Document:-

A/CN.4/SR.2810

Summary record of the 2810th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

2004, vol. I

2810th MEETING

Friday, 4 June 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Organization of work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON said that the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) was composed of Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Economides, Ms. Escarameia, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Mansfield, Mr. Matheson, Mr. Momtaz and Mr. Yamada.

Responsibility of international organizations[1] (*concluded*)** (A/CN.4/537, sect. A, A/CN.4/541,[2] A/CN.4/545,[3] A/CN.4/547,[4] A/CN.4/L.648 and Corr.1)

[Agenda item 2]

Report of the Drafting Committee

2. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee), introducing the titles and texts of draft articles 4 to 7 adopted by the Drafting Committee(A/CN.4/L.648), thanked the Special Rapporteur for the guidance that he had given the Committee during the four meetings held on the subject of responsibility of international organizations and for his spirit of cooperation.

3. Draft articles 4 to 7 dealt with the attribution of conduct to an international organization. He recalled that Part One, Chapter II, of the draft articles on responsibility of States for internationally wrongful acts[5] contained eight articles on the question of attribution. While some of those articles applied in an equivalent or similar fashion to the attribution of conduct to an international organization, others related specifically to States or could be applied to international organizations in exceptional cases only. Those were some of the questions that had been discussed at length in plenary.

4. For the most part, the discussion had focused on article 4 concerning the general rule on the attribution of conduct. It had been agreed that the article should deal with three basic questions: the category of natural or legal persons whose conduct could be attributed to an international organization, the context in which the conduct occurred and the applicable law. Following a lengthy debate, the Drafting Committee had revised article 4 as proposed by the Special Rapporteur and had reached agreement on a text that comprised four paragraphs and dealt with three basic issues.

5. Paragraph 1 defined the category of natural or legal persons whose conduct could be attributed to an international organization. The Committee had decided that, in principle, it should adopt a broad definition because it would otherwise be difficult to identify the various natural and legal persons through whom an international organization performed its functions. For example, apart from the different organs of an international organization, other categories of legal persons could be involved, such as subcontractors, law firms, banks and so on. The same applied to individuals, who, in addition to officials of the organization, could be experts on mission, temporary or locally recruited staff and so on. It was thus preferable to use terms which covered all those different categories. That approach would also be in keeping with the advisory opinions of ICJ on the *Reparation for Injuries* and the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* cases, in which the Court had stated that the term "agent" should be interpreted "in the most liberal sense" and had recognized that the United Nations had to entrust its increasingly varied missions "to persons not having the status of United Nations officials" (pp. 177 and 194, respectively).

6. The second issue was that of the context in which the conduct in question must occur in order to be attributable to an organization. In that connection, the Special Rapporteur had proposed two elements in his report (A/CN.4/541): the corporation or individual must be "entrusted with part of the organization's functions" (para. 28) and hold a position "in the structure of the organization" (*ibid.*). Those two criteria had been criticized in plenary insofar as they seemed to give the relationship between the person and the organization an official character. They also gave the impression that the article related to persons holding positions of authority, since they were part of the "structure" of the organization, and excluded those of lower rank. The Drafting Committee had considered that no distinction could be made between different categories of persons and officials in an international organization since the organization would be bound by the conduct of some of them but not by that of others. The conduct of a lower-ranking official in an international organization could be attributed to the organization in question in the same way as ill-treatment inflicted on an alien by a gendarme or police officer could be attributed to the State. Paragraph 1 before the Commission took those concerns into account by stating that: "The conduct of an organ or agent of an international organization in

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* Resumed from the 2808th meeting.

** Resumed from the 2803rd meeting.

[1] For the text of articles 1 to 3 of the draft articles and commentaries thereto adopted by the Commission at its fifty-fifth session, see *Yearbook ... 2003*, vol. II (Part Two), chap. IV, sect. C, pp. 18–23.

[2] Reproduced in *Yearbook ... 2004*, vol. II (Part One).

[3] *Ibid.*

[4] *Ibid.*

[5] See 2792nd meeting, footnote 5.

the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization".

7. Corporations or individuals whose conduct could be attributed to an international organization would from now on be referred to as "an organ or agent" of an international organization. The Drafting Committee had also wished to retain the term "agent" on account of the importance attached to it by the advisory opinion of ICJ. At the outset, the Committee had considered the possibility of using the wording "organs, agents or officials", which seemed to be broader. It had subsequently considered that it was not necessary to retain the term "officials", since the term "agents" included officials. It had then agreed to refer merely to "an organ or agent", but, in order to ensure that the term "agent" would be understood in broad terms, it had decided to give a definition of it in a separate paragraph. The definition was given in paragraph 2. The word "organ" was not defined. The Committee was aware that, while it was easy to identify an "organ" in the context of the United Nations or another more important and more complex international organization, the same was not necessarily true of all the other international organizations to which those articles applied. The "rules of the organization" must obviously be examined to determine whether the organ was of that organization; that matter would be taken up later in the commentary.

8. A second criterion introduced in paragraph 1 was that the conduct of an organ or an agent of an international organization must occur "in the performance of functions of that organ or agent". It would be recalled that, during the debate in plenary, many members had observed that there must be a sufficient link between the conduct of an organ or of an agent and the organization. The Drafting Committee had agreed. In view of the fact that the category of entities and persons whose conduct was attributable to an international organization had been extended, article 4 seemed to incorporate some elements from article 5 of the draft articles on State responsibility and it was therefore necessary for the link with the organization to be specified. The Drafting Committee had considered various formulations, such as: "the conduct of an organ or an agent of an international organization in the performance of the organization's functions" or "in the performance of their official functions". The Committee had rejected the third solution because the link between conduct and the organization was not strong enough. There were no functional or legal links between conduct and the organization other than those referred to by the organ or agent themselves. Having considered the first and second solutions, the Committee had opted in the end for the latter, namely the conduct of an organ or agent in the performance of the functions of that organ or agent. The advantage of that solution was that a complainant simply had to prove that the conduct of the organ or agent in question had occurred in the performance of its functions, and not that the function was also the function of the organization, which would have raised the problem of the burden of proof.

9. According to the last part of paragraph 1, conduct was attributable to the organization "whatever position the organ or agent holds in respect of the organization". The words "in the structure of the organization", proposed by the Special Rapporteur, had been replaced by the words "in the organization", which were more suited to the broad definition of an organ or agent for which the Committee had opted.

10. According to paragraph 2, "For the purposes of paragraph 1, the term 'agent' includes officials and other persons or entities through whom the organization acts". An "agent" could therefore be an individual or corporation. The expression "other persons or entities" should therefore be interpreted in a broad sense, as he had explained in connection with paragraph 1. The Committee had considered introducing the following condition at the end of that paragraph: "subject to these officials, persons or other entities acting in an official capacity", but it had ultimately decided not to do so. Some members of the Committee had considered that such a condition was too restrictive, while others had deemed it superfluous insofar as paragraph 1 stated that the conduct in question should occur in the performance of the functions of that organ or agent. Clearly, conduct was not attributable to an international organization when an organ or agent of that organization was acting in a personal capacity. The Committee had agreed that the matter should be dealt with in the commentary and not in the text of the article.

11. Paragraph 3 corresponded to paragraph 2 proposed by the Special Rapporteur. He recalled that, at the beginning of his statement, he had said that there were three issues to be dealt with, the third being that of the applicable law. In plenary, there had been broad support for the Special Rapporteur's proposed paragraph 2, according to which the organs, officials and persons mentioned in paragraph 1 "are those so characterized under the rules of the organization". However, since paragraph 1 had been recast, the formulation had had to be revised in view of its apparent contradiction with that paragraph. The two paragraphs defined organs and agents, but in a different way. In the Drafting Committee's view, the purpose of paragraph 3 should be to clarify the applicable law in order to define the *functions* of the organs and agents of an international organization. The Committee had agreed that those functions must, of course, be determined by the rules of the organization. Some members of the Committee had nonetheless feared that the paragraph was too restrictive and did not take account of the possibility that an organization could confer certain functions on an organ or agent without a clear statement to that effect in the organization's rules. It had also been pointed out that the paragraph did not take into consideration the "apparent authority" of an organ or an agent, which might be misleading for third parties. The Committee had therefore decided to amend the thrust of the paragraph. As currently drafted, it stated that the "rules of the organization shall apply to the determination of the functions of its organs and agents". It was clear that the rules of the organization were the basic applicable law. In particular, in view of the broad definition of "rules of the organization" given in paragraph 4, it was difficult to imagine that there could be functions which were not determined by those rules. That was particularly true of the functions of "organs". However, the paragraph did not rule out the possibility that, in exceptional circumstances, other rules or other considerations might apply

to determine the functions of organs or agents of an international organization. That point would be elaborated on in the commentary.

12. Paragraph 4 defined the "rules of the organization" and corresponded to paragraph 3 of the text proposed by the Special Rapporteur, which was based on the expression used in article 2, paragraph 1 (*j*), of the 1986 Vienna Convention and proposed several possible formulations. It should also be recalled that, in response to the question raised by the Commission, Governments had generally agreed that the definition was appropriate. The Drafting Committee had agreed to retain the basic structure of the 1986 definition which the Special Rapporteur had proposed and which contained the three following elements: "constituent instruments", "resolutions and decisions" and "established practice" of the organization. The Committee had discussed the meaning of the word "decisions" and how it differed from that of the word "resolutions", as used in the various international organizations. It had eventually come to the conclusion that, since the draft articles would need to apply to different organizations, the two terms should be interpreted in the context of each organization. The Committee had also decided to add the words "other acts taken by the organization", in view of the differences between organizations. The words would cover any act or measure taken by the organization, so long as it was in accordance with the constituent instruments of that organization. The commentary would provide further details of the meaning of the words "other acts taken by the organization". The Committee had then, in the French version, replaced the words *conformément à ces instruments* by the phrase *conformément aux actes constitutifs* in order to make the provision clearer. In addition, it had inserted a colon after the words "in particular" and semi-colons after the words "the constituent instruments" and "decisions, resolutions and other acts taken by the organization in accordance with those instruments", so as to emphasize the three separate elements covered in the paragraph.

13. Since paragraphs 2 and 4 of the article contained definitions, it might be preferable for them to be transferred to article 2, which dealt with definitions. A footnote had been added to that effect and the question would need to be considered at the end of the first reading. The title of the article was "General rule on attribution of conduct to an international organization".

14. Article 5 dealt with the attribution of conduct of an organ or agent of a State or an international organization placed at the disposal of another international organization. It was modelled on article 6 of the draft articles on responsibility of States for internationally wrongful acts. The Committee had made only drafting changes so as to align it with article 4, using the terms "organ" or "agent". The wording at the beginning of the article—"The conduct of an organ of a State or an organ or agent of an international organization"—was necessary because the premise of the draft articles on State responsibility was that States did not have "agents", but only "organs", whereas, in the topic under consideration, the basic idea of article 4 was that international organizations had "organs" and "agents". There had been a long discussion in plenary about "effective control"—mentioned near the end of article 5—as a criterion for attribution of conduct to an international organization. The outcome had been that conduct could be attributed only where an international organization exercised effective control over the conduct in question. Some members of the Commission had wondered how the "effective control" criterion would apply in practical terms. Most of the questions raised had concerned United Nations peacekeeping operations and particularly the question of whether operations under the general control of the United Nations met the "effective control" criterion or whether there existed a presumption to that effect. Questions had also been raised about the effect that an agreement between an international organization and a State or another international organization that placed an agent or organ at the disposal of an international organization might have on attribution of conduct.

15. The Drafting Committee had considered the issue at great length. It had decided that the only function of the article was to provide criteria for the attribution of conduct to an international organization. It had therefore replaced the phrase "to the extent that the organization exercises effective control" by the phrase "if the organization exercises effective control" in order to make it clear that the attribution applied only to an international organization. The article did not deal with the possibility that conduct could be attributable to an international organization as well as to a State or another international organization whose agent or organ had been placed at the disposal of the international organization in question. The possibility of a double attribution was therefore not excluded. As for the "effective control" criterion, the Committee had decided to retain the term, although it had wondered whether it had the same meaning in the draft article as in the case concerning *Military and Paramilitary Activities in and against Nicaragua* or in the *Tadic* case. It had agreed, however, that the question should be covered in the commentary and not in the text of the draft article. The commentary would also state that the provision would not apply to the responsibility of commanders of military units under international humanitarian law. The Committee had then considered whether the "effective control" criterion applied to the general behaviour of an "organ or agent" placed at the disposal of the organization or to specific conduct. It had come to the conclusion that the "effective control" criterion should, as in the case of article 6 of the draft articles on State responsibility, apply to specific conduct and not the general conduct of an organ or an agent. It had therefore amended the last part of the paragraph to read: "exercises effective control over that conduct".

16. The Drafting Committee had decided that the article did not apply to situations in which a natural person, whether considered as an organ or an agent, was attached to an international organization and thus became an organ or agent of that organization. It was intended to apply to situations in which that organ or agent, although placed at the disposal of an international organization, retained his original identity. Nor did the article relate to individual criminal responsibility. Further details would be given in the commentary.

17. The other question considered by the Drafting Committee had been whether, and to what extent, an

agreement between an international organization and a State or another international organization that put one of its organs or agents at the disposal of an international organization was affected by the question of attribution. The issue had also been fully explored in plenary. In order to settle the matter, the Committee had considered the possibility of adding a second paragraph to article 5 along the following lines:

> "Notwithstanding the provisions of paragraph 1, an agreement between a contributing State or an international organization and the host international organization may contain a different rule on the attribution of conduct. Such a rule may be applicable to a third party only if the latter knew, or should have known, the rule at the time of the conduct."

The Committee had, however, decided not to include such a paragraph, since it considered that any arrangement between an international organization and a contributing State or another international organization concerned only the two parties to the arrangement and should not impinge on the rights of third parties, even if such third parties knew of the arrangement. Moreover, such an agreement could not alter the rules of attribution of conduct, although it would affect the division of responsibility between the two contracting parties, for reasons different from those relating to the attribution of conduct. The Committee had therefore decided not to add a second paragraph to the article. The question should, however, be discussed in the commentary.

18. The title of article 5 was "Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization".

19. Draft article 6, which dealt with excess of authority or contravention of instructions, corresponded to article 7 of the draft articles on State responsibility. The text before the Commission was based largely on the Special Rapporteur's original draft of article 6. Several minor amendments had, however, been made. The first had been made in the light of the decision in article 4 to use the more generic term "agent" as meaning "[an official] or another person entrusted with part of the organization's functions". Thus, in article 6, the phrase "of an organ, an official or another person entrusted with part of the organization's functions" had been replaced by the phrase "of an organ or an agent of an international organization", while the phrase "if the organ, official or person acts in that capacity" had been replaced by the phrase "if the organ or agent acts in that capacity".

20. The aim of the second amendment was to emphasize that it was the authority of the "organ" or "agent" that the conduct exceeded and that it was the instructions of that organ or agent that were contravened. Such wording avoided the use of a pronoun to describe the "organ" or "agent". Thus, the phrase "even though the conduct exceeds authority or contravenes instructions" had been amended to read: "even though the conduct exceeds the authority of that organ or agent or contravenes instructions". The difference in that regard between article 6 and article 7 of the draft articles on State responsibility was purely stylistic.

21. The Drafting Committee had also wondered whether there was a contradiction between the phrase "in the performance of functions of that organ", which appeared in article 4, and the phrase "in that capacity" in article 6. They might actually constitute two different proposals, the one being functional while the other related to capacity, which could have consequences for the question of attribution.

22. There was general agreement that article 6 went further than what might be understood as a "general rule on attribution of conduct". Whereas the "functions" were a fundamental aspect of article 4, the focus in article 6 was the organ's or agent's capacity to act and not the functions of that organ or agent. Although the phrase "in that capacity" was not entirely satisfactory, the Drafting Committee had decided to retain it. It appeared in article 7 of the draft articles on State responsibility and played a crucial role as the link between *ultra vires* conduct and the functions entrusted to the organ or the agent.

23. The title of the article, "Excess of authority or contravention of instructions", was identical to that of article 7 of the draft articles on State responsibility.

24. Article 7, which dealt with conduct acknowledged and adopted by an international organization as its own, corresponded to article 11 of the draft articles on State responsibility and had met with general approval in the plenary. The Drafting Committee had not made any amendments, except, in the French and Spanish versions, to replace the indefinite article with the definite article at the beginning of the sentence, in order to align it with the preceding draft articles. It had been agreed that article 7 did not exclude the possibility that conduct was attributable to another international organization or another State under generally applicable rules. In order to ensure consistency with article 11 of the draft articles on State responsibility, the Committee had refrained from deleting the words "if and", even though that would have simplified the text. The Committee had also considered the question as to whether, in view of the specific competences of international organizations, the scope of article 7 should be restricted by a reference to the "rules of the organization". It had decided against the inclusion of such a phrase on the understanding that there might be situations when conduct that might be acknowledged or adopted was in fact *ultra vires*, or when a third party could rely on such conduct. It had been agreed that the matter would be dealt with in the commentary.

25. Article 7 was entitled "Conduct acknowledged and adopted by an international organization as its own".

26. The CHAIRPERSON invited the members of the Commission to adopt on first reading the titles and texts of the draft articles on responsibility of international organizations, as submitted by the Drafting Committee.

Article 4 (General rule on attribution of conduct to an international organization)

27. Mr. PELLET said that the word "*attribution*", not the word "*imputation*", should be used in the title of the French text of article 4 to bring it into line with the

English text. The same comment applied to the French text of article 7, in which the word "*imputable*" should be replaced by the word "*attribuable*".

28. In paragraph 4 of the French text of article 4, the use of the words "*actes constitutifs*" as a translation of the words "constituent instruments", which were perfectly acceptable, was shocking. Just as a country could have only one constitution, an international organization could have only one constituent instrument. He therefore proposed that the words "*s'entend notamment des actes constitutifs*" should be replaced by the words "*s'entend notamment de l'acte constitutif*", and the words "*conformément aux actes constitutifs*" by the words "*conformément à l'acte constitutif*".

29. Article 4, paragraph 3, was obscure and incomprehensible, despite the explanations the Special Rapporteur had given in his introduction concerning its relationship with article 6. Since the provision could not be amended in plenary, he therefore expressed the strongest reservations on that paragraph.

30. Mr. GAJA (Special Rapporteur) said that he endorsed Mr. Pellet's comment that, in the French text, the words "*attribution*" and "*attribuable*" should be used instead of the words "*imputation*" and "*imputable*". With regard to the use of the words "*actes constitutifs*" in the plural, he pointed out that that was the form used in the French text of the corresponding provision of the 1986 Vienna Convention, article 2, paragraph 1 (*j*). For the sake of uniformity, it would therefore be preferable not to use the singular. As to paragraph 3, he proposed that it should be explained in the commentary that article 4 dealt with the general rule of attribution and that article 6 dealt with cases in which acts were committed by organs or agents outside the framework of the normal exercise of functions. The wording of paragraph 3 was not that which he had proposed, but it had been adopted by the Drafting Committee and he had no objection to it.

31. Mr. GALICKI, supported by Mr. AL-BAHARNA, said that he had understood that article 4, paragraph 2, might be relocated, as indicated in the footnote to the text adopted by the Drafting Committee. As currently worded, it seemed slightly illogical, in that it said that the term "agent" was defined "for the purposes of paragraph 1", whereas the term also appeared in articles 5 and 6, *inter alia*. The restriction of the meaning of the word "agent" solely to paragraph 1 should accordingly be eliminated or modified. Similarly, the words "for the purpose of the present draft article", at the start of paragraph 4, seemed inappropriate, since the words "rules of the organization" appeared in other articles. There was a lack of consistency that should be corrected in future work.

32. Mr. GAJA (Special Rapporteur) said that, if paragraphs 2 and 4 were transferred to article 2, they would have to be adapted to the new context and their wording would accordingly need to be modified. He did not think such changes could be made at the present stage, since the Commission was going to adopt new articles and the change could be made only at the end of the procedure. For the time being, it could be explained that what applied to article 4 implicitly also applied to the other articles. He therefore proposed that the text should be left as it was pending the decision to be taken on the relocation of the paragraphs.

33. Mr. FOMBA said that he supported Mr. Pellet's proposal concerning the use of the singular for the words "*actes constitutifs*", since the example of Community law, which distinguished between primary rules ("*droit primaire*") and subsidiary rules ("*droit dérivé*"), appeared to militate in favour of that wording.

34. Mr. GAJA (Special Rapporteur) said the example given by Mr. Fomba had not won him over, for the simple reason that the Treaty on European Union (Maastricht Treaty) and the Treaty establishing the European Community were of the same hierarchical level, both being primary rules. He had nothing against the use of the singular for "*actes constitutifs*", but that would mean departing from the 1986 Vienna Convention and he would have to explain in a footnote to the commentary why the French text was at variance with the English.

35. Mr. PELLET said that the English version could simply be translated into French as "*instruments constitutifs*", since, in the Community law example, there was obviously more than one constituent instrument. He had no qualms about departing from the 1986 Vienna Convention. The choice was thus between "*instruments constitutifs*", in the plural, and "*acte constitutif*", in the singular, with the second option being preferable, in his view.

36. Mr. PAMBOU-TCHIVOUNDA pointed out that the title of article 4 referred to "an" international organization and that an international organization could not have more than one constituent instrument.

37. Mr. ECONOMIDES said that Mr. Pambou-Tchivounda's logic was Cartesian, but that he nevertheless supported Mr. Pellet's proposal to use the phrase "*instruments constitutifs*", which would have the advantage of streamlining a text in which the word "*acte*" appeared three times.

38. Mr. GAJA (Special Rapporteur) said that the 1986 Vienna Convention spoke of "*actes constitutifs*" in relation to the rules "*de l'organisation*"; in other words, in relation to a single organization.

39. Mr. DAOUDI asked the Special Rapporteur why the words "constituent instruments" had been used in the plural in the 1986 Vienna Convention and whether that was perhaps not an error.

40. Mr. GAJA (Special Rapporteur) said that, if there had been an error, it dated far back in time, since the 1986 Vienna Convention reproduced exactly the same wording as in article 1, paragraph 1 (34), of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, which was to be found in paragraph 20 of his report.

41. The CHAIRPERSON said that it did not seem appropriate to engage in a drafting exercise at the current stage of the work. He invited the Commission to adopt the amendment to the title of article 4 proposed by Mr.

Pellet and to keep in mind, for the second reading or any other review of the text, the comments made by Mr. Al-Baharna, Mr. Daoudi, Mr. Economides, Mr. Galicki, Mr. Pellet and Mr. Pambou-Tchivounda concerning the other aspects of the wording of that article.

Article 4 was adopted, as orally amended in French by Mr. Pellet.

Article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization)

42. Mr. Sreenivasa RAO said that the case of peacekeeping operations was a difficult issue for United Nations legal experts. He hoped that the Special Rapporteur would find an appropriate way of explaining that in the commentary.

43. Mr. GAJA (Special Rapporteur) assured Mr. Sreenivasa Rao that the commentary would deal with the rules for attribution of conduct in the case of peacekeeping operations.

44. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt article 5, bearing in mind the comments by Mr. Sreenivasa Rao.

Article 5 was adopted.

Article 6 (Excess of authority or contravention of instructions)

45. Mr. AL-BAHARNA said that he sincerely hoped that the commentary would explain the reasons for the inclusion of an article on excess of authority or contravention of instructions in the draft articles on responsibility of international organizations.

46. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt article 6, bearing in mind the comments by Mr. Al-Baharna.

Article 6 was adopted.

Article 7 (Conduct acknowledged or adopted by an international organization as its own)

47. The CHAIRPERSON recalled Mr. Pellet's proposal to replace the word "*imputable*" by the word "*attribuable*" in the French text of the article in order to bring it into line with the English text. If he heard no objection, he would take it that the Commission wished to adopt article 7, as amended.

Article 7 was adopted, as orally amended in French by Mr. Pellet.

48. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the draft articles on the responsibility of international organizations as a whole, as submitted by the Drafting Committee.

It was so decided.

Reservations to treaties[6] (A/CN.4/537, sect. E, A/CN.4/544,[7] A/CN.4/L.649 and Corr.1)

[Agenda item 6]

Report of the Drafting Committee

49. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee), introducing the titles and texts of the draft guidelines adopted by the Drafting Committee (A/CN.4/L.649), said that they covered the five draft guidelines which the Commission had referred to the Committee at is fifty-fifth session and to which the Committee had devoted two meetings. He thanked the Special Rapporteur, Mr. Pellet, for his advice and cooperation and the members of the Drafting Committee for their constructive suggestions and active participation in the Committee's deliberations.

50. The five draft guidelines submitted to the Commission dealt with one last aspect of the modification of reservations (widening of the scope of a reservation), as well as with the modification and withdrawal of interpretative declarations, including conditional interpretative declarations.

51. Draft guideline 2.3.5 was entitled "Widening of the scope of a reservation". The Drafting Committee had kept the initial title of the draft text, which had triggered a fairly lively plenary debate during the fifty-fifth session, when the Special Rapporteur had even submitted a definition of the widening of the scope of a reservation. Some members had queried whether the section in brackets in the Special Rapporteur's initial proposal should be maintained. In that connection, attention had also been drawn to the fact that the reference to draft guideline 2.3.3 was not without problems, since the latter related to an objection to the late formulation of a reservation, which prevented the reservation from being established, whereas the initial reservation had already been established when the scope of a reservation was widened. The draft guideline dealt with a situation which was encountered in practice, where a State or an international organization intended to widen the scope of its initial reservation, a situation which was very similar to the late formulation of a reservation. The Drafting Committee had considered several possibilities ranging from rather long, explanatory wording (paragraph 1 containing a definition of "widening", a paragraph 2 containing the applicable rules, and so on) to more concise formulations. It had finally opted for the current wording, which was not very different from the draft text proposed by the Special Rapporteur. The Committee had also seen no need to retain the words in brackets, as the explicit reference to other guidelines made the text very unwieldy. In order to solve the question of the not entirely relevant reference to draft guideline 2.3.3, moreover, a second sentence had been added which stated that, if an objection was made to the widening of the scope of the reservation, the initial reservation would remain unchanged.

[6] For the text of the draft guidelines provisionally adopted by the Commission to date, see *Yearbook ... 2003*, vol. II (Part Two), pp. 65–70, para. 367.

[7] See footnote 2 above.

52. Draft guideline 2.4.9, entitled "Modification of an interpretative declaration", had not given rise to much comment in plenary. The Drafting Committee had considered some variations in the initial wording; for example, placing the first phrase ("Unless the treaty …") at the end of the guideline. For the sake of consistency with the other draft guidelines and with the 1969 Vienna Convention, the Committee had finally decided to keep the original order. The text was virtually the same as that proposed by the Special Rapporteur.

53. Consideration had also been given to linking the draft guideline with draft guidelines 2.4.3 ("Time at which an interpretative declaration may be formulated") and 2.4.6 ("Late formulation of an interpretative declaration"). Draft guideline 2.4.3 was concerned with the time at which an interpretative declaration might be formulated without prejudice to the special rules provided for in other guidelines. Draft guideline 2.4.6 related to the late formulation of an interpretative declaration and was, in some respects, the counterpart of draft guideline 2.4.9. In order not to make the text of the guideline too cumbersome, the Drafting Committee had been of the opinion that it would be better to analyse its relationship with draft guidelines 2.4.3 and 2.4.6 in the commentary. The Drafting Committee had also discussed the use of the verb "made", which, at first glance, might seem somewhat strange in a guideline on the modification, not the formulation, of an interpretative declaration. It had been felt that, if a treaty stipulated that an interpretative declaration could be made only at specified times, it followed *a fortiori* that such an interpretative declaration could not be modified. The Drafting Committee had thought, however, that it would be useful for such an explanation to appear in the commentary.

54. The wording of draft guideline 2.4.10, entitled "Limitation and widening of the scope of a conditional interpretative declaration", diverged considerably from the initial version and was based on the idea that since it was extremely difficult to distinguish between the limitation and the widening of the scope of a conditional interpretative declaration, such a declaration could be modified only if none of the other contracting parties objected. That concept was reflected in the introduction of rules on the modification of conditional interpretative declarations that were stricter than those applying to reservations. The Drafting Committee, having reconsidered the matter, had arrived at the conclusion that there was nothing against the modification of a conditional interpretative declaration being governed by the rules for the partial withdrawal or the widening of reservations. That was exactly what was meant by the draft guideline. The order of the two kinds of modification (limitation or widening) was determined in the draft text by the frequency of their occurrence in practice, since conditional interpretative declarations were limited more often than they were widened.

55. Draft guideline 2.5.12 dealt with the time at which an interpretative declaration could be withdrawn, and it posed no particular problems. The Drafting Committee had thought about retaining the introductory phrase "Unless the treaty provides otherwise" and the words in brackets ("in conformity with the provisions of guidelines 2.4.1 and 2.4.2"). However, it had ultimately decided to delete both phrases on the grounds that the phrase at the beginning of the draft guideline was redundant, since the whole Guide to Practice was simply an additional reference source confirming usage, as were the 1969 and 1986 Vienna Conventions themselves. Hence it was understood that any special treaty provision, or any clause of a treaty that said the opposite, would take precedence. The only reason for retaining that phrase would be to mirror article 22, paragraph 3, of the 1969 Vienna Convention. However, the view had been taken that, in the case in point, it would not add anything and would tend to make the text unwieldy. The Drafting Committee was of the opinion that an explanation of that point should appear in the commentary. The words in brackets had also been deleted for ease of reading and for the same reasons as those stated in respect of draft guideline 2.3.5. The draft guideline would thus be in line with the wording finally adopted for draft guideline 2.3.5. An explanation to that effect should also be placed in the commentary. Draft guideline 2.5.12 was entitled "Withdrawal of an interpretative declaration".

56. Draft guideline 2.5.13, entitled "Withdrawal of a conditional interpretative declaration" had not produced many reactions. The Drafting Committee had decided to delete the phrase in brackets ("given in guidelines 2.5.1 to 2.5.9") for the sake of consistency with the previous draft guidelines. Apart from that amendment, which should also be explained in the commentary, the draft guideline remained unchanged. It stated that the withdrawal of a conditional interpretative declaration was governed by the rules applying to the withdrawal of reservations. Of course, that draft guideline, like all the others relating to conditional interpretative declarations, depended on the Commission's final decision on that subject. If it were shown that conditional interpretative declarations "behaved" like reservations, it might be enough to set out the rules applying to them in one or two general draft guidelines, but it would not be possible to reach any decision in that regard until the study of the topic was drawing to a close.

57. In conclusion, he proposed that the Commission should adopt the draft guidelines that he had introduced.

58. The CHAIRPERSON invited the members of the Commission to adopt the draft guidelines on reservations to treaties adopted by the Drafting Committee, guideline by guideline.

Draft guideline 2.3.5 (Widening of the scope of a reservation)

Draft guideline 2.3.5 was adopted.

Draft guideline 2.4.9 (Modification of an interpretative declaration)

Draft guideline 2.4.9 was adopted.

Draft guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration)

59. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) said that in order to bring the French title of the draft guideline into line with that of the other languages, the word "*ou*" should be replaced by the word "*et*".

Draft guideline 2.4.10, as amended, was adopted.

Draft guideline 2.5.12 (Withdrawal of an interpretative declaration)

60. Mr. CANDIOTI said that the words "*competente para este fin*" in the Spanish version of the draft guideline and the equivalent words in English "competent for that purpose" were ambiguous, since it was unclear whether the authorities in question were those competent for withdrawal or those competent for formulation. The French text was clearer.

61. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) said that the reference was to the authorities competent for formulation and that the different language versions should therefore be harmonized.

62. Mr. GAJA suggested that the problem might be solved in the English text by placing the words "following the same procedure applicable to its formulation" after the words "at any time".

63. Mr. Sreenivasa RAO said that he had no objection to that amendment, since the selfsame authorities were competent for both the formulation and the withdrawal of an interpretative declaration.

64. Mr. PELLET (Special Rapporteur) said that he was in favour of the amendment proposed by Mr. Gaja.

Draft guideline 2.5.12 was adopted subject to the proposed amendment of the English text and the corresponding amendment of the Spanish text.

Draft guideline 2.5.13 (Withdrawal of a conditional interpretative declaration)

Draft guideline 2.5.13 was adopted.

65. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the draft guidelines on reservations to treaties adopted by the Drafting Committee.

It was so decided.

The meeting rose at 11.35 a.m.