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Summary record of the 2882nd meeting

Topic:
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)

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The problem raised by Mr. Valencia-Ospina would best be dealt with in the commentary.

111. The CHAIRPERSON noted that the phrase had elicited no comment or observation from Governments. Draft article 16 simply indicated that the system set up under the 19 articles of the draft was in no way incompatible with any other actions that might be implemented by the various entities listed in order to secure redress under a general or special system of international responsibility.

112. Mr. BROWNLIE proposed that the Commission should follow the advice of the Chairperson of the Drafting Committee and adopt the text submitted by the Drafting Committee, particularly in view of the fact that Governments had not criticized the expression "or other entities".

113. The CHAIRPERSON said that the debate had raised a number of interesting points, which the Special Rapporteur would try to cover in the commentary.

Draft article 16 was adopted.

Draft articles 17 to 19

Draft articles 17 to 19 were adopted.

114. The CHAIRPERSON said he took it that the Commission wished to adopt on second reading, the titles and texts of the draft articles on diplomatic protection, as a whole, as amended.

It was so agreed.

115. Mr. DUGARD (Special Rapporteur) expressed his gratitude to the Commission for having adopted the draft articles on second reading. In particular, he wished to thank the Chairperson of the Drafting Committee, Mr. Kolodkin, the other members of the Drafting Committee and the Chairperson of the Commission for guiding it through the final stage of the proceedings.

Organization of work of the session (*continued*)

[Agenda item 1]

116. Mr. KOLODKIN (Chairperson of the Drafting Committee) announced that the Drafting Committee on responsibility of international organizations was composed of Mr. Economides, Ms. Escarameia, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Valencia-Ospina and Mr. Yamada, together with Mr. Gaja (Special Rapporteur) and Ms. Xue (Rapporteur), *ex officio*. The Drafting Committee on shared natural resources was composed of Mr. Candioti, Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson and Mr. Pambou-Tchivounda (Chairperson of the Commission), together with Mr. Yamada (Special Rapporteur) and Ms. Xue (Rapporteur), *ex officio*.

The meeting rose at 12.30 p.m.

2882nd MEETING

Friday, 2 June 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

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) (*concluded*)* (A/CN.4/562 and Add.1, A/CN.4/566, A/CN.4/L.686 and Corr.1)

[Agenda item 3]

Report of the Drafting Committee

1. Mr. KOLODKIN (Chairperson of the Drafting Committee 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)), introducing the report of the Drafting Committee on the Commission's second reading of the draft principles on the allocation of loss arising out of hazardous activities (A/CN.4/L.686), said first of all that the question of the final form of the instrument had continued to elicit different views at various stages of the Commission's consideration of the topic, and that the majority of Commission members had favoured an outcome in the form of principles; it was on that basis that the Drafting Committee had proceeded. It should be recalled that the Commission had adopted texts cast as principles in the past: in 1950, for example, it had adopted the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[147]

2. The title and structure adopted on first reading had been retained.[148] The Drafting Committee had been mindful of the fact that some of the principles, such as draft principle 1, on scope of application, or draft article 2, on the use of terms, would not qualify as principles in the strict sense of the term. It had nevertheless decided to retain the term "principle", a decision that simply reflected the Commission's wish to arrive at a text that was legally non-binding and used the term with some coherence and consistency.

3. The Drafting Committee was conscious that through the draft principles the Commission was endeavouring to

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* Resumed from the 2875th meeting.

[147] See footnote 86 above.

[148] See footnote 55 above.

set out a coherent set of standards of conduct and practice that all States were expected to comply with. Some aspects might correspond to existing or developing customary international law. However, the Drafting Committee had focused its work on formulating the substance of the draft principles, and it had therefore chosen not to consider in depth or evaluate the current status of different principles, or various aspects of the principles, in international law. Thus the wording of the draft principles, including the verb forms used, did not reflect that concern.

4. Turning to the text of the draft principles, he said that the Drafting Committee had considered the preamble on the basis of the draft adopted on first reading, to which it had made a number of changes. It had felt it necessary to retain in the first paragraph the specific references to principles 13 and 16 of the Rio Declaration[149] rather than a general reference to the Declaration itself. It had also decided that those two principles provided a rationale for the current exercise, and had therefore changed the word "recalling" to the more affirmative "reaffirming". The third preambular paragraph had also been changed: in order not to prejudge the outcome of the work of the General Assembly, where the draft articles on prevention of transboundary harm from hazardous activities[150] were still being considered,[151] the reference to the provisions of the draft articles on prevention had been changed to reflect the general need for States to comply with their obligations relating to the prevention of transboundary harm. As the purpose of the preamble was to set out objectives, the Drafting Committee had strengthened the language of the fifth paragraph by deleting the phrase "as far as possible", as some Governments had wished, and amending the phrase "should be able to obtain" to read "are able to". Moreover, the word "emphasizing" had replaced the word "concerned" in order to avoid repetition, as the latter word was used in the subsequent paragraph. That paragraph was an addition, becoming the sixth preambular paragraph, and stressed a point that was also covered in the draft principles, namely the need for appropriate response measures when an incident occurred. In the seventh preambular paragraph, formerly the sixth, the phrase "States shall be responsible" had been amended to read "States are responsible". The Drafting Committee had also deleted what had been the seventh preambular paragraph for reasons of economy and in order not to cast doubt on the importance of international cooperation among States. Lastly, the eighth preambular paragraph had been changed in order to recall the significance of existing international agreements that dealt with specific hazardous activities and to stress the importance of concluding additional agreements of that type.

5. He next proposed to take up the draft principles individually. With regard to draft principle 1 (Scope of application), there had been a general understanding that the draft principles had the same scope of application as the draft articles on prevention in that they were both intended to cover "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences". On first reading the language of the draft principle had thus been aligned with the corresponding language in the draft articles on prevention. On second reading the Drafting Committee had found that wording too verbose, and it had sought to overcome that lack of elegance without losing the essential connection to the draft articles on prevention. Accordingly, the text had been simplified without changing its substantive scope. The phrase "transboundary damage caused by hazardous activities not prohibited by international law" continued to embrace four essential elements that were prominent in the draft articles on prevention. The first two—the fact that such activities were not prohibited by international law and the fact that they involved a risk of causing significant harm—had been captured in the new wording of draft principle 1 and were partly reflected in the definition of the term "hazardous activity" contained in subparagraph (*c*) of draft principle 2 (Use of terms). The third, or territorial, element was currently reflected in the notion of "transboundary" and the consequent definition of "transboundary damage" contained in subparagraph (*e*) of the same draft principle. The fourth element, i.e., the physical consequences, had been deleted from the text on the understanding that it would be reflected in the commentary. The draft principles continued to apply to hazardous activities involving a risk of causing transboundary damage through their physical consequences. Thus transboundary harm caused by State policies in monetary, socio-economic or similar areas was excluded from the scope of the draft principles. It should be noted that the term "transboundary damage" was used for the purposes of the draft principles simply to draw attention to the emphasis placed in the liability phase on the damage actually caused.

6. With regard to draft principle 2 (Use of terms), he noted that some paragraphs had been renumbered because of the introduction of two additional terms that the Drafting Committee had felt needed to be defined for the purposes of the draft principles: "State of origin" and "victim". The definition of "damage" in subparagraph (*a*) remained unchanged. It was directed at three essential elements, namely persons, property or the environment, and it was understood to include damage to State property. There had been a brief discussion as to whether the tautology in the definition ought to be removed by using a term such as "significant harm", but it had been felt that the term "damage" had a particular meaning in the context of the draft principles, intended to distinguish the current work from the work on prevention, and the Drafting Committee had therefore decided to retain the original definition. It would have to be clarified in the commentary that the threshold of "significant" was also intended to avert frivolous or vexatious claims. The definition of the term "environment" in subparagraph (*b*) had also remained unchanged.

7. There had been a slight change, however, in the definition of the term "hazardous activity" in subparagraph (*c*), which had previously been subparagraph (*d*). As a result of the changes made to draft principle 1, the phrase "through its physical consequences" at the end of the original text had been deleted, and it would be explained in the commentary that

[149] See footnote 72 above.

[150] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 146, para. 97.

[151] *Ibid.*, p. 145, para. 94.

the hazardous activities implied by the draft principles were activities that had a risk of causing transboundary harm through their physical consequences. Once again, there had been a discussion as to whether the expression "significant harm" should be changed to "significant damage". It was understood that the phrase reflected the general thrust of the Commission's work on the topic over the years. The notion of "damage" had been introduced in the draft principles simply to denote the specificity of the transboundary harm that occurred; accordingly the term "significant harm" had been retained.

8. The definition of "State of origin" in subparagraph (*d*) was the same as the definition in the draft articles on prevention and had a similar import. The commentary would clarify other terms that had been used in the text of the draft principles, such as "State affected", "State likely to be affected" and "States concerned", but the Drafting Committee had decided not to specifically define them in order to retain a certain balance in the text of the principles as a whole.

9. The definition of "transboundary damage" in subparagraph (*e*), formerly subparagraph (*d*), had undergone two changes. First, the phrase "to persons, property or the environment" had been inserted between "damage caused" and "in the territory" to clarify the meaning of the word "caused", which in the case at hand was "suffered". Secondly, as a consequence of the introduction of the definition of "State of origin" in the draft, the phrase "other than the State in the territory, or otherwise under the jurisdiction or control of which the activities referred to in draft principle 1 is carried out" had been replaced by the phrase "other than the State of origin". Thus formulated, the definition of "transboundary harm" covered damage that might be caused, for example, to exclusive economic zones, as provided for in some liability regimes, or to oil platforms.

10. A new subparagraph (*f*) that defined the term "victim" had been added, following consideration of a proposal by the Special Rapporteur concerning draft principle 3, which sought to clarify that for the purposes of the draft principles, natural or legal persons, including States, could be considered victims, depending on the nature of the damage involved. Since it was felt that that wording would be better placed in the provision on use of terms than in draft principle 3, the Drafting Committee had decided to define the term "victim" for the purposes of the draft principles. The definition of "operator" in subparagraph (*g*), formerly subparagraph (*e*), remained unchanged; the definition was a functional one, and the wording "at the time the incident … occurs" was intended to establish a connection between the operator and the transboundary activity.

11. Turning to draft principle 3, he noted that the title had been changed from "Objective" to "Purposes", to better reflect the essential rationale for developing the draft principles. The Drafting Committee had proceeded on the basis of a proposal by the Special Rapporteur to separate the various elements covered in the previous text, which had been densely worded. The new wording captured two of those core issues in two separate paragraphs, namely, "to ensure prompt and adequate compensation to victims of transboundary damage" (subparagraph (*a*)) and to preserve and protect the environment (subparagraph (*b*)). As was borne out by practice, the latter objective would be accomplished primarily by taking response measures aimed at mitigating the damage and reasonable measures of restoration or reinstatement, concepts referred to in draft principle 2. The third purpose was to identify the victims of transboundary damage; that question was currently addressed in the provision on "Use of terms".

12. Draft principle 4 (Prompt and adequate compensation) was essential to the scheme of allocation of loss and was virtually identical to the text adopted on first reading. It reflected four important elements of the scheme for allocation of loss. First, States must establish a liability regime that afforded redress and compensation to victims of transboundary harm. Secondly, the regime should impose liability on the operator without requiring proof of fault. Thirdly, such liability could be subject to conditions, limitations or exceptions, which should be consistent with the purposes of draft principle 3. Lastly, provision must be made for a tiered scheme for ensuring that compensation was available to those suffering damage. Such a scheme would seek to integrate and harness, in as flexible a manner as possible and taking particular needs and interests into account, the various forms of security, insurance and industry funding to provide sufficient financial guarantees of compensation. It should be noted that the notion of liability without proof of fault in paragraph 2 embraced the various designations used in different legal systems to describe "strict liability". It was understood that the commentary would elaborate on the meaning of "prompt and adequate compensation" more fully. Some minor changes had been introduced in draft principle 4. For example, paragraph 5 did not directly require the State of origin to set up government funds to guarantee prompt and adequate compensation; it did have to ensure that additional financial resources were made available. The Drafting Committee had also felt that the words "are made available" were more felicitous than "are allocated".

13. With regard to draft principle 5 (Response measures), it would be recalled that the provision adopted on first reading had brought together a series of different notions in a single paragraph. That provision had undergone structural and substantive changes. On the basis of a proposal by the Special Rapporteur, the various levels of interaction anticipated in the event of an incident had been made more specific. The first three measures—notification, response, and consultation and cooperation—were the responsibility of the State of origin. The other two, mitigation and assistance, applied to States that were affected or were likely to be affected by the damage and the States concerned. The adoption of expeditious response measures following the occurrence of an incident was an important element in the mitigation of the overall damage that could result from such an incident.

14. Draft principle 6 (International and domestic remedies) had undergone some changes, on the basis of a proposal by the Special Rapporteur, in order to highlight further the principle of equal access to domestic remedies, which comprised three elements: participation in administrative hearings and judicial proceedings;

non-discrimination; and access to information. Those elements were dealt with separately and in detail in the new text. Initially they had been grouped together in paragraph 3 of the original principle 6, whereas they were now covered in paragraphs 1, 2, 3 and 4. The reference to international claims settlement procedures, formerly in paragraph 2, had been retained and moved to paragraph 4. Such procedure included mixed claims, commissions and negotiations for lump-sum payments. The international component did not preclude the possibility of a State of origin participating in the disbursement of compensation to an affected State through a national claims procedure established by the affected State.

15. Draft principle 7 (Development of specific international regimes) built on principle 22 of the Stockholm Declaration[152] and principle 13 of the Rio Declaration.[153] The change in the wording of paragraph 1 sought to strengthen the text by emphasizing the need to conclude such specific agreements that would deal with the three main aspects of the draft principles, namely, compensation, response and remedies. Paragraph 2 had also undergone some drafting modifications. As currently worded it provided that such agreements should, as appropriate, include arrangements for industry or State funds as a third tier of compensation. The word "losses" in the initial draft had been changed to the more precise "damage", which was used throughout the draft principles. The flexibility afforded by the paragraph was comparable to that which the parties to negotiations of such agreements enjoyed in establishing arrangements that were suitable for a particular sector or activity.

16. The changes introduced in draft principle 8 (Implementation) had been made to improve and tighten the language used as well as to ensure clarity. The reference to nationality, domicile or residence was merely intended to stress the circumstances in which discrimination frequently manifested itself in situations covered by the draft principles without excluding other forms of discrimination. The phrase "consistent with their obligations under international law" at the end of paragraph 3 of the text adopted on first reading, considered superfluous and imprecise, had been deleted. The key element to be stressed was the duty of States to cooperate in the implementation of the draft principles.

17. He concluded by recommending to the Commission that it should adopt on second reading the draft principles submitted to it by the Drafting Committee.

18. The CHAIRPERSON suggested that the Commission should consider and, where appropriate, adopt the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (A/CN.4/L.686) submitted by the Chairperson of the Drafting Committee.

Preamble

First preambular paragraph

The first preambular paragraph was adopted.

[152] See footnote 71 above.

[153] See footnote 72 above.

Second preambular paragraph

19. Mr. VALENCIA-OSPINA said that it should be recalled, if only implicitly, that the draft articles on prevention of transboundary harm had already been submitted to the General Assembly.[154]

20. The CHAIRPERSON suggested that this information should be included in a footnote, in accordance with standard practice.

It was so decided.

The second preambular paragraph, with the proposed addition, was adopted.

Third to eighth preambular paragraphs

The third to eighth preambular paragraphs were adopted.

Ninth preambular paragraph

21. Mr. ECONOMIDES proposed that the word "further" should be deleted, as it seemed to him superfluous in qualifying the development of international law.

22. Mr. Sreenivasa RAO (Special Rapporteur) endorsed that proposal.

The ninth preambular paragraph, as amended, was adopted.

Draft principle 1 (Scope of application)

Draft principle 1 was adopted.

Draft principle 2 (Use of terms)

Subparagraph (*a*)

Subparagraph (a) was adopted.

Subparagraph (*b*)

23. The CHAIRPERSON suggested that in the French text subparagraph (*b*) should begin with the words "*Le terme*", to make it consistent with the preceding subparagraph.

It was so decided.

24. Mr. KATEKA said that he saw no reason for the colon after the word "includes".

25. The CHAIRPERSON agreed that the colon should be deleted in all language versions.

Subparagraph (b), as amended by the Chairperson and Mr. Kateka, was adopted.

Subparagraphs (*c*) to (*g*)

Subparagraphs (c) to (g) were adopted.

Draft principle 3 (Purposes)

Draft principle 3 was adopted.

[154] See footnote 56 above.

Draft principle 4 (Prompt and adequate compensation)

Draft principle 4 was adopted.

Draft principle 5 (Response measures)

26. Mr. VALENCIA-OSPINA proposed that the word "transboundary" in subparagraph (*a*) should be deleted, as the words "transboundary damage" already appeared in the chapeau, and the adjective was not used again in subparagraphs (*c*) and (*d*).

27. Mr. GAJA said that deletion of the word would alter the meaning. There should at least be some sort of link to the first mention of transboundary damage by referring to "that damage" or "such damage".

28. Mr. VALENCIA-OSPINA suggested that the reference should then be to "transboundary damage" in all subparagraphs.

29. Mr. Sreenivasa RAO (Special Rapporteur) endorsed that proposal but pointed out that the expression "transboundary damage" would then appear twice in subparagraph (*d*). He proposed that the adjective should be used only in the second reference in order to avoid repetition.

30. Mr. VALENCIA-OSPINA suggested that the opposite might be done: the word "transboundary" would appear in the first reference and the word "that" or "such" would be used in subsequent references.

31. The CHAIRPERSON said he would take it that subparagraph (*d*) would read in all languages: "the States affected or likely to be affected by transboundary damage shall take all feasible measures to mitigate it and if possible to eliminate the effects of such damage".

Subparagraphs (a) to (e) were adopted, with the amendments proposed by Mr. Valencia-Ospina.

Draft principle 6 (International and domestic remedies)

Draft principle 6 was adopted.

Draft principle 7 (Development of specific international regimes)

Draft principle 7 was adopted.

Draft principle 8 (Implementation)

Draft principle 8 was adopted.

The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, as a whole, were adopted.

32. Ms. ESCARAMEIA said that she did not object to the adoption of the draft principles, solely out of respect for the work of her colleagues; however, she was incapable of agreeing with the content of the Commission's work on the topic and would like to make a declaration for the record.

33. The only way that the Commission could discharge the mandate entrusted to it by the General Assembly in its resolution 56/82 of 12 December 2001 would be to adopt a set of draft articles on allocation of loss that complemented the draft articles on prevention of transboundary harm, since they were two sides of the same topic. As stated in that resolution, prevention and allocation of loss was a single topic and the Commission should "[bear] in mind the interrelationship between prevention and liability" (para. 3). Instead, the Commission had decided to adopt a declaration containing a set of draft principles whose legal status was far from clear. That form had been used only once before, back in 1949, in dealing with the rights and duties of States, and had used much more assertive language. The Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, to which the Chairperson of the Drafting Committee had referred at the beginning of the meeting, were a set of principles that did not in fact take the form of a declaration. More recently, the Commission had adopted a set of draft articles in the form of a declaration in dealing with the nationality of natural persons in relation to the succession of States,[155] but there again the language had been prescriptive.

34. Moreover, it was essential that victims should have the right to reparation if the Commission wished to guarantee them prompt and adequate compensation and preserve the environment as was prescribed in principle 3 of the present project. Yet the draft principles before the Commission merely pointed to the desirability of setting up mechanisms to respond to situations involving loss. In some ways, the draft principles were a move away from the principles established 14 years earlier in the Rio Declaration.

35. The declaration just adopted amounted to very little in a world that was increasingly threatened by dangerous environmental pollution. She had tried, but failed, to convey that view to her colleagues. She could only hope that States members of the Sixth Committee would realize that and give the draft principles the substance they deserved.

36. Mr. MANSFIELD said that he fully respected the right of Ms. Escarameia to express her opinion, but he wished to have his heard as well. The Commission had travelled a long way and made considerable progress since it had started its work on the topic. When the first Special Rapporteur had submitted his initial report,[156] most States had been of the view that victims of transboundary harm should be compensated only for the loss occasioned by the harm. It had subsequently been accepted that States undertaking hazardous activities ought to have certain obligations, particularly in the area of prevention, but the situation of victims suffering harm even when those obligations had been fulfilled continued to be a matter of concern. Currently, as the Special Rapporteur explained in his third report, it was considered unacceptable for States to engage in hazardous activities without providing appropriate mechanisms to guarantee prompt and adequate compensation to any victim of transboundary harm resulting from those activities. In the light of that requirement, the draft principles that had just been adopted were a coherent and relevant whole. No State that

[155] *Yearbook … 1999*, vol. II (Part Two), p. 20, para. 47.

[156] *Yearbook … 1980*, vol. II (Part One), document A/CN.4/334 and Add.1–2, in particular pp. 251–252, paras. 13–15.

wanted to maintain its standing in the international arena would think of neglecting them, and in that sense they represented considerable progress. Naturally, it would be extremely desirable for the principles to be strengthened and to take the form of a convention that could be universally adopted, but the current situation was far preferable to one involving a convention that attracted the participation of only a handful of States. The potential influence of a declaration of that type, formulated by a body such as the International Law Commission, should not be overlooked.

37. Mr. Sreenivasa RAO (Special Rapporteur) thanked the members of the Commission and especially the members of the Drafting Committee and the Chairperson of the Commission for having allowed him to conclude the "saga" that had grown out of the topic of international liability since it had been included on the Commission's agenda in 1978.[157] The theoretical difficulties posed by the topic, together with the emotional charge resulting from incidents that had occurred over the years throughout the world had sometimes resulted in the resources implied by such a task being exceeded. During that time State practice had continued to evolve and different measures and instruments had been adopted. The topic had grown in complexity. That was why the adoption of the draft principles represented significant progress. Certainly the question of form was important, but it could be debated further in the Sixth Committee, and it was States, after all, that were best placed to settle the matter. As for the Commission, it had finally completed its task, which had essentially been to identify all the elements that would allow it to establish reasonable criteria for ensuring that the victims of transboundary harm did not have to bear by themselves any losses that such harm might occasion, which might have been the case had the issues involved not been clarified. The Commission should be proud of the work it had done, which would doubtless have a major influence on the conduct of States.

38. The CHAIRPERSON thanked the Special Rapporteur and commended him for his work, his pragmatism and his sense of duty. He was convinced that the international community would duly appreciate the outcome of that effort.

The meeting rose at 11.30 a.m.

2883rd MEETING

Tuesday, 6 June 2006, at 10.05 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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[157] *Yearbook ... 1978*, vol. II (Part Two), document A/33/10, chap. VIII, sect. C, annex, p. 150.

Reservations to treaties[158] (A/CN.4/560, sect. G, A/CN.4/558 and Add.1–2,[159] A/CN.4/572, [160]A/CN.4/574,[161] A/CN.4/L.685)

[Agenda item 7]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. MANSFIELD presented the report of the Drafting Committee on the topic "Reservations to treaties", in the absence of the Chairperson of the Drafting Committee and of the Special Rapporteur on the topic, who had expressed his regret at being unable to attend the meeting. The report was to be found in document A/CN.4/L.685 and Corr.1. The Drafting Committee had held two meetings on the topic, on 23 and 24 May 2006, at which it had considered five draft guidelines referred to it by the plenary during the fifty-seventh session of the Commission.[162] It had also reviewed two draft guidelines which had already been adopted with a view to reconsidering the terminology used therein in the light of the debate held on the issue in the Commission in 2005.[163] The five draft guidelines dealt with the substantive validity of reservations. The term "validity" was quite general, encompassing both the substantive and formal requirements and conditions necessary for the formulation of reservations. The guidelines belonged to the third part of the Guide to Practice, which would bear the general title "Validity of reservations". To distinguish substantive validity from general validity, the Drafting Committee had decided to use the term "permissibility" ("*validité matérielle*") to denote the former. The Drafting Committee had considered that the use of the terms "validity" and "permissibility" clarified a much debated question and contributed to greater consistency and precision in the draft guidelines. The commentary would analyse the terminological issues involved and the Commission's selection of the term "validity".

2. Draft guideline 3.1 read:

"3.1 *Permissible reservations*

"A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

"(*a*) The reservation is prohibited by the treaty;

"(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

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[158] For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2005*, vol. II (Part Two), para. 437.

[159] *Yearbook ... 2005*, vol. II (Part One). For the presentation and discussion of the tenth report of the Special Rapporteur, see *Yearbook … 2005*, vol. I, 2854th and 2856th–2859th meetings, *Yearbook ... 2005*, vol. II (Part Two), pp. 63–71, paras. 333–436, and above, 2888th–2891st meetings.

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

[161] *Idem*.

[162] *Yearbook ... 2005*, vol. II (Part Two), p. 71, para. 435.

[163] *Ibid.*