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Summary record of the 2772nd meeting

Topic:
Unilateral acts of States

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to human rights, self-determination and United Nations resolutions in recognizing a State. The question then arose whether recognition was discretionary. In that context, it was regrettable that paragraph 39 gave no consideration to Lauterpacht's controversial view that States were under a duty to recognize an entity that met the requirement of statehood expounded in the Convention.

34. Raising the question of whether admission to the United Nations was a form of collective recognition, the Special Rapporteur correctly dismissed the question as irrelevant to the topic. His remarks did, however, whet the appetite as to whether admission to the United Nations was a form of collective recognition or not. There was a further contradiction between the suggestion in paragraph 54 of the report that collective recognition was possible because a United Nations vote constituted a form of declaration and the statement in paragraph 32 that collective recognition did not fall within the Commission's mandate. The issue required further study.

35. A further question was whether non-recognition was discretionary. Paragraph 45 of the report suggested that it was not: the fact that the Security Council could direct States not to recognize a new entity that claimed to be a State surely gave rise to the duty of non-recognition. As for the withdrawal of recognition, in the case of failed States the Special Rapporteur suggested in paragraph 96 that no withdrawal of recognition was possible, whereas paragraph 101 acknowledged that in some circumstances such withdrawal was indeed possible. The matter was important in view of the growing phenomenon of failed States, but again the Special Rapporteur whetted the reader's appetite yet failed to pursue the topic.

36. Finally, the Special Rapporteur said that implied recognition was not relevant to the study. Nevertheless, since no form was required for the act of recognition, it surely followed that implied recognition could exist. Thus, in the past, South Africa had maintained diplomatic relations with Rhodesia, which implied recognition. Yet the Special Rapporteur dismissed the point.

37. He congratulated the Special Rapporteur on a provocative report, which nonetheless lacked the requisite clarity: it touched on a host of controversial issues, without examining any of those that had troubled jurists for over 100 years. Indeed, it simply added to the growing awareness that recognition, as a unilateral act, was very difficult to codify. The report mixed theory and practice, with the result that it was vulnerable on both counts: State practice was inadequately examined, while the account of recognition as a unilateral act was not convincing.

38. He was uncertain how the Commission should proceed—whether it should adopt a theoretical approach or should examine State practice in detail. He agreed with Mr. Gaja that the latter would be more fruitful. An examination of State practice would enable the Commission to establish the common principles relating to the nature of recognition.

The meeting was suspended at 11.30 a.m. and resumed at 12.15 p.m.

39. The CHAIR said that, following informal consultations on how best to proceed, support had emerged for the

establishment of a small *ad hoc* group that would meet before the text was referred to the Drafting Committee. The group would convene immediately, with the task of defining the basis and objective of the study of unilateral acts with a view to progressive development.

40. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he fully supported the Chair's proposal and suggested that the *ad hoc* group should be chaired by Mr. Pellet, who had expressed a willingness to start at once, thus enabling the Drafting Committee to undertake its work on the topic during the session.

41. The CHAIR said he took it that the Commission was in favour of establishing an *ad hoc* group that would work on definitions and undertake research into State practice, beginning immediately after the end of the meeting.

It was so decided.

The meeting rose at 12.25 p.m.

2772nd MEETING

Wednesday, 9 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Brownlie, 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. KOSKENNIEMI commended the Special Rapporteur's decision to turn from the generalities of unilateral acts to the specific topic of recognition and, in particular, the recognition of States. By the same token, he was not in favour of drawing up a grand table containing all type of unilateral acts, as advocated by Mr. Pellet. In relation to the general approach outlined in the introduction to the sixth report (A/CN.4/534, paras. 1–16), he noted that the Special Rapporteur had doubts about the

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

existence of unilateral acts as a legal institution, but argued that, even if they did not exist as an institution, the Commission would have to take them up, even though he also said that the subject might be too complex to be subjected to codification. The fact was that the topic was not susceptible to codification because it did not exist as a legal institution, unlike treaties and the succession of States, topics having an entire set of rules, principles and institutions. Unilateral acts did not describe a set of formal arrangements but rather the sociological reality of State activity, which might occur unilaterally but could often be found in the context of interaction with other States, with the result that States sometimes found themselves bound by their actions. Unfortunately, lawyers and ICJ had, in the *Nuclear Tests* cases, for example, based such obligations on a concept of unilateral acts that implied the presence of a set of formal acts fulfilling certain conditions of validity. That approach was, however, nothing more than an *ex post facto* construction, since in all such cases the obligation depended on informal considerations: estoppel, equity, reasonableness, justice or general principles of law. That being so, although the Court had ruled in the above-mentioned case that unilateral declarations bound the State making them when it was that State's intention to assume such an obligation, it had corrected its unfortunate interpretation of unilateral acts by stating that good faith and the need for confidence in international relations sometimes required a State to be bound. All such acts depended on the context. The topic of unilateral acts was not susceptible to codification because it denoted an area of informal State interaction that fell outside the formal law of treaties, even if it could justifiably be said that obligations sometimes emerged from it. It would, however, be a mistake to try to parcel up that area of law into formalistic categories.

2. As for the specific act of recognition, the report did not, as other members of the Commission had already pointed out, make any useful reference to academic research, whether recent or not, and, more importantly, it paid little attention to the academic dilemmas or the tone of the debate on the topic. Nor was it practical enough: the review of State practice was sparse and haphazard, as well as containing some contested interpretations of such practice. On the other hand, the Special Rapporteur had only recently embarked on that aspect of the subject and should be congratulated on his willingness to consider the practice, since academic abstractions in the area of recognition were indeterminate and of little use in grappling with the practical problems of recognition. Generally speaking, the Special Rapporteur's treatment of recognition was characterized by a formalistic attitude that limited recognition to a formal act, with the result that—although the report did not say so in so many words—implicit or tacit recognition would need to be excluded from the compass of the study. It was, however, fair to wonder why, in practice, recognition should include a governmental declaration communicated through a diplomatic procedure, but exclude the formal act of a bilateral treaty on the grounds that it did not expressly refer to recognition. The distinction between express and tacit recognition, which arose out of the formalistic and voluntaristic notion put forward by the Special Rapporteur and his identification of recognition as an expression of willingness to be bound, was inapplicable in practice, not only because the distinction was strange

in itself, but also because of the more general problem referred to above, namely, that recognition, promise, waiver or estoppel constituted not a legal institution but informal State activities.

3. The State would generally agree to be bound, in a reciprocal fashion, but most often it had no intention of being so. It was for lawyers to tell political decision makers that their actions could impose an obligation on the State against their will, but it was not their business to provide decision makers with a procedural device whereby they could formulate an act having the effect of binding the State, if they so wished. The topic of unilateral acts of States was on the Commission's agenda in order to deal with the grey area of State conduct in cases where the will to be bound was not clear, or where it was necessary to establish criteria to determine whether an obligation had been created outside the framework of a formal act. The topic of recognition, and recognition of a State in particular, might present a window of opportunity in that regard by enabling the Commission to deal with the reality that existed as a legal institution, having the corresponding formal characteristics. By undertaking a practice-oriented study on the recognition of States and perhaps also the recognition of governments, it could set about drawing up guidelines or articles regulating the institution.

4. Mr. BROWNLIE said that, procedurally speaking, Mr. Koskenniemi's comments raised the question whether the Commission should continue its consideration of a subject that had been on its agenda for several years, and, if so, whether it should rely on the Special Rapporteur's sixth report or should revise its agenda. Second, although the word "recognition" appeared in the rubric "recognition of States", the latter was clearly a separate topic. No one could believe that a study of the recognition of States necessitated a study of the recognition of governments. The Commission would therefore be turning from the question of unilateral acts to that of the possible subject matter of such acts, which would include much, if not all, of international law. It was a little unfair to say that no such legal institution as unilateral acts existed, since they were quite widely accepted as a category of study and as an area of problems. Indeed, they could cause difficulties. The United Kingdom had decided some time ago that the subject was so complex that it was not susceptible to codification. It could, however, be the topic of a structured study using the material contained in the Special Rapporteur's previous reports, which could be refined and presented in a systematic way. The sixth report, meanwhile, dealt with recognition, with what was recognized and with the legality of the act itself; and that went beyond the scope of the subject.

5. Mr. PAMBOU-TCHIVOUNDA said that it was impossible not to be shocked by Mr. Koskenniemi's questioning of the existence of unilateral acts of States as a legal category and his assertion that such acts reflected the sociological reality of relations between States. After all, the same could be said of treaties, which were also concluded within a given context, since the realities that governed the development of law on the international stage were realities of interest. Unilateral acts of States had both a theoretical and a practical existence, as was evidenced by the numerous references to State practice appearing in the Special Rapporteur's sixth report.

6. Mr. MELESCANU said that he endorsed Mr. Brownlie's view. The current discussion was pointless, since the topic of international acts was indeed on the agenda of the Commission, which should do its best to carry out its mandate. He had not been convinced by Mr. Koskenniemi's argument: the assertion that only the will of the State was of any account, together with the denial of the legal existence of unilateral acts whereby States decided unilaterally to undertake international obligations, was self-contradictory. Unlike Mr. Koskenniemi, who also thought that, if States expressed their will clearly, there was nothing to codify, he believed that there was a need for the codification of the rules governing issues such as the conditions for the validity of a unilateral act and its consequences, from the point of view of liability, for example. In any case, if the Commission decided, once the study had been completed, that there was insufficient material for codification, it was free to adopt a resolution to that effect to submit to the General Assembly. At the current stage, to ensure that the work advanced, it would be preferable to refrain from casting doubt on both the topic and the manner of its treatment.

7. Mr. CHEE said that he could not agree with Mr. Koskenniemi's statement that recognition was not an institution of international law. He read out to the Commission the definition of recognition contained in two public international law treaties.

8. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he would respond to all the comments that had been made when the general debate continued at the Commission's next meeting, but he felt compelled to give a reply to Mr. Koskenniemi, who would not be present at that meeting, on the question of existence of unilateral acts of States. It could hardly be argued that international law covered acts, conduct, activities or absences of reaction that could be attributed to States in international relations but were not linked to treaties. He was referring to specific acts, which had specific characteristics and produced legal effects. They were acts whereby States unilaterally undertook obligations in the exercise of their sovereignty. As such, they should be regulated by specific rules in order to increase confidence and security in international relations.

9. Mr. ADDO said that unilateral acts undoubtedly existed, but whether the topic was really ready for codification was open to question, given the paucity of State practice. The Commission should, perhaps, wait for the *ad hoc* working group to complete its work, so that it could suggest the best way forward.

10. Mr. MANSFIELD (Rapporteur) said he had not heard Mr. Koskenniemi saying that unilateral acts of States did not exist, but had understood him as saying that it was difficult, even impossible, to codify rules governing such acts with the same clarity and degree of detail as rules for the law of treaties. Moreover, he tended to agree with Mr. Koskenniemi that it was pointless to try to find the will of States to be bound by a series of acts where such will patently did not exist, and that a study of practice and cases where States had undertaken obligations might result in the formulation of guidelines, but not the drafting of detailed rules and precise definitions such as those on the law of treaties. Whatever the case, it showed the wisdom

of the Commission's decision to set up a working group on the subject.

11. Ms. XUE said she was of the opinion that what was important was to determine whether certain unilateral acts by States constituted a separate source of international obligations. If State practice showed that that was indeed the case, there was ample justification for considering the matter. The Special Rapporteur had done the right thing by beginning the study of different acts with the concept of recognition, for, although the acts tended to be based on political considerations, they also had legal effects in relations among States, for instance, in the field of treaty obligations or diplomatic privileges and immunities. Thus, when a State recognized the Government of the People's Republic of China as the sole legitimate Government in China, the country was legally entitled to expect a certain conduct on the part of the State concerned.

12. Mr. DAOUDI said that, if he had understood Mr. Koskenniemi's statement correctly, he was not denying the existence of unilateral acts, but the existence under international law of the legal institution known as "unilateral acts", which was likely to lead to codification. During the previous session, the majority of the members of the Commission had decided that work on the topic should be continued and had recommended that the Special Rapporteur should examine unilateral acts one by one.

13. The current discussion should have taken place when the Sixth Committee had requested the Commission to study the topic of unilateral acts. It was in that context and in response to the question whether it should continue or abandon its study of the topic that the Commission had decided to establish a working group to study how the topic should be dealt with. For that reason, he did not consider it useful to continue discussing the matter before the Working Group's report became available.

14. Mr. NIEHAUS expressed surprise at Mr. Koskenniemi's remarks, which seemed to deny the existence of unilateral acts. Such a position, about which some members had raised doubts, was difficult to accept.

15. The topic was a complex one, as the Special Rapporteur had clearly shown, but it would be a serious error simply to deny the existence of unilateral acts, when they were unanimously recognized by doctrine. Likewise, to say that unilateral acts were informal, which implied that there was no intention to be bound, was not true. There were unilateral acts whereby States expressed their will to undertake obligations, although it was a different type of obligation from that arising under a treaty act. That was why the decision to set up a working group with the task of responding to questions raised by the Sixth Committee was justified. The Commission would find itself in an embarrassing situation if it concluded that it had been working for several years on a subject which did not exist. The Working Group must therefore be given the opportunity to continue its work with a view to reaching a satisfactory conclusion.

16. Mr. SEPÚLVEDA considered that one of the tasks of the Working Group would be to clarify, not the feasibility of the topic, but the possible validity of the study on unilateral acts. He did not share the Special Rapporteur's

view expressed in paragraph 1 of the report, according to which the Commission, as a consultative organ of the General Assembly, must consider all topics on its agenda. That was not sufficient justification. First the legal nature of unilateral acts as well as their legal effects would have to be clarified. The introduction should indicate why unilateral acts entailed legal consequences and established rights and obligations.

17. As far as recognition was concerned, he considered that the inductive method proposed for dealing with the matter was appropriate. However, the distinction drawn in chapter I between the different categories of recognition was inadequate, and that might lead to some confusion about the recognition of States, the recognition of Governments, the recognition of the belligerent State, the recognition of insurrection, recognition *de jure* or the recognition of territorial changes. All those acts produced different effects, which were not studied as they should have been in the report. The basis for a unilateral act by a State, on the one hand, and the institution of recognition in its various legal forms, on the other hand, had not been dealt with clearly enough in the report to explain why unilateral acts of States and the institution of recognition had to be considered.

18. With regard to methodology, he considered that a system should be used which would, in the view of the Sixth Committee, justify the feasibility of a study of the topic by the Commission.

19. The CHAIR, speaking as a member of the Commission, acknowledged that Mr. Koskenniemi's comments on the subjective element of will in unilateral acts were relevant. It was true that international law sometimes recognized the effects of some unilateral conduct, even in the absence of any intention to produce such effects. That had been clearly demonstrated in the *Nuclear Tests* cases, in which ICJ had attributed an intention to the declaration by the representative of France which he probably had not had. Intention was thus a very important element to be considered by the Working Group, particularly as far as defining the topic for study was concerned.

20. As Mr. Brownlie had said, moreover, State recognition was a separate topic. In that connection, the purpose of the study must be to analyse recognition in general as a category of unilateral acts, rather than to try to analyse the very specific aspects of recognition.

21. Mr. KOSKENNIEMI said he fully shared Mr. Melescanu's view that it would be indefensible and unwise to give up the study of unilateral acts after so many years. It had not been his intention to propose such a move or to claim that the Commission had any alternative, as some members seemed to believe. On the contrary, he considered that the establishment of a working group to deal with the subject was a good idea—a step in the right direction.

22. So why then had there been all those questions on the feasibility of the topic? Probably because adopting of general positions affected the way in which a given or specific opinion was formed on the question of recognition. He had merely wished to make some general comments and to draw attention to the ambiguous nature of the legal

concept of institution, which was not well defined, with a view to the forthcoming discussion.

23. In that respect, he agreed with the first sentence of the report ("It is true that it has not been clearly established that the institution of unilateral legal acts exists..."); that was admittedly surprising, but fully reflected his point of view. What was the point of questioning the existence of unilateral acts as an institution, when there was no doubt about the existence of treaty law or State succession as institutions? Drawing an analogy with internal law, he pointed out that a contract was undeniably an institution of internal law, regardless of the cultural context, like marriage. But could it be said that due diligence was a legal institution? What those three notions had in common was that they were legal terms and concepts, but there was a great difference between them: contract and marriage were governed by a set of rules and principles, but also by institutional practices and history; that was not the case of due diligence. It was not a legal institution in that there was no act of due diligence to which a set of rules, principles and criteria could be applied. So when it was stated that unilateral acts were not a legal institution in the sense of the law of treaties or State succession, the same distinction was being drawn, and it would have practical consequences with regard to codification. That was why the first sentence of the report made sense only if such a distinction was drawn; but the drawing of such a distinction had many consequences.

24. Mr. MOMTAZ, welcoming the fact that the Special Rapporteur was to be assisted by a team of university research scholars, said that such help would enable him to deal in greater depth with one very important aspect of the topic, State practice. That team could perhaps take up the question raised by Mr. Melescanu, namely, to what extent States which had entered into a commitment through a unilateral act were liable if they did not honour their commitments. That would entail codification based on State practice. Personally, he did not share the opinion expressed by the Special Rapporteur in paragraph 4 of his report that work should focus more on a progressive development approach than on codification. The question was not one of establishing general rules on the subject, but of identifying a minimum number of rules which had been drawn from State practice and could then be regarded as the lowest common denominator. Care therefore had to be taken not to make all of the rules on the law on treaties applicable to unilateral acts.

25. The institution of unilateral acts had undeniably proved useful to the international community, in that it enabled a State to enter into a legal commitment without having to sign an agreement, and thus to defuse a situation that placed peace and international security in jeopardy. That was why the binding nature of a unilateral act had to be emphasized in order to obviate the risk of completely destroying its stabilizing effect in international relations. The Special Rapporteur was right in that regard to refer to the principles of *acta sunt servanda* and good faith in relation to unilateral acts. Those principles certainly applied to all unilateral acts and to recognition in particular. As Ms. Xue had said earlier, when a State recognized a Government, it assumed an obligation to that Government. If, however, all the principles of the Vienna system of the law of treaties were transferred to the context of unilateral

acts as a whole, the latter would no longer have a *raison d'être*.

26. The main questions arising in respect of recognition were whether States, through such an act, were free to enter into a commitment towards an entity which had declared its independence, and whether that freedom to enter into a commitment was comparable to the freedom to enter into a commitment by signing or ratifying a treaty. It was hard to believe that a State was free to grant recognition to any entity that wanted such recognition. Those doubts were substantiated by the directives concerning the recognition of new States in Eastern Europe and the Soviet Union adopted in 1991 by the European Community² which were mentioned in paragraph 37 of the report and whose purpose had been to reconcile the right to self-determination with the need for international stability. A unilateral act did indeed have a stabilizing effect. In an endeavour to reconcile the interests of the international community and the act of recognition, Mr. Boutros Boutros-Ghali, the former Secretary-General of the United Nations, had said in his concluding statement to the Congress on International Law, held in 1995, “To suggest that any social or ethnic entity which decides that—often for reasons which are ambiguous and sometimes reprehensible—it is different from its neighbours, should be recognized as a State would be a very perverse way of interpreting the right of peoples to self-determination.”³ In other words, States would appear to have a rather vaguely defined obligation of non-recognition. A difference therefore existed between a unilateral act of recognition, a commitment to another State into which a State was free to enter, and a treaty-based undertaking.

27. The same considerations held good with regard to the recognition of Governments, a topic to which the Special Rapporteur had unfortunately not referred. It was clear, for example, that most States had not recognized the Taliban government, despite the fact that it had controlled almost the entire territory of Afghanistan, primarily because that government had not respected human rights or fundamental freedoms. A unilateral act was not therefore discretionary. It was against that background that consideration should be given to the withdrawal of a *de facto* act of recognition of a State, to which Mr. Pellet had referred at the previous meeting.

28. All that showed the advantages and limitations of the category-by-category approach adopted in the sixth report. A unilateral act of recognition had specific characteristics which were difficult to transpose to all the other categories of unilateral acts. It would therefore be advisable to pursue the category-by-category approach initiated by the Special Rapporteur in order to define the specific characteristics of each category of unilateral act and to exclude from the draft articles those which were not shared by all unilateral acts. Hence it would seem that not many common rules would be drawn from State practice.

29. Mr. PAMBOU-TCHIVOUNDA said it was regrettable that there was not a single rule—not even the start

of one—in the sixth report, which also did not contain a single draft article.

30. As to the debate on the discretionary nature of recognition, to say that there were rules of international law which established an obligation of non-recognition or at least an obligation for States to ensure that the law endorsed an initiative in respect of recognition was one thing, but to declare that States could not freely determine whether a situation should be recognized, even if that meant that they might make a mistake, was another. In the example mentioned by Mr. Momtaz of the directives concerning the recognition of new States in Eastern Europe and the Soviet Union adopted in 1991 by the European Community, the concern had been to safeguard the rights of minorities within existing borders. In Africa, the inviolability of borders was regarded as a peremptory norm. Conceivably, the rebellion in Côte d'Ivoire might cause the country to split into three separate States which the African Union was unlikely to recognize. But what of non-African States which might, on account of their own interests, well wish to recognize some of those States? The rules of international law might restrict freedom of recognition, but they did not prevent a State from taking the initiative of venturing into recognition. That was the crux of the problem of the discretionary nature of recognition.

31. Mr. MOMTAZ, replying to Mr. Pambou-Tchivounda on the question whether the report under consideration identified a rule which might apply to all categories of unilateral acts, said that the principle of *acta sunt servanda*—of good faith in the fulfilment of commitments entered into under a unilateral act—might be one rule that must apply to all unilateral acts. That was the conclusion reached by the Special Rapporteur.

32. As to the second point raised by Mr. Pambou-Tchivounda, he himself had not said that a State was not free to evaluate the criteria for the recognition of States and Governments. What he had meant was that those criteria were becoming increasingly strict in order to reconcile questions of security and the maintenance of peace with States' freedom of action in matters of recognition. States were still free to evaluate those criteria.

33. Mr. ECONOMIDES, referring to some of the points made in the interesting, stimulating report submitted by the Special Rapporteur, noted that it was stated in paragraph 26 that “silence is not always interpreted as acquiescence”. That meant that, as a general rule, silence was interpreted as acquiescence, save in exceptional circumstances. That sentence was absolute. In his view, very great caution was required when treating silence as acquiescence, especially if such passive conduct had been adopted by a weak State in its dealings with a powerful State.

34. He disagreed with the opinion the Special Rapporteur expressed in paragraph 99 of his report that a State could “persistently oppose a general custom, which would mean that the latter is not opposable to it”. It was true, as Mr. Melescanu had noted at the preceding meeting, that customary international law had not yet been codified, but the Special Rapporteur's view was at variance with Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, since, unlike a treaty, custom was bind-

² See *Bulletin of the European Communities*, vol. 24, no. 12 (1991).

³ Press release SG/SM/5583/Rev.1 – L/2710/Rev.1 of 17 March 1995, p. 4.

ing on all States without distinction, even those which opposed it. Custom was not an optional legal rule.

35. An act of recognition was not declarative. Admittedly, an act of recognition did not create the new State which already existed at the time of its recognition as a State, but there was no denying that, on the basis of recognition, a whole nexus of relations was established between recognizing and recognized States, and that nexus of relations was more constitutive than declarative in nature.

36. It was also regrettable that, when referring to the obligation of non-recognition under United Nations decisions, the Special Rapporteur did not mention the relatively recent case, to which Mr. Dugard had referred at the preceding meeting, of the State of Northern Cyprus, which had been established unlawfully.

37. Like Mr. Pellet, he regretted that the Special Rapporteur had not made more of the classical distinction between *de jure* recognition, which was irrevocable, and *de facto* recognition, which was both temporary and of a trial nature and therefore revocable.

38. The procedure for admitting new Members to the United Nations could not be regarded as a collective act of recognition of those States. A recent example which gave the lie to any such tendency was the attitude of Greece, which had voted in favour of the admission of the former Yugoslav Republic of Macedonia to the United Nations while maintaining its decision not to recognize that State.

39. The purpose of the sixth report was to make the Commission think about how to handle the codification and progressive development of unilateral acts of States. He was convinced that the first thing to do was to define unilateral acts of the State restrictively and, on the basis of that fundamental definition, to begin preparing the provisions of the draft. The unilateral acts on which the Commission's work must focus were those that could be a source of international law on the same basis as treaties, custom or binding decisions of international organizations. In other words, as he had already said at the preceding meeting, a unilateral act must create an international obligation towards another State, several States or the international community as a whole, or even towards other subjects of international law. Any other unilateral act must be excluded from the scope of the study.

40. For essentially didactic reasons, the doctrine divided unilateral acts into various categories such as promise, recognition, waiver and protest. He did not consider that list to be exhaustive. In addition, a single unilateral act might be placed in more than one category. The famous Ihlen declaration⁴ might be taken as an example: as the Special Rapporteur stated in paragraph 21 of his report, it recognized a situation, but it also contained a promise and even a waiver. Obviously, what mattered in that case was the legal effect of the unilateral act, not its actual categorization. He was therefore sceptical about the need for further specific methodological studies. On the basis of State practice, as many speakers had pointed out, basically what was needed was to identify unilateral acts which could create international obligations and to draft

a limited number of rules applicable to them—both customary rules and rules derived from progressive development. True, State practice was not rich as far as unilateral acts that created international obligations were concerned. States were highly averse to assuming such obligations unilaterally with nothing in return, since that was by definition contrary to their foreign policy. When they did assume such obligations, they usually did so unwittingly or as a result of open or unavowed constraint. The purpose of the study was accordingly to alert States to effects of their unilateral acts that could sometimes be harmful to them.

41. In conclusion, he said that he was still in favour of the codification of unilateral acts of States, but thought that the Commission should not be overly ambitious and should produce a relatively short text including the basic, fundamental principles that applied to such acts. He was also of the view that the title of the topic should be broadened to read: "Unilateral acts of States as a source of international law".

42. Mr. FOMBA congratulated the Special Rapporteur on the efforts he had made in preparing his report and noted that he had done what the Commission had asked of him. It might be asked, however, whether the results were perfect in spirit and letter, specifically with regard to the categorization and evaluation of State practice. At all events, the most important thing was to criticize constructively. He would not enter into the substantive discussion on recognition of States, which might, despite appearances, be considered to constitute a fairly unique category of unilateral acts and which was also probably the best known. He would therefore make just a few very brief comments on form and the methodological approach to the topic.

43. On form, following the introduction, the report was divided into four parts dealing with recognition, the validity of the unilateral act of recognition, the legal effects of recognition and the application of acts of recognition. The ordering and internal consistency of those components could probably be improved. In fact, the four parts were based on two main concepts, namely, the definition and scope of recognition, on the one hand, and the applicable legal regime, on the other. There was also, at least for the time being, no section entitled "Conclusions and recommendations".

44. As to the usefulness of the topic, even though unilateral acts of States were not placed by international law on the same footing as treaties, they were no less important and should be seen as such with a view to adding to the full array of sources of international law.

45. At present, it was too early to determine what form the final product might take. Among the various options, however, he would prefer the preparation of as comprehensive a set of draft articles as possible, accompanied by commentaries. On that point, however, a number of speakers, particularly Mr. Momtaz, had called for some caution, and their opinion should be taken into account. As to the methodological choice between a case-by-case study and a comprehensive study, he preferred the latter, but, since the Commission had already committed the Special Rapporteur to an empirical approach, it was now a question of capitalizing on the work already done. He therefore agreed

⁴ See 2770th meeting, footnote 8.

to a series of monographs, but with a view to bringing together and systematizing the conclusions that could be drawn. That was why he found merit in Mr. Pellet's idea of a table containing a preliminary assessment of the various categories of unilateral acts for the purposes of comparison and systematization. The Working Group that had been set up could do useful work along those lines. What was needed was an evaluation questionnaire that was as rigorous, clear-cut, comprehensive and coherent as possible. There were many fundamental questions, including the generic definition of unilateral acts, its applicability to all the possible categories, the identification of specific features, the conceptual and methodological framework, the deciphering of the intellectual and operational process from the standpoint both of internal and of external logic, and the current situation and prospects for incorporation in international law.

46. As to the scope of the study, whereas the Commission's mandate had initially been limited to unilateral acts of States, the codification process would be incomplete if it was not followed up by a study of unilateral acts of international organizations.

47. The definition proposed of unilateral acts by the Special Rapporteur in paragraph 67 of his report was not without interest, but he would refrain from commenting on it until the text proposed by the Working Group had been made available.

48. While account must be taken of the *acta sunt servanda* principle, caution should be exercised in applying, *mutatis mutandis*, the Vienna regime particularly with regard to the question of the modification, suspension and revocation of unilateral acts.

The meeting rose at 12.35 p.m.

2773rd MEETING

Thursday, 10 July 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

later: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, 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. The CHAIR extended a warm welcome to Mr. Matheson, the new member of the Commission, and invited the Commission to resume its discussion of the sixth report on unilateral acts of States (A/CN.4/534).

2. Ms. XUE said that the sixth report was very useful in that it studied the subject matter from one specific aspect and thus provided a more solid basis for the Commission's deliberations. The topic deserved serious study for the purposes of the codification and progressive development of international law. State practice showed that certain unilateral acts did give rise to international obligations, and it would therefore be desirable to lay down some rules for such acts in the interests of legal security and in order to lend certainty, predictability and stability to international relations.

3. The topic was complicated and difficult because it encompassed various kinds of unilateral acts performed by States, some of which, such as the recognition of States or Governments, could be directly assimilated to existing legal regimes, while others, such as promise or denunciation, could not. It also touched on the very nature of State conduct and on States' willingness to be bound by their own acts. In international relations, most unilateral acts of States were political in nature, yet they were often as solemn and important as legal commitments and were normally upheld by States as a matter of honour. In practice, States were reluctant to regulate the matter mainly for foreign policy reasons, but the scope of the topic needed to be defined in order to maintain a proper balance between States' individual interests and the need to strengthen the legal system. The establishment of a working group to produce such a definition was therefore welcome.

4. The report did not study State practice in sufficient depth and failed to focus on acts of recognition that had a direct bearing on the rules governing unilateral acts. In the classical doctrine of recognition, constitutive theory contained strict rules on the criteria for the recognition of a State or Government and turned on the issue of legality, but declaratory theory was gradually prevailing with the development of State practice. In recent years, some States had gone so far as to stop giving formal recognition to a new State and directly decide whether to establish diplomatic relations with it. Hence the contents of the criteria for the recognition of a State or Government should not be examined, but the Commission should consider at what point such recognition took effect. Since recognition was essentially a political act which produced legal effects, the State which had been recognized rightfully expected such an act to have certain legal consequences that would be governed by international law.

5. Care had to be taken not to interpret silence and acquiescence as being synonymous, especially when territorial matters were concerned. She took issue with the

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