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Summary record of the 2770th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
2003, vol. I

SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-FIFTH SESSION

Held at Geneva from 7 July to 8 August 2003

2770th MEETING

Monday, 7 July 2003, at 3.05 p.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

Organization of work of the session (*continued*)

[Agenda item 2]

1. The CHAIR welcomed the members of the Commission to the second part of the fifty-fifth session and announced that he would suspend the meeting to enable the Enlarged Bureau to consider a revised programme of work for the first two weeks of the second part of the session.

The meeting was suspended at 3.10 p.m. and resumed at 3.40 p.m.

2. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to adopt the revised programme of work.

It was so decided.

Filling of casual vacancies in the Commission (article 11 of the statute) (*concluded*)* (A/CN.4/527 and Add.1–3)

[Agenda item 1]

3. The CHAIR announced that the Commission was required to fill a casual vacancy that had arisen following the resignation of Mr. Robert Rosenstock. The curriculum vitae of the candidate for the vacancy was contained in document A/CN.4/527/Add.3. He would suspend the meeting to enable the members of the Commission to hold informal consultations.

The meeting was suspended at 3.45 p.m. and resumed at 4.20 p.m.

4. The CHAIR announced that the Commission had elected Mr. Michael J. Matheson to fill the casual vacancy. On behalf of the Commission, he would congratulate him on his election and invite him to join the Commission.

Unilateral acts of States (A/CN.4/529, sect. C, A/CN.4/534,[1] A/CN.4/L.646)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR

5. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing the sixth report on unilateral acts of States (A/CN.4/534), said that it dealt in a very preliminary and general manner with one type of unilateral act, recognition, with special emphasis on recognition of States, as some members of the Commission and some representatives in the Sixth Committee had suggested in 2002. He had tried to reflect the very interesting comments made on that question, especially by the Working Group established to consider it. It had been decided at that time to take time out to request Governments to transmit information on their practice in that regard and to give more in-depth consideration to the way the Commission's work was to proceed.

6. The question was not only complex but also full of grey areas, since it could not be said that there was a theory of unilateral acts. To define the nature of a unilateral legal act, *stricto sensu*, and particularly the applicable rules, was not easy, but that in no way meant that the act did not exist as such and did not produce legal effects. There was no doubt that, as ICJ indicated in its decisions in the *Nuclear Tests* cases, declarations that took the form of unilateral acts could have the effect of creating legal obligations, which was the premise forming the basis of the Commission's work.

* Resumed from the 2751st meeting.

[1] Reproduced in *Yearbook … 2003*, vol. II (Part One).

7. The Commission had said at its forty-ninth session, in 1997, and had repeated in the conclusions adopted by the Working Group,[2] that it was possible to engage in codification and progressive development. The topic was ripe for that purpose, but, despite the extensive writings on it, which were nevertheless not homogeneous, and despite the very relevant but not abundant case law, it remained highly controversial. It might be possible to consider whether or not certain rules could be codified on the formulation of an act, concentrating solely on certain aspects of a general nature, but a more rigid codification effort would be more difficult. The codification of the law of treaties had proved comparatively easier because treaties had a much clearer foundation in practice, the doctrine was much more abundant and coherent, and there were many legal decisions and arbitral awards. The law of treaties was much more structured and comprehensive than any other institution, but that was certainly not true of unilateral acts, since their still undefined nature, foundation and legal effects made them more difficult to study. The Commission's work was sometimes easier when it was a matter of choosing one option among several equally valid ones. Such was the case, for example, with diplomatic protection, where there were much clearer rules than for unilateral acts, on which State practice had not yet been sufficiently analysed. However, while government opinions had not been numerous, they were fundamental to the consideration of the topic. The fact that practice had not been sufficiently analysed was one of the major obstacles he had encountered. Unilateral acts were formulated frequently, as could be seen every day, but there was no certainty as to their nature. Without knowing the views of States, it was not easy to determine what the nature of the act was, whether the State that had formulated it had the intention of acquiring legal obligations, and whether it considered that the act was binding on it or that it was simply a policy statement, the result of diplomatic practice.

8. It was difficult to tell what final form the Commission's work might take. In that connection, he recalled the very important statements made in the Sixth Committee. If it proved impossible to draft general or specific rules on unilateral acts, consideration might be given to the possibility of preparing guidelines based on general principles that would enable States to act and that would provide practice on the basis of which work of codification and progressive development could be carried out. Whatever the final product, he believed that rules applicable to unilateral acts in general could be established, based on the definition referred two years earlier to the Drafting Committee. That definition was intended to reproduce the principle that the State could bind itself through a unilateral expression of its will, it naturally being understood that, by such an act, the State could not impose obligations on other States or even on the other subjects of law that were the addressees of the act, something which was known to be a widely established principle of international law.

9. Certain principles of a general nature which were applicable to all unilateral acts, regardless of their content, could be stated. First, a unilateral act in general and an act of recognition in particular must be formulated by persons authorized to do so—in other words, by persons authorized to act at the international level and to bind the State they represented. Such authority was determined by internal law. Moreover, the act must be freely expressed, and that made its validity subject to various conditions, such as an examination of the causes of invalidity, some of which were related to the expression of will, the lawfulness of the purpose of the act and its compatibility with the peremptory norms of international law. A unilateral act was legally binding if it met those conditions.

10. The binding nature of the act might be based on a specific rule, *acta sunt servanda*, taken from the *pacta sunt servanda* rule that governed the law of treaties. It might also be stated as a general principle that a unilateral act was binding on a State from the moment it was formulated or the moment specified in the statement by which the State expressed its will. The act would then be binding. Similarly, the act could not be modified, suspended or revoked unilaterally or arbitrarily by its author. While the act was unilateral at the moment of its formulation, it established a bilateral relationship between its author and the addressee, in which it created an expectation, thereby limiting the possibility of modifying, suspending or revoking the act in an equally unilateral way. The State accordingly did not have the arbitrary power to modify, suspend or revoke its unilateral act in the same way. Owing to the very nature of unilateral acts, their interpretation must be based on a restrictive criterion, and great caution must be exercised in respect of a unilateral statement with no specific addressee.

11. The aim of the sixth report was to bring the definition and examination of a specific material act—recognition—into line with the Commission's work on unilateral acts in general. The introduction dealt with the viability of the topic, possible forms for the final product of work on it and the structure of the report. Chapter I contained a definition of an act of recognition. It examined acts and conduct that should be excluded, reaching the conclusion that the unilateral act of recognition with which the Commission was concerned was expressly formulated, with a precise intention. A distinction was then drawn between the institution of recognition and a unilateral act of recognition. Chapter II dealt with the conditions for the validity of such an act, still in relation to unilateral acts in general. Chapter III examined the legal effects of recognition, which were expressed by their opposability, and re-examined its legal basis, namely, the introduction of a specific rule, *acta sunt servanda*. Finally, chapter IV dealt with the possibility of modifying, revoking or suspending the temporal and spatial application of acts of recognition. Some consideration was also given to causes external to an act which could bring about its termination— the disappearance of the object of the act or a change of circumstances.

12. Chapter I dealt with the various forms of recognition and ended with an outline definition that could be aligned with the draft definition of unilateral acts in general. He attempted to show that the draft definition considered by the Commission could encompass the category of specific acts constituted by recognition. Before consideration of certain forms of recognition other than the unilateral act *sensu stricto*, unilateral acts would need to be characterized, but that would not be easy. The recognition of a *de*

[2] *Yearbook … 1997*, vol. II (Part Two), p. 64, paras. 194 and 196.

facto or *de jure* situation or of a legal claim could, in its turn, involve waiver, or indeed promise, which made it difficult to characterize. What was most important was to determine whether it was a unilateral act in the sense understood by the Commission, regardless of its characterization, namely, a unilateral expression of will formulated with the intention of producing certain legal effects.

13. The institution of recognition did not always coincide with the unilateral act of recognition. A State could recognize a situation or a legal claim by means of a whole range of acts or conduct. No list of acts of recognition seemed to be in existence, but there were undoubtedly acts of recognition that could be identified as such, for instance, in relation to the recognition of States or Governments or of belligerency, neutrality, delimitation of borders or sovereignty. A State could recognize a *de facto* or *de jure* situation or a legal claim implicitly or explicitly, for example. The conclusion of an agreement with an entity that it had not recognized as a State constituted implicit recognition, something that would certainly have legal effects. The State formulating the act recognized the status of the entity or Government with which it had concluded the agreement, and that established a legal relationship between the author State and the addressee. The same applied to recognition of the territorial status or claim to sovereignty of a State by an explicit act which was distinct from an express act of recognition. In the Special Rapporteur's view, such acts, which should be considered to be recognition, could be excluded from the study of unilateral acts which the Commission was seeking to define.

14. A State might also recognize a situation or a claim through conduct such as silence. Such silence could take several different forms: approval, disagreement or simply indifference. International courts had several times had to rule on such conduct interpreted as recognition, for example, in the *Temple of Preah Vihear* or *Right of Passage over Indian Territory* cases. Silence signified an absence of protest, which could mean that a legal claim was recognized or accepted. Once again, a link between various unilateral acts and conduct—silence, protest or acquiescence—could be discerned. Even though it produced legal effects, however, recognition arising out of silence should be excluded from unilateral acts proper, as understood by the Commission.

15. Recognition could also be based on a treaty, and in that regard the Special Rapporteur referred the Commission to paragraph 29 of the report. In his view, such recognition should also be excluded from the unilateral acts to be considered by the Commission. As was briefly outlined in paragraphs 30 *et seq*., acts of recognition expressed through a United Nations resolution should be excluded as well. It was worth emphasizing that, over the past years, the practice of a vote in favour of admission of a State to an international organization had developed into a form of recognition. That applied, for example, in the case of Spain with regard to the former Yugoslav Republic of Macedonia. Acts emanating from international organizations, although they could signify recognition and have political and legal force, should also be eliminated from the scope of the study. The matter was not discussed in the report, but recognition could also arise out of a statement made in the context of judicial proceedings, and in that regard the Special Rapporteur recalled the dissenting opinion of Judge Wellington Koo in the *South West Africa* cases in 1966.

16. Chapter I also raised some questions that were crucial to the adoption of a draft definition of a unilateral act of recognition. The questions related to the criteria for the formulation of such an act and its discretionary nature, a feature that seemed quite specific to the act of recognition but could also characterize other acts, such as waiver, protest or promise. Its discretionary nature was clearly acceptable as an appropriate characteristic of the act of recognition of a State, given its more political nature.

17. There were no criteria governing the formulation of an act of recognition. The recognition of States, in particular, was not based on any consistent criteria, although the requirements of international law had to be met with regard to determining that recognition had occurred. Recognition of a state of belligerency, insurgency or neutrality also seemed not to be subject to specific criteria, and the same seemed to apply to situations of a territorial nature. Such an absence of criteria was linked with the discretionary nature of the act. Nothing obliged a State to recognize or not recognize a given situation or legal claim. Under international law, there was no general rule imposing obligations in that context, as most of the literature acknowledged. International practice in the matter was clear, as was shown by Opinion No. 10 of the Arbitration Commission of the Conference for Peace in Yugoslavia, paragraph 4 of which stated that recognition was a discretionary act that other States might perform when they chose and in a manner of their own choosing, subject only to respect for the guiding norms of general international law.[3]

18. Any consideration of an act of recognition involved the consideration, even if only cursory, of non-recognition, which could also be an express act and could thus on occasion be confused with protest. The discretionary nature of non-recognition could be approached in a different way. A State could—as was recognized in various international texts, such as the Anti-War Treaty (Non-Aggression and Conciliation) (the so-called Saavedra Lamas treaty), the Charter of the Organization of American States and various General Assembly and Security Council resolutions—be prohibited from recognizing *de facto* or *de jure* situations, such as situations arising out of violations of international law, including territorial settlements obtained by non-peaceful means or by occupation. The State was thus not obliged to take action or to formulate non-recognition, but was simply not permitted to recognize such situations. The discretionary criterion that applied to the act of recognition seemed, however, to apply equally to the act of non-recognition. The latter could thus be a unilateral and fully intentional expression of will, which made it similar to the act of recognition and, to a certain extent, protest. The declaration by the Minister of State of Cyprus on 3 October 2002 on the non-recognition of the Turkish Republic of North Cyprus fell into that category, for example. In practice, the author State often explained why it did not recognize a situation; the United Kingdom's opinion on Taiwan was a good example of such practice.

[3] A/48/874 – S/1994/189, annex; see also *ILM*, vol. 31, no. 6 (November 1992), p. 1526.

19. Paragraphs 52 *et seq*. of the report also discussed the general possibility that the act of recognition, besides being declaratory, might be hedged around with conditions, something which might appear inconsistent with its unilateral nature. In that context, the European Community Declaration on Yugoslavia[4] of 16 December 1991 had been less an act of recognition as such than a directive establishing the rules for declarations by European States on the recognition of States emerging from the former Yugoslavia. To be recognized, such States were obliged, as a first step, to adopt the appropriate constitutional and political measures to guarantee that, for example, they had no territorial claims in respect of neighbouring States. As paragraph 57 of the report stated, however, the Declaration was not in itself an act of recognition. The power of recognition had not been transferred by States to the European Community. Although based on the Community's Declaration, recognition was ultimately formulated through individual acts. A unilateral act of recognition could be formulated individually, collectively or even in a concerted manner, but, as in the case of the unilateral act in general, that did not affect its unilateral nature.

20. The intention of the author State was an important element, since, as an examination of declarations of recognition by States showed, the legal nature of the act lay in the expression of intent to recognize and in the creation of an expectation. In its judgments in the *Nuclear Tests* cases, ICJ had ruled that, when the State making the declaration considered itself bound, that intention gave its position the nature of a legal commitment.

21. As to form, an act of recognition could be formulated in writing or orally, through a diplomatic note or any other declaration expressing the intention of the State. In the non-formalist system of public international law, the form of the act of recognition was in itself of no importance. That was as true of an act of recognition as of unilateral acts in general. As ICJ had stated in the *Temple of Preah Vihear* case, where the law did not provide for any particular form, the parties were free to choose the form most convenient to them, as long as their intentions were clear. After examining, by way of reference, the various acts and conduct by which States recognized a *de facto* or *de jure* situation or a legal claim, the Special Rapporteur had concluded that the best approach was to retain the act of recognition expressly formulated for that purpose, but to link it with the draft definition of unilateral acts considered by the Commission and referred to the Drafting Committee. He had therefore proposed, in paragraph 67 of the report, the following definition of the act of recognition:

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

22. That suggested definition, which was based on the general opinion expressed in the literature on the topic, contained elements that resembled, to a certain extent, the draft definition that the Drafting Committee would consider during the current session: the formal, unilateral nature of the act, even if collective in origin; and the valid expression of will, formulated by a subject entitled to do so—a State, in the case in question—and by a person authorized in that regard, having a lawful purpose that did not contravene any rule of *jus cogens*, with the intention of producing legal effects, which generally meant the opposability accepted by the author State from the time of its declaration or from a time indicated in the declaration.

23. Chapter II of the report dealt briefly with the validity of the unilateral act of recognition by following closely the precedent set with regard to the unilateral act in general: the capacity of the State and of persons; the expression of will of the addressee(s); the lawful object; and, more specifically, conformity with peremptory norms of international law.

24. Chapter III examined the question of the legal effects of the act of recognition, in particular, and the basis for its binding nature, referring once again to the precedent of the unilateral act in general. He pointed out first of all that, according to most legal writers, the act of recognition was declarative and not constitutive. In particular, the declarative nature of the act of recognition of a State was provided for in various international texts, including the Convention on Rights and Duties of States, which had been adopted at the Seventh International Conference of American States, held in Montevideo in December 1933, and which stated that the political existence of the State was independent of recognition by other States. That idea had subsequently been taken up by the Institute of International Law, which considered that recognition was merely the acknowledgement of the existence of the State. The declarative nature was also reaffirmed by articles 13 and 14 of the Charter of the Organization of American States and by the arbitral commission of the European Community.

25. An interesting question was raised, albeit in a different manner, by the act of non-recognition, which, irrespective of whether it was express or tacit, also had important legal implications. The non-recognition of an entity as a State affected the exercise of its rights under international law, such as, for example, rights deriving from the law concerning State immunity and the impossibility of being admitted to an international organization. However, the effects of non-recognition were basically a question between the non-recognizing State and the entity which was the object of non-recognition and which could be recognized by other States.

26. As for the legal effects of the act of recognition, it was important that the recognizing State should conduct itself in accordance with its statement, as in the case of estoppel. From the moment the statement had been made or from the time specified therein, the State or other addressee could request the author State to act in accordance with its statement. The act was therefore opposable to its author from that moment on.

27. The binding nature of the unilateral act in general and of recognition in particular must be justified, whence the adoption of a rule based on *pacta sunt servanda* and

[4] See *Bulletin of the European Communities*, vol. 24, no. 12 (1991), pp. 119–120.

called *acta sunt servanda*. Legal certainty must also prevail in the context of unilateral acts. As ICJ had recalled in the *Nuclear Tests* cases, mutual confidence was an inherent condition of international cooperation. However, the binding nature hinged on good faith, and the Court had made good faith one of the basic principles governing the establishment or fulfilment of legal obligations, regardless of their source.

28. Chapter IV dealt in general with the application of the act of recognition with a view to drawing conclusions about the possibility whether and conditions under which a State might revoke a unilateral act. An act of recognition was opposable to the author State from the time of its formulation or the time indicated in the declaration of recognition itself, and that was to some extent equivalent to the entry into force of a treaty. Its acceptance was not necessary: the fact that the act was enough in itself had been confirmed by the international courts. The author State assumed a legal obligation which was opposable to it, on the understanding that it could not impose obligations on third parties without their consent. Chapter IV also referred briefly to the spatial and temporal application of the unilateral act in the case of the recognition of States in particular. Such matters, which were dealt with in detail in the law of treaties, particularly in the 1969 Vienna Convention, should be clarified in connection with the topic under consideration.

29. At the end of the report, he also considered the modification, suspension and revocation of unilateral acts, namely whether States could modify, suspend or revoke acts unilaterally, in the same way as they had formulated them. The question of the termination of acts was very important, and the general principle could be established that the author could not terminate the act unilaterally unless that possibility was provided for in the act or there had been some fundamental change in circumstances, as was stipulated, for instance, in the law of treaties. The revocation of the act would thus depend on the conduct and attitude of the addressee, which once again was similar to estoppel. In the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ had considered that, since the acceptance of the Court's jurisdiction was undeniably unilateral in form, the unilateral nature of a declaration did not imply that the declaring State could modify the scope and contents of the declaration. Further examples were those of the declaration by the Government of Guatemala of 14 August 1991 officially recognizing the right of Belize to self-determination[5] and the declaration of 11 September 1991 establishing diplomatic relations with that country. Guatemala's Constitutional Court had reviewed the declarations to see whether recognition was definitive and whether an official communication and declaration by the President of the Republic were valid and produced legal effects. On 3 November 1992, the Court had issued a ruling affirming the validity of those declarations on the grounds that the act of recognition was the result of a change in the dispute between the two countries following the independence of Belize, although that could not be considered as a definitive measure under the Constitution.[6] A minority in the Court, including the President, had questioned the validity of the acts, stressing that in accordance with the Constitution of Guatemala they should have been submitted to the Congress for approval. Three days after the ruling was issued, the President of Guatemala had officially announced that the recognition was not definitive and had reiterated his willingness to abide by the Constitution by putting any definitive agreement on the matter to a referendum. Several days later, the Congress had endorsed the agreement, thereby complying with constitutional requirements. That was an interesting case from the viewpoint of the validity of a unilateral act relating to a matter subject to legislative scrutiny and the possibility of the unilateral revocation of an act by the author State.

30. In conclusion, he said that the sixth report was general in nature in keeping with the Working Group's decision to have a break in its work. Further consideration was required of how the Commission should complete its work on the topic. It was worthwhile establishing some general principles, and relevant practice should also be studied. During the International Law Seminar, which was now getting under way, a group of participants under his supervision and that of Ms. Isabel Torres Cazorla from the University of Malaga would conduct an in-depth study of such practice. The Drafting Committee already had several draft texts before it, and the Working Group would have the task of deciding how the topic should be studied in the future. Perhaps there could be an exchange of views on other unilateral acts such as promise, whereby the State also assumed unilateral obligations on which common rules and principles could be drafted, even though it was difficult to characterize unilateral acts definitively. The Commission's work might be based not on the sixth report but on the relationship between an act of recognition in its various forms and in relation to different objects, and unilateral acts in general, which the Commission had been studying for several years. As it had not been possible to obtain outside assistance for a systematic study, compilation and presentation of State practice in respect of unilateral acts, he suggested that the International Law Seminar might first conduct some bibliographical research, the results of which would be presented at the end of the session. Thereafter, work on the topic would continue in cooperation with the University of Malaga and would be the subject of a document to be submitted to the Commission in 2004.

31. Mr. PELLET said that the worst criticism that could be levelled at the Special Rapporteur's sixth report was that it did not indicate where it was supposed to lead the Commission. Personally, he had always championed the topic of unilateral acts of States, and so the Special Rapporteur, who had devoted most of the introduction of his report to a justification of the very existence of the topic, had had no difficulty in convincing him that the consideration of unilateral acts might be of great practical value, since it was advisable for States to know when the unilateral expression of their will or intentions would, quite apart from any treaty-based link, constitute a commitment on their part. Intellectually, moreover, the topic might be fascinating if a study of it could explain the alchemy whereby a sovereign State trapped itself by expressing its will or how

[5] A/46/368 – S/29953.

[6] See J. A. González Vega, "El reconocimiento de Belice ante la Corte de Constitucionalidad de Guatemala: la sentencia de 3 de noviembre de 1992", *Revista Española de Derecho Internacional*, vol. 45, no. 2 (July–December 1993), pp. 580–585.

it could derive legal obligations from its sovereignty, even when it was not necessarily dealing with another State. That type of question had to be asked in order to build a conceptual framework.

32. The Special Rapporteur was much less persuasive when he went from defending his topic to defending his choice of method or, rather, the new method followed in his latest report, which plainly marked a significant methodological turning point compared with the work done so far. A move seemed to have been made away from an overall approach—which took the law of treaties or the law of State responsibility as its model and tried to give an overview of the law of unilateral acts in order to identify general rules—to a case-by-case approach, although the Special Rapporteur's oral introduction had gone some way towards lessening that impression. While he personally had not been one of the members who had advocated the new approach, he would have no objection to it in theory, provided that he could see what the purpose of a case-by-case study was. The Special Rapporteur described the general legal rules applicable to recognition, but he did not conclude with a summing up of the lessons he had learned from that description, with draft guidelines, which would be fairly pointless, despite what the Special Rapporteur explained in paragraph 8, or with draft articles, a draft resolution or a draft recommendation, even though he had, during his oral introduction, appeared to believe that he had submitted new drafting proposals for the definition of unilateral acts. That was all the more puzzling because it was hard to see how those proposals, which were scattered throughout the report, fitted in with the draft definition already referred to the Drafting Committee.

33. He himself was not radically opposed to a case-by-case approach, provided that three conditions were met. First, the Commission had to be sure that it was not giving up on its ultimate goal, which should still be a set of draft articles accompanied by commentaries, but not necessarily a preliminary draft convention. He would be in favour of the topic of unilateral acts of States only if the aim of the study was to prepare comprehensive draft articles containing general rules.

34. Second, case studies such as those the Special Rapporteur had devoted to recognition in his sixth report should be only preparatory studies, or, as had been said in the Sixth Committee by the representative of Greece (whom the Special Rapporteur quoted in paragraph 11 of his report), they should merely represent a first stage making it easier to proceed to the identification of the general rules that would be applicable to unilateral acts of States.[7]

35. However, the third condition was that each case study should help pave the way for the achievement of the final objective. The report under consideration did not seem to do that, for the Special Rapporteur drew no conclusions from his study of recognition. At the end of his report, he could have been expected to deduce general rules, and it would have been interesting to see how he made the transition from the specific to the general. He had seemed to suggest, during his oral introduction, that the definition of recognition was the same as that of unilateral acts. In his own personal opinion, that was not true.

36. The question was how conclusions of that kind could be drawn from the case studies towards which the Special Rapporteur seemed to be moving. The first step would be to prepare a two-way table in which such information could be represented. The rows of the table would show the various categories of unilateral acts according to their purpose: recognition, promise, waiver and so on. That did not give rise to any particular problems, although in practice it was far from obvious, as could be seen from the difficulties mentioned by the Special Rapporteur in paragraph 21 of his report in connection with the Ihlen declaration,[8] named after the Norwegian Minister for Foreign Affairs. The Special Rapporteur rightly held that the declaration could be seen as a promise, a waiver or recognition, but that appeared to contradict what was said in paragraph 22 of the report, namely, that an act of recognition was not easily confused with a waiver or a promise. Unfortunately such confusion was possible and even frequent, hence the need to find distinguishing criteria. If the consideration of the topic had made it possible to dispel such uncertainty, it would have been worthwhile.

37. The columns of the table should list the various legal issues which were raised by unilateral acts in general and which should be given in-depth consideration: What was/were the criterion/criteria making it possible to tell the difference between the various unilateral acts or categories of unilateral acts? Who was entitled to enter into a commitment on behalf of a State? It was far from certain that legal authority to recognize was identical to legal authority to promise, or that legal authority to recognize a State was the same as legal authority to recognize the applicability of a rule. It would be necessary to find out on what conditions the expression of the will of a State to be bound was valid and what was/were the effect(s) of that expression of the will of a State. It was probable that the effects differed considerably from one category of act to another. Could the act in question be withdrawn, and on what conditions? The Special Rapporteur obviously had those questions in mind, and he touched on them in some places in his report, but more careful thought should be given to their formulation in order to arrive at an interpretation grid on which everyone could agree. A working group might be set up to devise a table of that kind, a task that was simple only at first sight, for the success of the study as a whole would depend on the accuracy of the headings. Nothing could be forgotten, but at the same time it was necessary to be as clear and precise as possible. Given the reason for studying the subject, once the row and column headings had been defined, the boxes would have to be filled in so as to determine the common features of the various categories of acts, rather than the features that made them different. As soon as those common features had been found, it should be relatively easy to identify the general rules which applied to unilateral acts and would form the actual substance of the draft articles.

38. The CHAIR announced that the Drafting Committee for unilateral acts was composed of: Mr. Kateka

[7] See *Official Records of the General Assembly, Fifty-seventh session, Sixth Committee*, 24th meeting (A/C.6/57/SR.24), and corrigendum, para. 74.

[8] See pp. 69 and 70 of the PCIJ judgment in the *Eastern Greenland* case.

(Chair), Mr. Rodríguez Cedeño (Special Rapporteur), Mr. Brownlie, Mr. Candioti, Mr. Daoudi, Mr. Economides, Ms. Escarameia, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Ms. Xue, Mr. Yamada and, *ex officio*, Mr. Mansfield (Rapporteur).

The meeting rose at 6 p.m.

2771st MEETING

Tuesday, 8 July 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue.

Unilateral acts of States (*continued*) (A/CN.4/529, sect. C, A/CN.4/534,[1] A/CN.4/L.646)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET, continuing his comments from the previous meeting, recalled that he had expressed doubts about the methodology used by the Special Rapporteur and wondered how the Special Rapporteur could tie his monographic studies in with the ultimate objective of the exercise, namely the preparation of draft articles enabling States to realize when they ran the risk of being ensnared by the formal expression of their will. For his own part, he had suggested the use of a detailed table with, horizontally, the various categories of unilateral acts and, vertically, the legal issues that needed to be addressed. If common elements were found in the various categories, then general rules applying to unilateral acts could be developed as the very substance of the draft articles.

2. The sixth report (A/CN.4/534) was an attempt to go in that direction, but it was not sufficiently rigorous. Horizonally, the category of recognition was proposed, but the question was whether there was really a single category of unilateral acts, a homogeneous unit that could be called recognition. He thought not. The category must be more clearly delineated, something the report failed to do.

3. The Special Rapporteur referred frequently to concepts that he rightly described as similar to recognition, such as acquiescence and acceptance. The three were by no means equivalent, however. Plainly, the horizontal categories had to be further refined. In addition, it was by no means certain that acts of non-recognition must be addressed simultaneously with recognition. The subject deserved further consideration, but, *a priori*, non-recognition seemed to be more closely related to a quite different category, namely protest.

4. The Special Rapporteur devoted much attention to the classic issue of whether recognition of States was a declarative or constitutive act, rightly concluding that it was purely declarative. But what was true of recognition of States was not necessarily true of recognition of other entities. The Special Rapporteur had given an interesting analysis at the previous meeting of Guatemala's statement in 1991 in which it had recognized that Belize had the right to self-determination.[2] In fact, however, that had been an acknowledgement of the existence of a legal rule, not recognition in the legal sense of the term. Acknowledgement itself could probably not be ranked as recognition. If ever it could, then Guatemala's statement had been declarative, not constitutive.

5. In paragraph 90 of his report, the Special Rapporteur wrote that in some cases, for instance the *Eastern Greenland* case, the constitutive theory of recognition had been argued. True, but there was nothing surprising about that, since the State was a fact and had an existence in international law regardless of how it was viewed. On the other hand, extension of a State's territorial jurisdiction, which had been at issue in the *Eastern Greenland* case, raised an entirely different question: it flowed, or could flow, from recognition by other States, as was demonstrated in the *Eastern Greenland* and *Temple of Preah Vihear* cases, but there, recognition of territorial jurisdiction did not have, and could not have, the same effects as recognition of a State.

6. All of this implied that totally different concepts could not be lumped together, as he feared the Special Rapporteur had a tendency to do, and that even if recognition was an individual category, it produced different effects depending on its object. Those effects varied according to parameters other than the object as well, one of them being the addressee's reaction. The addressee could make use of recognition, and that very proposition—that use could be made of a unilateral act—was the primary foundation for the notion of the unilateral act, as ICJ had recalled in the all-too-famous *Nuclear Tests* cases.

7. If the addressee said nothing and did nothing, however, the option of making use of a unilateral act was merely a virtual one, a possibility, and the State that had given the recognition was much freer to go back on that act than if the beneficiary had used it as the basis for taking certain measures that it would otherwise not have taken. In such cases, the question of estoppel came up, but that did not mean the act was bilateralized, as the Special Rapporteur wrongly suggested in paragraph 119 of his report. The act remained unilateral, but the will of the State was ensnared more firmly than when there was

[1] Reproduced in *Yearbook ... 2003*, vol. II (Part One).

[2] See 2770th meeting, footnote 5.