Document:-
A/CN.4/2899

Summary record of the 2899th meeting

Topic:
<multiple topics>

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

48. As to future cooperation between AALCO and the Commission, the AALCO Secretariat would continue to draw up notes and comments on the topics under consideration in the Commission so as to assist the representatives of the member States of AALCO in preparing their deliberations on the Commission's report in the Sixth Committee.

49. An item entitled "Report on matters relating to the work of the International Law Commission at its fifty-eighth session" would be considered at the forty-sixth session of AALCO. The session would be held in Khartoum in 2007 and he invited members who so wished to attend.

50. Noting that the quinquennium was drawing to a close, he congratulated all the members for their outstanding contributions to the Commission's work over the past five years. The Commission had made considerable progress on all the topics on its agenda. It had completed much of its work on some of them, and the new topics which it had taken up were of immense significance. It was to be hoped that in its new composition, the Commission would continue its work with the same energy and enthusiasm.

51. The CHAIRPERSON said that the Commission had greatly benefited from its relations with AALCO for two reasons: first, because many of the representatives of its member States were distinguished legal specialists whose publications enriched legal research the world over; and, second, because most of the representatives of its member States were legal counsellors of Governments whose daily work related to the "State practice" which the Commission must take into account in its work of the codification and progressive development of international law.

52. Mr. DAOUDI, noting that the representatives of the AALCO member States had spoken at length on the topics on the Commission's programme of work, expressed surprise that, despite the resolution adopted by AALCO at its forty-fifth session and referred to by Mr. Kamil, most of the comments and observations addressed in writing to the Commission had come from industrialized countries. He asked whether AALCO had institutionalized mechanisms to help better familiarize the Commission with the views of its member States on the topics under consideration.

53. Mr. Sreenivasa RAO asked whether it might not be time for AALCO, which was celebrating its fiftieth anniversary and was moving into its new headquarters, to consider new fields of activity. He had five suggestions to make in that regard: establish working groups to study aspects of international law of relevance to the region; organize regional fellowship programmes; provide legal assistance to African and Asian States; organize exchanges of legal experts within and between those regions; and conduct a lecture series on subjects of interest to Africa and Asia.

54. Mr. KAMIL (Secretary-General of the Asian–African Legal Consultative Organization), replying to Mr. Daoudi, said that interaction between AALCO and the Commission had grown over the years and that the views of the member States were communicated to the latter in various ways. First, the Commission was represented at AALCO sessions. Secondly, its member States expressed their views to him on topics under consideration in the Commission, which he then forwarded to it, as he had done at the current session.

55. AALCO and the Commission also held a joint meeting in the framework of the meeting of legal counsellors of Governments which took place every year in New York. The records of the debates at the annual session of AALCO and at the joint meeting with the Commission were published in the AALCO *Yearbook*, a copy of which was sent to the Commission every year.

56. With regard to Mr. Sreenivasa Rao's suggestions, he said that he could not himself enlarge the mandate of AALCO and that any innovation must be approved by its member States. The suggestions were interesting and some of them were already being considered. For example, a training programme was to be started as soon as the organization had moved into its new headquarters.

57. Mr. KATEKA asked whether the AALCO secretariat could put a summary of the views expressed by its members on the various topics under consideration in the Commission on the AALCO website. AALCO should also update its website more often and flesh out the information offered.

58. Mr. GALICKI said that the relationship between AALCO and the Commission was very valuable for the latter, and especially for the special rapporteurs, and they enabled the Commission to be more closely in touch with the views of African and Asian legal experts.

59. Mr. KAMIL (Secretary-General of the Asian–African Legal Consultative Organization) said that the organization was in a transition period because of its move to new headquarters. As soon as it was settled in, the centre for research and training which was to be established there would start functioning and the website would be completely reworked and expanded with much new information.

The meeting rose at 1.05 p.m.

2899th MEETING

Tuesday, 25 July 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

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

Cooperation with other bodies (*continued*)

[Agenda item 13]

Declaration by the President of the International Court of Justice

1. The CHAIRPERSON welcomed Judge Rosalyn Higgins, President of the International Court of Justice. A renowned teacher and practitioner of international law, Judge Higgins had been a judge at the Court since 1995 and its President since February 2006. Among her countless accomplishments was the masterly general course she had given in 1991 at the Hague Academy of International Law on "International law and the avoidance, containment and resolution of disputes", published in volume 230 (1991) of the *Collected Courses of the Hague Academy of International Law*,[313] in which she had referred to the nature and function of international law as "a normative system". With the emergence of peremptory norms of international law and rules of *jus cogens*, it was to be hoped that one day the ICJ would give concrete form to the theoretical normative system conceived by Kelsen.[314]

2. The Court, at the Peace Palace in The Hague, and the Commission, at the Palais des Nations in Geneva, enjoyed long-established, harmonious and mutually beneficial relations in promoting international law in the service of States and the international community. The order of the Court of 13 July 2006 in the *Pulp Mills on the River Uruguay* case contained many elements that would be readily recognizable to members of the Commission, in the light of its own contributions to the elaboration of rules and principles through texts such as the 1997 Watercourses Convention and the draft articles on prevention of transboundary harm from hazardous activities.[315] Conversely, the Statute of the Commission mandated it to make use of the work done by the Court in its own task of codification and progressive development of international law. The annual visit by the President of the Court offered a regular and timely reminder of that symbiotic relationship. The Commission would undoubtedly derive the greatest benefit from the information to be provided by Judge Higgins, whom he accordingly invited to address the Commission.

3. Judge HIGGINS (President of the International Court of Justice) thanked the Chairperson for the warmest of welcomes and said she was delighted to address the Commission, whose work she so much admired. The Court greatly appreciated such exchanges between the two bodies, and the fact that they had become an annual event. She planned, as was traditional, to report on the judgments rendered by the Court over the past year, with particular reference to aspects of recent case law that had special relevance for the work of the Commission.

4. She would begin with the *Frontier Dispute (Benin/Niger)* case. Territorial disputes invariably involved many similar elements: an analysis of colonial instruments, the study of acts claimed to be legal *effectivités* and the question of *uti possidetis*, which often had a critical-date function to play in the long road to independence and the subsequent history. Yet each dispute over title to territory or the fixing of a boundary had its own special elements that provided instruction in history and challenges in law. And so it had been in the *Frontier Dispute* Chamber case, decided on 12 July 2005, the very day after her predecessor had addressed the previous session of the Commission.

5. To understand who at the time had had the authority to determine or change a frontier of international law had required reliance on and understanding of the national law of the time. But it had also become important for the Court to be able to identify which colonial acts were purely intra-colonial and determine whether they could have had the effect of altering a frontier for purposes of international law.

6. The Chamber of the Court, created at the request of the parties, had been charged with determining the course of the entire boundary between Benin and Niger and specifying which State owned the islands in the River Niger sector, with particular emphasis being placed by the parties on the island of Lété, the largest of them all. The parties had asked the Court to use the principle of *uti possidetis* for its decision. The challenge had been to have that doctrine play its important role without ignoring all that had occurred in real life subsequently. The Court had confirmed that it would look at maps and other data subsequent to the critical date, for the purpose of seeing if they evidenced any agreement to alter the *uti possidetis* line.

7. Beginning with the Niger River sector, the Chamber had found that the boundary between Benin and Niger followed the "main navigable channel of the river". Having determined the exact course of that main navigable channel by reference to the deeper soundings at the time of independence of the two countries, the Chamber had then found that the islands lying east of that channel—Lété and 15 others—belonged to Niger, while the nine islands located west of the channel belonged to Benin.

8. In the Mekrou River sector, the Chamber had had to decide whether, as Benin argued, the Mekrou River itself formed the border, or, as Niger claimed, the boundary was a straight line running between the Atakora mountain range and the confluence of the Mekrou and Niger rivers. Relying in particular on a 1927 decree of the French colonial authorities, the Chamber had ruled that the Mekrou River had formed the common border when both countries had gained independence and, consistent with *uti possidetis*, still formed the current border. The Chamber had then found that the Mekrou River was not navigable, and consequently that the median line of the river would constitute the appropriate boundary.

9. The case represented an interesting example—although not the first—of a dispute between African States being brought to the Court by special agreement. The option chosen by the parties to submit the case to the Court in that manner had proved of particular significance for the organization of the proceedings. Not only had the parties agreed to have the case heard by a Chamber of

[313] *Collected Courses of the Hague Academy of International Law, 1191-V*, vol. 230 (1993).

[314] H. Kelsen, *Théorie générale des normes*, Paris, Presses Universitaires de France, 1996, translated by Olivier Beaud.

[315] See footnote 56 above.

five judges, but also, interestingly, they themselves had fixed relatively short time limits for the filing of their respective written pleadings and had agreed to use solely the French language in their written and oral pleadings, thereby simplifying their own work as well as that of the Court and limiting their expenses.

10. The case had also presented the Court with an interesting small delimitation question that had never been addressed by an international court or tribunal until then: that of the delimitation of the boundary on bridges over international watercourses in the absence of any bilateral agreement between the two neighbouring States. That question had not been addressed by the Commission during its important work on watercourses, which, had not, in any event, been directed at boundary matters. The Court had found that in the absence of a bilateral agreement, the solution was to extend vertically the line of the boundary on the watercourse. It had noted in paragraph 124 of its judgment that

> [t]his solution accords with the general theory that a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air. Moreover, the solution consisting of the vertical extension of the boundary line on the watercourse avoids the difficulties which could be engendered by having two different boundaries on geometrical planes situated in close proximity to one another.

11. In the past year, the Court had had to deal with a very different type of inter-African case, raising issues of a wholly grimmer character. She was referring to the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*. It had involved very grave allegations relating, *inter alia*, to the unlawful use of force, violation of territorial sovereignty, occupation, human rights and humanitarian law violations, as well as to the illegal exploitation of natural resources. It had by no means been an easy or routine case for the Court, if only because when deliberations on the merits had started, the armed conflict had not been entirely settled on the ground. Indeed, according to news reports at the time, it had been threatening to flare up again. The Commission needed no reminding, either, of the complex history of that conflict in the Great Lakes Region and of the difficulty of untangling the sequence of events and identifying the numerous actors involved. The number of specific violations alleged by the parties and the amount and variety of material submitted in support of those allegations had been unprecedented.

12. In its judgment of 19 December 2005, the Court had ruled essentially in favour of the Democratic Republic of the Congo, although it had followed Uganda on one of its counter-claims. The outcome of the case was that the Court had found

> that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law. (para. 345 (3) of the judgment)

It had also found

> that the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law. (para. 345 (4))

13. Regarding Uganda's claim, the Court had then found

> that the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961. (para. 345 (12))

14. The Court had decided consequently that both countries were under an obligation to make reparation for those specified injuries.

15. The questions, legal and factual, that the Court had had to answer to reach those findings were too numerous, albeit important, to be recounted even in summary form. She would simply mention a few points of particular interest, as well as those parts of the Court's reasoning that had a direct bearing on the International Law Commission's work.

16. The Court had dealt extensively with important issues relating to the principles of non-use of force and non-intervention, consent to the presence of foreign troops and claims by Uganda that certain actions were to be articulated as self-defence. Detailed findings of fact had preceded findings of law. It was noteworthy that the Court had stated that, as in the *Military and Paramilitary Activities in and against Nicaragua* case, the facts did not warrant any pronouncement on whether self-defence would be available in the light of an imminent attack from across the border. Uganda had told the Court that it was not responding to any imminent attack and that in its view a series of small attacks constituted an attack that had already occurred.

17. The Court had then turned its attention to the legal definition of belligerent occupation. The Democratic Republic of the Congo had contended that Ugandan troops had set up a very large occupation zone, which Uganda administered both directly and indirectly. The defining criterion for establishing a situation of occupation, according to the Democratic Republic of the Congo, was not whether Ugandan troops were or were not present in specific locations in that zone, but rather Uganda's ability to assert its authority over the territory concerned. Uganda, on the other hand, claimed that with a maximum of 10,000 troops on the entire territory of the Democratic Republic of the Congo, it simply could not have occupied such an extensive swathe of territory. It had further maintained that most of the territories alleged to be occupied were controlled and administered by

Congolese rebel groups not under the control of Uganda. The question whether those groups were or were not subservient, in the State responsibility sense, had been an important issue for the Court.

18. In paragraph 172 of its judgment, the Court recalled that according to article 42 of the Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land, which reflected customary law on the matter, "[t]erritory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised". The Court had gone on to examine whether there was sufficient evidence to demonstrate that the said authority had in fact been established and exercised by Uganda. It had specified that it would not be enough simply to show that there were armed forces in a particular location: it had to be proved that the armed forces had substituted their own authority for that of the Government of the Democratic Republic of the Congo in that location. The Court had had no difficulty in concluding that Uganda had established and exercised authority in Ituri as an occupying Power. It had found, however, that the Democratic Republic of the Congo had not provided specific evidence to show that that authority was exercised by Ugandan armed forces in other areas. As a consequence, the Court had had to deal with two separate areas to which different legal regimes applied. In Ituri, article 43 of the Hague Convention 1907 imposed on Uganda a duty to restore and ensure public order and safety while respecting the laws of the Democratic Republic of the Congo. Uganda could thus be held responsible not only for its own acts and omissions in that region but also for any lack of vigilance in preventing violations of human rights and humanitarian law by other actors in that territory, and more specifically, by rebel groups. On the rest of the Congolese territory invaded by Uganda, but not qualified as "occupied" in the international law sense, that specific duty of vigilance did not apply and Uganda there could only be held responsible for the acts and omissions of its own forces.

19. Difficult questions had arisen of whether, when a State agreed to a ceasefire and a phased withdrawal of foreign troops, it had given a consent *pro tempore* for the presence of those troops. Looking at the series of such agreements, the Court had found that they did not constitute consent by the Democratic Republic of the Congo to the presence of Ugandan troops on its territory "in the sense of validating that presence by law" (para. 105 of the judgment). That was a finding that would, she imagined, have a wider interest.

20. Turning to aspects of the case connected to the work of the International Law Commission, she noted that the Court had had occasion to rely in its reasoning on the Commission's draft articles on responsibility of States for internationally wrongful acts.[316] The Democratic Republic of the Congo had claimed that Uganda had created the *Mouvement de Libération du Congo* and should thus be held responsible for the violations of international law committed by that rebel movement. Basing itself on articles 4, 5 and 8 of the draft articles on responsibility of States to address that claim, the Court had decided that the conduct of the rebel movement was not that of an organ of Uganda or of an entity exercising elements of governmental authority on its behalf and that there was no evidence that the *Mouvement* was acting under the instructions of Uganda or under its direction or control.

21. In its pleadings, the Democratic Republic of the Congo had also raised an objection to the admissibility of a part of Uganda's counter-claim which concerned events that had allegedly taken place under the Mobutu regime, i.e. prior to May 1997. It had argued that Uganda's conduct following those events had amounted to an implied waiver of whatever claims it might have had against the Democratic Republic of the Congo at the time. In its reasoning, the Court had referred to paragraph (5) of the commentary to article 45 of the draft articles, which pointed out that "[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal".[317] The Court had held *in casu* that nothing in the conduct of Uganda in the period after May 1997 could be considered as implying an unequivocal waiver of its right to bring a counter-claim.

22. Another interesting point raised in relation with the counter-claim concerned the difference between the invocation of the Vienna Convention on Diplomatic Relations to protect diplomats and diplomatic premises and the invocation of a right to exercise diplomatic protection for nationals—another topic currently under consideration by the Commission. Uganda had claimed that some of its diplomats and nationals residing in the Democratic Republic of the Congo had been maltreated by Congolese soldiers in the days leading to the opening of hostilities. The Democratic Republic of the Congo had argued that those claims were inadmissible, as Uganda had not fulfilled the conditions for the exercise of diplomatic protection. The Court had recalled first that the Vienna Convention on Diplomatic Relations continued to apply notwithstanding the existence of an armed conflict. It had then explained that claims based on violations of the Convention had been brought by Uganda in its own right, and not in the exercise of diplomatic protection. Only those claims of Uganda relating to nationals not enjoying diplomatic status and not present on the premises of the diplomatic mission had been brought in the exercise of diplomatic protection, and in respect of those alone had Uganda had to demonstrate that the conditions for such actions had been fulfilled.

23. The judgment in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case had also been noteworthy for its very specific and fact-based findings. Although time constraints did not permit her to give any examples, the Court had not hesitated to specify which types of evidentiary materials it would or would not regard as reliable, and it had done so in the context of each and every finding. Thus, it was possible to see the factual finding on which each legal finding was based and the particular evidence which had been deemed to be sufficiently credible to lead to

[316] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

[317] *Ibid.*, p. 122.

that conclusion. Interestingly, the case also showed what evidence, including some provided by the United Nations, the Court had not been prepared to regard as reliable.

24. The Court's docket increasingly included fact-intensive cases in which it must carefully examine and weigh the evidence. No longer could it focus solely or even largely on legal questions. Such cases had raised a whole range of new procedural issues. In the run-up to the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court had anticipated many issues likely to arise with regard to witness evidence and examination. It had made preparatory proposals, *inter alia* on whether witness examination should be preceded by affidavits, how to organize the cross-examination, how to secure the confidentiality of the testimony during the hearings, and on what type of translation to provide for the witnesses and for the Court. Very particular arrangements had had to be made with the press, which, she was pleased to say, had been fully honoured. The Court had put in place plans to deal with the huge but unequal number of witnesses originally listed without totally blocking progress on the rest of its docket. In the event, the number of witnesses called had dwindled to entirely manageable dimensions.

25. The challenges raised by cases such as *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* were not only procedural, however. Those cases constituted exemplary material for the Commission's topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".

26. The new International Criminal Court was currently investigating crimes allegedly committed in the Democratic Republic of the Congo and in Uganda. Arrest warrants had been issued, and a first prisoner had been transferred to that Court in March 2006 in relation to events in the Democratic Republic of the Congo. The International Criminal Court would certainly want to use the ICJ findings of international law in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case as a framework within which to accomplish its work with regard to international criminal law. As President, she was engaged in contact with International Criminal Court President Kirsch to that end. While the International Criminal Court currently had a particular focus on events arising from the activities of the Lord's Resistance Army, which had not been one of the groups within the ambit of the Court's judgment, there were nonetheless findings of law and facts in that judgment which would probably be of use to the International Criminal Court. Conversely, the written and oral pleadings of Bosnia and Herzegovina in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case currently under deliberation relied very much on the case law of the International Tribunal for the Former Yugoslavia for both evidence as to facts and claims as to law. That Tribunal had undoubtedly had occasion to go into those matters very deeply and carefully. An interesting legal question for the Court would be to ascertain what categories of findings made by the Tribunal seemed to fall within the Court's notion of "safe evidence" for purposes of determinations of particular facts. Certainly, it could only be helpful for the Court, when wrestling with the ample legal issues relating to the Convention on the Prevention and Punishment of the Crime of Genocide, to be able to study the various findings of law of the different Chambers of the Tribunal.

27. A further case decided by the Court over the past year had again entailed litigation between two African States. On 3 February 2006, the Court had concluded the proceedings between the Democratic Republic of the Congo and Rwanda in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)* by finding that it had no jurisdiction to entertain the application filed by the Democratic Republic of the Congo. However, the case had proved to be rather absorbing from the legal standpoint. The Democratic Republic of the Congo had invoked no fewer than 11 bases of jurisdiction. The Court's deliberations had turned mainly on the interpretation of particular jurisdictional provisions and on the analysis of requirements contained therein. The case had appeared at first sight to be rather straightforward: after all, the Court had already pronounced *prima facie* on most of those jurisdictional provisions in its order on provisional measures in 2002. A series of very interesting questions had, however, arisen during the oral proceedings. She would address just two of them in relation to the line of reasoning developed by the Democratic Republic of the Congo apropos the Rwandan reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide conferring jurisdiction upon the ICJ. The Congolese strategy had been two-pronged: it had argued, first, that Rwanda had withdrawn its reservation—a new argument introduced during the oral stage—and, second, that Rwanda's reservation had been invalid.

28. With regard to the withdrawal of the reservation, the Democratic Republic of the Congo had claimed that Rwanda had undertaken on various occasions to withdraw all reservations made by it when it had become party to treaty instruments on human rights. It had invoked in particular the Arusha Peace Agreement of 1993 (Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front),[318] a Rwandan *décret-loi* of 1995 and a statement made by Rwanda's Minister of Justice in 2005 in the United Nations Commission on Human Rights. For its part, Rwanda had contended that it had never taken any measure to withdraw its reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

29. Taking all those elements into consideration, the Court had explained, in paragraph 41 of its judgment, that "a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State's domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other

[318] National Legislative Bodies, *Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front*, 4 August 1993, available at www.unhcr.org/refworld/docid/3ae6b4fcc.html (accessed 26 January 2012).

States parties to the treaty in question". In the Court's view, the question of the validity and effect of the *décret-loi*, in particular, was different from that of its effect within the international legal order. Recalling the provisions of article 22, paragraph 3, and article 23, paragraph 4, of the 1969 Vienna Convention, the Court stated that "[i]t is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a contracting State of a reservation to a multilateral treaty takes effect in relation to the other contracting States only when they have received notification thereof". The Court had further observed, in paragraph 43, that the Secretary-General of the United Nations was the depositary of the Genocide Convention and that it was "through the medium of the Secretary-General that [States parties] must be informed both of the making of a reservation to the Convention and of its withdrawal". The Court did not have any evidence that Rwanda had notified the Secretary-General of the withdrawal of its reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

30. At the same time, the Court had been prepared to accept that a statement made by a minister of justice to the Commission on Human Rights could bind a State (paras. 46–48 of the judgment). However, the statement that all reservations to human rights treaties would be withdrawn had given no time frame, and the international acts for that commitment to withdrawal had not been put in place (paras. 50–52).

31. The Democratic Republic of the Congo had also argued that, in accordance with the spirit of article 53 of the 1969 Vienna Convention, Rwanda's reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide should be considered null and void because it sought to "prevent the … Court from fulfilling its noble mission of safeguarding peremptory norms" (para. 56). It had added that the reservation was incompatible with the object and purpose of the Convention since its effect was "to exclude Rwanda from any mechanism for the monitoring and prosecution of genocide, whereas the object and purpose of the Convention are precisely the elimination of impunity for this serious violation of international law" (para. 57).

32. The Court had not accepted the argument of the Democratic Republic of the Congo. It had explained, as it had had occasion to do in the past, that the *jus cogens* character of a norm and the rule of consent to jurisdiction were two different things and that the fact that a dispute related to a norm of *jus cogens* could not in itself provide a basis for the jurisdiction of the Court to entertain that dispute (para. 64). Jurisdiction was always based on the consent of the parties. In the case of a treaty containing a compromissory clause, jurisdiction existed only in respect of the parties to the treaty that were bound by that clause (para. 65). The Court had recalled next that, in 1950, it had already found, at least by implication, that reservations were not prohibited under the Convention on the Prevention and Punishment of the Crime of Genocide (para. 66). The Court had not simply looked at the question whether the Democratic Republic of the Congo had protested Rwanda's reservation at the time; rather, the question of the validity of a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide depended on the compatibility of that reservation with the object and purpose of the Convention, which the Court itself had proceeded to assess. In that regard, the Court had found that:

> Rwanda's reservation to article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention. (para. 67)

That was not to be read as a statement by the Court that procedural obligations could in no circumstances be contrary to the object and purpose of a convention.

33. The paragraphs of the judgment on the reservation issues might also be of some interest to the Commission in the context of the work of its Special Rapporteur on that topic. That part of the Court's judgment also contained the first explicit and direct recognition by the Court of the existence of rules of *jus cogens*, with the specification that the prohibition of genocide was such a rule. That development had already attracted some attention.

34. Less than two weeks previously, the Court had handed down its order for the indication of provisional measures in the *Pulp Mills on the River Uruguay* case. In May 2006, Argentina had initiated proceedings against Uruguay with regard to alleged violations of the Statute of the River Uruguay, a treaty signed by the two States on 26 February 1975.[319] Argentina had argued in particular that Uruguay had not respected the procedures organized by the 1975 Statute when authorizing the construction of two pulp mills and that the construction and the commissioning of those mills would result in pollution and damage to the environment of the River Uruguay. In its order of 13 July 2006, the Court had found that the circumstances of the case, as they presented themselves at that moment, were not such as to require the exercise of its power under article 41 of the 1975 Statute to indicate provisional measures.

35. Although the content of the Court's order was restricted to an analysis of the conditions required for the indication of provisional measures, it contained some matters of interest. The case between Argentina and Uruguay raised important questions relating both to environmental law and to the right to economic development. The Statute of the River Uruguay, whose provisions were at the centre of the dispute, would be of particular interest to the Commission. That treaty, concluded in 1975, had been considerably in advance of its time in terms of watercourse law and environmental law. It had even been ahead of the Convention on the Law of the Non-navigational Uses of International Watercourses adopted in 1997 following the Commission's pioneering work. In addition to the usual notification and consultation mechanisms provided for in the 1997 Convention and in most international watercourse treaties, the 1975 Statute had already addressed the issue of what happened when

[319] United Nations, *Treaty Series*, vol. 1295, No. 21425, p. 339.

such mechanisms failed, by giving jurisdiction to the ICJ. Moreover, it established a monitoring body and had very detailed requirements as to information exchanges.

36. As to the arguments made by the parties during the proceedings, counsel for Uruguay had relied heavily on the definition of "grave and imminent peril" given by the Commission in the commentary to article 25 (Necessity) of the draft articles on responsibility of States for internationally wrongful acts,[320] and on the use which the Court had made thereof in its judgment in the *Gabčíkovo–Nagymaros Project* case to seek to prove that the conditions of imminent threat of irreparable prejudice required for the indication of provisional measures had not been fulfilled. For its part, Argentina had contested that the said conditions had been virtually the same.

37. In the *Gabčíkovo–Nagymaros Project* case, the parties had debated whether the grounds for suspension and termination of treaties established by the 1969 Vienna Convention were exclusive or whether the notion of state of necessity as developed by the Commission in its draft articles on responsibility of States[321] could provide an extra basis for such suspension and termination. Although different, Uruguay's argument in the present case relied on the same logic. There the suggestion was that the state of necessity was interchangeable with the condition of imminence belonging to provisional measures proceedings. In the *Gabčíkovo–Nagymaros Project* case, the Court had noted that suspension and termination of treaties were regulated by the law of treaties. However, the evaluation of the extent to which the suspension or termination of a convention involved the responsibility of the State which proceeded thereto was seen as incompatible with the law of treaties. Such evaluation was therefore to be made under the law of State responsibility. The Court had not dwelt further on the question of the relationship between the law of treaties and the law of State responsibility. Similarly, in its order of July 2006 in *Pulp Mills on the River Uruguay*, it had not found it necessary to resolve the issue of the relationship between the law of State responsibility and the requirements for the indication of provisional measures. However, such arguments were made with increasing frequency, and it might be that, before too long, the Court would have to state how it saw such relationships as a matter of principle.

38. The Court still had a heavy docket and was being used more widely than ever before. Some 59 States had come before it in the past 10 years. Its regular clientele was comprised of States from Latin America, Africa, Asia, Western Europe and America, from what had formerly been referred to as Eastern Europe, and from the Middle East. Of the 12 cases on the docket, four were between European States, four between Latin American States, two between African States, one between Asian States and one of an intercontinental nature. That regional diversity reflected the Court's universality. The subject matter of those cases was also very diverse. Side by side with "classic" territorial and maritime delimitation disputes and disputes relating to the treatment of nationals by other States, the Court was seized of cases concerning "cutting edge" issues, such as allegations of massive human rights violations, including genocide, the use of force, and the management of shared natural resources.

39. The Court recognized that the quality of its decisions and the global confidence in its conclusions came from the collegiate way in which its members worked and the fact that every judge was involved throughout the life of a case. The Court had benefited from having members of the Commission sit as *ad hoc* judges or appear as counsel in a number of cases.

40. At the same time, the Court must strive, within those parameters, to meet the expectations of those States which placed their trust in it to find a solution in a timely fashion. It was currently deliberating in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case and would be holding other hearings in the autumn of 2006. Following a meeting with the agents of the parties in the *Pulp Mills on the River Uruguay* case, directly after the issuance of its order, the Court had indicated relatively short time limits for the filing of the memorial and the counter-memorial in that case.

41. Many of the topics being examined by the Commission were of the highest relevance for the Court, which would continue to follow the work of the former body with great interest.

42. The CHAIRPERSON, after thanking the President of the International Court of Justice for the wealth of information provided in her statement, said that, in keeping with past tradition, Judge Higgins had agreed to reply to questions or comments by members of the Commission on the activities of the Court.

43. Mr. KABATSI said that, on occasions, albeit not very often, some international lawyers and States had felt that a given decision of the Court had not been wholly just and legally correct, most particularly with regard to the facts, which had not always been proved. Moreover, such decisions had sometimes been closely contested within the Court, again in particular relation to the facts. Yet the Court's decision was final. He therefore wondered whether, as part of the reform process, there was any possibility that the Court might contemplate the establishment of an appeal chamber.

44. Judge HIGGINS (President of the International Court of Justice) said that facts, and their proof, were to an extent in the eye of the beholder; what was a fact for one person was not a fact for another. It was a main function of a court of law to try to ascertain what could be considered reliable evidence. The ICJ had come to realize that, increasingly, cases brought before it hinged on the reliability of the evidence. It had therefore systematically set about establishing the soundness of such evidence. The question of the standard of proof to be attained was so far unresolved in the Court's jurisprudence. As a common law lawyer, she would prefer the standard to be articulated, whereas her civil law colleagues believed profoundly in *l'intime conviction du juge*. It

[320] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 28.

[321] In its judgment, the Court referred to the draft articles adopted on first reading, reproduced in *Yearbook … 1980*, vol. II (Part Two), p. 30, and in particular to draft article 33 (State of necessity) and to the commentary thereto, p. 33.

might not be possible to continue the stand-off between the two approaches indefinitely, given the way that the issues presented themselves in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. In any event, the Court had adopted the course of meticulously identifying every fact and assessing whether it had or had not been proved. It even identified pieces of evidence that had been rejected. She hoped that the Court's approach would give the international community greater confidence. The Court did not envisage the establishment of an appeal chamber: it did not believe that such a chamber could perform the task better than or differently from the Court. Moreover, the task of appeal chambers around the world was to deal with appeals relating to points of law rather than to facts.

45. Mr. DUGARD said he was pleased that Judge Higgins had raised the problem of fact-finding, which, although a relatively new phenomenon—starting, perhaps, with the *Military and Paramilitary Activities in and against Nicaragua* case and continuing with the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case and the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*—had assumed particular importance for the work of the Court. He also noted that different tribunals might on occasion sit in judgement on the same factual situation; for example, the International Tribunal for the Former Yugoslavia and the ICJ were examining identical issues in the dispute between Bosnia and Herzegovina and Serbia and Montenegro. In view of the importance of evidence, he wished to put a question about witnesses. His impression was that parties appearing before the ICJ were reluctant to call witnesses. Judge Higgins had stated, for example, that, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* dispute, the parties had ultimately failed to call as many witnesses as had initially been expected. He wondered whether that might be due to the fact that the Court itself had discouraged the use of witnesses. In view of the growing number of cases involving fact-finding, it would seem important to encourage rather than discourage the use of witnesses. He therefore asked whether wider provision could be made for the calling of witnesses to testify before the Court on matters of fact.

46. His second question concerned the use of reports, especially those emanating from the United Nations. In the dispute between the Democratic Republic of the Congo and Uganda, the Court had been able to benefit not only from a report by a Ugandan judge, on which, understandably, it had relied heavily, but also from reports by United Nations special rapporteurs. He wondered whether it might not be desirable, in situations where a special rapporteur had produced a report, as in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, for the Special Rapporteur in question to be called to give evidence. In that case, several judges had had difficulty in accepting that certain facts had been proved, in effect calling into question the validity of the report. Understandable though that was, the difficulty might be obviated by calling the Special Rapporteur to testify.

47. Judge HIGGINS (President of the International Court of Justice) said she would hesitate to accept, as a general proposition, that in cases in which establishing the facts was paramount, the parties should be encouraged to call witnesses. In the first place, it was for each party to decide how best to present its case. The Court was neutral as to the calling of witnesses, although clearly it would not be desirable for a very large number to be called, as the Court had a duty to cases other than the case at hand. She would have more to say on the subject at the fifty-ninth session, if the Commission invited her to address it again. As for the use of United Nations reports, she said that, as part of the United Nations system, the Court started from the assumption that all United Nations materials would be useful. The truth was, however, that some were more useful than others. The reports that Mr. Dugard had provided as Special Rapporteur in the context of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case contained reliable information, unlike some other reports that had tried to cover incidents occurring over a vast swathe of territory, in which a United Nations team relied on hearsay from non-governmental organizations on the ground. In the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case, one or two reports submitted by Special Rapporteurs on the issue had turned out not to have been fully accurate, through no fault of their own, for the reasons she had mentioned. She was, however, taken with the idea that a special rapporteur whose report could be helpful might be called as a witness. If a party did not wish to do so, one possibility was that the Court could call the special rapporteur as its own witness.

48. Mr. MANSFIELD said that many inter-State disputes were a complex mix of elements, comprising the political, economic and social as well as the legal, and the Court had responded in various ways, in some cases making findings on principles that the parties must implement or follow through in subsequent negotiations, or, in some recent cases, making very detailed and comprehensive findings. He therefore wondered whether the Court used particular techniques to ensure that its legal findings contributed to the resolution of the broader or other elements of a given dispute, or whether it proceeded on a case-by-case basis.

49. Judge HIGGINS (President of the International Court of Justice) said that, broadly speaking, the Court acted on a case-by-case basis. What it could do and say in its *dispositif* was greatly constrained by what the parties requested in their final submissions, which provided them—after their initial submissions and submissions during the course of the argument—with the opportunity to look back and decide what they wanted from the Court. Technically, it was not for the Court to go beyond what the parties asked for, although, once in a while, it might do so. The wider point, however, was that the Court played no role in the compliance phase, and that it could not formally ask the United Nations whether a particular ruling was or was not being complied with. If necessary, the Security Council could take the matter up, as had happened, for example, when it had taken it upon itself to ensure that the judgment in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case was complied with by overseeing the withdrawal of Libyan troops from the territory in

question. More recently, the Secretary-General had taken it upon himself to play a very active role in putting into effect, phase by phase, the Court's judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. Judgments were followed up only when the Court required the parties to conduct further negotiations, as part of the judgment, in which case the Court would wish to know what the parties had decided. It was in that context that Slovakia and Hungary periodically returned to the Court with information on the progress they were making in the context of the *Gabčíkovo–Nagymaros Project* case.

50. Ms. ESCARAMEIA noted that the Court had taken cognizance of various topics covered by the Commission, such as responsibility of States for internationally wrongful acts and reservations to treaties. She therefore wondered whether there were any topics that Judge Higgins thought the Commission might take up that would be useful to the Court in its work.

51. Her second question related to the acceptance of the Court's jurisdiction. Even though the Court had no shortage of work, she wondered whether it was at all concerned at the relatively low number of States accepting its jurisdiction. There was, after all, a real difference between a State accepting the Court's jurisdiction in a general declaration and accepting it by means of a special agreement. She also wondered whether there had been any activity to promote the Court's work, so as to encourage more States to accept its compulsory jurisdiction through a general declaration. Lastly, she asked whether Judge Higgins was at all concerned about the politicization of elections to the Court, and whether, as a role model for women lawyers everywhere, she favoured the idea that provision should be made for female judges to be fairly represented at the ICJ, as was the case at the International Criminal Court.

52. Judge HIGGINS (President of the International Court of Justice) said that, although she could reply only in her own personal capacity, she welcomed Ms. Escarameia's idea about the interplay between the work of the Court and that of the Commission. One topic on which she personally would warmly welcome a study by the Commission was the relationship between the global push for measures to combat impunity, on the one hand, and international law on immunity, on the other.

53. The Court was, of course, concerned about the question of jurisdiction. On the other hand, it had heard important cases from all over the world. Indeed, it had been pleased to discover, as it prepared for its sixtieth anniversary, that precisely 59 States had appeared before it. The anniversary celebrations had been preceded by a colloquium to which the legal advisers of all the States that had come before the Court in the past 10 years had been invited, together with a handful of the leading counsel that they used. One of the major themes at the colloquium had been the issue of jurisdiction.[322] Attempts were being made within the European Union to see whether its expansion might lead to a wider acceptance of compulsory jurisdiction among its member States. The Court would welcome such an outcome, although if that were to entail a stream of reservations, it might be felt that that was too high a price to pay. Moreover, she doubted whether spending time on jurisdictional matters that were heavily contested was the best use of the Court's resources. More and more cases now came before the Court by way of special agreements and multilateral treaties containing jurisdictional clauses whereby disputes could be referred to the Court. States' previous reluctance to agree to such clauses seemed largely to have fallen away. More generally, she intended to take every opportunity to raise the Court's profile and to explain how it could be useful to States.

54. Mr. PELLET, referring to the comments by Mr. Dugard, said that in his experience as one who had been involved in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the use of witnesses had been totally disastrous; the only benefit that he could see was that the Court had obtained a number of admissions against interest. Calling witnesses to testify was not an appropriate source of evidence for the ICJ, at least in cases of that type. States would be well advised to avoid such abuses in the future. On the question of *intime conviction*, he considered that the Court should continue to adopt an empirical approach to evidence rather trying to set standards of proof that would inevitably be very common law-oriented.

55. Further to Mr. Mansfield's comments, he was inclined to assign a special role to the Court. In addition to settling disputes in accordance with international law, the Court was the body best placed to fill the gap left by the absence of a world legislature and, as such, to try to adapt the law to developments in international relations. That was a task that had been performed admirably by the PCIJ, which had managed to crystallize the modern legal framework. The ICJ had also had its successes, such as the 1951 advisory opinion on *Reservations to the Convention on Genocide*, and its failures, such as the 1969 *North Sea Continental Shelf* judgment, and the—to his mind—disastrous judgment in the *Arrest Warrant* case; nevertheless, his impression was that the Court had gradually been abandoning its role of adapting the law to the realities of international life over the past 10 years. He wondered whether Judge Higgins envisaged any change in the Court's approach.

56. Judge HIGGINS (President of the International Court of Justice) said that over the past 10 years, the Court had undeniably failed to play its part in the *East Timor* case. In the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court had, however, done what it could in awkward circumstances, since the party that might have provided the most information had chosen not to appear, as it had been entitled to do. In that case, however, the Court had been trying to adapt an existing old law to deal with the contemporary phenomenon of prolonged occupation, for which, frankly, it had never been envisaged. She took Mr. Pellet's point, however. When an opportunity arose, the Court should, to use a sporting expression, "step up to the plate": it should not shirk its duty to use, adapt and

[322] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 4* (A/61/4), Report of the International Court of Justice, p. 45, para. 207.

develop existing law to deal with contemporary problems. She hoped that Mr. Pellet would shortly feel that progress had been made in that respect.

57. The CHAIRPERSON again thanked Judge Higgins, on behalf of the Commission, for her valuable statement, and also for her thoughtful replies to members' questions.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/571[323])

[Agenda item 10]

Preliminary report of the Special Rapporteur

58. Mr. GALICKI (Special Rapporteur) said that the text before the Commission comprised a very preliminary set of initial observations concerning the substance of the topic, identifying the most important issues requiring further consideration and suggesting a general road map for the Commission's future work in that field. That work should result in the identification of legal rules governing the obligation to extradite or prosecute, by which the international community would be ready to abide, either in the form of binding norms or of a "soft law" instrument. It would, however, be premature to decide whether the final product should take the form of draft articles, guidelines or recommendations. Similarly, it was too early to formulate any draft rules relating to the concept, structure or operation of the principle *aut dedere aut judicare* and obligations deriving from it. It was therefore essential that members of the Commission apprise the Special Rapporteur of their views with regard to the form that the final product should take.

59. The preliminary report consisted of eight parts accompanied by an annex containing an introductory bibliography. The preface briefly summarized the background to the Commission's inclusion of the topic in its current programme of work. The introduction traced the origins of the obligation to extradite or prosecute back to the initial principle *aut dedere aut punire* enunciated by Grotius.[324] In his report, he had tried to stress that the obligations deriving from the more modern principle *aut dedere aut judicare* took the form of alternatives, although authors had described the particular elements of those alternatives in a variety of ways. The formulas most frequently used were listed in paragraph 7 of the report.

60. In paragraph 6, he had drawn attention to a question of paramount importance for the future work of codification, namely whether the obligation in question derived exclusively from the relevant treaties, or whether it also reflected a general obligation under customary international law, at least with respect to specific international offences. In paragraph 8, he pointed out that a full analysis of the link between the principle of universal jurisdiction in criminal matters and the principle *aut dedere aut judicare* should undoubtedly have an important place in the Commission's work on the topic. Lastly, it was noted that the Commission had elucidated the principle and the rationale behind it in some detail when incorporating the *aut dedere aut judicare* rule in the 1996 draft code of crimes against the peace and security of mankind.[325] Paragraph (3) of the Commission's commentary to article 9 of the draft Code was cited in full in paragraph 10 of the report.

61. The various problems which might arise in practice from the interrelationship between the principle of universal jurisdiction in criminal matters and the obligation *aut dedere aut judicare* had been outlined in chapters I (Universality of suppression and universality of jurisdiction) and II (Universal jurisdiction and the obligation to extradite or prosecute) of the report. The list was not exhaustive and merely offered a number of illustrative examples. He would be especially interested to hear other members' opinions regarding the extent to which the question of universal jurisdiction should be considered in the context of the Commission's general work on the obligation to extradite or prosecute, since legal writers took widely differing views on the relationship between those two matters. Some evidence of the linkage between the two concepts could be found in the Commission's earlier work on the draft code of crimes against the peace and security of mankind, as described in paragraphs 24 to 30 of the report.

62. Chapter III of the report was devoted to the sources of the obligation to extradite or prosecute, which were discussed under the three subheadings of "International treaties", "International custom and general principles of law" and "National legislation and practice of States". As was noted in paragraph 35, one of the preliminary tasks in the future work of codification would be to draw up a comparative list of the relevant treaties and the formulations used therein to reflect that obligation. Although attempts had been made in the literature to identify treaties of that nature, a more detailed and up-to-date list was required, along with a classification of treaty provisions laying down the obligation to extradite or prosecute. The criteria for that classification should take into account both the substantive and the procedural elements of the obligation.

63. As stated in paragraph 40 of the report, one of the crucial problems the Commission would have to solve when elaborating possible principles concerning the obligation to extradite or prosecute was that of ascertaining whether the legal source of the obligation should be limited to treaties that were binding on the States concerned, or extended to include appropriate customary norms or general principles of law. While there was no consensus among scholars on that question, a large and growing body of writers maintained that an international legal obligation *aut dedere aut judicare* was a general duty based not only on the provisions of particular international treaties but also on generally binding customary norms, at least in respect of certain categories of crimes. A thorough evaluation of possible customary grounds for the obligation was an essential prerequisite for the final definition of its legal nature. The extent to which that definition would be an exercise in the codification or in the progressive development of international law would depend largely on whether it

[323] Reproduced in *Yearbook … 2006*, vol. II (Part One).

[324] H. Grotius, *De Jure Belli Ac Pacis*, book II, chap. XXI, paras. III and IV (English translation by F. W. Kelsey), *The Law of War and Peace, in* J. B. Scott (ed.), *Classics of International Law*, Oxford, Clarendon, 1925, pp. 526–529.

[325] *Yearbook … 1996*, vol. II (Part Two), draft article 9, p. 30.

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

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

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

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

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

Organization of work of the session (*concluded*)

[Agenda item 1]

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

The meeting rose at 1 p.m.

2900th MEETING

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

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

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

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

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

---

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

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