Document:-
A/CN.4/3111

Summary record of the 3111th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2011, **vol. I**

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.9.7 was adopted.

2.9.8 *Non-presumption of approval or opposition*

Guideline 2.9.8 was adopted.

Commentary

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to guideline 2.9.8 was adopted.

2.9.9 *Silence with respect to an interpretative declaration*

Guideline 2.9.9 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.9.9 was adopted.

The meeting rose at 12.50 p.m.

3111th MEETING

Monday, 25 July 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/638, sect. E, A/CN.4/648)[349]

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the obligation to extradite or prosecute (A/CN.4/648).

2. Mr. GALICKI (Special Rapporteur) said that his fourth report was a further step in the process of formulating draft articles dealing with some general aspects of the topic. After recalling the work done in 2009[350] and 2010[351] by the Working Group on the obligation to extradite or to prosecute, he explained that in his fourth report he had decided to concentrate primarily on the sources of the obligation *aut dedere aut judicare*.

3. The general framework proposed by the Working Group in 2009[352] would seem to be an appropriate basis for further codification work, since it had been accepted by the members of the Sixth Committee of the General Assembly. The starting point for that work was to identify the sources of the obligation to extradite or prosecute, a task he had begun in his previous reports.[353] It should be noted that, in comparison with the reaction of States to the preliminary report on the topic in 2006, criticism of the idea that there might possibly be a basis in customary law for the obligation *aut dedere aut judicare* had been to some extent relaxed in 2008. That relaxed attitude had been even more visible after the two sessions—in 2009 and 2010—when the topic had been discussed in the Working Group of the Commission.

4. The eight sections of the chapter of the fourth report on the sources of the obligation to extradite or prosecute closely followed the above-mentioned general framework. They dealt with the duty to cooperate in the fight against impunity; the obligation to extradite or prosecute in existing treaties; the principle *aut dedere aut judicare* as a rule of customary international law; the discussion of the customary character of the obligation in the Sixth Committee during the sixty-fourth session of the General Assembly (2009); the customary basis of the rights invoked before the ICJ; an identification of categories of crimes and offences which could be classified as those giving rise to the customary obligation *aut dedere aut judicare*; *jus cogens* as a source of a duty to extradite or prosecute; and a proposed draft article 4 on international custom as a source of the obligation *aut dedere aut judicare*.

5. The fourth report contained an entirely new element in the shape of a draft article on the duty to cooperate in the fight against impunity. That duty, as a *sui generis* primary source of the obligation *aut dedere aut judicare*, had headed the list of the legal bases of the obligation as proposed by the Working Group in 2009, and its prime importance had been confirmed by the Working Group in 2010.[354] For that reason, he was proposing, in paragraph 40 of his fourth report, a draft article 2 that read:

> "*Article 2. Duty to cooperate*
>
> "1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with competent international courts and tribunals, in the fight against impunity as it concerns crimes and offences of international concern.

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[349] Reproduced in *Yearbook … 2011*, vol. II (Part One).

[350] *Yearbook … 2009*, vol. II (Part Two), pp. 142–144, paras. 200–204.

[351] *Yearbook … 2010*, vol. II (Part Two), pp. 191–192, paras. 337–340.

[352] *Yearbook … 2009*, vol. II (Part Two), pp. 143–144, para. 204.

[353] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report), *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585 (second report), and *Yearbook … 2008*, vol. II (Part One), document A/CN.4/603 (third report).

[354] *Yearbook … 2010*, vol. II (Part Two), pp. 191–192, para. 339.

"2. For this purpose, the States will apply, wherever and whenever appropriate, and in accordance with these draft articles, the principle to extradite or prosecute (*aut dedere aut judicare*)."

In paragraphs 26 to 40, the Special Rapporteur provided a detailed explanation of the background to and rationale for the draft article and demonstrated the linkage between the duty to cooperate in the fight against impunity and the obligation to extradite or prosecute.

6. In his preliminary report in 2006, he had proposed an initial classification of existing treaties that established an obligation to extradite or prosecute, a classification that distinguished between substantive treaties and procedural conventions. In paragraphs 44 to 69 of his fourth report, he reviewed the best-known classifications of such treaties, namely, those done by Cherif Bassiouni and Edward M. Wise in 1995;[355] by Amnesty International in 2001,[356] 2009[357] and 2010;[358] by Claire Mitchell in 2009;[359] and by the Secretariat of the United Nations in 2010.[360] The growing number of international treaties that contained clauses laying down the obligation *aut dedere aut judicare* lent further support to the view that they formed the primary and most frequently applied basis of the obligation to extradite or prosecute. The treaty-based rights invoked by States before international courts in cases involving the obligation *aut dedere aut judicare* served as a useful tool for parties to a dispute.

7. As no objections had been raised in either the Commission or the Sixth Committee to the original version of draft article 3 entitled "Treaty as a source of the obligation to extradite or prosecute", it could be retained. Bearing in mind the wide variety of treaty provisions concerning the obligation in question, it seemed advisable, however, to add a second paragraph concerned with the practical implementation of the obligation by individual States. The draft article, as presented in paragraphs 70 and 71 of the fourth report, would then read:

"*Article 3. Treaty as a source of the obligation to extradite or prosecute*

"1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.

"2. Particular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party, in accordance with the treaty establishing such obligation and with general principles of international criminal law."

8. The last section of the fourth report dealt with the various problems connected with recognition of the principle *aut dedere aut judicare* as a rule of customary international law, a matter on which opinions differed widely. Although he had adopted a fairly cautious position in that respect, support for the view that an obligation to extradite or prosecute did exist under customary international law had grown significantly in recent years. The fullest presentation of the grounds for holding that the obligation derived from customary international law had been given by Eric David[361] in the case before the ICJ concerning *Questions relating to the Obligation to Prosecute or Extradite*; David's arguments were quoted in paragraph 82. As Special Rapporteur, he awaited with great interest the Court's final decision in that case, as it might further strengthen the notion of a customary basis for the obligation *aut dedere aut judicare*. Since it could not yet be stated that an obligation to extradite or prosecute indubitably existed under general customary international law, a more promising approach seemed to be that of identifying the categories of crimes which might give rise to a customary obligation recognized by the international community, even though that obligation might be limited in scope and substance. In section F of the last chapter of the fourth report, the Special Rapporteur discussed several categories of such crimes.

9. In section G of the fourth report, he considered *jus cogens* as a source of a duty to extradite or prosecute. While some norms of international criminal law (such as the prohibition of torture), which were based not only on treaty provisions but also on recognition by the international community, had attained *jus cogens* status, scholars disagreed on whether that was true of an obligation *aut dedere aut judicare* deriving from, or connected with, such peremptory norms of international law.

10. He therefore proposed, in paragraph 95 of the report, draft article 4, which would read:

"*Article 4. International custom as a source of the obligation* aut dedere aut judicare

"1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation derives from a customary norm of international law.

"2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

"3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of the acts listed in paragraph 2."

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

[356] Amnesty International, *Universal Jurisdiction: the Duty of States to Enact and Enforce Legislation*, London, 2001 (IOR 53/002–018/2001).

[357] Amnesty International, *International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)*, London, 2009 (IOR 40/001/2009).

[358] Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support this Essential International Justice Tool*, London, 2010 (IOR 53/015/2010).

[359] C. Mitchell, *Aut Dedere, aut Judicare: the Extradite or Prosecute Clause in International Law*, Geneva, Graduate Institute of International and Development Studies, 2009, No. 2.

[360] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/630 (also available from the Commission's website).

[361] ICJ, Public sitting held on Monday, 6 April 2009, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, verbatim record (CR2009/8), pp. 42–44, paras. 19–23 (available from the website of the ICJ: www.icj-cij.org).

The list of crimes and offences contained in brackets in paragraph 2 was open to further consideration and discussion.

11. Lastly, he recalled that the Commission had not yet decided on an acceptable text for draft article 1 on the scope of the draft articles. The alternative versions of that article, as presented in his second and third reports, were reproduced in the footnote to paragraph 39 of the fourth report, after the title of draft article 2 (Duty to cooperate).

12. Mr. MURASE thanked the Special Rapporteur for his introduction to the fourth report on a significant but difficult topic. With respect to draft article 2, he agreed with the Special Rapporteur's emphasis on the importance of the fight against impunity for serious international crimes. However, in his view, the wording of the first paragraph was too vague, even for a provision intended to define a duty to cooperate. The phrase "the fight against impunity" sounded like a campaign slogan and was not precise enough for an operative provision in a legal text. Furthermore, the phrase "as it concerns crimes and offences of international concern" was far too ambiguous to define the type of offences to be covered by the draft articles.

13. As to the second paragraph of draft article 2, he had been surprised by the excessively broad wording of the phrase "wherever and whenever appropriate". That might be misinterpreted to mean that States were permitted to extradite or prosecute as they considered appropriate. In order to avoid such a misunderstanding, the draft article should clearly explain the relationship between the principle *aut dedere aut judicare* and the duty of States to cooperate with one another. On the whole, draft article 2 did not seem appropriate as a provision in the body of the operative text and should therefore be moved to the preamble or else deleted.

14. With regard to draft article 3, he was unsure what purpose was served by paragraph 1, as it hardly seemed necessary to remind States of their treaty obligations. In paragraph 2 it was not clear which State party was being referred to. If the State of residence of a suspected criminal was meant, he wondered what would be the consequence if its internal law was not in accordance with its treaty obligation as interpreted by other States parties. Moreover, it was not clear from the phrase "general principles of international criminal law" which principles were being referred to. If paragraph 2 was to be retained, it should be reformulated to indicate that a State's treaty obligations took precedence over its domestic law.

15. The report presented a review of several classifications of international treaties establishing the obligation *aut dedere aut judicare*, but unfortunately contained no further analysis of those classifications. There were a number of interesting areas that might usefully be explored, such as the qualifications, conditions, requirements and possible exceptions relating to extradition or prosecution provided for in those treaties. Other issues that should be addressed in relation to extradition included the political offence exception and the nationality exception.

16. Draft article 4 was the most problematic of all. The debates in the Sixth Committee had revealed that a majority of States doubted the customary law character of the obligation *aut dedere aut judicare*. Indeed, the Special Rapporteur himself admitted in paragraph 86 of his report that it was rather difficult to prove the existence of a general international customary obligation to extradite or prosecute. He also seemed to assert that certain serious crimes such as genocide, crimes against humanity and war crimes could be considered as having a customary law basis by citing the entirely non-binding draft code of crimes against the peace and security of mankind, adopted by the Commission in 1996,[362] and the Rome Statute of the International Criminal Court, which was binding only as a treaty obligation. Regrettably, there was no reference to State practice and the only evidence of *opinio juris* cited concerned a presentation by counsel for Belgium in the *Questions relating to the Obligation to Prosecute or Extradite* case. Furthermore, he personally had no recollection of the Working Group having relaxed the criteria for the customary law character of the obligation in question.

17. There seemed to be two possible ways to prove the existence of a customary law obligation. It was first necessary to ask whether an obligation to extradite or prosecute existed outside specific treaties. The answer would probably be in the negative. A second question was whether it was possible to conceive of a crime based on a customary international law rule, which was, by definition, unwritten. One of the basic principles of criminal law was *nulla crimen sine lege*, which established that there was no crime without a written law. He was not aware of any country in the world where individuals could be convicted in criminal proceedings on the basis of unwritten customary law, whether internal or international.

18. He sympathized with the Special Rapporteur, who had tackled an intractable topic. In his view, the Commission should not force the Special Rapporteur to bear such a heavy burden any further and should consider suspending or terminating the project. It was his understanding that the Sixth Committee was planning to establish a working group on universal jurisdiction; it might therefore be desirable to suspend the project at least until the Commission could benefit from the working group's conclusions. It was not unprecedented for a project to be terminated: in 1992, the Commission had decided to terminate consideration of the second part of the topic "Relations between States and international organizations", on the status, privileges and immunities of international organizations and their personnel.[363] He hoped that the Commission would take a clear stance on whether to continue or terminate a project which had not made any significant progress after so many years.

19. Mr. MELESCANU commended the Special Rapporteur and the Working Group on their excellent work. At the previous session, the Working Group had reaffirmed the idea that, in accordance with the Commission's practice, the general orientation of future reports should be towards the presentation of draft articles.

20. The main novelty of the Special Rapporteur's fourth report was that he had decided to focus on just two of the

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

[363] *Yearbook ... 1992*, vol. II (Part Two), p. 53, para. 362.

sources of the obligation *aut dedere aut judicare*, namely international treaties and international custom, leaving aside, only temporarily, one hoped, the other sources identified in previous reports, such as general principles of international law, national legislation and State practice.

21. An important development in the Special Rapporteur's approach to the subject was that for the first time he had prepared a draft article on the duty of States to cooperate in the fight against impunity, in accordance with the first item on the list of issues prepared by the Working Group in 2009.[364] He did not share the view expressed by Mr. Murase that the reference to the duty to cooperate belonged in the preamble to any final document the Commission produced on the topic. Although he was sensitive to the arguments presented by Mr. Murase, he was in favour of improving the drafting of that article rather than deleting it altogether.

22. Another important aspect of the report was the Special Rapporteur's analysis of the different classifications of international treaties establishing the obligation *aut dedere aut judicare*, including the valuable classification prepared by the secretariat.

23. The last part of the report was devoted to the presentation and analysis of different problems arising in connection with attempts to recognize the principle *aut dedere aut judicare* as a rule of customary international law. Judging from debates in the Sixth Committee and the literature on the topic, opinions were divided on the issue. The most comprehensive presentation of the customary grounds for the obligation *aut dedere aut judicare*, given by Mr. David in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, was merely an opinion and, as such, could not be used as the basis of the Commission's future work on the topic until the ICJ had rendered a decision in that case.

24. He supported the Special Rapporteur's view that it was difficult in the current state of affairs to prove the existence of a general international customary obligation to extradite or prosecute and that it was more promising to try to identify particular categories of crimes that might give rise to such a customary obligation. He also shared the doubts expressed by the Special Rapporteur as to whether the obligation *aut dedere aut judicare* could be considered a *jus cogens* norm.

25. In conclusion, while the topic remained on its agenda, the Commission should concentrate its efforts on realistic objectives. Owing to time constraints, he was of the view that the draft articles proposed by the Special Rapporteur should not be sent to the Drafting Committee. He proposed therefore to attach the draft articles to the Commission's report in whatever form members deemed appropriate.

26. Mr. DUGARD thanked the Special Rapporteur for his fourth report on a very difficult topic involving some of the most controversial issues in international law, such as extradition law, prosecutorial discretion, asylum, universal jurisdiction and the principles of *jus cogens*. Before commenting on the report itself, he wished to raise a more general issue prompted by the Special Rapporteur's comments on the views of the Sixth Committee in paragraphs 18 and 19 of the report. It was, of course, customary for special rapporteurs to refer to the work of the Sixth Committee; however, it was important to consider the reasons for doing so. Was it a question of obligation, was it merely for guidance or was it perhaps because the accumulated views of the Sixth Committee constituted evidence of State practice? He would like to ask the Sixth Committee itself for answers to such questions relating to the status of its work.

27. One of the Special Rapporteur's main problems was how to distinguish between core crimes and other crimes. The Special Rapporteur referred to some examples of core crimes in draft article 4, paragraph 2. The term "core crimes" was used rather freely to refer to crimes that fell within the jurisdiction of the International Criminal Court, such as genocide, aggression, crimes against humanity and war crimes. Yet all would agree that some war crimes were of lesser significance. Thus one could not simply assert that all war crimes came under the category of core crimes. In paragraph 24 of the report, the Special Rapporteur mentioned the crime of piracy, but, personally, he would not classify it as a core crime, one to which the principle *aut dedere aut judicare* automatically applied, as was borne out by the difficulties encountered by the international community in prosecuting pirates operating off the Somali coast. It was nevertheless important to distinguish between core crimes and other crimes, because the former could be classified as violations of *jus cogens* norms or possibly as crimes subject to universal jurisdiction. In 1996, in its draft code of crimes against the peace and security of mankind, the Commission had stated that the principle *aut dedere aut judicare* applied to genocide, crimes against humanity and war crimes.[365] Perhaps that provision had been *de lege ferenda*, but at least it suggested that the Commission should pay particular attention to such crimes. Another factor to be borne in mind was that the political offence exception did not apply in respect of genocide and crimes against humanity.

28. The situation was much more difficult in respect of other crimes, mainly crimes defined under international conventions. They could not all be classified as *jus cogens* crimes; certainly torture might, but not all forms of terrorism. In the absence of a definition of terrorism, it was difficult to classify crimes involving terrorism as *jus cogens* crimes.

29. Moreover, there was a distinction to be drawn—that between early and later conventions relating to terrorism. For example, the Convention for the suppression of unlawful seizure of aircraft of 1970 did not exclude the political offence exception. That had been done deliberately since, at the time, States had not wished to accept an obligation to extradite or prosecute that allowed for no exceptions in the case of a politically motivated aerial hijacking. However, later conventions, like the International Convention for the Suppression of the Financing of Terrorism of 1999, expressly excluded the political offence exception; thus

[364] *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

[365] *Yearbook ... 1996*, vol. II (Part Two), pp. 30–32, article 9, and pp. 44–56, articles 17–20.

the obligation to prosecute or extradite was firmer. His point was that the subtle differences in formulation among treaties must be borne in mind.

30. With regard to the text of the draft articles, he shared many of the misgivings expressed by Mr. Murase. Draft article 1 could be left in its current form. Draft article 2 seemed to be concerned with international crimes only, although the phrase in paragraph 1 "concerns crimes and offences of international concern" was slightly misleading and implied that non-international crimes were at issue too. He endorsed Mr. Murase's comment that the phrase "the fight against impunity" belonged to a preambular provision and not to the text of a draft article. Furthermore, it was not clear to him why States were required to cooperate among themselves and with competent international courts and tribunals. The question principally concerned domestic courts and not international courts, in respect of which special surrender provisions applied. He also agreed with Mr. Murase that paragraph 2 was very broad in scope, although that might be necessary in view of the range of treaties involved.

31. Concerning draft article 3, he shared Mr. Murase's view that it was not necessary to include paragraph 1, which merely reiterated the obligation to implement treaty provisions. Paragraph 2 referred to general principles of international criminal law; he would appreciate it if, at some point, the Special Rapporteur would be more specific about which principles he had in mind, whether, for example, prosecutorial discretion was one of those principles.

32. With regard to draft article 4, it was necessary to distinguish between core and other crimes, which was implied by the Special Rapporteur in paragraph 2. However, he could not agree with paragraph 3, which postulated that the basis of the obligation to extradite or prosecute was to be found in peremptory norms of general international law. That conclusion was in contradiction with paragraph 94 of the report, which expressed doubt as to whether the principle *aut dedere aut judicare* possessed characteristics of *jus cogens*. Moreover, the relevance of the citation in paragraph 93 from the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was questionable.

33. At some stage, he would like to know the Special Rapporteur's detailed views on his plans for the future consideration of the topic. It could not be addressed with broad, sweeping provisions; the details of extradition law, general principles of prosecution, especially prosecutorial discretion, and of when the State could grant asylum to political offenders would need to be looked into. He was not in favour of abandoning the topic: it was too important and expectations had been raised that the Commission would address it properly. However, there seemed to be no point in referring the draft articles to the Drafting Committee, which would not have enough time during the current session to deal with them. He therefore recommended that the Commission should simply take note of the draft articles and leave the task of their further consideration to the new membership of the Commission in the next quinquennium.

34. Mr. VASCIANNIE thanked the Special Rapporteur for his fourth report. He felt assured that the project was now substantially under way; however, there were important caveats. First, draft article 2 begged questions and could not be supported in its current form. It called for cooperation, but did not say when such cooperation should be provided. Perhaps the provision should be reconsidered at a later stage when the implications of the duty to cooperate in that context had been more clearly defined.

35. Secondly, draft article 3 should be deleted in its entirety. Paragraph 1 was superfluous, since it set forth the well-established treaty rule *pacta sunt servanda*; restating the rule would merely cause confusion. Furthermore, paragraph 2 was too vague to make it clear exactly what was required.

36. Thirdly, draft article 4 needed further consideration by the Special Rapporteur before it could be referred to the Drafting Committee. While the terms of paragraph 1 were unobjectionable, the paragraph added little. It affirmed that States were obliged to extradite or prosecute if they were so obliged by customary law. While that must be true, it was a tautology. In other words, although the rule set forth in paragraph 1 was true, it followed not from any special rule relating to *aut dedere aut judicare*, but rather from the definition of what a customary rule happened to be. A State was required to do something if customary international law ruled that the State must do so.

37. Paragraph 2 had the potential to become an important rule, but its current formulation was too tentative to be of particular use, since the Special Rapporteur had placed square brackets around the central issues. The Special Rapporteur should undertake a more detailed study of State practice and *opinio juris* and reach his own conclusions on whether and to what extent certain offences against international humanitarian law gave rise to an obligation on the part of States either to extradite or to prosecute an alleged offender. If the Special Rapporteur believed that there was such an obligation, he should provide arguments to support it, so that the other members of the Commission could decide whether they agreed with his conclusions after a full review of the primary sources. That applied equally to genocide, crimes against humanity and war crimes, as well as possibly to other crimes.

38. The chapter of the report on sources of the obligation to extradite or prosecute represented a start but did not cover the ground fully. The Special Rapporteur should examine certain aspects of State practice more closely. As part of the analysis, he might wish to consider expressly whether the accumulation of many treaties with *aut dedere aut judicare* clauses meant that States accepted that there was a customary rule, or whether States believed that they were derogating from customary law. That determination could play an important part in the Special Rapporteur's assessment of the weight to be given to different material sources of law in determining whether a customary rule existed. The Special Rapporteur should not await a decision of the ICJ on the subject, but should reach his own conclusion, however difficult that might be.

39. The meaning of draft article 4, paragraph 3, was not entirely clear. Did it mean that only offences that were in breach of a peremptory norm of international law could be regarded as offences giving rise to the obligation to extradite or prosecute, or that once a peremptory norm existed, any breach of that norm gave rise to such an obligation? The latter interpretation would be without prejudice to the existence of other offences that gave rise to an obligation to extradite or prosecute, whereas the former would suggest that *jus cogens* norms provided the only basis for invoking the obligation.

40. However, the challenges presented by draft article 4, paragraph 3, were not merely drafting questions that could reasonably be thrashed out by the Drafting Committee without guidance from State practice and *opinio juris*. The paragraph required extensive analysis by the Special Rapporteur, building on paragraphs 92 to 94 of his report: the place of *jus cogens* in the topic needed full and careful consideration.

41. Following an assessment of the significance of customary law and *jus cogens* norms in that area, the Special Rapporteur might then consider whether desirable rules could be drafted that would codify or supplement existing customary rules or, alternatively, set the foundation for treaty rules pertaining to the obligation to extradite or prosecute. In his subsequent reports, the Special Rapporteur might also consider more fully the relationship between *aut dedere aut judicare* and universal jurisdiction and whether that relationship had any bearing on the draft articles to be prepared. With such considerations in mind, draft article 4 would remain a viable and useful project for the Commission to pursue. If the Special Rapporteur undertook additional work and could come to less equivocal conclusions than those reflected in his fourth report, the Commission would probably be in a position to refer a substantially revised draft article 4 to the Drafting Committee during its sixty-fourth session. He did not support the referral of draft articles 2 and 3 to the Drafting Committee at the present juncture. However, overall, he believed that the project should be continued.

42. Mr. SABOIA thanked the Special Rapporteur for his fourth report which had helped the Commission to make progress on a difficult topic. Thanks were also due to the Working Group on the obligation to extradite or prosecute for its contribution. With respect to the sources of the obligation to extradite or prosecute, he observed that the duty to cooperate in the fight against impunity was well established, *inter alia*, in the Charter of the United Nations and the Rome Statute of the International Criminal Court. In addition, more recently, a positive approach to the duty to cooperate had been taken in the fourth report on the protection of persons in the event of disasters (A/CN.4/643). He did not share the concerns voiced about the use of the expression "fight against impunity" in draft article 2, paragraph 1. The expression was easy to understand and the words "fight against" were commonly used in legal texts in respect of drugs and terrorism. He did, however, have a problem with the reference to "competent international courts and tribunals". Some redrafting would be necessary, but, on the whole, draft article 2 made a good attempt at defining the duty to cooperate.

43. With respect to section B in the last chapter, on the obligation to extradite or prosecute in existing treaties, he endorsed Mr. Dugard's comments about the need to distinguish more clearly between core crimes and other crimes. Yet that was no easy task, as was borne out by the useful information on the Bassiouni and Wise classification[366] provided in paragraph 44 of the report, which helped to identify the types of crimes on which the international community needed to cooperate to ensure that the perpetrators were brought to justice. He also agreed with Mr. Dugard on the need to distinguish between treaties that admitted exceptions and those that did not. Such aspects must be borne in mind during the consideration of the topic. He would therefore be in favour of drawing up a list of crimes in the corresponding draft article that was not too restrictive. Criminals were creative and the Commission needed to keep its options open too. Draft article 3 had been described as superfluous, yet he found paragraph 2 useful: in dealing with the obligation to extradite or prosecute based on a treaty, the particular conditions of national law and jurisprudence should be taken into account.

44. With respect to section C on the principle *aut dedere aut judicare* as a rule of customary international law, he acknowledged that the rule had not yet been properly defined. Nevertheless, in 1996, in its draft code of crimes against the peace and security of mankind, the Commission had stated that States parties should extradite or prosecute individuals in their territory alleged to have committed genocide, crimes against humanity or war crimes. It was therefore surprising that, 15 years later, the Commission seemed reluctant to take that provision seriously.

45. Although draft article 4 as proposed by the Special Rapporteur required some redrafting, the number of treaties establishing the obligation to extradite or prosecute and the number of States parties to them was proof in itself that there was a basis in international customary law for the obligation. However, as Mr. Vasciannie had said, a more detailed explanation of the legal basis was required.

46. He had no particular recommendation to make in respect of the future consideration of the topic. He did not support Mr. Murase's proposal, but Mr. Melescanu's proposal might be acceptable to him, if it garnered sufficient support among other members. Perhaps it would be preferable to defer any decision until the Commission's sixty-fourth session.

Immunity of State officials from foreign criminal jurisdiction (*continued*)* (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

47. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/646).

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[366] C. Bassiouni and E. M. Wise (see footnote 355 above).

* Resumed from the 3088th meeting.

48. Mr. KOLODKIN (Special Rapporteur) said that his third report marked the culmination of the initial phase of work on the topic, provided a thematic overview and outlined the conceptual balance that was shaping up—in his own mind, at any rate.

49. The third report focused on procedural aspects of immunity: the stage of criminal proceedings at which the question of immunity should come into play; when and by whom it could be invoked; which State bore the burden of invoking it; and by whom and how it could be waived. The report also covered the non-procedural issue of the relationship between a State's declaration that its official had immunity and the responsibility of that State for a wrongful act committed by that official.

50. The third report differed methodologically from the second,[367] in which an analysis of the practice of States, their opinions on the scope of immunity from foreign jurisdiction, rulings of the ICJ and national courts and the literature had allowed certain conclusions to be drawn with regard to the current status and future development of international law on immunity for State officials. The situation was somewhat different with respect to the procedural aspects of such immunity, on which neither Governments nor national courts had set out their position so clearly. As to the literature, while some procedural aspects were dealt with, most were not covered.

51. Nevertheless, some relevant precedents could be adduced. Of particular importance was the judgment of the ICJ in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. There was also the Court's advisory opinion regarding the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the practice of States and various significant rulings from national courts. Some conclusions drawn in the report were extrapolations of logic rather than deductions from an analysis of sources of the applicable law, the approach used in the second report.

52. The issue of immunity ought to be raised at the preliminary stage of criminal proceedings, even though the State exercising criminal jurisdiction was not obliged to consider the issue of immunity at that stage. In any event, the issue of immunity should be addressed at an early stage of the judicial proceedings, and even at the pretrial stage. As the ICJ had stated in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, "questions of immunity are … preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law" (para. 63). Failure to consider the issue of immunity at the start of criminal proceedings could be considered a violation by the forum State of the norms governing immunity.

53. The stage of criminal proceedings at which the issue of immunity should be considered should likewise be examined from the standpoint of who bore the burden of invoking immunity. If the State of the official enjoying immunity *ratione materiae* did not invoke immunity in the initial stages of the proceedings, then the proceedings could continue, and the issue of a violation of the obligations stemming from immunity would not arise. In any event, recognition of an official's personal or functional immunity did not preclude all measures that might be taken in the exercise of criminal jurisdiction, only those which imposed an obligation on the official or were coercive.

54. A second question was who could legally raise the issue of immunity, the official or the State which the official served? Immunity belonged not to the official, but to the State which the official served or had served. The official merely "enjoyed" immunity, which belonged legally to the State. Accordingly, the rights inherent in immunity were rights of the State. It could thus be said that only when it was the State of the official which invoked or declared immunity that the invocation of immunity was legally meaningful. That did not mean that such a declaration by an official had no significance at all in the context of legal procedures carried out in relation to that person. It was unlikely that it could simply be ignored by the State that was criminally prosecuting the official. However, if it was uncorroborated by the official's State, it would seem that such a declaration lacked sufficient legal weight and significance.

55. For the State of an official to be able to declare that that official had immunity, it must be aware that criminal proceedings were being undertaken or were planned with regard to that person. Consequently, the State implementing or planning such measures must so inform the State of the official. That, naturally, could be done only when it became known or there were grounds to suppose that a foreign official was involved.

56. As to which State should raise the issue of immunity, his third report took as its starting point the position that the burden of invoking immunity fell to different parties, depending on whether the official involved was a serving member of the "threesome", or troika—Head of State, Head of Government or Minister for Foreign Affairs—or any other serving or former official.

57. In the case of officials who had merely functional as opposed to personal immunity, the burden of invoking immunity fell to the State of the official. Functional immunity was enjoyed by officials who were not high ranking and by former officials, and only with regard to actions carried out by them in an official capacity. The State exercising jurisdiction was under no obligation to know that they were foreign officials, much less former officials, nor that, in violating the law, they were acting in an official capacity. The State of the official must notify the State exercising jurisdiction of the existence of and grounds for immunity: if it failed to do so, then the State exercising jurisdiction was not obligated to consider the issue of immunity *proprio motu*, and, consequently, could proceed with the criminal prosecution.

58. Similar logic yielded the same result when applied to officials who enjoyed personal immunity but were not part of the troika—if indeed there was such a category of officials, and he believed there was. The State exercising jurisdiction was not required to be aware of the significance of the official's position, the functions the official exercised or the fact that he or she represented the State in international relations. The official's State had to notify

[367] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631.

the State exercising jurisdiction that the official enjoyed immunity and had to substantiate the claim of immunity.

59. Applying the same logic to serving Heads of State, Heads of Government or Ministers for Foreign Affairs who enjoyed personal immunity gave the opposite result: the State exercising jurisdiction should raise the issue of immunity itself. All such officials were, as a rule, well known to foreign States. They enjoyed immunity in respect of actions undertaken in both their official and personal capacities. Consequently, the State of the official was under no obligation to invoke immunity before the authorities of the State exercising jurisdiction.

60. The above conclusions were confirmed, in his view, by the judgment of the ICJ in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.

61. With regard to the means of invoking immunity, his third report concluded that the State of an official was not obliged to invoke immunity before a foreign court, and that it sufficed to do so through diplomatic channels. The absence of an obligation on the part of the State to deal directly with a foreign court stemmed from the principle of the sovereign equality of States. The issue of immunity from foreign criminal jurisdiction often arose and was resolved at the pretrial stage.

62. Concerning waiver of immunity, he said that the right to waive an official's immunity, like the right to invoke immunity, lay with the State and not with the official, for the same reasons.

63. The means of waiving immunity varied. In the case of State officials belonging to the troika, the waiver must be express. Any possible exceptions would be largely hypothetical. On the other hand, waiver of the personal immunity of officials not included in the troika and of the functional immunity of other officials could be either express or implied. Importantly, an implied waiver could take the form of failure by the official's State to invoke immunity.

64. Thus, who must invoke immunity and who must waive it depended on who it was that enjoyed immunity—a member of the troika or another State official. In either case, members of the troika were in a privileged position.

65. His third report also examined the relationship between the invocation or waiver of an official's immunity by the State of the official and the responsibility of that State. The relationship was based on the fact that conduct presumed unlawful could be attributed to the official and the State of the official simultaneously.

66. First, a State which invoked its official's immunity on the grounds that the act with which that person was charged was of an official nature was acknowledging the fact that the act was an act of the State itself. That established significant premises for the responsibility under the international law of the State in question. The fact that the burden of invoking functional immunity lay with the official's State left that State with a choice: to declare that an official's or former official's actions were official in nature, thereby acknowledging the action as its own, with all the attendant political and legal consequences; or not to do so, thus allowing the foreign State to prosecute the official concerned. Cases of the latter were known to have occurred.

67. Secondly, the State of an official could acknowledge that he or she had acted in an official capacity, but not invoke immunity, as in the *"Rainbow Warrior"* incident. In itself, such recognition did not relieve the official of responsibility, as attributing conduct to the State did not preclude attributing it to the official as well.

68. Thirdly, the State could opt not to declare that its official's acts were of an official nature, and thus not invoke functional immunity. It could even declare that the official had acted in his or her personal capacity and consequently did not enjoy immunity. That did not mean, however, that the State exercising jurisdiction could not deem the acts to have been carried out in an official capacity. In such a case, that State could then not only bring criminal proceedings against the foreign official, but also, if the acts were internationally wrongful, raise the question of the international responsibility of the official's State, on grounds of dual attribution.

69. In conclusion, he said that the consideration of the issues dealt with in his third report would help to strike an appropriate balance between immunity of State officials from foreign criminal jurisdiction and responsibility for crimes committed.

The meeting rose at 5.55 p.m.

3112th MEETING

Tuesday, 26 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*concluded*)*

[Agenda item 13]

STATEMENT BY THE SECRETARY-GENERAL OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The CHAIRPERSON welcomed the Secretary-General of the Asian–African Legal Consultative Organization (AALCO), Mr. Rahmat Mohamad, and invited him to take the floor.

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* Resumed from the 3108th meeting.