UNILATERAL COSTS OF STATES

[Agenda item 7]

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

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CONTENTS

Multilateral instruments cited in the present report

	Source
General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928)	League of Nations, *Treaty Series*, vol. XCIV, No. 2137, p. 57.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994)	United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 3.
Annex 1 B: General Agreement on Trade in Services	Ibid., vol. 1869, No. 31874, p. 181.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	E/1996/99.

Works cited in the present report

CAFLISCH, Lucius

"La pratique suisse en matière de droit international public 1995", *Swiss Review of International and European Law* (Zürich), vol. 6, 1996.

"La pratique suisse en matière de droit international public 1998", *Swiss Review of International and European Law* (Zürich), vol. 9, 1999, pp. 639–651.

DI QUAL, Lino

Les effets des résolutions des Nations Unies. Paris, LGDJ, 1967.

DUPUY, Pierre-Marie

Droit international public. 5th ed. Paris, Dalloz, 2000.

GOODRICH, Leland M. and Edvard HAMBRO

Charter of the United Nations: Commentary and Documents. Boston. World Peace Foundation, 1946.

Commentaire de la Charte des Nations Unies. Neuchâtel, Éditions de la Baconnière, 1948.

REUTER, Paul

Droit international public. 7th ed. Paris, Presses Universitaires de France, 1993.

ROUSSEAU, Charles

Droit international public, vol. I, *Introduction et sources*. Paris, Sirey, 1970.

SKUBISZEWSKI, Krzysztof

"Unilateral acts of States", *in* Mohammed Bedjaoui, ed., *International Law: Achievements and Prospects*. Paris, UNESCO and Dordrecht, Martinus Nijhoff, 1991, pp. 221–240.

VERHOEVEN, Joe

"Les nullités du droit des gens", *in* Prosper Weil, ed., *Droit International 1*. Paris, Pedone, 1981.

WHITEMAN, Marjorie M.

Digest of International Law. Vol. 4. Washington, D.C., 1965.

ZEMANEK, K.

"Unilateral legal acts revisited", *in* Karel Wellens, ed., *International Law—Theory and Practice: Essays in Honour of Eric Suy*. The Hague, Martinus Nijhoff, 1998.

Introduction

I. GENERAL OBSERVATIONS AND OUTLINE OF THE THIRD REPORT

1. The topic of unilateral acts of States is a particularly complex one, mainly because of the diversity of such acts from the material point of view, which makes it difficult to establish common rules that apply to all of them.

2. In order to move forward in the work undertaken by the International Law Commission, in particular since 1996, it is essential to consider, in the most appropriate manner, the comments and observations expressed by its members and by Governments, both in writing and in the Sixth Committee of the General Assembly.

3. Following the submission of reports on the topic in 1998[1] and 1999,[2] and bearing in mind those comments and observations, it seemed useful to present this third report in two parts: a first part, which would clarify, complete and even revise some of the concepts already presented, and a second part, containing some draft articles and comments thereon concerning the issues that the Commission itself had suggested should be addressed.

4. During its fifty-first session in 1999, the Commission considered the topic at its 2593rd to 2596th meetings and at its 2603rd meeting. On that occasion, the Commission established a Working Group, at the request of the Special Rapporteur, whose task was "(*a*) to agree on the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (*b*) to set the general guidelines according to which the practice of States should be gathered; and (*c*) to point the direction that the work of the Special Rapporteur should take in the future".[3] The Working Group produced a report[4] containing thought-provoking comments; these were taken into account in the preparation of this third report and also produced an interesting debate in the Commission.[5]

5. Although the doctrine and precedents relating to the topic have been considered extensively, practice has been looked at comparatively less. Since the study of practice is at times difficult to systematize, the Commission, with a view to making the topic easier to study, requested the Secretariat, after consultation with the Special Rapporteur, to distribute a questionnaire to Governments about their practice in the area of unilateral acts, in particular about the categories of such acts, capacity to act on behalf of the State through unilateral acts, formalities for such acts, their content, legal effects, importance, usefulness and value, rules of interpretation that apply to such acts, and their duration and possible revocability.[6] The Secretariat sent the questionnaire to all Governments on 30 September 1999, and the General Assembly, in paragraph 4 of its resolution 54/111 of 9 December 1999, invited Governments to respond by 1 March 2000. Some delegations in the Sixth Committee, it is worth noting, had referred to specific aspects of the topic that were addressed in the questionnaire.[7]

6. Although at the time this report was prepared no information had yet been received from Governments, some State practice, as reflected in specialized publications in a number of countries, has been examined.

7. As indicated above, the third report is divided into two parts, preceded by three preliminary issues that need to be addressed: first, the relevance of the topic; secondly, the relationship between the draft articles on unilateral acts and the 1969 Vienna Convention on the Law of Treaties; and third, the question of estoppel and unilateral acts. Once these three issues have been dealt with, the third report will be organized as follows:

Reformulation of articles 1–7 of the previous draft articles

1. New draft article 1. Definition of unilateral acts.
2. Deletion of the previous draft article 1 on the scope of the draft articles.
3. Advisability of including a draft article based on article 3 of the 1969 Vienna Convention.
4. New draft article 2. Capacity of States to formulate unilateral acts.
5. New draft article 3. Persons authorized to formulate unilateral acts on behalf of a State.
6. New draft article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose.
7. Deletion of former draft article 6 on expression of consent.
8. New draft article 5. Invalidity of unilateral acts.

[1] *Yearbook … 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

[2] *Yearbook … 1999*, vol. II (Part One), p. 195, document A/CN.4/500 and Add.1.

[3] Ibid., vol. II (Part Two), p. 137, para. 581.

[4] Ibid., pp. 137–139, paras. 577–597.

[5] Ibid., vol. I, 2603rd meeting, pp. 260–265, paras. 1–46.

[6] Ibid., vol. II (Part Two), pp. 138–139, paras. 593–594.

[7] "Topical summary of the discussion in the Sixth Committee on the report of the Commission during the fifty-fourth session of the General Assembly" (A/CN.4/504), pp. 29–30, paras. 148–156.

II. PRELIMINARY ISSUES

8. It seemed appropriate to review three basic issues in the study of unilateral acts of States on which a firm position needs to be taken in order to move ahead in the work on the topic.

A. Relevance of the topic

9. In the first place, as illustrated by the nearly unanimous opinion of the members of the Commission and representatives of Governments in the Sixth Committee, there appears to be no doubt as to the increasingly frequent use by States of unilateral acts in their international relations, the importance of such acts and the need to elaborate specific rules to govern their functioning.

10. As may be recalled, the Working Group established in 1997 by the Commission at its forty-ninth session discussed the reasons why such acts should be considered, underlining the view that "[i]n their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects".[8] This idea was taken up again in 1997 and 1998 by the Commission at the suggestion of the working groups it had established to look into the topic.

11. The topic of the sources of international law, proposed for codification by the Secretariat in 1949, is not considered to have been exhausted. In this context, the report adopted by the Commission in 1996 at its forty-eighth session on its long-term programme of work notes that, among the topics which had been proposed, that of unilateral acts was a proper subject for immediate consideration. The Commission expressed the view that the topic was rather well delimited, that States had abundant recourse to unilateral acts and that their practice could be studied with a view to drawing general legal principles.[9]

12. At its fifty-first session, in 1999, the Commission made commentaries in favour of this proposal. One member indicated that "such acts were the most common means of conducting day-to-day diplomacy and there was uncertainty, both in the literature and in practice, regarding the legal regime that was applicable to them. As it was the function of international law to ensure stability and predictability in international relations, some regime was needed in order to prevent unilateral acts from becoming a source of disputes or even conflicts".[10]

13. In the Sixth Committee, some representatives stressed the relevance of the topic. It was noted, in this connection, that a complex situation arose in both the doctrine and the practice of international law, not only because of the extraordinary variety of unilateral acts, but also because they were omnipresent in international relations, constituted the most direct means that States had of expressing their will and were a means of conducting day-to-day diplomacy. State practice and precedents confirmed that they could create legal effects, engendering rights and obligations for States.[11]

14. Accordingly, there appears to be no doubt about the relevance of the work and the need to go on with it, in order to respond to the General Assembly's request and give continuity to what was expressed in the Commission itself.

B. Relationship between the draft articles on unilateral acts and the 1969 Vienna Convention

15. In the second place, and also as a preliminary step, the importance of the 1969 Vienna Convention should be reconsidered as an essential source of inspiration for the Commission's work on the topic.

16. In the view of some members of the Commission and representatives in the Sixth Committee, the approach that has been taken thus far to the topic follows the 1969 Vienna Convention too closely, while for others, on the contrary, the work on unilateral acts has become separated from treaty law, and some have mentioned the need to take the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations into account as well.

17. The previous reports on the topic pointed out that the 1969 Vienna Convention was an extremely useful source of inspiration for the Commission's work on the topic. This relationship has been commented on by several members of the Commission[12] and some State representatives in the Sixth Committee, several of whom endorsed the Special Rapporteur's statement, while others, as indicated, felt that a close relationship should be established with the 1986 Vienna Convention as well as with the 1969 Convention. Still others, however, noted that it was not necessary to follow the 1969 Convention too closely, in view of the differences between treaty acts and unilateral acts.[13]

18. The report on the long-term programme of work adopted by the Commission in 1996 states that "[a]lthough the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties certainly offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts could be approached".[14]

19. Although it was indicated when the second report was introduced in the Commission in 1999 that the 1969 Vienna Convention constituted a very important point of reference for the work on unilateral acts,[15] this certainly did not mean that all the rules of that Convention were automatically transferred to the draft articles.

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[8] *Yearbook …1997*, vol. II (Part Two), p. 64, para. 196.

[9] *Yearbook … 1996*, vol. II (Part Two), annex II, addendum 3, p. 141, paras. 1–3.

[10] *Yearbook … 1999*, vol. I, 2595th meeting, statement by Mr. Hafner, pp. 204–205, para. 27.

[11] A/CN.4/504 (see footnote 7 above), p. 25, para. 115.

[12] *Yearbook …1999*, vol. II (Part Two), pp. 133–134, paras. 534–535.

[13] A/CN.4/504 (see footnote 7 above), pp. 28–29, paras. 140–145.

[14] *Yearbook … 1996* (see footnote 9 above), para. 3 (*d*).

[15] *Yearbook … 1999* (see footnote 12 above), p. 136, para. 567.

20. The referential criterion should be conceived, of course, in a flexible way, bearing in mind the specificity of unilateral acts, which are admittedly characterized mainly by their unilateral formulation without the participation of the addressee State. It is true that there are important differences, as indicated, between the two categories of acts, but it is equally true that common elements exist that must be taken into account in this study.

21. In the view of the Special Rapporteur, it is very useful to follow the methodology and structure of the 1969 Vienna Convention, which served, moreover, as a model for the 1986 Vienna Convention. It is equally important to bear in mind also, in the most appropriate way, the work of the Commission when the draft 1969 Vienna Convention was being drafted, together with the debates in the Sixth Committee and during the United Nations Conference on the Law of Treaties in Vienna, which reflected the sense of the rules as elaborated at that time.

22. The issue should therefore be settled definitively, accepting a flexible parallelism with the work on the law of treaties and the 1969 Vienna Convention, adapted to the category under consideration here.

C. Estoppel and unilateral acts

23. Thirdly, before beginning the first part of the report, which amounts to a recapitulation of the treatment of the topic, it would seem helpful to refer briefly to the issue of estoppel and its relationship to unilateral acts, an issue that has been mentioned on various occasions by representatives of Governments in the Sixth Committee.

24. The principle of preclusion or estoppel (in Spanish law, *regla de los actos propios*) is a general principle of law whose validity in international law has generally been admitted, as illustrated by various judicial decisions, including that of ICJ on the *Arbitral Award Made by the King of Spain*[16] and in the *Temple of Preah Vihear*[17] case, both of which have been commented on in previous reports.

25. There is no doubt about the relationship between unilateral acts and acts pertaining to estoppel. The act that may give rise to recourse to estoppel is a unilateral State act; its importance, however, is perhaps less related to the definition of a unilateral act than to the application of such an act.

26. It is important to note that estoppel may arise not only from an act but also from an omission, as in the *Temple of Preah Vihear* case, when ICJ stated that "[e]ven 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 from 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 ... Cambodia, relied on Thailand's acceptance...".[18] In this case, the Court applied estoppel, but Thailand's view, as expressed by its representative at the United Nations Conference on the Law of Treaties of 1968–1969, was that Thailand had been the "victim of the application of estoppel by ICJ".[19] Also in the case of the *Arbitral Award Made by the King of Spain*, the Court indicated that "Nicaragua, by express declaration and by conduct, recognized the Award as valid".[20]

27. It should be borne in mind, as noted in previous reports, that the precise objective of acts and conduct relating to estoppel is not to create a legal obligation on the State using it; moreover, the characteristic element of estoppel is not the State's conduct but the reliance of another State on that conduct.

[16] *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, pp. 213–214.

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

[18] Ibid., p. 32.

[19] Statement by Mr. Suphamongkhon, cited in Verhoeven, "Les nullités du droit des gens", p. 83.

[20] *I.C.J. Reports 1960* (see footnote 16 above), p. 213.

Reformulation of articles 1–7 of the previous draft articles

I. GENERAL OBSERVATIONS

28. Without the least doubt, the work of the Special Rapporteur, in the view of the Commission, is to facilitate the Commission's study of the topic on the basis of his reports, which should take into account not only the doctrine, precedents and available practice of States, but also the commentaries made by the members of the Commission and Governments, both in writing and in the General Assembly.[21]

29. On the basis of the foregoing, the definition of unilateral acts, presented earlier in draft article 2, shall be discussed and the conclusion will be a new version. It shall also be considered whether it is necessary to retain the previous article 1, on the scope of the draft articles, and the advisability of including a provision based on article 3 of the 1969 Vienna Convention concerning the legal force and international law applicable to international agreements not included in the scope of the Convention.

[21] On the functions of special rapporteurs, see *Yearbook …1996* (footnote 9 above), pp. 90–92, paras. 185–201.

II. DEFINITION OF UNILATERAL ACTS OF STATES

A. Observations of the Special Rapporteur

30. One of the most complex issues facing the Special Rapporteur and the Commission is that of defining unilateral acts of States, on the basis of which the draft articles on unilateral acts of States will be elaborated. Progress on the work on the topic necessarily depends on reaching ultimate agreement on the definition of unilateral acts of States.

31. In particular, the following are reconsidered:

(*a*) Intention of the author State;

(*b*) Use of the term "act", which most view as broader than the term "declaration";

(*c*) Legal effects of unilateral acts: rights and obligations;

(*d*) "Autonomy" or non-dependence of unilateral acts;

(*e*) "Unequivocal" character of unilateral acts;

(*f*) "Publicity" of unilateral acts.

1. The intention of the author State

32. Since its initial consideration of this topic, the Commission, after ruling out certain State conduct and acts, has carefully considered the various unilateral acts of States and concluded that some of these may produce legal effects; this fact distinguishes them from other acts that are merely political and therefore do not produce such effects, which does not diminish their importance in international relations.

33. Some unilateral acts admittedly produce or may produce legal effects at the international level, while others, which should be definitively ruled out, have only political intentions. It is quite evident that it is difficult to separate these categories of acts, not only from the conceptual point of view, but also in relation to the very nature of the act. It is hard to determine in all cases whether or not an act produces legal effects, that is, whether or not it was formulated with that intention.

34. The intention of the author of the act is fundamental, a fact that raises some concerns, because it is impossible to determine the element of intent in all cases. It might be affirmed, as did a representative in the Sixth Committee, that all acts of States are in principle political, and that some of them may be legal if that is the intention of the author State,[22] although it has been recognized that intent is always difficult to prove, and even that States might perform unilateral acts without realizing their intention;[23] the Special Rapporteur does not agree with this latter position, if it is accepted that the legal act translates into the manifestation of will and reflects the State's intention.

35. An act cannot be defined as a unilateral act, within the present meaning, if the State does not understand that it assumes a legal commitment in formulating it. If the State does not understand that it has assumed such a commitment, the act is more like a conduct or attitude which, although it may produce legal effects, cannot be considered a legal act in the strict meaning of the term.

36. Despite the doubts that might arise about the criterion for determining the existence of a unilateral act that produces legal effects, the Special Rapporteur believes that the reference to the intention of the State is absolutely valid.

2. Use of the term "act"

37. The use of the term "unilateral act" in the new draft article 1 instead of the term "unilateral declaration" as in the previous text is intended to meet the concerns expressed by some members and representatives in the Sixth Committee, although it should be pointed out that the workable definition, which the Working Group and the Commission adopted in 1999, refers to a unilateral declaration.

38. It is worth noting that the term "unilateral declaration" has appeared in earlier works of the Commission although then it was within the context of treaty law. Draft article 22 submitted by the Special Rapporteur, Sir Gerald Fitzmaurice, in his fifth report, in 1960, states that "[w]here a State makes a unilateral declaration in favour of, or assuming obligations towards, one or more, or all, other States, in such a manner, or in such circumstances that, according to the general rules of international law, a legally binding undertaking will result for the declarant State, the other State or States concerned can claim as of right the performance of the declaration".[24]

39. This wording, even though it is placed in that part of the draft articles submitted by the Special Rapporteur concerning *in favorem* effects resulting from the act of the parties to a treaty or of a single party, is important for the study of unilateral acts.

40. In the view of the Special Rapporteur, the comments made on the term "declaration" are useful in that, as has been pointed out, most if not all unilateral acts of a State are formulated in declarations which, in turn, contain a variety of material acts such as protests, waivers, recognitions, promises and declarations of war, of cessation of hostilities and of neutrality.

41. Unilateral acts can take a variety of forms. Acts formulated by means of oral declarations or by means of written declarations can be seen in practice. Declarations whereby a State formulates a unilateral act are not necessarily written declarations. In practice, some unilateral declarations have been formulated orally, although they have subsequently been confirmed in writing, as in the case of the Ihlen declaration formulated by the Minister for Foreign Affairs of Norway on 22 July 1919.[25]

[22] A/CN.4/504 (see footnote 7 above), p. 26, para. 119.

[23] Ibid., para. 120.

[24] *Yearbook ... 1960*, vol. II, document A/CN.4/130, art. 22, "Unilateral declarations conferring rights on other States", p. 81, para. 1.

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

42. Unilateral acts relating to the cancellation of the external debt of some countries are an important example in the recent practice of States. These unilateral acts are formulated by an internal organ and brought to the attention of the addressee States by the foreign affairs organs of the State making the declaration.

43. After Hurricane Mitch caused enormous damage in Central America, the Council of Ministers of Spain, in a decision taken on 13 November 1998, cancelled the development assistance funds debt of Belize, the Dominican Republic, El Salvador, Honduras and Nicaragua. This act was made public when it appeared in the *Boletín Oficial del Estado* and the addressee States were informed of it through the diplomatic channel.

44. It could be said that Spain's act was a unilateral act; it was formulated by a competent organ of the State with the intention to produce legal effects on the international plane, made public and brought to the attention of the addressee.

45. Moreover, a written unilateral declaration can also be issued, made public or brought to the attention of the addressee by means of a variety of documents, including through declarations or communiqués which might be called unilateral even though two or more States participated in their elaboration—as in the case of the joint declaration by the Governments of Mexico and Venezuela referred to in the first report of the Special Rapporteur.[26] Such unilateral declarations can also be formulated by means of an unsigned press release issued by a State as, for example, the act of recognition by the Government of Venezuela formulated through a press release of 3 September 1998, whereby it decided to recognize the Palestine Liberation Organization as the legitimate representative of the Palestinian people.[27]

46. In this connection, it should be noted that form does not affect the legal validity of an international act; the important thing is the determination of the will of the State or States to make a legal commitment, as was pointed out by ICJ in the *Aegean Sea Continental Shelf* case when it considered that a press release issued at the close of a meeting of ministers for foreign affairs could reflect the agreement between the parties, independently of its content,[28] which view is entirely applicable in the context of unilateral acts when an unsigned declaration is issued which reflects, as can be deduced from interpretation of the release, the intention of the State to commit itself in relation to another State or States or in relation to one or more international organizations.

47. Notwithstanding the foregoing, in order to satisfy an important body of opinion, the term "act", which many consider broader and less restrictive, has been used, thus dispelling any doubts which may have arisen regarding possible exclusion from the scope of the draft articles of any acts other than declarations, which are hard to determine, although some people feel differently.[29] Thus the mandate entrusted to the Commission regarding consideration of unilateral acts of States has been respected.

3. Legal effects of unilateral acts

48. Draft article 2, which was submitted in the second report of the Special Rapporteur,[30] stated that the expression of will was related to the obligations assumed by the State in relation to one or more other States or one or more international organizations but made no general reference to legal effects. These legal effects can cover not only the assumption of obligations but also the acquisition of rights.

49. The State formulating the unilateral act can either acquire obligations or confirm its rights. However, it cannot, by means of a unilateral act, impose obligations on another State or on an international organization without the latter's consent; this is based on a clearly established and accepted general principle of law—*pacta tertiis nec nocent nec prosunt*—which is applied in treaty law and which must be considered together with the equally recognized principle *res inter alios acta*, a direct consequence of which is that the implementation of a treaty is limited, in principle, to the parties to the treaty. In principle, as Rousseau said, treaties merely have a relative effect. They can neither harm nor benefit third parties. Their legal effects are strictly limited to the circle of contracting parties.[31]

50. This theory is also confirmed in practice; the declaration by the Government of Nicaragua concerning the treaty delimiting the maritime boundary in the Caribbean Sea between Colombia and Honduras, which might affect Nicaragua's rights, states that this treaty is, for Nicaragua, what in legal terms is called *res inter alios acta*, that is to say, that it does not create any right for either Colombia or Honduras in relation to Nicaragua. It is also a rule of customary international law and of treaty law that a legal instrument does not create any obligations or rights for a third State without its consent.[32]

51. Other judicial precedents are also clear on this matter, as can be seen, in particular, from the PCIJ decisions in the case concerning *Certain German Interests in Polish Upper Silesia*[33] and in that concerning the *Free Zones of Upper Savoy and the District of Gex*.[34]

52. Legal doctrine reflects the almost unanimous view that a State cannot impose obligations on another State without the latter's consent. As Dupuy points out, classical voluntarist positivism sees an obstacle of principle to the suggestion that a State should be able, by the unilateral expression of its own will, to determine that of other

[26] *Yearbook … 1998* (see footnote 1 above), p. 329, para. 83.

[27] *Libro Amarillo de la República de Venezuela* (Caracas, Ministry of Foreign Affairs, 1999), p. 1020.

[28] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 41–44, paras. 100–108.

[29] Switzerland stated in the Sixth Committee that (unilateral) acts will often, but not always, take the form of a declaration; see Caflisch, "La pratique suisse en matière de droit international public 1998", p. 651.

[30] See footnote 2 above.

[31] Rousseau, *Droit international public*, pp. 453–454.

[32] *Consideraciones sobre un tratado entre terceros Estados que pretende lesionar la soberanía de Nicaragua*, Part IV: Conclusions (Managua, Ministry of Foreign Affairs, December 1999).

[33] *Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 29.

[34] *Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 141.

equally sovereign States.[35] Of course, a State can act unilaterally in exercise of its sovereign rights in order to reaffirm its rights, but not in order to acquire new rights by imposing obligations on third parties without the latter's consent. As pointed out by Skubiszewski: "No unilateral act can impose obligations on other States, but it can activate certain duties these States have under general international law or treaties."[36]

53. However, a review of practice reveals that a State can impose obligations by formulating a formal unilateral act, provided the addressee States agree, as would seem to be the case in declarations of neutrality; the declaration formulated by Austria is a good example of this.[37] It was indicated, in the Commission, in this connection, that a declaration of neutrality did not affect the other State unless they endorsed it.[38]

54. The State can also impose obligations on one or more States by means of a unilateral act, which may originate internally, but be applicable internationally under international law. That would be the case with the abovementioned unilateral declarations intended to establish the exercise of sovereign rights, especially in relation to the exclusive economic zone, which is based on a rule of general international law set out in the United Nations Convention on the Law of the Sea, although some writers believe that these acts belong more to internal law than to international law.[39]

55. It is also possible that rights acquired by a State through an earlier agreement may be lessened by a unilateral act of a State as, for example, in the case of the unilateral measures adopted by the Government of Nicaragua on the basis of articles XXI, paragraph (*b*) (iii), of the Marrakesh Agreement establishing the World Trade Organization and XIV *bis*, paragraph (1) (*b*) (iii), of the General Agreement on Trade in Services.

56. In this case Nicaragua adopted unilateral measures which might affect the rights of Colombia and Honduras, considering that its national security could be jeopardized by the treaty delimiting the maritime boundary in the Caribbean Sea between these two countries, which was signed on 2 August 1986; the issue is now the subject of consultations in WTO.

57. The Government of Nicaragua imposed special measures on imports of goods from Colombia and Honduras, which could affect the rights that these countries had acquired under earlier universal and subregional trade agreements. Again, this is not a case of imposing obligations on third parties by means of a unilateral act, but of reducing rights already acquired on the basis of earlier treaty provisions that permit exceptions to the established regime, as is the case of the previously quoted article from the Marrakesh Agreement.

58. Another issue which merits further comment, even though it has already been referred to, is the adoption by one or more States of unilateral measures based on internal legal acts which have no basis in pre-existing agreements or in any rule of international law. This would be the case, for example, of the trade blockade imposed unilaterally by one State, in particular the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act),[40] whereby one State seeks to impose obligations on other States, a step which, according to general opinion, is contrary to international law.

59. The expression "to produce legal effects", which is broader given that it covers a variety of situations, cannot be interpreted as a permissive provision enabling States to impose, by means of these acts, obligations on other States without the latter's consent, even though they can certainly reaffirm them. When submitting the report of the Working Group set up in 1999, the Special Rapporteur noted that, following the discussion in the Commission and the Working Group, it had been concluded that the best wording would be "with the intention to produce legal effects on the international plane".[41]

4. "Autonomy" of unilateral acts

60. Another issue that merits special attention is the characteristic of non-dependence of these acts. On the one hand, it can be stated that unilateral acts do not depend on an earlier act, that is to say, on an earlier expression of will, although it is true that all unilateral acts are based on international law; on the other hand, unilateral acts produce legal effects irrespective of whether or not they are accepted by the addressee; on this point there are different positions and views within the Commission.

61. Such a criterion cannot be interpreted too broadly. While it is true that a legal act is linked to earlier rules, particularly rules of general international law, this very broad approach cannot be the yardstick for determining

[35] Dupuy, *Droit international public*, pp. 317–318, para. 335.

[36] Skubiszewski, "Unilateral acts of States", p. 233.

[37] Concerning a unilateral act by Austria, see Zemanek, "Unilateral legal acts revisited", pp. 212–213:

> "Unilateral acts which establish obligations only for the author State do not require formal acceptance to become legally effective. However, if unilateral acts affect other States they must be made known to and received by them, to give them an opportunity to react.
>
> "In a class of their own are unilateral acts which … may, implicitly, affect the rights of other States. They then need acceptance or, at least, acknowledgment to achieve legal force. The following example shows the difficulty of an exact determination: On 6 November 1990 the Austrian Government declared in a note addressed to the four signatories of its 'State Treaty' of 1955 (France, UK, USA, USSR), that six articles of that treaty had become obsolete. The declaration seemed to state an already accomplished fact. In support the Austrian Government argued that the articles related to the previously existing situation in Germany which had been changed by the treaty of 12 September 1990 between Germany and the same four powers. This new treaty demonstrated, in the view of the Austrian Government, a change of opinion by the powers concerning their rights; moreover, the articles had never been applied. While the answer of the US Government that 'the United States concurs with the Austrian Government view' supports the declaratory nature of the Austrian statement, the reply by the USSR that the Soviet Government 'has no objection' or by the French Government that it 'donne son consentement ... la communication autrichienne' seemed to point rather to a constitutive unilateral act requiring acceptance."

[38] *Yearbook ... 1999* (see footnote 10 above), 2596th meeting, p. 212, para. 43.

[39] Reuter, *Droit international public*, p. 144.

[40] ILM, vol. XXXV, No. 2 (March 1996), p. 359.

[41] *Yearbook … 1999* (see footnote 10 above), 2603rd meeting, p. 261, para. 4.

the autonomy of the act. The point is to exclude, by means of this criterion, acts linked to other regimes, such as all acts linked to treaty law.

62. The unilateral act concerned with here arises at the time it is formulated—provided, of course, that the necessary requirements for validity are met—there being no need for acceptance or any act or conduct along those lines by the addressee State or States or by the addressee organization or organizations.

63. In earlier reports it was considered appropriate to use the term "autonomous"; this produced some contrary reactions from some members when the second report of the Special Rapporteur was discussed and, particularly, when the draft report of the Working Group established in 1999 was discussed. Some members said that the issue of autonomy was not essential;[42] that the notion of autonomy had nothing to do with the definition of a unilateral act;[43] that the autonomous or non-autonomous nature of an act was of secondary importance;[44] that the term should be eliminated;[45] and that "the notion of autonomy was … ambiguous".[46] Nevertheless, and this reflects the complexity of the issue, other members considered that "if an act ... was unilateral, then the autonomous element was implicit";[47] and that "autonomy was an important feature of unilateral acts".[48]

64. Certainly, the issue of autonomy as a constituent element of the unilateral act—as the debate in the Commission reveals—is extremely important and complex and it should therefore continue to be very carefully considered. As one member of the Commission suggested, everything regulated by treaty law should be excluded from the study on unilateral acts; the relevant criteria were "whether the act was unilateral and whether it produced legal effects".[49]

65. Representatives of Governments in the Sixth Committee also referred to this issue. One representative in particular pointed out that:

> [T]he "autonomy" of unilateral acts was totally conditional since the legal obligation that they created arose not from the unilateral expression of the will of the State that issued them, but rather from the compatibility between that will and the interests of other States. It was unimaginable that a unilateral act would have legal effects in the relations between its author and another subject of international law if the latter had raised objections. Furthermore, a State that made a unilateral declaration took into consideration the reactions of those to whom it was addressed.[50]

66. Others in the Sixth Committee felt that the specific reference to the term "autonomy" was appropriate. One representative said that his delegation "concurred with the concept of autonomy … as a first step towards defining the scope of unilateral acts"[51] and he questioned its elimination from the definition proposed by the Commission.

67. In recent articles, some experts on public law also considered that the term was appropriate to identify those acts which did not fall within the contractual sphere. As Zemanek states: "Autonomous unilateral acts are intended to create rights and/or obligations under international law for the author State." He goes on to add that "[s]ome autonomous unilateral legal acts, such as recognition, protest, declarations of war or neutrality, and possibly renunciation are standardized, or typified unilateral transactions".[52]

68. According to a fairly widely held view, it can be stated that there is a possibility that a unilateral act by a State may have a scope which is not dependent. ICJ in its well-known rulings on nuclear tests which, although controversial, are important for the study of this category of acts, and to which extensive reference has been made in previous reports, recognizes this possibility when it concludes that such acts can produce legal effects independently of whether they are accepted by the addressee, which reflects one of the forms of autonomy to which reference has been made.[53] There is no reason to conclude that a promise, for example, is not binding upon the State that makes it, whatever the position of the addressee may be; this is based on the principle of good faith and, more particularly, on the obligation to respect convictions arising from its conduct.[54]

69. Although the term "autonomous" is not included in the definition submitted in the present report, it can be assumed that these acts are independent in the sense mentioned above, although this issue will have to be discussed further in the Commission so as to define and delimit such acts.[55]

5. "Unequivocal" character of unilateral acts

70. The definition of unilateral acts that was submitted in the second report of the Special Rapporteur[56] stated that the expression of will must not only be autonomous or non-dependent, but must be formulated unequivocally and publicly; these terms must now be clarified so as to support the new draft article.

71. With regard to the unequivocal character of the act, the issue that arises is whether that character must be linked to the expression of will or to the content of the act. Some members said that it should be related to the intention, whereas others felt that that did not properly reflect State practice in the formulation of unilateral acts and the conduct of their foreign policy.

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[42] Ibid., para. 13 (Mr. Pellet).

[43] Ibid., p. 263, para. 28 (Mr. Candioti).

[44] Ibid., p. 264, para. 32 (Mr. Addo).

[45] Ibid., paras. 33 and 37 (Mr. Simma and Mr. Dugard).

[46] Ibid., para. 35 (Mr. Pellet).

[47] Ibid., p. 262, para. 17 (Mr. Rosenstock).

[48] Ibid., para. 18 (Mr. Lukashuk).

[49] Ibid., p. 263, para. 28 (Mr. Candioti).

[50] A/CN.4/504 (see footnote 7 above), pp. 26–27, para. 127.

[51] Statement by Chile, *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 16th meeting (A/C.6/54/SR.16), para. 11.

[52] Zemanek, loc. cit., p. 212.

[53] *Nuclear tests (Australia* v. *France*), *Judgment, I.C.J. Reports 1974*, pp. 267–272, paras. 42–60; and ibid. *(New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 472–477, paras. 45–63.

[54] Reuter, op. cit., p. 142.

[55] *Yearbook … 1999* (see footnote 10 above), 2603rd meeting, pp. 264–265, para. 40 (Mr. Baena Soares), p. 263, para. 29 (Mr. Gaja), and p. 264, para. 38 (Mr. Melescanu).

[56] See footnote 2 above.

72. It would seem that the link must be established in relation to the expression of will, that is to say, that what is important is to specify that the act must be formulated unequivocally.

73. The term "unequivocal" can be likened to the term "clarity", as was pointed out by one representative in the Sixth Committee when he said that it was clear that there was no unilateral legal act except insofar as the State formulating the act clearly intended to produce a normative effect.[57]

74. It was pointed out in the Sixth Committee that, under the judicial practice of some countries, acts that did not intend to produce legal effects sometimes produced them,[58] which would seem to contradict the accepted position that the act is based on the State's intention.

75. This assertion would seem to be contrary to legal security and confidence in international relations which is what has prompted the Commission to undertake the study of unilateral acts of States and to prepare specific rules to regulate their operation.

76. In order to ensure legal security it would seem obvious that there must be certainty; this is another term that was used, together with the term "predictability" in the 1997 report of the Working Group which the Commission adopted.[59]

77. Accordingly, it has been deemed appropriate to include in draft article 1, which is submitted in this report, the term unequivocal, linked to the expression of will.

6. "Publicity" of unilateral acts

78. It appears, from the debate on this issue, that it is essential that a unilateral act formulated by a State should be known, at least to the addressee of the act. As some members of the Commission and some representatives in the Sixth Committee have noted, the basic requirement is that the addressee of an act unilaterally formulated by a State should be aware of the act. In this connection, it is interesting to note what was said by the Legal Counsel of the Federal Department of Foreign Affairs of Switzerland with respect to the consideration of unilateral legal acts, to the effect that unilateral declarations made by a State were binding on the latter to the extent that the State intended to commit itself legally and provided that the other States concerned were aware of that commitment.[60]

79. Thus, the definition presented in the present report specifies that the act must be "known to that State or international organization". This primarily reflects the requirement that the act should be public and should be known, at least, to the addressee. The criterion of publicity had been introduced into the previous definition, as the Special Rapporteur himself noted upon introducing his second report, and "had to be understood in connection with the State to which the act in question was addressed, which must be aware of the act in order for it to produce effects".[61]

B. New draft article 1. Definition of unilateral acts

80. In view of the foregoing, the Special Rapporteur proposes the following article 1, which replaces the previous draft article 2:

"Article 1. Definition of unilateral acts

"For the purposes of the present articles, "unilateral act of a State" means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization."

[57] Statement by Switzerland referred to in Caflisch, "La pratique suisse … 1998", p. 651.

[58] A/CN.4/504 (footnote 7 above), p. 26, para. 120.

[59] *Yearbook …1997* (see footnote 8 above), p. 64, para. 196.

[60] Caflisch, "La pratique suisse en matière de droit international public 1995", p. 596.

[61] *Yearbook …1999* (see footnote 12 above), p. 137, para. 574.

III. DELETION OF THE PREVIOUS DRAFT ARTICLE 1 ON THE SCOPE OF THE DRAFT ARTICLES

81. At this point, it would be appropriate to consider two issues that were raised at the beginning of the present report: first, whether or not to include a provision specifying the scope of the draft articles; and secondly, whether or not to include a provision based on article 3 of the 1969 Vienna Convention.

82. As to the first point, some members of the Commission and representatives of Governments were in favour of deleting draft article 1, which was presented in the second report of the Special Rapporteur, and merging it with article 2,[62] although it was also noted that draft articles 1 and 2 were complementary and that their wording should be strictly consistent.

83. The 1969 Vienna Convention refers only to agreements concluded between States in written form, in accordance with the definition laid down in article 2, paragraph 1 (*a*), of the Convention, and the article specifying its scope refers to treaties, in line with that definition.

84. In the case of unilateral acts, the draft refers to a category of acts which is much broader than what seems to be covered by the definition contained in draft article 1, which does not seem to allow the consideration of other acts; this will be discussed later in the context of the issue

[62] Ibid., p. 135, para. 548.

of whether or not to include a provision based on article 3 of the 1969 Vienna Convention.

85. Since it appears that the scope of application of the draft articles is specified in the new draft article 1 and that the draft applies only to unilateral acts formulated by a State with the intention of producing legal effects at the international level, the inclusion of a specific article defining the scope of application seems unnecessary, as had been suggested in the second report of the Special Rapporteur;[63] this, then, represents a departure from the model of the 1969 Vienna Convention.

[63] See footnote 2 above.

IV. ADVISABILITY OF INCLUDING A DRAFT ARTICLE BASED ON ARTICLE 3 OF THE 1969 VIENNA CONVENTION

86. Another question that arises is whether or not to include a provision based on article 3 of the 1969 Vienna Convention concerning the legal force of international agreements not within the scope of the Convention and the provisions of international law which apply to them.

87. Certainly, the situation referred to in the context of the 1969 Vienna Convention, as indicated above, is different from the one referred to in relation to unilateral acts of States. It therefore seems appropriate to depart from the model of the 1969 Convention.

88. The 1969 Vienna Convention refers to international treaties, as defined in its article 1, while recognizing the existence of other agreements not in written form which may be outside the scope of the Convention, for which reason article 3 was included in the Convention.

89. In the case of unilateral acts, although this issue was raised by a member of the Commission, the inclusion of such an article seems unnecessary because the draft refers to unilateral acts; this term is broad enough to cover all unilateral expressions of will formulated by a State. This might not have been the case if the draft had referred to unilateral declarations, since that term was rejected by the majority and was considered more restrictive, and therefore could have excluded from the scope of application certain unilateral acts other than declarations.

90. This assessment agrees with the view expressed by the majority of members, to the effect that unilateral acts should be considered primarily as physical rather than formal acts; in the latter case, the discussions would have revolved around declarations.

V. CAPACITY OF STATES TO FORMULATE UNILATERAL ACTS

A. Observations by the Special Rapporteur

91. Article 3 of the draft articles presented in the second report of the Special Rapporteur has been essentially retained, and reflects the equivalent provision of the 1969 Vienna Convention. However, the drafting suggestions put forward by the members of the Commission have been duly taken into account in the formulation of the new text.

B. New draft article 2. Capacity of States to formulate unilateral acts

92. Accordingly, the Special Rapporteur proposes the following article:

"Article 2. Capacity of States to formulate unilateral acts

"Every State possesses capacity to formulate unilateral acts."

VI. PERSONS AUTHORIZED TO FORMULATE UNILATERAL ACTS ON BEHALF OF A STATE

A. Observations by the Special Rapporteur

93. The second report of the Special Rapporteur,[64] submitted in 1999, contained a proposed draft article on representatives of a State authorized to act on its behalf and to engage the State at the international level through the formulation of a unilateral act.

94. As indicated in that report, "[t]he structure of article 7 of the 1969 Vienna Convention should guide the drafting of the present draft article on unilateral acts, taking into account certain peculiarities to which reference should be made".[65] Accordingly, the essence of that article of the Convention has been retained, while authorization to represent the State has been extended to other persons who may act on behalf of the State in specific areas of competency through the formulation of unilateral acts.

95. The issue that arises in relation to a provision concerning the authorization of persons to act on behalf of the State and engage it at the international level through unilateral acts is whether such authorization should be limited to Heads of State, Heads of Government and Ministers for Foreign Affairs, or whether it should also extend to heads

[64] Ibid.

[65] Ibid., para. 75.

of diplomatic missions, representatives to an international conference, other persons who are granted full powers for that purpose and others who may be considered competent to act on behalf of the State by reason of accepted practice or other circumstances.

96. In the debate that took place in the Commission on draft article 4 proposed by the Special Rapporteur in his second report,[66] some members felt that it followed too closely article 7 of the 1969 Vienna Convention and that its contents were not sufficiently supported by State practice. Other members, however, felt that this was an instance in which the analogy with the Convention was fully justified.

97. The point was made in this connection that the range of persons formulating unilateral acts tended in practice to be wider than that of persons empowered to conclude treaties, but that that point was adequately covered by paragraph 2 of the proposed article. In one view, paragraphs 2 and 3 could be deleted, since Heads of State, Heads of Government and Ministers for Foreign Affairs were the only persons with the capacity to commit the State internationally through a unilateral act. The view was also expressed, as regards paragraph 3 of the draft articles then under consideration, that it was doubtful that heads of diplomatic missions or the representatives accredited by a State to an international conference or to an international organization had the power to bind a State unilaterally. Practice showed that that power was not normally included in the full powers of such persons.[67]

98. With respect to the capacity of heads of mission and heads of delegation, there seems to be no doubt that they may also act on behalf of the State, in terms similar to those laid down in the 1969 Vienna Convention, namely, in relation to the accrediting State and in the context of an international conference or meeting.

99. Nonetheless, it was indicated in the Commission that a head of delegation could not engage the State in the context of a conference, and a specific case was recalled in which a head of delegation at an international conference had made a commitment which subsequently had been considered not to be binding on the Government he represented. [68]

100. In relation to this issue, it seems important to distinguish between the various types of declarations which may be formulated by a State through the head of its delegation in the context of an international conference.

101. Some declarations are made in the context of ongoing negotiations and, of course, cannot be viewed so rigidly as to prevent the State from subsequently changing or withdrawing them. This seems to have been the case of the above-mentioned declaration, which was made by the head of the delegation of the United States of America at the Third United Nations Conference on the Law of the Sea.

102. In contrast, other declarations may have a different meaning when the State formulates them outside the context of ongoing negotiations. In any event, as noted in the Commission in 1999, an international conference presents a perfectly appropriate opportunity for a person to formulate a unilateral act on behalf of the State.[69]

103. In such cases, it seems that the State can formulate a unilateral act and, if its intention is to bind itself legally, that its declarations should produce legal effects. This would be the case of unilateral declarations formulated in the context of pledging conferences, at which States pledge to provide voluntary contributions which may then be demanded by the recipients. This issue was also referred to by one member in the 1999 discussions.[70]

104. It may be asked whether unilateral acts formulated by a State at a pledging conference are merely political or legally binding. This is the case of special conferences such as the one held in Stockholm in 1998 to consider the impact of Hurricane Mitch on Central America. On that occasion, as at other meetings of this kind, States offered voluntary contributions, sometimes on condition that practical development programmes and plans be elaborated. Are these declarations opposable in respect of the State issuing them? Is the declaring State obligated to honour the promise or offer made in the context of a high-level formal meeting such as the one mentioned above? In practice, there do not seem to have been any cases in which a State to which such a declaration was addressed has subsequently demanded the fulfilment of the promise made by the declaring State. The nature of such acts is therefore hard to determine.

105. In his second report,[71] the Special Rapporteur raised the issue of whether such authorization should extend to other persons who act on behalf of the State in specific areas, such as technical ministers who carry out functions which, in some cases, fall within the scope of foreign relations. This issue has arisen with increasing frequency in international relations.

106. In the Sixth Committee, it was noted that article 4, paragraph 3, as proposed by the Special Rapporteur, might not reflect State practice. Only Heads of States or Governments, Ministers for Foreign Affairs or expressly empowered officials could commit the State by means of unilateral acts. This international rule was now fully recognized and its importance was fundamental. Since the contemporary world was characterized by the multiplication of communications and relations between institutions and by acts carried out outside the country by agents of the State, it was important to know precisely who could commit the State by a statement or a unilateral act. Moreover, the conclusion of a treaty, an instrument which involved rights and obligations, required the presentation of credentials signed by the Minister for Foreign Affairs unless it was concluded by one of the three aforementioned persons. It was easy to understand that an official, even one at the highest level, could not create international obligations for his State by carrying out a unilateral act.

[66] Ibid., para. 71.

[67] *Yearbook … 1999* (see footnote 12 above), p. 135, paras. 550–551.

[68] Ibid., vol. I, 2596th meeting, statement by Mr. Kateka, p. 209, para. 19.

[69] Ibid., 2594th meeting, statement by Mr. Pellet, p. 194, paras. 9–10.

[70] Ibid., 2595th meeting, statement by Mr. Hafner, p. 205, para. 28.

[71] See footnote 2 above.

Anything one might want to add to that established rule of customary law would have to be considered from a restrictive angle. The only course was to seek to improve the formulation presented by the Special Rapporteur by taking contemporary international realities into account.[72]

107. In practice, certain persons other than Heads of State, Heads of Government and Ministers for Foreign Affairs act at the international level and formulate, with some frequency, declarations within the scope of their competencies in their relations with other States.

108. The question that arises is whether these declarations should be covered by the draft articles or whether, on the contrary, they should be excluded from the articles' scope of application. In the latter case, it would seem that declarations made by certain persons acting on behalf of the State would remain outside the scope of the draft articles. This would not contribute to the established purpose of guaranteeing international confidence and legal security.

109. It is true that the issue is controversial. Is a restrictive interpretation called for in this regard? It seems that, in this case, one could leave open the possibility that such acts could be covered by the draft articles.

110. Accordingly, draft article 3 proposed in the present report contains a second paragraph that could reflect this consideration by leaving open, through a broad interpretation, the possibility that persons other than those mentioned in the first paragraph could act on behalf of the State and commit the State internationally, if it appears from practice or other circumstances that the person is authorized to do so.

111. As was suggested in the Commission, the range of persons formulating unilateral acts tends in practice to be wider than that of persons empowered to conclude treaties, but this point is adequately covered by paragraph 2 of the article proposed below.

112. Another question that should be considered in this connection is whether the draft should refer to full powers, as does the 1969 Vienna Convention.

[72] A/CN.4/504 (see footnote 7 above), p. 29, para. 149.

113. The inclusion of such a provision does not seem necessary. The authorization of the person or official arises from other acts and circumstances which do not require the granting of full powers in the sense of the 1969 Vienna Convention. One member noted in the Commission that it would be problematic to refer to full powers in connection with unilateral acts which evidently did not lend themselves to a reference to full powers.[73]

114. Lastly, it should be noted that some members of the Commission indicated, in the discussion on the second report of the Special Rapporteur, that the term *habilitation*[74] was more appropriate than *autorisation* in the French version of the draft article under consideration and, with respect to paragraph 2 of that article, that the term "person" was more appropriate than "representative". Accordingly, those terms, which are certainly more appropriate, have been used.

B. New draft article 3. Persons authorized to formulate unilateral acts on behalf of a State

115. The Special Rapporteur proposes the following article:

"Article 3. Persons authorized to formulate unilateral acts on behalf of a State

"1. Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.

"2. A person is also considered to be authorized to formulate unilateral acts on behalf of the State if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as authorized to act on behalf of the State for such purposes."

[73] *Yearbook … 1999* (see footnote 10 above), 2594th meeting, statement by Mr. Pellet, p. 197, para. 26.

[74] Ibid., statement by Mr. Pambou-Tchivounda, p. 199, para. 50.

VII. SUBSEQUENT CONFIRMATION OF AN ACT FORMULATED BY A PERSON NOT AUTHORIZED FOR THAT PURPOSE

A. Observations by the Special Rapporteur

116. The second report, submitted in 1999,[75] includes a draft article 5 on the subsequent confirmation of an act when the person having formulated it is not authorized for that purpose.

117. Two different issues arise in relation to the importance of including such a provision. First, a person may act on behalf of the State without being authorized to do so; secondly, a person may act on behalf of the State because he or she is authorized to do so, but either the action in question is not within the competencies accorded to that person, or he or she acts outside the scope of such competencies. In either case, the State may repudiate the act or consider that it is not bound thereby, or it may subsequently confirm the act.

118. According to the 1969 Vienna Convention, which, in principle, seems to apply, the confirmation of the act may be either explicit or implicit. In the draft submitted at the Commission's fifty-first session, in 1999, a change was introduced which is considered applicable to unilateral acts.

[75] See footnote 2 above.

119. It was suggested at that time that, in contrast to the relevant provision of the 1969 Vienna Convention, the confirmation of the act had to be explicit, since this appeared to be more in line with the restrictive approach that must be taken to the formulation of unilateral acts of States.

120. If a unilateral act is formulated by a person who is not authorized or who exceeds his or her powers in formulating the act, the State may confirm the act. However, given the particular characteristics of unilateral acts, such confirmation must be explicit, although it is understood that, in general, consent may be expressed through conclusive acts or conduct.

B. New draft article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose

121. Accordingly, the Special Rapporteur proposes the following draft article:

"Article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose

"A unilateral act formulated by a person who is not authorized under article 3 to act on behalf of a State is without legal effect unless expressly confirmed by that State."

VIII. DELETION OF THE PREVIOUS DRAFT ARTICLE 6 ON EXPRESSION OF CONSENT

A. Desirability of deleting the draft article

122. Another question that was discussed in the Commission at its 1999 session had to do with whether to include a provision referring to the expression of consent, to which draft article 6, as presented in the second report of the Special Rapporteur,[76] referred.

123. It was pointed out in the Commission that it was difficult to speak of the consent of a State to be bound by a unilateral act, as that was too suggestive of treaty language,[77] a point also made by a representative in the Sixth Committee: as regards possible areas where provisions on treaty law and on unilateral acts might differ, the example was given of article 6 on expression of consent, an expression taken from the 1969 Vienna Convention, "which did not convey very clearly what was intentional about the act".[78]

124. Several members stated in the Commission that that provision should be deleted, although it was also suggested that it should be retained with separate commentaries.

125. If it is considered that articles 3 and 4 can, in fact, cover the expression of consent, then a specific provision on the manifestation of will or expression of consent would not be necessary. Clearly, it should be inferred that the will of the State to bind itself legally at the international level is expressed at the time of the formulation of the act, a question that would also be governed by a specific provision, which is examined in the second part of this draft.

B. Silence and unilateral acts

126. Although this provision could be deleted, it is appropriate to comment briefly on two questions raised during the discussion on the topic in the Commission in 1999, specifically silence, which was not taken into account in the preparation of draft article 6 as presented in the second report of the Special Rapporteur,[79] and the question of the consensual tie, which arises when the unilateral act has legal effect.

127. In this regard it is worth noting that, as mentioned in the first report of the Special Rapporteur,[80] silence is not a legal act in the strict sense of the term, although, to be sure, the legal effect that such conduct can entail cannot be overlooked. A member of the Commission, agreeing with the Special Rapporteur, also stated that "[s]ilence [wa]s not strictly a legal act, although it produced legal effects. The element of intent was missing".[81] Some representatives in the Sixth Committee have expressed a similar view.[82]

128. An important question has been raised concerning silence and the formulation of a unilateral act from a material standpoint. It is worth asking whether a State can formulate a unilateral act through silence.

129. In examining each of these unilateral acts it can be concluded that in the case of a promise, for example, it would appear impossible for a State to promise or offer something by means of silence. The same observation can be made with regard to a declaration of war, cessation of hostilities or neutrality.

130. On the other hand, in cases involving waiver, protest or recognition, it might be thought that the State can

[76] Ibid.

[77] *Yearbook … 1999* (see footnote 10 above), 2594th meeting, statement by Mr. Pellet, p. 197, para. 26.

[78] *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 25th meeting (A/C.6/54/SR.25), statement by Argentina, para. 64.

[79] See footnote 2 above.

[80] See footnote 1 above.

[81] *Yearbook … 1999* (see footnote 10 above), 2596th meeting, statement by Mr. Rodríguez Cedeño, p. 212, para. 41.

[82] See the statement by Switzerland in Caflisch, "La pratique Suisse … 1998", p. 651.

certainly formulate a legal act by means of silence. Such would be the case, for example, where a State recognizes an armed group as a belligerent in a conflict situation by means of silence. The same observation can be made with regard to protest and, to a lesser degree, waiver. Regardless of that, however, it would also be necessary to ask whether such conduct, which clearly has legal effect, is or is not linked to a previous act and, accordingly, whether it can be understood as a legal act encompassed by the study of unilateral acts that are now being considered.

131. In the view of the Special Rapporteur, silence cannot be an independent manifestation of will, since it is a reaction to a pre-existing act or situation, which takes us away from the concept of the unilateral act that is being considered, whose functioning will be governed by the rules being elaborated.

132. It was stated in the Commission, moreover, that it had not been taken into account that by having effect, any unilateral act creates a bilateral tie—an important question that bears a relationship, as shall be seen below, to the modification, revocation and suspension of the effect of a unilateral act.

133. Of course, as was noted in previous reports, while the formulation of an act is unilateral, its legal effect must be seen as reaching beyond the unilateral context, into the bilateral context, which does not, however, mean that the act takes place in a treaty context.

IX. INVALIDITY OF UNILATERAL ACTS

A. Comments by the Special Rapporteur

134. The second report of the Special Rapporteur[83] presented a draft article 7, on invalidity of unilateral acts, on which comments were made in both the Commission and the Sixth Committee. Some stated at the time that it was not appropriate to follow the 1969 Vienna Convention so closely, while others indicated that, on the contrary, it seemed appropriate to follow the rules laid down in the Convention.

135. In this case the comparison with the 1969 Vienna Convention appears to be appropriate. The causes of invalidity of an act are, in general, similar to those which may arise in a treaty context, as rightly noted by a representative in the Sixth Committee, who said that: "draft article 7 [on invalidity of unilateral acts] should follow more closely the corresponding provision in the Vienna Convention. Since the consent to be bound by a treaty and the consent to a unilateral commitment were both expressions of the will of State, it seemed logical that the same reasons for invalidity should apply to both types of statements".[84] Undoubtedly, a unilateral act is impugnable, as is a treaty, if the expression of will is vitiated by flaws.

136. Clearly, the special nature of unilateral acts and the evolution of international relations and international law open up the possibility of including a cause not provided for in the corresponding article of the 1969 Vienna Convention, such as one concerning the infringement of a decision of the Security Council by a unilateral act, a question that will be addressed below.

137. When former draft article 7 was considered in the Commission, some members stated that it was preferable in any event to distinguish between the causes of invalidity and to draft separate articles, following the structure of the 1969 Vienna Convention—a question that is not being considered here, as it is believed to be more of a drafting question.

138. In re-examining each of the causes included in the draft article, reference is made in the first place to paragraph 1, on error, about which it was stated in the Commission that it could not be applied in the same way as in the law of treaties. It was stated that an error of fact should be easier to correct than an error committed by a State in adopting the text of a treaty.

139. As is well known, error has been the subject of consideration by international tribunals, particularly PCIJ and ICJ, in several cases, such as *Eastern Greenland*, *Temple of Preah Vihear* and *Mavrommatis*, to name but a few.[85]

140. The question that arises is whether the cause of invalidity based on error—referring, of course, to the substance and not to the expression of consent—applies to unilateral acts on the same terms as in the law of treaties. If unilateral error is possible in a treaty context, there seems to be no reason to deny that it might also be considered in the context of unilateral acts.

141. A State's expression of will can certainly be based on error, and that is a justified cause of invalidity in this context, although error cannot be invoked in certain circumstances, as ICJ noted in rejecting Siam's arguments in the *Temple of Preah Vihear* case: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."[86]

142. Some doubts were expressed with regard to fraud, referred to in paragraph 2 of former article 7, on the consideration that that provision "might encroach on certain accepted ways whereby States led their foreign policy and convinced other States to join in that policy".[87]

[83] See footnote 2 above.

[84] *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 25th meeting, statement by Poland (A/C.6/54/SR.25), para. 120.

[85] *Legal Status of Eastern Greenland* (see footnote 25 above), p. 22; *Temple of Preah Vihear* (see footnote 17 above); and *Readaptation of the Mavrommatis Jerusalem Concessions, Judgment No. 10, 1927, P.C.I.J., Series A, No. 11*.

[86] *I.C.J. Reports 1962* (see footnote 17 above), p. 26.

[87] *Yearbook … 1999* (see footnote 12 above), p. 135, para. 555.

143. It was deemed appropriate to retain this cause of invalidity, which is applied in the context of the law of treaties, on the consideration that the general practice of States does not exactly appear to be one of inducing other States to assume certain obligations based on deceit. Policies differ, of course, but a statement to that effect does not conform to reality. Widespread practice along those lines could impair international relations and undermine the necessary confidence and transparency in relations between States.

144. In practice, of course, there do not appear to be any examples of an act liable to be invalidated by fraud, except in the case of the Webster-Ashburton Treaty, concerning the north-eastern boundary between the United States and Canada.[88] "That, however, was a case of non-disclosure of a material map by the United States in circumstances in which it was difficult to say that there was any legal duty to disclose it, and Great Britain did not assert that the non-disclosure amounted to fraud."[89] It was considered, however, that that clause should be retained in the draft articles.

145. Paragraph 3 retains the reference to corruption of the person formulating a unilateral act on behalf of a State. Corruption is a practice regrettably common and international, while also condemned by the entire international community, which has made very serious efforts to combat it by adopting legal instruments, such as the Inter-American Convention against Corruption.

146. The inclusion of a paragraph referring to corruption as affecting the validity of unilateral acts still appears to be necessary; it has, therefore, been retained with some drafting changes which bring it into line with the comments made.

147. Paragraph 4 of former article 7 refers to coercion of the person formulating the unilateral act, which is presented in the same way in article 51 of the 1969 Vienna Convention. The practice relating to coercion of the representative of a State in negotiations for the conclusion of a treaty is well known.

148. The cause of invalidity relating to the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations, which is restated in article 52 of the 1969 Vienna Convention, has also been retained.

149. As is well known, resort to force, which was accepted in eras preceding the League of Nations, is prohibited by international law—mainly since the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), on which the Charter of the United Nations is based—as confirmed by subsequent resolutions and declarations, such as the Manila Declaration on the Peaceful Settlement of International Disputes,[90] which has now been corroborated by international doctrine as a whole.

150. A unilateral act that conflicts with these principles, mainly those included in the Charter of the United Nations and, more specifically, the obligation contained in Article 2, paragraph 4, of the Charter, which for many is a peremptory norm of *jus cogens*, is *nulo ab initio* (void from its inception).

151. The cause of invalidity relating to a unilateral act that conflicts with a peremptory norm of international law—a question which arose in the Commission in 1966 and which elicited an interesting debate at the 1968–1969 United Nations Conference on the Law of Treaties—was included in paragraph 6 of former article 7. There are, of course, many divergent positions on the existence of such norms, as was evidenced by the failure to define them at the Conference.

152. One member of the Commission stated at the fifty-first session in 1999 that such a norm should be applied more flexibly in the case of unilateral acts. The question that arises is how such a provision can be made more flexible. The wording of a rule based on this cause of invalidity cannot be distinct from the wording in the 1969 Vienna Convention, which was the result of an intense process of negotiations, notwithstanding the fact that, as noted above, such peremptory norms were not defined in the Convention. Endeavouring to make them more flexible could reopen the debate on a question that continues to be controversial in international law and that should be retained as drafted for the time being.

153. In former article 7, paragraph 7, reference is made to the invalidity of a unilateral act formulated in clear violation of a norm of fundamental importance to the domestic law of the State which formulates it. This cause would be closely related to the authorization of the person who formulates the act, a question to which reference has been made above.

154. An act formulated by an unauthorized person would be invalid unless it is subsequently confirmed by the State.

155. Another question that arose at the fifty-first session of the Commission in 1999 had to do with the invalidity of a unilateral act that conflicts with a resolution of the Security Council, particularly in the context of Chapter VII of the Charter of the United Nations, a question that was addressed by other members of the Commission and by some representatives in the Sixth Committee.

156. The suggestion by one member of the Commission that under the causes of invalidity, mention should be made of the fact that a unilateral act may conflict with a decision of the Security Council appeared to be very apt. The member of the Commission then stated that "article 7 should include Security Council resolutions among the factors that could be invoked to invalidate a unilateral act. For example, if a State made a declaration that conflicted with a Council resolution, particularly under Chapter VII of the Charter of the United Nations, that called on Members not to recognize a particular entity as a State, it could be argued that such a unilateral act was invalid".[91] That view was reiterated by a representative in the Sixth

[88] Treaty between Great Britain and the United States (Washington, 9 August 1842), *British and Foreign State Papers, 1841–1842*, vol. XXX (London, Ridgway, 1858), p. 360.

[89] *Yearbook ... 1963*, vol. II, document A/CN.4/156 and Add.1–3), p. 47, para. 1 of the commentary to article 7.

[90] General Assembly resolution 37/10 (15 November 1982), annex.

[91] *Yearbook … 1999* (see footnote 10 above), 2595th meeting, statement by Mr. Dugard, p. 204, para. 24.

Committee, who stated that "a unilateral act in violation of a Security Council resolution adopted under Chapter VII of the Charter", should be invalid.[92]

157. For this reason it was deemed appropriate to include in the draft article on invalidity of unilateral acts a cause relating to their conflict with a resolution, or rather, a decision of the Security Council—a term that the Special Rapporteur considers more appropriate because of its legal significance—a view that was also expressed by a member of the Commission, who in 1999 referred to "another cause of invalidity, namely, conflict between a unilateral act and decisions of the Security Council. Clearly, what was intended were binding decisions of that body".[93]

158. In drafting this new paragraph, it was deemed necessary to stipulate that what is involved are decisions, in order to distinguish them from recommendations of the Security Council, without expressly referring, furthermore, to Chapter VII of the Charter of the United Nations, since the Council can also adopt decisions in the framework of Chapter VI of the Charter.

159. Article 25 of the Charter of the United Nations confers on the Security Council the authority to adopt decisions, stating that: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." The Council can adopt resolutions having the value of recommendations in the context of both Chapters VI and VII of the Charter, but it can also adopt decisions in both contexts.

160. In the case of Chapter VI, while in principle the Security Council can adopt binding resolutions or decisions from the legal standpoint, such as those adopted under Article 34 of the Charter of the United Nations, concerning investigation,[94] the Council also has the option of taking decisions under Chapter VII of the Charter, such as those adopted pursuant to Articles 41 and 42,[95] which is evidenced clearly by the very wording of those provisions.

161. Undoubtedly, it is Security Council decisions that must be involved and not other acts, such as recommendations, which are not legally binding. Such would be the case with regard to the resolutions adopted by the Council on Iraq, particularly resolutions 660 (1990) and 661 (1990), which contain mandatory and comprehensive sanctions under Chapter VII of the Charter of the United Nations; it is also worth mentioning that the term "sanctions" is not used in the Charter, which uses the term "measures".

162. Collective security, as provided for in the Charter of the United Nations, is a question of general interest which is based on two groups of Charter articles that should be mentioned: Articles 2, paragraphs 3–4, 51, and 41–42, the last two referring to collective measures. This assessment reflects the importance of the Security Council's decisions relating to the maintenance and re-establishment of international peace and security, and provides the basis for invalidating unilateral acts formulated by a State that conflict with them.

163. Lastly, a point was raised in the Commission at the fifty-first session in 1999 concerning the invalidity of unilateral acts that conflict with a norm of general international law. One member stated at the time that:

> he could not agree that a unilateral act could not depart from customary law. Such an act could not produce legal effects if it was not accepted by the addressee States. The problem was one of legal effects rather than invalidity. States could derogate from customary law by agreement. He saw no reason why the declaring State should not, as it were, make an offer to its treaty partners, and still less why it should not make a unilateral declaration extending or amplifying its obligations under the customary rule in question.[96]

164. A unilateral act that is not consistent with a norm of general international law can be declared invalid if it is not accepted by the State or States to which it is addressed. An important example that is worth considering is the unilateral act formulated by the United States in 1945, known as the Truman Proclamation,[97] on the extension of the continental shelf.

165. This act marked an important milestone in the formulation of the international law of the sea, and while it was not consistent with a pre-existing customary norm, it had a decisive influence on the formulation of a new norm when States accepted it and it was later reflected in the conventions on the law of the sea.

166. It was not deemed appropriate to include a norm along these lines as a cause of invalidity because, in fact, such an act, which conflicts with a norm of general international law, is not invalid if the States concerned or affected agree that, while it is not consistent with existing general international law, it is part of the process of formulating a new customary norm, and that the norm was not rejected by States and did not give rise to protest.

B. New draft article 5. Invalidity of unilateral acts

167. On the basis of the foregoing, the Special Rapporteur proposes the following article:

"Article 5. Invalidity of unilateral acts

"A State may invoke the invalidity of a unilateral act:

"(*a*) If the act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State

[92] *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 25th meeting, statement by Poland (A/C.6/54/SR.25), para. 122.

[93] *Yearbook … 1999* (see footnote 10 above), 2596th meeting, statement by Mr. Rodríguez Cedeño, p. 212, para. 39.

[94] Di Qual, *Les effets des résolutions des Nations Unies*, pp. 81 et seq.

[95] Goodrich and Hambro, *Commentaire de la Charte des Nations Unies*, cited in Di Qual, op. cit., p. 276.

[96] *Yearbook … 1999* (see footnote 10 above), 2593rd meeting, statement by Mr. Pellet, p. 189, para. 54.

[97] Proclamation on the "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf" of 28 September 1945 (Whiteman, *Digest of International Law*, pp. 756–757).

contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;

"(*b*) If a State has been induced to formulate an act by the fraudulent conduct of another State;

"(*c*) If the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State;

"(*d*) If the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him;

"(*e*) If the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;

"(*f*) If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;

"(*g*) If, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;

"(*h*) If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it."