UNILATERAL ACTS OF STATES

[Agenda item 5]

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Sixth report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur

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CONTENTS

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	Source
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Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States (Montevideo, 26 December 1933)	*Ibid*., vol. CLXV, p. 19.
Charter of the Organization of American States (Bogotá, 30 April 1948)	United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3.
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Introduction

Viability of the topic. Possible forms for the final product of work on the topic. Methodological approach: study of specific unilateral acts. Structure of the sixth report

1. It is true that it has not been clearly established that the institution of unilateral legal acts exists, and the existence of such an institution is by no means clearly defined in international law, even though there are major doctrinal and case-law elements and even a certain State practice that could demonstrate the existence of the institution. However, the topic must continue to be studied by the International Law Commission, in accordance with the views expressed by the great majority of Commission members and Sixth Committee representatives. Governments have given the Commission a mandate to consider the topic and to endeavour to engage in a codification and progressive development exercise. Despite any doubts members might have, the Commission has had to adopt such an approach to consideration of the topic of unilateral acts of States. Even if the institution of unilateral acts did not in fact exist, the Commission would still be obliged to take up the matter: as a consultative organ of the General Assembly, it must consider all topics in its agenda. It must examine any legal institutions that it is asked to, to determine whether such institutions exist and whether a codification and progressive development exercise is feasible, and to respond

appropriately to the requests made and issues raised by Governments.

2. Since 1997, when the decision was taken to appoint a Special Rapporteur on the topic of unilateral acts of States,[1] the Commission's work has been characterized by its complexity and by the uncertainty that has prevented the Commission from making the progress it was hoping for when it first embarked on its work on the topic, unlike in the case of its consideration of other issues. As pointed out by some Commission members, the topics considered by the Commission in recent years have been based on a wealth of authoritative law and the task was to choose between competing and inconsistent rules emerging from State practice, as in the case of diplomatic protection.[2]

3. An extremely important factor that has had a negative impact on the Commission's work on the topic has been that State practice is not being considered in a broad context. It has been emphasized that consideration of the conduct of States in their international relations reflects a whole range of unilateral acts and conduct, some of which are not within the purview of the study of unilateral acts of the type with which the Commission is concerned. The main issue that arises is that of the uncertainty as to how convinced the author State is as regards the nature and scope of the act it is formulating.

4. The Commission has been considering the topic on the basis of the reports submitted by the Special Rapporteur, which, as pointed out on earlier occasions, have been based on the Commission's prior work on the topic. So far the main goal has been to elaborate rules governing the acts in question, focusing more on a progressive development approach than on codification, in accordance with the Commission's statute, in keeping with the conclusions adopted by the Commission and the Working Group on unilateral acts of States that met in 1996,[3] and in accordance with the views expressed by the majority of representatives in the Sixth Committee.

5. In the specific case of unilateral acts, the majority view in the Commission and the Sixth Committee has been that the topic of unilateral acts of States can be dealt with as both a codification and a progressive development exercise. It should be borne in mind that the 1997 Working Group on unilateral acts of States concluded in its report that "[i]n the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of act and what the legal consequences are, with a clear statement of the applicable law".[4] However, owing to the complexity of the topic and the doubts to which it gives rise, a number of other Commission members and Sixth Committee representatives are of a different view: they believe that it is too early for the topic to be the subject of such a study, particularly since consideration of State practice has not been completed; States have yet to comment on the matter, although some information that is of great relevance to the Commission's work has indeed already been received.

6. Apart from any quantitative assessment in that connection, these differences of opinion in the Commission and the Sixth Committee are an obstacle to progress in dealing with the topic. A number of other possibilities should perhaps be considered, since they offer ways of solving some difficulties and would facilitate further consideration of the topic, enabling States to hear the Commission's views on a matter of great importance to international relations.

7. Although it is true that codification and progressive development form the mandate of the Commission as a consultative organ of the General Assembly, the Commission has itself adopted other approaches with respect to other topics, as in the case of the topic of reservations to multilateral treaties, in connection with which a Guide to Practice is being prepared, which will set out guidelines for States to consult in matters relating to their future practice and will facilitate the consolidation of State practice.

8. As one representative indicated in the Sixth Committee, unilateral acts are extremely complex in nature and their codification may not necessarily be feasible within the foreseeable future. That representative also said that codification obviously does not mean a simple compilation of doctrine and jurisprudence on it: it is vital to complete the above two elements with the practice developed by States. The representative in question indicated in that connection that the adoption of such guidelines on unilateral acts by a General Assembly resolution, similar to those relating to reservations to treaties, might be advisable to provide a set of non-binding rules that States could rely upon, which in her view could help develop uniform practice in that respect.[5] Although the view has been expressed that it is too early to decide on the final form to be taken by the outcome of the Commission's work on the topic under consideration, the view expressed by that representative can be taken appropriately into account. A decision on the matter could perhaps facilitate progress in the Commission's work, by making the relevant conclusions less rigid. The Commission might wish to consider the matter before taking up other questions that entail further consideration of work carried out earlier that is discussed in the present report.

9. In accordance with suggestions made by a number of Commission members and representatives of States, this report will focus on a particular type of unilateral act: recognition, particularly recognition of States, although reference will also be made to other acts of recognition. Acts of recognition in general could

[1] *Yearbook ... 1997*, vol. II (Part Two), pp. 66, para. 212, and 71, para. 234.

[2] *Yearbook ... 2002*, vol. I, 2722nd meeting, statement by Mr. Dugard, p. 76, para. 57.

[3] *Yearbook ... 1996*, vol. II (Part Two), p. 14, para. 29, and annex II, addendum 3, p. 141.

[4] *Yearbook ... 1997* (see footnote 1 above), p. 64, para. 196 (*c*).

[5] Statement by Poland, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 26th meeting (A/C.6/57/SR.26), para. 25.

represent a specific category of the acts in question, that is, acts whereby States assume unilateral obligations.

10. Focusing efforts on the study of a particular act such as recognition could facilitate study of the topic, in addition to constituting a response to the suggestions made by a number of Commission members and Sixth Committee representatives. At the fifty-fourth session of the Commission in 2002, a number of members did in fact suggest such an approach. For example, one Commission member indicated that it had been proposed that the Commission should focus on certain areas of practice, such as recognition of States or Governments.[6] Another member had expressed the view that the Commission should start by considering examples of unilateral acts such as recognition and promise, in order to ascertain whether any general rules could be laid down.[7]

11. In the Sixth Committee, a number of representatives had also been of the view that separate consideration of the acts could be very useful. For example, one representative indicated that in order to achieve greater progress on this complex topic it would be desirable not only to gather and study relevant State practice on the widest possible basis, but also, in parallel with the consideration of general rules, to begin to study and codify rules on some unilateral acts whose nature and intended legal effects were relatively easier to determine. Protest, recognition, waiver and promise were examples of such unilateral acts.[8] Another representative made a similar statement on the same occasion, indicating that to do so it would be necessary primarily to elaborate a method of work which would be appropriate for the matter at hand and conducive to the production of results. Such a method would entail, first, the study of each category of cases of unilateral acts, starting from the classical ones, i.e. promise and recognition. It would thereafter be much easier to proceed to the identification of the general rules that would be applicable to those acts.[9] Another representative said that she would be grateful if in his sixth report the Special Rapporteur would consider a specific category of unilateral acts that many delegations regarded as falling within the category of so-called classical acts in the area under consideration, such as recognition.[10] Another representative had made a similar comment, indicating that in order to facilitate such work, it might be useful to study each specific type of act, such as promise, recognition, renunciation or protest, before elaborating the general rules on unilateral acts.[11]

12. Before consideration of the various aspects of the topic is taken up in this report, attention should be drawn to a major concern, with respect to which it should be borne in mind that major doubts have been expressed: the question of the possibility of elaborating a number of rules for application with respect to all unilateral acts, regardless of their characterization and their legal effects.

13. In earlier reports, the Special Rapporteur indicated that it would seem possible to elaborate a number of rules applicable to all unilateral acts, particularly as regards formulation of an act: definition, capacity of the State, individuals authorized to formulate the act, conditions for validity and reasons for revocation, which gave rise to a very interesting exchange of views at the fifty-fourth session of the Commission in 2002. Some members, it will be recalled, were of the view that the applicable rules could be unified, at least at the level of general principles.[12] Other members, however, did not express support for such a possibility.

14. In 2002 a number of Sixth Committee representatives also made comments on the matter, and some representatives expressed support for the approach. One representative indicated that it would be appropriate for the Commission at first to formulate rules common to all unilateral acts and afterwards to focus on the consideration of specific rules for particular categories of unilateral acts.[13] On the same occasion, another representative indicated that despite the controversial nature of the subject matter, he was convinced that the identification of general rules applicable to all unilateral acts was required to foster the stability and predictability of relations between States.[14] Similarly, another representative encouraged the Commission to continue to study the general and specific rules applicable to the various types of unilateral acts and to build upon that in order to draft a complete and coherent set of rules on the matter.[15]

15. Regardless of whether or not it is possible to elaborate rules common to all unilateral acts, whatever their form and legal effects, consideration of the matter will be approached in keeping with the suggestions made by the majority of Commission members in 2002. It is not a question of preparing a new theoretical study on the institution of recognition, which has been sufficiently examined by legal writers, but rather of examining the matter in the light of the considerations put forward on the topic of unilateral acts of States in general, in the Commission.

16. In chapter I, the institution of recognition will be taken up, with a focus on recognition as a unilateral act, and excluding other State acts and conduct that, although they might produce similar legal effects, do not fall within the context of the study currently under discussion by the Commission. A brief reference will also be made, in this chapter, to two interesting

[6] *Yearbook ... 2002* (see footnote 2 above), statement by Ms. Escarameia, p. 77, para. 65.

[7] *Ibid.*, statement by Ms. Xue, para. 70.

[8] *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 24th meeting, statement by China (A/C.6/57/SR.24), para. 37.

[9] *Ibid.*, statement by Greece, para. 74.

[10] *Ibid.*, 26th meeting, statement by Venezuela (A/C.6/57/SR.26), para. 51.

[11] *Ibid.*, statement by the Republic of Korea, para. 70.

[12] *Yearbook ... 2002* (see footnote 2 above), 2726th meeting, statement by Mr. Pellet, p. 99, para. 13.

[13] *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 26th meeting, statement by Nepal (A/C.6/57/SR.26), para. 18.

[14] *Ibid.*, 24th meeting, statement by Brazil (A/C.6/57/SR.24), para. 64.

[15] *Ibid.*, statement by Portugal, para. 15.

questions: criteria for the formulation of an act and their discretionality, relating chiefly to recognition of States. In the same chapter an attempt will be made to define acts of recognition, either in terms of or in close connection with the work carried out so far by the Commission; in addition, at the end of the chapter, a number of comments will be made on a type of non-recognition that has its own characteristics, although to a certain extent its effects are comparable to those of an act containing a protest. In chapter II, the conditions required for the validity of such an act are examined: formulation (intent), lawfulness of the object and conformity with imperative norms of international law. In chapter III, consideration of the legal effects of an act of recognition will be taken up, particularly with regard to the opposability and enforceability of the act. Lastly, chapter IV takes up a number of issues relating to the application of acts of recognition: the relationship between the author State and the addressee; the spatial and temporal application of acts of recognition; and, lastly, although only on a preliminary basis, matters relating to the modification, suspension and revocation of acts of recognition, including causes external to the act, that is, causes beyond the author's control, in particular, in keeping to a certain extent with the Vienna regime on the law of treaties, the disappearance of the object and a fundamental change in circumstances.

Chapter I

Recognition

Conduct and acts. Silence and acquiescence. Tacit recognition through implicit or explicit acts. Conventional recognition. Criteria for formulation and discretionality of acts of recognition

17. As already indicated, the goal is not to prepare a new study on a topic on which extraordinary writings have already been produced by jurists. The aim is, instead, as indicated in the introduction to this report, to set out the most important characteristics of the institution of recognition in such a way as to link them to the work already carried out by the Commission on unilateral acts in general. Recognition as an institution and unilateral acts of recognition are not necessarily identical concepts, and this is precisely what is being referred to in the present chapter. Specifically, the aim is to examine the institution and the various acts and forms of conduct whereby a *de facto* or *de jure* situation or legal claim is recognized, in order to exclude those that do not fall within the framework of the unilateral acts that are of interest to the Commission.

18. To begin with, once again an issue must be examined that has already been considered in earlier reports: the difficulties involved in qualifying or characterizing unilateral acts of recognition in a definitive manner; and the need to circumscribe the study of recognition of unilateral legal acts, which means that it will be necessary to exclude other acts and types of conduct on the part of States to which reference has also been made, in general terms, in reports and previous discussions in the Commission.

19. As experience has already shown, it is not easy to qualify unilateral acts of States in a definitive fashion and to characterize them, on the basis of studies of the subject and the conclusions drawn by international legal writers and case law. As will be noted, it is possible to choose to qualify such acts without differentiating between them. There is, for example, the relationship between acts of recognition and other acts accepted by legal writers as also being unilateral acts, as in the case of renunciation and promise; and in the case of some forms of conduct and attitudes on the part of States, such as silence, which is sometimes interpreted as acquiescence. There is also an important relationship, particularly as regards effects, between acts of recognition and estoppel, which has sometimes been referred to in earlier reports. As indicated by the Chamber constituted by ICJ in the *Gulf of Maine* case:

> [The] concepts of acquiescence and estoppel … both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.[16]

20. This approach also calls for a reference to non-recognition which may be performed by means of an express act or by means of express or explicit conduct, which is also of interest and has legal implications; in any event, non-recognition can constitute a unilateral act within the meaning that is of concern to the Commission.

21. The Ihlen declaration[17] is a clear example of the wide range of conclusions that can be drawn when an attempt is made to qualify an act, as the Special Rapporteur attempted to demonstrate in earlier reports.[18] This declaration recognizes a situation, but it also contains a promise and even a renunciation. The same can be said of the declaration by the Government of Colombia on Los Monjes, which has also been referred to in earlier reports[19] and can equally well be described as recognition or a renunciation, or even a promise. Further valid examples are unilateral declarations of neutrality, which can entail a renunciation or a promise; and, lastly, as yet a further illustration of the wide variety and complexity of acts of recognition, there are the negative security assurances formulated by States in the framework of disarmament

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[16] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 305, para. 130.

[17] See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 69–70.

[18] *Yearbook … 2001*, vol. II (Part One), document A/CN.4/519, p. 125, paras. 72–73; and *Yearbook … 2002*, vol. II (Part One), document A/CN.4/525 and Add.1–2, pp. 93–94, para. 6, p. 97, para. 36 and p. 112, para. 160.

[19] *Yearbook … 2002* (see footnote 18 above), p. 96, para. 23. See also Vásquez Carrizosa, *Las relaciones de Colombia y Venezuela: la historia atormentada de dos naciones*, pp. 337–339.

negotiations, which can be regarded or qualified as a promise or a renunciation.

22. Whereas a renunciation is an expression of the general capacity to dispose of one's rights, as pointed out by some, recognition is an expression of the capacity to assume obligations, which is a prerogative of States: this is the same capacity whereby a legal value is attributed to international agreements, whatever term may be used in that connection. Recognition has some characteristics in common with a promise, or, to be more precise, it falls within the broader framework of unilateral acts representing exercise of the general capacity to assume obligations by means of an expression of will, that is, within the framework of a general concept of legal acts.[20] An act of recognition of a State would thus, owing to its object, seem to be on firmer ground than other unilateral acts because it is not easily confused with a renunciation or a promise.

23. One and the same question arises, however, in all cases: the State formulating the act, regardless of its qualification or characterization, would be assuming unilateral obligations. The State would be obliged, on the basis of the act concerned, to conduct itself in a particular manner, when a promise is involved; or it would be obliged subsequently to refrain from calling into question the legality of a particular situation, in the case of recognition or a renunciation. An act formulated by a State is binding on it from that point in time, which means that the addressee has the right to require enforcement; the principles of opposability and enforceability, which will be dealt with below, thus arise.

24. Formulation of an act could, in all events, be the subject of another general comment. Unilateral acts of recognition, renunciation and protest, and unilateral acts containing a promise are expressions of unilateral will on the part of an individual authorized to act on behalf of a State and engage it on its behalf in that context, with the intention of producing particular legal effects.

25. Recognition of a *de facto* or *de jure* situation or a legal claim is not always performed by means of acts expressly formulated to that end. Both the writings of jurists and practice reveal the existence of various acts and a number of types of conduct whereby States can recognize a situation or a claim that should be excluded from the study that is to be carried out. The type of recognition to focus on is that formulated by a State by means of a unilateral legal act. Recognition of States and Governments in particular can be performed either explicitly or implicitly. Furthermore, a listing of acts that result in recognition does not exist.

26. It will thus be noted that States can recognize a particular *de facto* or *de jure* situation or a legal claim not only by means of the expression of explicit will, but also by means of various forms of conduct or acts that tacitly, implicitly or explicitly encompass such recognition. First, recognition of a situation or claim by means of non-active conduct, such as silence, will be noted; this is of great importance in international law and has unquestionable legal effects, as will be revealed by an examination of international practice and writings of jurists. Silence may be interpreted as a lack of reaction, which has its importance in the context of legal situations and claims, particularly territorial claims, matters which have been considered on a number of occasions by ICJ, as in the cases concerning the *Temple of Preah Vihear*,[21] the *Arbitral Award Made by the King of Spain on 23 December 1906*,[22] the *Right of Passage over Indian Territory*[23] and, *inter alia*, in the cases involved in the *Land, Island and Maritime Frontier Dispute*.[24] It should, however, be pointed out that silence is not always interpreted as acquiescence, as observed by the majority of legal writers and the case law of the international courts;[25] it cannot always be viewed as acquiescence.[26]

27. A State can also recognize a *de facto* or *de jure* situation or a legal claim by means of an act expressly performed to that end, but not with the specific intention of formulating an act of recognition in the sense under consideration. Nor does such an act, whereby a State recognizes implicitly or explicitly a situation or claim, appear to belong in the category of acts of recognition in a strict sense. If that is so, one is in the presence of explicit acts of States that may be interpreted as acts of recognition that unquestionably produce the same legal effects.

28. When a State establishes diplomatic relations or concludes an agreement with an entity that it has not recognized as such, it will be recognizing it from that point in time onwards or from the point in time at which the act is established. A State that concludes an agreement with another State on the subject of a territory will unquestionably be recognizing that entity as a State, which has legal consequences similar to those produced by an express act of recognition, manifested with the intention of recognizing such a situation.[27] As will be seen below, a State could even be recognizing a State as such when it is admitted to membership of the United Nations.

29. Another category of acts of recognition that would not fall within the context of the unilateral acts of

[20] Venturini, "The scope and legal effects of the behaviour and unilateral acts of States", p. 396.

[21] *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6.

[22] *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192.

[23] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 39.

[24] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 422, para. 100.

[25] *Ibid.*, p. 577, para. 364.

[26] Arbitral award in the *Island of Palmas* case (*Island of Palmas (Netherlands/United States of America)*, award of 4 April 1928, UNRIAA, vol. II (Sales No. 1949.V.1), p. 843).

[27] In the context of the recognition of States there is, for example, the joint communiqué of 17 January 1986 signed by Israel and Spain, in which the Governments of the two countries decided to establish diplomatic relations, an act which would without question be governed by the Vienna regime on the law of treaties.

recognition under consideration would be conventional acts of recognition, that is, recognition performed by means of a conventional act concluded by two States, which would be an act falling within the sphere of the Vienna regime on the law of treaties. Nothing would appear to prevent two States from deciding to establish relations, by means of an agreement, including an informal one such as a joint communiqué that would not necessarily be signed, but would simply be issued; this could represent mutual recognition, as, for example, in the case of mutual recognition by the two Germanies, by means of a treaty concluded by the two countries, in which they recognized each another as legitimate political entities.[28]

30. Recognition can also occur as a result of an act formulated by an international organization, particularly acts whereby a State is admitted to membership of the United Nations. These are unilateral acts of a collective origin, performed by an international organization, within the framework of its competences and in accordance with its rules, to be more specific, by means of a formal resolution of the General Assembly.

31. The admission of new members is based on a constitutional procedure, laid down in the Charter of the United Nations, for political reasons; new members have been admitted in greater numbers since 1960 following the adoption by the General Assembly of its resolution 1514 (XV) of 14 December 1960, on the granting of independence to colonial countries and peoples; more recently, this process has been the result of the disintegration of the former Yugoslavia and the Soviet Union. The most recent admission to membership involved Timor-Leste, which was admitted by means of Assembly resolution 57/3 of 27 September 2002. Unquestionably, this internal act on the part of the United Nations, which is not an express act of recognition in the sense that is of concern to the Commission, has legal and political effects similar to those of the formal unilateral act under consideration. States participating in the decision would be implicitly recognizing the entity admitted by the United Nations. When the United Kingdom of Great Britain and Northern Ireland supported the admission of the Democratic People's Republic of Korea to the United Nations it stated: "[W]e also now recognize [it] as a state, but have no plans to establish diplomatic relations".[29] An act of recognition formulated by means of a resolution on admission to membership of the United Nations would even be opposable with respect to States that reject such recognition. In such a case, there would be a State that has effectiveness.

32. Although the act in question is a unilateral legal one of a collective origin that produces particular legal effects, and despite its legal and even political importance, this act must be excluded from the scope of the study under discussion because it does not fall within the Commission's mandate, which is limited to unilateral acts of States.

33. Consideration of the type of recognition with which the Commission is concerned should be limited to unilateral legal acts formulated by States with the intention of recognizing a particular situation or claim. The acts in question must be formulated expressly by a State, either orally or in writing, and should not be other acts or various types of conduct that imply recognition, even though they may produce the same legal effects. The relevant practice indicates that many acts of recognition are formulated expressly by means of a declaration or a diplomatic note, with even greater frequency in the context of the recognition of States that is to form the main framework for the present report, in accordance with the suggestion made by the Commission. One type of act of recognition among many others is the kind of formal declaration formulated by most States whereby the new African and Caribbean States and new States in other regions have been recognized upon gaining independence since 1960. More recently, there have been many acts concerning the recognition as independent States of Bosnia and Herzegovina, Croatia, Estonia, Latvia, Lithuania and Slovenia, and the various former Soviet Republics, among others, that have resulted from the political process that began towards the end of the 1980s.[30]

34. Before any attempt is made to define unilateral acts of recognition, two issues that would appear to be of interest should be taken up: the criteria for formulating such acts and discretionality.

35. Acts of recognition, including acts of non-recognition, which will be discussed below, are not subject to any specific criteria. Recognition of States, for example, is based on criteria that are not homogeneous in practice, but in any event meet the requirements of international law for determining that the State in question exists. For example, in the case of the political recognition of States by the United Kingdom, formulated when in 1986 it was considering either recognizing or not recognizing Bophuthatswana, the British Government laid down the following criteria:

> The normal criteria which the Government apply for recognition as a State are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations.[31]

Interestingly, the British Government adds the following: "Other factors, including some United Nations resolutions, may also be relevant".[32] Also in 1986, it

[28] Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic (Berlin, 21 December 1973), ILM, vol. XII, No. 1 (January 1973), p. 16.

[29] Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, *Hansard*, House of Commons Debates (6th series), vol. 196 (16 October 1991), cited in Harris, *Cases and Materials on International Law*, p. 145.

[30] Among the many declarations of recognition in question, attention should be drawn to those formulated by Venezuela whereby it recognized, as sovereign and independent States, Bosnia and Herzegovina (14 August 1992), Croatia (5 May 1992) and Slovenia (5 May 1992), *Libro Amarillo de la República de Venezuela correspondiente al año 1992* (Caracas, Ministry for Foreign Affairs, 1993), pp. 505 and 508.

[31] *Hansard* (see footnote 29 above), vol. 102, Written Answers (23 October 1986), cited in Marston, ed., "United Kingdom materials on international law 1986", p. 507.

[32] *Ibid.*

expressed the view that the entity in question did not qualify for recognition by the United Kingdom because it was a fragmented territory largely dependent on South Africa. Later in 1988, it also indicated that the chief obstacle to recognition of the fragmented territory in question was that, in addition to being a dependent territory, Bophuthatswana was a result of apartheid.[33]

36. Recognition by means of acts on the part of the United Nations is not based on specific criteria either, although there was an occasion when it was proposed that the relevant criteria should be consolidated. It was once suggested that the General Assembly should adopt a declaration describing the characteristics of a State and "assert[ing] that there must be a finding of the possession of such characteristics before any political entity is recognized as a state".[34] That did not prove possible, however. The criteria continued to be an expression of the State in terms of its political interests, because in the final analysis an act of recognition is a political act, entered into freely and at the discretion of a State, that produces legal effects.

37. In practice, however, there are additional criteria on which recognition can be based that can to a certain extent be assimilated to the conditions imposed by some countries for recognition of certain States, particularly those that emerged from the disintegration of the Soviet Union and the former Yugoslavia. This is so in the case of the declarations adopted by the 12 States members of the European Community on 16 December 1991,[35] whose chief substantive purpose was to reconcile practice as regards self-determination with recognition of the need for international stability, particularly with respect to borders and minority rights. According to this practice, which could point to a number of relevant criteria, the entities in question must be founded on democratic principles, comply with the Charter of the United Nations and respect human rights and fundamental freedoms.

38. There is less reason to assert that there are criteria for recognition of legal situations or claims, such as those relating to a state of belligerency or those of a territorial nature. Discretion in the formulation of acts of recognition extends to the criteria that form the basis for the declarations containing the acts.

39. Acts of recognition are unilateral in the strict sense of the term, and they are perhaps the most important type of unilateral act, in view of their content and their legal effects, including their political effects. However, fundamentally what determines their unilateral nature is that they are discretionary, as emphasized both by the relevant writings of jurists and widespread practice. No general rule of international law would appear to have been laid down that might specify that it is mandatory to recognize a legal situation or claim. Discretionality continues to be of fundamental importance in formulating acts of recognition. The assertion that acts of recognition are discretionary is to be found in a number of texts, such as opinion No. 10 of the Arbitration Commission of the International Conference on Peace in the Former Yugoslavia, which emphasized that:

> [R]ecognition is … a discretionary act which other States may perform when they choose and in a manner of their own choosing, subject only to respect for the guiding norms of general international law.[36]

40. The discretionary nature of acts of recognition means, as already indicated, that there is no obligation to perform such an act. If there were such an obligation in this context, it would be conventional.

41. The obligation of non-recognition arises in a different manner. First, a State is prevented from recognizing a particular situation when that situation is linked to, or has resulted from, situations that violate international law, as in the case of situations linked to or resulting from the threat or unlawful use of force, as laid down in a number of instruments and international texts that reflect the existence of a norm of general international law. This is so, for example, in the inter-American regional sphere, in the case of the Anti-War Treaty (Non-Aggression and Conciliation), which is known as the Saavedra Lamas Treaty, article II of which states that the parties:

> shall recognize no territorial arrangement not obtained through pacific means, nor the validity of an occupation or acquisition of territory brought about by armed force.

42. This obligation is also provided for in article 20 of the Charter of the Organization of American States (as amended by the "Protocol of Buenos Aires") and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which is set out in the annex to General Assembly resolution 2625 (XXV) of 24 October 1970, which states that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal".

43. There are also a number of other General Assembly resolutions adopted by consensus that contain such a prohibition, as in the case of resolution 3314 (XXIX), on the definition of aggression, adopted on 14 December 1974, article 5, paragraph 3, of which states that:

> No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

44. There is also General Assembly resolution 42/22 of 18 November 1987, containing in its annex the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, paragraph 10 of which states that:

> Neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation.

[33] *Ibid.*, vol. 126 (3 February 1988), cited in Harris, *op. cit.*, p. 154.

[34] Jessup, *A Modern Law of Nations: an Introduction*, p. 47.

[35] S/23293, annexes I–II.

[36] A/48/874–S/1994/189, annex, para. 4.

45. The obligation of non-recognition also arises in Security Council resolutions, such as resolution 662 (1990) of 9 August 1990, on the situation between Iraq and Kuwait, which reads as follows:

1. *Decides* that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void;

2. *Calls upon* all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.

46. Moreover, a State is not obliged to formulate an act of non-recognition in order to ensure that a given situation is not regarded as binding on it. That is, it is not obliged to formulate an express act to that effect, which means that the discretionality applicable to an act of recognition would be valid with respect to the formulation of an act of non-recognition. There does not appear to be any norm of general international law that requires States to formulate an act of recognition or of non-recognition, which reflects the discretionary nature of the two types of act. What a State may not do, and this is not discretionary, is recognize a situation resulting from the threat or use of force; from an express act; or from explicit acts or forms of conduct.

47. Generally speaking, recognition has been extensively examined by legal writers,[37] although its definition may vary according to the object involved, that is, according to whether a general definition is what is entailed or whether the definitions concerned relate to a particular object, as in the case of definitions relating to recognition of a State, Government, state of insurgency or belligerency, national liberation movements or any other change in or modification of the legal order, including in a territorial context, which is one of the most important and delicate objects of such acts, on which the international courts have made pronouncements on a number of occasions.

48. Although recognition is not a term of art having a precise meaning in international law,[38] most legal writers generally define it as "a unilateral declaration of will whereby a subject of international law acknowledges the existence of a fact, a situation or a claim and expresses its will to consider them legitimate".[39] Other legal writers have formulated definitions along the same lines, in general terms. Recognition is a unilateral act "whose object is the attitude which a State takes with regard to a *de facto* or *de jure* situation"[40] or "an expression of will … by a State or a group of States with the intention of making a situation opposable in respect of the author State".[41]

49. In these definitions and the other definitions generally formulated in the writings of jurists, the three constituent elements of the definition of the act can be distinguished: formal unilaterality, acknowledgement of an existing situation and the intention of the author to produce specific legal effects by recognizing its opposability.

50. The definition of the act of recognition will contain a series of elements on which comments shall subsequently be made: unilateral expression of will (absence of defects), capacity of the subject formulating the recognition and of the person acting on its behalf, the lawfulness of the object of the act and the production of legal effects; the latter question will be discussed in chapter III. In every case, these characteristics of the act of recognition in general would seem to be applicable to the act of recognition of States.

51. The act of recognition which is of concern is a unilateral expression of will that produces effects in itself. No other expression of will is required to enable it to produce its legal effects. In form it is a unilateral act and therefore in no way depends on or is related to any pre-existing norm, although it may be related to a pre-existing *de facto* situation, as in the case of the act of recognition of a State.

52. The act of recognition which is of concern is "a declaration of will which, in principle, should not entail any condition or be subject to any limitation".[42] Nevertheless, as practice shows, although the act of recognition can be considered declarative in nature, it can be formulated in conditional form, as some legal writers acknowledge,[43] which links it to the previously considered issue of the criteria for the formulation of the act.

53. In the European context, for example, one may note the guidelines on recognition adopted by the European Community which, although they do not constitute an act of recognition in themselves, establish the rules for the formulation of such acts by member States. The European Community declaration on Yugoslavia referred to above (para. 37) contains a clear condition, in that the Community and its member States "require a Yugoslav republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring community State and that it will conduct no hostile propaganda activities versus a neighbouring community State, including the use of a denomination which implies territorial claims".[44]

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[37] See, *inter alia*, Kelsen, "Recognition in international law: theoretical observations"; Venturini, *Il riconoscimento nel diritto internazionale*; Lauterpacht, *Recognition in International Law*; Kunz, "Critical remarks on Lauterpacht's 'Recognition in International Law'"; Williams, "La doctrine de la reconnaissance en droit international et ses développements récents"; Charpentier, *La reconnaissance internationale et l'évolution du droit des gens*; Suy, *Les actes juridiques unilatéraux en droit international public*; Brownlie, "Recognition in theory and practice"; and Dugard, *Recognition and the United Nations*.

[38] Brownlie, *loc. cit*., p. 627.

[39] Diez de Velasco Vallejo, *Instituciones de derecho internacional público*, p. 133.

[40] Monaco, "Cours général de droit international public", p. 182.

[41] Degan, "Création et disparition de l'État (à la lumière du démembrement de trois fédérations multiethniques en Europe)", p. 247.

[42] Strupp, *Grundzüge des positiven Völkerrechts*, p. 78. Quoted by Williams, *loc. cit*., p. 210.

[43] Barberis, "Los actos jurídicos unilaterales como fuente de derecho internacional público", p. 113. The author recognizes that these acts can be subject to conditions or specific circumstances, which could provide grounds for their termination or revocation.

[44] S/23293, annex I.

54. The act of recognition, like all unilateral acts, can be formulated by a single State, by several States collectively and even by several States in a concerted manner through similar but not necessarily identical declarations.[45]

55. The act of recognition, especially recognition of States, may thus be individual, collective or even concerted in origin, that is, expressed by various States in separate acts or declarations, whether simultaneous or not, as in the case—although these are not acts of recognition—of the declarations on negative security guarantees, to which reference has been made in earlier reports,[46] and which, although they express rather a promise or even a waiver, according to the definition most often given in the writings of jurists, illustrate the possibility of concerted adoption in the context of the formulation of unilateral acts in general. There seems to be no reason why several States should not formulate similar or even identical declarations to recognize a *de facto* or *de jure* situation. In the case of recognition of States, this has been seen in the acts of recognition formulated by the European States *vis-à-vis* the new States which emerged from the dismemberment of the former Yugoslavia.

56. In State practice there are many important acts of recognition of individual origin, referring mainly to situations involving States, Governments, belligerency and insurgency, which are easy to find in the various repertories of State practice. These declarations are particularly numerous in the case of recognition of States, having been formulated during the 1960s after the decolonization process initiated by the Declaration on the granting of independence to colonial countries and peoples adopted by the General Assembly (para. 31 above), and, more recently, after the formation of the new States emerging from the dismemberment of the Soviet Union and the former Yugoslavia. Although the tendency will be to focus on these declarations, in practice there are also many declarations concerning territorial questions, such as the aforementioned Ihlen declaration[47] or the declaration by the Government of Colombia,[48] and other situations such as recognition of a state of belligerency or insurgency.

57. With regard to the collective form, one may cite the declarations adopted by the member States of the European Community in Brussels on 16 December 1991 concerning Yugoslavia and the guidelines relating to the recognition of the new States in Eastern Europe and in the Soviet Union, which were, in substance, used by the member States in recognizing those entities.[49] As has already been noted, those declarations are not in themselves acts of recognition. Legal writers consider that the power of recognition has not been transferred by States to the European Community. Therefore, on the basis of the declarations, the European States decided to recognize, individually but in a concerted manner, although not necessarily in the same terms, the new States arising from the disintegration of the former Yugoslavia and the Soviet Union.

58. In the case of recognition and, more particularly, recognition of a State through an act expressly formulated to that end, the intention of the State is not difficult to identify, as can be seen from the declarations formulated by a number of States concerning the recognition of the States resulting from the dismemberment of the former Yugoslavia, which use the term "recognizes", thus reflecting the intention to grant the status of State requested by those entities. In concrete terms, it is to be noted that these declarations state that the author State "has decided to recognize …".[50]

59. The act of recognition which is of concern is generally formulated in a declaration incorporated in a diplomatic note or communication which the author State sends to the authorities of the State or entity in question, whatever the object of the act. Practice shows that the act of recognition is generally formulated in writing, although this does not preclude its being formulated orally, as was the case of the declaration by the Minister for Foreign Affairs of Venezuela concerning non-recognition of an insurgent group,[51] to which reference will be made later when considering the act of non-recognition. In the non-formalist system of public international law, the form of the recognition in itself is of no importance.[52] The view that the form of the act is not determinant, in the context of unilateral acts in general, is also applicable to the act of recognition of a State in particular.

60. In the case of territorial questions, to which reference is always made for illustrative purposes, diplomatic correspondence is the most widely used means of performing the act of recognition; this is reflected in the practice, including the cases examined by the international courts, as in the *Legal Status of Eastern Greenland* case, in which PCIJ considered the official correspondence addressed by Denmark to other States.[53] In the *Minquiers and Ecrehos* case, ICJ considered an official British document of 17 August 1905.[54] The aforementioned declaration by Colombia was likewise transmitted through a diplomatic note from the Ministry for Foreign Affairs.[55] In any case, form does not seem to be determinant in establishing the performance of an act of recognition.

61. Furthermore, for acts of recognition in general, and the act of recognition of a State in particular, there is a requirement of "notoriety", which is consistent with the conclusions reached concerning unilateral acts in

[45] Suy, *op. cit.*, p. 191; and Erich, "La naissance et la reconnaissance des États", p. 457.

[46] *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1, pp. 198–199, paras. 23 and 25; *Yearbook ... 2001*, para. 71, and *Yearbook ... 2002*, para. 6 (see footnote 18 above).

[47] See footnote 17 above.

[48] See footnote 19 above.

[49] See footnote 35 above.

[50] Declarations of 5 May and 14 August 1992 (see footnote 30 above).

[51] *El Universal* (Caracas), 11 March 2003.

[52] Verhoeven, "Relations internationales de droit privé en l'absence de reconnaissance d'un État, d'un gouvernement ou d'une situation", p. 22.

[53] *P.C.I.J.* (see footnote 17 above), p. 54.

[54] *I.C.J. Pleadings, Minquiers and Ecrehos*, Vol. I, pp. 123–124.

[55] See footnote 19 above.

general. "Notoriety", which goes beyond mere publicity of the act, that is, knowledge of the act and its content on the part of the addressee, is another constituent element of the act of recognition. Indeed, the act must be known to the addressee in order to produce its legal effects, even though some might consider the importance of this to be, rather, probatory in nature, which is undoubtedly also true. ICJ referred to notoriety in connection with the *Gulf of Maine* case, when considering the reply of the United States of America concerning the lack of "notoriety" of the issue of offshore permits by Canada.[56]

62. Furthermore—and reference will be made to this in chapter III of this report—the act of recognition produces specific legal effects, independently of its acceptance by the addressee, which are based on the intention of the author State. The unilateral act of recognition will be opposable with respect to the author State from the time of its formulation.

63. Consideration of the act of recognition also obliges one to consider non-recognition, which can be carried out through the formulation of an explicit act, rendering it to some extent similar to recognition, and through other acts or forms of conduct of a conclusive nature. As has been noted, a State can recognize a *de facto* or *de jure* situation or a legal claim. However, a State may also not recognize a situation, both explicitly and implicitly, and this, too, can produce legal effects.

64. Non-recognition can be produced through the formulation of an explicit act, which to some extent can be assimilated to protest as regards its legal effects. Refusal to recognize the status claimed by an entity which aspires to recognition as a State can take the form of an explicit declaration, as was the case with the explicit acts of non-recognition formulated by Greece with regard to the former Yugoslav Republic of Macedonia or a number of States in relation to Southern Rhodesia.

65. Explicit non-recognition may arise in another context, namely in connection with recognition of a subject other than a State. The qualification of such an entity, for example an internal insurgency movement, is likewise of interest in the context of the consideration of non-recognition. There are unilateral acts which, although also based on political motives, can produce important legal effects in international relations. One example taken from recent practice is the explicit oral declaration by the Minister for Foreign Affairs of Venezuela, in which he affirmed that "Venezuela will not qualify the leftist guerrillas in Colombia (Fuerzas Armadas Revolucionarias de Colombia and the Ejército de Liberación Nacional) as terrorists".[57] The absence of explicit qualification implies non-recognition of something specific, which has important legal consequences, relating mainly, at least, to the applicable legal regime.

66. Consideration of the act of non-recognition is important within the framework of the study of the act under consideration. The legal act of non-recognition is also, as has already been noted, a unilateral expression of will, formulated with the intention of producing a specific legal effect. Hence, in the view of the Special Rapporteur, the act of non-recognition, explicitly formulated and not dependent on or related to any other expression of will, may be placed within the context of the study of the act under consideration. On the other hand, implicit or tacit non-recognition, which cannot be assimilated to a legal act in the strict sense of the term, should be excluded from the study, like the aforementioned tacit or implicit act of recognition.

67. It is not easy to define the act of recognition, specifically the recognition of a State, just as it is not easy to define unilateral acts in general. However, one can try to present a definition which to some extent is related to the work already done by the Commission on this topic. The act of recognition could thus be defined as follows:

"A unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a *de facto* or *de jure* situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself."

[56] *I.C.J. Reports 1984* (see footnote 16 above), para. 131.

[57] See footnote 51 above.

Chapter II

Validity of the unilateral act of recognition

Formulation of the act: act of the State and persons authorized to formulate the act. Acknowledgement of the situation and intention of the author State. Lawfulness of the object. Question of the addressee in the case of the act of recognition. Temporal and spatial application of the act of recognition

68. Having sought to define the unilateral act of recognition in the light of doctrine and practice and in accordance with the work already done by the Commission, reference is now made to the conditions of validity of the act of recognition.

69. The conditions of validity of legal acts in general appear to be applicable to the act of recognition in particular. Although no draft article on the conditions of validity of a unilateral act has been drafted, such conditions were mentioned in earlier reports, in particular the capacity of the State, the authorization of the person who can act on behalf of the State in international relations and engage it in this sphere and the causes of invalidity, which include, as has already been said, the lawfulness of the object, its conformity with

international law, the expression of will and absence of defects, to all of which reference will be made later.

70. In the majority of cases seen in practice, only States formulate acts of recognition of the kind which are of concern, namely unilateral, explicit and with the intention of producing legal effects. This does not mean that there can be no other subjects with the capacity to do so. Acts of recognition of States and Governments, those relating to states of belligerency and insurgency, those concerned with declarations of neutrality by a State and those concerning territorial questions are formulated by States. Hence, the first consensual condition of validity relates to the capacity of the State, which means, at least for the time being, that other subjects of international law, such as international organizations, cannot formulate an act of this kind.

71. Acts of recognition, specifically recognition of a State, unlike other unilateral acts, are generally formulated by ministries for foreign affairs and their ministers, which does not mean that other persons linked to the State cannot formulate acts on its behalf. As practice indicates, diplomatic notes are in general declarations formulated by ministries for foreign affairs, the principal organ competent to act on behalf of the State in the international sphere, although the issue of competence to act on behalf of the State in this context is a matter of internal law.

72. With regard to unilateral acts in general, it may be stated that other entities and representatives of the State can act on its behalf at the international level and engage it, a matter which has been considered in earlier reports and on which the Commission has expressed its views at length. However, in relation to the act of recognition and, more specifically, the act of recognition of a State, it seems difficult to admit that a person other than the Head of State or Government or the minister for foreign affairs or the representatives of the State in limited spheres, such as ambassadors *vis-à-vis* the State or international organization to which they are accredited, can act on its behalf. It is difficult for the recognition of a State or Government to be the object of an act of recognition by a different organ. There is a limitative criterion in the case of recognition of a State, which is probably different from other unilateral acts such as promise, in which case a broader criterion can be established since, in effect, the object of such acts may fall within the sphere of competence of other State authorities.

73. The international courts have examined the character of some declarations, finding some of them to be binding.[58] However, not all officials or persons related to the State, to cite a broader category, can formulate acts on its behalf and engage it at the international level. Thus, the act of a technical official was examined in the *Gulf of Maine* case, in which the Chamber of ICJ considered that the act did not engage the United States internationally. In this case, it will be recalled, the Chamber of the Court considered that the "Hoffman letter" could not be invoked against the United States.[59]

74. With regard specifically to the act of recognition of a State, no references have been found to its being examined by the international courts with a view to determining whether it is binding or not.

75. The conditions of validity and the causes of invalidity of unilateral acts in general and the act of recognition in particular are also related to the object, the expression of consent and conformity with international law. This question has been dealt with in earlier reports, in which it was noted, among other things, that a unilateral legal act could be governed, to a large extent, by rules similar to those applicable to treaties embodied in the Vienna regime on the matter.

76. According to most legal writers, the object of an act of recognition referring to any situation or claim must be lawful. As has been noted, such acts may have various objects, but the main one is the recognition of the State "whose birth, since the end of the eighteenth century, has constantly evoked reflexes of (non) recognition on the part of the 'family of nations' which was called upon to welcome a new member".[60] As has already been noted, the object may refer to a Government, to a state of belligerency or insurgency, or to any legal claim. There are no criteria for establishing a limitative list of objects in relation to which an act of recognition can be formulated.

77. If a unilateral act, particularly an act of recognition, runs counter to an act emanating from an international body, such as a United Nations resolution, which precludes the recognition of a State, this invalidates the act and deprives it of legal effects.

78. In the specific case of recognition in the context of territorial changes, it may be observed that in practice, acts of annexation carried out in breach of international law have been considered invalid and therefore do not produce the legal effects claimed by the author State. For example, the annexation of Ethiopia by Italy[61] shows that recognition by third parties did not give it the legality claimed.

79. As has been seen, the act of recognition is an expression of will which must be formulated without defects, a condition which is applicable to legal acts in general, whether conventional or unilateral. An act of recognition will be valid and produce legal effects if the will of the author State is formulated without defects.

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[58] Thus, for example, PCIJ recognized the binding nature of declarations in the following cases: *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*; *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*; and *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*. In the context of a judicial process, an arbitral tribunal considered that the declarations of an agent in the oral proceedings were binding on the State.

[59] *I.C.J. Reports 1984* (see footnote 16 above), para. 139.

[60] Verhoeven, *loc. cit*., p. 20.

[61] Italian Decree regarding the Transfer of Abyssinia to Italian Sovereignty (Rome, 9 May 1936), *British and Foreign State Papers, 1936*, vol. CXL (London, HM Stationery Office, 1948), p. 624.

The causes of invalidity established in the Vienna regime on the law of treaties, as noted in earlier reports in connection with the expression of consent, could to a large extent be transferred to the regime applicable to unilateral acts in general. The act of recognition of a State, in particular, is an expression of will and the defects which might affect it would be the same as those applicable to the expression of consent in that sphere.

80. An act of recognition of a State must be formulated in conformity with international law, and in particular it must not run counter to an imperative norm of international law. Thus, for example, the recognition of a State established in violation of international law, e.g. by an illegal annexation, would as has already been noted, be invalid and produce no legal effects.

81. The condition of validity applicable to a legal act in general, which intervenes in the sphere of the law of treaties with reference to the lawfulness of the object, is fully applicable to acts of recognition in general and recognition of States in particular. Indeed, it is essential, as has been seen earlier, that the object of the act be lawful.

Chapter III

Legal effects of recognition

Opposability and enforceability. Basis for the binding nature of the act of recognition

82. In this chapter three questions shall briefly be considered: the legal effects of the act of recognition of States, its opposability and enforceability, and the basis for its binding nature.

83. First, one must seek to determine the nature of the act of recognition, particularly as it refers to recognition of States, that is, whether what is at issue is a declarative or a constitutive act—a longstanding discussion. As Dugard points out, "there is an unresolved debate among legal scholars as to whether a political community that meets these requirements automatically qualifies as a 'State' or whether, in addition, it requires recognition by other States to endow it with international legal personality".[62] This reflects the point of view of those who support the declarative theory of the act of recognition. They affirm that "an entity becomes a State on meeting the requirements of statehood and that recognition by other States simply acknowledges (declares) 'as a fact something which hitherto has been uncertain' ".[63]

84. Indeed, as has been seen, the existence of a certain situation does not depend on such a declaration, as reaffirmed by the majority of legal writers and embodied in international instruments and texts. For instance, with regard to the existence of the State, the Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States, states in its article 3 that: "The political existence of the State is independent of recognition by the other States."

85. The Institute of International Law expressed itself in similar terms, stating in its resolution III that recognition is "the free act by which one or more States acknowledge the existence in a certain territory of a politically organized human society, independent of any other existing State and capable of observing the precepts of international law".[64]

86. To this should be added article 13 of the Charter of the Organization of American States, as amended by the "Protocol of Buenos Aires", which states that:

> The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law.

87. Article 14 of the same Charter stipulates that:

> Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States.

88. The declarative theory of the act of recognition is supported by the views of most legal writers. It is observed that "international practice shows us how the reality of the new State is acknowledged by means of recognition".[65] It is affirmed that "the new State does not need to be recognized in order to exist as a State. Once the process of establishment is completed, it is a State, a subject of international law and a member of the international community".[66]

89. Arbitral tribunals have also supported the declarative theory of the act. Thus, in the *Tinoco* case,[67] the Tribunal suggests that recognition is simply proof of compliance with the requirements established by international law.

90. Nevertheless, the nature of the act of recognition has been subject to differing interpretations. In some cases the constitutive theory of recognition has been argued unsuccessfully, as in the position espoused by Denmark in the proceeding concerning the *Legal Status*

[62] Dugard, *op. cit.*, p. 7.

[63] *Ibid.*, and Brierly, *The Law of Nations: an Introduction to the International Law of Peace*, p. 139.

[64] *Annuaire de l'Institut de Droit International*, Brussels session (April 1936), vol. II, art. 1, p. 300.

[65] Verdross, *Derecho Internacional Público*, p. 228.

[66] Daillier and Pellet, *Droit international public*, p. 553.

[67] *Aguilar-Amory and Royal Bank of Canada Claims*, award of 18 October 1923, UNRIAA, vol. I (Sales No. 1948.V.2), p. 369.

of Eastern Greenland, in which the Government stated that:

> The legal status of a certain region is established in international law by the general conviction, or *communis opinio juris*, of the States constituting the international community …
>
> When the sovereignty claimed by a State over a country finds … general acceptance among other States, such sovereignty should be considered to have been established …
>
> The sovereignty of Denmark over all of Greenland is based above all on international agreements and on general recognition by the community of nations.[68]

91. More recently, the declarative theory has been confirmed by the practice of States. Note should be taken, for instance, of the opinion of the Arbitration Commission of the European Community, which stated that the recognition of States by other States "has only declarative value".[69]

92. While it may be concluded that the act of recognition of States is mainly declarative, it cannot be denied that non-recognition also has important legal ramifications. Indeed, non-recognition of an entity as a State affects the exercise of its rights under international law, such as, for example, rights deriving from the law concerning State immunity and the impossibility of being admitted to international organizations. Such a situation undoubtedly limits the international capacity of the State in practice. As some have noted, "recognition is not a mere formality … the legal situation of the new State is not the same *before* and *after*".[70]

93. The act of recognition is a unilateral expression of will, formulated with the intention of producing certain legal effects. It is in the intention of the author State that the act of recognition of States is rooted, as in the formulation of any other legal act. Of course, as can be seen in the Commission's discussions, the author's intention can arouse concern because of the difficulties of determining it. In any event, as has been noted, intention is difficult to prove. In the *Nuclear Tests* case[71] ICJ examined intention (although it did so in the context of an act containing a promise), which proved to be the basis of the binding nature of the act. Intention is sometimes easy to determine, at least within the framework of the law of treaties; it can be based on the interpretation of the terms of the declaration and other circumstances pertaining to the formulation of the act, in accordance with the rules established for that purpose. In other cases, however, intention is more difficult to determine; it may, however, be inferred if it is clear from the interpretation of the act, as has been referred to in previous reports and observed in the *Nuclear Tests* case (also referred to earlier), in relation to promise.

94. The act of recognition can be addressed to another State, and that may be what is most common in practice, but it does not preclude the possibility that such acts may be addressed to addressees other than States. While it can be affirmed, at least in this context, that only States can formulate this category of acts, it can also be said that the addressee of the act can be any other entity, such as an international organization, a subject with a defined but limited legal capacity, as well as other entities, such as a liberation movement or an insurgent group. Of course, one is not claiming that this extends to all entities which in some manner act in the international arena, such as transnational enterprises and even NGOs, since that does not appear to be the practice. For now, at any rate, the focus shall only be on the act of recognition of States.

95. One question which has not been studied thoroughly in previous reports, in the context of unilateral acts in general, concerns their effects, although it was always indicated that such acts could vary in accordance with their classification, particularly if what is of concern is acts by which States assume obligations or reaffirm their rights. In any event, the object of the act has a significant bearing on its effects. It does not appear feasible to provide a single answer for all acts. Regardless of the object of the act of recognition, the subsequent conduct of the author State must be consistent with the terms of its declaration, provided that the latter has been formulated in accordance with the requirements of international law, to which reference was made earlier.

96. International law accords a legal effect to recognition, in the sense that a State which has recognized a certain claim or an existing state of affairs cannot contest its legitimacy in the future;[72] this, as shall be seen, is confirmed by both doctrine and case law.

97. While the act of recognition may be regarded as declarative, it has important legal effects. First, the State undertakes to consider an existing *de facto* or *de jure* situation as such and to respect its legal consequences, so that it is obligated not to act in a contrary manner in the future.

98. The legal effects of the act of recognition are reflected mainly in the opposability to which reference shall be made forthwith.[73] What is at issue is an act whereby the State accepts certain facts or legal acts, and "acknowledges that they are opposable to it".[74]

99. Before considering opposability in the context of the act of recognition, it should be looked at in relation to treaties and custom. In accordance with the principle of the relative effect of treaties, "third parties are not bound by undertakings to which they are not parties;

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[68] *Legal Status of Eastern Greenland, P.C.I.J., Series C, Nos. 62–67*, pp. 712 and 723–724, cited by Kohen, *Possession contestée et souveraineté territoriale*, p. 330.

[69] See footnote 36 above.

[70] Daillier and Pellet, *op. cit.*, p. 553.

[71] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253.

[72] Anzilotti, *Cours de droit international*, p. 347, cited by Williams, *loc. cit*., p. 210.

[73] Opposability is defined in Salmon, ed., *Dictionnaire de droit international public* (p. 782) as "the capacity of a rule, a legal act, a right or a *de facto* situation to produce legal effects *vis-à-vis* external subjects of law which are foreign to the obligations arising directly therefrom".

[74] Daillier and Pellet, *op. cit.*, p. 358.

the latter are simply *not opposable* to them".[75] Opposability, in the context of custom, is more complicated. A State can accept a practice and regard it as legal because it is opposable to that State; on the other hand, it is also possible for a State to deny the existence of a practice or its legality, which means that such a practice is not opposable to that State. A State can persistently oppose a general custom, which would mean that the latter is not opposable to it.

100. As has been seen, recognition in all its forms makes the recognized *de facto* or *de jure* situation opposable to the State which is the author of the act. This in turn raises the issue of its enforceability by the addressee. Case law is clear in this context, as can be seen in the case concerning the *Arbitral Award Made by the King of Spain on 23 September 1906*, where the ICJ stated that, in its opinion, "Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award".[76] The Court also confirms this in the *Temple of Preah Vihear* case, where it states that "[i]t is not now open to Thailand … to deny that she was ever a consenting party to [the settlement]".[77]

101. In the context of the act of recognition, the question of opposability is posed in the following terms. As some have indicated, by means of recognition, "the State declares that, in its view, a situation exists, and it can no longer retract that declaration; whether or not it exists objectively, the situation is opposable to that State from then on, if it was not already so".[78] Recognition produces effects in relation to the States directly involved, that is, the State which is the author of the act and the addressee. The State which acts and recognizes is obligated to maintain a conduct consistent with its declaration in relation to the addressee of the act. In the case of recognition of States, the author State recognizes that status, which from then on is opposable to it by the entity that is the object of the act, and therefore its legal relations must take such recognition into account.

102. Recognition is an expression of will formulated "with the intention of making a situation opposable in respect of the State which grants it. In other words, the State granting recognition acknowledges that the legal consequences of the recognized situation apply to it. Moreover, the State is henceforth prevented from contesting any characterization of the recognized situation (the principle of *estoppel*)".[79]

103. In the specific case of recognition of a frontier, for example, it is to be noted that, as ICJ points out, recognizing a frontier means first and foremost accepting that frontier, that is, drawing the legal consequences of its existence, respecting it and refraining from contesting it in the future.[80]

104. Statements of recognition can also have a different value in certain contexts, such as a probative one. This is the case, for example, with regard to the statements by high-ranking Nicaraguan officials that were considered by ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case. The Court recalls "that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission".[81] The statements in question are seen by the Court in a broader context. It thus considers the statements made in the framework of international organizations and takes note specifically of "statements of representatives of the Parties … in international organizations … in so far as factually relevant".[82]

105. The binding nature of the unilateral act of recognition needs to be justified. In the same way that a treaty obligates the parties and must be complied with in good faith, as stipulated by article 26 of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention), the act of recognition is also binding and the State which formulates it must comply with it in good faith.

106. The universally accepted *pacta sunt servanda* rule, which implies that the good-faith attitude must prevail during the performance of a treaty in force, satisfies a need for legal security, which applies also in relation to unilateral legal acts, where such security must also prevail.

107. As mentioned, unilateral acts in general and acts of recognition in particular are opposable in respect of the author State from that time on, which makes them enforceable by the addressee(s). Good faith should also be the basis of the binding nature of such acts, as ICJ stated in the *Nuclear Tests* case, although that was in relation to a specific type of act, namely, promise.[83]

108. The issue of justifying the binding nature of a legal principle was raised in the Commission in 1996[84] and addressed by the Special Rapporteur in his first report on the topic.[85] Unilateral acts of recognition would be binding on the basis of the *acta sunt servanda* principle. It should be added that confidence in international legal relations also strengthens this justification of the binding nature of unilateral acts, particularly the act of recognition.

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[75] *Ibid.*, p. 273.

[76] *Arbitral Award Made by the King of Spain on 23 September 1906, Judgment, I.C.J. Reports 1960*, p. 213.

[77] *I.C.J. Reports 1962* (see footnote 21 above), p. 32.

[78] Combacau and Sur, *Droit international public*, p. 285.

[79] Degan, *loc. cit.*, p. 247.

[80] *Territorial Dispute (Libyan Arab Jamahiriya* v. *Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 42.

[81] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64.

[82] *Ibid.*, p. 44, para. 72.

[83] *I.C.J. Reports 1974* (see footnote 71 above), pp. 267–269, paras. 43, 46 and 49.

[84] *Yearbook ... 1996* (see footnote 3 above), annex II, addendum 3, sect. 2, p. 142.

[85] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, p. 337, para. 157.

Chapter IV

Application of acts of recognition

Commencement of legal effects and their relativity. Spatial and temporal application of acts of recognition. Modification, suspension, revocation and termination of unilateral acts of recognition

109. The act of recognition produces its effects in respect of the parties involved (author and addressee) from the time of its formulation, which to some extent is equivalent to the entry into force of a treaty in the context of the law of treaties. The act produces effects without the need for its acceptance by the addressee; that is, it produces effects in and of itself, which is one of the main characteristics of unilateral acts in general, as ICJ in fact indicated in the aforesaid *Nuclear Tests* case[86] with reference to one such act, promise.

110. The act of recognition obligates the author State in relation to one or more addressees. The author State cannot impose obligations on third parties without their consent by means of such an act, as stipulated in the law of treaties, and as previously considered by the Commission. The *pacta tertiis nec nocent nec prosunt* principle, or, treaties neither obligate nor benefit third parties, is fully applicable to any legal act.

111. Two issues resolved within the framework of the law of treaties deserve comment in relation to unilateral acts and the act of recognition of States in particular, namely, the territorial application of the act and its application in time.

112. Territorial application in the context of the law of treaties is regulated in article 29 of the 1969 Vienna Convention, which provides, in general terms, that the territory to which the treaty applies is the one on which the parties agree. There is an assumption that the treaty applies to territories under the sovereignty of the State. For its part, the territorial application of the act of recognition would essentially be a function of the object of recognition itself, that is, of the entity to which it refers; nothing, however, would prevent the author State from formulating a limitation that would exclude some part of the territory of the new State from forming a part thereof. In any event, the author's will is what is most important. The rule contained in article 29 of the Convention would, in the view of the Special Rapporteur, be fully applicable to unilateral acts of recognition, particularly recognition of States.

113. Application in time may be less complicated. In contrast to the object, reference is made in this case to the expression of will and its effects in time. It can be said that, as in the law of treaties, the act will in principle produce its effects from the time of its formulation or the time when the addressee becomes cognizant of it (a question that has not yet been considered), unless the author State expresses a different intention. The non-retroactivity embodied in the treaty regime would appear to be applicable in the context of unilateral acts and, more specifically, in that of unilateral acts of recognition. Unless the State which is the author or declarant of the recognition expresses otherwise, the act would produce its effects from the time of its formulation, as can be seen in article 28 of the 1969 Vienna Convention. The question of the non-retroactivity of treaties has been considered by international courts, particularly ICJ and its predecessor, PCIJ, in the *Ambatielos*[87] and *Mavrommatis*[88] cases.

114. The final question which arises with regard to the act of recognition, in the context of its application, is that which concerns its modification, suspension and revocation. As has been noted, the act produces its legal effects from the time of its formulation, without the need for acceptance or any reaction signifying such on the part of the addressee(s). This is very different from the manner in which elaboration and entry into force are posed in the context of the law of treaties, where the concerted expression of will gives rise to the act, and the determination of the time when the act arises and the commencement of the production of its legal effects is agreed on by the States parties. The basic rule governing the matter in that context is that the modification of a treaty is possible only on the basis of the will of the parties to the treaty.

115. In the case of unilateral acts in general and the act of recognition in particular, the act is formulated unilaterally. As has been stated, what is at issue is a unilateral expression of will, which does not depend on another manifestation of will in order to give rise to a legal act. It is from that time, moreover, that the act produces its legal effects.

116. The question posed is whether, given the specificity of legal acts and their particular and individual characteristics, which distinguish them from conventional acts, the same criterion that prevails in the Vienna regime can be applied in this context. The question, concretely, is whether the author State can modify, suspend or revoke the act unilaterally.

117. It is to be noted first of all that in relation to unilateral acts in general, the view of most legal writers is that the author State does not, generally speaking, have the power to modify a legal relationship unilaterally. For some, the State which is the author of the act does not have the power to create arbitrarily, by means of another unilateral legal act, a rule constituting an exception to the one which it had created by means of the first act.[89] For others, such capacity can be limited and even non-existent.[90] In the specific case of revocation, and

[86] *I.C.J. Reports 1974* (see footnote 71 above), p. 267, para. 43.

[87] *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10.

[88] See footnote 58 above.

[89] Barberis, *loc. cit*., p. 113.

[90] Skubiszewski, "Unilateral acts of States", p. 234.

in relation to unilateral acts in general, it is admissible "only in the case envisaged by the general norms of the international legal system, because otherwise, the compulsory value of those same acts would be abandoned to the arbitrary power of their authors".[91] An unauthorized unilateral act which modifies a previous act can be considered a different act, which could even be situated in the context of international responsibility.

118. The modification, suspension or revocation of a unilateral act, in particular an act of recognition, is possible when it is provided for in the act itself. Thus, for example (resorting to hypotheses that might be valid in order to stimulate reflection), the State which is the author of the act stipulates therein that it can be modified under certain conditions. It can also be suspended, if certain requirements are met, and even revoked under similar circumstances. It is necessary to add that the act can terminate in the strict sense of the term, that is, if it is performed, if the same act provides for a fixed term or conditions giving rise to its termination. For example, it may be that

> a State formulates a promise for a term of 10 days or subjects it to certain resolutive conditions. In such cases, if the term expires or the condition is fulfilled, the promise ceases without the need for any act of revocation. Another case may occur in which the author of the promise or the waiver expressly provides for the possibility of revoking it under certain circumstances. However, if the possibility of revocation derives neither from the context of the unilateral legal act nor from its nature, a unilateral promise and a unilateral waiver are in principle irrevocable[92]

—in the same unilateral manner, at least. In sum, unilateral acts can be said to be unmodifiable in the broad sense of the term, unless the opposite can be inferred from the act itself or derived from circumstances or conditions provided for therein, or, as shall be seen below, from external situations.

119. Modification, suspension or revocation of an act apart from the cases indicated would be possible only with the agreement of the addressee. Indeed, as noted, once the act has been bilateralized, a right is created on the part of the addressee that, while not affecting the unilateral nature of the act, makes any change dependent on the will of the addressee.

120. In the case of the act of State recognition (resorting again to the use of hypotheses), it is to be noted that an act of State recognition, while declarative, cannot be modified, suspended or revoked unilaterally unless one of the aforesaid circumstances occurs, such as the disappearance of the State (object) or a change of circumstances.

121. Lastly, a brief reference which may prompt reflection, concerning the modification of the act for reasons beyond the will of the author State. The act of recognition may, in fact, cease to produce legal effects for external reasons, as referred to in the Vienna law of treaties regime, particularly in connection with the appearance of a supervening impossibility of performance[93] and a fundamental change of circumstances[94] which makes performance of the treaty impossible.

122. Generally speaking, if the object of the act disappears, the latter would cease to produce its legal effects, which would to some extent transpose the concept contained in the law of treaties regime. In the case of the act of recognition of States in particular, if the State disappears through disintegration or dismemberment, for example, the act would no longer produce its effects. Likewise, it can be said that the fundamental change of circumstances or the *rebus sic stantibus* clause, understood as a resolutive clause in the contractual and treaty context, could also affect the application of the unilateral act of recognition, particularly with regard to suspension or termination—although, as the majority of legal writers affirm, its acceptance does not conflict with the binding nature of treaties or the application of the *pacta sunt servanda* rule.

123. If it is considered that a change of circumstances could prompt the suspension or termination of a unilateral act, the clause must be examined more thoroughly. The change must be fundamental and must affect the object of the act itself, and, as stated in the 1969 Vienna Convention, must affect the essential basis of the expression of consent by the author State, as stipulated in article 62, paragraph 1 (*a*)–(*b*), of the Convention (although it refers exclusively to treaties).

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[91] Venturini, *loc. cit*., p. 421.

[92] Barberis, *loc. cit*., p. 113.

[93] 1969 Vienna Convention, art. 61.

[94] *Ibid.*, art. 62.