try a suspect; that State must also be seen to have jurisdiction. He was nevertheless in favour of referring the draft article to the Drafting Committee.

42. Mr. PERERA said that two aspects of the report called for particular attention, namely, the source of the obligation to extradite or prosecute and the scope of the topic, especially the relationship between that obligation and the principle of universal jurisdiction.

43. With regard to the source of the obligation, the second report reflected the cautious approach adopted both by the Commission and by the Sixth Committee in concluding that, at least at present, there was no obligation under customary law to extradite or prosecute that was applicable in general to all criminal offences. At the same time, there appeared to be a broad consensus that international treaties increasingly embodied such an obligation in respect of offences falling within their scope. The Commission must give closer attention to the question whether the obligation was gradually acquiring a customary-law character, at least for certain categories of crimes, and must take into account current developments in State practice and jurisprudence.

44. The factors which needed to be taken into account included the acceptance of the obligation to extradite or prosecute by a growing number of States as State parties to treaties dealing with the suppression of serious international crimes, and thus an increase in State practice leading to a broad network of international legal obligations to extradite or prosecute; the adoption by those States of domestic legislation to give effect to the obligation to extradite or prosecute; judicial decisions, of which the *Lockerbie* case was a good example, referring to the existence of a principle of customary international law, *aut dedere aut judicare*; and doctrinal support, as referred to in the second report (para. 109), for the idea that growing acceptance of the obligation and State practice in respect of a wide range of international treaties embodying it should lead to the entrenchment of the principle in customary international law. In his view, there was a sufficient customary basis for the limited category of "grave international crimes" with broad recognition in international law. That category also included crimes defined in a number of international conventions whose purpose was the suppression of terrorism and drug trafficking and which were widely accepted by the international community. That was a crucial issue and he looked forward to the next report, in which the Special Rapporteur had undertaken to present a systematic survey of the relevant international treaties, classified according to the extent of the obligation they defined. That would certainly simplify the Commission's task.

45. With regard to the scope of the topic, the second report raised the important issue of the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction. Work should focus primarily on the issues arising out of the obligation to extradite or prosecute and a boundary line must be drawn between the obligation and the principle of universal jurisdiction, but that should not necessarily result in the watertight compartmentalization of the two related principles. Although not automatically entailing a general study of the principle of universal jurisdiction, the study of the obligation to extradite or prosecute must of necessity recognize the obvious linkages between the two and take account of the fact that the principle of universal jurisdiction was a key component of the full implementation of the obligation to extradite or prosecute. In practice, the State in whose territory the suspect was present must ensure that its courts were vested with the jurisdiction to prosecute that person, regardless of where the offence had been committed, when it was not in a position to extradite the suspect to a requesting State with the necessary jurisdiction. International treaties containing the obligation to extradite or prosecute, particularly sectoral conventions dealing with the suppression of certain terrorist crimes, provided for different types of jurisdiction. The farthest-reaching provision was the requirement that a contracting State should establish its jurisdiction for the offences specified in the convention when the alleged offender was present in its territory and the State did not extradite. In such a case, the State was under an obligation to assume jurisdiction. The only link between the crime and the State which exercised jurisdiction in such instances was the presence of the alleged offender in its territory and the control which the custodial State had over that person. That

requirement was nearly the same as the principle of universal jurisdiction. As noted by Mr. Dugard at the previous meeting, some conventions, such as the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism, had a broader jurisdictional basis. On the question of surrender to international tribunals, he agreed with the previous speakers that there was a need to be cautious and that distinct rules might be applicable.

46. The Special Rapporteur was proposing draft article 1 on the basis of the material contained in the preliminary³⁵³ and second reports. It recognized the alternative nature of the obligation, deriving directly from the traditional expression of *aut dedere aut judicare*, which was premised on the choice between extradition and prosecution; and it was broadly acceptable. However, the Special Rapporteur raised several questions on the substance of the provision, namely: which alternative should have priority in the practice of States which implemented the obligation; whether States were free to choose between extradition and prosecution; and whether the custodial State had the discretion to refuse a request for extradition when it was prepared to prosecute or when the request was manifestly wrongful. Those issues must be approached in the light of the historical evolution of the legal concept of extradition as an attribute of sovereignty and a prerogative of the State. A requested State would thus be free to refuse a request for extradition on the basis of legal or other impediments, such as the constitutional prohibition of the extradition of a national. In such instances, however, refusal would immediately give rise to the obligation to prosecute so that the alleged offender did not evade justice. Thus, it was not a question of priority, and the two sides of the alternative obligation must be placed on an equal footing.

47. Another issue was that of the application of traditional restrictions on extradition. Current developments with regard to the non-applicability of the political-offences exception in the case of serious international crimes, in view of their predominantly criminal and indiscriminate nature, must be duly taken into consideration. The International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the draft comprehensive convention on terrorism currently being elaborated contained an identical provision excluding the applicability of exceptions in respect of crimes under those instruments.

48. The States parties to those conventions had adopted legislation which amended their extradition laws by removing the application of the political-offences exception in respect of the category of crimes covered by those instruments. However, another traditional limitation, namely, the right to refuse extradition when the request itself was made in bad faith, was not in the interest of criminal law or was for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or opinion, was expressly retained and remained applicable. Those developments were directly relevant to

the practical application of the obligation and deserved careful consideration for the preparation of future draft articles.

49. As to further work on the topic, he agreed that the formulations referred to in paragraphs 113 and 114 of the second report, on the important work accomplished by the Commission on the 1996 draft code of crimes against the peace and security of mankind, would provide invaluable material and serve as useful guidelines for further work on the draft articles. Like Mr. McRae, he thought that the Commission should wait to have more draft articles before referring them to the Drafting Committee.

Effects of armed conflicts on treaties (*concluded*)^{*} (A/CN.4/577 and Add.1–2, sect. D, A/CN.4/578, A/CN.4/L.718)

[Agenda item 5]

REPORT OF THE WORKING GROUP

Mr. Vargas Carreño (Vice-Chairperson) took the Chair.

50. The CHAIRPERSON invited the Chairperson of the Working Group on the effects of armed conflicts on treaties to introduce the report of the Working Group (A/CN.4/L.718).

51. Mr. CAFLISCH (Chairperson of the Working Group on the effects of armed conflicts on treaties), referring to the approach taken by the Working Group, said that its mandate was very broad, namely, to seek a common position on several key matters raised during the plenary debate on the Special Rapporteur's third report. The Working Group had understood that the purpose of the exercise was to facilitate the transmission of the draft articles to the Drafting Committee by developing specific guidance on those key matters and, where possible, even to suggest drafting. At the same time, the Working Group had appreciated that matters of drafting were primarily the province of the Drafting Committee, with one exception (relating to draft article 4), and that had been the approach which it had taken.

52. The work programme of the Working Group had been organized into three clusters of issues: the scope of the draft articles; draft articles 3, 4 and 7, as proposed by the Special Rapporteur; and other matters raised during the debate in plenary, including the question of the legality of the use of force. The Working Group had completed consideration of the first two clusters, as well as of some matters in the third. However, several issues required more time for reflection and, accordingly, it was recommended in the last paragraph of the report that the Working Group should be re-established the following year to complete its work.

53. In paragraph 4 of its report, four main recommendations were formulated. First, the Working Group recommended that draft articles 1 to 3, 5, 5 bis, 7, 10 and 11, as proposed by the Special Rapporteur in his third report, should be referred to the Drafting Committee together

³⁵³ Yearbook ... 2006, vol. II (Part One), document A/CN.4/571.

* Resumed from the 2929th meeting.

with the recommendations contained in paragraph 4 (1) (a) to (d) of its report. With regard to draft article 1, the Working Group had been of the view that the draft articles should apply to all treaties between States where at least one was a party to an armed conflict. In addition, there had been agreement that it was premature to take a definitive decision on whether treaties involving international organizations should be included within the scope of the draft articles. It had been decided to leave the matter in abeyance until a later stage in the development of the draft articles. In the meantime, the Working Group recommended that the Secretariat be requested to circulate a note to international organizations asking for information about their practice with regard to the effect of armed conflict on treaties involving them.

54. Turning to draft article 2, he said that the definition proposed by the Special Rapporteur did not exclude internal armed conflicts *per se*. Although there had been differences of opinion on the inclusion of that type of conflict, the Working Group had ultimately decided that, in principle, the definition should cover internal armed conflicts, but that States should be able to invoke the existence of an internal armed conflict in order to suspend or terminate a treaty only when the conflict had reached a certain intensity. The intensity threshold had been introduced so as to favour the continuity principle contained in draft article 3 by limiting the kinds of internal conflicts which could be invoked to suspend or terminate the application of a treaty. It had also been agreed that occupation in the course of an armed conflict should likewise not be excluded from the definition.

55. The Working Group had also considered draft article 7 and the question of the inclusion of a list of categories of treaties in the draft articles. It had thought that the essence of paragraph 1 should be retained, with a caveat that its formulation should be aligned with that proposed for draft article 4. In addition, the provision should be placed closer to draft article 4. It was proposed that the list of categories in paragraph 2 should be placed in an appendix to the set of draft articles with an indication that the list was non-exhaustive, that the various types of treaties on the list might be subject to termination or suspension either in whole or in part and that the list was based on practice and, accordingly, its contents might change over time. He also drew the Commission's attention to footnote 3 in the report of the Working Group, where it was suggested that the Drafting Committee should review the list taking into account the views expressed in the plenary debate. The Working Group had agreed that the Drafting Committee, when considering draft articles 10 and 11, should proceed along the lines of articles 7, 8 and 9 of the resolution adopted by the Institute of International Law³⁵⁴ on the same topic.

56. As to the Working Group's second recommendation, relating to draft article 4, he recalled that this provision had given rise to difficulties in plenary. The Working Group had decided to reformulate the draft article by suggesting that resort should be had both to the rules on the interpretation of treaties contained in the 1969 Vienna

Convention, i.e. articles 31 and 32, and to the nature and extent of the armed conflict, its effect on the treaty, the subject matter of the treaty and the number of parties to it. The Working Group recommended that the Commission refer that formulation of draft article 4 to the Drafting Committee.

57. The third recommendation of the Working Group was that draft article 6 *bis* be deleted. The provision would raise more questions than initially apparent and its subject matter would be better dealt with in the commentary, possibly to draft article 7.

58. The fourth and final recommendation was that the Working Group be re-established in the following year to complete its work, particularly on issues relating to draft articles 8, 9 and 12 to 14. He hoped that the Working Group would be able to meet early at the next session of the Commission in order to finalize its recommendations on the other draft articles, so that the Drafting Committee could work on a complete set of proposals.

59. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group and the recommendations contained in paragraph 4 thereof.

It was so decided.

60. The CHAIRPERSON said that, in keeping with the decision that had just been taken, draft articles 1 to 3, 5, 5 *bis*, 7, 10 and 11, as proposed by the Special Rapporteur in his third report, together with the guidance contained in paragraph 4 (1) (a) to (d) of the report of the Working Group, as well as the revised draft article 4 contained in paragraph 4 (2) of the report, would be referred to the Drafting Committee. In addition, as also recommended by the Drafting Committee, draft article 6 *bis* would be deleted and its content would be reflected in a commentary, perhaps to draft article 7.

Mr. Brownlie (Chairperson) resumed the Chair.

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)

61. THE CHAIRPERSON said that, as time still remained, he invited the Commission to resume its consideration of the second report of the Special Rapporteur on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/585).

62. Mr. SABOIA commended the Special Rapporteur on his second report, which defined the extent and content of the obligation to extradite or prosecute in a balanced manner. The obligation was part of the issue of criminal jurisdiction and its international dimension and its application had evolved over time. Extradition, which usually had a basis in treaties but could also be carried out by States on the basis of reciprocity, corresponded to

³⁵⁴ Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (1985), p. 278.

the shared interest of States, namely, ensuring that serious offences committed in the territory of another State did not go unpunished. Many treaties provided that, when the requested State refused extradition, it must institute criminal proceedings against the alleged offender. In that respect, bilateral and, in certain cases, multilateral treaties concerning extradition and reciprocal judicial assistance established the conditions under which that alternative obligation was exercised. He agreed with the view expressed by the Special Rapporteur in paragraph 47 of his report that, rather than considering the technical or procedural aspects of extradition, the Commission should concentrate on the conditions for the triggering of the obligation to extradite.

63. The interest of the international community in the repression of certain grave offences had contributed to the progressive development of rules of international law imposing on States the obligation to exercise jurisdiction in that regard, no matter where or by whom the offences were alleged to have been committed. The number of international legal instruments establishing that kind of jurisdiction attested to an emerging customary rule that might be applicable to all States, at least in respect of *jus cogens*.

64. In his opinion, the Commission was in fact in the presence of an obligation and not a mere principle, although its extent and implications were more limited in the case of treaties on cooperation in the area of extradition, which covered most crimes punishable by the criminal legislation of the contracting States, whereas international crimes were defined in the relevant constituent instruments. As indicated in paragraph 54, for that category of crimes, there was general recognition by States of the emergence of a customary or generally binding obligation to extradite or prosecute. Another argument in favour of that position could be drawn from the Rome Statute of the International Criminal Court, according to which a State party had an obligation to exercise its jurisdiction over the crimes defined in the Statute when the conditions for the establishment of that jurisdiction were fulfilled.

65. With regard to extradition, article 90 of the Rome Statute of the International Criminal Court, on competing requests, might be of relevance for the topic under consideration. He was not calling for extensive treatment of the concept of surrender, but the distinction between it and extradition should be taken into account.

66. As to the starting point for the draft articles, and specifically paragraph 74 on the link between universal jurisdiction and the obligation to extradite or prosecute, he believed that it would be necessary to establish a distinction between the two concepts, since they both referred to the broader subject of jurisdiction, but not go any further than that in the treatment of universal jurisdiction. The proposed text of draft article 1 seemed to be a good starting point for the definition of the scope of the draft articles and he was in favour of referring it to the Drafting Committee.

67. The answer to the question whether the obligation to extradite or prosecute was absolute or relative depended

on whether the Commission was dealing with obligations arising out of an extradition treaty—in which conditions did in fact exist regarding the exercise of jurisdiction by the requested or requesting State and in which the role of national legislation and courts was greater—or with situations in which the obligation to extradite or prosecute derived from provisions of a multilateral treaty defining categories of international crimes, for which the obligation was more comprehensive or even absolute. That obligation, at least in some cases, should be seen as an obligation of behaviour rather than one of result.

68. With regard to paragraph 99, in which the Special Rapporteur advocated a wide concept of jurisdiction, “including all possible types of jurisdiction—both territorial and extraterritorial”, he said that caution should be exercised not to legitimize the abuse of extraterritorial jurisdiction, through which some States or judicial systems tried to extend their national legislation beyond the limits of legitimate jurisdiction, in violation of international law. He agreed with the reasoning in paragraph 102 on the need to consider international customary rules as a possible source of criminalization of certain acts, but thought that strict criteria should be used to determine the types of offences that belonged in that category. The provisional formulation of a draft article X proposed in paragraph 108 would not be sufficient in respect of obligations arising out of customary norms or multilateral treaties which established obligations with regard to international crimes. On the other hand, the same provision might be seen as excessive in the case of the implementation of the obligation under extradition treaties, when a requested State, having refused extradition, found itself unable to establish grounds for prosecution.

69. Replying to the question asked by the Special Rapporteur in paragraph 116 of the report, he said that the “preliminary plan of action” remained a good road map for future work, on the understanding that it should reflect the ongoing debate in the Commission and the Sixth Committee. At least provisionally, the outcome of the work should take the form of draft articles.

70. Mr. VARGAS CARREÑO said he was pleased that the Commission had included the obligation to extradite or prosecute (*aut dedere aut judicare*) in its long-term programme of work and he paid tribute to the Special Rapporteur for his preliminary³⁵⁵ and second reports.

71. He agreed with Mr. Dugard that responsibility for the codification and progressive development of the topic was incumbent above all on the Special Rapporteur and the Commission, although the opinions of the Sixth Committee and Governments must be taken into consideration.

72. The obligation to extradite or prosecute was applicable only if a State had jurisdiction to accuse a person of an offence and if that person was physically present in its territory. As to the question of which part of the alternative obligation should take precedence, it was important to bear in mind the territory in which the offence had been committed. In the course of its work, the Commission

³⁵⁵ Yearbook ... 2006, vol. II (Part One), document A/CN.4/571.

should also clarify whether the rule *aut dedere aut judicare*, which was generally accepted in international law, was absolute or relative. In any event, given current practice, the main limitation on the obligation to extradite appeared to be the nationality rule. In such cases, a State could not extradite its national and was under an obligation to try him. One such recent treaty which established the obligation to try a national who could not be extradited was the 2003 United Nations Convention against Corruption (Merida Convention).

73. One of the most difficult and controversial aspects of the topic was that of sources. At the previous meeting, Mr. Dugard had drawn the Commission's attention to the comments by the United States that, since, in international law, the obligation to extradite or prosecute was limited to what the relevant international legal instruments provided, only binding instruments could make provision for the obligation *aut dedere aut judicare* (A/CN.4/579 and Add.1–4). That was an interesting viewpoint, particularly since international law was composed primarily of international conventions and the international community was increasingly trying, with the help of conventions, to punish illegal acts or crimes against humanity. The International Convention for the Protection of All Persons from Enforced Disappearance, adopted at the end of 2006, was a recent example. However, that did not suggest that customary international law should be left out. It could be applicable, in particular in the absence of a binding treaty between two States, but a treaty which defined a particular behaviour as an international crime could be considered, in view of the large number of States parties to it, to have established a customary norm which was also applicable to non-States parties. However, the imprecise application of a so-called "customary law" had more drawbacks than advantages and he referred in that context to the *Pinochet* case. Pinochet had been present in London when a Spanish judge, citing two offences duly defined in Spanish law, namely, genocide and terrorism, had requested his extradition to Spain. The Court of Appeal of the House of Lords had not accepted the offences cited by the Spanish judge to justify the extradition. However, it had recognized that the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Chile, Spain and the United Kingdom were parties, was the legal instrument applicable in that situation. He believed that in practice, there was always a treaty that might be invoked without it being necessary to resort to a vague customary law.

74. The Commission should also consider two important questions relating to universal jurisdiction and referral to an international jurisdiction, the International Criminal Court in particular. Before referring to universal jurisdiction, it was first necessary to define a number of elements which the Commission had not yet discussed. As to the possibility of referral to the International Criminal Court, that did not necessarily stem from the obligation *aut dedere aut judicare*, but from the provisions of the Rome Statute of the International Criminal Court itself, which stated that its jurisdiction was complementary to national jurisdictions and was exercised as an alternative. If the Commission decided to address that point, it should do so in a separate provision.

75. He endorsed draft article 1 on the scope of application, but thought that the word "alternative" should be deleted. He also agreed with the three elements proposed by the Special Rapporteur in paragraph 77 of the report for determining the scope of the draft articles, namely, the time element, the substantive element and the personal element. The Special Rapporteur should develop those three elements further when he introduced his third report to the Commission. He was in favour of referring draft article 1 to the Drafting Committee.

76. Mr. NIEHAUS congratulated the Special Rapporteur on the quality of his second report on the obligation to extradite or prosecute. The importance of the topic could be seen in the fact that it had been one of the projects considered as early as 1949, at the first session of the International Law Commission.³⁵⁶

77. He recalled that, in paragraph 61 of his preliminary report, the Special Rapporteur had introduced a very clear preliminary plan of action for a study of the topic. In his view, the suggestions made therein must be followed up because they would greatly facilitate the Commission's work. The Commission should not wait for comments or information from the Sixth Committee or Governments with some exceptions.

78. The Special Rapporteur had allowed himself to be too influenced by the views expressed in the Sixth Committee, the effect of which had been to undermine his second report. Like Mr. Pellet, he personally considered that the growing tendency to follow the positions of States was a negative development. He also agreed with those members of the Commission who had argued that the best contribution to the consideration of the topic could be made by specialized criminal experts, because that would make it possible to have an in-depth comparative study and would provide a clear idea on how to treat the subject matter.

79. The Commission must decide whether the obligation to extradite or prosecute was based on a customary norm or general principle or originated in a treaty and also whether it was applicable solely to international crimes, regardless of the basis of such crimes in customary law or treaty law, or also to offences which were not deemed international or ordinary. It should also examine the implementation of universal jurisdiction, the need for an extraterritorial jurisdiction to be able to try or extradite, the question of limitations on extradition (political offences and guarantees of due process, as well as the problem of the existence of constitutional provisions which prohibited the extradition of nationals) and the problems to which insufficient evidence gave rise.

80. He endorsed draft article 1, as contained in paragraph 76 of the second report, which augured well for future draft articles. The three elements proposed in draft article 1 were important and should be clearly formulated; that was a matter for the Drafting Committee. He also agreed with the Special Rapporteur and other members of the Commission that an obligation, and not a principle, was at issue. On the other hand, he disagreed with the idea

³⁵⁶ Yearbook ... 1949, p. 280.

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

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

The meeting rose at 1 p.m.

2947th MEETING

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

Chairperson: Mr. Ian BROWNLIE

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

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

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

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

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

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

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

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

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

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

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