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Summary record of the 2853rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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States during the current session, on the basis of which certain rules or principles governing the matter could be identified.

The meeting rose at 1 p.m.

2853rd MEETING

Tuesday, 19 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Commissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Unilateral acts of states (*continued*) (A/CN.4/549 and Add.1, sect. C and A/CN.4/557)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA thanked the Special Rapporteur for his report but said she was disappointed that he had not devoted more time to the conclusions and that the report did not contain any proposals as to how work should proceed.

2. The topic of unilateral acts of States gave rise to two types of criticism. One, more radical, was that there was no such thing as a legally binding unilateral act of a State, because such an act involved only one party and thus could be modified or revoked at any time (inapplicability of the principle of *pacta sunt servanda*). However, the report had shown that that position was untenable, given international jurisprudence (namely, the *Legal Status of Eastern Greenland*, *Temple of Preah Vihear* and *Nuclear Tests* cases). In the *Nuclear Tests* case, the ICJ had clearly rejected the possibility of revocation of a unilateral act: "the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration" (para. 82 of the report). Then there were those who felt that the unilateral acts of States were so diverse that they could not be a source of international law. Although such acts differed considerably, the practice described in the report indicated that they had a number of common traits, which had been identified by the Working Group, on which the Commission could base its work.

3. Whereas the date, form and content of the act might not be so decisive, the author and its competence (*vis-à-vis* international law rather than domestic law) must be taken into consideration. In that connection, article 7 of the 1969 Vienna Convention on the Law of Treaties, although too restrictive, might offer some guidance, provided that competence was expanded to include other authors, including legislative bodies. Intent, context and circumstances were fundamental in determining whether an act produced legal effects. Once again the ICJ, in the *Nuclear Tests* case, had declared that "statements [...] must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made" (para. 83 of the report). The addressees could also vary considerably, but they should always be subjects of international law. The reaction of addressees was particularly important when it consisted of action taken on the basis of the act in question or in reply to a specific request. The reactions of third parties could also help to determine whether a unilateral act was involved, as could the adoption of implementing instruments, whether by the author, the addressees or third parties.

4. As to how the Commission should proceed with its work, she did not think that the 1969 Vienna Convention was the best model; it should only be used as a reference, particularly for the competence of authors. Unilateral acts were in fact very different from treaties; they were acts by States which produced legal effects on their own. Thus the Commission should begin by agreeing on a definition, drafted in sufficiently broad terms to leave scope to manoeuvre: for example, "an act that originates in a State authority and produces international legal effects". It should then analyse case law and State practice to compile the list of factors (intent, circumstances, reactions of the addressees or third parties, etc.) that supported the presumption that a given act produced legal effects. In that connection, it would be very useful if the Secretariat could produce a paper similar to the excellent document on the effects of armed conflicts on treaties (A/CN.4/550 and Corr.1–2). Once the notion of unilateral act was established, the Commission might consider what cases did not fall under that category and then consider the consequences of unilateral acts, such as responsibility for their violation. For the time being, those objectives were sufficient, because the project was very ambitious. States would then have an idea of what they could or could not do and with what consequences.

5. Mr. PELLET said that he shared Ms. Escarameia's interest in the subject but did not think that the project was too ambitious. The aim was to tell States the extent to which they risked becoming trapped by their own declarations, i.e. their own commitments. States needed to know, for example, what statements they could make in the international arena without such statements being regarded as legal acts that could be used against them.

6. In essence, the report was based on the work of the Working Group. The practice described was more limited than in the previous report,[1] but more usable, although the acts addressed were perhaps not entirely representative. The report's conclusions were not developed to any great extent, but they constituted a starting point for further consideration. He noted several ambiguities (paras. 179 and 199) and some vagueness (paras. 183 and 186), in particular with regard to the Ihlen Declaration, about

[1] See 2852nd meeting, footnote 6.

which it was still unclear whether it was a declaration or an agreement (paras. 121–126); he hoped that the Special Rapporteur would express a definitive view on that point. In any case, the report provided sufficient support for a definition of a unilateral act. In 2006 the Special Rapporteur should propose one or more draft articles containing a definition for consideration and adoption by the Drafting Committee. The Commission also had sufficient material to move ahead on the questions of the capacity and competence of the authors of unilateral acts. However, it would seem quite premature to study informal conduct of States that might constitute unilateral acts, such as that of Thailand and Cambodia in the *Temple of Preah Vihear* case, but whose interference with unilateral acts as understood in the decision on the *Nuclear Tests* case obscured the problem rather than helping to clarify it, particularly as it was not even certain that it constituted an aspect of the topic.

7. Mr. KOSKENNIEMI said that there was a contradiction between Mr. Pellet's starting point and his conclusions. He personally was of the view that unilateral acts of States could not be codified and that all the work of the Commission on the topic confirmed that fact. If, however, one assumed, as Mr. Pellet did, that such codification would help to alert States to situations in which they risked being entrapped by an obligation they had not considered, two conclusions followed. One was that the Commission was dealing with a source of non-voluntary obligations. States sometimes found themselves bound in spite of themselves by obligations resulting from their past statements or acts. That in itself was not a problem, but on a purely practical level the Commission should perhaps ask States whether they would be prepared to accept a codifying convention in which they agreed to be bound irrespective of their will. The second and much more important point was that, if it was true that States were sometimes entrapped irrespective of their words, then the question arose of where such obligations emerged from.

8. Mr. PELLET suggested that the conditions in which a State might become "entrapped" by the unilateral declaration of their intentions should be spelled out; however, it seemed impossible to compile an exhaustive list of such conditions, and in fact that was not the Commission's role. The Commission could, however, indicate to States that they might be bound by certain behaviours, for example the principle of good faith, and that this could occur even in the absence of any agreement. It would therefore be more appropriate for the Commission to give guidance on what was meant by unilateral acts.

9. He was afraid that there was a misunderstanding between Mr. Koskenniemi and himself. When he had said that unilateral acts were a "trap of intent", he had not meant that States—in the context of the topic—could be bound against their will, but that once they had unilaterally made a public declaration of intent (otherwise than through a treaty), they were "trapped" by that declaration. Unilateral acts were clearly a part of voluntary law (as opposed to what some, following the thinking of Ago, called "spontaneous" law[2]). However, the problem lay in determining when the State became entrapped by its declaration of intent. As Ms. Escarameia had pointed out, Heads of State sometimes said things of little consequence, and in such cases there was no intent to be bound. The ICJ had itself made that observation, for example in its 1986 judgment in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, when it had found that there were no grounds for considering that the Malian Head of State had intended to be bound by his declaration, which had been political in nature and thus had not produced legal effects (para. 40 of the judgment).

10. Mr. Koskenniemi's conclusion also posed a problem: as soon as one acknowledged that the State could become entrapped—in his own view, intentionally, and in Mr. Koskenniemi's view, unintentionally—it was important to ascertain just when such entrapment occurred. Consequently, States needed draft articles that were as precise as possible so that they could know, for example, what the conditions were for making declarations of intent, who was entitled to make such a declaration, and above all—a matter that had not yet been elucidated—whether they could withdraw such a unilaterally expressed declaration. The Working Group had not been able to gather enough examples of practice to clarify the latter point, which would probably be a matter for the progressive development of international law.

11. He reiterated his conviction that the topic was useful and that it was in fact possible to prepare a set of draft articles that would be genuinely helpful to States.

12. Mr. BROWNLIE said he thought that the appropriate vehicle for the work under way should have been an expository study, a view shared by several Governments. He agreed with most of the points made by Mr. Koskenniemi. The subject, quite frankly, was non-existent: there was no such thing as a "unilateral act". The term was used in textbooks because it was a standard reference and people knew what it referred to. The whole point about unilateral acts was that they all occurred in context, and it was only in that context that the possibility of legal effects arose. There was a complete contrast, technically and culturally, between the law of treaties and unilateral acts. The law of treaties was a well-established matrix of law, and when a State concluded a treaty it usually knew what it was doing, which was not always the case with a unilateral act.

13. He greatly hoped that the Commission would not persist in elaborating draft articles or even a simple definition of unilateral acts. That would be a very protracted exercise, and as the members of the Commission would have difficulty agreeing, the definition would be incomplete and might create enormous confusion. Moreover, it would be said that the Commission had somehow tried to diminish the significance of estoppel, which had been set aside. What was important at the current stage was to preserve the positive elements of what had been done so far: the accumulation of State practice produced by the Special Rapporteur and the Working Group, and the demonstration of the risks. If the Commission continued the work within the same model, it would be tantamount to assuming that the topic was analogous to the law of treaties, which was not true.

[2] See R. Ago, "Positive law and international law", *AJIL*, vol. 51 (1957), pp. 717, 729 and 732. See also Daillier and Pellet, *op. cit.* (2839th meeting, footnote 10), p. 321.

14. Mr. PELLET said that there had never been any question of setting aside estoppel. It was simply that estoppel was not on the same level as a unilateral act, which could give rise to an estoppel. If one approached the topic as Mr. Brownlie did, it was indeed impossible to deal with. The problem was that the topic was not the conduct of States in the international arena but the unilateral acts of States, in other words, the unilateral expression of their intent at the international level. Legal acts certainly did exist and they had a definition, which was precisely the expression of intent. An expression of intent in the international arena could be either unilateral, which was the type that was of interest to the Commission, or bilateral or multilateral, taking the form of a treaty. What was irksome about the view taken by some members was that they were altering the topic in order to conclude that it was impossible to deal with.

15. Mr. CHEE said he was surprised to hear that one could say that unilateral acts did not exist as such when a number of distinguished authors, including Oppenheim, frequently referred to them. Moreover, the notion was found in private law, where the "quasi-contract" was similar to a unilateral act of intent.

16. Mr. BROWNLIE said that it was somewhat by way of provocation that he had stated that unilateral acts did not exist as such. What he had wanted to say was that the expression "unilateral acts" was used because it was convenient and one could immediately see what it meant, much as one could recognize a riot without actually understanding the legal definition and consequences of it. The phrase did not have any analytical basis, since, as the acts in question necessarily came under the scope of relations between States, they could not, strictly speaking, be "unilateral". He also wished to draw attention to a far more serious theoretical problem, namely the drawing of an analogy with the law of treaties, essentially bilateral ones, with which he simply did not agree.

17. Mr. KOSKENNIEMI said that the exchange that had just taken place between Mr. Pellet and Mr. Brownlie was a perfect illustration of the confusion surrounding the topic. When Mr. Pellet had accused Mr. Brownlie of reformulating the topic so as to focus on the conduct of States and in so doing to nullify it, he was basing himself on certain specific aspects of French doctrine, which enshrined the concept of "the legal act". For those who did not have a background in that doctrine, however, it was only natural that the topic should cover the conduct of States at the international level.

18. Mr. PELLET said that a concept should not be rejected just because it had been developed by French doctrine. That having been said, the origin of the topic lay not in French doctrine but with the ICJ, for instance in the *Legal Status of Eastern Greenland* case and, more clearly, in the *Nuclear Tests* cases.

19. The CHAIRPERSON, speaking in his personal capacity, said that the difficulty probably stemmed from the absence of specific criteria that would make it possible to ascertain a State's intent to undertake international commitments through a unilateral act.

20. Mr. KAMTO noted that the question of the existence or non-existence of unilateral acts had been the subject of debate in the Commission for some time and that the Commission needed to take a clear decision in the matter. Moreover, it was unusual that a concept so clearly established by the ICJ should be called into question because, although not infallible, the Court was generally considered to be a reliable source. At any rate, the legal act was a valid concept in all legal systems, regardless of ideology or culture.

21. He thanked the Special Rapporteur and the Working Group for having endeavoured to clarify matters by listing several categories of unilateral acts, and he endorsed the conclusions, notwithstanding their brevity, that the Special Rapporteur had tried to draw concerning all of them.

22. Turning to a question of terminology which he believed had substantive implications, he expressed concern that in paragraph 157 of the French version of the report, the Special Rapporteur referred to declarations that contained ("*qui contiennent*") unilateral acts. In fact, the point was to ascertain whether the declarations contained or constituted unilateral acts. If the declarations contained the act, that was a tautology and the form (*instrumentum*) might be sacrificed to the substance (*negotium*). However, the form was extremely important because it allowed for a distinction to be drawn between unilateral acts—normative statements that complied with rules of form—and forms of conduct. The Special Rapporteur had perhaps been a trifle careless in that area, since he said in paragraph 170 that

> [t]he first conclusion that can be drawn is that the form is relatively unimportant in determining whether we are dealing with a unilateral legal act of the type in which the Commission is interested—in other words, an act that can produce legal effects on its own without the need for its acceptance, or for any other reaction on the part of the addressee.

Even though he then went on to say that "it may still be considered that the formality of the act has a role to play in determining the intent of its author", he ought to have drawn the conclusion more clearly and stated whether the oral form of the act should be rejected or retained. In that connection, it was worth noting that the dissenting opinion of Judge Anzilotti in *Legal Status of Eastern Greenland*, cited in paragraph 126 of the report, was based on the very subjective view that the declaration was one part of an international agreement and not a unilateral act.

23. With regard to types of unilateral acts, he noted that in paragraph 180 of the report the Special Rapporteur addressed the issue of persons authorized to formulate unilateral acts and suggested that they were the persons authorized to represent the State as defined in the 1969 Vienna Convention. However, persons other than those identified in that Convention could bind a State through a unilateral act. In an earlier report the Special Rapporteur had referred to the Helms–Burton[3] and D'Amato-Kennedy Acts[4] (international trade legislation of the United States), the declarations of acceptance of the compulsory jurisdiction of the ICJ and national legislation

[3] See 2841st meeting, footnote 3.

[4] "Iran and Libya Sanctions Act of 1996", *ILM*, vol. 35, No. 5 (September 1996), p. 1274.

on the delimitation of maritime boundaries of States. He wondered whether the Special Rapporteur still intended to examine that type of act. Indeed, some legislative acts of national parliaments had all the characteristics of unilateral acts in the sense intended by the Commission. A good example was Israel's Revised Disengagement Plan of 25 October 2004, by which the Israeli Parliament had adopted the plan for Israel's unilateral withdrawal from the Gaza Strip, even though it confirmed earlier declarations by the Israeli Prime Minister. The Special Rapporteur might wish to examine that category of acts.

24. Another category of unilateral acts might be judicial decisions. There a distinction needed to be drawn between decisions of national courts that referred to an international legal instrument, such as the decisions of the United States courts in the *Breard*, *LaGrand* and *Avena* cases, and those that did not refer to such instruments, as in, for example, the cases concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo* v. *Belgium*) and *Certain Criminal Proceedings in France*. That might also be another avenue worth exploring. Where unilateral acts were concerned, the legislative and judicial bodies of States were perfectly capable of expressing the intent of the State at the international level.

25. Another interesting example was the statement made by the agent of Cameroon before the ICJ in the *Land and Maritime Boundary between Cameroon and Nigeria* case, according to which Cameroon, faithful to its tradition of hospitality, would afford protection to Nigerian nationals living in those parts of the territory concerned by the dispute. The Court had dealt with that statement in a questionable manner, and it had taken note of it in the operative part of its judgment (paras. 317 and 325 (V)(C)), with the result that Nigeria had been able to use it against Cameroon when the judgment was being enforced.

26. Lastly, as Ms. Escarameia had said, the Commission might also wish to consider statements made by future Heads of State or Government between the time they were elected and the time they took office. If such a statement was not refuted after the person concerned had taken office, then it must be considered to be a unilateral act. An example was to be found in the statement made by Mr. Zapatero before he became Prime Minister concerning the withdrawal of Spanish troops from Iraq, a statement that had indeed been confirmed after he had taken office. One might well ask whether such confirmation was necessary for the statement to produce the legal effects of a unilateral act when it had not been refuted after the individual in question had taken office. There was a grey area there at the very least that perhaps warranted the Special Rapporteur's attention.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

Statement by the Observer from the Asian–African Legal Consultative Organization

27. The CHAIRPERSON welcomed Mr. Kamil, Secretary-General of the Asian–African Legal Consultative Organization (AALCO), and invited him to address the Commission.

28. Mr. KAMIL (Asian–African Legal Consultative Organization (AALCO)) said that his organization attached immense significance to its traditional ties with the Commission. One of the organization's primary functions, as envisaged in its statutes, was to examine questions under consideration in the Commission and to ensure that the views of its member States were placed before the Commission. AALCO had held its forty-fourth session at Nairobi, from 27 June to 1 July 2005, during which it had, as at previous sessions, considered an agenda item on the work of the Commission and had mandated him to bring to the attention of the Commission the views expressed by AALCO member States.

29. Concerning diplomatic protection, he said that the States members of AALCO had welcomed the progress achieved on the topic and had observed that the 19 draft articles adopted by the Commission on first reading represented a significant advance in the development of international law,[5] as they covered all aspects of diplomatic protection, an institution that had undergone vast changes over the years.

30. One delegate had observed that the 19 draft articles basically reflected the relevant rules of customary international law. While expressing satisfaction over the progress achieved, the delegate had expressed the hope that the Commission would continue its efforts to improve the draft articles, taking into account the comments offered by States, so as to ensure that the topic could be completed on schedule in 2006.

31. Observations had also been made on individual issues relating to the topic. One delegate had expressed reservations about extending diplomatic protection to stateless persons and refugees, as such a step departed from the traditional rule that only nationals could benefit from diplomatic protection. He had further observed that his delegation's reservations derived also from its reluctance to accept any definition of the term "refugee" that expanded the universally accepted definition set out in the 1951 Convention relating to the Status of Refugees, irrespective of the purpose for which the introduction of a new definition had been proposed.

32. Another delegate had agreed with the general thrust of the draft articles but had underlined that the application of the nationality principle raised a number of difficulties arising from multiple or dual nationality. He had thus supported retention of the traditional continuous nationality rule. One delegate had indicated that a State bore responsibility for injury to an alien caused by its own wrongful act or omission, and that diplomatic protection enabled the State of nationality of the injured persons to secure their protection and obtain reparation for the harm inflicted. He had observed that the 19 draft articles established several legal principles on the subject. The application of diplomatic protection to legal persons, as described in articles 9

* Resumed from the 2851st meeting.

[5] See *Yearbook … 2004*, vol. II (Part Two), chap. IV, sect. C, pp. 18 *et seq*.

to 13 of the draft, set out a standard principle by virtue of which a corporation was protected by its State of nationality and not by the State of nationality of its shareholders. The State of nationality of the shareholders nevertheless had the right to exercise diplomatic protection, but only under specific conditions, as indicated in article 11. The delegate had been of the view that that draft article adequately balanced the interests of States and those of investors. With regard to the application of diplomatic protection to ships' crews, covered in article 19, the delegate had seconded the Commission's views that both the right of the State of nationality to exercise diplomatic protection and the right of the flag State to seek redress for the crew should be recognized, with priority being accorded to neither. His delegation was of the view that ships' crews should enjoy the maximum protection that international law could offer, especially since the threat of unilateral coercive acts at sea within the framework of Proliferation Security Initiatives and Regional Maritime Security Initiatives could endanger global stability.

33. Another delegate had been of the view that the right to exercise diplomatic protection was a right that accrued to the State as a subject of international law and not a right of individuals or corporations. He had supported the wording of article 10, which stipulated that it was the State that was entitled to exercise diplomatic protection on behalf of its nationals. The article conferred an entitlement upon the State without imposing any obligation upon it. It was the State which had discretion to decide how and when it would apply its right to exercise diplomatic protection on behalf of its nationals.

34. Turning to the topic "Reservations to treaties", he said that comments had been made on a number of specific issues. One delegate had held that the intention of both parties should be taken into account in determining the kind of treaty relationship that existed between the reserving State and the objecting State. Another delegate had observed that the Special Rapporteur's ninth report relating to the object and definition of objections[6] constituted a complement to the eighth report on the formulation of objections to reservations and interpretative declarations.[7] He had welcomed the adoption of five draft guidelines and the commentaries thereto, namely draft guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12 and 2.5.13.[8] With regard to draft guideline 2.6.1, he had supported the wording prepared by the Commission but preferred the deletion of the words in square brackets.

35. Another delegate had focused on two points: the definition of an objection and the question of which States or international organizations were entitled to formulate objections to a reservation. On the first point, he had observed that his delegation shared the view of the Special Rapporteur that a definition of objections was needed before the Commission could deliberate on their legal effects. Nevertheless, as had already been noted in the Commission, the definition could be revised, if necessary, when the effects of objections had been appropriately formulated. The term "objection" should be defined in the light of the established principles of international law, including the principle of the sovereignty of States. That principle, which formed the basis of the consensual framework defined by the 1969, 1978 and 1986 Vienna Conventions, ensured that States were bound to a treaty obligation only after they had expressed their consent to be bound and that no State could bind another against its will. His delegation believed that objections with "super maximum" effect had no place in international law. Such an effect, which would create a binding relationship between the author of the reservation and the objecting State in respect of the treaty in its entirety, including the provisions to which the reservation had been made, amounted to imposing treaty obligations on a State without its prior consent. It changed the Vienna regime on reservations to treaties and was not in conformity with the general practice of States. As the Commission had indicated in its report, the guidelines were intended to assist States in their practice and must in no way alter the relevant provisions of the Vienna Conventions.[9]

36. On the question of which States or international organizations were entitled to formulate objections, the delegate had been of the view that a reservation and an objection thereto created bilateral legal relations between the reserving State and the objecting State; accordingly, only parties to a treaty were entitled to formulate objections to reservations made to that treaty. That argument was also based on the principle that there should be a balance between the rights and obligations of the parties to a treaty. Signatory States did not have the right to formulate objections because they did not assume all the obligations flowing from the treaty. Moreover, the subject of reservations and objections thereto could vary widely, from substantive issues to purely procedural aspects of the treaty. Therefore, in that delegate's view, it did not seem legally appropriate to give a signatory the right to make objections to reservations when its overall obligation towards the parties to the treaty was limited to refraining from acts that would defeat the object and purpose of the treaty. At most, a signatory State could be entitled to formulate objections to reservations it deemed contrary to the object and purpose of the treaty.

37. Concerning unilateral acts of States, he recalled the Commission's request for comments from States on their practice in that area[10] and noted that one delegate had asked for more details and guidance from the Commission on the information it wished to gather, as the subject was very broad. Another delegate had agreed that the concept of a unilateral act had not been analysed rigorously enough; consequently, the first step should be to consider specific aspects of the topic thoroughly in order to get a picture of State practice and the applicable law. The term "unilateral acts" covered a wide range of legal norms and procedures used by States in conducting their international relations. In addition, in the absence of objective criteria, political acts must be distinguished from legal acts. The delegate had proposed that the Working Group

[6] See 2842nd meeting, footnote 12.

[7] *Ibid.*, footnote 11.

[8] *Yearbook … 2004*, vol. II (Part Two), chap. IX, sect. C.2, p. 106, para. 295.

[9] *Ibid.*, chap. IX, p. 97, para 251.

[10] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 19, para. 29 and p. 205, para. 254.

should undertake an in-depth study of the definition and classification of unilateral acts of States.

38. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that one delegate had observed that the report presented by the Special Rapporteur provided an in-depth analysis of the need to protect the interests of innocent victims of transboundary harm caused by hazardous activities.[11] The scope of the topic and the triggering mechanism should be the same as those relating to the prevention of transboundary harm. In a scheme covering either liability or allocation of loss, the primary liability should be that of the operator, as it was he who controlled the activity and therefore had a duty to redress the harm caused. The same delegate had further stated that the draft presented by the Special Rapporteur was not only innovative but also flexible and propounded a scheme that was without prejudice to the claims that might arise and to the applicable law and procedures. That flexibility was further strengthened by the Special Rapporteur's formulation of "principles" rather than "rules". That approach was to be welcomed, as some of the draft principles had been accepted only in certain sectors and most were in the nature of progressive development of international law.[12] In addition, the proposal advocating compensation for transboundary damage caused to the environment *per se* was not sufficiently supported by State practice to enable general principles to be derived, and it was difficult to quantify such damage in monetary terms or to establish *locus standi*, for example.

39. The same delegate had further observed that the need for technology transfers and capacity-building in developing countries had been recognized in various international instruments and that several multilateral legal instruments acknowledged that different standards should be applied to developing countries in matters of environmental protection. That delegate had stressed that that balancing factor ensured that environmental consensus was viewed as an essential part of the right of States to meet their development needs. The Special Rapporteur's report underscored the importance of that view and acknowledged that the choices made and approaches followed in the draft principles and their implementation might also be influenced by the stage of economic development of the countries concerned.

40. One delegate had supported the idea of prompt and adequate compensation embodied in principle 4. That principle rightly articulated the four prerequisites for guaranteeing such compensation: firstly, a liability regime must be adopted; secondly, such liability should not require proof of fault; thirdly, any conditions or limitations placed on such liability should not erode the requirement of prompt and adequate compensation; and, fourthly, the operator or other person or entity should take out insurance or establish bonds or other financial guarantees to cover compensation claims.

41. With regard to principle 6, the same delegate had been of the view that it was closely linked to principle 4: while principle 4 established States' obligation to provide prompt and adequate compensation, principle 6 indicated the measures that must be taken in order to give effect to principle 4 and to achieve its objective. Access to the domestic procedures that must be available in the event of transboundary damage should be similar to that enjoyed by nationals.

42. One delegate had stressed the complexity of the question of the responsibility of international organizations, observing that, unlike States, which shared certain basic qualities, international organizations varied widely in their structure, functions and competence. It was therefore difficult to formulate and apply a set of common norms that would cover all the entities termed "international organizations". The delegate had noted that, in the commentary to draft article 5, the criterion of "effective control" had been based largely on practice relating to peacekeeping forces.[13] He had said it was unclear whether that criterion could be applied to all situations covered by draft article 5.

43. As to the three questions put by the Special Rapporteur in his third report (A/CN.4/553), one delegate had suggested that a study of the topic should be based as far as possible on in-depth research into the practices followed by various international organizations, but that it should be confined to intergovernmental organizations. Moreover, the Commission should give more weight to the codification of international law than to its progressive development. The "effective control" criterion was an evolving rule that needed to be fleshed out in practice. Lastly, necessity should not be invoked by an international organization as a circumstance precluding wrongfulness.

44. One delegate had observed that some of the expressions used throughout the draft articles, such as "other acts" and "other entities", ought to be clarified.

45. With regard to the subject of the fragmentation of international law, one delegate had expressed the hope that the Study Group's work would have a positive effect on the application of international law and would help to elucidate the relationship of rules stemming from different branches of international law without weakening its basic principles.[14]

46. On the topic of shared natural resources, one delegate had emphasized the need to learn more about transboundary aquifers in general, about particular aquifer conditions and about State practice in the matter. His delegation had taken the view that specific agreements and arrangements were the best way to resolve questions relating to transboundary groundwaters or aquifer systems. On the question of the final form the draft text should take, he agreed with those delegates who had been in favour of a form that was as flexible as possible so as to permit the conclusion of arrangements tailored to individual circumstances.

[11] See *Yearbook … 2004*, vol. II (Part One), document A/CN.4/540.

[12] For the draft principles and commentaries thereto adopted by the Commission on first reading, see *ibid.*, vol. II (Part Two), paras. 175–176.

[13] See 2839th session, footnote 16.

[14] For the report of the Study Group presented at the fifty-sixth session of the Commission, see *Yearbook … 2004*, vol. II (Part Two), chap. X, sect. C, pp. 111–119, paras. 300–358.

Recalling that the Convention on the Law of the Non-navigational Uses of International Watercourses had failed to garner enough support to enter into force, he had advocated the adoption of guidelines which States could use when negotiating bilateral or regional agreements.

47. Another delegation had commented that the principle of States' sovereignty over their natural resources should not be overlooked. As the Commission was currently elaborating draft principles on the allocation of loss in case of transboundary harm arising out of hazardous activities and had already adopted draft articles on the responsibility of States for internationally wrongful acts,[15] there seemed to be no need for it to look into the issue of liability and responsibility as part of the topic under consideration. Lastly, the Commission should decide on the final form of the outcome of the topic after progress had been made on substantive matters.

48. Another delegation had pointed to the need to draw up an international legal instrument to guide the use, allocation, preservation and management of aquifers, bearing in mind the non-renewable nature of that resource. It would be useful to examine whether the principles of the Convention on the Law of the Non-navigational Uses of International Watercourses could be applied to non-renewable underground water resources, or whether transboundary aquifers should be governed by a regime akin to those of other natural resources, such as oil or natural gas. Given the sensitive nature of the topic, it would be useful to undertake a comprehensive study of State practice. Lastly, the delegate had suggested that the Commission's work on the subject should take the form of a framework document or guiding principles that would enable States to arrive at appropriate national and regional arrangements.

49. As to the future work of the Commission, one delegation had endorsed the two new topics chosen, namely the effects of armed conflicts on treaties and expulsion of aliens.

50. At its forty-fourth session, AALCO had considered not only the Commission's work but also: (*a*) the deportation of Palestinians and other Israeli practices; (*b*) the jurisdictional immunity of States and their property; (*c*) international terrorism; (*d*) cooperation against trafficking in women and children; (*e*) the International Criminal Court: recent developments; (*f*) an effective international legal instrument against corruption; (*g*) the WTO as a framework agreement and code of conduct for world trade; (*h*) expressions of folklore and its international protection; and (*i*) human rights and Islam. In addition, a special meeting had been devoted to environmental law and sustainable development.

51. In 2006, AALCO would be celebrating its golden jubilee. That celebration would coincide with the inauguration of the organization's permanent headquarters in New Delhi. To mark the occasion, all members of the Commission were invited to attend the forty-fifth session of AALCO. It was to be hoped that, as was customary, a meeting between the members of the Commission and AALCO could be organized after the meeting of AALCO legal advisers and that that meeting would provide an opportunity to intensify collaboration between both bodies.

52. The CHAIRPERSON, speaking on behalf of the Commission, thanked Mr. Kamil for his statement and his invitation.

53. Mr. Sreenivasa RAO thanked Mr. Kamil for his excellent report in which he had provided a very detailed account of the views of AALCO members on various aspects of the Commission's work. That constituted a much appreciated contribution of the African–Asian region to the development of international law. In that connection, he commended the efforts of the Secretary-General of AALCO to encourage French-speaking countries to join his organization.

54. He hoped that in the future AALCO would be able to mobilize the necessary resources for the establishment of working groups to study certain subjects of international law.

55. Mr. GALICKI thanked Mr. Kamil for his presentation and said that he was impressed by the very constructive attitude of AALCO members. Their observations on the form and substance of the questions they had addressed would be of great use in the Commission's work. Given the wide variety of topics considered by AALCO, it was to be hoped that the organization would be able to find the resources needed to establish working groups on topics of interest to both regions. He wished to know if AALCO was planning any initiatives to promote the ratification of regional conventions and treaties.

56. Ms. XUE said that she had found Mr. Kamil's report most interesting and that the comments made by AALCO members on the Commission's work were particularly timely and useful as the Commission prepared to embark on the last year of the current quinquennium.

57. She also drew attention to the publication of the Commission's yearbooks on CD-ROM. Since she knew how difficult it could be for law institutes and universities to obtain such information, she encouraged Mr. Kamil to purchase the CD-ROM in question, provided that doing so would not give rise to copyright problems.

58. Mr. KAMIL (Observer from AALCO), replying to Mr. Sreenivasa Rao, said that his efforts to persuade French-speaking countries to join his organization had not yet met with great success, but he was sure that they would ultimately be fruitful.

59. As for working groups, he was happy to be able to announce that the establishment of six such groups had been proposed at the previous session, a move that could only enhance the quality of the work of AALCO.

60. In response to Mr. Galicki's question, he said that AALCO was currently working on two conventions, one on trafficking in women and children and the other on the respective rights of the countries of origin and host countries of migrant workers.

[15] See 2838th session, footnote 5.

61. Lastly, he thanked the members of the Commission for their warm welcome and the interest they showed in the work of AALCO.

62. Mr. MIKULKA (Secretary to the Commission) said that the circulation of the Commission's yearbooks on CD-ROM still posed copyright problems, but it was hoped that all that documentation would be accessible on the Internet in the near future.

The meeting rose at 1.10 p.m.

2854th MEETING

Wednesday, 20 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Unilateral acts of states (*continued*) (A/CN.4/549 and Add.1, sect. C and A/CN.4/557)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA thanked the Special Rapporteur for his eighth report on unilateral acts of States (A/CN.4/557), which would serve as a useful basis for the Commission's further work. Before commenting in detail on the report, he wished to provide information on the statement made by the Head of State of the Republic of Mali, in connection with the territorial dispute between Burkina Faso and Mali, considered by the ICJ as the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, in a judgment dated 22 December 1986. He regretted that he had been unable to provide the promised input to the Working Group on the subject, owing to difficulties in obtaining the relevant documentation in his capital.

2. Following an armed conflict between the two countries, which had broken out on 14 December 1974, appeals had been launched for conciliation, notably by the President of the Organization of African Unity. In January 1975, the Organization's Mediation Commission had formed a Legal Sub-Commission whose role was to draw up an initial proposal for submission to the Mediation Commission comprising an outline solution. On 11 April 1975, the Head of State of Mali had made the following statement during an interview with Agence France-Presse:

> Mali extends over 1,240,000 square kilometres, and we cannot justify fighting for a scrap of territory 150 kilometres long. Even if the Organization of African Unity Commission decides objectively that the frontier line passes through Bamako, my Government will comply with the decision. (para. 36 of the judgment)

3. On 14 June 1975, the Legal Sub-Commission had presented its report to the Mediation Commission and had suggested that the parties should accept the implementation of the principle of the intangibility of colonial frontiers; the use for that purpose of texts and maps; and specific proposals for the frontier line. On 17 and 18 June 1975, the Mediation Commission had met with the two Heads of State, and had adopted a final communiqué whereby the two States undertook to bring their dispute to an end on the basis of the Mediation Commission's recommendations, and agreed to the establishment of a neutral technical committee to determine the location of certain villages, to reconnoitre the frontier, and to make proposals for its materialization to the Mediation Commission. On 10 July 1975, the Heads of State had met again, and in a joint declaration had welcomed the efforts made and the results achieved by the Mediation Commission and had affirmed their common intention to do their utmost to transcend the results, especially by facilitating the delimitation of the frontier between the two States in order to place the final seal on their reconciliation. The technical committee had been unable to fulfil its function, and despite further contacts between the parties, that was how matters had remained until the conclusion of the Special Agreement by which the case had been brought before the ICJ.

4. With regard to the legal positions of the two parties and areas of agreement, they had agreed in the first place that the Mediation Commission had not been a jurisdictional body and had lacked the power to take legally binding decisions. In the second place, they had agreed that the Mediation Commission had never actually completed its work, since it had not formally taken note of the reports of its subcommissions, and had submitted no definitive overall solution for consideration by the parties in the context of its mediating functions.

5. As for areas of disagreement, Burkina Faso had argued that there had been acquiescence by Mali in the solutions outlined in that context, on three grounds. First, the final communiqué of 27 December 1974 setting up the Mediation Commission must be considered as a genuine international agreement binding upon the States parties. Second, while admitting that the Mediation Commission had not been empowered to render binding decisions, Burkina Faso had alleged that the report of the Legal Sub-Commission, endorsed by the summit meeting of Heads of State in June 1975, had become binding for Mali because it had proclaimed itself already bound by the report which might have been made by the Mediation Commission, by virtue of the declaration made by the President of Mali on 11 April 1975. Third, Burkina Faso had also argued that the effect of the final communiqué of 18 June 1975, which had emanated from the enlarged Mediation Commission, and had also been an international agreement which the parties were bound to observe, had been to reinforce Mali's obligations in the matter.