UNILATERAL ACTS OF STATES

[Agenda item 5]

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Seventh report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur

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CONTENTS

Multilateral instruments cited in the present report

	Source
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	*Ibid*., vol. 189, No. 2545, p. 137.
Security Treaty between Australia, New Zealand and the United States of America (San Francisco, 1 September 1951)	*Ibid*., vol. 131, No. 1736, p. 83.
Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw, 14 May 1955) (Warsaw Pact)	*Ibid*., vol. 219, No. 2962, p. 3.
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	*Ibid*., vol. 516, No. 7477, p. 205.
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968)	*Ibid.*, vol. 729, No. 10485, p. 161.
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Introduction

1. At its fifty-fifth session, in 2003, the International Law Commission established a Working Group on unilateral acts of States, which recommended (recommendation 4) that:

The report which the Special Rapporteur will submit to the Commission at its next session will be exclusively as complete a presentation as possible of the practice of States in respect of unilateral acts. It should also include information originating with the author of the act or conduct and the reactions of the other States or other actors concerned.[1]

2. The question of the definition of a unilateral act is still under discussion within the Commission. As an interim measure, with a view to being able to make progress with its work, the Commission endorsed the Working Group's recommendation and adopted the definition given below. While this is only a working definition, it will serve as a basis for the adoption in due course of a definitive definition of a unilateral act which the Commission can use for its work of codification and progressive development:

Recommendation 1

For the purposes of the present study, a unilateral act of a State is a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law.[2]

3. In accordance with the Commission's regular practice, a suitable definition of a unilateral act, one that can be used for purposes of developing rules governing the functioning of this category of legal acts, must be based on adequate consideration of the practice of States. This point was made by a number of members of the Commission in 2003, with reference to the Special Rapporteur's sixth report on unilateral acts of States.[3]

[T]he examination of State practice was limited. The analysis should focus on relevant State practice for each unilateral act, with regard to its legal effects, requirements for its validity and questions such as revocability and termination; State practice needed to be assessed so as to decide whether it reflected only specific elements or could provide the basis for some more general principles relating to unilateral acts.[4]

[I]t was felt that, based on State practice, unilateral acts which created international obligations could be identified and a certain number of applicable rules developed.[5]

4. Similar remarks were made by representatives of several States in the Sixth Committee of the General Assembly in 2003: that in the absence of a systematic analysis of existing State practice in that area it would be difficult, if not premature, to proceed until a wider response from States had been received;[6] that at the current stage more information should be gathered on State practice in that field;[7] that information on State practice would be useful;[8] and that the Special Rapporteur should submit as complete a presentation as possible of the practice of States in respect of unilateral acts.[9]

5. The Working Group on unilateral acts of States, established in 2003, offered some guidelines which the Special Rapporteur has taken into consideration in preparing this report:

Recommendation 5

The material assembled on an empirical basis should also include elements making it possible to identify not only the rules applicable to unilateral acts *sensu stricto*, with a view to the preparation of draft articles accompanied by commentaries, but also the rules which might apply to State conduct producing similar effects.

Recommendation 6

An orderly classification of State practice should, insofar as possible, provide answers to the following questions:

(*a*) What were the reasons for the unilateral act or conduct of the State?

(*b*) What are the criteria for the validity of the express or implied commitment of the State and, in particular, but not exclusively, the criteria relating to the competence responsible for the act or conduct?

[1] *Yearbook … 2003*, vol. II (Part Two), para. 308.

[2] *Ibid*., para. 306.

[3] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/534.

[4] *Ibid*., vol. II (Part Two), para. 277.

[5] *Ibid*., para. 282.

[6] *Official Records of the General Assembly, Fifty-eighth Session, Sixth Committee*, 17th meeting, statement by Israel (A/C.6/58/SR.17), para. 44.

[7] *Ibid*., 19th meeting, statement by Portugal (A/C.6/58/SR.19), para. 13.

[8] *Ibid*., statement by Chile, para. 75.

[9] *Ibid*., statement by France, para. 34.

(*c*) In which circumstances and under which conditions can the unilateral commitment be modified or withdrawn*Recommendation 7*

In his next report, the Special Rapporteur will not submit the legal rules which may be deduced from the material thus submitted. They will be dealt with in later reports so that specific draft articles or recommendations may be prepared.[10]

6. As he had stated last year that he would do, the Special Rapporteur—with the invaluable assistance of the University of Málaga, Spain, to the professors and students of which he wishes to express his sincere thanks for their excellent work—undertook a study of the practice of States, based on an abundant bibliography, from which he has selected a series of unilateral acts, some of which may be useful for the purposes of a consideration of the topic under review.

7. It is important to note that an assessment of the practice of States can only be subjective, inasmuch as Governments' own views on the nature of their statements are not available; this, indeed, may be one of the characteristics of these acts. Consequently, acts, statements and conduct discussed in this report are essentially factual.

8. In chapter I below, an attempt has been made to organize the practice of States by subdividing it into acts that fall into various categories of material acts, as usually designated in international doctrine. These acts, despite previous statements to the contrary, have been assigned to the three categories that appeared to be most satisfactory as a basis for a general classification, namely (*a*) acts whereby a State assumes obligations (promise and recognition); (*b*) acts whereby a State renounces a right (renunciation); and (*c*) acts whereby a State asserts a right or legal claim (protest). Notification is discussed separately; certainly it is no less unilateral from a formal standpoint, but there is some disagreement as to whether it is a unilateral act in the sense with which the Commission is concerned. In every case, moreover, the Special Rapporteur has sought to convey some idea of the formal aspects of the issue under discussion, albeit the topics in question have been fully documented and examined in terms of practice.

9. This report, then, focuses on a comprehensive, organized survey of the practice of States, supplemented by information previously received from Governments in their replies to questionnaires prepared by the Commission.[11] It is hoped that it will serve as a basis for conclusions enabling the Commission to determine whether there are any principles or standards of customary origin that govern the matter.

10. The presentation of the examples of practice assembled in this report is preceded by a very preliminary survey of the various acts analysed herein, although it is essential to realize that the classification scheme has been adopted solely in order to facilitate the study of declarations and unilateral acts of States that can be deemed unilateral in the sense with which the Commission is concerned. As has been seen, it is by no means a simple matter to determine the nature of an act and identify its legal consequences. Both theory and practice reflect the fact that a statement indicating a unilateral act may constitute something more than an act in accordance with the designation assigned by theory. Nonetheless, in the interests of a systematic approach to the study of practice, such acts must be grouped into categories which are recognized and accepted by most authors.

11. Also in chapter I, an attempt has been made, using the same representative format and with some accompanying theoretical remarks, to present some examples of the conduct of States which, while not legal acts *sensu stricto*, may produce similar legal effects, in line with the above-mentioned recommendations of the Working Group on unilateral acts of States.

12. Chapter I contains comments on the characteristics of the acts formulated with a view to facilitating the task of drawing conclusions about common factors and the issue of the existence or formation of standards of customary origin. In particular, this part deals with the context in which an act is formulated; its most usual form; the person who formulates it; the confirmation or non-confirmation of the act by means of subsequent statements or through conduct; the reaction, if any, of the addressee or addressees; the subsequent conduct of the State concerned in relation to the execution or observance of its act or declaration; and the reaction of the addressee or addressees to the execution or non-execution or observance on the part of the author State. The discussion will also include any reaction or conduct by other States that did not participate in the formulation of the act and that were not addressees, except in cases involving a declaration *erga omnes*.

[10] *Yearbook … 2003*, vol. II (Part Two), pp. 57–58, para. 308.

[11] See *Yearbook … 2000*, vol. II (Part One), p. 265, document A/CN.4/511, and *Yearbook … 2002*, vol. II (Part One), document A/CN.4/524.

Chapter I

Acts and declarations that may represent the practice of States

A. Acts whereby States assume obligations

1. Promise

(a) *The concept of promise in international law*

13. While a promise is regarded as a unilateral act par excellence, this does not mean that the concept of promise has always remained unaltered; in the thinking of such authors as Grotius[12] or Pufendorf,[13] the obligatory nature

[12] For this author, "*[u]t autem promissio jus transferat, acceptatio hic non minus quam in dominii translatione requiritur*" (In order that a promise may transfer a right, the acceptance is made), *De Jure Belli ac Pacis* (On the Law of War and Peace), book II, chap. XI, p. 224.

[13] *Elementorum Jurisprudentiae Universalis: Libri Duo*, definition XII, para. 10.

of a promise is associated with the need for acceptance by the party to which the act in question is directed, with the result that a promise is barely distinguishable from a formal agreement. Even in more recent times, and despite the position suggestive of the existence of unilateral promises that has been adopted by such authors as Suy[14] (one of a group of internationalists who taught general courses at The Hague Academy of International Law at about the same period[15]), there has been some hesitancy about recognizing the binding character of a promise in the absence of a concomitant need for its acceptance or inclusion in a formal agreement. This emerges from some arbitral decisions, as in the case of the *Island of Lamu* dispute between Germany and the United Kingdom in 1889: the arbitrator acknowledged the existence of a promise made by the sultans, but did not regard it as creating an obligation, on the grounds that

> in order to convert that intent into a unilateral promise equivalent to a formal agreement, there would have had to be mutual assent in the form of an express promise by one of the parties, combined with acceptance by the other party, and such mutual assent would have had to refer to essential factors constituting the subject of the agreement.[16]

14. Judge de Castro, in his dissenting opinion in the *Nuclear Tests* case, pointed out that "any promise (with the exception of *pollicitatio*) can be withdrawn at any time before its regular acceptance by the person to whom it is made (*ante acceptationem, quippe iure nondum translatum, revocari posse sine iniustitia*)".[17] However, the ICJ judgment clearly stated the reverse:

> An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[18]

15. A promise may, in principle, be couched in one of two different forms: it may either be positive (a promise to do something) or negative (a promise not to do something). As Sicault notes, the latter formulation may be liable to confusion with renunciation. However, it is essential to distinguish between the two: the former is a means of creating an obligation, whereas the latter is the extinction of an obligation or a right.[19]

16. On occasion, the concept of promise has been associated with what are termed "unilateral agreements" or "contracts", which frequently arise under specific domestic codes of law. An illustration is to be found in the separate opinion written by Judge Jessup in the *South-West Africa* case:[20]

> It is also generally recognized that there may be unilateral agreements, meaning agreements arising out of unilateral acts in which only one party is promisor and may well be the only party bound. Unilateral contracts of the same character are recognized in some municipal legal systems. In the United States, for instance: "In the case of unilateral contract, there is only one promisor; and the legal result is that he is the only party who is under an enforceable legal duty. The other party to this contract is the one to whom the promise is made, and he is the only one in whom the contract creates an enforceable legal right." The assent of the promisee is not always required.[21]

This is actually a second formulation of a promise, one not involving any requirement for acceptance or anything of the sort as a condition for the creation of the unilateral act as such.[22]

17. The doctrine has also considered the question of whether a promise and the principle of estoppel, both of which are grounded in good faith and generate an expectation, could amount to the same thing. According to Jacqué, the distinction between the two consists in the way the obligation is created: whereas a promise is a legal act, the obligation arising from the manifestation of the author's will, estoppel acquires its effect, not from that will as such, but from the representation of the author's will made in good faith by the third party. The author goes on to state that, for that reason, the behaviour of the addressee is fundamental in the framework of estoppel. It alone will afford a means of demonstrating that the State has placed its faith in the representation. With promise, in contrast, the addressee's behaviour adds nothing to the binding force of the unilateral declaration.[23]

(b) *International practice*

18. An interesting case of promise, in which the promisee was an international organization, the United Nations, is as follows. In the course of negotiations aimed at settling the question of the legal status that Switzerland would grant to United Nations employees, Mr. Perréard, a member of the Council of State of the Canton of Geneva, stated that the Geneva authorities were "prepared to grant

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[14] *Les actes juridiques unilatéraux en droit international public* (Unilateral legal acts in international public law), p. 110, where the author points out that the existence of promise as such in international law must be regarded as an established fact, despite the difficulties that this may entail, as he notes on page 111:

> "[P]urely unilateral promises do exist in international law, although they are very rare. Their rarity is readily understandable in view of the fact that no State is willing to make gratuitous concessions on its own initiative. The task of detecting such purely unilateral promises calls for a painstaking research effort to determine whether a formally unilateral declaration of will may not conceal an underlying bilateralism."

[15] As, for example, the courses given by Reuter, "Principes de droit international public", p. 532, and Quadri, "Cours général de droit international public", pp. 364–365.

[16] Translation by the Special Rapporteur. See the arbitral award made by Baron Lambermont on 17 August 1889 in the *Island of Lamu* dispute (De Martens, *Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International*, p. 101). The paragraph reproduced above is also quoted in Suy, *op. cit.*, p. 128, and in Coussirat-Coustère and Eisemann, *Repertory of International Arbitral Jurisprudence*, p. 47.

[17] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 374, para. 3. This reasoning does not appear to imply in any way that a promise becomes complete—and consequently cannot be withdrawn—when such acceptance takes place.

[18] *Ibid.*, p. 267, para. 43.

[19] Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", p. 639.

[20] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319.

[21] *Ibid.*, pp. 402–403.

[22] The Special Rapporteur emphasized this aspect in particular, noting that a strictly unilateral promise should be distinguished from a promise made by a State in response to the request of another State; from a promise whose purpose is to obtain its acceptance by another State; and from a promise made on condition of reciprocity (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, p. 338, para. 167).

[23] Jacqué, "A propos de la promesse unilatérale", p. 339.

the United Nations the benefit of the same exemptions and the same privileges as had previously been granted to other international institutions".[24] The other international institutions in question were ILO and WHO. An official statement released to the press by the head of the Federal Political Department following a meeting with the Secretary-General of the United Nations, Trygve Lie, indicated that the Swiss authorities were "prepared to grant the United Nations and its employees treatment at least as favourable as the treatment granted any other international organization on Swiss territory".[25] This statement was subsequently reiterated by the Swiss Federal Council in its message to the Federal Assembly on 28 July 1955, thereby granting the United Nations the benefit of this "most-favoured-organization clause". The issue arose again when the taxation authorities of the Canton of Geneva tried to compel a United Nations staff member to pay alimony, whereupon the United Nations Office at Geneva cited the above-mentioned statements, which were nothing more nor less than unilateral acts formulated by the Swiss Confederation.[26]

19. Perhaps the best instance of a promise intended to produce particularly clear-cut legal effects (the most formal and explicit formulated up to that time, according to Degan) was the Declaration made by Egypt on the Suez Canal and the arrangements for its operation,[27] acknowledging all relevant rights and obligations and guaranteeing freedom of passage through the Canal as from late October and early November 1956.[28] This was a very advanced system of commitment, formulated in writing and also deposited and registered with the United Nations Secretariat. As the same author also emphasizes:

> There was certainly a strong political interest on the part of Egypt to assume these far-reaching and very precise international obligations by a formal unilateral declaration in written form. It thus avoided an international conference on [the] Suez Canal, which in the political circumstances of that time could probably fail. By that Declaration Egypt calmed and normalized the situation over the Suez Canal and enabled at the same time efficient exploitation of the Canal to its profit.[29]

20. Nonetheless, this declaration gave rise to a host of reactions; indeed, many of those reactions were somewhat rigid in nature, as a result of the political storm aroused by the issue. In the United Nations Security Council, for example, it was argued that the declaration was inadmissible, on the grounds that the terms of an international agreement could not be altered by means of a unilateral act.[30]

21. In recent years, grants of aid or credits between States based on unilateral promises have become a familiar phenomenon. Such grants tend to be made particularly frequently between neighbouring States or States having particularly smooth relations.[31]

22. Some examples of promise found in the jurisprudence, as reported by Barberis,[32] are: the statement of Poland before PCIJ in the case concerning *Certain German Interests in Polish Upper Silesia*;[33] the assurances given by Germany between 1935 and 1939 that it would respect the territorial integrity of Austria, Belgium, Czechoslovakia and the Netherlands;[34] and, of course, the well-known statements made by the French authorities relating to nuclear tests in the Pacific must not be omitted.[35]

23. More recent international practice affords a number of instances of promise; the cases referred to below are some that have been found from the period extending from the 1980s to the present. The promises involved are concerned with a wide range of matters, including an intent to address a humanitarian crisis[36] or an

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[24] Caflisch, "La pratique suisse en matière de droit international public 1982", p. 182.

[25] *Ibid*., p. 183.

[26] This is the conclusion that emerges from the note issued by the International Law Directorate of the Swiss Federal Political Department on 2 April 1979, which acknowledged that the declaration made on 5 August 1946 had created an obligation. That declaration by the head of the Federal Political Department granted the United Nations the benefit of the "most-favoured-organization clause". Other organizations, such as ILO and WHO, were subject to advantageous income-tax rules under the Headquarters Agreements of 1921/1926. It will be seen from the foregoing discussion that the United Nations had a right to demand that its employees should enjoy the same tax advantages as had been granted to employees of ILO and WHO (*ibid*., pp. 183–186).

[27] Declaration made by the Government of Egypt on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957), United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

[28] See Degan, *Sources of International Law*, p. 300.

[29] *Ibid*., p. 301.

[30] This was the view expressed in the Security Council, on 26 April 1957. France stated that:

> "The system of operation of the Suez Canal, as established under the concession granted to the Universal Suez Maritime Canal Company, was confirmed by the Convention of 1888. It was the outcome of international agreements, and hence could be modified only by a new international agreement, not by a unilateral declaration, even one registered with the United Nations."

(Official Records of the Security Council, Twelfth Year, 776th meeting, para. 45)

[31] On 4 August 1973, during Raúl Lastiri's provisional presidency in Argentina, a government minister, Mr. Gelbard, announced that a US$ 200 million credit would be made available to Cuba: "Initial steps towards the implementation of an independent foreign policy. Argentina makes a US$ 200 million credit available to Cuba and is in the process of joining the Andean Group" (*La Opinión*, 7 August 1973, p. 1. See also the article by F. Ramírez, *ibid.*, 9 August 1973, p. 12).

[32] "Los actos jurídicos unilaterales como fuente del derecho internacional público", p. 108.

[33] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*. In its judgment, PCIJ noted that:

> "The representative before the Court of the respondent Party, in addition to the declarations above mentioned regarding the intention of his Government not to expropriate certain parts of the estates in respect of which notice had been given, has made other similar declarations which will be dealt with later; the Court can be in no doubt as to the binding character of these declarations."

(*Ibid.*, p. 13)

[34] *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 1947), vol. I, pp. 90–91.

[35] *I.C.J. Reports 1974* (see footnote 17 above), p. 259, para. 20, and pp. 265–267, paras. 34–41; and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 462, para. 20, and pp. 469–472, paras. 35–44.

[36] As, for example, the announcement by the Ministry of Foreign Affairs of Thailand concerning the establishment of a refuge area between the borders of Cambodia and Thailand (4 April 1980) to enable Cambodians fleeing from fighting, hunger and the pro-Vietnamese regime in Phnom Penh to find safety, food and medical assistance without having to enter Thailand (Rousseau, "Chronique des faits internationaux" (1980), p. 1081). A similar case was the announcement by the Australian authorities on 8 December 1989 that Chinese citizens who had entered the country unlawfully following repressive measures in China the previous month would not be expelled (*ibid.* (1990), p. 481). This case is perhaps unclear in that, while an obligation was

exceptionally critical situation in which the promisor is concerned to express solidarity;[37] a desire to settle outstanding monetary issues;[38] granting of permission to use specific areas;[39] adoption of unilateral moratoriums on the pursuit of specific activities;[40] withdrawal from areas that have been militarily occupied[41] or used for strategic purposes;[42] forgiveness of foreign debt[43]

assumed *vis-à-vis* individuals who had left China, no such obligation was assumed *vis-à-vis* third States. A different type of example that may be noted here was the resolution adopted by the Spanish Council of Ministers on 13 November 1998 approving an initial allocation of 18,192 million pesetas as emergency assistance following the devastation caused by Hurricane Mitch. In addition, the President of the Spanish Government announced a three-year moratorium on debt repayments by the four countries that had been hit by the hurricane (REDI, vol. LI, No. 2 (1999), p. 497). On 13 March 2001, the Office of Diplomatic Information announced that the Spanish International Cooperation Agency (AECI) had decided to provide increased funding under WFP for Mozambique in the light of reports of serious flooding in that country. Specifically, the Government, through AECI, intended to make an additional US$ 300,000 (52.5 million pesetas) available to WFP to enable it to transport rescue helicopters to Mozambique (*ibid.*, vol. LIII, Nos. 1–2 (2001), p. 628). In response to torrential rains in Albania, Japan announced on 30 September 2002 that it would provide assistance: "[T]he Government of Japan decided to extend emergency assistance (20 tents, 4,065 blankets, 10 water purifiers, 12 electric power generators and 12 reels of electric cord, valued at roughly 14 million yen), to the Republic of Albania, which has sustained damage from recent floods" (http://www.mofa.go.jp). More recently, on 25 March 2003, the Embassy of Ireland in Washington, D.C., released a message from the Minister of State worded as follows: "I have today announced that the Government is putting aside €5 million in humanitarian assistance for the alleviation of suffering of innocent Iraqi civilians. This funding will be distributed to our partner NGOs and International Agencies who have the capacity to respond effectively to the current crisis" (http://www.foreignaffairs.irlgov.ie).

[37] See the message broadcast by the Minister for Foreign Affairs of Cuba on 11 September 2001:

> "In this bitter hour for all Americans, our people express their solidarity with the American people and their full willingness to cooperate, to the extent of their modest possibilities, with the health care institutions and any other medical or humanitarian organization in that country in the treatment, care and rehabilitation of the victims of this morning's events."

(http:// cuba.cu/gobierno/discursos)

The provision of assistance to combat specific diseases is evident in the following declaration by Cuba:

> "The Government of Cuba will keep its word, and early in June will deliver to Uruguay the remaining 800,000 of the total of 1,200,000 doses of meningitis vaccine which it is committed to donating to that country."

(http://europa.cubaminrex.cu)

[38] On 26 October 1980, on the occasion of a visit by the Prime Minister of France to Tunisia, the Tunisian Government officially announced that it was determined to proceed immediately to unblock, within a relatively short period of time, French funds that had been frozen following the country's accession to independence in 1956. Measures to that end came into force on 1 January 1981 (Rousseau, *loc. cit.* (1981), pp. 395–396).

[39] An example of this is the promise made to the United States of America by New Zealand in 1982, confirming that American nuclear-powered warships would be allowed to enter New Zealand ports (Rousseau, *loc. cit.* (1983), p. 405).

[40] However, some of these "promises" include an intrinsic conditionality that makes their real binding force questionable, and in some instances makes it unclear whether the act in question is actually a promise or a renunciation. For example, on 1 August 1984, Japanese officials announced that Japan was prepared to discontinue commercial whaling in Antarctic waters on condition that whaling for scientific research purposes should be allowed to continue (Rousseau, *loc. cit.* (1985), p. 165). An official announcement that commercial whaling operations had been discontinued, after four centuries, was issued by the Japanese Government on 15 March 1987 (*ibid.* (1987), p. 962). A more clear-cut case was a statement made by the Japanese Ambassador to Australia to the effect that his country's Ministry of Foreign Affairs had announced on 17 July 1990 that Japan was suspending drift-net fishing in the Pacific during 1990 and 1991, a year before the adoption of United Nations resolutions on the matter (*ibid.* (1991), p. 155). Declarations renouncing nuclear testing have been comparatively frequent as well (e.g. the statement by the Prime Minister of India on 21 March 2000 (Poulain, "Chronologie des faits internationaux d'intérêt juridique (2000)", p. 848). Some interesting examples have been declarations giving rise to cooperation and initiatives aimed at resolving situations of conflict between two States, as in the case of the dispute between India and Pakistan over Kashmir: early in November 2003 a number of statements (widely reported in the international press) were made by both countries, with one side (India) offering and the other (Pakistan) accepting a series of rapprochement measures.

[41] An example illustrating this situation might be the announcement made by the Prime Minister of Israel on 10 June 1985 concerning the evacuation of southern Lebanon, which had been occupied since 18 March 1978 (Rousseau, *loc. cit*. (1985), p. 1038). On 5 March 2000, Israel announced that its troops stationed in southern Lebanon would be withdrawn by July at the latest, regardless of whether a peace agreement with Syria had been reached (Poulain, *loc. cit*., p. 853). Similarly, late in 1989 the Soviet Deputy Minister for Foreign Affairs sent a letter to the Secretary-General of the United Nations stating that a unilateral withdrawal of all Soviet troops stationed outside the Soviet Union was under consideration, but without specifying a definite date for such a withdrawal. The letter was made public on 15 December 1989. This is perhaps an example of a somewhat vague promise (Rousseau, *loc. cit.* (1990), p. 517).

[42] In response to repeated questions on the issue, the Minister of State of the United Kingdom issued a statement containing a promise to cede the Chagos Islands to Mauritius when they were no longer needed for defence purposes:

> "My right hon. Friend the Foreign Secretary has made clear both in a letter to the Mauritian Foreign Minister and during a meeting in January this year, that the UK will continue to maintain sovereignty over the Chagos Islands, but that when they are no longer needed for defence purposes, we will be willing to cede them to Mauritius subject to the requirements of international law."

(Marston, "United Kingdom materials on international law 2001", p. 633)

[43] For example, President Chirac of France, in the course of a visit to Central America, announced that France would write off a total of 739 million francs in bilateral debt that had been incurred by El Salvador, Guatemala, Honduras and Nicaragua for development aid, inasmuch as those countries had been devastated by Hurricane Mitch, and also promised to negotiate a reduction in their commercial debt at the next meeting of the Paris Club (RGDIP, vol. CIII (1999), p. 195). Another case arose as a result of the crisis that shook South-East Asia in mid-1997: on 2 October 1998, the President of the United States proposed that the World Bank and the Inter-American Development Bank should provide States that were suffering from withdrawals of capital with new guarantees and emergency credits. He also suggested that IMF should make standby loans available to States experiencing economic difficulties, but not yet in a full crisis situation. This proposal was supported by other industrial powers. On 22 October 1998, the United States enacted domestic legislation providing US$ 17.9 billion in additional United States funds for IMF financing (Murphy, "Contemporary practice of the United States relating to international law", p. 191).

On 4 April 2000, the Spanish Head of Government stated: "I should also like to inform you that I have announced that US$ 200 million of official development assistance to the main Sub-Saharan African countries is being written off. That is to say, Spain is announcing the cancellation of US$ 200 million worth of sub-Saharan African countries' indebtedness to our country" (*Actividades, Textos y Documentos de la Política Exterior Española* (Madrid, Ministry of Foreign Affairs and Cooperation, 2000), p. 102).

Increasingly, economic issues are bound up with the performance of specified conditions. It might perhaps be said that such a case is not really a unilateral act, but a warning relating to the granting of assistance, rather than a promise as such. There is no simple answer; it all depends whether it appears that greater weight should be assigned to the promise or to the associated condition, but at all events the necessary correlation between the two means that we cannot properly speak of a unilateral act *sensu stricto*, inasmuch as the compulsory nature of the condition imposes specific actions upon the promisee State. The matter requires further consideration, but such consideration must start from the fact that acts of this kind, subject to conditions, are becoming increasingly frequent.

Nonetheless, it is important to emphasize that States are not always as consistent as might be wished in imposing conditions relating to

(*Continued on next page.*)

or provision of economic assistance;[44] elimination of tariffs,[45] a measure closely related to the preceding item; contribution to a specific international action where such contribution is not obligatory *per se*;[46] or collaboration in the destruction of a particular category of weapons.

24. Some cases may be described as unclear, such as offers to mediate between parties to a conflict;[47] where

(*Footnote 43 continued.*)

human rights upon third parties in return for economic assistance. In this connection, action of the United States in granting most-favoured-nation status to China may be noted. At a press conference in Washington, D.C. on 26 May 1994, the President of the United States announced that he had decided to renew that status. He agreed, he said, with the Secretary of State's conclusion that China had not achieved "overall significant progress in all the areas outlined in the executive order relating to human rights … and that serious human rights abuses continued in China", but in his judgement, renewal of that country's most-favoured-nation status would afford "the best opportunity to lay the basis for long-term sustainable progress in human rights and for the advancement of ... other [U.S.] interests with China" (Nash Leich, "Contemporary practice of the United States relating to international law", p. 745).

A somewhat clearer instance is the position of the Spanish Government in the matter of assistance to Paraguay to enable that country to stabilize and develop its political situation. In the words of the Minister for Foreign Affairs:

> "At each and every step taken by the Spanish Government to normalize relations with Paraguay since the fall of the military dictatorship, it has demonstrated its clear intention of supporting Governments that are in transition to the recovery of democracy and full respect for human rights, and are working to achieve sustainable development, the fair distribution of wealth and genuine social justice.
>
> "...
>
> "Naturally, the Spanish Government is following the situation of the rights of ethnic minorities and, in general, the human rights situation in Paraguay, with close attention, and will continue to do so. Over and above its interest in this issue, however, the Spanish Government is also prepared to help the Government of Paraguay achieve full respect for those rights. That, essentially, is the reason why the Cooperation Plan has been initiated and the assistance just mentioned made available. Accordingly, it is necessary to wait for a reasonable length of time in order to give the Government of Paraguay a chance to take appropriate action."

(*Boletín Oficial de las Cortes Generales*, Congress, Fifth Legislature, series D (1994), No. 173, p. 259; see also REDI, vol. XLVII, No. 2 (1995), p. 170)

[44] For an example, see Royal Executive Order No. 1/2001 of 19 January 2001 (published in the 20 January 2001 issue (No. 18) of the *Boletín Oficial del Estado*) approving a loan guarantee to Argentina and giving the Council of Ministers broader authority to approve operations to be financed from the Development Assistance Fund established by Spain as a tool aimed at helping Argentina cope with its economic crisis. The preamble to the Order stated (p. 2505): "This Executive Order makes provision for a mechanism designed to make financial support from Spain available to Argentina, in close cooperation with the International Monetary Fund and subject to the same conditions of economic reform and progress as are required by the Fund."

Another example is the statement issued on 29 October 2002 by the Japanese Ministry of Foreign Affairs concerning the assistance that Japan was about to make available to Palestine for the implementation of legislative and other reforms. A further relevant example from Japan involves an aid package for reconstruction in Afghanistan:

> "Japan decided to extend a new assistance package of more than a total of about $136 million (about 16,700 million yen) utilizing Grant Aid Cooperation and other forms of assistance to support the Transitional Administration of Afghanistan, headed by President Hamid Karzai, and to promote the peace and reconstruction process in the country.
>
> "Japan announced at the International Conference on Reconstruction Assistance to Afghanistan (Tokyo Conference) that it would provide up to $500 million over two and a half years of which up to $250 million would be provided in the first year. With this package, Japan's assistance for recovery and reconstruction amounts to about $282 million, thereby attaining the commitment for the first year that Japan announced at the Tokyo Conference. Combining humanitarian, recovery, and reconstruction assistance, the total since the terrorist attacks in September 2001 amounts to about $375 million."

(http://www.mofa.go.jp)

In the context of the reconstruction of Iraq, Australia announced on 28 October 2003 that it was making US$ 110 million available as assistance for the Iraqi people (http://www.ausaid.gov.au).

[45] The Prime Minister of Australia announced that all customs duties and quotas on products imported from the world's 50 poorest nations would be eliminated. "I am pleased to announce," he said, "that Australia will provide duty-free, quota-free access for the world's 49 least developing countries, as well as Timor-Leste." The Australian leader made this announcement on the eve of the tenth Economic Leaders' Meeting of the Asia-Pacific Economic Cooperation forum held in the resort of Los Cabos in north-eastern Mexico ("Tariff-free access for the world's poorest countries", *Media Release*, 25 October 2002).

[46] An example of Spanish practice may serve to clarify this situation. Spain contributed a frigate and two corvettes to the naval forces deployed by a number of Western Powers in the Gulf region and in the Red Sea during the latter half of August 1990, pursuant to Security Council resolutions adopted in the wake of Iraq's invasion of Kuwait. The Minister for Foreign Affairs stated on 28 August that the decision to send the ships was, in the first place:

> "a consequence of the measures expressly called for under successive United Nations resolutions, in a context of European cooperation ... In the second place, the Government of Spain was under no obligation, either legal or political, to take this decision by virtue of its membership in NATO, the European Community or WEU. Any speculation along those lines is sheer demagoguery. There are member countries of those organizations that have not taken such measures, such as Portugal, Iceland or Ireland. That is to say, this is Spain's own decision, aimed at protecting not only common interests, but our own national interests, pursuant to United Nations resolutions."

(*Diario de sesiones del Congreso de los Diputados*, Committees, Fourth Legislature (1990), No. 126, p. 3722; see also REDI, vol. XLIII, No. 1 (1991), p. 135)

[47] For example, the German Federal Republic's offer in February 1981 to mediate between the El Salvador regime and the rebels of the Democratic Revolutionary Front in order to put an end to the civil war (Rousseau, *loc. cit*. (1981), pp. 591–592).

It is essential to take account of the fact that in inflamed situations of conflict over territory, willingness to negotiate frequently stems from public demonstrations. A case in point might be the Spanish position on Gibraltar and the ongoing negotiations on that issue, as the Minister for Foreign Affairs pointed out in the General Assembly:

"I wish to reiterate my Government's firm decision to continue the process of negotiation with the United Kingdom in a constructive spirit and on the basis of the Brussels Declaration of 27 November 1984".

(Official Records of the General Assembly, Forty-eighth Session, Plenary Meetings, 11th meeting; see also REDI, vol. XLVI, No. 1 (1994), p. 159)

The tone of these demonstrations tends to be very similar in all cases, as may be seen from the following passage dealing with the situation in Equatorial Guinea. The passage is taken from a statement by the Spanish Minister for Foreign Affairs, appearing before the Foreign Affairs Committee of the Spanish Congress on 1 June 1994:

> "As you ladies and gentlemen are well aware—I mention this very briefly, because you are all familiar with the matter—the Spanish Government had publicly undertaken, before Equatorial Guinean, Spanish and world opinion, to contribute to a process of genuine democratization in that country. A public statement was issued the day after the elections, in which the Government indicated that it had drawn the same conclusions as the greater part of the Spanish democratic opposition concerning the absence of democratic legitimacy, and this would logically affect the formulation of our future policy relating to Equatorial Guinea. At the same time, we stated that in our view, the democratic transition process had not ended with those elections, and consequently that we intended to continue, by every means in our power, to work for a renewal of dialogue between the Government and the political forces to enable the process of transition to a genuinely democratic system to continue."

(*Diario de sesiones del Congreso de los Diputados*, Committees, Fifth Legislature (1994), Congress, No. 225, p. 6818; see also REDI., vol. XLVI, No. 2 (1994), p. 656)

Another recent instance is afforded by the answer to a question about the border between Belize and Guatemala that was asked in the Parliament of the United Kingdom. In his reply, the Minister of State indicated that the United Kingdom was prepared to cooperate to bring about a resolution to the conflict:

> "I want to emphasise that the United Kingdom has no legal responsibilities in relation to Guatemala's border dispute with Belize,

such an offer is not accepted, the initial act produced no effects, even though it was a genuine case of promise.[48]

25. Another example of a promise is one relating to the non-application of domestic regulations where to do so would have given rise to criticism or negative effects in a third country. In such a case, the State commits itself by issuing a declaration to that effect.[49] There are even examples of a State promising to reduce the effects of some harmful activity, but without binding itself through a formal agreement.[50] In addition, there have been declarations which appear to be promises but do not indicate by their content that the State formulating the declaration has actually assumed an obligation.[51]

26. In addition, there have been some recent instances of what may be regarded as a promise "not to do something", in the sense of not placing difficulties in the way of activities conducted by a third party, as for example in a case of disputed territory. By way of illustration, a statement by the President of Venezuela may be considered, undertaking "not to put obstacles in the way of any project that may be implemented in that region [referring to the Essequibo region, which is the subject of a territorial dispute with Guyana] where the project in question is deemed likely to be beneficial for its inhabitants".[52] This unilateral declaration, which was made in the context of negotiations between Guyana and Venezuela, may even affect a formal agreement of long standing: the Agreement to resolve the controversy over the frontier between Venezuela and British Guiana (Geneva, 17 February 1966).[53]

27. The President of Venezuela's declaration was reiterated to the press, although in somewhat qualified terms, by the country's Minister for Foreign Affairs. The Chancellor stated that Venezuela would not oppose development projects in the Essequibo region that benefit the Guyanese population, but "projects that affect our interests will be analysed". He added that "to maintain the present status of that region would be to accept the term of 'no man's land'", but he also insisted that that decision did not constitute a relinquishment of Venezuela's claim.[54]

28. On 25 February 2004, the President's statement was challenged before the Supreme Court of Venezuela, which was asked to find it unconstitutional and null and void. It would have been highly interesting from the standpoint of the present study if the Court had analysed the issue,

which goes back to 1859. However, *we are ready to give diplomatic assistance to both sides to bring about a peaceful solution. That is our role, and we will continue to work towards it.*"

(Marston, "United Kingdom … 2000", p. 539)

[48] Another similar case is to be found in the Spanish Government's offer of the possibility of asylum for Manuel A. Noriega, of Panama:

"The Spanish Government declared on 27 February 1988, in a statement issued by the Office of Diplomatic Information, that … it would like to see Panama's problems solved in a context of respect for its sovereignty … without outside interference."

(*Boletín Oficial de las Cortes Generales*, Senate, Third Legislature (1988), Series I, No. 185, p. 7705)

Similar declarations were made by the European Community and the Ministers for Foreign Affairs of various Ibero-American countries. The Spanish Government went on to indicate that it would be prepared, in the framework of a Panamanian solution, to receive General Noriega if he should so request, provided this would contribute to the consolidation of civilian authority, the strengthening of democracy and the dignity of the Panamanian people. The objective was to provide a framework for a negotiated solution reached by the various Panamanian political forces (*ibid.*, p. 7706; see also REDI, vol. XLI, No. 1 (1989), p. 163).

[49] As, for example, following the tense situation between Spain and Canada in the so-called "Greenland halibut war", when Canada made a promise to Spain relating to fisheries. In reply to a question about Canada's new Fisheries Act that was asked by the socialist parliamentary group on 15 November 1999, the Government informed the Congress of this fact, according to the information found in the *Spanish Yearbook of International Law*, vol. VII (1999–2000), p. 107:

"[T]he Commission received a letter from the Canadian ambassador in Brussels ... and made particular mention that it would not apply Canadian extra-territorial legislation against Spanish or Portuguese vessels.

To formalize this commitment in a way that is legally binding for Canada, Spain insists that it be reiterated by Canada by means of a Note Verbale from the Canadian embassy in Helsinki, capital of the Member State that currently holds the Presidency of the European Union, at the end of July ...

On 30 September a response was sent in the form of a note verbale by the competent institutions of the European Union (Commission Council) as acknowledgement of receipt and to formally show their agreement with the guarantees offered by Canada without prejudice to the legal opinion of the European Union on certain extra-territorial aspects not respectful of the New York Agreement and of the Law of the Sea in force that would be dealt with in due time with the Canadian authorities."

[50] Such as the promise made by the United States relating to the reduction of greenhouse gases, as an alternative measure following its refusal to sign the Kyoto Protocol to the United Nations Framework Convention on Climate Change. In February 2002, the President of the United States announced the adoption of alternative measures to offset the effects of climate change; the measures in question would be voluntary in nature. The President's announcement ran in part as follows:

"Our immediate goal is to reduce America's greenhouse gas emissions relative to the size of our economy.

"My administration is committed to cutting our Nation's greenhouse gas intensity, how much we emit per unit of economic activity, by 18 percent over the next 10 years. This will set America on a path to slow the growth of our greenhouse gas emissions and, as science justifies, to stop and then reverse the growth of emissions.

"… We will challenge American businesses to further reduce emissions. Already, agreements with the semiconductor and aluminum industries and others have dramatically cut emissions of some of the most potent greenhouse gases. We will build on these successes with new agreements and greater reductions.

"Our Government will also move forward immediately to create world-class standards for measuring and registering emission reductions. And we will give transferable credits to companies that can show real emission reductions. We will promote renewable energy production and clean coal technology, as well as nuclear power, which produces no greenhouse gas emissions. And we will work to safely improve fuel economy for our cars and our trucks."

(Murphy, *loc. cit.* (2002), pp. 487–488)

[51] An example of this is a declaration made in the course of a press conference held in Seoul by the Minister for Foreign Affairs of Ecuador, indicating:

"the willingness of the Government of Ecuador to help ensure that this country's business activities will flourish in the South American market, and that consideration will be given to the possibility of establishing a free trade zone for Korean firms, which would then be able to manufacture goods and export them to third countries."

(Ministry of Foreign Affairs Newsletter, No. 11/85, p. 6, quoted in Lira B., "La política exterior de Ecuador: del multilateralismo al bilateralismo", p. 242)

[52] "De Rangel a Chávez", *El Universal* (Caracas), 23 February 2004.

[53] United Nations, *Treaty Series*, vol. 561, No. 8192, p. 321. Specifically, article V, paragraph (1), of that agreement states:

"In order to facilitate the greatest possible measure of cooperation and mutual understanding, nothing contained in this Agreement shall be interpreted as a renunciation or diminution by the United Kingdom, British Guiana or Venezuela of any basis of claim to territorial sovereignty in the territories of Venezuela or British Guiana, or of any previously asserted rights of or claims to such territorial sovereignty, or as prejudicing their position as regards their recognition or non-recognition of a right of, claim or basis of claim by any of them to such territorial sovereignty."

[54] *El Universal* (Caracas), 24 February 2004.

but it did not: it declined to hear the case on the grounds that the petition had not been accompanied by "the documents that would have been indispensable in order for the Court to be able to determine whether the action was admissible".[55]

29. Membership of an international organization is a situation which in some cases has resulted in promises that are formulated along lines such that the promised action is made subject to a decision by the organization in question aimed at coordinating the actions of its members.[56] Recent examples have been found of promises—subject to conditions, to be sure—in the matter of the lifting of sanctions, as in the case of the Libyan Arab Jamahiriya and the sanctions imposed by the Security Council.[57] Subsequent events suggest that this conflict has taken a positive turn.[58] Also in relation to international organizations, promises concerning the lifting of sanctions imposed on a State have sometimes been made.[59]

30. In addition, still in the context of the activities of international organizations, there have been some recent examples of promises of support for countries seeking membership of a particular organization[60] or one of its constituent bodies,[61] including one case where the promise was made in return for support for a specific country's application to join the European Union,[62] to mention one of several particularly significant cases.

31. Furthermore, even at multilateral meetings held at the highest level, joint statements or declarations may be adopted that contain promises which are effectively unilateral acts, even though issued at a multilateral forum. An example is the announcement below by Taiwan, Province of China (disregarding any controversial aspects of the status of that entity).[63]

32. Recent international practice affords a number of instances of promises that have elicited responses by third parties (an example might be a promise that triggers a protest[64]), or have even involved recognition of a particular situation,[65] in which case the task of analysing the nature of the promise in question is rather more complex. Moreover, it is becoming increasingly frequent for a State to offer economic assistance—in a word, to make a promise—but subject to specified conditions, notably in cases in which the addressee State is unstable.[66] Can this

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[55] The ruling of inadmissibility was handed down on 25 March 2004. It may be consulted at the website http://www.tsj.gov.ve.

[56] Following the announcement on 19 August 1991 by Radio Moscow that President Mikhail Gorbachev had been overthrown, the Minister for Foreign Affairs of Spain issued the following statement:

> "Spain will act in concert with the other members of the Community with respect to Community credits and assistance to the USSR"

(REDI, vol. XLIII, No. 2 (1991), pp. 415–416)

[57] In the course of a debate in Parliament on relations between the United Kingdom and the Libyan Arab Jamahiriya, the British Minister of State stated:

> "The Security Council—I stress that it is the Security Council that imposes these requirements rather than individual countries—requires Libya to accept responsibility for the actions of its officials and to pay appropriate compensation. Libya also needs to satisfy us that it has renounced terrorism and disclosed all that it knows of the Lockerbie crime.
>
> … We shall be discussing with Libya how we can achieve compliance with all the requirements and I can confirm that, once satisfactory arrangements have been made, we will agree to the lifting of sanctions."

(Marston, "United Kingdom … 2001", pp. 643–644).

[58] Official relations between the Libyan Arab Jamahiriya and the United Kingdom were resumed on 7 August 2002, as a result of a meeting between the British Foreign Secretary and the President of the Libyan Arab Jamahiriya. Following that meeting, the Libyan Arab Jamahiriya stated that with respect to compensation for the victims of the Lockerbie bombing: "In principle, the question of compensation is on the table, and we are ready to discuss it" (*Cape Argus* (South Africa), 8 August 2002; see also RGDIP, vol. CVI (2002), p. 939). On the same issue, as a result of a visit by the French Minister for Foreign Affairs to Tripoli, significant progress was made on the question of compensation for the victims of the bombing of a UTA DC-10. The Libyan Arab Jamahiriya was prepared to pay compensation to French victims who had not received any compensation as yet, and to pay additional compensation to other persons in accordance with French court rulings. In July 1999, the Libyan Arab Jamahiriya transferred US$ 210 million to France for the purpose of compensating the families of the 170 victims of the bombing. This transfer was tantamount to acknowledging that Libyan officials had been behind the bombing (*ibid.*, vol. CVII (2003), p. 140).

[59] For example, on 19 June 2000 the United States announced that it intended to lift the economic sanctions that had been imposed upon the Democratic People's Republic of Korea following the end of the Korean War in 1953 (Poulain, *loc. cit*., p. 860).

[60] This emerges from a joint announcement by the Ministers for Foreign Affairs of Belgium and Latvia on 5 September 1991, which read in part as follows:

> "Belgium favours the full and urgent integration of Latvia in an orderly way into the international organisations. As a member of the Security Council, Belgium will facilitate its entry in the United Nations."

(Klabbers and others, State Practice regarding State Succession and Issues of Recognition: the Pilot Project of the Council of Europe, p. 177)

[61] At a meeting with the Minister for Foreign Affairs in Madrid, the Head of Government of Andorra undertook to support Spain as a non-permanent member of the Security Council (REDI, vol. LIII, Nos. 1–2, (2001) p. 608).

[62] The Minister for Foreign Affairs of Cyprus visited Madrid on 22 January 2001 and met with his Spanish counterpart to discuss, in particular, the expansion of the European Union. In that connection, the Spanish Minister for Foreign Affairs informed his visitor that his Government was working within the EU in an effort to ensure that negotiations over Cyprus' membership would be concluded during the first half of 2002, during Spain's presidency. The Cypriot Minister, for his part, announced that his country would support Spain's candidacy for membership of the Security Council (*ibid.*).

[63] See *Chinese Yearbook of International Law and Affairs*, vol. 18 (1999–2000), pp. 41–42:

> "The President of the Republic of China promised to enhance cooperation in those areas in support of the region, including also such subjects as the promotion of Taiwanese investment in the isthmus, given the vital importance of investment to the generation of employment, technological modernization, and increasing the productivity of the economies of the Central American region; as well as those areas related to the fostering and diversification of trade, the development of sustainable tourism and complementary production among the industries of the Central American states and of the Republic of China."

[64] As happened when a Russian listening station in Cuba was dismantled, with diametrically opposite reactions in Cuba and the United States. In the former country, the Russian announcement that the station was to be closed down was viewed as a concession to the United States Government (RGDIP, vol. CVI (2002), p. 149).

[65] On 5 February 2002, the Belgian Minister for Foreign Affairs presented an official apology for the role that his country had played in the assassination of Patrice Lumumba in 1961: "In the light of today's standards ... there were Belgian individuals or agencies at the time that unquestionably bore some responsibility for the events leading up to the death of Patrice Lumumba." The Minister also announced in Brussels that Belgium would donate €3.75 million to the Lumumba Foundation, which had been established for the purpose of promoting democracy in the former Belgian colony (RGDIP, vol. CVI (2002), p. 377).

[66] This was the case with the offer made by the United Kingdom on 27 April 2000: it would make a financial contribution to the process of land reform in Zimbabwe, but not until land occupations and political

be regarded as a unilateral act *sensu stricto*, if it has conditions associated with it? The question is worth considering, inasmuch as practice affords clear indications that phenomena of this kind are occurring fairly frequently.

33. In practical terms, a specific issue such as disarmament serves to demonstrate that conditionality is a constant feature of many declarations. Should it therefore be concluded that as far as that particular issue is concerned, the declarations in question are not unilateral *sensu stricto* and should be excluded from this study? Or should it rather be concluded that, owing to the distinctive nature and special relevance of the issue in question, practice shows that as a rule, conditionality is one of the aspects that induces States to undertake commitments which otherwise they would not have undertaken? It will be worthwhile to look at a number of specific examples illustrating practice in the matter of disarmament or commitments not to use a particular type of weapon.[67]

34. Let us begin with the unilateral declaration committing China not to be the first to use nuclear weapons[68] made on 15 November 1971 by the Deputy Minister for Foreign Affairs and head of the Chinese delegation at the twenty-sixth session of the General Assembly, in the course of an address setting forth China's positions on a number of international issues. The main points covered in that address may be summarized as follows: China would never participate in the so-called nuclear disarmament talks between the nuclear Powers. It was developing nuclear weapons solely for the purpose of defence. The Chinese Government had consistently stood for the complete prohibition and the thorough destruction of nuclear weapons, and had proposed to convene a summit conference of all countries of the world to discuss that question

> and, as the first step, to reach an agreement on the non-use of nuclear weapons. *The Chinese Government has on many occasions declared, and ... once again solemnly declare[s], that at no time and under no circumstances will China be the first to use nuclear weapons. If the United States and the Soviet Union really and truly want disarmament, they should commit themselves not to be the first to use nuclear weapons*.*[69]

35. On 23 October 1972, the issue of disarmament was discussed by the First Committee of the General Assembly; the following day, the representative of China outlined the basic principles underpinning his country's position on disarmament.

> The Chinese Government had consistently stood for the *complete prohibition and the thorough destruction of nuclear weapons*.* It was prepared to work actively for the convening of an effective world conference on disarmament. But certain necessary *preconditions** must be met, namely:
>
> (*a*) All nuclear countries, and particularly the Soviet Union and the United States, must commit themselves not to be the first to use nuclear weapons under any circumstances. They must also undertake not to use nuclear weapons against non-nuclear countries;
>
> (*b*) All countries must undertake to withdraw from abroad all their armed forces and dismantle all their military bases, including nuclear bases, on foreign soil.[70]

36. On 2 October 1973, the head of the Chinese delegation to the United Nations delivered an important address in the General Assembly, outlining China's attitude to major international problems, including, the question of disarmament:

> The Chinese Government is in favour of convening a world conference on genuine disarmament. But there must be the necessary preconditions … for the conference. That is, all nuclear countries … must … undertake the unequivocal obligation that at no time and in no circumstances will they be the first to use nuclear weapons, particularly against non-nuclear countries and in nuclear-weapon-free zones …they must withdraw from abroad all their armed forces, including nuclear missile forces, and dismantle all their military bases, including nuclear bases, on the territories of other countries.[71]

The situation appears to have changed a good deal, if the above is compared with the position held by China during the 1990s. On 29 July 1996, China conducted a nuclear test, the forty-fourth since 1964, promising that it would be the last and announcing a moratorium on nuclear testing effective from 30 July 1996.[72]

37. Particular interest attaches to the unilateral declarations formulated by the nuclear States on 5–6 April 1995, in the context of the negotiations leading to the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons. As García Rico points out:

> while they did entail the acceptance of an obligation not to use nuclear weapons against those States, that obligation would not apply (except in the case of the People's Republic of China) in the event of an invasion or any other attack against the nuclear powers, their territory, their armed forces or their allies, or any State with which they had a security agreement, on the part of a non-nuclear State in association or alliance with a nuclear State.[73]

In the view of the Special Rapporteur, this was a declaration meant as a unilateral act binding on the State formulating it, but framed in accordance with the specific parameters with which that State wished to associate its performance.[74] It was, to use descriptive terminology, a

violence against the opposition had ceased (Beukes, "Southern African events of international significance: 2000", p. 314).

A similar instance arose when the United States, on 5 December 2001, offered Zimbabwe an aid package with the condition of an end to violence and equitable land reform. A few days later, on 18 December, the President of Zimbabwe denounced the offer as "a bold insult to the people of Zimbabwe" (*ibid.*, (2002), p. 365).

[67] The discussion of international practice in the following pages draws extensively on material collected and systematized by Elena del Mar García Rico, Professor of Public International Law and International Relations at the University of Málaga, Spain, who has very kindly placed her documentation at the Special Rapporteur's disposal.

[68] Commitment—conditional promise—taken from Focsaneanu, "La République populaire de Chine à l'ONU", pp. 118–119.

[69] *Official Records of the General Assembly, Twenty-sixth Session, Plenary Meetings*, 1983rd meeting, para. 211.

[70] Focsaneanu, *loc. cit*., pp. 125–126.

[71] *Official Records of the General Assembly, Twenty-eighth Session, Plenary Meetings*, 2137th meeting, para. 46. See also Focsaneanu, *loc. cit*., p. 137.

[72] A/51/262, annex; see also *Asian Yearbook of International Law*, vol. 7 (1997), p. 410.

[73] García Rico, *El Uso de las Armas Nucleares y el Derecho Internacional: Análisis sobre la Legalidad de su Empleo*, p. 127.

[74] Another example occurred when the President of the United States announced on 27 September 1991 a series of unilateral decisions relating to a reduction in tactical nuclear weapons, on the grounds of the dissolution of the Warsaw Pact (in this connection, see Furet, "Limitation et réduction des armements stratégiques en 1992", pp. 612–619). On 5 October 1991, the President of the Soviet Union did the same (RGDIP, vol. XCVI (1992), p. 128). Both positions were clarified in the State of the Union message of 28 January 1992: the President of

(*Continued on next page.*)

unilateral act that was "limited or subject to conditions", constituting a characteristic expression of the will of the State formulating it and reflecting that State's position on the specific issue involved.

38. Another even more recent example occurred after the Democratic People's Republic of Korea had reactivated its nuclear programme,[75] one explicitly involving conditionality in its wording: on 19 January 2003, the Deputy Secretary of Defense announced that the United States would guarantee the security of the regime of the Democratic People's Republic of Korea if Pyongyang would agree to abandon its nuclear programme. On 15 February the offer was rejected. In a conciliatory gesture, the United States Secretary of State announced on 25 February that the United States would resume its food aid to the Democratic People's Republic of Korea.

39. Other very recent examples may be found in declarations that were the outcome of concerted action involving a number of States and were assented to by the Islamic Republic of Iran, having to do with that country's acceptance of inspections by IAEA and its assumption of a commitment to the use of atomic energy for peaceful purposes.[76]

2. Recognition

(a) *The concept of recognition in international law*

40. Some decades ago, Schwarzenberger defined recognition as "a general device of international law for the purpose of making a situation or transaction *opposable* to the recognising entity";[77] doubtless the political nature of the act of recognizing a particular state of affairs is self-evident, but at the same time, it is essential to note that an act of this kind produces legal consequences of the utmost significance. This has led to the general view that recognition is something more—a good deal more, the Special Rapporteur suggests—than a mere political act.[78] Some studies on unilateral acts, such as the work by Suy referred to earlier, have emphasized the characteristics of this important type of initiative, defining it as a general legal institution which authors have unanimously regarded as a unilateral manifestation of will emanating from a subject of law whereby that subject first takes note of an existing situation and expresses the intention of being willing to regard it as legitimate, as being lawful.[79] Nonetheless, despite the impressive weight of legal scholarship devoted to recognition, the fact remains, as Ruda points out, that "[r]ecognition is one of the most difficult subjects to define in international law, since it is governed by no clear-cut customary rules, and legal opinion has been divided over fundamental issues".[80]

41. No attempt will be made here to conduct an exhaustive study of the institution of recognition, nor of the available body of scholarship dealing with it, a task which would not be feasible in any case. Rather, the Special Rapporteur proposes simply to survey recent practice as it relates to recognition in its various forms, noting the more innovative aspects found in contemporary usage. The unilateral act of recognition, of course, was covered in the sixth report submitted by the Special Rapporteur,[81] and this should be taken into account.

42. Nor is it proposed to dwell at undue length on the arduous debate—which is largely academic today—between what are known as the declarative and constitutive theories of recognition. In point of fact, there are precedents from as long ago as the nineteenth century which have affirmed specifically that "[r]ecognition is based upon the preexisting fact; does not create the fact. If this does not exist, the recognition is falsified".[82] Not, of course, that this has prevented some writers from closing their eyes to more recent international events, which afford plenty of evidence that some States, when they have decided to recognize a particular entity as a State, have made such recognition subject to particular criteria or conditions, thereby approximating fairly closely

(*Footnote 74 continued.*)

the United States clearly indicated his Government's intentions, announcing numerous unilateral disarmament measures, followed by proposals for negotiation addressed to the Commonwealth of Independent States. The following day, the President of the Russian Federation, in a television interview, offered a number of similar proposals with a view to fresh negotiations.

[75] See RGDIP, vol. CVII (2003), pp. 440–442.

[76] On the occasion of a visit to Tehran by the Ministers for Foreign Affairs of France, Germany and the United Kingdom on 21 October 2003, Hassan Rohani, the Iranian official in charge of the nuclear issue, stated that his country was prepared to take the necessary action to sign the Protocol Additional to the IAEA agreement for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons [authorizing IAEA inspections] and become the eighty-first signatory before 20 November. He subsequently qualified this statement by saying that the Iranian authorities reserved the right to resume work on uranium enrichment if they should deem it necessary within a day, a year or a longer period of time, as their interests might require. They would also continue to use that energy for peaceful purposes, since all their peaceful nuclear activities, including uranium enrichment, were an inalienable national right of which no one could deprive them. The second statement qualifies the earlier promise by making an exception for peaceful uses of atomic energy and declaring that the promise is subject to withdrawal in due course (see *Le Monde*, 23 October 2003). In an interview with Kyodo, a Japanese news agency, Kamal Kharazi, the Iranian Minister for Foreign Affairs, stated that his country was determined to enhance cooperation with IAEA and to remove the international community's concern about the Islamic Republic of Iran's nuclear programme. On 22 October 2003, the Minister for Foreign Affairs of the Russian Federation announced that his country was prepared to continue to cooperate with the Islamic Republic of Iran. An English-language summary of the Minister's statement reads as follows: "The Russian Federation is ready to continue to cooperate with Iran, including in the nuclear field, with strict observance of international obligations" (http://www.mid.ru).

[77] *International Law*, p. 549.

[78] Duculesco notes that:

"We thus reach the conclusion that while the act of recognition—regardless of the particular case of recognition at issue—is a political act by virtue of *its content*, yet it cannot be regarded as an 'exclusively political' act, because of its legal consequences."

("Effet de la reconnaissance de l'état de belligérance par les tiers, y compris les organisations internationales, sur le statut juridique des conflits armés à caractère non-international", p. 127)

[79] Suy, *op. cit.*, p. 191.

[80] "Recognition of States and Governments", p. 449, where the author goes on to define recognition as "a unilateral act by which a State acknowledges the existence of certain facts, which may affect its rights, obligations or political interests, and by which it expressly states or implicitly admits that these facts will count as determining factors when future legal relations are established, on the lines laid down by the same act".

[81] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/534.

[82] Coussirat-Coustère and Eisemann, *op. cit.*, p. 108. See the *Joseph Cuculla* v. *Mexico* case, between Mexico and the United States, which was settled by a mixed commission on 20 November 1876 (*ibid.*, p. 480).

to traditional constitutive theory, at any rate as regards the consequences flowing from the recognition or non-recognition of the entity in question.[83]

(b) *Earlier practice relating to recognition*[84]

43. Unquestionably, the forms of recognition of States and governments have been the two that have traditionally occupied a preponderant place both in doctrinal analysis and in practice. Both, moreover, have been regarded as forms that commonly give rise to a great variety of legal consequences,[85] but which are unmistakably unilateral acts.[86] However, the recognition of States is somewhat more clear-cut than the recognition of Governments: in the latter case, the interplay of a variety of conflicting theories[87] complicates the situation that this analysis of practice must consider.[88] In addition, recognition may be either explicit[89] or implicit,[90] and it may be either *de jure* or *de facto*, making the task of analysis still more difficult. As a rule, recognition produces its full legal effects from the time when it occurs, and not retroactively. This is clear from the jurisprudence: "[I]t is not a principle accepted by the best recognized opinions of authors on international law, as is alleged, that the recognition of a new state relates back to a period prior to such recognition."[91]

44. As regards the recognition of governments, early nineteenth-century practice did not require a new government to have come to power democratically in order to be granted recognition;[92] democratic legitimacy, as such, began to emerge more strongly only from approximately the mid-nineteenth century onwards, although even then practice was by no means uniform.[93] Within the British Commonwealth, for example, recognition by the Crown ordinarily extended automatically to other territories,

[83] As Ribbelink has noted, the cases of State succession that occurred in Europe during the 1990s may be said to indicate something of a return to the "constitutive theory" of recognition. He bases this statement on the fact that the European Community and its member States, as well as other States which have followed the same guidelines, have set conditions that new States must meet in order to be admitted to the pre-existing community of States ("State succession and the recognition of States and Governments", p. 44). The book from which this article is taken contains a highly useful survey of recent European practice.

[84] This initial section is very short, a focus on more recent practice in the matter of recognition (since the 1980s in particular) having been preferred. Examples of earlier practice relating to recognition may be found in digests dealing with the matter, including the following, photocopies of which were placed at the disposal of the Special Rapporteur: Castel, *International Law Chiefly as Interpreted and Applied in Canada*; Lapradelle and Niboyet, *Répertoire de droit international*; Hackworth, *Digest of International Law*; Moore, *A Digest of International Law*, and *History and Digest of the International Arbitrations to which the United States has been a Party*; Parry, *A British Digest of International Law*; Wharton, *A Digest of the International Law of the United States*; Whiteman, *Digest of International Law*.

[85] This was clearly indicated by the representative of the French Government to PCIJ at the public session of 4 August 1931, when he stated that recognition of (a State's) independence implies, on the one hand, that its Government's acts will be deemed to commit the State so recognized, in accordance with international law, and, on the other hand, that the rules of international law will be applied with respect to that State (*Customs Régime between Germany and Austria, P.C.I.J., Series C, No. 53, p. 569*). See also Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. III, p. 15.

[86] The fact that recognition of a government is a unilateral act was emphasized in a statement made in the Assembly of the French Union, at its session of 21 March 1950, that when a country recognizes a government or an authority that may constitute a government, it performs a unilateral act, but it does not enter into a contract with that authority (Kiss, *op. cit.*, vol. III, p. 33).

[87] The principle of democratic legitimacy, postulated by the Minister for Foreign Affairs of Ecuador, Mr. Tobar, and the principle of effectiveness, upheld by the Minister for Foreign Affairs of Mexico, Mr. Genaro Estrada, are two of the criteria that are commonly applied at the present time. The latter theory was set forth in a statement made by Mr. Estrada on 27 September 1930:

> "After a very careful study of the subject, the Government of Mexico has transmitted instructions to its Ministers or Chargés d'Affaires in the countries affected by the recent political crises, informing them that the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign régimes.
>
> "Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem advisable, of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or *a posteriori*, regarding the right of foreign nations to accept, maintain or replace their governments or authorities."

("Estrada doctrine of recognition", *Supplement to* AJIL, vol. 25, No. 4 (October 1931). See also Seara Vázquez, *La paz precaria: de Versalles a Danzig*, p. 377.

[88] A clear example of the Estrada doctrine is to be found in the position adopted by the Netherlands in recognizing the government that took power in Iraq in 1958, on the grounds that:

> "It may further be pointed out that *according to the rules of international law* the recognition of a new government can in no regard be deemed to imply any judgment concerning the manner or circumstances in which it came to power."

(Panhuys and others, *International Law in the Netherlands*, p. 379). The Netherlands subsequently altered its position on the recognition of governments, as shall be seen in the following section.

[89] See, for example, the statement issued by the Ministry for Foreign Affairs of France on 12 August 1974 explicitly recognizing Guinea-Bissau and supporting its application for membership of the United Nations:

> "Recognition and best wishes for successful development:
>
> The French Government, which welcomes the decisions made by Portugal, declares that it recognizes the State of Guinea-Bissau and supports its application for membership of the United Nations and international organizations."

(*La politique étrangère de la France: textes et documents 1974* (Paris, Ministry for Foreign Affairs), p. 58)

[90] Implicit recognition is illustrated by a number of examples relating to the annexation of Estonia, Latvia and Lithuania by the Soviet Union. When the Netherlands recognized the Soviet Union on 10 July 1942, it did not formulate any reservations concerning the Baltic States, which at that time were under German occupation. Many years later, the same thing happened with Spain, which restored diplomatic relations with the Soviet Union in 1977 without formulating any reservations in the matter, and thereby implicitly recognizing the annexation of those countries. Portugal took a different position: it established diplomatic relations with the Soviet Union in 1973, but announced at the same time that it did not recognize the annexation of the Baltic countries (see Klabbers and others, *op. cit.*, p. 283).

[91] Coussirat-Coustère and Eisemann, *op. cit.*, p. 54. See the case of *Eugène L. Didier, adm.* et al. v. *Chile*, between Chile and the United States (9 April 1894), quoted in *ibid.*, p. 490.

[92] This was the reasoning used by the Secretary of State of the United States when he declared to the British Ambassador in 1833 that:

> "It has been the principle and the invariable practice of the United States to recognize that as the legal Government of another nation which by its establishment in the actual exercise of political power might be supposed to have received the express or implied assent of people."

(Wharton, *op. cit.*, vol. I, p. 530)

[93] Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815–1995*, pp. 53–55.

although the latter would communicate formal confirmation of their assent in the matter,[94] even in straightforward cases of annexation of territory.[95]

45. At this point, it will be of some interest to note some instances of actions by States that might entail legal consequences analogous to recognition in cases where statehood is not clear-cut. An example is the action of Belgium and Italy in establishing official relations with the Palestine Liberation Organization (PLO) on 27 and 29 October 1979 respectively. The official visit of the Chief of the PLO Political Department to Rome was regarded by the Italian Ministry for Foreign Affairs as a highly positive step, although it was not equivalent to formal recognition of the PLO. Similarly, when the PLO official visited Belgium, he was received by the Belgian Minister for Foreign Affairs, making the visit *de facto* recognition, although that interpretation was neither confirmed nor denied by Brussels.[96]

46. In addition, it is important to bear in mind that in cases where statehood is controversial, the recognition of a government frequently occasions an act of protest by a State deeming itself wronged by such recognition. On 13 March 1980, for example, the Austrian Government announced that it was recognizing a PLO diplomat as that organization's official representative in Austria. In response, the Minister for Foreign Affairs of Israel, Mr. Shamir, summoned Austria's chargé d'affaires in Tel Aviv on 14 March and delivered a vigorously worded verbal protest, alleging that that aspect of Austria's international policy was jeopardizing the security and existence of the State of Israel.[97] This explains why Spain proceeded so cautiously when it decided to establish diplomatic relations with Israel in 1986, sending individual letters to the heads of all the Arab countries to explain the reasons for its decision.[98]

(c) *Recent practice relating to recognition*

47. Traditionally, the sending of an official note of recognition had been the procedure whereby the act produced its full effects. This form of action fell out of use for a time, but has recently experienced something of a revival.[99] The most usual procedure is the establishment of diplomatic relations;[100] while this might be termed implicit recognition, it is unquestionably a form of recognition that leaves no room for doubt as to its consequences.

48. As regards recognition of States, the international practice of the past decade offers a host of cases, essentially as a result of events occurring in Central and Eastern Europe; moreover, there have been substantial changes in this form of recognition, such as the appearance of so-called "conditional recognition", which has become

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[94] A useful illustration is the practice of the Department of External Affairs of Australia, as for example in the matter of recognition of General Franco's regime in Spain (see *Documents on Australian Foreign Policy* (Canberra, Australian Government Publishing Service, 1976), vol. 2 (1939), document 30). See also http://www.info.dfat.gov.au, section devoted to historical documents.

[95] Once the United Kingdom had recognized Italy's annexation of Abyssinia, Australia sent a telegram to the British Government in October 1938, worded as follows:

> "Commonwealth Government strongly of opinion that, as a contribution to peace, Anglo-Italian agreement should be brought into operation forthwith and de jure recognition accorded to Italian Empire in Abyssinia … To refuse de jure recognition seems to us to ignore the facts and to risk danger for a matter which is now immaterial."

(*Documents on Australian Foreign Policy* (Canberra, Australian Government Publishing Service, 1975), vol. 1 (1937–1938), document 317). See also http://www.info.dfat.gov.au.

[96] See Rousseau, *loc. cit*. (1980), p. 664.

[97] *Ibid.*, p. 1077.

[98] All these letters are reproduced in Sagarra Trías, "El reconocimiento de Estados y de gobiernos", pp. 258–259.

[99] In recent cases of State succession (Czechoslovakia, the former Soviet Union, Yugoslavia), the procedure of explicit recognition has frequently been followed. An example is the letter sent by the Prime Minister of the United Kingdom to the President of Croatia on 15 January 1992. The case of Slovenia was much the same: the British Prime Minister sent a letter to the President of that country as well, bearing the same date and with contents that were virtually identical (Marston, "United Kingdom … 1992", pp. 636–637). Another instructive illustration is the Prime Minister's letter recognizing Georgia (although the letter is careful to state that recognition does not imply any position with respect to other situations involving territorial disputes):

> "The Presidency of the European Community has today issued a statement noting the assurance of the Government of Georgia that it is ready to fulfil the requirements of the 'Guidelines on the Recognition of the New States in Eastern Europe and the Soviet Union' approved by the Council of Ministers of the European Community.
>
> "I am writing to place on record that the British Government formally recognises Georgia as an independent sovereign state … I can confirm that, as appropriate, we regard Treaties and Agreements in force to which the United Kingdom and the Union of Soviet Socialist Republics were parties as remaining in force between the United Kingdom and Georgia.
>
> "Recognition shall not be taken to imply acceptance by Her Majesty's Government of the position of any of the Republics concerning territory which is the subject of a dispute between two or more Republics".

(*Ibid.*, pp. 640–641)

Nor was this the case in the European context exclusively; on 14 May 1993, the British Prime Minister wrote to the Secretary-General of the Provisional Government of Eritrea to inform him of the United Kingdom's recognition of Eritrea as a State:

> "I am writing to place on record that the British Government formally recognises Eritrea as an independent sovereign state. The Foreign Secretary … will be writing to his opposite number in your Government concerning the establishment of diplomatic relations."

(*Ibid.* 1993, p. 602)

The position adopted by the United Kingdom in the matter is clear from the virtually identical letters dated 1 January 1993 from the Prime Minister addressed to the Prime Ministers of the Czech and Slovak Republics, recognizing both republics. The passage reproduced below contains the most salient features of the letters:

> "I am writing to place on record that the British Government formally recognises the Czech Republic as an independent sovereign state.
>
> "We have noted that the Czech Republic, by the terms of the arrangements for the dissolution of the Czech and Slovak Federal Republic, has assumed its share of the legal and financial obligations of the former Czech and Slovak Federal Republic."

(*Ibid.*, "United Kingdom … 1994", p. 587)

[100] On 27 April 1993, the Eritrean authorities officially announced that the people of Eritrea had voted in favour of the independence of that State in a referendum held on 23–25 April 1993. Following the announcement, the United States consul in Asmara confirmed in informal talks that the United States was recognizing Eritrea as a State, although it was not until 28 April 1993 that a State Department representative indicated that formalities leading up to the establishment of diplomatic relations with Eritrea were under way. In actual fact, it is probably true to say that diplomatic relations are the mark of recognition, as may be seen from a note from the United States Ambassador to Ethiopia addressed to the Minister for Foreign Affairs of Eritrea (Nash Leich, *loc. cit*. (1993), pp. 597–598). Another recent case of the same kind involved Namibia: the British Foreign Secretary himself stated that the establishment of diplomatic relations in March 1990 indicated not formal but implicit recognition (Marston, "United Kingdom … 1992", pp. 642–643).

a factor in the context of European Community members and some other States that are geographically part of Europe.[101] New States are required to comply with a series of principles designed to ensure that certain conditions relating to stability are met and that fundamental safeguards for specific rights are in place, and while this has not altered the essentially political and unilateral nature which has traditionally been the defining characteristic of the act of recognition, it has added some innovative features.

49. It may even be reasonable to ask whether "conditional recognition" is really a unilateral act or a proposal for an agreement. The third State's compliance with the condition or conditions imposed upon it, or, more realistically, the validation of the situation by the State or States imposing the condition and its/their willingness to grant recognition, must in the last analysis depend on the recognizing State or States, and in that case the recognition retains its status as a unilateral act.[102] Several noteworthy examples of what some authors have been calling the "dawn of conditional recognition"[103] have arisen out of the situation that prevailed during the 1990s in the former Yugoslavia and the ex-Soviet Union.

50. On 16 December 1991, the European Community adopted a joint statement in Brussels in an effort to establish common guidelines, acceptable to all Community members, on the recognition of the territories that had broken away from the former Yugoslavia.[104] Other European States that were not EC members maintained a wait-and-see attitude,[105] keeping a close watch on the EC position. However, events developed at a rather less leisurely pace than had originally been anticipated. The Community's recognition of Croatia and Slovenia on 15 January 1992 was unexpected, to say the least; it was precipitated by a statement by the Chancellor of Germany in which, disregarding the Commission's recommendations, he announced that Germany would recognize Croatia and Slovenia as subjects of international law. That same day, in the framework of European political cooperation, a statement by the Presidency on recognition of those Yugoslav Republics was published.[106] A variety of mechanisms have been used by EC members to recognize Croatia and Slovenia.[107]

51. Greater difficulties arose in the case of Macedonia, owing to opposition from Greece, which pointed to the presence of inadequately protected ethnic minorities in the territory in question and did not want the new republic to bear the same name as one of its own provinces; as a result, the issue was postponed.[108] Problems between this

[101] An example is the position adopted by Switzerland in the matter of recognition of the Baltic States (Estonia, Latvia and Lithuania), as outlined by the head of the Federal Department of Foreign Affairs at a press conference held in Bern on 28 August 1991 (reproduced in Klabbers and others, *op. cit.*, pp. 344–348), that it is essential for a State to be recognized only when its security is, insofar as possible, assured and safeguarded … recognition is sometimes used as a political weapon to compel one of the parties to withdraw from a potential conflict. An in-depth analysis is indispensable.

[102] In answer to a question about the recognition of Croatia, the British Minister of State stated on 5 February 1992:

> "The criteria are that a country should have a clearly defined territory with a population; a Government with a prospect of retaining control; and independence in its foreign relations. These criteria are always subject to interpretation in the light of circumstances on the ground. In this case we and our EC partners recognised Croatia on the basis of advice from the arbitration commission that Croatia largely fulfilled the guidelines on recognition adopted last December. These were that the state to be recognised shall respect the United Nations charter; guarantee the rights of minorities; respect the inviolability of frontiers except by peaceful agreement; accept commitments on disarmament, nuclear non-proliferation, security and regional stability; and promise to settle by agreement questions of state-succession and regional disputes. We also took account of additional undertakings from the Croatian Government on minorities legislation."

(Marston, "United Kingdom … 1992", p. 639). On 5 March 1992, during a debate on the same issue, the Minister of State was asked about the "premature recognition" of Croatia, and replied:

> "I understand the argument of those who have suggested that our recognition of Croatia was premature ... But by January of this year it became plain that many states within the Community were determined to recognise Croatia … it was inevitable. It was right to do it at that time, and we would have gained nothing by withholding our own recognition."

(*Ibid.*)

[103] González Campos, Sánchez Rodríguez and Sáenz de Santa María, *Curso de Derecho Internacional Público*, p. 494.

[104] Community member States held various positions, some because they were directly (Greece) or indirectly (Germany) involved in the conflict. Given this situation, it was essential to adopt a unanimous position, as otherwise various parties might have attempted to expedite or impede independence movements, relying on the support or opposition of member States, as Quel López points out in "La actitud de España en el marco de la coordinación de la política exterior comunitaria: el reconocimiento de los nuevos Estados surgidos de la antigua URSS y de la República Socialista Federativa de Yugoslavia", p. 707. The full English text of the above-mentioned joint statement may be found in the *Bulletin of the European Communities*, vol. 24, No. 12 (1991), p. 119. See also ILR, vol. 92 (1993), p. 174. See further Charpentier, "Les déclarations des Douze sur la reconnaissance des nouveaux États".

[105] This was the case with Austria: on 25 June 1991, the Federal Minister for Foreign Affairs declared that Austria would continue to regard international treaties to which Yugoslavia was a party as applying, mutatis mutandis, to all the republics. This would make it possible to maintain relations in matters relating to the movement of persons and economic, social and legal issues. A decision on formal recognition would be taken when the requirements prescribed by international law had been met (Klabbers and others, op. cit., p. 163). Finland adopted a similar position: in the course of a parliamentary debate on 14 November 1991, the Minister for Foreign Affairs stated:

> "The question of the recognition of Slovenia and Croatia has been left to the deliberations of the EC and its Member States. The matter is indissolubly connected with a political settlement of the Yugoslavian crisis."

(*Ibid.*, p. 188)

[106] It ran as follows:

> "The Presidency wishes to state that, in conformity with the declaration on 16 December 1991 on the recognition of States and its application to Yugoslavia, and in the light of the advice of the Arbitration Commission, the Community and its Member States have now decided, in accordance with these provisions and in accordance with their respective procedures, to proceed with the recognition of Slovenia and Croatia."

(*Bulletin of the European Communities*, vol. 25, Nos. 1/2 (1992), p. 108)

[107] As an example, see the joint declaration of 17 January 1992 on the establishment of diplomatic relations between Italy and Slovenia, which begins as follows:

> "Upon recognition by Italy of full independence, sovereignty and international personality of the Republic of Slovenia, the Italian Republic and the Republic of Slovenia have agreed, as of today, the establishment of diplomatic relations."

(Klabbers and others, *op. cit.*, p. 264)

[108] On 2 May 1992, following an informal meeting of foreign ministers of the European Community, in the framework of European political cooperation, a joint statement on The former Yugoslav Republic of Macedonia was published, in which the EC member States declared themselves to be "willing to recognize that State as a sovereign and independent State, within its existing borders, and under a name that can be accepted by all parties concerned" (Bulletin of the European

(*Continued on next page.*)

ex-Yugoslav republic and Greece did not dissipate when the new State joined the United Nations on 8 April 1993 with the curious name of The former Yugoslav Republic of Macedonia.[109] However, its admission as a member of the United Nations appears to have resulted in its recognition by a substantial part of the international community.[110]

52. Spain, for its part, regarded itself as an unwavering follower of the agreements adopted in the framework of European political cooperation on recognition of the new States that had hived off from the former Yugoslavia.[111] Spain's position was closer to France's advocacy of conditions for recognition than to Germany's urging for immediate recognition, unilateral recognition if need be, even at the cost of breaking ranks with the rest of the EC on the issue.[112] Spain's formal recognition of Croatia and Slovenia followed the adoption of a Community position: diplomatic relations were established with the latter in March 1992. Bosnia and Herzegovina, for its part, was recognized by EC members shortly after Croatia and Slovenia, by a decision published on 7 April 1992.[113] This was the position adopted by Belgium, among others.[114]

53. The declaration issued on 27 April 1992 by the Assembly of the Socialist Federal Republic of Yugoslavia was an attempt to realize an ambitious plan for the "transformation" of the former Yugoslavia into a new State comprising two republics (Serbia and Montenegro); needless to say, the international community did not accept a single continuator State of the former Yugoslavia,[115] whatever interpretations may have been devised subsequently, after the conflict was over. It thus appears that there are a number of unilateral acts which must be taken into account here: the unilateral declaration by Yugoslavia, followed by various protests indicating a refusal to accept that position. As the Badinter Commission pointed out, the Federal Republic of Yugoslavia was a new State, and as such must apply for admission to membership of the corresponding international organizations.[116] Mutual recognition between two ex-Yugoslav republics, Bosnia and Herzegovina and the Federal Republic of Yugoslavia, was achieved with the Dayton peace agreement, in the following terms: "The Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina recognize each other as sovereign independent States within their international borders. Further aspects of their mutual recognition will be subject to subsequent discussions."[117]

54. Paragraph IV of the joint declaration signed in Paris on 3 October 1996 stated that the purposes of the

(*Footnote 108 continued.*)

Communities, vol. 25, No. 5 (1992), p. 103). However, the European Council, meeting in Lisbon on 26–27 June 1992, decided that the Republic would be recognized under a name which did not include the term Macedonia (ibid., No. 6, p. 22), although in the event this proved not to be the case.

[109] See RGDIP, vol. XCVII (1993), p. 1010, and vol. IC (1995), p. 679. On 13 September 1995 a provisional agreement on their mutual relations was signed in New York. Under that agreement, Greece lifted its embargo, the sovereignty, territorial integrity and political independence of both States was acknowledged, and the existing border between them was confirmed, as was its inviolability. The agreement was ratified on 15 October in the city of Skopje (*Keesing's Record of World Events*, vol. 41 (1995), pp. 40737–40783). For further discussion, see Pazartzis, "La reconnaissance d''une république yougoslave': la question de l'ancienne République yougoslave de Macédoine (ARYM)".

[110] Arcos Vargas, "El reconocimiento de Estados: Nuevos aspectos de la institución tras las declaraciones de los doce respecto a las antiguas repúblicas yugoslavas", p. 118. In the case of the United Kingdom, the Government spokeswoman said in the course of a debate on Macedonia in the House of Lords:

> "We shall continue to act as honest broker in order to obtain recognition of that State under any name except Macedonia ... Bulgaria, Croatia, the Philippines, Russia and Turkey have already recognized the former Yugoslav republic of Macedonia. Until the name is settled, our policy remains as I stated earlier."

(Marston, "United Kingdom … 1992", p. 648)

The situation, of course, has remained largely unchanged since that time, as the British Minister of State emphasized in reply to a question as to whether Macedonia had been recognized or not:

> "We have already done so. The United Kingdom's support for an application for United Nations membership means that the United Kingdom recognises the applicant as a state. Macedonia's application was accepted by the General Assembly on 8 April."

(*Ibid.*, "United Kingdom ... 1993", p. 601)

[111] See Rodríguez-Ponga y Salamanca, "La Comisión de Arbitraje de la Comunidad Europea sobre Yugoslavia", pp. 255–256. The recognition of Bosnia and Herzegovina by the EC member States and the United States as from 7 April 1992 prompted recognition by other States (Bulgaria and Turkey had extended recognition earlier, on 15 January 1992 and 6 February 1992 respectively): Croatia on 7 April, Canada and New Zealand on 8 April, Czechoslovakia, Hungary and Poland on 9 April, Egypt on 16 April, Saudi Arabia on 17 April, and Australia on 1 May 1992 (Rich, "Recognition of States: the collapse of Yugoslavia and the Soviet Union", pp. 49–51).

[112] As pointed out by Quel López in "La práctica reciente en materia de reconocimiento de Estados: problemas en presencia", p. 78.

[113] It was on that date that the joint statement on Yugoslavia was published in Brussels, Lisbon and Luxembourg (*Bulletin of the European Communities*, vol. 25, No. 4 (1992), p. 81).

[114] As appears from a note verbale of 10 April 1992 from the Belgian Ministry of Foreign Affairs addressed to the Ministry of International Cooperation of Bosnia and Herzegovina (unpublished text, reproduced in part in Klabbers and others, *op. cit.*, p. 184, which reads as follows: "The Kingdom of Belgium recognizes the Republic of Bosnia and Herzegovina as a successor State of Yugoslavia as regards its international status and within the limits of its territory as at 10 April 1992.").

[115] The Spanish Government's refusal to recognize the Federal Republic of Yugoslavia (Serbia and Montenegro) as the continuator of the former Yugoslavia was expressed in the following terms by the Minister for Foreign Affairs, speaking in the Foreign Affairs Committee of the Spanish Congress:

> "[T]his new Republic has proclaimed itself the successor, the continuator, of the former Yugoslavia. We cannot accept this, any more than the other Republics have done, because the matter is still unresolved, and in any case, in our view, it should be negotiated, and we should be prepared to assent to whatever settlement is reached by all the successor Republics of the former Yugoslavia, assuming they do reach a settlement, *inter alia* in the framework of the peace conference chaired by Lord Carrington. At all events, I wish to make it quite clear that we have not accepted the new Yugoslavia's claim to be automatically the continuator, the successor of the old Yugoslavia"

(*Boletín Oficial de las Cortes Generales*, Committees, Fourth Legislature, Foreign Affairs, No. 499 (1992), p. 14661. See also REDI, vol. XLIV, No. 2 (1992), p. 558)

A virtually identical view was expressed on 14 May 1992 by the representative of Belgium at the 620th plenary meeting of the Conference on Disarmament in Geneva. Referring to Yugoslavia's failure to win recognition as the continuator State, he said:

> "As a matter of fact, Australia, Belgium, France, Germany, Italy, the Netherlands, the United Kingdom and the United States have not accepted the automatic continuity of the Federal Republic of Yugoslavia in international organizations and conferences, including the Conference on Disarmament.
>
> At this stage they reserve their position on this question and consider that the participation in the Conference on Disarmament of the delegation in question is without prejudice to future decisions which might be taken on this and related issues."

(CD/PV.620. See also Marston, "United Kingdom … 1992", pp. 655–656)

[116] See Rich, *loc. cit.*, p. 54, and Hille, "Mutual recognition of Croatia and Serbia (+Montenegro)", p. 610.

[117] General Framework Agreement for Peace in Bosnia and Herzegovina, art. X.

declaration were the mutual recognition of both States, acceptance by Bosnia and Herzegovina of the continuity of the Federal Republic of Yugoslavia and reaffirmation of the territorial integrity of that State, in accordance with the principles approved at Dayton.[118] On 23 August 1996 an agreement on the establishment of normal relations was signed between Croatia and the Federal Republic; article 5 of that agreement, by which both States agreed to recognize each other, is particularly noteworthy.[119]

55. The disparities between EC members in the matter of granting recognition to the former Yugoslav republics and their failure to coordinate with the Badinter Commission doubtless served to sideline the issue. However, in view of the variety of solutions applied, it is particularly striking to find the EC member States adopting a common stance following their joint statement of 9 April 1996 on recognition of the Federal Republic of Yugoslavia.[120]

56. It appears offhand that the change of government which occurred in Yugoslavia in late 2000 has made it easier for the international community to accept that State, albeit not before it had applied for admission to the United Nations, as it had been called upon to do. However, actions have been conducted on other fronts, including an application to ICJ requesting confirmation of the Federal Republic of Yugoslavia (at any rate implicitly, as the Court did not rule on that point as such) as a continuing party to the Convention on the Prevention and Punishment of the Crime of Genocide. As a result, a few months after the Federal Republic had joined the list of States Members of the United Nations (from which, paradoxically, it had never been barred, under the name of Yugoslavia), it petitioned the Court for a review of its ruling of 11 July 1996, ultimately without success.[121] Furthermore, the latest change undergone by that State, when it became the Union of Serbia and Montenegro on 4 February 2003, has had no effect on the institution of recognition in the sense with which the Commission is concerned.

57. In a different geographic setting, the various positions adopted in the matter of the former Soviet Republics are also worthy of note. Here, it is necessary to distinguish between the respective situations of the Baltic Republics, the Russian Federation[122] and the other Republics that emerged from the break-up of the Soviet Union.

58. The joint statement on the Baltic States published by the States members of the European Communities in The Hague and Brussels on 28 August 1991 stated, *inter alia*:

> The [European] Community and its Member States warmly welcome the restoration of the sovereignty and independence of the Baltic States, which they lost in 1940. They have consistently regarded the democratically elected parliaments and governments of these States as the legitimate representatives of the Baltic peoples ...
>
> It is now time, after more than 50 years, that these States resume their rightful place among the nations of Europe.[123]

59. This whole process culminated in the progressive recognition of these countries as independent States by a significant number of members of the international community.[124] In the case of the Baltic Republics in par-

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[118] A/51/461–S/1996/830, annex.

[119] Agreement on Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia (Belgrade, 23 August 1996), A/51/318–S/1996/706, annex. See also ILM, vol. XXXV, No. 5 (September 1996), p. 1221.

[120] See Bühler, "State succession, identity/continuity and membership in the United Nations", pp. 301–302. The statement on recognition of the Federal Republic of Yugoslavia by the member States of the European Union may be consulted in the *Bulletin of the European Union*, No. 4 (1996), p. 58. As the United Kingdom Minister of State noted on 22 April 1999:

> "The UK recognised the Federal Republic of Yugoslavia in line with EU partners on 9 April 1996 following the change in regional circumstances post-Dayton."

(Marston, "United Kingdom … 1999", p. 424)

[121] Application for revision submitted on 24 April 2001 (*I.C.J. Pleadings, Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia v. Bosnia and Herzegovina)* (not yet published). Yugoslavia, in its application, relied on Article 61, paragraph 1, of the Statute of the Court, arguing that it had been clearly shown that before 1 November 2000 (the date on which it was admitted to membership of the United Nations), Yugoslavia was not a continuation of the legal and political personality of the Federal Republic of Yugoslavia, was not a member of the United Nations and was not a party to either the Statute of the Court or the Convention on the Prevention and Punishment of the Crime of Genocide (see www.icj-cij.org).

[122] Evidence of this is to be found in the document issued by Finland on 28 February 1992 (entitled "Government Bill 8/1992 on the acceptance of the Agreement on the Foundation of Relations between Finland and the Russian Federation", reproduced in Klabbers and others, *op. cit.*, p. 190 (FIN/23), which reads as follows:

> "Finland accepted on 30 December 1991 the status of Russia as continuation of former USSR and concurrently recognized ten former Soviet republics as independent states."

In the case of France, on 13 November 1992 the Minister for Foreign Affairs referred to the Russian Federation as the continuator of the USSR in the course of a debate in the French Senate on the ratification of a treaty between France and the Russian Federation in which that expression was used:

> "[T]he treaty acknowledges the fact that Russia is the continuator State of the USSR … Russian diplomacy admirably illustrates the paradox of that country, which, as the 'continuator State of the USSR', refuses to be regarded as a State that has arisen *ex nihilo*, but at the same time constitutes a young State whose identity, having been dissolved in the Soviet crucible for seventy years, must be defined."

(*Ibid.*, pp. 201–202)

[123] *Bulletin of the European Communities*, vol. 24, Nos. 7/8 (1991), p. 115. The statement on the Baltic States has some unusual features owing to the distinctive nature of those countries. For example, the term "recognition" does not occur in it, and that politico-legal act is not the subject of the statement; rather, the statement is an expression of unanimous agreement on the establishment of diplomatic relations, as a direct consequence of the previous recognition and not of recognition as such, as Quel López notes in "La actitud de España …", p. 705.

[124] Many political factors entered into the recognition of the Baltic States. Iceland was the first country to recognize the independence of Lithuania, on 22 March 1990, and of Estonia and Latvia on 22 August 1991; Denmark did the same on 24 August, and Norway followed suit one day later. Most of the States members of the European Community recognized the Baltic States on 27 August; then came Bulgaria, Czechoslovakia, Hungary and Romania on 1 September. The United States followed on 2 September, the Council of State of the USSR adopted the same decision on 6 September, and on 7 September it was the turn of Afghanistan, the Democratic People's Republic of Korea, Japan, Pakistan and Viet Nam, among other countries (Rousseau, *loc. cit.* (1992), pp. 125–126). Belgium's position is particularly noteworthy: a joint statement signed by the Belgian and Latvian Ministers for Foreign Affairs on 5 September 1991 announced the re-establishment of diplomatic relations between Belgium and Latvia. Some particularly relevant passages of that statement read as follows:

"Belgium recognized de jure the Republic of Latvia on January 26, 1921 ... On August 27, 1991 Belgium decided with its European partners to meet the demands of the three Baltic States to reestablish diplomatic relations ... Today, we reestablish the diplomatic relations by the exchange of verbal notes."

(Klabbers and others, *op. cit.*, p. 176)

ticular, it is important to emphasize the position adopted by States that had never recognized their annexation by the Soviet Union.[125] The position adopted by Spain is worth some attention, since its recognition was in a sense dependent on recognition by the Soviet Union.[126] Following the statement of 28 August 1991, in the framework of the European Community, Spain encountered an obstacle in the form of the exchange of notes of March 1977 between itself and the USSR on the establishment of diplomatic relations: the notes in question referred expressly to recognition and respect for the territorial integrity of the Soviet Union, not excluding—and thereby implicitly including—the Baltic Republics. Consequently, Spain was automatically barred from taking a position on the recognition of those Republics until the USSR had done so.[127] The solution that was adopted was *de jure* recognition of the new Republics through official communications addressed to their respective Ministers for Foreign Affairs, worded as follows:

> Having regard to the Declaration that we, the Ministers for Foreign Affairs of the EEC, have just published, I am writing to offer you my congratulations and to inform you that the Spanish Government is prepared immediately to initiate procedures leading to the re-establishment of diplomatic relations between our two countries.[128]

60. International reactions were not slow in coming. A few days later, the European Council (Maastricht, 9–10 December 1991) issued a declaration on developments in the Soviet Union. After mentioning various aspects such as the inviolability of borders and the importance of resolving all issues by peaceful means, the declaration stated:

> The Community and its Member States attach particular importance to necessary measures being taken without delay at the level of the republics concerned to put into effect the agreements in the field of arms control, nuclear non-proliferation and the effective control and security of nuclear weapons.[129]

Six days after that, the Council published its Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union,[130] which laid down the minimal bases (protection of human rights and respect for the fundamental international instruments dealing with the matter) for obtaining recognition by the European Community's member States.

61. On 31 December 1991, the 12 member States of the European Community issued a statement that simultaneously closed one door (the existence of the Soviet Union) and opened another (the possibility of recognizing the Republics that were breaking off from it). The statement began:

> The Community and its Member States welcome the assurances received from Armenia, Azerbaijan, Belarus, Kazakhstan, Moldova,

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[125] The position of the United Kingdom was emphasized by the Prime Minister, who stated on 1 May 1990 in reply to an oral question:

> "I have indicated before in the House that this country never recognized the legality of the annexation of Lithuania, Latvia and Estonia into the Soviet Union. Thus, we have never had any representation in those states and we do not recognize the legality of their annexation now. The Helsinki accord recognized the boundaries in fact but not in law."

(Marston, "United Kingdom … 1990", p. 497)

On 16 October 1990, the Federal Republic of Germany declared:

> "The Federal Government has never recognized the annexation of the Baltic States. Therefore, when diplomatic relations were established with the USSR on 13 September 1955, it has formulated a reservation concerning the recognition of the territorial possessions of both parties and has taken into account this reservation ever since."

(Klabbers and others, *op. cit.*, p. 211)

As a consequence of this non-recognition of the annexation of those countries, on 23 September 1991 the Amtsgericht Berlin Tiergarten handed down a decision settling the question of the ownership of a building that had been the Embassy of Estonia before its annexation by the Soviet Union. The ruling read in part:

> "After the end of World War II, the embassy of Estonia has been put under legal guardianship. After the independence of Estonia, its membership in the United Nations and its recognition by the Federal Republic of Germany this guardianship had to be lifted and property be restituted to Estonia."

(*Ibid*., p. 225)

Italy had not recognized the Soviet annexation either, and that fact was emphasized in the joint declaration by which diplomatic relations between Italy and Latvia were re-established on 30 August 1991 (*ibid*., pp. 259–260). Norway took a very similar attitude: a protocol of 20 April 1994 on the agreements governing bilateral relations between Lithuania and Norway stated, *inter alia*:

> "*Predicating* the non-recognition of the illegal incorporation of Lithuania into the former Soviet Union ... *Recognizing* the continued validity of bilateral treaties entered into between Norway and Lithuania in the period between 1920 and 1940. "

(*Ibid*., p. 299)

Turkey's stand was blunter still: the Ministry for Foreign Affairs issued a statement on 3 September 1991 announcing that:

> "Turkey, welcoming the Statement of Lithuania, Letonia and Estonia regarding the re-establishment of status of independence, has decided to re-establish diplomatic relations with the above mentioned Republics."

(*Ibid*., p. 353)

A joint declaration was issued on 22 October 1991 announcing the formal establishment of diplomatic relations between Latvia and Turkey (*ibid*., p. 355).

[126] The situation was similar in the case of Sweden: the Swedish Government recognized the three Baltic Republics on 27 August 1991, after the Russian Federation had done so (Klabbers and others, *loc. cit.*, pp. 303–304). Similarly, on 16 January 1992 Sweden publicly announced its recognition of Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Tajikistan, Turkmenistan and Uzbekistan (*ibid*., p. 306). Sweden's position on recognition was emphasized in a reply from the Ministry for Foreign Affairs to the Swedish Parliament stating:

> "There is no obligation to recognize new states in international law and, in some cases, Sweden has for political reasons postponed recognition. In general, however, Sweden has avoided adding political conditions or prerequisites to the three legal criteria."

(*Ibid*., p. 309)

The French Minister for Foreign Affairs, for his part, announced in Paris on 16 January 1992 that the Community and its member States had received confirmation from the Kyrgyz Republic and the Republic of Tajikistan of their intention to respect the "Guidelines on the recognition of the new States in Eastern Europe and the Soviet Union" defined by the Community on 16 December 1991. Like its European Community partners, France recognized those two Republics, after having recognized eight other new States from the former USSR (*La politique étrangère de la France: textes et documents 1992* (Paris, Documentation française, Ministry for Foreign Affairs), p. 57).

[127] In this connection, see the remarks made by the Minister for Foreign Affairs of Spain before the Foreign Affairs Committee of the Congress of Deputies. The Minister outlined Spain's position on recognition of the Baltic Republics, and in particular the re-establishment of diplomatic relations with them, taking into account Spain's peculiar position resulting from its having established relations with the USSR in March 1977 (*Spanish Yearbook of International Law*, vol. I (1991), pp. 48-49). See also *Diario de Sesiones del Congreso de los Diputados* (1991), Fourth Legislature, No. 294, pp. 8418–8419 and 8439.

[128] Communications 2178, 2179 and 2180, addressed to the Ministers of Lithuania, Latvia and Estonia, quoted in Quel López, "La actitud de España …", p. 705.

[129] *Bulletin of the European Communities*, vol. 24, No. 12 (1991), p. 11.

[130] *Ibid*., p. 119. On 8 January 1992, a statement on Georgia was issued in the framework of European political cooperation (*ibid*., vol. 25, Nos. 1/2 (1992), p. 107).

Turkmenistan, Ukraine and Uzbekistan that they are prepared to fulfil the requirements contained in the "Guidelines on the recognition of new States in Eastern Europe and the Soviet Union". Consequently, they are ready to proceed with the recognition of these republics.

They reiterate their readiness also to recognize Kyrgyzstan and Tadjikistan once similar assurances will have been received.[131]

Shortly thereafter, Belgium recognized Tajikistan,[132] while Turkey had recognized Kazakhstan even before the publication of the EC guidelines.[133]

62. Considering the development of this process and its repercussions on the international community, it may be said that radical change has occurred with respect to two matters: agreement as the determinative procedure for the changes occurring in the Soviet Union, and the technique of conditional recognition.[134] This idea is corroborated in the above-mentioned study by Ribbelink, which emphasizes these two new aspects of recognition that have emerged recently: "What is new, at least in comparison with the post Second World War practice in Europe, is first of all the revival of collective decision-making, and second, the rehabilitation of the constitutive approach. And in both the European Community plays a vital role."[135]

63. As an example of the rehabilitation of this long-neglected practice, which was in vogue in the era when the "Concert of Europe" was a reality, let us consider the reply submitted by the Netherlands to the questionnaire from the Commission.[136] It emphasized the idea of collective decision-making, in the light of actual facts: recognition was extended to the former Yugoslav and Soviet Republics individually by each European Community State as it deemed that action timely, with the result that the intended concerted action was not taken into account by all member States on a footing of equality. The Netherlands itself recognized Croatia and Slovenia in 1991, while in 1992 it recognized those republics of the Community of Independent States that met the conditions laid down in the European Community framework.

64. More recently, of course, other States have made their appearance on the international scene, in addition to the instances discussed above, but there can be no doubt that in other cases agreement between the parties involved has given rise to fewer problems as far as recognition is concerned, as for example German unification[137] or the break-up of Czechoslovakia.[138]

65. Traditionally, a State's membership of a particular international organization has not implied recognition of all other member States.[139] However, that tradition seems to stand in fairly stark contrast to a more recent approach as observed in a number of cases. The Spanish Minister for Foreign Affairs, for example, replying to a deputy who had asked about the recognition of the former Yugoslav Republic of Macedonia, said: "We recognized the former Yugoslav Republic of Macedonia; on 8 April 1993, when the Security Council … voted in favour of the admission … of that new State as a full member of the United Nations."[140]

66. According to the predominant internationalist doctrine, and in accordance with Spain's contemporary diplomatic practice, that vote should be regarded, to all intents and purposes, as an act of recognition, no subsequent declaration to support or reinforce that decision being necessary. Clearly, then, Spain's recognition of the new Republic was not reserved in any sense; rather, the latter's

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[131] *Ibid.*, vol. 24, No. 12 (1991), p. 123. See also Dehousse, "The international practice of the European Communities—current survey: European political cooperation in 1991" , p. 143.

[132] Unpublished note verbale dated 20 January 1992 from the Embassy of Belgium in Moscow to the Ministry for Foreign Affairs of Tajikistan, which stated, in part, that Belgium, in view of the agreements of the Minsk Conference of 8 December 1991 and the Alma-Ata Conference of 21 December 1991, recognized Tajikistan as a successor State of the USSR in respect of its international status and within the limits of its territory (Klabbers and others, *loc. cit.*, p. 185).

[133] As appears from a letter sent by the Turkish Prime Minister to the President of Kazakhstan on 24 December 1991, making Turkey the first State to extend recognition to Kazakhstan:

"I have the honour to inform you that the Turkish Government has decided to recognize the decision of 16 December 1991 of the Supreme Soviet of Kazakhstan Republic concerning the independence of Kazakhstan at the same date.

On this occasion, I would like to convey to you that we have the honour of being the first state who recognizes the independence of Kazakhstan."

(Klabbers and others, *op. cit.*, p. 357)

The Council of Ministers of Turkey had decided on 16 December 1991 to establish consulates-general in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan (*ibid*., p. 359).

[134] Rich, *loc. cit*., and Türk, "Recognition of States: a comment", pp. 66–71.

[135] *Loc. cit*., p. 76. The author goes on to state (p. 78) that the constitutive element—towards which practice has been converging in recent years—is illustrated by the fact that the above-mentioned criteria were additional. In brief, the statehood of the entities in question is not in doubt, but it had been decided that those new States, in order to be recognized, were required to accept norms and standards that the (European) community of States regarded as vital. Nonetheless, making recognition dependent on a series of criteria—which, moreover, might not be the same in every case—might open the door to arbitrariness and lack of clarity.

[136] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/511, p. 267.

[137] In a case before the High Court of Justice of the United Kingdom, the Government's legal counsellor, with the authorization of the Secretary of State for Foreign and Commonwealth Affairs, submitted an affidavit dated 24 February 1995 stating that "the United Kingdom recognises the Federal Republic of Germany that exists today as the continuation of the Federal Republic of Germany that existed prior to 3 October 1990 and that the Federal Republic of Germany remains the same international person as it was before 3 October 1990" (Marston, "United Kingdom … 1997", p. 522).

[138] For example, on 11 November 1993, a Protocol on the agreements governing bilateral Norwegian-Czech relations was signed by the Czech Republic and Norway. It stated that:

"The Government of the Kingdom of Norway and the Government of the Czech Republic,

Predicating that the Czech Republic is successor to the Czech and Slovak Federal Republic ..."

(Klabbers and others, *op. cit.*, p. 295)

[139] As an illustrative example, let us consider a note dated 25 April 1934 from the French Legal Service, in which the Ministry for Foreign Affairs of France set forth its position in the following terms:

"The admission of the USSR as a member of the League of Nations can only facilitate relations between the Soviet Government and the Governments of all States Members of the League and the resumption of diplomatic relations in cases where such relations are still suspended. But the fact that two States are members of the League of Nations does not necessarily imply that diplomatic relations between them should be established; that is a question of timeliness and circumstances."

(Kiss, *op. cit.*, vol. III, p. 157)

[140] *Diario de Sesiones del Congreso de los Diputados* (1994), Fifth Legislature, No. 110, p. 3507.

admission to full membership of the United Nations was taken as the mark of that recognition.[141] The situation is somewhat unclear, although it appears that increasingly States are inclined to adopt the position expressed by Spain in the case under discussion.[142]

67. It is of interest to note at this point that in the course of the study of State practice in recent years, a number of procedures have been found that do not fit any of the standard models. One of these is what has sometimes been called, in Spanish practice, "cross-recognition". The Secretary General for Foreign Policy of Spain's Ministry for Foreign Affairs, speaking in explanation of the Spanish Government's policy *vis-à-vis* the Democratic People's Republic of Korea, said that Spain's recognition of that State was conditional on the granting of what he referred to as "cross-recognition":

> [W]hen the Western countries, beginning with Washington and Tokyo, recognized North Korea, the Eastern countries, beginning with Moscow and Beijing, recognized South Korea at the same time. It is the Government's position that all options should be left open, but we believe that an isolated recognition at this time does not fit into the context of balance which we consider it is important to maintain.[143]

As the compilers of REDI have noted, this so-called "cross-recognition" appears to be acquiring a curious kind of "naturalization paper" in Spain's international practice, without having made any noteworthy impact in the field of legal theory, which knows nothing of this singular concept.[144] In point of fact, "cross-recognition" might usefully be regarded as a somewhat more complex form of conditional recognition.

68. As regards recognition of governments, the concept of effectiveness is a criterion that weighs heavily in the balance, as has been seen. Accordingly, this form of recognition tends to be qualified as it applies to ambiguous or transitory situations in which a government cannot be said to be fully functional;[145] there are, for example, a number of European States that prefer to withhold recognition where there are two rival governments at the same time. Rather than choose between recognizing one government or the other, they prefer to wait until the situation has become stable.[146] For some time now, moreover, there have been States that have made a well-established tradition of not recognizing governments as such, but States exclusively, in the light of the specific conditions which they will use to determine, on a case-by-case basis, what policy they wish to follow in relation to the entity in question.[147]

69. Spanish practice in this area appears to be clear, as the Minister for Foreign Affairs noted in the course of remarks delivered in Congress:

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[141] See *Actividades, Textos y Documentos de la Política Exterior Española* (1994), p. 676. A similar example is furnished by Sweden, which on 22 May 1992 announced that it had voted in favour of a General Assembly resolution whereby Bosnia and Herzegovina, Croatia and Slovenia became members of the Organization. The announcement went on to state expressly:

> "In accordance with Swedish practice this means that Sweden has also recognized the Republic of Bosnia-Herzegovina. Croatia and Slovenia have already been recognized by Sweden."

(Klabbers and others, *op. cit.*, p. 313)

[142] The idea that a vote in favour is tantamount to recognition has recently been put forward by Sweden as well as by the United Kingdom; but Belgium and Finland have advocated a more nuanced position, namely that a vote in favour should be viewed as *de facto* recognition, to be followed in due course by formal recognition.

[143] *Diario de Sesiones del Congreso de los Diputados* (1988), Third Legislature, No. 282, p. 9725; see also REDI, vol. XLI, No. 1 (1989), pp. 190–191. The Democratic People's Republic of Korea was recognized by Germany and the United Kingdom on 19 October 2000 (Poulain, *loc. cit*., p. 858).

[144] The Spanish Minister for Foreign Affairs used the term in speaking of Greece's recognition of the Palestinian State:

> "[T]he Government of Greece may indeed decide to recognize the Palestinian State, and there may indeed be cross-recognition. The only information at our disposal is the message that we received yesterday from the Greek Minister for Foreign Affairs, who is here today, to the effect that a decision had not yet been taken, but that a decision to that effect, in favour of cross-recognition, would probably be taken."

(*Diario de Sesiones del Senado*, Foreign Affairs Committee (1988), Third Legislature, No. 136, p. 7; see also REDI, vol. XLI, No. 1 (1989), p. 191).

[145] However, in cases where a change of government is the result of a coup d'état, the response to the situation is frequently one of rejection; for example, this can be inferred from the position of the Spanish Government towards the situation of political instability in Paraguay:

> "The events in which General Lino Oviedo played a leading role in Asunción during the period 22–25 April of this year constituted an attempt to subvert the constitutional order and institutional normality, and soon reached the point of being a political and military crisis.
>
> "... [T]he Spanish Government immediately, clearly and unequivocally condemned that attempt in a press release issued by the Office of Diplomatic Information on 23 April, indicating that Spain was determined to support democracy, reaffirming the supremacy of civil authority, and also strongly condemning any attempt to alter the institutional democratic order."

(*Boletín Oficial de las Cortes Generales*, Senate, series I, No. 51 (18 September 1996), p. 59; see also REDI, vol. XLIX, No. 2 (1997), p. 92)

[146] To take only one example, this is the line that the Netherlands regularly adopts:

> "For that reason the Netherlands is very rarely among the first countries to recognize a new government."

(Panhuys and others, *op. cit.*, p. 382)

[147] A useful illustration in this connection is a document issued on 9 November 1998 by the Canadian Legal Bureau, indicating the adoption of a different policy from the one that had been previously applied in the matter of recognition; in essence, governments that had come to power by unconstitutional means would not be recognized (*Canadian Yearbook of International Law*, vol. XXVII (1989), pp. 387–388; see also the same publication, vol. XXVI (1988), pp. 324–326). Similarly, in the European context there are many States that are tending to recognize other States rather than governments as such, as has been emphasized by Germany, the Netherlands, Switzerland and the United Kingdom. In the case of the Netherlands, on 4 July 1990, the Dutch Minister for Foreign Affairs sent a letter to Parliament stating:

> "I should like to inform you hereby of the practice that will be followed in future by the Dutch Government with regard to the recognition of governments.
>
> "The Dutch view is that there is no duty to recognise a new government and no right to recognition of a new government …
>
> "[I]t is desirable to follow the policy of all the other EPC [European Political Cooperation] partners, the Dutch Government has come to the conclusion that it will no longer recognise governments.
>
> "…
>
> "The answer to questions whether the Dutch Government regards an entity as a foreign government will have to be inferred from the nature of the relations which it has with that entity. Discussion of such issues will not disappear as a result of a change of this kind in Dutch policy, but will instead concentrate on the nature of the relations."

(Siekmann, "Netherlands State practice for the parliamentary year 1989–1990", pp. 237–238)

In a different geographic setting, on 19 January 1988 the Australian Minister for Foreign Affairs and Trade announced that his Government had decided to abandon the practice of recognizing governments (Bergin, "The new Australian policy on recognition of States only", p. 150).

Spain recognizes States and not governments. We maintain diplomatic relations with States, as do all of the nations of the world ... This certainly does not mean that we agree with the current state of affairs there or with Mr. Fujimori's coup.

…

Democratic Spanish governments have coexisted with Mr. Pinochet or Mr. Videla based on the Estrada doctrine ... without ever supporting any of these regimes.[148]

70. In Latin America, there have been a number of clear-cut examples of a military regime winning acceptance after it has seized power.[149] The Estrada doctrine has been applied in some recent cases, as, for example, Mexico's response to the events that occurred in Venezuela in 2002.[150] More recently still, the abandonment of the Presidency in Bolivia and the subsequent change were met with a variety of responses, especially within Latin America.[151]

71. However, States have not always proceeded in the same way as regards the recognition of governments. The United Kingdom affords an instructive example: the year 1980 marked a major turning point,[152] with a discernible trend in the direction of not recognizing governments after that date.[153] On occasion, it has also been the case that no act recognizing the new government has been performed, but other governments have stated their objections to the way that government has come to power.[154]

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[148] *Spanish Yearbook of International Law*, vol. II (1992), p. 152.

[149] The Videla Government in Argentina was the first in the region to recognize the dictatorship of García Meza, who came to power in Bolivia in July 1980 (daily newspaper *Clarín* (Buenos Aires), 6 August 1980, pp. 2–3).

[150] The following statement was issued on 12 April 2002:

"Mexico—without abdicating any of its humanitarian responsibilities or its solidarity with the people of Venezuela, strictly in accordance with the Estrada doctrine in its precise and only sense—will refrain from either recognizing or not recognizing the new Government of Venezuela, and will restrict itself to maintaining diplomatic relations with that Government. In addition, the Government of Mexico will ask OAS to apply the procedures laid down in the Inter-American Democratic Charter in response to the breakdown of the democratic order in Venezuela, in accordance with the relevant provisions of that document."

(*Revista Mexicana de Política Exterior*, Nos. 67–68 (July 2002–February 2003), pp. 191–192)

[151] See, for example, the position adopted by Mexico, which was that in view of the political and social events in Bolivia, which had led to the resignation of President Gonzalo Sánchez de Lozada, the Government of Mexico appealed for respect for the constitutional order and the rule of law as an indispensable condition for peace, governability and development. Mexico affirmed that it would collaborate fully with the Government of President Carlos Diego Mesa, with a view to strengthening the democratic process and furthering Bolivia's economic and social development.

Chile also made its position clear in an official statement issued by the Chancellery on 18 October 2003. After referring to the obligations that applied in the Latin-American context, the statement went on to say that Chile "[a]ssures the new Government that it is fully prepared to maintain constructive dialogue with a view to the mutual benefit of our respective peoples and the progress of development and regional integration" (OAS Permanent Council, OEA/Ser.G, CP/ACTA 1387/03 of 22 October 2003). Nor were statements along these lines confined to the Latin-American geographic context, as may be seen from a statement issued by the Presidency of Spain on 28 October 2003, which echoes a statement issued by the European Union:

"The European Union welcomes the appointment of Mr Carlos Diego de Mesa Gisbert as constitutional President of Bolivia.

"Presenting its congratulations to President Mesa ...

"Recalling the European Council conclusions of 17 October last on the dramatic events that led to the loss of human lives in Bolivia, the EU will continue to provide help and assistance to Bolivia, for strengthening democratic institutions, the rule of law and respect for human rights, and in order to promote a more effective climate of social progress and economic development."

(Bulletin of the European Union, No. 10 (2003), p. 93)

In addition, on 14 October 2003 Argentina issued a statement to the effect that it was prepared to provide Bolivia with assistance to enable it to emerge from its crisis.

[152] The point of view adopted by the United Kingdom until the 1980s arose from the case of *R.* v. *the Government of Spain and Others ex parte Augusto Pinochet Ugarte,* in which the two questions set forth below had to be answered. The text quoted here is taken from a letter dated 21 January 1999 that was sent to the Crown Prosecution Service by the Head of the Protocol Department at the Foreign and Commonwealth Office:

"1) Did Her Majesty's Government recognise the Respondent, Augusto Pinochet Ugarte, as Head of State of the Republic of Chile?

"2) If so, from what time was he so recognised?

"2. At the time, Her Majesty's Government still adhered to the policy (abandoned in 1980, see Hansard HC Vol. 983 col. 277) of according recognition to new Governments which came to power unconstitutionally, provided that they met certain conditions, in particular that the new regime had effective control over most of the State's territory, and that it was, in fact, firmly established. Recognition was not understood to be a judgement on the constitutional or other legitimacy of the governing authorities in question. Its effect was to signal Her Majesty's Government's willingness to deal with the authorities in question as the government of the State concerned. There was no practice of according separate or express recognition to Heads of State.

"…

"4. The coup which brought to power the military junta took place on 11 September 1973. The new Government was recognised by Her Majesty's Government on 22 September the same year, through the medium of a Diplomatic Note from the British Embassy responding to a Note from the Ministry of Foreign Affairs the day after the coup".

(Marston, "United Kingdom … 2000", p. 584)

[153] In a written answer delivered in the House of Lords on 28 April 1980, the Secretary of State for Foreign and Commonwealth Affairs stated:

"[W]e have decided that we shall no longer accord recognition to Governments. The British Government recognise States in accordance with common international doctrine.

"Where an unconstitutional change of régime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new régime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and announce a decision formally 'recognising' the new Government.

"This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there might be legitimate public concern about the violation of human rights by the new régime, or the manner in which it achieved power, it has not sufficed to say that an announcement of 'recognition' is simply a neutral formality.

"We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with régimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so."

(Marston, "United Kingdom … 1980", p. 367)

[154] For example, following the coup d'état in Liberia on 11 April 1980, the question of the new Government's relations with third States arose. The new Head of State was not invited to attend the Fifth ECOWAS Conference in Lomé on 27 April 1980; in protest against his exclusion, Liberia broke off diplomatic relations with Côte d'Ivoire, Nigeria and Senegal. Other States did not expressly recognize the new regime, but maintained their diplomatic representation in Monrovia (Rousseau, *loc. cit.* (1980), p. 1145). In 1992 there was a similar case

(*Continued on next page.*)

Moreover, a distinction is frequently drawn between the continuation of some forms of relations and recognition of the traumatic change of government, with the former not necessarily implying the latter.[155] Practice unquestionably affords growing numbers of examples of non-recognition of governments, at any rate explicitly. There were many such cases in the 1970s and 1980s, including Iran[156] and Nicaragua,[157] among others.

72. Another recent example of express non-recognition was the statement by the Minister for Foreign Affairs of Venezuela explicitly refusing to recognize the new Government of Haiti which had been in power since the departure from office of former President Jean-Bertrand Aristide.[158]

73. Recent practice also affords a number of instances of formal, explicit acts of non-recognition formulated by international organizations. One example is the decision adopted by CARICOM in 2004, expressly condemning the new Government in Haiti, after the departure of former President Aristide.[159]

74. International practice offers various examples involving neither recognition of States nor recognition of governments properly so called, inasmuch as the entities involved have not yet achieved what might be termed "full statehood",[160] or recognition of entities whose state-

(*Footnote 154 continued.*)

involving Venezuela: in response to an attempted coup d'état in that country, the Office of Diplomatic Information, an arm of Spain's Ministry for Foreign Affairs, issued the following statement on 4 February:

"The Spanish Government emphatically condemns the attempted coup d'etat that took place in the last few hours in Venezuela against a democratically elected government that represents the public will.

"The Spanish Government reiterates its unconditional endorsement of the constitutional Government of Venezuela, grants complete support for the measures adopted by the president of the Republic, Carlos Andrés Pérez, to quash the attempted coup."

(*Spanish Yearbook of International Law*, vol. II (1992), pp. 144–145)

[155] In response to a question asked in the Senate on the measures that would be taken to revise diplomatic relations and general cooperation with Peru if democracy was not be re-established there, the Spanish Government stated:

"As has been stated on many occasions, Spain maintains normal diplomatic relations with all Latin American countries without this fact implying support for a particular regime in any of them. Therefore, the Spanish Government has no plans to take any measures to revise its diplomatic relations with Peru."

(*Spanish Yearbook of International Law*, vol. II (1992), p. 153)

A number of measures were taken nonetheless: negotiations on treaties of friendship and cooperation were suspended, assistance was frozen, bilateral visits and contacts were suspended, contacts with the Peruvian authorities were reduced, and so on (*ibid.*, p. 224).

[156] It is of interest to recall the situation that arose after the fall of the imperial regime and the establishment of an Islamic Republic in Iran, with the resulting problems relating to the change of government and recognition of that government (Rousseau, *loc. cit.* (1979), pp. 807–810). In principle, all States maintained diplomatic relations with Iran. Some indicated their acceptance of the new regime by expressly recognizing it, once the Bazargan Government had been established on 5 February 1979. This course was adopted by the Soviet Union on 12 February, by Algeria, Belgium, India, Iraq, Jordan, Kuwait, the Libyan Arab Jamahiriya, Saudi Arabia, Tunisia, the United Kingdom and Yemen on 13 February, and by China on 14 February 1979. Except for Belgium and the United Kingdom, other Western States, as well as Czechoslovakia and Poland, simply maintained their diplomatic relations with the new Iranian regime, a procedure which was tantamount to tacit recognition. At a press conference on 13 February 1979, President Carter stated:

"We hope that the differences that have divided the Iranian people for so many months will soon come to an end. During this entire period, we have been in contact with those in control of the government of Iran, and we are prepared to work with them."

(*International Herald Tribune*, 14 February 1979, and *Le Monde*, 15 February 1979)

France implicitly recognized the new regime. On 13 February 1979, the Ministry for Foreign Affairs issued the following statement:

"The French Government has closely followed the development of the political crisis in Iran. As the President of the Republic stated on 17 January, the French Government will make no judgement in this matter, nor will it intervene in events which are and must continue to be the responsibility of the Iranians.

"The practice of the French Government … in any case, is to recognize States and not Governments. France is prepared to continue its cooperation with Iran in the interests of both countries. Its ambassador in Tehran has contacted Mr. Bazargan. The French Government sincerely hopes that the process of normalization will lead to the re-establishment of civil peace and security in Iran."

(Rousseau, *loc. cit*. (1979), p. 808)

[157] As a result of the resignation of General Somoza in Nicaragua on 17 July 1979 and the seizure of power by the insurgents, problems relating to recognition arose. After the ephemeral designation of an interim President, who remained in office for 24 hours, power was vested in a five-member junta and an 18-member ministerial cabinet. Many States quickly recognized the new Government, including Panama on 18 June, Grenada on 22 June, Guyana on 5 July, Costa Rica on 18 July, Bolivia, Colombia, Ecuador, Peru and Venezuela on 19 July, the Soviet Union, the Eastern States as well as Ethiopia on 20 July, and Brazil, Cuba, Honduras, Denmark and Sweden on 23 July 1979. As regards France, for all its frequently reiterated practice of recognizing States and not governments, there can be no doubt that, as a practical matter, the French Government recognized the revolutionary junta. This may be inferred from a number of facts. Paul Fauré was sent to Managua as the French Ambassador on 23 October 1979. Earlier, the prospective recognition had been made clear by a number of actions: (*a*) the Second Secretary of the French Embassy in Mexico City had been sent to Managua to look after routine matters; (*b*) the Deputy Director for Latin America had authorized Eduardo Kuhl, the junta's ambassador-at-large with residence in Bonn, to take possession on 28 July of the Nicaraguan Embassy in Paris, which had been abandoned by its occupants; and (*c*) Alejandro Serrano Aldera had been appointed Ambassador of Nicaragua in Paris a few weeks later, on 18 August. All these events point to the conclusion drawn above. The United States, for its part, did not undertake any formal act of recognition, but it is significant that the Secretary of State, Cyrus Vance, was in Quito on 10 August 1979, where he met with representatives of the new regime, including the Minister for Foreign Affairs, who were attending the ceremonial investiture of the new President of Ecuador. This may be regarded as a case of tacit recognition (see Rousseau, *loc. cit.* (1979), pp. 1056–1057).

[158] See James Painter, "Dimisión bajo la lupa", *BBCMundo.com*, 1 March 2004.

[159] See, for example, the letter dated 11 March 2004 from the Permanent Representative of Jamaica to the United Nations addressed to the Secretary-General (A/58/731–S/2004/191).

[160] This was the case with Greece's recognition of the PLO on 16 December 1981 as having diplomatic status as the sole representative of the Palestinian people. The Head of the Greek socialist Government, Mr. Papandreou, had signalled his Government's intention of taking this step some weeks earlier, on 23 October. The Greek Government had decided to promote the PLO's information office in Athens, which had been opened in February 1981, to the rank of diplomatic representation. The PLO would have the same number of diplomats as Israel (which did not have an embassy, but only a representation), namely 12 persons. At that time, Greece was the only European Community country to grant the PLO such high status (Rousseau, *loc. cit*. (1982), p. 376). Spain's position in the matter was outlined by the Minister for Foreign Affairs in the following terms:

"Spain has made no grandiose demagogic declarations, but it has recognized the fact that the PLO is an interlocutor for us. At this time, within the Palestinian State, it is the PLO that actually exercices what we may term the managerial and political capacity of that Palestinian State.

"How have we done this? Two years ago I sent a letter to the Chief of the PLO Political Department, and a reply to that letter was received. That is, there was an exchange of letters, in the international meaning of the term. In my letter, I stated that the Spanish Government, reaffirming its traditional policy of friendship and solidarity with the Palestinian people—this was two years ago—and being convinced of the key role that the Palestine Liberation Organization must play in the search for a peaceful, just and lasting solution to the Arab-Israeli conflict, had decided, as from that date,

hood is questionable.[161] On other occasions, States have proceeded cautiously by not recognizing problematic entities,[162] or making it clear that they regard the entity in question as an integral part of some particular State. [163] In other cases, non-recognition has been the outcome of the fact that the territory concerned has been annexed, and States have wished to make it clear that they are opposed to the annexation.[164]

75. To take a different issue, recognition of a situation of belligerency constitutes another important class of unilateral act producing legal consequences, and accordingly is worth being attended to here.[165] When, for example, nationals of third countries sustain loss or damage as a result of a conflict, recognition may play a very important role. The jurisprudence has arrived at the position that, where the situation of belligerency is not recognized by the State in which the conflict is taking place: "The sovereign is responsible to alien residents for injuries they receive in his territories from belligerent action, or from insurgents whom he could control or whom the claimant government has not recognized as belligerents".[166] A number of recent cases have been identified involving the situation of belligerency and its resolution.[167]

76. The Special Rapporteur cannot claim to have exhausted the list of situations in which the issue of recognition may arise, as appears from some other examples of recent practice. [168] For example, a State's responsibility for

to formalize the status of that Organization's office in Spain. The PLO's office in Spain is on the diplomatic list, and this, to all intents and purposes, constitutes recognition of the status of the PLO as an interlocutor.

"Consequently, this special formula, recognition of the fundamental organ of the Palestinian State, serves to enable Spain to act in this case, or so I believe, in the forefront of the countries that are following the Palestine problem closely and attentively."

(*Diario de Sesiones del Senado* (1988), Third Legislature, No. 136, p. 7)

The position of the United Kingdom in this connection is noteworthy:

"The British Government support the right of the Palestinian people to establish a sovereign, independent and viable Palestinian state and looks forward to early fulfilment of this right, provided there is a concomitant recognition of Israel's right as a state, and the right of its citizens to live in peace with security."

(Marston, "United Kingdom … 2001", p. 596)

[161] This situation has arisen fairly frequently in connection with the issues of recognition of the statehood of the Saharan Arab Democratic Republic (SADR) and the People's Republic of China or Taiwan Province of China. Recognition of SADR, for example, has frequently triggered protests by Morocco, or even caused that country to break off diplomatic relations, as it did with Yugoslavia on 29 November 1984, on the grounds that such conduct was an unfriendly act (Rousseau, *loc. cit.* (1985), p. 463). Similarly, when Belize, Grenada and Liberia recognized Taiwan Province of China on 13 and 24 October 1989, the People's Republic of China broke off diplomatic relations with them on those same dates (*ibid.* (1990), p. 484). The position of the United Kingdom in the matter is quite clear, as will be seen from the answer that was given to a question asked in Parliament:

"Like most countries, we do not recognise Taiwan as an independent state. We acknowledge the position of the Chinese Government that Taiwan is a province of the People's Republic of China and recognise the Chinese Government as the sole legal government of China. Taiwan and the UK nevertheless enjoy an excellent relationship, particularly in the commercial and cultural spheres. We wish to build on that to our mutual benefit. We believe that the issue of Taiwan should be solved peacefully through dialogue by the Chinese people on the two sides of the Taiwan Strait. We are firmly opposed to the use of military means, and we make that view clear to the Chinese on every appropriate occasion."

(*Marston*, "United Kingdom … 2000", p. 538)

France does not recognize Taiwan Province of China as a State either, and a curious situation resulted when on 24 September 1978, the French Minister for Foreign Affairs confirmed that the entry visas held by a number of Taiwanese gymnasts, coming to compete at the world gymnastics championships being held in Strasbourg, France, from 22 to 29 October 1978, had not been accepted. "France," he said, "has always refused to issue entry visas to any delegation from Taiwan since the latter has withdrawn recognition from Beijing. Entry visas are issued to Taiwanese persons only on an individual basis." A few days later, the International Gymnastics Federation excluded Taiwan Province of China from membership and readmitted the People's Republic of China. (Rousseau, *loc. cit*. (1979), p. 494)

[162] In the course of a debate on the future of the Western Sahara, the British Minister of State, Foreign and Commonwealth Office, said: "We neither support the Moroccan claim to sovereignty over the territory, nor recognise the Polisario's self-proclaimed Saharwi Arab Democratic Republic." (Marston, "United Kingdom … 1998", p. 478)

[163] For example, as was emphasized in the British Parliament when the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

"We recognise Chechnya as an integral part of the Russian Federation. The UK position is shared by our international partners. President Maskhadov was elected in 1997 in a process recognised as democratic by the Organisation for Security and Co-operation in Europe (OSCE)."

(Marston, "United Kingdom … 2000", p. 536)

In the matter of the northern part of Cyprus, the position of the United Kingdom was clearly stated by the Minister of State at a press conference held on 3 October 2000: "We have never recognised the so-called Republic of Northern Cyprus and we have no intention of doing so." (*Ibid.*, p. 539)

[164] On 14 September 1999, the Spanish Minister for Foreign Affairs, Abel Matutes Juan, informed the Spanish Congress: "Spain never recognised the annexation of Timor by Indonesia ... a territory the annexation to Indonesia of which was never recognised either by the UN or by the international community" (*Spanish Yearbook of International Law*, vol. VII (1999–2000), pp. 84–85). Despite this statement, it should be noted that on 20 January 1978, Australia had, in fact, recognized Indonesia's annexation of the eastern part of Timor (Rousseau, *loc. cit.* (1978), p. 1085).

[165] Although it may be true, as Verhoeven asserts, that this form of act has virtually disappeared, in view of the fact that States are usually very reluctant to proceed with recognition where to do so may intensify hostilities ("Relations internationales de droit privé en l'absence de reconnaissance d'un État, d'un gouvernement ou d'une situation", p. 21).

[166] Coussirat-Coustère and Eisemann, *op. cit.*, p. 310, case of *Aroa Mines (Ltd.)*, United Kingdom/Venezuela, settled by the Mixed Claims Commission in 1903 (*ibid*., p. 508).

[167] On 15 August 2002, the Minister for Foreign Affairs of Japan issued a statement on the opening of peace talks between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE):

"The Government of Japan welcomes the fact that the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), through the facilitation of the Government of Norway, have agreed to commence formal talks in order to resolve the ethnic conflict in Sri Lanka.

…

With a view to supporting the peace process, the Government of Japan has given its assistance to the North and East areas mainly in the field of humanitarian assistance of emergent nature. The Government of Japan will continue such assistance. Japan reiterates its readiness that once a durable peace is established, Japan will spare no efforts to extend cooperation toward the reconstruction and rehabilitation of those areas."

(www.mofa.go.jp)

[168] See the statement issued on 22 July 2003 by the Press Secretary/Director-General for Press and Public Relations, Ministry for Foreign Affairs of Japan, on the situation in the Solomon Islands:

"Japan recognizes that the Government of Solomon Islands made an official request to the Australian Government and the Pacific Islands Forum (PIF) member countries for deploying police and armed forces for the stabilization of law and order in the country, and that the Australian Government, responding to this request, decided on 22 July to dispatch police and other personnel together with other PIF member countries. Japan supports the initiative of

(*Continued on next page.*)

some particular form of conduct might be recognized.[169] In such a case, it must be asked whether recognition could be conditional, as some instances appear to suggest.[170]

77. Recognition is not restricted to a government, a State or a particular situation; it may also refer to a legal claim. In practice, this form of recognition has consisted of express acts and conduct implying a particular attitude, and consequently, as far as its effects are concerned, is similar to renunciation, where the required conditions are met.

78. There is such a thing as recognition of a State that is a party to the relationship involved and recognition of other States that are not parties to it and even the international community; this type of recognition may take the form of express acts, or it may be reflected in conduct and attitudes. In addition, the case may be considered of a State that concludes an agreement with another State, over a matter of territory, which deals with an object of which only the sovereign may dispose.[171] In the case of Delagoa (Lourenço Marques) Bay,[172] the United Kingdom granted formal, but implicit, recognition in favour of Portugal by the 1817 Treaty.[173]

79. A clear-cut example of a formal, explicit unilateral act of recognition is the Government of Colombia's recognition of Venezuela's legal and historic title to the Los Monjes archipelago by note on 22 November 1952. This was confirmed by the Minister for Foreign Affairs of Colombia before a session of that country's Senate on 3 August 1971.[174]

B. Acts by which a State waives a right or a legal claim

Waiver

80. Just as a State is free to assume obligations—as noted in the context of promise and recognition—it can also waive certain rights or claims.[175] Of course, it can waive only its subjective, current rights. But, as demonstrated in relation to promise in the events of the *Nuclear Tests* cases,[176] the same is true of waiver; notification must be given, at least to those States which may be affected by this expression of will. As a unilateral legal act (which it is), waiver may be defined as "an expression of will by which a subject of law renounces a subjective right without any intervention of will by a third party".[177] However, although possible, such acts are rare in practice; this has led one author to state that explanations of them are mostly based on deduction from other applicable rules of international law, rather than on the existence of many examples of waiver on the basis of which its specific characteristics could be established.[178]

81. Another interesting issue related to waiver is the distinction in doctrine between waivers involving abdication (through which a right is simply renounced) and those involving transfer (through which the right is transferred to another subject of international law). As Suy notes, a waiver involving abdication is any legal act through which a State merely renounces a right without stipulating that it does so in favour of another subject of law; generally speaking, the waiving State does not concern itself with the future of the rights in question. In the case of waivers involving transfer, however, the process is far more complex; it involves not only the renunciation of a right, but also its transfer to another subject.[179] Thus, the unilateral nature of the act remains somewhat questionable; in reality, the act constitutes an agreement in the strictest sense of the word.[180]

(*Footnote 168 continued.*)

the PIF member countries based on the request made by the Government and the National Parliament of Solomon Islands since the recovery of the law and order of Solomon Islands is important for the peace and stability in the region."

(www.mofa.go.jp)

[169] An example is Chile's conduct in the *Carmelo Soria Espinoza* case. The Chancellery informed the Inter-American Commission on Human Rights (IACHR) that the Chile had reached agreement with the family of Carmelo Soria Espinoza, as a result of which the case brought by that family before IACHR was then resolved. Following negotiations between the parties, an agreement had been reached which put an end to the dispute. The Soria family accepted the symbolic reparation measures offered by Chile, consisting of: a public declaration by the Government of Chile recognizing the responsibility of the State, through the action of its agents, for the death of Mr. Carmelo Soria Espinoza; the declaration included an offer to erect a monument of remembrance to Mr. Carmelo Soria Espinoza in a location designated by his family in Santiago. Chile undertook to pay a lump sum of US$ 1.5 million as compensation to the family of Mr. Carmelo Soria Espinoza, which payment will be made *ex gratia* through the offices of the Secretary-General of the United Nations. The Government of Chile would present before the Chilean courts an application to reopen criminal proceedings that had been initiated to prosecute those who killed Mr. Carmelo Soria Espinoza (*Annual Report of the Inter-American Commission on Human Rights 2003*, report No. 19/03, case 11.725 (Chile) (OEA/Ser.L/V/II.118, Doc. 5 rev. 2)).

[170] The promise made by Saudi Arabia to Israel in 2002—recognition and normalization of relations with Israel—was conditional on effective Israeli withdrawal from the occupied territories. Prince Abdullah bin Abdul Aziz declared that they were offering full normalization of relations, including recognition of the State of Israel, if Israel withdrew completely from all the occupied territories, in accordance with United Nations resolutions, including Jerusalem.

[171] Kohen. *Possession contestée et souveraineté territoriale*, p. 327.

[172] Award on the claims of Great Britain and Portugal to certain territories formerly belonging to the Kings of Tembe and Mapoota, on the eastern coast of Africa, including the islands of Inyack and Elephant (Delagoa Bay or Lorenzo Marques), decision of 24 July 1875, *British and Foreign State Papers, 1874–1875*, vol. LXVI, p. 554.

[173] Additional Convention between Great Britain and Portugal, for the prevention of Slave Trade (London, 28 July 1817), *ibid., 1816–1817*, vol. IV, p. 85. See also Kohen, *op. cit.*, p. 328.

[174] Rojas Cabot and Viña Laborde, *Al otro lado del Golfo, Colombia refuta a Colombia*, pp. 293 *et seq.*

[175] The term "waiver" has been defined, for example, by Jacqué (*Éléments pour une théorie de l'acte juridique en droit international public*., p. 342), as "an act through which a subject of international law voluntarily relinquishes a subjective right".

[176] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *ibid. (New Zealand* v. *France)*, p. 457.

[177] Suy, *op. cit.*, p. 156.

[178] Degan, "Unilateral act as a source of particular international law", p. 221.

[179] *Op. cit.*, p. 155.

[180] One example of this situation is Mauritania's waiver of its claims to Western Sahara on 5 August 1979. An agreement signed by Mauritania and the Frente Polisario states that the "Islamic Republic of Mauritania solemnly declares that it does not have and will not have any territorial or other claims on Western Sahara" (*Official Records of the Security Council, Thirty-fourth Year, Supplement for July, August and September 1979*, document S/13503, annex I, pp. 111–112). In reality, this waiver is formalized in an international agreement, although one of the parties thereto is not a "State" as such (see also *Keesing's Contemporary Archives*, vol. XXV (1979), p. 29917). The United States' waiver of its claim of sovereignty over 25 Pacific islands is an example

82. However, the international situation is far more complex than can be conveyed by any attempt to distinguish between waivers involving abdication and those involving transfer, as seen from the following example: on 31 July 1988, King Hussein of Jordan announced that he was breaking the legal and administrative ties between Jordan and the West Bank. The Hashemite monarch had affirmed his desire to bow to the will of the PLO as the sole legitimate representative of the Palestinian people and to the stated wish of the Arab Heads of State to promote Palestinian identity. With an area of 5,878 km^2 and 900,000 inhabitants, the West Bank had been part of the Hashemite Kingdom from 1950 until its occupation by Israel in 1967. In reality, this was a renunciation of a territory which Jordan did not, *de facto*, hold because it was occupied by another State; the waiver was presumably made with the intent that the Palestinian people living there should ultimately achieve statehood.[181]

83. Some authors provide various examples of cases which were settled by arbitral and judicial courts in which, as a general rule, a State is not presumed to have waived its rights.[182] For example, in the *Closure of the Port of Buenos Aires* case (Argentina *v*. United Kingdom),[183] which concerned Argentina's right to raise a claim, the President of Chile, in the award of 1 August 1870, said that the fact that a party had not reserved for itself a right did not mean that it had abandoned it. In the *Campbell* case of 10 June 1931 (United Kingdom *v*. Portugal), the arbitrator, Count Carton de Wiart, said in regard to the abandonment of the lease of a mining concession that renunciation is never presumed.[184] In the case of the Swedish motor ship "*Kronprins Gustaf Adolf*" (Sweden *v*. United States) of 18 July 1932, the arbitrator Eugène Borel said that "[a] renunciation to a right or a claim is not to be presumed. It must be shown by conclusive evidence, which in this case does not exist".[185] This position, although in a different context, was also taken in the *"Lotus"* case (France *v*. Turkey) of 7 September 1927, in which PCIJ stated that: "Restrictions upon the independence of States cannot ... be presumed."[186] In a more recent example, that of the *Nottebohm* case of 6 April 1955, ICJ had to decide whether waivers must be explicit in nature:

> It would constitute an obstacle to the opening of negotiations for the purpose of reaching a settlement of an international dispute or of concluding a special agreement for arbitration ... to interpret an offer to have recourse to such negotiations or such means, consent to participate in them or actual participation, as implying the abandonment of any defence which a party may consider it is entitled to raise or as implying acceptance of any claim by the other party, when no such abandonment or acceptance has been expressed and where it does not indisputably follow from the attitude adopted.[187]

84. Doctrine has also supported the idea that waivers must be explicit, invoking the ICJ decision of 27 August 1952 in the *United States Nationals in Morocco* case.[188] A restrictive interpretation is called for: silence or acquiescence is not considered sufficient for a waiver to produce effects. In any event, a tacit waiver is deemed acceptable only where it arises from acts which are, or at least appear to be, of an unequivocal nature.[189]

85. However, some doubt arises if certain assumptions made in practice in connection with the exercise of jurisdiction over a territory are considered. In many such

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of a similar form of waiver. On 20 May 1980, the State Department officially announced that the United States had waived its claim of sovereignty over 25 islands in the Central and South Pacific: (*a*) the Gilbert Islands, which had been known as Kiribati since July 1979; (*b*) the Ellice Islands, which had declared their independence in 1978 as Tuvalu; (*c*) the 14 islands of the Phoenix group; (*d*) the Canton and Enderbury Islands, which had been jointly administered by the United Kingdom and the United States under an exchange of notes dated 6 April 1939; (*e*) four atolls which formed part of the Cook Islands; and (*f*) three atolls which formed part of the Tokelau group and belonged to New Zealand (Rousseau, *loc. cit*. (1980), p. 1101). In fact, this notification was later amplified when, on 22 June 1983, the United States Senate adopted four treaties renouncing all United States claims of sovereignty over 25 islands in the South Pacific. This is clear evidence that territorial waivers are now generally made in writing through conventions, thereby providing an authoritative record of the resulting international situation. Under the first of the aforementioned treaties, concluded with New Zealand, the United States waived its territorial claims to Tokelau, an island north of the 10th parallel, while confirming its sovereignty over the Swains Islands. The second treaty established the maritime boundaries between the United States territory of Samoa and the Cook Islands: longitude 165° west. The third treaty ceded four islands (the Ellice Islands) in the archipelago of Tuvalu, north of the Fiji Islands. The fourth treaty ceded 14 islands, formerly known as the Gilbert Islands, located north of Tuvalu, to Kiribati (*ibid*. (1984), p. 234).

[181] Between 9 and 16 August 1988, as a consequence of its waiver of territorial claims to the West Bank, Jordan officially dismissed over 21,000 Palestinian civil servants in the territory occupied by Israel, including 5,200 Palestinian civil servants who had been recruited by Jordan prior to June 1967 and 16,105 more who had been employed prior to that date but did not, in fact, have the status of civil servants. On 20 August 1988, the West Bank adopted a series of measures establishing the new status of the inhabitants, who would henceforth be considered Palestinian rather than Jordanian citizens; this resolved the issue of relations between the two banks of the Jordan (Rousseau, *loc. cit.* (1989), pp. 141–142).

[182] See Degan, *op. cit*., pp. 321–322.

[183] *Ibid*. See also *British and Foreign State Papers,1872–1873*, vol. LXIII, p. 1173.

[184] See Degan, *op. cit*., p. 321. "It is a matter of principle, accepted in the law of all countries, that there can never be a presumption of waiver and that, as waivers constitute the renunciation of a right, an option or even a hope, they must always be interpreted in the narrowest sense ... even if we accept that waivers may be tacit, only facts which do not lend themselves to any other interpretation in the context of the situation may be deduced therefrom" (UNRIAA, vol. II (Sales No. 1949.V.1), p. 1156).

[185] *Ibid*. See also UNRIAA (footnote 184 above), p. 1299.

[186] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18. See also Degan, *op. cit*., p. 321.

[187] *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 19–20. See also Degan, *op. cit*., p. 322.

[188] *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176. In this regard, Bentz has stated that "[a] rule of international law established in the interests of the community of nations cannot be waived" ("Le silence comme manifestation de volonté en droit international public", p. 75), but some authors, such as Jacqué (*op. cit*., p. 342), have maintained that a waiver may arise either from an explicit manifestation of will or from a series of acts from which it can be deduced conclusively. However, this position does not appear to have received much support from doctrine because of the evidential problems involved.

[189] In the *Free Zones of Upper Savoy and the District of Gex* case, at the public session of PCIJ on 26 April 1932, the French Government's representative maintained that "with respect to tacit waiver, as a matter of principle, a right cannot easily be presumed to have been waived; the concept of waiver comes into play only where unequivocal acts are involved" (*P.C.I.J., Series C, No. 58, p. 587*). See also Kiss, *op. cit*., vol. I, p. 644).

cases, the idea of effectiveness prevails (see the *Island of Palmas*[190] and the *Temple of Preah Vihear* cases[191]).

86. The principle that waiver may never be presumed is deduced from international practice; it is also a principle of law recognized by almost all States.[192]

87. International practice offers occasional cases involving waiver of interest payments on previously contracted debts. For example, in its decision of 11 November 1912 in the *Russian Indemnity* case between Russia and Turkey, the Permanent Court of Arbitration rejected Russia's attempt to change its position once the debt had been paid, on the understanding that Russia had waived the interest payments.[193] In many of these cases, as demonstrated above in the discussion of "promise", a promise of cancellation of a debt is equivalent to a waiver. In this instance, it does not matter what type of unilateral act is involved; what matters is that it is indeed a unilateral act which may give rise to the legal consequences produced by such acts.

88. Another example of waiver is the decision to discontinue the proceedings in a State prosecution (for example, the waiver of appeal against the British Government's decision not to extradite General Pinochet to Spain).[194]

[190] UNRIAA (see footnote 184 above), p. 829.

"In view of the condition formulated in the Award in the *Island of Palmas Arbitration*—that effectiveness is, and since the nineteenth century has been, necessary for the maintenance of a title by occupation—failure to protest against competing acts of sovereignty, openly performed, might suffice to indicate that the requisite degree of effectiveness in maintaining the title was not being shown."

(MacGibbon, "The scope of acquiescence in international law", p. 168).

[191] *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 23.

[192] See Suy, *op. cit*., p. 163.

[193] It was established in this case involving the Russian Imperial Government and the Sublime Porte that Russia had waived its interests since its Embassy had accepted without discussion or reservation and, on many occasions, had reproduced in its own diplomatic correspondence an outstanding total balance in an amount equal to the outstanding principal balance. Once the entire amount of the loan had been repaid or made available, the Russian Imperial Government could not legitimately reject, on a unilateral basis, an interpretation which had been accepted and implemented in its name by its Ambassador (UNRIAA, vol. XI (Sales No. 1961.V.4), p. 446).

[194] Spain's waiver of appeal against the British Government's decision not to extradite General Pinochet on humanitarian grounds. On 17 January 2000, the Office of Diplomatic Information of the Spanish Ministry for Foreign Affairs issued the following communiqué:

"The Spanish Ambassador has also been instructed to reiterate to the Home Office the decision taken by Spain not to file any sort of appeal against the eventual decision taken by the Home Office in the extradition process of Senator Pinochet."

(*Spanish Yearbook of International Law*, vol. VII (1999–2000), p. 96)

The Office of Diplomatic Information made a similar statement on 26 January 2000:

"This Ministry of Foreign Affairs ... has simply reiterated on a number of occasions that it is the firm decision of the Spanish Government to abstain from appealing a possible government decision taken by the British Home Office that could bring a definitive halt to the extradition process of Senator Pinochet.

"...

"It has simply formally reiterated its decision not to file an appeal."

(*Ibid*., p. 97)

C. Acts by which a State reaffirms a right or a legal claim

1. Protest

89. As Suy notes, a simple perusal of the newspapers suggests that States often lodge protests against violations of their rights or actions by third parties which they view as unwarranted interference in their affairs.[195] Venturini defines protest as "a declaration of the intent not to recognize a given claim as legitimate or, in any event, to challenge the validity of a given situation".[196] Even greater weight is attached to the definition provided by MacGibbon, for whom:

A protest constitutes a formal objection by which the protesting State makes it known that it does not recognize the legality of the acts against which the protest is directed, that it does not acquiesce in the situation which such acts have created or which they threaten to create, and that it has no intention of abandoning its own rights in the premises.[197]

90. Protest has exactly the opposite effects to recognition.[198] "Its purpose is to prevent a situation from becoming opposable to a State which protested against it, and may thus deprive it of any legal effect."[199]

91. It is clear from this that protest must be reiterated and, as indicated by jurisprudence, followed where circumstances permit by decisive action, such as an appeal before an organ of an international organization[200] or a similar court,[201] although such extremes are not necessary for the protest to produce effects. In reality, in order for protest to actually produce effects, it must not only be explicit, but expressed in an active, reiterated manner; in short, it must be clearly enunciated since, in many cases, its effects are contingent on the force and determination with which it was made.[202]

92. Protest can have, in particular, a negative effect on the formation of historic titles, such as acquisitive prescription, or of extinctive prescription; it has a paralyzing effect, since it interrupts the lapse of time which is

[195] *Op. cit*., p. 47.

[196] "The scope and legal effects of the behaviour and unilateral acts of States", p. 433.

[197] "Some observations on the part of protest in international law", p. 298.

[198] Charpentier considers that protest is the opposite, not of recognition, but of notification; he adds that "protests do not of themselves produce effects unless they constitute official notification of a refusal to accept a given claim" ("Engagements unilatéraux et engagements conventionnels: différences et convergences", p. 368).

[199] Degan, *op. cit*., p. 346.

[200] Suy presents various examples of notes of protest addressed to the Security Council; furthermore, when a protest is sent to an international organization, it is also often sent to the party against which it is directed (usually the State which is the subject of the protest); see Suy, *op. cit*., pp. 59–60.

[201] See Cahier, "Le comportement des États comme source de droits et d'obligations", p. 251. As an example of jurisprudence on this issue, he mentions the *Chamizal* case (UNRIAA (see footnote 193 above), p. 309) and the individual opinion of Judge Levi Carneiro in *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 108.

[202] Where this is not the case, it does not produce the desired effects: "If the protest is an isolated one, it is presumed that the protester did not have the real will to oppose the allegedly unlawful situation" (Suy, *op. cit*., p. 79).

deemed necessary for an adverse possession to transform into a valid, conclusive title for all purposes. What happens is that there is really no rule of international law which establishes the length of time required in order for prescription—whatever its nature—to produce full effect. As Venturini notes, its function in international law is replaced by other legal institutions "which follow the general principle of effectiveness, according to which any *de facto*, stable, well-known and uncontested situation eventually acquires legal validity".[203]

93. This unilateral act has as its primary purpose the preservation of the rights of the protesting State. It can be expressed by oral or by written statements of competent organs, and communicated, either directly or through intermediaries, to another State or States which may be affected by it.[204] However, as Suy notes, such protests may also be inferred from certain implicit acts, such as bringing a dispute before the Security Council or the General Assembly, initiating an arbitral proceeding or bringing a case before ICJ, breaking off diplomatic relations or expelling the members of a mission, or taking measures such as retorsion, reprisals or self-defence, if these acts were undertaken in protest against an unlawful act by another State.[205] Furthermore, the protest is generally addressed to a specific party and is confined to a specific issue, except in situations which may be defined as "breaches of international obligations having serious consequences for the international community as a whole"[206] or "serious breaches of obligations under peremptory norms of general international law".[207]

94. ICJ had occasion to consider the concept of protest in the *Fisheries* case,[208] in which it stressed that a protest must be lodged with a certain immediacy and with the intent to prevent the unilateral act being opposed from achieving recognition. This view was reiterated in the *Land, Island and Maritime Frontier Dispute* case.[209] The strength of its arguments is usually one of the factors which allows a protest to produce its full effect; this is, in a sense, a logical circumstance based on the nature of things, since, if the intent of the protest is to prevent a given act, conduct or situation from producing effects in respect of the protesting State, its terms must be absolutely clear so that third parties will have no doubts as to the position adopted by that State with regard to the act against which it is protesting. In that respect, practice reveals many examples of every kind, as may be seen from the preceding attempts at a definition of this unilateral act.

(a) *Protest against acts contrary to international law*

95. Certain cases are illustrative of these unilateral acts, although not all are juridical according to the Special Rapporteur's definition. Some acts of States, those that could be regarded as protests, will simply be looked at and a basic classification of them will be attempted. First to be considered will be protests against a prior act of a State which, in the judgement of the protesting State, breaches a previous international agreement or is generally contrary to international law, or is even considered to be merely disproportionate.[210]

96. A note handed to the German Government by the French Ambassador in Berlin on 21 March 1935 expressed the French protest against the attitude of Germany as being contrary to various international treaties preventing or restricting the country's rearmament:

> The Government of the Republic is obliged to protest in the most formal manner against these measures, concerning which it now expresses the gravest reservations.
>
> ...
>
> Being determined, for its part, to seek every possible means of international cooperation to dispel this sense of disquiet and to preserve the peace of Europe, it wishes to reaffirm its respect for treaty law and its firm resolve that unilateral decisions made in defiance of international commitments shall not be accepted in negotiations.[211]

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[203] *Loc. cit.*, p. 393.

[204] In one such case, on 23 September 1999, the Spanish Minister for Foreign Affairs cancelled a scheduled meeting with the Permanent Representative of Yugoslavia to the United Nations in protest against a Yugoslavian court's charge against the outgoing NATO Secretary-General (REDI, vol. LII, No. 1 (2000), p. 105).

[205] *Op. cit.*, p. 49–52. However, the "implicit" character of the protest which may be inferred from some of these acts, realistically speaking, is somewhat unusual (*ibid.*, p. 53).

[206] This is not the time to reopen each and every one of the discussions which, beginning with the debate on the concept of "international crime" in former article 19 under part one of the draft articles on State responsibility, prepared by the Commission and later modified owing to serious reservations regarding draft chapter III, led to the adoption of this language in the summer of 2000. In that regard, see the fourth report on State responsibility by Mr. James Crawford (*Yearbook … 2001*, vol. II (Part One), document A/CN.4/517 and Add.1), and, in particular, paragraphs 43–53 thereof.

[207] General Assembly resolution 56/83 of 12 December 2001, annex. These words echo the title of chapter III of the draft articles on responsibility of States for internationally wrongful acts.

[208] *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116. The Court stated (pp. 131 and 138): "In any event, the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast ... [T]he Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose."

[209] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351.

> "The Chamber considers that this protest of Honduras, coming after a long history of acts of sovereignty by El Salvador in Meanguera, was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras vis-à-vis earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation. Furthermore, Honduras has laid before the Chamber a bulky and impressive list of material relied on to show Honduran *effectivités* relating to the whole of the area in litigation, but fails in that material to advance any proof of its presence on the island of Meanguera."

(*Ibid.*, p. 577, para. 364)

[210] An example of this latter category occurred in early November 2003 with the closure of the border between Spain and the United Kingdom in Gibraltar, owing to the risk of infection from a virus which had been brought to the Rock by the vessel *Aurora*. The British Foreign Secretary made a formal protest, in the following terms:

> "I regret the action taken by the Spanish Government, which is unnecessary and disproportionate. There have been active discussions over the weekend with the Spanish Government and the decision made by the operator of this cruise liner to withhold the passports of those who go on to the shore in Gibraltar is a perfectly adequate safeguard to ensure that none of these people can actually go through the border control in to Spain. So the action is unnecessary and unwelcome."

(www.nationalarchives.gov.uk)

[211] Text reproduced by Kiss, *op. cit.*, vol. I, pp. 15–16.

97. The protest by China, in its statement of 21 June 1980, against sales of arms to Taiwan Province of China by the United States, has been regarded as the most severe issued by the Government in Beijing since the recognition of the Government of Beijing by the United States of 15 December 1978.[212] In the course of 1982 there was a further series of protests by China against the attitude of the United States to this matter. An attempt was made to resolve the problem through a joint communiqué published in Washington, D.C., and Beijing on 17 August 1982, declaring the intention of the United States Government not to continue a long-term policy of selling arms to Taiwan Province of China, and to cut back supplies drastically. The sales which followed prompted a reaction from China, in the form of a protest on 24 July 1983. On 20 June 1984 the Chinese Government made a fresh protest, against the supply of United States military transport aircraft to Taiwan Province of China.[213] In early 2001 the United States declared that it would give military assistance to Taiwan Province of China, resulting in a protest by China.[214]

98. In fact, the ambiguous situation of Taiwan Province of China tends to excite angry protests from China whenever third States act in a manner which can be construed as recognition, or a step towards it. This is the thrust of the protest by the Chinese Government on 15 October 1980 against the signing of an agreement between the United States and Taiwan Province of China providing for the grant of certain privileges and immunities to their respective representatives. China perceives this agreement as a flagrant breach of the agreements entered into by the Government of the United States since the latter's recognition of China on 15 December 1978, and the establishment of diplomatic relations between the two States. This protest was conveyed by one of the Chinese deputy Ministers for Foreign Affairs to the United States Ambassador in Beijing.[215] In this connection, mention may be made of the protest of the Chinese Government, on 26 March 1982, against certain provisions of the United States Immigration Act of 29 December 1981. The protest was particularly aimed at the clause permitting the issue of 20,000 visas a year to immigrants from mainland China, and the same number to immigrants from Taiwan Province of China. The Beijing Government took the view that this measure was equivalent to treating Taiwan Province of China as a State or as an independent entity, contrary to the undertakings between the two States.[216]

99. Again in respect of Taiwan Province of China, diplomatic relations between China and the Netherlands were downgraded as from 20 January 1981 to the level of chargé d'affaires, in consequence of the sale of two submarines by the Government of the latter country to the authorities in Taiwan Province of China. The Chinese Government issued a protest against the sale of the submarines, stating that it not only created obstacles to a peaceful reunification of Taiwan Province of China with mainland China, but also undermined peace and stability in the region.[217]

100. A further protest ensued from China "when the new President of Taiwan Province of China visited the United States. Beijing expressed its opposition to the visit, claiming that the authorities of Taiwan Province of China were using it to carry out separatist activities".[218]

101. The invasion of Afghanistan by the Soviet Union resulted in numerous protests. The Special Rapporteur notes in particular the force of the language used in the statement issued on 23 June 1980 by the Group of Seven (G7) Summit (Canada, Federal Republic of Germany, France, Italy, Japan, United Kingdom, United States):

> We therefore reaffirm hereby that the Soviet military occupation of Afghanistan is unacceptable now and that we are determined not to accept it in the future. It is incompatible with the will of the Afghan people for national independence, as demonstrated by their courageous resistance, and with the security of the States of the region.[219]

102. On 30 July 1980 the Parliament of Israel adopted the basic law proclaiming the reunification of Jerusalem, now to be called the eternal capital of Israel, and arranging for the transfer of national institutions. This caused numerous hostile reactions. For example, on 31 July 1980 the Government of the Federal Republic of Germany declared that the adoption of the law was contrary to international law and to United Nations resolutions. On the same day, the French Ministry for Foreign Affairs deplored what it described as "a unilateral decision which is part of a whole collection of measures aiming to challenge the status of Jerusalem". A communiqué from the State Department of the United States declared that the United States considered unilateral acts purporting to modify the status of Jerusalem outside the framework of a negotiated settlement to be without effect. In addition, the States which had diplomatic missions established in Jerusalem announced that they had decided to transfer them to Tel Aviv.[220]

103. Egypt's protest against Israel's plan to build a canal linking the Mediterranean with the Dead Sea was based on the argument that the projected canal, which began in the Gaza Strip and transected part of the occupied West Bank, was contrary to the spirit and letter of the Camp

[212] According to the statement, while claiming that it would not do anything to endanger the process of rapprochement between continental China and Taiwan Province of China, the United States Government was sending huge quantities of weapons to Taiwan Province of China. The protest went on to state that such discrepancy between words and deeds was an example of bad faith in international relations, and that it was obvious that continuing to sell increasing quantities of arms to Taiwan Province of China was a breach of the principles enshrined in the agreement on the establishment of diplomatic relations between China and the United States and adversely affected the normal development of Sino-American relations. Certainly the Chinese people could not remain indifferent to that situation (Rousseau, *loc. cit*. (1981), p. 119).

[213] See Rousseau, *loc. cit*. (1983), p. 839, and (1985), p. 124.

[214] On 23 April 2001, Washington agreed to sell Taiwan Province of China much of the weaponry it had asked for (destroyers, patrol aircraft, helicopters, artillery, surface-to-air missiles). The United States Administration played down the scale of this transaction, claiming it was made under the Taiwan Relations Act, which requires the United States to secure the defence of the island (RGDIP, vol. CV (2001), p. 735.

[215] See Rousseau, *loc. cit.* (1981), p. 389.

[216] *Ibid.* (1982), pp. 781–782.

[217] *Ibid.* (1981), pp. 545–546.

[218] RGDIP, vol. CIV (2000), p. 1012.

[219] United States, Department of State, *Bulletin*, No. 2041 (August 1980). See also Rousseau, *loc. cit.* (1980), p. 845.

[220] Rousseau, *loc. cit.* (1981), pp. 182–183.

David agreements and an obstacle to peace.[221] The British Minister of State, when asked to comment, replied: "The project as planned is contrary to international law, as it involves unlawful works in occupied territory and infringes Jordan's legal rights in the Dead Sea and neighbouring regions. No official support will be given by Her Majesty's Government in respect of the project."[222]

104. On 15 June 1981, one day after elections had been held by direct universal suffrage in the eastern sector of Berlin at the instigation of the Soviet Government, France, the United Kingdom and the United States transmitted a protest to that Government through their ambassadors in Moscow. The Western States took the view that the new electoral procedure was an endeavour to make East Berlin an integral part of the Democratic Republic of Germany, contrary to the Quadripartite Agreement of 3 September 1971.[223]

105. A protest was sent to the Ambassador of the Soviet Union in Rome by the Italian Minister for Foreign Affairs as a consequence of what Italy regarded as an unacceptable violation of its territorial waters in the Gulf of Tarento by a Soviet submarine on 24 February 1982.[224]

106. A protest note was sent by the Swedish Prime Minister to the Soviet Ambassador in Stockholm as a consequence of incursions by Soviet submarines into Swedish waters in March, April, May and July of 1983, which were construed as a violation of Sweden's territorial integrity and a form of espionage.[225]

107. Third States took action with respect to the mining of ports in Nicaragua by the United States. Several States protested and declared their concern at the measures taken by the Central Intelligence Agency (CIA) relating to the mining of Nicaraguan ports; among them were the Governments of the Federal Republic of Germany, France, Japan, Mexico, the Netherlands and the United Kingdom. On 8 April 1984 the four States members of the Contadora Group published a joint statement condemning the action, which had also been criticized by the Ministers for Foreign Affairs of the member States of the European Economic Community.[226]

108. On 18 March 1986 the Soviet Government protested against the violation of its territorial waters by two United States warships.[227]

109. A protest was transmitted to the Soviet Union by Japan as a consequence of the violation of its airspace by a Soviet bomber aircraft. This was the twentieth incursion by a Soviet aircraft into Japanese airspace in the course of 1987. On 27 August 1987 Moscow had made excuses, promising that there would be no more violations of Japan's airspace in future.[228]

110. A protest was issued by the United States in consequence of the destruction by Cuban aircraft, on 24 February 1996, of two civilian planes (belonging to Brothers to the Rescue) which carried United States registration. The following day, the United States Permanent Representative to the United Nations convened an emergency session of the Security Council, and the President immediately decided "to condemn the Cuban action and to present the case for sanctions on Cuba until it agrees to abide by its obligation to respect civilian aircraft and until it compensates the families of the [four] victims".[229]

111. There were also protests against the attacks carried out by the United States against Afghanistan and the Sudan, in response to the bombing of the United States embassies in Dar es Salaam and Nairobi on 7 August 1998. According to the protest by the Sudan, the attacks were an "iniquitous act of aggression which is a clear and blatant violation of the sovereignty and territorial integrity of a Member State of the United Nations, and is contrary to international law and practice, the Charter of the United Nations and civilized human behaviour".[230]

112. Protests by States followed almost immediately upon the attacks carried out on Yugoslavia in 1999 by NATO. Austria closed its airspace to NATO military flights. The Russian Federation recalled its Ambassador to NATO and condemned the attacks, arguing that regional organizations should take action to restore peace and security only under the express authority of the Security Council; for the same reason, Belarus, China, Cuba, India and Ukraine joined with the Russian Federation in condemning the attacks.[231]

113. Also in connection with actions in the former Yugoslavia, China protested against the attack by NATO forces on the Chinese Embassy in Belgrade on 7 May 1999, which caused the death of three Chinese nationals and injured about 20 others.[232]

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[221] *Ibid*., pp. 866–867.

[222] Marston, "United Kingdom … 1981", p. 467. On 4 December 1981, the United Kingdom delegate, speaking in the Special Political Committee of the General Assembly, echoed the position of the Community partners on this question:

> "The proposed canal can in no way be considered an act of mere administration. In addition the Ten believe that the project as planned could serve to prejudice the future of Gaza which should be determined as part of a general peace settlement. In the circumstances the Ten wish to reiterate their opposition to the project."

(*Ibid*., p. 516).

[223] See Rousseau, *loc. cit*. (1982), p. 120.

[224] *Ibid*., p. 598.

[225] *Ibid.* (1983), p. 900.

[226] *Ibid*. (1984), pp. 669–670.

[227] *Ibid*. (1986), pp. 657–658.

[228] *Ibid.* (1988), p. 402.

[229] Nash Leich, *loc. cit*. (1996), p. 449.

[230] S/1998/786, annex, para. 2. See also S/1998/792, S/1998/793 and S/1998/801, letters from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council on 22–24 August 1998. A spokesman for the Taliban also protested against the missile attacks, as did the Islamic Republic of Iran, Iraq, the Libyan Arab Jamahiriya, Pakistan, the Russian Federation and Yemen, Palestinian officials and certain Islamic militant groups. The secretariat of the League of Arab States condemned the attack on the Sudan as a violation of international law, but was silent as to the attack on Afghanistan. Other States, however, expressed support, or at least understanding, of the attacks: these included Australia, France, Germany, Japan, Spain and the United Kingdom (see Murphy, *loc. cit*. (1999), pp. 164–165).

[231] Murphy, *loc. cit*. (1999), p. 633, and (2000), p. 127.

[232] *Ibid*. (2000), p. 127.

114. A note verbale of protest was transmitted by Spain through its Embassy as a consequence of an incident on 4 September 1988 involving a Spanish citizen on a tourist visit to Cuba, who was expelled from the country without being allowed by the Cuban authorities to make contact with the Spanish Embassy.[233]

115. A protest was conveyed to Mexico by Spain as a result of the detention of Angeles Maestro Martín, a Spanish member of Parliament, by the Mexican police on 9–10 October 1994.[234]

116. The events following upon the invasion of Kuwait by Iraq sparked off numerous protest actions by Spain, relating to various situations. It is interesting to consider these protests and the manner in which each of them is expressed, depending on the addressee. For example, the Office of Diplomatic Information registered a protest on 22 January 1991 against the treatment by the Iraqi Government of soldiers taken prisoner who were nationals of the States which had deployed military contingents in the zone since 16 January 1991. In this missive, the Spanish Government

> vigorously condemns the inhumane treatment meted out by Iraq to prisoners of war from the multinational forces, and the manipulative way in which they have been displayed to the media while threatening to use them as human shields in military installations, all such conduct being a flagrant violation of international law and of elementary rules of humane conduct.[235]

117. The Spanish Government expressed its condemnation of the bombing of civilian targets in Baghdad by the States cooperating with Kuwait, which had resulted in many civilian deaths. For this purpose, the President of the Spanish Government transmitted a personal letter to the President of the United States, explaining the Spanish position:

> [T]he Executive is convinced of the firm determination of the international coalition to avoid causing human victims and casualties among the civilian population, and therefore suggests that an investigation should be opened to elucidate the facts concerning the bombardment of the Iraqi shelter.
>
> …
>
> The Spanish Government takes the view that aerial actions by the international coalition against Baghdad and other cities should be brought to an end, and military efforts should be focused on the operational zones around Kuwait.[236]

118. In fact, in this latter example the protest is somewhat muted by comparison with the forceful language in which protests are usually expressed, this being a direct consequence of the particular stance taken by Spain in this case. This stance is in stark contrast with the language used in Spain's severe condemnation of the treatment by Iraq of nationals of Western States, including Spanish nationals, who were on its territory or on that of Kuwait:

> Spain reiterates its continuing concern at the fact that the Iraqi authorities continue to refuse permission for citizens of Spain and nationals of other countries who are in Kuwait and Iraq to leave.
>
> The Government rejects the Iraqi practice of isolating nationals of certain countries and requests that the confinement of these innocent persons be immediately brought to an end.[237]

119. A statement was issued on 3 May 1991 by the 12 European Community partners, in the context of European political cooperation, to clarify their position on the policy of new Israeli settlements in the occupied Arab territories (this, being a protest, also implies a refusal by the Community partners to recognize this policy as lawful). In this statement, the Community and its member States deplored the fact that Israel had allowed the new settlements, considering that the establishment of any new Israeli colony in the occupied territories was unlawful in any event, and was especially harmful at a time when all parties should be displaying flexibility and realism in order to create a climate of confidence which would enable negotiations to begin. The Community and its member States urged Israel not to allow or encourage the establishment of settlements in the occupied territories.[238]

120. A formal protest was transmitted by the Spanish Minister for Foreign Affairs to the French Ambassador on 21 November 1996, because of the damage caused by the French lorry drivers' strike. The Office of Diplomatic Information issued a communiqué on this subject on 28 November, and a draft law was prepared and approved by the Committee on Foreign Relations of the Congress on 8 May 1997.[239]

121. Numerous protests have been made by various States over the past years with regard to the actions that Israel is taking against Palestine. One example is the statement in which the Ministry for Foreign Affairs of Cuba expressed extremely strong condemnation of the aggressive action by the army and the Government of Israel against the Palestinian population and demanded an immediate cessation of the violence, which had turned the Occupied Palestinian Territory illegally occupied by Israel into nothing more nor less than a theatre of war, where not even the most basic rules of international humanitarian law were respected (12 April 2001).

(b) *Protests to prevent the consolidation of an existing situation*

122. A statement by France, issued to the press on 10 June 1917, contained a strong protest against the disposal of French private property by Germany in the occupied countries and Alsace Lorraine.[240]

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[233] *Boletín Oficial de las Cortes Generales*, Senate, series I (1988), Third Legislature, No. 253, p. 10594, and REDI, vol. XLI, No. 1 (1989), p. 189.

[234] Spain protested both against the detention itself and against the fact that the member of Parliament was not allowed to contact the Spanish Embassy in spite of requesting permission to do so (Cortes Generales, *Diario de Sesiones del Congreso de los Diputados* (1994), Fifth Legislature, No. 396, p. 12224, and REDI, vol. XLVII, No. 2 (1995), p. 142).

[235] REDI, vol. XLIII, No. 1 (1991), p. 139.

[236] *Ibid*., p. 139.

[237] *Ibid*., p. 140.

[238] See *Bulletin of the European Communities*, vol. 24, No. 5 (1991), p. 83.

[239] See *Boletín Oficial de las Cortes Generales*, Congress, Sixth Legislature, series D (1997), No. 144, p. 3, and REDI, vol. XLIX, No. 2 (1997), p. 83.

[240] "The Government of the Republic states that it considers null and void the disposal measures ordered by the German authorities in respect of French private property in Germany, the occupied countries and Alsace Lorraine.

123. On 2 October 1979, the Japanese Government sent a protest to the Soviet Government, deploring the installation of a Soviet military base on the islands of Etorofu, Kunashiri and Shikotan, off the Japanese island of Hokkaido (Kuril Islands). The Soviet Ambassador in Tokyo spoke out against the protest, calling it interference in his country's internal affairs.[241] Similarly, following a statement by Japan, on 7 February 1981, claiming the return of the Kuril Islands, the Soviet Government issued a protest of its own, on 16 February 1981, having previously summoned the Japanese Ambassador in Moscow to inform him that it was going to do so.[242]

124. An official protest was directed by China at Japan, on 23 July 1981, concerning the dispatch of a Japanese scientific mission to the Senkaku Islands (Diaoyu Islands), north-east of Taiwan Province of China, which were claimed by Japan and the People's Republic of China. The protest took the form of a statement by the Chinese Minister for Foreign Affairs urging on Japan that the activities concerned should cease once and for all.[243]

125. Protests were lodged by Australia and New Zealand following the nuclear tests conducted by France in the Pacific on 19 April, 25 May and 28 June 1983. The Australian Prime Minister expressed his displeasure to the President of France during his visit to Paris on 9 June and the Australian Government decided to suspend its deliveries of uranium to France until the end of 1984.[244]

126. Official letters of protest were sent to the Governments of Belgium and the Netherlands by Spain, which had taken exception to the dumping in the Atlantic of nuclear waste from those States (August-September 1982).[245]

127. A protest was lodged by the United States when the Soviet Union resumed its ballistic missile tests above the Pacific near United States territory on 29–30 September 1987.[246]

128. In February 1988, there occurred an incident involving United States and Soviet warships in the Black Sea. At that time, the aim of the Soviet regulations was to prevent the innocent passage of warships in maritime areas over which the Soviet Union exercised control and to restrict them to certain routes, none of which ran through the Black Sea.[247] In protest, the United States warships acted in defiance of this rule and exercised their right of innocent passage through those areas, without accepting the restrictions unilaterally imposed by the Soviet Union.[248]

129. A protest was issued in 1992, in the form of a note verbale, to the British Government by the Spanish Government when military manoeuvres were conducted by a group of military personnel from Gibraltar in Sierra Nevada without Spain having being notified. The Spanish Minister for Foreign Affairs called for the immediate suspension of the activities concerned (which, according to the British response, were not official) and also reminded the British that manoeuvres could not take place without prior notification and authorization by the Spanish authorities.[249]

130. A protest was lodged by Spain against Portugal over an incident that occurred on 10 September 1996 between a fishing boat from Huelva and a Portuguese patrol boat that fired on the fishing boat when it found the latter allegedly fishing in Portuguese waters, in the Guadiana estuary. Spain sent a letter of protest direct to the Portuguese authorities through the Spanish consul and the Spanish Ministry of Foreign Affairs subsequently summoned the Portuguese Ambassador to inform him of the protest by the Spanish Government, since it considered the Portuguese action unjustified. A communiqué was issued by the Portuguese authorities expressing regret for the incident. A proposal was made which was, in fact, adopted: that the two authorities should work together in a manner similar to the collaboration already existing with other European countries to avoid incidents between coastguard patrols and ships from neighbouring countries.[250]

131. In order to give protests greater force, Governments issue them with ever greater frequency, sometimes in the form of joint statements, at international forums. One case, albeit somewhat marginal, featured the small island of Palmyra, in the South Pacific, which the United States hoped to turn into a nuclear waste depository. The proposal was condemned, in July 1979, in a resolution adopted by the South Pacific Forum, which comprised Australia, New Zealand and ten small islands in the region. A similar protest was subsequently made by Japan, the Philippines and Taiwan Province of China. The Governments of four neighbouring archipelagos—Guam, Hawaii, the Northern Mariana Islands and Samoa—also issued a joint statement at the beginning of October 1980,

"...

"This statement will be communicated to all Allied and neutral Governments. It is necessary that foreigners who might acquire property disposed of by the German authorities should understand that France considers such disposals void; the invalidity of the disposal necessarily applies also to all subsequent alienations."

(Kiss, *op. cit.*, vol. I, p. 24)

[241] See Rousseau, *loc. cit.* (1980), p. 657.

[242] *Ibid.* (1981), pp. 584–585.

[243] *Ibid.* (1982), p. 130.

[244] *Ibid.* (1983), p. 861.

[245] *Ibid.*, pp. 391–392.

[246] *Ibid.* (1988), p. 389.

[247] Rules for navigation and sojourn of foreign warships in the territorial waters (territorial sea) of the USSR and the internal waters and ports of the USSR, art. 12, ILM, vol. XXIV, No. 6 (November 1985), p. 1717.

[248] The Soviet regulations were amended in order to comply with the so-called Uniform Interpretation of 23 September 1989, which recognized no such restriction. The press release accompanying the text of the Uniform Interpretation, signed by the Soviet Union and the United States, stated that:

"Since the Soviet border regulations have been brought into conformity with the 1982 Convention on the Law of the Sea, we have assured the Soviet side that the United States has no reason to exercise in the Soviet territorial sea in the Black Sea its right of innocent passage under the U.S. Freedom of Navigation Program."

(Nash Leich, *loc. cit.* (1990), p. 241)

[249] *Spanish Yearbook of International Law*, vol. II, 1992, p. 175.

[250] *Diario de Sesiones del Congreso de los Diputados* (1996), Sixth Legislature, No. 24, pp. 992–993, and REDI, vol. XLIX, No. 1 (1997), p. 153.

in which they condemned the action and expressed their total opposition to the plan.[251]

132. The Heads of Government of the 16 countries of the South Pacific Forum, meeting in Madang, Papua New Guinea, issued a unanimous statement on 14 September 1995, expressing their indignation at the continuation of nuclear tests by France.[252]

133. On 19 October 2003, a dispute between the Russian Federation and Ukraine caused considerable tension following the construction by the Russian Federation of a dam in the Kerch Strait near the Ukrainian island of Tuzla. This provoked protests by Ukraine, until the Russian authorities finally suspended work on the dam.[253]

(c) *Protests to prevent the consolidation of the legal situation in a given territory*

(i) *Territory* sensu stricto

134. In the *Island of Bulama* case, in which sovereignty over the island was a cause of dispute between Portugal and the United Kingdom, persistent protests by Portugal about British activities, including the specific actions on which its claims were based, led the arbitrator to decide, on 21 April 1870, "that none of the acts done in support of the British title have been acquiesced in by Portugal"; it was decided that "the claims of the Government of His Most Faithful Majesty the King of Portugal to the Island of Bulama on the Western Coast of Africa, and to a certain portion of territory opposite to this Island on the mainland are proved and established".[254]

135. In the *Chamizal* case between Mexico and the United States, which related to the delimitation of the border in the Rio Grande region between El Paso, Texas, and Ciudad Juárez, the International Boundary Commission, in its ruling of 15 June 1911, drew attention to the way in which the Mexican protest had prevented due consideration being given to the United States' claim.[255] The Commission stated that:

> In the present case, the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment.[256]

136. On 26 September 1979, the Chinese Minister for Foreign Affairs issued a statement formally asserting China's ownership of the archipelago of the Spratly (Nansha) Islands. The statement was issued by way of a protest against a communiqué by the Philippines, which claimed that the archipelago had come to form part of Filipino territory.[257]

137. In a speech delivered at the University of Georgetown, Washington, D.C., on 10 October 1978, the Moroccan Minister for Foreign Affairs reaffirmed his country's position with regard to the Spanish enclaves of Ceuta and Melilla. He said that Morocco had not fully regained its territorial integrity, inasmuch as it had not re-established its sovereignty over the two outposts. These remarks prompted a reply by the Spanish Minister for Foreign Affairs, who declared that Spain once again reaffirmed in the strongest terms that the two territories were Spanish and totally rejected the inadmissible claims expressed by the Moroccan Minister. At the same time, the Spanish Ambassador in Rabat lodged a strong protest against the Moroccan authorities. Meanwhile, King Juan Carlos postponed indefinitely a visit to Morocco that had been due to take place in December 1978.[258]

138. On 31 January 1980, the Vietnamese Ambassador in Beijing rejected a Chinese document explicitly claiming the Paracel and Spratly Islands for China and repeating the assertion that the two archipelagos had formed an integral part of Chinese territory since time immemorial.[259]

139. On 23 May 1981, the Bangladesh Parliament unanimously adopted "a resolution protesting against

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[251] See Rousseau. *loc. cit.* (1980), pp. 378 and 616, and (1981), p. 406.

[252] See RGDIP (1995), vol. IC, p. 983.

[253] In his speeches, the Ukrainian President repeatedly warned of a military response if the disputed boundary lines were crossed. Specifically, he said that his country would consider itself under attack if the boundary was crossed, and that would lead to the adoption of the appropriate response measures. The continuation of the work would, in any case, be considered an unfriendly act. Ukraine's reaction was not restricted to words: in a unilateral act that could be characterized as conduct producing a legal effect, it deployed a number of army units on the island that it considered belonged to it and maintained a constant presence there. The Ukrainian President also warned that in the event that the Russian dam crossed the demarcation line, Ukraine would suspend its participation in the common economic space set up by Belarus, Kazakhstan and the Russian Federation. A request by the Russian Federation, several days after the beginning of the dispute, that Ukraine should submit documents in support of Ukrainian territorial claims to the island of Tuzla prompted renewed Ukrainian protests; the spokesman for the Ukrainian Government said that his Government was unhappy about the request for copies of documents confirming Ukrainian ownership of the small island of Tuzla in the Strait. It was unacceptable that Kyiv should have to confirm the indisputable fact that the island was part of Ukrainian territory. The dispute ended with a meeting between the two Ministers for Foreign Affairs who issued the following statement, which also appeared on the website of the Russian Ministry of Foreign Affairs (www. mid.ru). The joint statement, dated 31 October 2003, reads as follows:

> "It has been decided to establish appropriate working groups which will engage in the preparation of bilateral agreements on cooperation in the Sea of Azov and the Kerch Strait in the fields of navigation, fishing, nature management, seabed exploration, ecology, and so forth.
>
> "Agreement has been reached to accelerate a joint ecological examination with regard to the situation in the Kerch Strait.
>
> "The Ministers have declared their firm intention to develop relations between the Russian Federation and Ukraine, states strategic partners, based on the Treaty on Friendship, Cooperation and Partnership of May 31, 1997, whose provisions stipulate, in particular, mutual respect, sovereign equality, territorial integrity and the inviolability of the borders existing between them, in accordance with the rules of international law and on the basis of observance of the bilateral treaty obligations."

[254] Moore, *History and Digest ...*, vol. II, p. 1921. See also Coussirat-Coustère and Eisemann, *op. cit.*, p. 78.

[255] The United States maintained that the prescription of rights and uninterrupted possession since 1848 could be considered justification for the Commission to rule that the disputed area belonged to the United States (Suy, *op. cit.*, p. 72).

[256] UNRIAA, vol. XI (Sales No. 61.V.4), p. 309. See also AJIL, vol. 5 (1911), p. 807.

[257] See Rousseau, *loc. cit.* (1980), p. 603.

[258] *Ibid.* (1979), p. 770; *Le Monde* and *Journal de Genève*, 12 October 1978.

[259] *Ibid.* (1980), pp. 605–606.

the unjustified military occupation of New Moore Island by the Indian authorities and calling on the New Delhi Government to withdraw its troops immediately and seek a peaceful solution to the conflict".[260]

140. On 28 June 1984, the United States Government lodged a protest against the landing on 18 June of a number of Canadian officials on Machias Seal Island, in the Gulf of Maine, which was claimed by both States. Canada replied that the island formed part of its territory and that a Royal Canadian Mounted Police patrol was simply carrying out routine checks.[261]

141. Chile formulated a protest, through its Minister for Foreign Affairs, following the issue by France of a postage stamp in April 1991, featuring Easter Island in French Polynesia. Chile strongly objected to this.[262]

142. A letter of protest was sent by the Estonian Government on 22 June 1994 to the Russian Ambassador in Tallinn in response to a decree by the Russian President unilaterally setting the boundary between Estonia and the Russian Federation. The former claimed border territories that had belonged to it before the Soviet annexation in 1940. On 15 August 1994, the Estonian Prime Minister again requested the Russian Federation to suspend work on the demarcation of the Estonian-Russian border.[263]

143. Protests have been formulated in relation to still unresolved territorial or colonial disputes. For example, a note was sent on 3 September 1980 by Argentina to the Netherlands, as the depositary of several treaties to which the United Kingdom was party and which established its relationship with the Falkland Islands (Malvinas). On 6 January 1981, the British Government responded in kind, sending a letter to the Government of the Netherlands, which stated:

> The United Kingdom therefore cannot accept the Argentine declaration referred to above in so far as it purports to question the right of the United Kingdom to extend the said Conventions to the Falkland Islands and their Dependencies nor can it accept that the Government of the Argentine Republic has any right in this regard.[264]

144. The British Minister of State stated, with regard to the South Sandwich Islands, over which the United Kingdom was also in dispute with Argentina:

> Her Majesty's Government have repeatedly protested to the Argentine Government, most recently at the Anglo-Argentine talks in New York in February 1982, about their illegal scientific station in Southern Thule. We have adhered to international law and the United Nations charter which requires disputes to be settled by peaceful means. Britain's legal position is fully protected.[265]

145. In June 1999, India rejected statements by the Pakistani Minister for Foreign Affairs that the boundary separating India and Pakistan in the Kashmir region was incorrectly drawn and should be discussed further.[266]

146. The Western Sahara conflict, which is still unresolved, prompted Morocco to issue statements in which it rejected the Peace plan for self-determination of the people of Western Sahara prepared by the Personal Envoy of the Secretary-General of the United Nations.[267]

147. With regard to the territorial dispute between British Guiana and Venezuela, an interesting opinion is expressed on the official website of the Venezuelan Ministry of Foreign Affairs concerning the significance of a bilateral agreement relating to a previous legal situation, namely the Arbitral Award of 1899.[268] According to this website, the Geneva Agreement of 17 February 1966[269] does not, strictly speaking, "invalidate the Award of 1899, but discusses and then accepts Venezuela's non-compliance, noting its contention that the Arbitral Award of 1899 concerning the border between Venezuela and British Guiana is null and void".[270] The conclusion may be drawn from the opinion of Venezuela cited above that an agreement of this kind could amount to a protest concerning a legal situation relating to a territorial issue and, at the same time, its acceptance by the other party.

(ii) *Maritime areas*[271]

148. A very large category of protests relates to unilateral declarations by States of various forms of domestic legislation (laws, decrees, declarations, etc.) the intention of which is to extend unilaterally the maritime area over which they exercise sovereign rights or, at least, are in a position to exercise some control (for the purposes of marine conservation, customs controls or operations for the conservation of resources on the continental shelf and its subsoil).[272]

149. One such protest is that contained in a letter addressed by France to the Soviet Minister for Foreign Affairs on 11 October 1957, expressing France's rejection

[260] *Ibid.* (1981), p. 854.

[261] *Ibid.* (1985), p. 123.

[262] *Ibid.* (1992), p. 120.

[263] See RGDIP, vol. XCVIII (1994), pp. 732–733 and 973.

[264] Marston, "United Kingdom … 1981", pp. 446–447.

[265] *Ibid.*, "United Kingdom … 1982", p. 430.

[266] Poulain, *loc. cit.* (1999), p. 952.

[267] S/2003/565 and Corr.1, annex II. In a communiqué, the Moroccan Ministry of Foreign Affairs had stated that Morocco wished to reaffirm, in the strongest terms, its rejection of the plan submitted by James Baker, in terms both of its general structure and of the specific measures proposed, on the basis of principle, for operational reasons and in the interests of regional security.

[268] Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, decision of 3 October 1899, *British and Foreign State Papers, 1899–1900*, vol. XCII, p. 160.

[269] See footnote 53 above.

[270] Website http://esequibo.mppre.gob.ve, documents on the claim to the territory of Essequibo.

[271] The Special Rapporteur would like to express his gratitude for information concerning practice in this section, which was provided by Ruiloba García, author of the book *Circunstancias especiales y equidad en la delimitación de los espacios marítimos*. The information is contained in the author's personal archives.

[272] A considerable number of unilateral acts of this kind, ensuing from various protests, may be found in MacGibbon, "Some observations ...", p. 303. See, for example, the practice adopted by the United Kingdom, where the Hydrographic Office publishes an annual list of various States and their claims to territorial seas, contiguous zones, exclusive economic zones or other areas, such as fisheries, to which they lay claim. The text makes it clear that the "claims are published for information only. Her Majesty's Government does not recognise claims to territorial seas exceeding twelve nautical miles, to contiguous zones exceeding twenty four nautical miles or to exclusive economic zones and fisheries zones exceeding two hundred nautical miles" (Marston, "United Kingdom … 2000", pp. 594–600). An identical list was drawn up at the beginning of 2002 (*ibid.*, "United Kingdom … 2001", pp. 634–639).

of the boundary drawn by the Soviet Union in the Bay of Vladivostok, which it considered excessive and contrary to the prevailing rules of customary law.[273]

150. The decision by the Indonesian Government on 13 December 1957 to extend its territorial waters to 12 miles around the archipelago gave rise to a number of protests.[274]

151. Venezuela directed a number of official protests at Colombia for its entry into Venezuelan territorial waters, particularly maritime areas that were the subject of bilateral talks on establishing the boundary. Such a protest appears in the letter from Venezuela of 3 September 1970, which stated that Venezuela had never, on any occasion, recognized the right of Colombian vessels, or those of any other nationality, to fish in the waters of the Gulf of Venezuela without authorization from the Venezuelan authorities. Since time immemorial, Venezuela has been the country that has had exclusive fishery rights in the internal waters of the Gulf of Venezuela.

152. Venezuela also protested on numerous occasions at the presence of Colombian ships, including the Colombian Navy (the *Caldas* incident) in the Gulf of Venezuela. The protests, which took the form of statements by the President and the Minister for Foreign Affairs of Venezuela, or of official communiqués, reaffirmed Venezuela's sovereignty over certain maritime areas in the Gulf.[275]

153. The Irish Government lodged a protest, on 9 September 1974, against the British Government's announcement of 6 September 1974 claiming the United Kingdom's rights over the continental shelf adjacent to Rockall Island.[276]

154. One case of a protest that was clearly repeated over a period of time was the series of notes verbales from the Japanese Government to the Ministry of Foreign Affairs of the Soviet Union, in which Japan opposed the extension of Soviet territorial waters in Peter the Great Bay. The first was sent on 26 July 1957 and two subsequent ones repeated the same message.[277]

155. The Chinese Government repeatedly rejected (23 April, 28 May and 13 June 1977) the effectiveness for China of the boundary of the continental shelf agreed between Japan and the Republic of Korea in a treaty of 30 January 1974.[278]

156. Norway issued a protest, in October 1974, against experimental drilling operations by the United States in the Lofoten Islands.[279]

157. Protests were made by the United States against Ecuador's plan to extend its territorial sea to 220 miles (1967) and its subsequent reaffirmation of its claim. In addition, the United States protested in 1986 against Ecuador's establishment of straight baselines.

158. The United States also protested against the maritime claims contained in legislation adopted by the Islamic Republic of Iran in 1993. The protest took the form of a note from the United States Permanent Mission to the United Nations, dated 11 January 1994 and addressed to the United Nations, for circulation through the *Law of the Sea Bulletin*.[280]

159. On 4 January 1990, a note was sent to the United Nations by the United States Mission protesting against the army command announcement of 1 August 1977 issued by the Democratic People's Republic of Korea, which purported to establish a 50-nautical-mile military maritime boundary, measured from a claimed straight baseline from which the territorial sea is drawn in the Sea of Japan, and a military maritime boundary coincident with the claimed exclusive economic zone limit in the Yellow Sea.[281]

160. The United States expressed strong opposition to the extension by the Federal Republic of Germany of its territorial sea when, in November 1984, the latter unilaterally decided to extend its territorial waters in the North Sea from 3 to 16 miles, to the south and west of Heligoland Island, for the purpose of controlling maritime traffic in what were extremely polluted waters. President Reagan wrote a personal letter to Chancellor Kohl.[282]

161. A protest was made by the Soviet Union on 21 May 1987 over two violations of its territorial waters on 17 and

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[273] The text of the protest is as follows:

"In these circumstances, the Government of the Republic considers that the Soviet Government's attempted appropriation is contrary to international law and should therefore not be effective for itself or its nationals or for French ships or aircraft. The French Government expresses the hope that the Government of the Union of Soviet Socialist Republics will reconsider its attitude."

(Kiss, *op. cit*., vol. I, p. 21)

[274] See RGDIP, vol. LXII (1958), p. 163 (see the relevant note from the French Government, *ibid*., pp. 163–164), and *Japanese Annual of International Law*, No. 2 (1958), pp. 218–219 (see also the communication by the Japanese Government rejecting recognition of the extension, *ibid*., pp. 219–220).

[275] See the *Libro Amarillo del Ministerio de Relaciones Exteriores de Venezuela* since 1985.

[276] See Rousseau, *loc. cit.* (1975), pp. 503–504.

[277] See *Japanese Annual of International Law* (footnote 274 above), pp. 213–214. For the second note verbale from the Japanese Government to the Soviet Ministry of Foreign Affairs, dated 6 August 1957, see page 215. The third note verbale, dated 17 January 1958, from the Japanese Embassy to the Soviet Minister for Foreign Affairs, in reply to his note verbale of 7 January 1958, reaffirming the Japanese Government's position, appears in *ibid.*, pp. 217–218 (unofficial translation).

[278] Agreement between Japan and the Republic of Korea concerning the establishment of boundary in the northern part of the continental shelf adjacent to the two countries (Seoul, 30 January 1974), United Nations, *Treaty Series*, vol. 1225, No. 19777, p. 103. See also Rousseau, *loc. cit.* (1978), pp. 243–245. A further Chinese rejection was issued on 26 June 1978 (*ibid.* (1979), pp. 143–144).

[279] See Rousseau, *loc. cit.* (1975), p. 812.

[280] See *The Law of the Sea: Current Developments in State Practice*, No. IV (United Nations publication, Sales No. E.95.V.10), pp. 147–149.

[281] The letter states:

"The Government of the United States therefore objects to the claims made by the Government of the Democratic People's Republic of Korea contained in the Army Command Announcement of August 1, 1977, which is inconsistent with international law, and reserves its rights and those of its nationals in this regard.

"The objection in this note is made without prejudice to the legal position of the Government of the United States of America which has not recognized the Government of the Democratic People's Republic of Korea."

(*Law of the Sea Bulletin*, No. 15 (May 1990), p. 9)

[282] See Rousseau, *loc. cit.* (1985), pp. 389–390.

21 May by the United States nuclear submarine *Arkansas*, off Kamchatka. The United States Embassy in Moscow expressed its opposition to the Soviet protest on the grounds that the *Arkansas* was in international waters: the United States did not recognize the Soviet Union's unilaterally declared 30-mile extension of its territorial sea along the whole length of its far-east coast, arguing that Soviet waters extended only to the three-mile limit.[283]

162. In a note addressed to the Canadian Embassy in Washington, D.C., on 20 September 1978, the United States Government rejected Canada's extension of its jurisdiction over the continental shelf and fisheries in the Gulf of Maine area.[284]

163. Spain's adoption of Royal Decree 1315/1997, of 1 August 1997,[285] establishing a fisheries protection zone in the Mediterranean, between Cabo de Gata and the French coast, with a view to preventing the uncontrolled exploitation of fisheries resources in the Mediterranean as a result of factory fishing by third States, prompted protests by France. These protests were based on France's disagreement with the application of the equidistance principle enshrined in the Royal Decree in fixing boundaries with neighbouring States with which no delimitation agreement existed.[286]

164. The case of Gibraltar, disputed between Spain and the United Kingdom, is equally important in relation to the formulation and projection of protests.[287] Thus it may be seen that the United Kingdom lodged a protest against Spain on 2 April 1986 following an incident that occurred on 20 March 1986, when a Spanish navy vessel entered Gibraltar's territorial waters without authorization or notification. The protest was rejected by Spain, which argued that, under the Treaty of Utrecht,[288] art. 10, Spain had ceded to the United Kingdom no more than the internal waters of the Port of Gibraltar, so all other waters were to be considered Spanish.[289] This position emerged clearly from the words of the Spanish Minister of Defence, who made the following statement:

> Spain has always maintained the position that there can be no recognition of British waters in the Bay of Algeciras, with the sole exception, restrictively interpreted, of the waters within the Port of Gibraltar. The British Government is attempting to impose the application of the 1958 Geneva Convention, art. 12, its interpretation of which is not accepted by Spain.[290]

165. The profound differences that have long existed between Spain and the United Kingdom with regard to Gibraltar are thrown into sharp relief by the reply made by the Minister of State, British Foreign and Commonwealth Office, who, on 19 May 1997, issued the following statement: "The territorial sea adjacent to the coast of Gibraltar is under British sovereignty. The territorial sea extends for three nautical miles from the coast, except where it abuts Spanish territorial waters, in which case the boundary follows a median line." According to a statement of 2 June 1997: "We are clear that the territorial sea adjacent to the coast of Gibraltar is under British sovereignty. The Government of Spain disagrees." [291]

166. Numerous statements concerning the dispute over Gibraltar have been exchanged. For example, the controls placed by Spain at the Gibraltar border from the end of October 1994 showed and brought into the open the tension between Spain and the United Kingdom. The Spanish Ambassador in London was notified of an official protest launched by the British Government; but at the same time, the meetings aimed at resolving the differences between the two countries, which had been suspended since March 1993, were resumed.[292]

167. As for the United Kingdom's position with regard to the United Nations Convention on the Law of the Sea, the Secretary of State for Foreign and Commonwealth Affairs wrote the Secretary-General of the United Nations the following letter for clarification:

> With regard to point 2 of the declaration made upon ratification of the Convention by the Government of Spain, the Government of the United Kingdom has no doubt about the sovereignty of the United Kingdom over Gibraltar, including its territorial waters. The Government of the United Kingdom, as the administering authority of Gibraltar, has extended the United Kingdom's accession to the Convention and ratification of the Agreement to Gibraltar. The Government of the United Kingdom, therefore, rejects as unfounded point 2 of the Spanish declaration."[293]

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[283] *Ibid.* (1987), pp. 1341–1342.

[284] The letter reads, in part, as follows:

"The United States Government considers the new Canadian claim to be without merit. The United States believes that Georges Bank is a natural prolongation of United States territory and that, in view of the special circumstances existing in the Gulf of Maine area, the maritime boundary published by Canada on November 1, 1976, based on the principle of equidistance, is not in accord with equitable principles. *A fortiori*, a delimitation allocating an even larger area of the United States continental shelf to Canada is not in accord with equitable principles.

"...

"[T]he United States rejects the expanded claim of Canadian jurisdiction. The United States will continue to exercise fisheries jurisdiction in the area of the expanded claim in accordance with United States law.

"The United States is nonetheless prepared to continue negotiations toward a settlement of maritime boundary issues, or an agreement to submit unresolved maritime boundary issues to international adjudication."

(Nash Leich, *loc. cit*. (1979), pp. 132–133).

[285] *Boletín Oficial del Estado*, No. 204 (26 August 1997).

[286] Jiménez Piernas, "La ratificación por España de la Convención de 1982 sobre el Derecho del mar y del Acuerdo de 1994 sobre la aplicación de la Parte XI : nuevos riesgos de la codificación del derecho internacional", p. 120, footnote 55.

[287] Only a few instances of international practice are given here, by way of example; for a follow-up to this dispute, the reader is recommended to consult, among others, the website of the Spanish Ministry of Foreign Affairs, which gives a far fuller list of statements on that topic (www.mae.es), or the articles appearing on the official Gibraltar website (www.gibraltar.gov.gi), as well as the *British Year Book of International Law,* REDI and the *Spanish Yearbook of International Law*.

[288] Treaty of Peace and Friendship between Great Britain and Spain (Utrecht, 13 July 1713), *British and Foreign State Papers, 1812–1814*, vol. I, part I, p. 611.

[289] See Rousseau, *loc. cit.* (1986), p. 975.

[290] REDI, vol. XLIV, No. 2 (1992), p. 529, and *Diario de Sesiones del Congreso de los Diputados* (1992), Fourth Legislature, No. 477, p. 14064.

[291] Marston, "United Kingdom … 1997", p. 593.

[292] See RGDIP, vol. IC (1995), p. 428.

[293] Marston, "United Kingdom … 1997", p. 495.

(iii) *Protest as a sign of support for an entity that will subsequently be recognized*

168. At the time that the process of disintegration of the Soviet Union was taking place, Belgium formulated a protest regarding the actions taken by Soviet troops in what subsequently became the Baltic States. It was thus showing, albeit indirectly, that it supported the independence of Estonia, Latvia and Lithuania and that diplomatic relations would later be re-established.[294]

169. It may be concluded from these examples of the practice, which reflects just one part of States' acts, that the concept of protest is of enormous importance in the international sphere: it takes numerous forms and is used in the most varied situations. As shown in a number of the instances cited—which form no more than a sample indicating the hundreds of protests that are made in situations of every kind that are considered unacceptable—in many cases, no obligation on the part of the State formulating the protest is involved. The protest most frequently entails non-acceptance of something or simply an expression of condemnation of a third party's previous conduct. In such cases, clearly, the definition of the autonomous unilateral act, in the sense in which it has been used throughout this report, comes up against certain difficulties of application, as though protests always took the same form. That is why various authors have chosen not to consider protests under the same category as other unilateral acts, such as promise or recognition, for example, whose nature as unilateral acts, and the effects associated with them at the international level, is more evident.

2. Notification

170. This concept has been defined as an "act by virtue of which a State makes known to another State or other States certain specific facts to which legal relevance attaches".[295] Its exact nature is highly controversial, since, in the view of some authors, it does not constitute a unilateral act *per se* but is simply a mechanism enabling a legal act to become known.[296] In this context, however, the really important element is the situation that gives rise to the notification rather than the notification itself. By the same token, the view has also been put forward that notification, although of a unilateral nature from the formal point of view, produces no effects in itself, since it is the result of a pre-existing action, and is therefore not an autonomous act.[297] In fact, it may be seen as the formula used to communicate or make known a situation, acting as the medium through which such a statement is expressed.[298]

171. In this context, a distinction should be drawn between two categories of notification, on the basis of their addressees: Miaja de la Muela states, in this regard, that, "by their nature, some have one or few addressees, while others are addressed to all States with which the notifier has regular diplomatic relations".[299] In fact, notification is frequently linked with a range of international treaties, the provisions of which state that other States parties must be notified of given situations relating to the international treaty concerned;[300] this is the familiar concept of the unilateral act—which it is—but associated with a specific treaty regime from which it arises.[301] The effects created by discretionary notifications would be different, since

[294] The joint communiqué issued by Belgium and Latvia on 5 September 1991 states: "Recalling the firm Belgian protests against the violent actions of the soviet armed forces in the Balticum, Latvia thanks Belgium for its efforts to support the Latvian cause in the previous difficult period" (Klabbers and others, *op. cit*., p. 177).

[295] Definition by Venturini, *loc. cit*., p. 429.

[296] As Miaja de la Muela has noted, in "Los actos unilaterales en las relaciones internacionales", p. 434, "rather than being a particular type of unilateral act, notification is an integral element of the most important unilateral acts, that is, acts arising out of an express statement, which may take the form of either the expression of will, feelings and beliefs—although only expressions of will constitute an international legal transaction—or the commission of an act".

[297] See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, p. 326, para. 52.

[298] One example will serve to show that notification has a variety of uses: in notifying the French Government that the person appointed ambassador did not seem appropriate to the receiving State, the Iranian Government informed the French Government, on 2 November 1982, of its refusal to accept or receive Mr. José Paoli as ambassador in the following terms:

> "In view of the French Government's support for counter-revolutionaries and terrorists who commit terrible crimes in Iran and kill its most upright citizens, the Iranian State cannot receive the Ambassador of France at this time. As long as this hostile attitude on the part of the French Government to the Muslim Iranian nation persists and French territory remains a refuge for hypocritical terrorists, there will be no progress in political relations between the two countries."

(Rousseau, *loc. cit.* (1983), p. 416)

[299] *Loc. cit*., p. 437; although what would be really interesting in this connection would be the effects produced with regard to States that had not been recipients of the notification concerned, or in the event that the notification was presented in a defective or incomplete form. A case-by-case assessment and interpretation would be the best way to judge the actual significance of each notification and its practical effects.

[300] It is also often customary to issue a notification, in the procedural sense of the word, to inform a jurisdictional body of a State's position in dealing with particular proceedings. For example, on 18 January 1985, the United States Department of State announced President Reagan's decision that the United States would not participate in the case brought by Nicaragua against the United States before ICJ on 9 April 1984 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392). A formal notification that the United States had abandoned the case was sent to the Registrar of the Court the same day by the representative of the United States, the State Department Legal Adviser, the wording being as follows:

> "The United States has given the deepest and most careful consideration to the aforementioned judgment, to the findings reached by the Court, and to the reasons given by the Court in support of those findings. On the basis of that examination, the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law ... Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims."

(Nash Leich, *loc. cit.* (1985), p. 439)

Although the content will be different, notification of acceptance of the jurisdiction of ICJ is, of course, of a similar nature. In this case, the connection between the notification and an international treaty would be beyond question.

[301] See Suy, *op. cit*., pp. 91–93. Suy (p. 107) emphasizes that "[n]otification provided for under a rule of international treaty law is thus not an expression of will exercised under a right or power. It is a formal act. It remains possible, however, that a rule of international treaty law may take a notification into consideration so that it may be given legal effect".

essentially they simply provide information about a situation, even though there is no legal obligation to do so.[302]

172. In some cases in recent practice, the notification of action to be taken is also directly related to judicial proceedings and the question of whether or not they should continue, as is the case with regard to applications for extradition;[303] a fundamental change in circumstances may, on occasion, prompt the issue of a notification announcing the cessation of a given State measure that had been operative until then.[304]

173. In its reply to the questionnaire drawn up by the Commission, the Netherlands presented some examples of relevant practice, most specifically with regard to the notification of domestic legislation adopted in 1985 concerning the country's territorial waters;[305] State practice contains a wealth of examples of the way in which States have given notification or have issued statements concerning the extension of their maritime areas.[306]

174. There is a direct connection between the emergence of new States on the world stage—that is, the products of State succession—and the frequent notifications of acceptance of such succession, which would, for example, involve consideration of a State as party to international treaties to which its predecessor State was party.[307] Further, reference may be made to a recent case in which Bosnia and Herzegovina and Spain established, by means of an exchange of letters between their respective Ministries of Foreign Affairs (a notification followed by a reply), a bilateral international agreement that provided for the succession by the two States to a number of bilateral agreements concluded between Spain and the former Yugoslavia. These agreements were listed in both documents. The termination of an agreement on air transport was also agreed on.[308]

175. The conflicts that have arisen over recent years provide examples of notifications the aim of which is to justify the adoption of anti-terrorism measures motivated by the need to respond to the events of 11 September 2001.[309]

176. There is one category of unilateral acts that could be termed "imperfect", since, if they receive no response or are not accepted, they are lacking in full effect. This category involves a specific form of notification whereby third parties are informed of the adoption of permanent neutrality status. To enjoy its full effect at the international level, it usually requires a positive response from third States, which will corroborate and accept the situation.

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[302] This type of notification is used in a multitude of situations of varied kinds. An analysis of the practice has yielded several cases such as the following, among others: (*a*) commitments to give notification of a specific activity; this would apply to the action taken by France concerning new nuclear tests that it was considering conducting (12 and 16 May and 17 and 23 June 1988); specifically, France announced, at the beginning of June 1988, that "in the interests of transparency" France would give notification of the number of tests conducted during the preceding 12 months (Rousseau, *loc. cit.* (1988), p. 992); (*b*) notification of a fact or situation arising out of the termination of an international agreement, such as the notification addressed by Greece to the United States, in which the latter was informed of the closure of the United States airbase in Hellenikon on 21 December 1988, which was the expiry date of the defence and economic cooperation treaty between the two countries signed on 8 September 1983 (*ibid.* (1989), p. 127).

[303] This applied in the Pinochet case. The British Secretary of State for the Home Department sent the following letter to the Spanish Ambassador (and identical ones to the Belgian, French and Swiss Ambassadors): " I am writing to inform you that the Secretary of State has this morning decided pursuant to section 12 of the Extradition Act 1989, to make no order for the return of Senator Pinochet to Spain. This letter sets out the Secretary of State's reasons" (Marston, "United Kingdom … 2000", p. 558).

[304] A case in point was the notification involving a change in the previous arrangements between France and Spain concerning the granting of refugee status to Spanish nationals living in France: the abolition of such status by virtue of an administrative decision of 30 January 1979. The French Ministry of Foreign Affairs announced in a communiqué on 30 January 1979:

> "The democratization of the Spanish Government, the general amnesty law, the adoption of the Constitution and the country's accession to the Geneva Convention relating to the Status of Refugees have led the Ministry of Foreign Affairs to decide that, in accordance with the Convention, which was adopted on 28 July 1951, the circumstances in which Spanish refugees could claim such status are no longer relevant.
>
> "When their documents expire, therefore, they will not be renewed. Persons to whom such status has already been granted will shortly receive notification of its withdrawal."

(Rousseau, *loc. cit.* (1979), p. 767)

[305] See *Yearbook … 2000*, vol. II (Part One), document A/CN.4/511, pp. 267–268. Specifically, the United Nations Convention on the Law of the Sea, art. 16, para. 2, states: "The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations."

[306] Reference may again be made to the Netherlands, which, even before the domestic legislation referred to above was drawn up, gave notification, on 26 October 1979, of the extension of its territorial sea from 3 to 12 miles. The Prime Minister stated that wide-ranging talks would be held with Belgium, the Federal Republic of Germany and the United Kingdom before the amendment entered into force. The procedure would be adopted in the Dutch Antilles with a view to preventing marine pollution (Rousseau, *loc. cit.* (1980), p. 664). Since the usual course of action is that the extension of maritime areas is established by internal legislation, it is normal that, once publicized, such action prompts both positive reactions and also strong protests, when a boundary is not accepted by third States. Information on State practice in respect of maritime boundaries may be found on the web page of the Division for Ocean Affairs and the Law of the Sea of the United Nations (www.un.org/Depts/los).

[307] A case in point is a letter dated 31 December 1991 in which the British Prime Minister wrote to the President of Ukraine as follows: "I can confirm that, as appropriate, we regard treaties and agreements in force to which the United Kingdom and the Union of Soviet Socialist Republics were parties as remaining in force between the United Kingdom and Ukraine" (Marston, "United Kingdom … 1998", p. 482).

[308] The agreements that remain in force relate to educational and cultural, scientific and technical, and economic and industrial cooperation, cooperation on tourism, legal aid with regard to criminal matters and extradition, and passenger and freight road transport (*Boletín Oficial Del Estado*, No. 68 (19 March 2004) and No. 97 (21 April 2004)).

[309] See, for example, the letter dated 7 October 2001 addressed to the President of the Security Council by the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom to the United Nations, in which he writes:

> "In accordance with Article 51 of the Charter of the United Nations, I wish on behalf of my Government to report the United Kingdom of Great Britain and Northern Ireland has military assets engaged in operations against targets that we know to be involved in the operation of terror against the United States of America, the United Kingdom and other countries around the world, as part of a wider international effort.
>
> "These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51 ... these operations are not directed against the Afghan population, or against Islam."

(S/2001/947). See also Marson, "United Kingdom … 2001", pp. 682–683.

A similar statement was made by the British Foreign Secretary to the General Assembly on 11 November 2001 (*ibid.*, p. 690). See also *Official Records of the General Assembly, Fifty-sixth Session, Plenary Meetings*, 46th meeting.

That is what gives it its specific nature. Austria's neutrality, adopted in 1955, is a case in point, among others.[310]

177. The purely unilateral nature of this act may be called into question, for various reasons, beginning with the way in which it was formulated: known as the Moscow Memorandum of 15 April 1955, it was originally concluded with the Soviet authorities and subsequently accepted by France, the United Kingdom and the United States.[311] It should, however, be pointed out that Austria's neutrality had already been set out in its Constitutional Law of 26 October 1955 and communicated through the diplomatic channel to all States with which Austria had diplomatic relations. In Degan's opinion, this constitutional rule really amounted to an offer, which would have real effects only once it was accepted by other States, whether implicitly or explicitly.[312] As Zemanek maintains, however, various actions have been taken in this regard, each with its own independent legal connotation. Thus, if an acceptance of Austria's permanent neutrality status turns out to be invalid, it will not have the same effect as the statements made by third States, whereas a defect in the Austrian declaration could have the effect of invalidating all the acceptances formulated by third States.[313] What is certain is that, as Rousseau indicates, the basic question is whether the status of permanent neutrality, as such, has full effects or whether acceptance by third States is required for the full effects.[314]

178. International practice over the past 20 years offers other examples of the adoption of permanent neutrality status: one example is Malta, which unilaterally declared its neutrality on 15 May 1980,[315] and another is Costa Rica, which made its declaration on 17 November 1983.[316]

D. Some forms of State conduct which may produce legal effects similar to those of unilateral acts

179. This section offers a preliminary introduction to the attempt to list the forms of State conduct that may produce legal effects, with the understanding that these are just a few examples of approaches that have been embarked upon but are not at all conclusive.

180. In the context of territorial disputes and in relation to the delimitation of maritime boundaries, some interesting forms of conduct have been observed, and these are reflected in the way certain areas are used. The term "usage", which has been defined in various ways in international texts,[317] although it remains ambiguous, may mean a generalized pattern of conduct involving a certain behaviour and its repetition. In the case of the delimitation of marine and submarine waters in the Gulf of Venezuela (Colombia/Venezuela), usage was considered to reflect a form of conduct on which historic title was based.[318]

181. Although a State might not recognize a given entity, certain forms of conduct may reveal its support of that entity. During a parliamentary debate concerning Tibet, the British Minister of State noted that:

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[310] Austrian neutrality is a question which still has an effect, even now: on 8 February 2001, speaking during an official visit to Austria, the Russian President said in that regard: "During the cold war, Austrian neutrality proved its usefulness, for Austria, Europe and the whole world. Today, although we face fewer difficulties and opposing blocs no longer exist ... Austrian neutrality remains a precious achievement" (RGDIP, vol. CV (2001), p. 415).

[311] Verdross, "La neutralité dans le cadre de l'O.N.U. particulièrement celle de la République d'Autriche", especially pp. 186–188.

[312] Degan, *op. cit*., pp. 299–300. However, in reply to a question concerning the United Kingdom's obligations in the event of any breach of Austria's neutrality, the British Lord Privy Seal replied: "The legal basis of Austria's neutrality is the constitutional law on neutrality passed by the Austrian Parliament on 26 October 1955. Her Majesty's Government have no specific obligations in international law relating to a breach of this neutrality" (Marston, "United Kingdom … 1980", p. 484). This emphasizes the unilateral nature of the decision.

[313] "The legal foundations of the international system: general course on public international law", p. 197.

[314] Rousseau states his position with confidence: "It is, however, doubtful from the legal point of view whether such a procedure is sufficient to establish permanent neutrality status enforceable against third States in the absence of a subsequent treaty and unequivocal recognition by such States" (*loc. cit.* (1984), p. 449). The problem may lie in the fact that the consequences of permanent neutrality are different from those of other unilateral acts, in which the will of third parties has no impact and does not affect the effectiveness of the act. A declaration whereby it is decided unilaterally to adopt such a position at the international level would be valid, although having very limited effects, or none, if third States declined to recognize the new state of affairs. The question would be different if the declaration of neutrality was made by an entity lacking the competence to implement it, as occurred in the case of the Cook Islands on 29 January 1986. The Prime Minister of the Cook Islands announced that the archipelago was declaring its neutrality, owing to the termination of the effects of the Security Treaty between Australia, New Zealand and the United States (ANZUS Treaty), and New Zealand's incapacity to defend the islands. The islands would therefore not have any military relations with foreign States or authorize further visits from United States warships. It seems that this declaration aroused no reaction on the part of either London or Wellington, since, according to Rousseau's theory, it lacked legal validity in view of the archipelago's lack of international competence (*ibid.* (1986), pp. 676–677).

[315] The first State to accept Malta's status was Italy, by virtue of an exchange of notes between Italy and Malta on 15 September 1980 concerning the island's neutrality, in which Italy committed itself to guaranteeing that neutrality; Malta, meanwhile, made the commitment to maintain its status, which excluded participation in military alliances and the stationing of foreign forces and bases on Maltese soil (Rousseau, *loc. cit.* (1981), p. 411; *Keesing's Contemporary Archives,* vol. XXVII (1981), p. 31076). Most relevant of all, the matter does not end there, since, during the course of 1981, Malta actively sought recognition and guarantees for the island's neutrality from third States. Such an acceptance was officially announced by France, on 18 December 1981, in the following terms:

> "Gives its full support, in accordance with the Charter of the United Nations, to the independence of the Republic of Malta and its status of neutrality, based on the principles of non-alignment;
>
> "Undertakes to respect that neutrality;
>
> "Calls on all other States to recognize and respect the status of neutrality chosen by the Republic of Malta and to refrain from any activity incompatible with such recognition and respect."

(Rousseau, *loc. cit.* (1982), p. 167)

[316] The President of Costa Rica formally announced his country's permanent, active and unarmed neutrality in a speech delivered at the National Theatre of the capital, San José, on 17 November 1983. He declared that the statement would be communicated to all States having diplomatic relations with Costa Rica and that the country's political groups would have to be consulted concerning the constitutional amendment that would be required (see Gros Espiell, *La Neutralidad de Costa Rica*, p. 75).

[317] "Continued usage of long standing" (Institute of International Law, 1894); "international usage" (*ibid*., 1928); "established usage" (Harvard draft of convention on territorial waters, *Supplement to* AJIL, vol. 23, special number (April 1929)); "continuous and immemorial usage" (draft convention amended by Mr. Schücking, *ibid*., vol. 20 (July and October 1926), p. 142); and in the work of codification done in preparation for the Conference for the Codification of International Law (The Hague, 1930). See *Yearbook ... 1962*, vol. II, document A/CN.4/143, p. 15, para. 101).

[318] See Lara Peña, *Las tesis excluyentes de soberanía colombiana en el Golfo de Venezuela*.

Tibet has never been internationally recognised as independent. This Government and our predecessors have not recognised the Dalai Lama's government in exile.

...

We do not recognise the Dalai Lama as the head of the Tibetan Government-in-exile, but we do acknowledge him as a highly respected spiritual leader, the winner of the Nobel peace prize and an important and influential force.[319]

182. The severing of diplomatic relations may be equivalent to the non-recognition of governments: on 24 September 2001, following the events of 11 September, the United Arab Emirates, one of the three countries that had recognized the Taliban regime as the Government of Afghanistan and had established diplomatic ties with it, decided to break them off. Saudi Arabia followed suit one week later.[320]

183. In a case where diplomatic relations were severed in response to declarations by another country that were considered inadmissible, the President of Ecuador stated on 8 October 1985 that "until a legitimate popular election is held, in which all Nicaraguans have the right to self-determination and to choose their own destiny, without resorting to the club or stick or other form of violence, the Central American drama will continue".[321] Daniel Ortega, President of Nicaragua, responded to this statement on 10 October, accusing his Ecuadorian counterpart of being "a tool of the United States, which is trying to divide the Latin American community and block the peace efforts in Central America".[322] As a result of this exchange of statements, Ecuador, through an official communiqué dated 11 October 1985, declared that "the Government of Ecuador categorically rejects the statements of Commander Ortega and, in the interest of protecting the dignity and sovereignty of the nation, has decided to sever diplomatic and consular relations with the Government of Nicaragua".[323]

184. A "friendly" attitude towards a separatist group may lead to protests. For instance, on 11 November 1999, the visit by a representative of Chechnya to Paris and a press conference given at the French National Assembly elicited protests from the Russian Federation, which accused France of collaborating with terrorism. The Ambassador of France in Moscow was reportedly warned of the potential impact of this unfriendly gesture on bilateral relations between the two countries.[324]

185. Certain forms of conduct may resemble protests, and are intended to prevent the consolidation of a given claim: the establishment of the exclusive economic zone (200-mile limit) has led to many tense situations, as shown by the following example. In 1975 Mexico warned the relevant regional body at the time, the Inter-American Tropical Tuna Commission, that it needed to create a regional conservation system that would be better adapted to the new legal reality emerging from the United Nations Conference on the Law of the Sea, that is, the 200-mile exclusive economic zone. At the opening of the negotiations to which Mexico had been invited for this purpose, the legal dispute with the United States became more obvious, and an unfortunate chain of events was set in motion, resulting in United States ships infringing the 200-mile Mexican zone and fishing for tuna illegally. This disagreement with respect to the new situation led Mexico to resign from the Commission and to begin detaining United States fishing vessels. In response, the United States imposed an embargo on exports of Mexican tuna to the United States. Meanwhile, Mexico had adopted provisional legislation aimed at concluding a regional agreement to conserve and administer tuna in the Eastern Pacific. Since then, the two countries have been holding a series of talks, both formally and informally, aimed at settling this dispute.[325]

186. The existence of tense relations between countries may in turn lead to incidents: those having to do with fishing, for example, sometimes result in protests, as noted above.[326] This tension may also take the form of impediments to official visits.[327]

E. Silence and estoppel as principles modifying some State acts

1. Silence and its potential international effects

187. In his first report on unilateral acts of States, the Special Rapporteur had considered silence, according to much of the literature, to be "a reactive behaviour and a unilateral form of expression of will", but he had added that "it certainly cannot constitute a formal unilateral legal act".[328] Moreover, it bears a close relationship to

[319] Marston, "United Kingdom … 1999", p. 425.

[320] See Remiro Brotóns, "Terrorismo, mantenimiento de la paz y nuevo orden", p. 151.

[321] Lira B., *loc. cit.*, p. 243.

[322] *Ibid.*

[323] *Ibid.*

[324] See Poulain, *loc. cit.* (1999), p. 991. Moreover, on 29 January 2002, the French Ambassador in Moscow was reportedly summoned to the Ministry of Foreign Affairs of the Russian Federation and was told that France had shown an unfriendly attitude towards the Russian Federation. The United Kingdom and the United States had been subjected to the same measure as had France with respect to Chechnya. The meeting in Paris of the former Chechen "Minister of Culture" with the French Minister of Education apparently resulted in the following note: "Moscow wonders what could have been behind the meeting of French officials with a representative of the Chechen extremists, whose direct ties with O. bin Laden have been irrefutably confirmed" (RGDIP, vol. CVI (2002), p. 413).

[325] See Szekely, "Aplicación en Latinoamérica de la Convención de las Naciones Unidas sobre el Derecho del Mar", p. 52.

[326] In late November 1967, a Chilean gunboat, the *Quidora*, entered Argentine territorial waters at Ushuaia without prior authorization. This incursion provoked a note of protest from the Chilean Minister for Foreign Affairs to the Argentine Ambassador. For more on these boundary incidents, see "Límites. El bloqueo de Ushuaia", *Primera Plana* (Buenos Aires), year V, No. 245 (5–11 September 1967), p. 13, and *Clarín* (Buenos Aires), 1 December 1967, p. 18.

[327] When German Minister of State, Ludger Volmer's visit to Cuba was cancelled, he issued a statement on 16 February 2001 that said that the Cuban Government had asked him to forego his visit to Cuba scheduled for 19 February 2001 (at the invitation of Cuba). That situation was a result of statements he was alleged to have made that were critical of Cuba. He failed to understand that interpretation. But it demonstrated that for the time being Cuba was not sufficiently willing to engage in a political dialogue in the fullest sense of the word. In such circumstances his visit to Cuba would not make much sense. His scheduled visit to the Dominican Republic would not be affected by the cancellation of his visit to Cuba.

[328] *Yearbook … 1998*, vol. II (Part One), document A/CN.4/486, p. 326, para. 50. As Rodríguez Carrión notes, in *Lecciones de Derecho Internacional Público*, p. 171, "*silence* is more than just a different type of unilateral act: it is a means of expressing the unilateral will of the State".

estoppel, in the sense that a given situation could make a State liable to exception if its consent to that situation, which could produce legal effects, might be inferred from its silence.

188. Strictly speaking and delineated in precise terms, silence cannot be considered a unilateral act; at times it may even produce legal effects by a "non-existent unilateral act", where, for example, faced with a given situation, a State could have issued a protest but refrained from doing so. In one way or another, this silence, along with other aspects that may well reveal the will of the State in question, may make a retraction impossible if the conduct continues.

189. Silence as such usually has legal consequences if it is related to a prior act on the part of another subject;[329] the Special Rapporteur therefore inclines towards the position held for some time by Sicault, whereby silence, since it cannot produce legal effects independently and requires another act in order to do so, does not come under the definition of unilateral engagement given at the beginning of his study.[330] Its effects are therefore relative, as French and German doctrine and jurisprudence, in particular, have traditionally suggested;[331] in contrast, however, the Anglo-Saxon school has defended the fiction of so-called "tacit will", in the understanding that it facilitates the passage from facts to law and allows for the maintenance of a certain vitality in international law so that the obstacles created by the negligence of some States can be overcome.[332]

190. In the Commission, for example, the views expressed in this regard have been very diverse; thus, it has been noted that while some types of silence definitely do not and cannot constitute a unilateral act, others may be described as intentional "eloquent silence", expressing acquiescence, and therefore do constitute such an act.[333] Moreover, it must be noted that silence produces important legal effects in some multilateral conventions.[334]

191. It has even been affirmed that acquiescence,[335] which may be (but is not always) derived from silence, is probably one of the most difficult issues and one of great practical importance, in view of its consequences. As MacGibbon has pointed out, "[a]cquiescence ... takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection".[336] What is indeed significant is that an opposable situation created by acquiescence is of particular importance for a State which enjoys a right on the basis of a customary rule which has not yet been fully consolidated, or when all aspects of its application on individual situations are still a matter of dispute.[337] Moreover, as Carrillo Salcedo has observed:

> It may be said that acquiescence is an admission or acknowledgement of the legality of a controversial practice, or that it even serves to consolidate an originally illegal practice. The State that has admitted or consented cannot raise future objections to the claim, by virtue of the principle of estoppel or "contrary act". Acquiescence thus becomes an essential element in the formation of custom or prescription.[338]

192. In order for acquiescence to produce legal effects, however, it is necessary for the party whose implicit consent is involved, first of all, to have had knowledge of the facts against which it refrained from making a protest; the facts must be generally known, if they have not been officially communicated. Each of these aspects was duly taken into account, in one way or another, by ICJ in the *Fisheries* case, based on the idea that the notoriety of the facts, the general toleration of the international community, the United Kingdom's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom;[339] however, in reality, as Carrillo Salcedo points out, in this case:

> The valid legal effects of the situation derive, then, not from the tacit or express consent of third States, but from the notoriety of the facts. The opposable *erga omnes* character of these legal situations is ultimately based on their compatibility and non-contradiction with the international legal order which recognizes the coastal State as the only one competent to establish the baseline of its territorial sea.[340]

193. Shortly thereafter, ICJ made a similar decision in the *Temple of Preah Vihear* case.[341] What is more, arbi-

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[329] The enormous number of protests that occur in international practice is, in the view of the Special Rapporteur, an important indicator that silence may have significant effects; therefore, each time there is a risk that a given situation with which a State disagrees might become more acute, the affected State or States will protest forcefully. The following is just one example (see Rousseau, *loc. cit*. (1979), pp. 143–144): upon the exchange of the instruments of ratification of the treaty between Japan and the Republic of Korea on 5 February 1974 on the joint delimitation and exploitation of the continental shelf situated in the eastern part of the China Sea, China reaffirmed its opposition to this treaty, which it had already reiterated three times, on 23 April, 28 May and 13 June 1977 (*ibid*. (1978), pp. 243–245). In a note issued on 26 June 1978, the Chinese Minister for Foreign Affairs stated that China expressed its deep indignation and raised a strong protest against the treaty, which it said undermined the sovereignty of China, and that any division of the continental shelf between different countries could be decided only after consultations between China and the countries concerned.

[330] *Loc. cit*., p. 673.

[331] As Bentz has pointed out, French jurisprudence has highlighted that "the silence of one party cannot bind it in the absence of any other circumstance" (*loc. cit*., p. 46).

[332] Idea taken from Bentz, *loc. cit*., pp. 52–53.

[333] *Yearbook… 2000*, vol. II (Part Two), p. 96, para. 585. That silence has very different aspects is also affirmed by Suy, who notes that "the formula '*qui tacet consentire videtur*' has no absolute value in law. Silence may, indeed, mean that an offer, a violation or a threat leaves the recipient totally indifferent … It may also express opposition" (Suy, *op. cit*. p. 61).

[334] See the Vienna Convention on the Law of Treaties, art. 65, para. 2, or the United Nations Convention on the Law of the Sea, art. 252.

[335] As affirmed by Salmon, "[a]cquiescence is a consent imputed to a State by reason of its conduct, whether active or passive, towards a given situation. Acquiescence is liable to occur in many circumstances" ("Les accords non formalisés ou '*solo consensu*'", p. 15).

[336] "The scope of acquiescence ...", p. 143.

[337] See Degan, *op. cit*., p. 353.

[338] "Funciones del acto unilateral en el régimen jurídico de los espacios marítimos", pp. 21–22. The author rightly adds that:

> "Acquiescence thus acts as a corrective to the rigidity of the dogmas of sovereignty and voluntaristic positivism in international law. Acquiescence represents an important factor in the development and formation of customary law, like that of '*opinio juris*' in the formation of customary obligation. '*Opinio juris*' differs from acquiescence, but it becomes its logical consequence."

[339] *I.C.J. Reports 1951*, p. 138 (see footnote 208 above).

[340] *Loc. cit*., p. 12.

[341] *I.C.J. Reports 1962* (see footnote 191 above). After considering the role of acquiescence when it results from an absence of protest

tral tribunals[342] and domestic courts[343] have more recently handed down decisions with respect to the effects and conditions of acquiescence.

194. To some extent, the conclusion might be drawn, in view of the above-mentioned legal precedents, that acquiescence is generally the result of the concomitance of various signs pointing to an overall conduct; the signs demonstrating acquiescence, that is agreement with a given situation, may be of many types, stemming from both active and passive State conduct.[344]

195. As shown by some arbitral decisions, acquiescence seems to have served as a means of clarifying certain doubtful aspects in need of interpretation. Thus, in a case concerning the boundary agreement of 1858 between Costa Rica and Nicaragua,[345] settled on 22 March 1888, the arbitrator stressed that, despite the fact that acquiescence could not replace the necessary ratification of the agreement by Nicaragua, 10 or 12 years of apparently favourable conduct "is strong evidence of that contemporaneous exposition which has ever been thought valuable as a guide in determining doubtful questions of interpretation".[346]

2. The principle of preclusion or estoppel

196. As noted by a member of the Commission with respect to the principle of preclusion or estoppel:

> Admittedly, a unilateral act could give rise to an estoppel, but it was a consequence of the act and, contrary to what had been stated by the Special Rapporteur in his oral introduction, no category of acts which would constitute "estoppel acts" seemed to exist. The only thing that could be said was that, in certain circumstances, a unilateral act could form the basis for an estoppel ... In international law, estoppel was a consequence of the principle of good faith which, as Mr. Lukashuk had pointed out (2593rd meeting), governed the rules on the legal effects of unilateral acts.[347]

197. It seems that Anglo-Saxon doctrine was the origin of the principle of estoppel, as a mechanism applicable in the international sphere which primarily deals with creating a certain amount of legal security, preventing States from acting against their own acts.[348] As Miaja de la Muela[349] has pointed out, this principle comes within the purview of the maxim *adversus factus suum quis venire non potest*, thereby identifying the origins of this Anglo-Saxon institution, which has been described in great detail by Díez-Picazo.[350]

198. Spanish doctrine has also given attention to the estoppel principle; specifically, Pecourt García starts with two basic premises that shape its essence: he assumes that:

> The first prerequisite for building the notion of "estoppel" is the existence of an "attitude" taken by one of the parties.
>
> …
>
> The second prerequisite for the applicability of *estoppel* is the existence of what we have called "secondary attitude", which must have been adopted by the party opposing the principle.[351]

The author continues:

> [T]he principle of *estoppel* may be related to certain types of expressions of will that are generically referred to as "acquiescence". Under such an assumption, *estoppel* works by integrating—in part or in full—the corresponding form of acquiescence, either deriving the latter from silence or omission (*estoppel by silence*), or by proving such acquiescence by means of certain courses of conduct or attitudes (*estoppel by conduct*), etc.[352]

This attitude must be clear and unequivocal, as PCIJ pointed out in the *Serbian Loans* case, of 12 July 1929:

> [W]hen the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied.[353]

199. Of course, there is some doctrinal confusion about the basis and scope of estoppel, together with some of the

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against a circumstance that should have provoked such protest, the Court decided as follows:

> "It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"

(*Ibid*., p. 23)

[342] For example, in the Dubai-Sharjah Border Arbitration of 19 October 1981 concerning a territorial dispute (ILR, vol. 91 (1993), pp. 612 *et seq*.) or in the *Laguna del Desierto* case of 21 October 1994 (Case concerning a boundary dispute between Argentiina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy, UNRIAA, vol. XXII (Sales No. E/F.00.V.7), p. 1; see also ILR, vol. 113 (1999), p. 1).

[343] The United States Supreme Court has done so in a number of decisions, including the *Georgia* v. *South Carolina* case of 25 June 1990, or in *United States* v. *Louisiana and Others* of 26 February 1985 (both reproduced in ILR , vol. 91 (1993), p. 411 and 439). In both cases, silence was considered the equivalent of acquiescence.

[344] See Barale, "L'acquiescement dans la jurisprudence internationale", p. 393, and the jurisprudential references on pp. 394–400.

[345] Treaty of Territorial Limits between Costa Rica and Nicaragua (San José, 15 April 1858), *British and Foreign State Papers, 1857–1858*, vol. XLVIII, p. 1049.

[346] Moore, *History and Digest …*, vol. II, p. 1959. See also Coussirat-Coustère and Eisemann, *op. cit*., p. 5.

[347] *Yearbook … 1999*, vol. I, 2594th meeting, p. 194, para. 12.

[348] For a detailed analysis of this notion, and especially its more distant origins, see Martin, *L'estoppel en droit international public précédé d'un aperçu de la théorie de l'estoppel en droit anglais*, pp. 10–14, in particular.

[349] *Loc. cit*., p. 440, also citing Díez-Picazo Ponce de León, *La doctrina de los propios actos: un estudio crítico sobre la jurisprudencia del Tribunal Supremo*, pp. 63–65.

[350] In the *Dictionnaire de la Terminologie du Droit International* (Paris, Sirey, 1960), p. 263, Judge Basdevant formulated the following definition of estoppel: a term of procedure, taking from English, which designates the peremptory objection which prevents one party to a proceeding from adopting a position which contradicts the one that had already been admitted, either expressly or tacitly, as well as the one which the party claims to hold in the current proceeding.

[351] "El principio del 'estoppel' en derecho internacional público", pp. 104 and 106.

[352] "El principio del 'estoppel' y la sentencia del Tribunal Internacional de Justicia en el caso del templo de Preah Vihear", pp. 158–159. For a detailed and more recent treatment of this issue, see Jiménez García, *Los comportamientos recíprocos en derecho internacional a propósito de la aquiescencia, el estoppel y la confianza legítima*.

[353] *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 39.

other principles mentioned. Perhaps the very diversity of effects which unilateral acts may produce, as well as their disparity, are circumstances that may explain, although not necessarily justify, all the doubts that arise on this issue. It seems reasonable to affirm that the basis of this principle essentially lies in good faith, which is common to various legal systems.[354]

200. Similarly, and directly related to the categories of unilateral acts and, specifically, to the place occupied by the principle of estoppel, the debates that have taken place in the Commission are highly illustrative.[355] The doubts that have arisen with respect to whether or not to consider estoppel as a unilateral act were already evident in 1971, however, when it was noted that: "Estoppel may perhaps more accurately be regarded as not in itself a unilateral act but as the consequence of such an act or acts."[356] Moreover, the most characteristic element of estoppel is not the conduct of the State, but rather the confidence that is created in the other State. It might even be said, as pointed out in the *Temple of Preah Vihear* case,[357] that the principle of estoppel serves as a mechanism that eventually validates given circumstances which otherwise would have permitted the nullification of the legal act in question. Although in this decision ICJ referred to the role that estoppel might play in respect of the validation of treaties, the Special Rapporteur believes that the same idea would be applicable to unilateral acts.

201. Of course, the attitude adopted by a State with regard to a specific situation to some extent forces it to continue behaving consistently,[358] especially if it creates a certain expectation in third parties of good faith that this activity will continue and will adjust to the same parameters.[359] This conduct, acknowledging as valid a given state of affairs for a certain time, led ICJ to its judgment against Nicaragua in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*.[360] There have even been relatively recent arbitrations in which express mention has been made of estoppel and its significance.[361] It is not only the case law of international tribunals that has stressed the importance of estoppel; the issue has also arisen in domestic courts.[362]

Chapter II

Conclusions

202. In accordance with the Commission's request to the Special Rapporteur in 2003 (para. 1 above), this report has presented, merely as an illustration, examples of State practice, in particular a series of acts and declarations, including some equally unilateral forms of conduct which may produce legal effects similar to those of acts and declarations. Admittedly, not all of these constitute unilateral acts in the sense that interests the Commission. Some of them may not be juridical; others, although juridical, may perhaps be better categorized in the context of a treaty relationship, and therefore are not of direct interest to the consideration of the acts in question.

203. This presentation has attempted to facilitate the study of the topic and the drawing of conclusions about the possible existence of rules and principles applicable to the functioning of these acts. In some cases it might be concluded that these rules and principles are generally applicable to all unilateral expressions of will, of course being limited to juridical expressions, or, on the contrary, to only one category of such expressions, although they

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[354] See Venturini, *loc. cit*., p. 372; and also Pecourt García, "El principio del 'estoppel' en derecho ...", p. 117.

[355] In this regard, see Mr. Tammes's opinion in *Yearbook ... 1967*, vol. I, 928th meeting, p. 179, para. 6, where, referring to the need for systematization of this topic, and in particular making reference to the classification that must unavoidably be carried out, he said that:

> "The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation. It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations."

[356] *Yearbook ... 1971*, vol. II (Part Two), pp. 60, footnote 333.

[357] *I.C.J. Reports 1962* (see footnote 191 above), p. 32, where the Court affirms that:

> "Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct for asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map."

[358] See *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6; under this assumption, the position maintained by a State for a certain amount of time is an indication of the consolidation of practice, leading to a perfect combination of acquiescence and the doctrine of estoppel:

> "For the purpose of determining whether Portugal has established the right of passage claimed by it, the Court must have regard to what happened during the British and post-British periods. During these periods, there had developed between the Portuguese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relies for the purpose of establishing the right of passage claimed by it."

(*Ibid*., p. 39)

[359] That repeated non-recognition of a form of government creates an obligation was noted in the *Charles J. Jansen* v. *Mexico* (Mexico/United States) case, decided on 20 November 1876 (Coussirat-Coustère and Eisemann, *op. cit*., p. 476) when it states: "It further results that the United States, at least, is not now at liberty to claim a government *de facto* for the Prince Maximilian, having always during the contest in Mexico recognized the republic and repudiated the empire." (*Ibid*., pp. 107–108)

[360] *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192. As the Court points out, referring to actions taken by Nicaragua:

> "In the judgment of the Court, 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. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived."

(*Ibid*., p. 213).

[361] See the Arbitration Tribunal which decided the *Pope and Talbot Inc.* v. *Government of Canada* case, in its decision of 26 June 2000 (reproduced in ILR , vol. 122 (2002), p. 294, especially p. 338). It refers to the characteristics of estoppel, in a way similar to that described earlier.

[362] See the judgement of 21 March 1986, in the case *Mission intérieure des catholiques suisses* v. *Canton de Nidwald et Tribunal administratif du canton de Nidwald*, whose most relevant paragraphs for current purposes appear in Caflisch, *loc. cit*. (1986), p. 140. In this case, the Court stated that there was an obligation, at both the international and domestic levels, to be consistent with one's own conduct, i.e. estoppel (a prohibition of *venire contra factum proprium*). "This principle was applied in international jurisprudence even in cases not involving a treaty, but rather simple unilateral declarations issued, for example, by a minister for foreign affairs (see the *Eastern Greenland* case …)."

may not easily be qualified or classified when, as has been noted, there are no definitive criteria involved.

204. The Working Group on unilateral acts of States that met during the 2003 session considered some issues which have inspired this attempt to draw some conclusions.

205. For practical and methodological reasons, declarations are divided into various categories of acts which doctrine and practice show as being expressions of the unilateral will of States, irrespective of whether other acts exist which are classified and qualified differently. By examining these acts, and noting once again that those selected are merely a sample of the range of variations of these expressions, the Special Rapporteur has observed that those related to the recognition of States, Governments and *de facto* and *de jure* situations are the most frequent, although other cases, such as those consisting of promises, waivers and protests, are also formulated on various occasions.

206. Generally speaking, in the great majority of cases, unilateral acts and declarations of States are addressed to other States. On some occasions, however, the addressees of such acts and declarations are subjects other than the State, such as international organizations.

207. In most cases, these acts and declarations have been formulated individually, although at times they have been issued by groups of States, including States members of an international body (whether an international organization or in the context of a conference).

208. Most of these declarations are formulated without full formal powers by persons authorized to act at the international level and make commitments on behalf of the State, such as the Head of State or Government, the minister for foreign affairs, ambassadors, heads of delegation and representatives of the State to international organizations and bodies.

209. Although these declarations are often made in writing, in some cases they may be expressed orally. These are frequently transmitted through notes and communiqués, and at times even through an exchange of notes verbales.

210. In declarations of recognition, those relating to recognition of States are the most common; a considerable increase has been noted since the events of the 1990s in Central and Eastern Europe, which led to the creation of new, independent States.

211. In this latter context, it has also been observed that most of these declarations, at least those to which the Special Rapporteur has had access, come from European countries as part of common policies aimed at adjusting to the changes that have occurred in this region, although many States from other geographical regions have also expressly or implicitly recognized these new republics.

212. It has also been noted, in the context of declarations and acts of recognition, that they are linked with other situations, such as those having to do with boundaries, disarmament, state of war and neutrality, or an international treaty.

213. In most cases, declarations are made outside the context of negotiations, which gives them greater autonomy, as is appropriate for unilateral acts *sensu stricto*. It is true, however, that some are made as part of the processes relating to the recognition of a State or government.

214. In some cases the Special Rapporteur found that declarations were intended to recognize a State, provided that the State complied with a series of conditions; this pattern was observed in particular in the European context.

215. Generally speaking, not all acts of recognition correspond to express acts; some are implicit in other acts such as the conclusion of agreements, or in existing situations such as the exchange of diplomatic or other representations.

216. Acts of express non-recognition may also be observed, especially in cases where statehood is controversial; such non-recognition is repeatedly underlined, for example in parliamentary debates, by a State which does not recognize the given situation.

217. It is easier to determine the result of acts of recognition, although it is not clear in all cases, than of the formulation of other unilateral acts and declarations. In the case of recognition of States, formal diplomatic relations and relations in general have been established between the recognizing State and the recognized State.

218. Many declarations have been formulated that contain promises relating to boundaries, disarmament, forgiveness of debt, pending monetary issues, granting of permits for the use of certain spaces and adoption of moratoriums, among others.

219. In general, declarations containing promises are also formulated by persons who are recognized as being authorized to represent the State in its external relations, i.e., the Head of State or Government or the minister for foreign affairs. Some of these declarations are made orally, while others are in writing, through notes and acts of the competent State bodies.

220. In most cases, no reaction on the part of the addressee States has been observed, although at times more clear reactions have been seen in the case of boundary issues.

221. The situation is more complex in the specific case of disarmament, where reactions have not been clear. States possessing nuclear arms have not reacted positively in the sense of recognizing that the declarations under consideration contain a promise and are therefore legally binding on them. Instead, in the negotiations within the Conference on Disarmament, these declarations have been imprecise, particularly with respect to their scope and nature, although some participating countries have stressed their importance and the need for them to be considered as declarations containing a promise, having legal effects for the declaring States.

222. In practice, declarations and conduct have also been observed which signify protest in various areas, particularly in the context of boundary issues and the application of treaties. Protests have been made by States against acts or declarations, including conduct related to the recognition of an entity as a State.

223. Declarations or acts containing protests are generally expressed by governments through explicit notes from foreign ministers or ministries. Moreover, the protest may sometimes be reiterated when the situation against which the protest is made continues for some time.

224. Some protests are made by States through forms of conduct that do not constitute legal acts, but that have or may have significant legal effects. This conduct is most visible in the context of territorial disputes and the recognition or non-recognition of States and governments, among others.

225. The same could be said of acts or declarations, including forms of conduct that contain or signify a waiver of a right or a legal claim, although it is true that these are less frequent. Renunciations involving abdication and transfer may be contained in these declarations and acts.

226. Certain courses of conduct sometimes lead to express acts by a State entity, acts which are substantially different from unilateral acts *sensu stricto*, and which are formulated with a given intention.

227. It is not easy to compare conduct with acts in the strict sense of the term; however, it is extremely useful to consider conduct in dealing with the topic of unilateral acts and in arriving at the definition which the Commission will adopt in 2004, in accordance with the characteristics of the topic. Of course, it is not easy to determine these characteristics. Thus, for example, certain active types of conduct on the part of State bodies may differ from those usually seen in the conduct of foreign affairs.

228. In the case of non-active forms of conduct, such as silence understood as acquiescence, it is extremely difficult to determine which body should have formulated the act but refrained from doing so.

229. After considering the topic from the standpoint of practice, a draft definition could be elaborated on the basis of the draft adopted in 2003 by the Working Group on unilateral acts of States during the session,[363] for which forms of conduct that differ from the unilateral act *sensu stricto* would have to be considered. The term "act" would have to be defined in relation to its legal effects rather than in terms of its formal aspects.

230. In accordance with the consideration of unilateral acts, declarations and forms of conduct of States in the present report and the attempt to draw some conclusions, it would seem possible to affirm that some rules exist that are generally applicable to all unilateral acts and forms of conduct relevant to the Commission's purposes.

231. In addition to the definition that might be adopted on the above-mentioned basis, the possibility could be considered of elaborating a provision that would reflect a State's capacity to formulate such acts and conduct and the authorization of given persons to act on behalf of the State and commit it, at this level, without the need for formal powers.

[363] *Yearbook … 2003*, vol. I, 2789th meeting, p. 262, para. 58.