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Summary record of the 2406th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1995, vol. I

2406th MEETING

Wednesday, 28 June 1995, at 10.30 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,[1] A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRMAN said that he would ask the Special Rapporteur to repeat his earlier proposal concerning the Commission's further work on the topic of State responsibility, following which he would invite the Commission to take a decision in the matter.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, as he had repeatedly stated with respect to the question of how to deal with the consequences of international crimes of States as defined in article 19 of part one of the draft,[2] he was open to all suggestions, including those put forward in writing, for instance, by Mr. Bowett. He had also mentioned the proposals made by Mr. Pellet (2397th meeting), as those by Mr. Mahiou (2395th meeting), which included the possibility not only of exploring solutions other than those suggested in the seventh report (A/CN.4/469 and Add.1 and 2) but also, if necessary, of submitting alternative solutions to the General Assembly in 1996, once the work of the Drafting Committee had been completed. He believed he had made that very clear at the close of the debate on the topic and also on two occasions in the course of the informal consultations held under the Chairman's guidance.

3. It had therefore been his understanding that the matter had been settled, at least in substance, since he believed—and he was not the only one so to believe—that during the informal consultations a very substantial number of persons had agreed that, subject to the conditions he had mentioned, the articles could be referred to the Drafting Committee. Should the Drafting Committee fail to reach an agreement at the next session, in 1996, the obvious inference to be drawn was that there could be no follow-up to article 19 of part one in parts two and three of the draft and that, when the time came to examine draft article 19 on second reading, it would be reconsidered and eventually reviewed. That would, however, take place only after the Drafting Committee had concluded a serious effort to find solutions, if necessary, alternative ones, relating to the consequences of crimes. It had been suggested by some members during the informal consultations that the Drafting Committee should consider not only solutions with regard to the consequences of crimes in parts two and three but also the question of deleting article 19 of part one. In his view, it would be improper to follow such a course, because the fate of that article should be decided only after the Commission had done its best with regard to crimes in parts two and three and in any event only at the stage of the second reading.

4. The CHAIRMAN asked whether the Commission could agree, in the light of the Special Rapporteur's explanations, that the draft articles proposed in the seventh report should be referred to the Drafting Committee for consideration along with any comments or proposals made during the debate.

5. Mr. ROSENSTOCK said that he could not in all conscience agree to referring the draft articles to the Drafting Committee and would like to explain his vote against any proposal for such referral.

6. Mr. LUKASHUK said that the problem with which the Commission was confronted involved a key concept of State responsibility, namely, that of international crime. Many convincing arguments had been advanced in the Commission in support of a provision on international crime, the main one perhaps being that the concept of crime now formed part of *lex lata* and positive law. One had only to call to mind the proceedings of international military tribunals, the practice of ICJ, and various conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide. There was a certain logic, too, in the argument of those who opposed such a concept, the most persuasive being that the effect of including in the future convention a provision in that connection would be to reduce the number of parties to the convention. Indeed, the fact that several States would not be prepared to accept the concept of international crime seemed to be the crux of the issue. It was therefore a matter of politics, not jurisprudence, in other words, the theory of law. Thus, if it was in its political interest to do so, a State would not stop short of calling for sanctions against a State responsible for an international crime, such as aggression. The case of Iraq was very indicative in that respect. Such facts, though fairly obvious, were interpreted in different ways inasmuch as an element of subjectivity was involved. He therefore wished to draw attention to certain objective facts that were undeniable.

7. The concept of international crime had been embodied in the draft articles on State responsibility at the initiative of a previous Special Rapporteur, Mr. Roberto Ago, and had been discussed in detail, and unanimously

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[1] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

[2] See 2391st meeting, footnote 8.

adopted, by the Commission in 1976.[3] It had also been stated in one report of the Commission that it would be undesirable to cast doubt on the concept in the future.[4] Subsequent Special Rapporteurs, though representing different schools of law, had firmly supported the concept of international crime, the same position having been taken in the Commission as a whole. A positive response to the concept of international crime was also to be found in world literature and, specifically, in a book by Cassese, according to whom the concept of international crime was a basic feature of the new world legal order.[5] Cassese was not alone in that assessment.

8. He asked what revolutionary changes had prompted members of the Commission to raise the question of revising a position already adopted and whether the end of the era of confrontation could really be grounds for reducing the effectiveness of international law. The example of Iraq pointed to the contrary; and such an approach could be dangerous, not only for the concept of international crime.

9. It had been suggested that the draft on State responsibility should be revised from the very beginning, starting with article 1, but to do so would take many years. It should not be forgotten that as far back as 1949 the topic of State responsibility had been included among the areas of law requiring codification and that, since 1961, the General Assembly had regularly recommended that work on the draft articles on responsibility should be speeded up. Moreover, recent Assembly resolutions spoke of finishing the work before the Commission's mandate expired in 1996. He asked whether 50 years was not enough. Many would find a decision to start all over again hard to understand.

10. One point made by supporters and opponents alike of the concept of international crime was that it would have meaning only if there was some appropriate mechanism to implement it. In support of their view, they referred to the history of the concept of *jus cogens*, which was conditioned by the adoption of the corresponding procedures for the settlement of disputes. Whereas those procedures had not received wide recognition, *jus cogens* had none the less become a generally recognized part of international law. Accordingly, the concept of international crime should be enshrined in a future convention notwithstanding any doubts and even if the establishment of an appropriate mechanism proved impossible.

11. It was now for the Commission to take a decision that would determine whether or not a particularly important branch of international law would come into being. To that end, it should make recommendations to the Special Rapporteur so that the work on the topic could be completed by 1996, as required by the General Assembly. Consensus in the matter was particularly important and would be a fitting prologue to the next 50 years in the life of the Commission.

12. Mr. TOMUSCHAT said that, before the draft articles were referred to the Drafting Committee, there should be general agreement on two points. First, the term "crime" should be understood as not having any criminal connotation. Secondly, the Drafting Committee should have a wide measure of discretion in dealing with the draft articles of part two and, in particular, with draft article 19. It would perhaps have to devise an entirely new approach and should therefore be authorized not only to consider the minutiae of drafting but also to reshape the articles. On that understanding, he could agree that the draft articles should be referred to the Drafting Committee.

13. Mr. de SARAM said he regretted that he was unable to concur in the proposal to refer the draft articles to the Drafting Committee. In particular, if it were to be decided that the draft articles should be so referred only if there was understanding on certain points, the focus of attention would be enlarged to such a point that no agreement at all would be reached. Furthermore, while every attempt should be made to arrive at a consensus, he was prepared, if really necessary, to agree, albeit reluctantly, to a vote.

14. Mr. PELLET, disagreeing with Mr. de Saram, said that all possibilities for achieving a consensus had been exhausted and much time had been wasted in that connection. The only sensible thing to do now was for the Commission to take a decision on the matter, though it would be useful for members to explain their positions briefly.

15. For his part, he was very much in favour of referring the articles to the Drafting Committee. The real problem was whether or not to retain the concept of crime in the draft on State responsibility; all the delaying tactics deployed by those opposed to that concept were aimed at the deletion not of the articles drafted by the Special Rapporteur but of article 19 of part one. He was resolutely opposed to such deletion, for article 19 was an excellent article and had been adopted by the Commission on first reading. The Commission should refer the articles to the General Assembly, and await the General Assembly's reaction. If the Assembly was not satisfied with the articles, they would be referred back to the Commission. But it was certainly not for the Commission to seek to take over the role of the Assembly.

16. He had reservations about the position of Mr. Tomuschat, who favoured referral to the Drafting Committee but with provisos that could only lead to endless discussion: he had no doubt that those opposed to referral would engage in filibustering in an attempt to ensure that the Drafting Committee did not deal properly with the articles on the consequences of crimes. The Drafting Committee should feel free to recast those articles to a considerable extent, subject only to the limitation that it should not divest them of all substance, something to which he would be absolutely opposed.

17. Mr. GÜNEY said it was clear from the statements by members that the Commission was divided on what was both a procedural and a substantive question. In that

[3] For the text of the articles adopted by the Commission at its twenty-eighth session, see *Yearbook ... 1976*, vol. II (Part Two), pp. 73 *et seq.*

[4] *Yearbook... 1994*, vol. II (Part Two), para. 234.

[5] A. Cassese, *International Law in a Divided World* (Clarendon Press, Oxford, 1988), p. 399.

respect, he shared Mr. de Saram's concern and agreed that the possibility of informal consultations had not been sufficiently explored. It was always possible to settle matters without a vote.

18. Mr. VILLAGRÁN KRAMER said that the Drafting Committee and the Commission, in their present composition, would no doubt deal with the matter with the same sense of responsibility and objectivity as had been displayed by the Commission and Drafting Committee when they had adopted article 19 of part one in 1976. In particular, the Drafting Committee would consider the terminological problem in a creative spirit. Its task would consist, basically, of determining whether or not the word "crime" should be retained and of deciding on the method of regulation that it would propose to the Commission for the purposes of the consequences of such acts, however the acts in question were called.

19. He respected the right of all members to ask for a vote, although he himself would not have thought it strictly necessary in the present case.

20. Mr. THIAM said that he was in favour of referring the draft articles to the Drafting Committee, but that did not mean he had abandoned his formal reservations on them. He was, however, surprised that some members of the Commission wanted to revert to article 19 of part one, which had already been adopted. The Commission should follow its usual procedure: wait for the articles to be referred back to the plenary, at which time it would have the opportunity, after examining the observations of Governments, to state its position a second time.

21. Mr. IDRIS said that he was seeking a way to break the deadlock, and asked whether the members would agree to allowing the Drafting Committee to deal exclusively with the matters raised by Mr. Tomuschat before considering the substance of article 19. If the Drafting Committee divided the matter into two parts, first handling the legitimate concerns mentioned by Mr. Tomuschat, a solution might be found before going into the substance of article 19 itself.

22. Mr. ARANGIO-RUIZ (Special Rapporteur) said he appreciated Mr. Tomuschat's suggestion for the Drafting Committee to have broad discretion. But surely that meant it was free, but also duty-bound, to explore solutions coming under parts two and three of the draft.

23. It was high time to realize that the Drafting Committee was a strange animal that worked as best it could, but not always with the participation of all, and that it was not always as representative as it had been meant to be when originally created at the beginning of each session.

24. If, at the meetings of the Drafting Committee at the next session, he had to face not only all the proposals that differed from his own—which he welcomed and wished to be explored—but also the question of whether article 19 of part one should be retained, it would be far too heavy a burden.

25. Consequently, although he would support Mr. Tomuschat's proposal, he thought that the Commission should take care not to turn the Drafting Committee, too frequently attended by only a few of its members, into a surrogate plenary for discussing whether or not to retain article 19 of part one. If, at the next session, the Drafting Committee could not reach agreement, the obvious conclusion was that article 19 should remain where it was, namely, in part one as adopted on first reading, pending a second reading of the whole draft. That did not mean the Drafting Committee should debate the point, because it would inevitably be argued at great length, and the Drafting Committee then would be unable to give serious consideration to the important question of legal consequences.

26. The CHAIRMAN asked Mr. Tomuschat whether his earlier statement tallied with the Special Rapporteur's understanding, namely that the existence of article 19 was not challenged, but that the Drafting Committee could look into any permutations thereof. Was that what Mr. Tomuschat meant by "reshaping"?

27. Mr. TOMUSCHAT said that he had no objection of principle against article 19 in part one, apart from the fact that he thought another term should be sought for "international crimes", which was inadequate. He objected to draft article 19 of part two, for it was inappropriate. An entirely different system was needed from the one proposed by the Special Rapporteur in his seventh report. Draft article 19 should be recast. He did not want to delete article 19 of part one; however, he thought that internationally wrongful acts were in a continuum ranging from not very serious violations to very serious ones. The Commission must live with article 19 of part one and submit to the General Assembly a draft based on the existence of that article.

28. Mr. IDRIS said that he was not in favour of sending draft article 19 of part two to the Drafting Committee, because it was not ripe for discussion. Nor did he believe that voting would solve the problem: the substance of the question would recur, and it would be discussed again and again. In his view, the Commission must remain flexible and tolerant. Just because an opinion was held by the minority, that did not mean it should not be defended.

29. Mr. YANKOV said that, as he understood it, the Drafting Committee had never been subject to limitations in its work. Its duty had always consisted in conducting informal consultations and producing drafts that were subject to the Commission's approval in plenary. The Committee should continue to employ its well-established working methods, which were anchored in the statute of the Commission. It had always shown flexibility in its search for solutions to many different issues. Some articles had been submitted to the plenary in alternative versions, even at the stage of second reading. Hence, the Commission should not consider that a new situation had emerged and that the Committee's methods needed to be improved. In that regard, he was against the proposal made to establish a working group.

30. The status of article 19 of part one, which had been adopted by the Commission on first reading without any formal objections, must be clarified. As to Governments, some reservations had been formulated. For example, one Government had stressed the exceptional importance of article 19 and the favourable reaction which the

underlying ideas as a whole should evoke, in that they introduced a moral component into the topic of the State responsibility.[6] It stated further that article 19 should be properly considered in part two in relation to the consequences of internationally wrongful acts and that the significance should then be clarified. Referring to the same issue in its comments and observations, another Government had stated that the differentiation of international responsibility in certain categories was of great importance for adequate coverage of the nature and the effectiveness of responsibility and that such differentiation resulted from the particular importance of the object attacked and from the subjects (a single State, several States or all States), but that the regime of the legal consequences of international crimes should be thoroughly elaborated in part two; unfortunately, that had not yet been done in a consistent manner.[7] In resolutions of the General Assembly, reference had always been made to parts one, two and three. The structure had been approved, and he therefore concluded that article 19 was not taboo in part one. It could be reconsidered in the light of the consequences. The Commission was free to proceed in that fashion. Comments and observations by the Sixth Committee, Governments and the Commission would be taken into consideration by the Drafting Committee. In his opinion, the Commission should refer the articles to the Drafting Committee, drawing its attention to the implications of article 19 of part one for draft articles on international crimes, with special reference to the substantive consequences.

31. He hoped that it would be possible to reach an agreement without a vote, but if the Commission decided that it was impossible to reach a consensus, the sooner a vote was held the better.

32. Mr. THIAM said that many speakers had reverted to questions of substance. The Commission should confine itself to responding to the question at hand: whether or not to refer the draft articles to the Drafting Committee.

33. Mr. BARBOZA said that he agreed with Mr. Thiam and would confine himself to the procedural discussion.

34. At the forty-sixth session, the Special Rapporteur had been asked to draft articles on the legal consequences of crimes.[8] There had been a fruitful debate on those articles; proposals had been made and informal consultations had been held. An overwhelming majority had emerged in favour of referring the draft articles to the Drafting Committee, which, bearing in mind the opinions voiced and the proposals made, was to consider the articles in the usual fashion—in which connection he agreed entirely with the remarks of Mr. Yankov—and to propose texts.

35. Article 19 of part one was not under discussion at the present time, having been provisionally adopted on first reading. The Commission should not put the cart before the horse. The Drafting Committee's conclusions and proposals would have a decisive impact during the consideration of that article on second reading. Therefore, the Drafting Committee should first examine the consequences of "crimes", or whatever term was eventually agreed on, and then review article 19 in the light of those consequences. Mr. Tomuschat, who had fortunately clarified that he was referring to article 19 proposed for part two, should rest assured that draft article 19 fell entirely within the competence of the Drafting Committee.

36. He was in favour of sending the articles proposed by the Special Rapporteur in his seventh report to the Drafting Committee without additional instructions.

37. Mr. AL-KHASAWNEH said that he fully agreed with Mr. Pellet, Mr. Yankov and Mr. Barboza. At issue was a vote on the concept of crimes of States. He did not favour such a step, but as the possibilities for reaching consensus had been exhausted, the sooner a vote was held, the better.

38. Mr. PELLET said that the Drafting Committee's role was to produce drafts on the basis of proposals made by the Special Rapporteur.

39. Mr. ELARABY said he endorsed the proposal to refer draft article 19 of part two to the Drafting Committee. However, if the Commission was split between a majority opinion and a minority opinion, that would not be helpful to the Drafting Committee, which he hoped would be able to take its decisions in the light of a consensus in the Commission, assuming that one could be reached.

40. Mr. ROSENSTOCK said that if the plenary decided to refer the articles and proposals to the Drafting Committee, it was not expressing a view one way or the other on article 19 of part one, and the concept of international crimes was not before it. While one might conceivably say that the assertion that States commit crimes was a statement of *de lege ferenda*, it was not *lex lata*, and Nürnberg was no basis for it. It had been expressly affirmed at Nürnberg that crimes were committed by individuals, not States. Hence, it would serve no purpose to look to the Nürnberg Tribunal for inspiration on crimes by States.

41. The Commission was missing an opportunity to decide that the controversial issues raised by article 19 of part one should be examined at the same time as the legal consequences to be drawn from them. At the forty-sixth session, the Special Rapporteur had bemoaned the fact that the consequences had not been considered at the same time as article 19 of part one a decade earlier. Yet at the present session, the Special Rapporteur was adamantly opposed to considering the question as a whole.

42. In his view, the proposals to be referred to the Drafting Committee were creative, but needlessly complex, seriously flawed, largely unworkable and unnecessary. He could not in good conscience vote to refer them to the Drafting Committee. The wisest course would have been to defer the entire question to the stage of second reading; the second wisest course would have been to be innovative in working methods, to see whether

[6] *Yearbook... 1982*, vol. II (Part One), p. 17, document A/CN.4/351 and Add.1-3.

[7] *Yearbook... 1988*, vol. II (Part One), p. 4, document A/CN.4/414.

[8] See 2392nd meeting, footnote 5.

problems and differences could be ameliorated and a coherent whole created. Elsewhere, the Commission had benefited from a new-found spirit of innovation. Noteworthy results had been achieved by the working groups on the draft statute for an international criminal court and on State succession and its impact on the nationality of natural and legal persons. In regard to international liability for injurious consequences arising out of acts not prohibited by international law, a working group was striving to solve one of the problems that had plagued that topic for a number of years. Yet when it came to State responsibility, the Special Rapporteur would not hear of innovation. It was puzzling to see that refusal to make every effort to find common ground. Presumably, some feared innovation or change, and others realized that recommendations made in 1976 were not as likely to be endorsed again if they were brought under rigorous examination.

43. Since he believed that the potential consequences for the topic—and beyond—of the majority decision to refuse a compromise proposal might be serious, the record should reflect the proposal to seek a compromise solution that had been rejected. Personally, he did not prefer the compromise, since it had not expressly called for a reconsideration of article 19 of part one. What the compromise proposal entailed was roughly the following: the proposals of the Special Rapporteur would be referred to the Drafting Committee along with other proposals made at the present session, and the Drafting Committee would be expressly authorized to elaborate alternatives, including those based on the present year's proposals, those based on the assumption that the notion of crime was deleted and those based on the use of a formulation such as "exceptionally serious wrongful acts affecting the international community as a whole".

44. Those who had declined that offer of compromise and variations thereof, such as the one suggested earlier by Mr. Tomuschat, had rejected an opportunity to establish a consensus and provide alternatives to the Members of the General Assembly so that they would be fully informed of the possibilities when they made their written comments on the draft completed on first reading.

45. State responsibility was probably the last great general topic for codification. If there was a genuine search for common ground, a basis for codification and progressive development could probably be found that States would be ready to accept. If, on the contrary, political groups or intellectual cliques insisted on riding their ideological hobby-horses, the prospects were dim. An opportunity had been missed at the present session; it was to be hoped that a more open-minded spirit would animate future work.

46. Mr. EIRIKSSON said that the question before the Commission seemed to be whether it should authorize the Drafting Committee to draft articles for part two on the consequences arising from article 19 of part one. The end result might or might not be based on the articles proposed by the Special Rapporteur. He could agree to referring the draft articles proposed in the seventh report to the Drafting Committee on that basis.

47. In his view, the Commission should dispense with further debate on the question of rediscussing the title of article 19 of part one. It should proceed on the grounds that article 19 had been adopted and go on to consider the consequences arising from it.

48. Mr. RAZAFINDRALAMBO said that thus far no clear majority had emerged in favour of or against referral of the draft articles to the Drafting Committee. That might, paradoxically, lend support to the position of those advocating further informal consultations.

49. Three possibilities were under consideration. The first was to continue the process of informal consultations to arrive at a consensus. The second was to send the draft articles to the Drafting Committee, with certain conditions. The third, which represented the usual custom of the Commission, was to send the articles to the Drafting Committee without any conditions.

50. He agreed with Mr. Yankov that the plenary could not place a straitjacket on the Drafting Committee, which must be free to consider the draft articles without restrictions. Accordingly, he was in favour of the third solution, namely, referring the articles to the Drafting Committee without any conditions.

51. Mr. KABATSI said that, because sharp divisions of opinion had arisen on both the substance of the articles and the procedure to be followed, it was possible that the same dissension might reign in the Drafting Committee. It would thus be preferable to continue with informal consultations in the hope that a consensus might be reached.

52. Nevertheless, and without compromising in any way his position that the notion that States could be said to commit crimes was completely unacceptable, if the matter had to be settled by a vote, he would endorse the procedure whereby the articles were referred to the Drafting Committee in the usual way, it being understood that the Drafting Committee would, in its wisdom and flexibility, take into consideration all the options and views that had been discussed in plenary and in the informal consultations.

53. Mr. HE said that he was not in favour of a vote. The matter under consideration dealt with one of the most significant aspects of modern international law. Accordingly, the Commission should act cautiously but flexibly.

54. He shared the views of previous speakers that consensus could be reached through further consultations. The Drafting Committee, if and when it did consider the articles, should take a flexible approach, giving due regard to all the views that had been expressed. A substantial number within the Commission and within the Sixth Committee had strong reservations about the contents of article 19 of part one. Consequently, it was incumbent on the Commission to present several alternatives to the General Assembly.

55. Mr. VARGAS CARREÑO said that the basic question was whether an article referring to crimes committed by States should be among the proposed articles. The Commission had been unable to arrive at a consensus on that matter. One possibility was to hold further consultations.

56. In his opinion, the various solutions proposed would be better dealt with by the Drafting Committee. He was in favour of referring article 19 to the Committee, together with all the alternatives that had been discussed, and without any restrictions as to the outcome.

57. Mr. FOMBA said that the concept of State crime was problematic mainly because of the difficulty of distinguishing *in concreto* between the legal person of the "State" and the natural person who embodied it. Yet, the concept was not as puzzling as it might appear. The notion of "legal person" was in fact necessary and useful, its purpose being to establish a close link between individual responsibility and the official and public framework within which it was exercised. In carrying out his criminal act, the individual was thus considered as a direct representative of the State and, as such, free to use the enormous and varied resources available to it.

58. For those reasons, he endorsed the concept of State crime and was in favour of examining the substantive and instrumental consequences arising from it. He therefore considered that the draft articles should be referred to the Drafting Committee, on the understanding that, in the final analysis, it was for States to decide whether the Commission was correct in attributing to them the capacity to commit crimes.

59. Mr. SZEKELY said he agreed with Mr. Fomba that there was good reason to adopt the concept of State crime. The Commission had basically exhausted the possibilities of arriving at consensus and should proceed to a vote.

60. Mr. MIKULKA said that, while part one of the draft had not yet been approved by States, the Commission still had a clear mandate: the General Assembly had invited it to consider the consequences of internationally wrongful acts, in other words, the consequences of all the provisions of part one, including article 19.

61. If it chose to refer the draft articles to the Drafting Committee, the Commission should not simply hand over a blank check, but should ensure that the Drafting Committee took into account all other drafting suggestions that had been presented in plenary. The Commission's task for the moment was to consider the consequences arising from article 19 of part one. It had not reached the stage of deciding whether that article should or should not remain part of the draft. Further consultations could be useful only if they were meaningful and in that regard views on either side did not seem to have changed. The best solution was to proceed to a vote.

62. The CHAIRMAN said that, to sum up the very rich debate so far, it appeared that the work ahead of the Drafting Committee was not as difficult or controversial as first thought. The Committee's task would be to consider the draft articles proposed by the Special Rapporteur. However, nothing prevented it from also considering innovative suggestions within that framework.

63. He wished to suggest the following to the Commission: "The draft articles proposed by the Special Rapporteur in his seventh report are hereby referred to the Drafting Committee for its consideration in the light of the various proposals made and the views expressed on the subject". He reminded the members that, by tradition, the Commission preferred to make its decisions by consensus.

64. Mr. ROSENSTOCK said that he was perfectly prepared to join in informal consultations with a view to finding a basis for consensus.

65. The Chairman's suggestion to refer to the Drafting Committee the draft articles along with any other suggestions reflected the traditional procedure under which the Commission usually operated. However, he himself was among those who could not in all conscience support any of the solutions that had been proposed at the present session with regard to article 19, considering them to be wrong and ill-advised. He could not, therefore, simply endorse the proposal to refer the draft articles to the Drafting Committee.

66. At no time had he or anyone else suggested that the Drafting Committee should be placed in a straitjacket. It had been suggested that the Drafting Committee should be authorized to put forward alternatives, bearing in mind three factors: the Special Rapporteur's proposed draft; the idea that a term other than "crime" should be used; and the idea that there was no qualitative difference between wrongful acts. That view had garnered some support but not enough for a consensus to emerge. There was a serious difference of opinion. There had been a basis for common ground, but it had not been used. There was, then, no alternative but to take a vote.

67. Mr. PELLET moved that the Commission proceed to a vote on the Chairman's suggestion.

The suggestion was adopted by 18 votes to 6.

68. Mr. YAMADA said that he had voted in favour of the Chairman's suggestion because he wanted to expedite the Commission's work on the topic of State responsibility in order to complete the first reading in accordance with the undertaking given to the General Assembly. His affirmative vote should not be interpreted as an endorsement of the draft articles proposed by the Special Rapporteur, with regard to which he entertained serious doubts for the reasons he had explained in detail (2396th meeting).

69. Mr. THIAM said that his position was the same as Mr. Yamada's. He, too, had voted in favour of the Chairman's suggestion, but that did not mean he agreed with the substance of the draft articles.

The law and practice relating to reservations to treaties (*continued*)* (A/CN.4/464/Add.2, sect. F, A/CN.4/470,[9] A/CN.4/L.516)

[Agenda item 6]

First report of the Special Rapporteur (*continued*)*

70. Mr. THIAM said that the Special Rapporteur's brilliant first report (A/CN.4/470) raised so many ques-

* Resumed from the 2404th meeting.

[1] Reproduced in *Yearbook ... 1995*, vol. II (Part One).

tions that it could best be described as a "questionnaire report". He intended to answer the more technical questions listed in the report at a later stage, and would confine himself to the questions of substance relating to the title of the topic, the preservation of what had already been achieved and the form the Commission's work on the topic should take in future.

71. He had no objection to changing the title of the topic. Precedents for such a course did exist. The example that came most readily to mind was that of the draft convention on succession of States in respect of matters other than treaties, which had eventually seen the light of day as the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. The proposed change should not, of course, alter the substance of the topic, and he was satisfied that such was not the Special Rapporteur's intention.

72. As to the issue of preserving what had been achieved, the problem before the Special Rapporteur was not unlike that facing an architect using a site on which a building was already standing. The architect could choose to do one of three things: he could pull down the building and replace it by a new one, a radical solution which, in the case in point, was clearly not envisaged by the Special Rapporteur or by any member of the Commission. The architect could, if the foundations and walls were not sufficiently solid and if the structure was faulty, embark on structural work to strengthen the building. Lastly, if the building was solid enough, he might carry out internal improvements so as to make the building more functional and better suited to its purpose. The Special Rapporteur appeared to be somewhat undecided between the second and the third solutions, which he set out very clearly in the report. As for the arguments in favour of going back to the drawing board, he had some doubts about the view apparently held by the Special Rapporteur that, as a result of political developments in recent years, the precautions embodied in the reservations provisions in the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"), the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention"), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention"), were perhaps no longer necessary. Political detente, however welcome, was not in his view a sufficient inducement to States to drop their guard where the safeguarding of their fundamental interests was concerned. The flexible system governing reservations established in 1969 was more than ever necessary, as the Special Rapporteur himself recognized in the report by admitting to being very much attracted by the second approach which preserves what has been achieved by existing provisions, adding that the representatives of States expressed their support for the existing provisions.

73. For his own part, he entirely shared the view set out in the report to the effect that the rules on reservations laid down in 1969 had over the years come to be seen as basically wise and as having introduced desirable certainty. In the case under consideration, the architect should leave the structure of the existing building alone and should concentrate on making some internal improvements.

74. With regard to the form the Commission's future work should take, he was not in favour of opting for only a detailed study of the problems involved or even an article-by-article commentary on existing provisions, a sort of guide to the practice of States and international organizations on reservations, as proposed in the report. Apart from the fact that embarking on the preparation of such a guide would be quite inconsistent with the proposed change of title for the topic, he could find no reference to preparing studies in the Commission's statute, in which articles 16 and 20 spoke only of "drafts" or "final drafts" in connection with both the progressive development and the codification of international law. The idea of preparing draft protocols to the existing conventions was more acceptable, but it might prove difficult to supplement and refine the existing texts without disturbing the delicate balance of the whole edifice. Of the various possibilities suggested by the Special Rapporteur, he would favour the preparation of model clauses adapted to special categories of multilateral treaties, which States would be free to adopt if they so desired.

75. In conclusion, he wished to thank the Special Rapporteur and encourage him to continue on the path of wisdom and moderation in the same spirit of flexibility as that which had inspired the authors of the 1969 Vienna Convention.

76. Mr. MIKULKA said he joined with other members in congratulating the Special Rapporteur on an excellent first report, and particularly on the comprehensive way in which the problems of the topic were set out in chapter II and the interesting reflections on the scope and form of the Commission's future work in chapter III. The report testified to the Special Rapporteur's prudent approach towards the problems and to his no less praiseworthy respect for what had already been achieved. The survey of the Commission's previous work on reservations contained in chapter I was a most useful guide to the history of the topic, and he agreed with the view expressed in the report that the regime of reservations as it had emerged from the 1969, 1978 and 1986 Vienna Conventions constituted a success, even if the flexible and pragmatic consensual system that the Conventions confirmed often rested on ambiguity or on carefully calculated silence.

77. The Special Rapporteur had classified the existing problems under two headings: that of ambiguities and that of gaps. Although the distinction was perhaps open to doubt, it could be maintained because the Special Rapporteur made it quite clear what was meant by each category. On the question whether the problems enumerated in the first report more or less covered the problem, he would be inclined to reply in the affirmative.

78. The questions relating to the permissibility of reservations and those relating to the problem of permissibility and opposability, went to the very heart of the problem. Assuming that the regime of reservations could vary depending on the specific object of certain treaties or provisions, differing answers might also be called for

in the case of some of the questions. As for the proposed systematic study of the practice of States and international organizations, such a study was necessary, even if it would not, perhaps, shed much additional light on the problem.

79. In the section on gaps in the reservations provisions in the Vienna Conventions, the Special Rapporteur raised the issue of reservations to bilateral treaties. Admittedly, in the 1969 Vienna Convention the point was left "in the dark", but the 1978 Vienna Convention was far clearer inasmuch as article 20, on reservations, was placed in the section relating exclusively to multilateral treaties.

80. With reference to the question of problems left unsolved by the 1978 Vienna Convention, the statement in one paragraph to the effect that article 20 of the Convention applied in the case of the decolonization or dissolution of States was no doubt due to a technical error, since article 20 applied only in the case of the emergence of a newly independent State resulting from the process of decolonization, including cases of newly independent States formed from two or more territories. It did not cover other categories of succession, such as cession of a part of the State territory or the uniting or separation of a State, the latter category including dissolution and secession. The fact that the 1978 Vienna Convention contained a provision on reservations for newly independent States but none for the other categories seemed to him to reflect a certain philosophy. The essential rule in the case of a newly independent State was the rule, often inaccurately described as the "*tabula rasa*" rule, set forth in article 16 of the Convention, under which "a newly independent State was not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty had been in force in respect of the territory to which the succession of States related". The act of notification of succession by which a newly independent State established its status as a party to any multilateral treaty therefore had at least some elements in common with an act whereby a State expressed its consent to be bound by a treaty. It therefore appeared entirely logical that the Convention should give a newly independent State the right to formulate its own reservations in respect of a treaty, while at the same time proceeding on the principle that reservations made by the predecessor State should be maintained except in the event of an indication of a contrary intention by the successor State (art. 20, para. 1).

81. The situation was not the same in cases of cession (transfer) of a part of a territory, where the principle of variability of the territorial limits of a treaty applied and, consequently, the problem of succession in respect of treaties did not arise (except in the case of treaties establishing frontiers and other territorial regimes). In such cases, however, the rule of continuity applied *ipso jure* and the treaty was maintained in the form in which it had existed at the date of the succession.

82. Similarly, in cases of the uniting or separation of States (including dissolution), articles 31 and 34 of the 1978 Vienna Convention confirmed the rule of continuity *ipso jure*. The situation was qualitatively different from that of newly independent States. No expression of the will of the successor State was required in order to bring the continuity rule into operation, and therefore no new reservations were called for. As for the withdrawal of the reservations of the predecessor State, the relevant rules of the law of treaties codified in the 1969 Vienna Convention applied and, accordingly, there was no need for new rules in the context of the topic under consideration.

The meeting rose at 1 p.m.

2407th MEETING

Thursday, 29 June 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law and practice relating to reservations to treaties (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/470,[1] A/CN.4/L.516)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MIKULKA said that he had already explained (2406th meeting) why it was logical to include a provision in the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") with regard to reservations applicable to newly independent States, except for States that came into being as a result of uniting, dissolution or separation. The position of those two categories of States in the case of succession to multilateral treaties was based on different principles. In the first case, a notification of succession was necessary, whereas, in the second, the rule that applied was that of automatic continuity, in other words, the successor State maintained the reservations of the predecessor State. That was why it was pointless to include an express provision on the matter.

2. That did not, however, mean—and there he agreed fully with the Special Rapporteur—that there was no gap

[1] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).