

UNILATERAL ACTS OF STATES

[Agenda item 5]

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Fifth report on unilateral acts of states,
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* Incorporating A/CN.4/525/Add.1/Corr.1 and 2.

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Introduction¹

A. Previous consideration of the topic

1. The International Law Commission has been considering the topic of unilateral acts of States since its forty-ninth session, in 1997; at that time, a working group was established which prepared an important report that has provided a basis for the Commission's subsequent work.² The Commission has been giving more specific consideration to the topic since its fiftieth session, in 1998, when the Special Rapporteur submitted his first report;³ in that report, he gave a general overview of the topic and provided the elements of a definition of unilateral acts, since in his view that was a fundamental issue which should be resolved prior to the preparation of draft articles and commentaries thereto, as the Commission had agreed.

2. In previous reports on unilateral acts of States,⁴ the Special Rapporteur, taking the Vienna regime as a valid frame of reference, to be viewed in the context of the *sui generis* nature of the unilateral acts with which the Commission is concerned, discussed several aspects of the topic, primarily those relating to the formulation and interpretation of unilateral acts.

3. On the basis of an extensive review of the literature, the Special Rapporteur also submitted some views regarding the classification of unilateral acts, a topic which appears fundamental to the structure of the draft articles which the Commission plans to prepare on the topic. In his opinion, the classification of unilateral acts according to their legal effects is not a mere academic exercise. On the contrary, for the reasons mentioned above, an appropriate classification of these acts—in itself a complex process involving several criteria—should facilitate the organization and progress of work on the topic. The Special Rapporteur believes that while not all rules concerning unilateral acts are necessarily applicable to all of them, some rules may be of general application. While it is not necessary to take a decision at this time on the classification of unilateral acts, an attempt could be made to develop rules applicable to all such acts.

4. A continuing source of concern, however, is the uncertainty which seems to persist regarding the subject matter of the work of codification, that is, the unilateral acts which might fall within its definition. Some of them, as will be seen, can be identified and associated with the conduct and attitudes of the State; others, while unquestionably unilateral acts from a formal standpoint, can be

placed in a different sphere, that of treaties or treaty law, while certain others would seem to fall into the category of acts with which the Commission is concerned. Indeed, as will be seen, when one of the acts commonly referred to as “unilateral” from a material standpoint is being dealt with, it may fall outside the scope of this study. Such is the case with regard to waiver or recognition by means of implicit or conclusive acts. It has been stated that waiver and recognition, *inter alia*, are unilateral acts in the sense with which the Commission is concerned. However, closer examination of their form may lead to the conclusion that not all unilateral acts of waiver or recognition fall into the category of interest to the Commission, and thus not all should be included in the definition sought to be developed.

5. In practice, it can be seen that recognition is effected through acts separate from the formal acts referred to above—in other words, through conclusive or implicit acts; this might be true, for instance, of the act of establishing diplomatic relations, by which a State implicitly recognizes another entity which claims the same status. An example of this would be the United Kingdom of Great Britain and Northern Ireland's implicit recognition of Namibia; the Minister for Foreign Affairs of the United Kingdom stated in this regard that the establishment of diplomatic relations with Namibia in March 1990 constituted implicit rather than formal recognition.⁵ It should also be noted that some of these acts are of treaty origin, as is the case of the Mauritania-Saharaoui agreement, signed at Algiers on 10 August 1979,⁶ referred to in paragraph 21 below; by their very nature, these acts should also be excluded from the scope of the present study.

B. Consideration of other aspects of international practice

6. The Special Rapporteur's work thus far has been based on an extensive study of doctrine and jurisprudence. However, while he is convinced that practice is of growing importance in this area, it has not been given the attention that it deserves. There is no doubt that this failure, which is due to the difficulties of gathering information on the matter, may have a negative impact on consideration of the topic. The Special Rapporteur is aware that without information concerning practice, it is impossible to prepare a comprehensive study of the topic, let alone embark on the task of codification and progressive development in that area. While unilateral acts are obviously common, there appear to be few cases in which their binding nature has been recognized. The Ihlen declaration⁷ was for many years a classic example of a unilateral declaration. Since then, other unilateral declarations have been considered equally binding, although they were not

¹ The Special Rapporteur wishes to thank Mr. Nicolás Guerrero Peniche, doctoral candidate of the Graduate Institute of International Studies in Geneva, for the assistance provided in the research work relating to the present report.

² *Yearbook ... 1997*, vol. II (Part Two), pp. 64–65, paras. 195–210.

³ *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

⁴ Second report, *Yearbook ... 1999*, vol. II (Part One), p. 195, document A/CN.4/500 and Add.1; third report, *Yearbook ... 2000*, vol. II (Part One), p. 247, document A/CN.4/505; and fourth report, *Yearbook ... 2001*, vol. II (Part One), p. 115, document A/CN.4/519.

⁵ Marston, ed., “United Kingdom materials on international law 1992”, p. 642, cited in Torres Cazorla, “Los actos unilaterales de los Estados en el derecho internacional contemporáneo”, p. 57.

⁶ *Official Records of the Security Council, Thirty-fourth Year, Supplement for July, August and September 1979*, document S/13503, annex I, pp. 111–112.

⁷ See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 70.

subject to judicial examination; Germany's declarations between 1935 and 1938 regarding the inviolability of the neutrality of certain European countries, which have been viewed in the literature as "guarantees", are one example. Also noteworthy is Austria's declaration of neutrality,⁸ which some consider a promise, and the declaration by Egypt of 24 April 1957 (with letter of transmittal to the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation,⁹ although the latter was registered with the Secretary-General. The declarations made by the French authorities questioned by ICJ in the *Nuclear Tests* cases¹⁰ would also be unilateral declarations of the type with which the Commission is concerned. Certain other unilateral declarations, such as negative security guarantees, which could, depending on their content, reflect a promise made by nuclear-weapon States to non-nuclear-weapon States, are another category of such acts, whose legal nature has not been examined by the courts or determined by the authors or the addressees, but which nonetheless may be considered binding from the legal point of view, as several members of the Commission noted in commenting on the second report of the Special Rapporteur.¹¹

7. At the fifty-third session of the Commission, in 2001, a working group was established to consider some aspects of the topic, as reflected in a report of which the Commission took note.¹² On that occasion it was noted that one of the problems posed by a study of the topic was that practice had not yet been given full consideration. The Working Group recommended that the Commission should request the Secretariat to circulate to Governments a questionnaire inviting States to provide additional information on practice with regard to the formulation and interpretation of unilateral acts.¹³ Some States, such as Estonia and Portugal, replied to this questionnaire in a highly constructive manner; their comments are mentioned below.

8. Portugal provided valuable information on the formulation of unilateral acts in its international relations, qualifying them in each case. It refers to protests against certain acts of Australia related to East Timor and, secondly, the recognition of East Timor's right to independence.

9. According to its report, Portugal made a series of diplomatic protests to the Australian authorities between 1985 and 1991. In 1985, Portugal made known to Australia that it could not "but consider strange the attitude of the Australian Government in negotiating the exploration of the resources of a Territory of which Portugal is the administering Power, a fact which is internationally recognized ... the Portuguese Government cannot but express

to the Australian Government its vehement protest for the manifest lack of respect for international law."¹⁴

10. In 1989, Portugal reiterated that "as the administering Power for the non-autonomous Territory of East Timor, Portugal protests against the text of the above-mentioned declarations".¹⁵ After the signature of the Timor Gap Treaty,¹⁶ Portugal let Australia know its view on the matter once more:

The Portuguese authorities have consistently lodged diplomatic protests with the Government of Australia ... In those protests the Portuguese Government pointed out that the negotiation and the eventual conclusion of such an agreement with the Republic of Indonesia ... would constitute a serious and blatant violation of international law ... In proceeding with the signing of the above-mentioned agreement Australia is continuing and bringing to its conclusion that violation of the law ... In signing the "Provisional Agreement" Australia acts in contempt, namely, of its duties to respect the right of the East Timorese to self determination ... In the light of the above, Portugal cannot but lodge its most vehement protest with the Government of the Commonwealth of Australia and state that it reserves itself the right to resort to all legal means it will consider as convenient to uphold the legitimate rights of the East Timorese.¹⁷

11. Portugal considers that those unilateral acts, which it refers to as acts of protest, constitute a manifestation of will and of the intention "not to consider a given state of affairs as legal and ... thereby to safeguard its rights which have been violated or threatened".¹⁸ This statement is extremely important in that it does not merely list and qualify the acts in question; it also notes the legal effects which it believes may result therefrom.

12. Estonia also provided extremely valuable information concerning practice. It states that:

On 19 December 1991, the Supreme Council issued a Statement on the Property of the Republic of Latvia and the Republic of Lithuania, which could be considered a promise. The Supreme Council stated that, considering the restoration of independence of Estonia, Latvia and Lithuania, Estonia would guarantee the legal protection of property in conformity with the equality of legal protection of forms of property of the said States in Estonian territory in accordance with Property Law of Estonia.¹⁹

13. Estonia mentions and qualifies other unilateral declarations in its reply to the above-mentioned questionnaire, including its statement of 24 July 1994 on the social guarantees of former Russian Federation military personnel; its declarations in recognition of States, such as its recognition of the Republic of Slovenia on 25 September 1991; and the Supreme Council's statement of 3 April 1990 on the restoration of independence of the Republic of Lithuania, recognizing Lithuania as an independent State. In September 1992, the Estonian Parliament adopted a declaration on restoration, which explicitly

⁸ *Austrian Federal Constitutional Laws (selection)* (Vienna, Federal Press Service, 2000), p. 199.

⁹ United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

¹⁰ *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253; (*New Zealand v. France*), *ibid.*, p. 457.

¹¹ See footnote 4 above.

¹² *Yearbook ... 2001*, vol. I, 2701st meeting, p. 238, paras. 58-60.

¹³ The questionnaire was transmitted to Member States in note No. LA/COD/39 of 31 August 2001. The questionnaire and the replies received are contained in document A/CN.4/524, reproduced in the present volume.

¹⁴ A/CN.4/524 (reproduced in the present volume), reply by Portugal to question 1, para. 3.

¹⁵ *Ibid.*

¹⁶ Treaty on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (signed over the zone of cooperation, above the Timor Sea, on 11 December 1989), United Nations, *Treaty Series*, vol. 1654, No. 28462, p. 105.

¹⁷ A/CN.4/524 (see footnote 14 above).

¹⁸ *Ibid.*, para. 4.

¹⁹ *Ibid.*, reply by Estonia to question 1, para. 6.

stated that the present Republic of Estonia was the same subject of international law as that which had first been declared in 1918.²⁰ Estonia adds: "With some unilateral acts the legal effects are obvious and clear, as is the case with statements guaranteeing legal protection to property of Latvia and Lithuania, recognition of other States ..."²¹

14. Clearly, there is a wide variety of unilateral acts. As some have stated: "The great number of terms which have been used or suggested for use in this field have been a hindrance rather than a help towards funding a satisfactory typology."²² Nevertheless, doctrine, and even the Commission itself, has identified promises, protests, waivers and recognition as unilateral acts. Furthermore, the Commission has noted that the work of codification and progressive development may focus, at least initially, on consideration of promises—in other words, that it may seek to develop rules on the functioning of unilateral acts, which, like promises, imply the assumption of unilateral obligations by one or more author States.

15. In studying such acts, bearing in mind that they may not be the only unilateral acts, it is to be noted that recognition through a formal declaration is common in practice; there are many examples of such acts, particularly in the context of acts of recognition of government, following the political changes that began in 1960 with the decolonization and independence of colonial countries and peoples and, more recently, in the context of the creation of new States following changes in the former Czechoslovakia, the former Soviet Union and the former Yugoslavia.

16. A study of diplomatic correspondence, as reflected in the major international press, suggests that States frequently recognize other States through diplomatic notes. For example, by a declaration of 5 May 1992, Venezuela "recognizes ... the Republic of Slovenia as sovereign and independent" and expresses "its intention to establish ... diplomatic relations".²³ Similarly, by a declaration of 14 August 1992, Venezuela decided "to recognize as a sovereign and independent State the Republic of Bosnia and Herzegovina" and expressed "its intention to establish ... diplomatic relations".²⁴ Lastly, by a declaration of 5 May 1992, Venezuela decided "to recognize the Republic of Croatia as a sovereign and independent State" and "expressed its intention to establish ... diplomatic relations".²⁵

17. Through a study of routine diplomatic procedures, certain useful practices capable of qualification are to be noted. One such case is the recognition of States emerging from the former Czechoslovakia, the former Soviet Union and the former Yugoslavia. Examples include notes reflecting such recognition which clearly constitute unilateral acts, such as those sent by the United Kingdom to the Heads of State of some of those countries; for example, in a letter dated 15 January 1992, the Prime Minister, Mr. John Major, stated:

²⁰ *Ibid.*, paras. 8, 9 and 11.

²¹ *Ibid.*, reply to question 3.

²² Fiedler, "Unilateral acts in international law", p. 1018.

²³ *Libro Amarillo de la República de Venezuela correspondiente al año 1992* (Caracas, Ministry for Foreign Affairs 1992), p. 505.

²⁴ *Ibid.*, p. 508.

²⁵ *Ibid.*

I am writing to place on record that the British Government formally recognises Croatia as an independent sovereign State ... In recognising Croatia, we expect the Government of Croatia to take swift steps to meet the reservation set out in M. Badinter's report with regard to the protection of the rights of minorities ... I look forward to the establishment of diplomatic relations. I can confirm that, as appropriate, we regard Treaties and Agreements in force to which the United Kingdom and the Socialist Federal Republic of Yugoslavia were parties as remaining in force between the United Kingdom and Croatia.²⁶

18. Recognition, usually a unilateral act, produces specific legal effects which will now be described, although the question will also be considered in future reports. Recognition does not confer rights on the author, but rather imposes obligations; through recognition, as noted in the literature, "the State declares that it considers a situation to exist, and it cannot subsequently state otherwise; whether or not it exists from an objective point of view, the situation will henceforth be enforceable with respect to that State if it was not already so".²⁷

19. Some of the many declarations formulated by States have been recognized as promises, such as the ones, discussed above (para. 6), that were formulated by the French authorities whom ICJ questioned in the *Nuclear Tests* cases. Other examples include the declaration by Spain, reflected in the Agreement of the Spanish Council of Ministers of 13 November 1998²⁸ and referred to in the third report on unilateral acts of States,²⁹ in which Spain decided to provide emergency assistance to mitigate the damage caused by Hurricane Mitch in Central America, and the declaration made by Tunisia on the occasion of a visit by the Prime Minister of France, Mr. Raymond Barre, on 26 October 1980, in which Tunisia announced its determination to unfreeze, within a relatively short time, the French funds retained after Tunisia gained its independence in 1956. These measures entered into force on 1 January 1981.³⁰

20. A study of practice reveals other unilateral declarations which may be qualified as promises in that they correspond to the known doctrinal definition of that act. One example is the declaration made by the President of France, Mr. Jacques Chirac, in which he undertook to cancel the debt of El Salvador, Guatemala, Honduras and Nicaragua, amounting to FF 739 million, following the damage caused to the region by Hurricane Mitch. President Chirac also undertook to negotiate a reduction of the trade debt during the following meeting of the Paris Club.³¹ A similar case is that of the declarations made by the Prime Minister of Spain, Mr. José María Aznar, on 4 April 2000, when he stated publicly: "I also wish to inform you that I have announced the cancellation of the debt owed by sub-Saharan African countries, worth US\$ 200 million in official development assistance credits."³²

²⁶ Marston, *loc. cit.*, p. 636.

²⁷ Combacau and Sur, *Droit international public*, p. 285.

²⁸ *Revista de actividades, textos y documentos de la política exterior española, año 1998* (Madrid, Ministry for Foreign Affairs and Cooperation), p. 823.

²⁹ *Yearbook ... 2000* (see footnote 4 above), p. 253, para. 43.

³⁰ Rousseau, "Chronique des faits internationaux", pp. 395–396, cited in Torres Cazorla, *loc. cit.*, p. 49.

³¹ Balmont and Weckel, eds., "Chronique des faits internationaux", p. 195, cited in Torres Cazorla, *loc. cit.*, p. 50.

³² *Revista de actividades, textos y documentos de la política*

21. Declarations containing a waiver may also be observed in international practice. One example, albeit conventional in origin, is Mauritania's waiver of its claims to Western Sahara. The Mauritania-Sahraoui agreement states that the "Islamic Republic of Mauritania solemnly declares that it does not have and will not have any territorial or other claims on Western Sahara".³³

22. Other declarations have also been observed in practice, including the declaration of 20 May 1980, in which the State Department announced that the United States of America waived its claim of sovereignty over 25 Pacific islands.³⁴

23. There are also declarations that may contain several material unilateral acts, as is the case of the declaration by Colombia, formulated in a note of 22 November 1952, in which a recognition, a waiver and a promise can be seen. In this note, Colombia declares that "it does not contest the sovereignty of the United States of Venezuela over the Archipelago of Los Monjes and, consequently, that it does not contest or have any complaint to make concerning the exercise of the sovereignty itself or of any act of ownership by that country over the said archipelago".³⁵ This declaration, formulated correctly, for a specific purpose, and notified to the addressees, is a unilateral act producing legal effects that the author State intended to produce when formulating it.

24. As shall be seen below, and as has been said on several occasions, it is clear that unilateral acts exist in international relations and that they are increasingly important and frequent as a means of expression of States in their international relations. But this practice, arising from the ordinary understanding of the evolution of such relations, is indeterminate to the extent that neither the authors nor the addressees of such acts have the common and general conviction that it reflects the formulation of unilateral acts in the sense that is of interest to the Commission, although some States recognize and qualify the practice as involving unilateral acts. It should be emphasized that this perception is very different from the one created when the rules on the law of treaties were drafted; the existence of treaties as a legal instrument was more apparent then, owing to the attitude of States towards their existence, their importance and their legal effects. It was much simpler to identify rules of customary law in this context than in that of unilateral acts.

C. Viability and difficulties of the topic

25. Most members of the Commission have indicated that the topic could be suitable for codification, despite its complexity and the difficulties that some of its aspects pose, as well as the evident weaknesses in gathering information on the topic, including the inadequate consideration of State practice. In general, the representatives of States to the Sixth Committee were of the same opinion.

exterior española, año 2000 (Madrid, Ministry for Foreign Affairs and Cooperation), p. 102, cited in Torres Cazorla, *loc. cit.*, p. 50.

³³ See footnote 6 above.

³⁴ *International Herald Tribune*, 21 May 1980, p. 3.

³⁵ Vásquez Carrizosa, *Las relaciones de Colombia y Venezuela: la historia atormentada de dos naciones*, p. 339.

26. Indeed, members of the Commission indicated that the issue was important and interesting,³⁶ and a prime candidate for progressive development and codification,³⁷ while satisfaction with the draft articles presented³⁸ and optimism as to the possibility of producing a set of draft articles on the topic were expressed.³⁹

27. It is true that some members expressed certain doubts about the feasibility of examining the topic and even about the approach and the grounds for doing so, which, according to some, did not take into account State practice, among other issues. One Government indicated that it "continues to consider that any approach which seeks to subject the very wide range of unilateral acts to a single set of general rules is not well founded".⁴⁰

28. Some Governments have also gone on record about the relevance of the topic and the approach taken by the Commission when examining it. For example, in its observations on the topic when completing the questionnaire distributed by the Secretariat, Portugal indicated that "it recognizes the important role played by unilateral acts ... and the need to develop rules to regulate their functioning".⁴¹

29. Most States tend to consider that it is possible to carry out this task and that the Commission should continue with its work. China stressed that unilateral acts were becoming increasingly important and that the codification and progressive development of the law relating to them were essential, difficult though the process would be.⁴² Some countries considered that the topic should be approached in a more limited way. Spain indicated that it would be desirable to concentrate on certain typical unilateral acts and the legal regime which should apply to each.⁴³ The Nordic countries stated their preference for limiting the study of the topic to a few general rules and a study of certain particular situations.⁴⁴ Japan considered that it would be wise for the Commission to focus on the more highly developed areas of State practice.⁴⁵ In the opinion of India, the Commission could consider the possibility of framing a set of conclusions on the topic, instead of proceeding with the preparation of draft articles.⁴⁶

³⁶ *Yearbook ... 2001*, vol. I, 2695th meeting, statement by Mr. Pellet, p. 187, para. 7.

³⁷ *Ibid.*, statement by Mr. Illueca, p. 193, para. 58.

³⁸ *Ibid.*, statement by Mr. Goco, p. 187, para. 10.

³⁹ *Ibid.*, statement by Mr. Al-Baharna, p. 192, para. 54. See also the statements of Mr. Economides, p. 200, and Mr. Rao, p. 195.

⁴⁰ A/CN.4/524 (reproduced in the present volume), general comments by the United Kingdom, para. 1.

⁴¹ *Ibid.*, Portugal, para. 1.

⁴² *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 22nd meeting (A/C.6/56/SR.22), para. 45. See also the statements by the Russian Federation and Poland, *ibid.*, para. 80, and *ibid.*, 24th meeting (A/C.6/56/SR.24), para. 2, respectively.

⁴³ *Ibid.*, 12th meeting, statement by Spain (A/C.6/56/SR.12), para. 44.

⁴⁴ *Ibid.*, 22nd meeting, statement by Norway (A/C.6/56/SR.22), para. 32.

⁴⁵ *Ibid.*, para. 56.

⁴⁶ *Ibid.*, 24th meeting (A/C.6/56/SR.24), para. 6.

30. It can confidently be said that States are increasingly making use of unilateral acts in their international relations. Evidently, this assertion raises doubts about whether those acts which in some way fall within this context, are unilateral acts in the sense that is of interest to the Commission, acts which formulated unilaterally, individually or collectively, may produce legal effects by themselves without the need for acceptance, assent or any other indication of agreement on the part of the addressee of the act. Even though unilateral acts are not referred to in article 38, paragraph 1, of the ICJ Statute, “both State practice and legal scholars presume the existence of such a category of legal acts”.⁴⁷

31. Of course, if the matter is complicated in the context of the formulation and application of such acts, it is even more complex when examining their legal effects, a matter that will be discussed below. However, it is worth underscoring that, as some have indicated:

The scope of unilateral acts, of certain unilateral attitudes, such as the prolonged non-exercise of a right, silence when it was necessary to say something, tacit acquiescence and estoppel, is characterized by uncertainties about their legal effects. In many circumstances, the International Court of Justice has dispelled such uncertainties by resorting to the principle of good faith and to objective considerations that are inferred from the general interest, particularly from the need for legal security and certainty.⁴⁸

32. In addition to the indeterminacy of the subject matter of the proposed work of codification and progressive development, one of the issues that gives rise to doubts about the viability of the topic is that, although a unilateral act may be formulated unilaterally, its materialization, or the legal effects it produces, is related to the addressee or addressees. This could lead to a rapid but mistaken conclusion that all unilateral acts are basically treaty acts, that unilateral acts would therefore not exist as such and that, consequently, no regime other than the one for treaty acts would be required to regulate their functioning.

33. The elaboration of the act and its legal effects are two aspects of the topic that should be carefully distinguished in order to avoid erroneous interpretations about the nature of such acts and the possibility that they may be the subject of codification and progressive development.

34. An act is unilateral in its elaboration, even though its effects generally take place in a relationship that extends beyond that sphere. A relationship between the author State or States and the addressee or addressees is always posited. The bilateralization of the act, if that term can be used, may not mean that it becomes a treaty act. The act continues to be unilateral and is created in this context, even though its materialization or legal effects belong in another, wider sphere. In other words, the unilateral act produces its legal effects even before the addressee considers that the act is enforceable in respect of the author State or States. Obviously, “most acts are inadequately disassociated from the mechanism of tacit acquiescence that deprives them of their originality; other acts, although considered unilateral, are even more closely associated with a genuine treaty mechanism (accession, waiver,

reservation, etc.), to the point that it is not worth disengaging them”.⁴⁹

35. Evidently, it is very difficult to identify and qualify a unilateral act. In the case of a promise, for example, the matter is not easy. It is necessary to start from the premise that international unilateral acts exist, although they are rare. As has been said, “such rarity is easily explained, since no State would willingly make spontaneous and gratuitous concessions”.⁵⁰ Also, the question is whether an act may be qualified as a promise. In this respect, as indicated in the literature, “detecting these purely unilateral promises requires meticulous research in order to determine whether a fundamental bilaterality is hidden behind the formally unilateral facade of a declaration of intent”.⁵¹

36. When examining the Ihlen declaration (para. 6 above) or the 1952 note from Colombia referred to above (para. 23), it can be affirmed that one is in the presence of a waiver, which is also a recognition or a promise, and that this has a bearing on the legal effects that such declarations produce. Consequently, it is not easy to conclude unequivocally that one is in the presence of a specific category of unilateral acts, although what is most important is the legal effect that they produce.

D. Content of the fifth report and recapitulative nature of its chapter I

37. During the fifty-third session of the Commission in 2001, a member underscored the importance of asking the Special Rapporteur to prepare a recapitulative report that would clarify the status of discussions on the topic in general and on the draft articles submitted up to then, while allowing the consideration of the topic to proceed as it had up to that point. That comment, and the start of a new quinquennium, made it necessary to take this concern into account; hence chapter I of the present report, which the Special Rapporteur is submitting to the Commission for its consideration.

38. The Special Rapporteur further considers that the work to be accomplished in the short term must be closely related to a longer-term programme. Accordingly, he has set out at the end of this report a general idea concerning future work, which will in any case have to be considered by the Commission.

39. Chapter I again addresses some questions which, in the view of the Special Rapporteur, should be studied in greater detail and clarified in order to allow the consideration of the topic to proceed in a more structured manner. To begin with, the definition of a unilateral act is considered in the light of the evolution of the discussions in both the Commission and the Sixth Committee. A decision in that regard is essential to the consideration of the topic and progress in that respect, although the Special Rapporteur is fully aware of the complexities and difficulties it poses.

⁴⁷ Fiedler, *loc. cit.*, p. 1018.

⁴⁸ De Visscher, *Les effectivités du droit international public*, pp. 156–157.

⁴⁹ Reuter, *Droit international public*, 3rd ed., p. 94.

⁵⁰ Suy, *Les actes juridiques unilatéraux en droit international public*, p. 111.

⁵¹ *Ibid.*

40. A definition should cover the majority of unilateral acts, which doctrine and jurisprudence recognize as acts that produce legal effects in and of themselves, regardless of their content. It is important to adopt a definition that allows the various acts that are regarded as unilateral for the purposes of the Commission's consideration of the topic to be placed in context. The definition will have to be broad in order to avoid the exclusion of some of those acts from the scope of the study; at the same time, however (and this reflects its complexity), it will need to be restrictive so as not to leave the door open too far to the inclusion of acts not compatible with or not falling into the category of the acts in question. A balanced approach is therefore essential in this regard.

41. A second question relates to the conditions of validity and causes of invalidity of unilateral acts, again in accordance with the discussion of the topic in both the Commission and the Sixth Committee. It has been pointed out that consideration of the regime of invalidities, which goes beyond consideration of the factors vitiating consent, or, in this context, vitiating the expression of will, must be preceded by consideration of the factors determining the conditions of validity of the act. All those aspects are addressed in greater detail in this report. Some other questions related to the non-application of unilateral acts are also taken up.

42. A third question that is delved into, again within the same parameters, relates to the rules of interpretation applicable to unilateral acts, a question that was submitted to the Commission by the Special Rapporteur in his fourth report⁵² and discussed at the fifty-third session, in 2001. A new version of the draft articles submitted previously is set out at the end of the review.

43. Lastly, another brief comment is made on the possibility of classifying unilateral acts and on their relevance

⁵² See footnote 4 above.

and importance to the structure of the work that would be carried out on the topic.

44. Chapter II addresses several questions within the framework of the possibility of elaborating common rules applicable to all unilateral acts, regardless of their name, content and legal effects. The general rule concerning respect for unilateral acts, which is based on article 26 of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) referring to the basic rule of the law of treaties, *pacta sunt servanda*, is examined. An attempt is made to base the binding character of the act on a rule formulated to that end, a topic that was addressed in the first report on unilateral acts of States.⁵³ Secondly, two questions are addressed which may be the subject of elaboration of rules common to all acts: the application of the act in time, which raises the issue of retroactivity, and the non-retroactivity of the unilateral act and its application in space.

45. Chapter III discusses an important topic: the determination of the moment when the unilateral act begins to produce its legal effects, which is closely related to the concept of entry into force in the context of the law of treaties, although of course with the specific characteristics of such acts. These are two concepts which cannot be conflated by the very nature of the legal acts in question, but which clearly have important elements in common. In this instance it is not a matter of preparing draft articles, but rather of raising some issues for discussion in the Commission, so as to facilitate the work of codification.

46. Chapter IV sets out the structure of the draft articles in accordance with prior discussions and the future plan of work which the Special Rapporteur is submitting to the Commission for its consideration.

⁵³ See footnote 3 above.

CHAPTER I

Recapitulative consideration of some fundamental issues

47. In order to facilitate consideration of the topic in the Commission, it was deemed important, as indicated above, to re-examine, albeit in summary fashion, four issues that are regarded as basic in order to bring forth new elements and clarifications; these issues are the definition of the unilateral act, the conditions of validity and causes of invalidity and other questions related to the non-application of unilateral acts, the rules of interpretation applicable to such acts, and classification and qualification and their impact on the structure of the draft articles.

A. Definition of unilateral acts

48. The definition of unilateral acts is a fundamental issue that must be resolved. The Special Rapporteur has proposed a definition which has evolved in accordance with the views and comments of the members of the Commission and the representatives of Member States, both in

the Sixth Committee and in their replies to the questionnaire sent in 2001.⁵⁴

49. At the fifty-third session of the Commission, in 2001, the view was expressed that progress had been made and that some appropriate terms had been introduced, leaving aside those on which there was no consensus in the Commission as to whether they should be retained.

50. As the discussions on the topic evolved, the draft definition of unilateral acts became more acceptable, and it was therefore submitted to the Drafting Committee in 2000⁵⁵ in the terms in which it was formulated in the third report on unilateral acts of States.⁵⁶

⁵⁴ See footnote 13 above.

⁵⁵ *Yearbook ... 2000*, vol. II (Part Two), p. 99, para. 619.

⁵⁶ *Yearbook ... 2000* (see footnote 4 above), p. 256, para. 80.

51. A number of differences can be seen in the version that was transmitted to the Drafting Committee of the Commission. First, it will be noted that the word “declaration” has been replaced by the word “act”, which was considered to be broader and less exclusive than the word “declaration”, as it would cover all unilateral acts, especially those which might not be formulated by means of a declaration, although the Special Rapporteur was of the view that unilateral acts in general, regardless of their name, content and legal effects, are formulated by means of a declaration.

52. The concept of “autonomy” was also excluded from the definition following the long discussion to which it gave rise in the Commission, although the Special Rapporteur was of the view that autonomy was an important characteristic, that it should perhaps be interpreted differently, but that in any case it signified independence from other legal regimes and would mean that such acts could produce effects in and of themselves. It will be recalled that ICJ explained in the *Nuclear Tests* cases that what was involved was the “strictly unilateral nature”⁵⁷ of certain legal acts, although it referred to one such act, a promise, which appears to reflect the independent character of such acts.

53. As has been pointed out, legal scholars have had recourse to the independence of unilateral acts in characterizing such manifestations of will; the Special Rapporteur shares that approach. Suy, for example, notes that “as to its effectiveness, the manifestation of will may be *independent from other expressions of will* emanating from other subjects of law”.⁵⁸ For some members of the Commission, however, unilateral acts cannot be autonomous because they are always authorized by international law.

54. The matter was also discussed in the Sixth Committee in 2000. On the one hand, it was held that the concept of autonomy, understood as independence from other, pre-existing legal acts, or as the State’s freedom to formulate the act, should be included in the definition.⁵⁹

55. With regard to the phrase “expression of will formulated with the intention of producing legal effects”, it will be noted that during the discussions in the Commission in 2000, some were of the view that it did not need to be included. They even pointed to the possible tautology or redundancy of such terms, but as reflected in the report which the Commission adopted that year, “there was a clear-cut difference between the first term, which was the actual performance of the act, and the second, which was the sense given by the State to the performance of that act. The two were complementary and should be retained”.⁶⁰

56. A more explicit reference to the expression of will remains pertinent, as it is a fundamental aspect of a legal

act in general and, clearly, of the unilateral acts which are of concern. The importance attached to the role of will in legal acts is well known. For some, in fact, the act is an expression of will, which is reflected in the proposed definition. This also accounts for the importance attached to the interpretation of will, be it the declared or the actual will of the author of the act, and to the flaws that may affect its validity.

57. Unilateral acts have been defined in nearly all of the literature, without major differences between authors, as the expression of will formulated by a subject of the international legal order with the intention of producing legal effects at the international level.⁶¹ As one author states: “Unilateral legal acts are an expression of will ... envisaged in public international law as emanating from a single subject of law and resulting in the modification of the legal order.”⁶² For others, “unilateral acts emanate from a single expression of will ... and create norms intended to apply to subjects of law who have not participated in the formulation of the act”.⁶³

58. The expression of will is closely linked to the legal act and, consequently, the unilateral act. Will is a constituent of consent and is also necessary to the formation of the legal act. Will should, of course, be seen as a psychological element (internal will) and as an element of externalization (declared will), a view that is considered in another context below.

59. The definition of recognition given in the specialized literature is based on the expression of will. For some, recognition is “a general legal institution which authors unanimously regard as a unilateral expression of will emanating from a subject of law, by which that subject first takes note of an existing situation and expresses the intention to regard it as legitimate, as being the law”.⁶⁴ A promise would also be based on the expression of will.⁶⁵ The same applies to waiver, which would be “the expression of will by which a subject of law gives up a subjective right without there being a manifestation of will by a third party”.⁶⁶

60. In addition, the phrase “the intention to acquire legal obligations” was replaced by the expression “the intention to produce legal effects”, which was considered to be broader and to cover both the assumption of obligations and the acquisition of rights. It should be noted, however, that the Commission remains of the view that a State cannot impose unilateral obligations on another State through an act formulated without its participation and consent. On that point, it reiterated principles firmly established in international law, including the principle of *res inter alios acta* and the principle of Roman law, *pacta tertiis*

⁵⁷ *I.C.J. Reports 1974* (see footnote 10 above), p. 267, para. 43 (*Australia v. France*); and p. 472, para. 46 (*New Zealand v. France*).

⁵⁸ Suy, *op. cit.*, p. 30.

⁵⁹ See *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 19th meeting, statement by Italy (A/C.6/55/SR.19), para. 19.

⁶⁰ *Yearbook ... 2000* (see footnote 55 above), para. 607.

⁶¹ Urios Moliner, “Actos unilaterales y derecho internacional público: delimitación de una figura susceptible de un régimen jurídico común”, p. 59.

⁶² Rigaldies, “Contribution à l’étude de l’acte juridique unilatéral en droit international public”, p. 451.

⁶³ Jacqué, *Éléments pour une théorie de l’acte juridique en droit international public*, p. 329.

⁶⁴ Suy, *op. cit.*, p. 191.

⁶⁵ Jacqué, “À propos de la promesse unilatérale”, p. 339.

⁶⁶ Suy, *op. cit.*, p. 156.

nec nocent nec prosunt, i.e. that agreements neither bind nor benefit third parties. As has been stated: “In traditional international law, it is impossible, in principle, for a subject of law to create an obligation for another subject without the latter having given its consent.”⁶⁷ It should be underscored that the justification for such a rule would be based not solely on that principle, which is applicable in the contractual field, but on the sovereignty and independence of States. International jurisprudence is clear in this regard. The decision of arbitrator Max Huber in the *Island of Palmas* case should be recalled: “It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the ‘Philippines’ could not be binding upon the Netherlands.”⁶⁸ That decision also points out that “[it] is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers.”⁶⁹ One should also recall the decision, cited in previous reports, of PCIJ in the case of the *Free Zones of Upper Savoy and the District of Gex*, in which the Court stated that “even were it otherwise, it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it.”⁷⁰ Lastly, mention should be made of the decision in the case concerning the *Aerial Incident of 27 July 1955*, in which ICJ stated that Article 36, paragraph 5, of the PCIJ Statute “was without legal force so far as non-signatory States were concerned”.⁷¹

61. International law is also clear in that, in principle, not even a treaty can confer rights on States that are not party to it, as PCIJ established in the case concerning *Certain German interests in Polish Upper Silesia*, when it indicated that “the instruments in question make no provision for a right on the part of other States to adhere to them ... A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced in favour of third States”.⁷²

62. Evidently, the law of treaties establishes exceptions to this rule, such as the stipulation in favour of third parties that requires the consent of the third State,⁷³ and it should be asked whether, in the context of unilateral acts, the possibility might be considered that one State might impose obligations on another without its consent; in other words, whether it is possible to go beyond reaffirming rights and legal claims.

63. When examining the various unilateral acts to which reference has been made, it can be seen that they do not

⁶⁷ Jacqué, *op. cit.*, p. 329.

⁶⁸ UNRIAA, vol. II (Sales No. 1949.V.1), arbitral award of 4 April 1928, p. 850.

⁶⁹ *Ibid.*, p. 842.

⁷⁰ *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 141.

⁷¹ *Aerial Incident of 27 July 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 138.

⁷² *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 28–29.

⁷³ PCIJ in the *Free Zones of Upper Savoy and the District of Gex* case indicated that “[t]here is ... nothing to prevent the will of sovereign States from having this object and this effect” (see footnote 70 above), p. 147.

impose obligations on States. Waiver and promises are clear in this respect. Recognition, referring to recognition of States, could perhaps bear closer examination.

64. Indeed, when an entity is recognized as having the condition or status of a State, the author State assumes some obligations that are related to the very nature of the State and that arise from international law. Yet the question might be asked whether the obligations corresponding to the State in accordance with international law may be imposed on the recognized entity. The answer to this depends on the nature of the recognition of States. If the thesis that the act of recognition is merely declarative and not constitutive is accepted (and the Special Rapporteur shares this point of view), it can be said that such obligations do not arise from that act of recognition but from its very existence as a State.

65. Most members of the Commission and representatives in the Sixth Committee considered that the expression should be broader; however, in the opinion of the Special Rapporteur, that could not allow or be interpreted as allowing States to impose obligations on third States without their consent.

66. Lastly, the requirement of “publicity” is replaced by that of “notoriety”, since it is considered that the former has been used exclusively in the case of a unilateral act formulated *erga omnes*, as were the declarations formulated by the French authorities and considered by ICJ in the *Nuclear Tests* cases.⁷⁴ However, the Commission discussed whether that element was constitutive of the act itself or whether, to the contrary, it was a declarative element that was not essential to the definition of the act.

67. For a Government, the intention to produce legal effects referred to in the definition is not the basis for the binding nature of the unilateral act. Thus, when agreeing with the definition proposed by the Special Rapporteur, Portugal stated that “it is international law, and not the State’s intention, that provides for the legal force of unilateral acts in the international legal order”.⁷⁵

68. The proposed definition, and there appears to be a general consensus in the Commission on this, refers to acts formulated by the State. However, with regard to the addressee, a broader formulation has been introduced in relation to the first one proposed by the Special Rapporteur; it reflects that, even though it is a question of acts of State, they may be addressed to other subjects of international law. A member of the Commission even indicated that the addressee, in addition to being a State or an international organization, could be other distinct subjects and entities, an opinion that the Commission has not yet considered. The definition initially proposed could, according to an opinion expressed in the Commission, limit the effects of unilateral acts to relations with other States and international organizations, excluding other entities, such as national liberation movements, and others that might be the beneficiaries of such acts if that was the author’s intention.

⁷⁴ See footnote 10 above.

⁷⁵ A/CN.4/524 (reproduced in the present volume), general comments, para. 2.

69. The inclusion of the word “unequivocal” was generally accepted by the Commission. During the discussion, it was considered “acceptable, since ... it was hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions or how it could be easily and quickly revoked”.⁷⁶ However, some members opposed the inclusion of the word because they considered

that it should be understood that the expression of will must always be clear and comprehensible; if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act ... [T]he ideas of clarity and certainty [that were conveyed] by means of the word ‘unequivocal’ was a question of judgement which was traditionally for the judge to decide and did not belong in the definition of unilateral acts.⁷⁷

70. In this respect, in 2000, the Sixth Committee indicated that the “word ‘unequivocal’ qualifying ‘expression of will’ in the definition need not be construed as equivalent to ‘express’. An implicit or tacit expression of will could be unequivocal”.⁷⁸

71. In any case, the draft definition must be considered by the Drafting Committee during the fifty-fourth session of the Commission in 2002. Evidently, there is a certain tendency towards focusing consideration of unilateral acts mainly on promises, in other words, elaborating rules based primarily on one kind of promise, an international promise, although this is clearly a very important unilateral act that has a certain influence on the evolution of the topic. A balanced approach is needed, considering the different unilateral acts that both doctrine and jurisprudence recognize as such, particularly in the context of the work of codification and progressive development that the Commission has undertaken. In this respect, it is worth recalling that the Commission itself has considered that the work of codification can be focused, at least during the first stage, on promises, understood as they are defined in most of the literature, i.e. as reflecting the unilateral assumption of obligations.

72. Regarding the diversity of acts and the difficulties involved in grouping and classifying them (which to some extent relates to their legal effects), it should be indicated that during its deliberations, the Commission was able to exclude a number of acts and kinds of conduct that, even though they produce legal effects, are distinct from the legal act that it is attempting to regulate.

73. Some unilateral declarations raise doubts about their place in the Vienna regime or in the context of unilateral acts; this is the case, for example, of declarations recognizing as compulsory the jurisdiction of ICJ formulated by States under Article 36, paragraph 2, of the Statute of the Court, which the Commission has examined previously. The Special Rapporteur, concurring with some legal scholars, has affirmed that such declarations belong within treaty relationships. However, as the Court itself has recognized, their specific characteristics can

make them appear different from what are clearly treaty declarations.

74. Other declarations already examined seem to belong more easily in the context of the unilateral acts that are of interest to the Commission. These are the declarations formulated by a State’s representative during a proceeding before an international court. The question that arises is whether such declarations may or may not be considered unilateral and binding on the State on whose behalf the agent acts, provided, of course, that they comply with the conditions for validity of the act.

75. This is the case of the declaration formulated by the agent of Poland before PCIJ in the case concerning *Certain German Interests in Polish Upper Silesia*. With regard to a declaration made by Poland, the Court stated that:

The representative before the Court of the respondent Party, in addition to the declarations above mentioned regarding the intention of his Government not to expropriate certain parts of the estates in respect of which notice had been given, has made other similar declarations which will be dealt with later; the Court can be in no doubt as to the binding character of all these declarations.⁷⁹

76. The Special Rapporteur has proposed to separate some types of conduct and attitudes, such as silence, which, even though they can undoubtedly produce legal effects, do not constitute unilateral acts in the strict sense of the term: a unilateral act is an expression of will, formulated with the intention of producing legal effects in relation to a third State that has not participated in its formulation, which produces legal effects without the need for participation of that third party, in other words, without the latter’s acceptance, assent or any other reaction that would indicate assent.

77. Many have considered silence to be a reactive expression of will, in the face of a situation or claim by another subject of international law. The value placed on it by both doctrine and international courts should not be disregarded. In some important judicial decisions, such as those relating to the *Fisheries* case (United Kingdom v. Norway)⁸⁰ and the case concerning the *Temple of Preah Vihear*,⁸¹ silence and its legal effects were considered; this has been elaborated on further in previous reports and was also discussed in the Commission. It is worth asking whether the expression of will in those cases differs from the expression of will whose definition is presently of concern. Should the Commission determine that it is pertinent to include silence in its study of unilateral acts, it would be necessary to determine the meaning and limit of the State obligation that this conduct expresses. The Commission would have to consider the matter and decide whether conduct such as silence should be counted among the expressions of will that it seeks to regulate and, consequently, ensure that it is covered by the definition to be adopted this year, or, on the contrary, as has been argued, whether it should be removed from the scope of the study and excluded from the definition.

⁷⁶ *Yearbook ... 2000* (see footnote 55 above), p. 94, para. 553.

⁷⁷ *Ibid.*, para. 554.

⁷⁸ *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 20th meeting, statement by Guatemala (A/C.6/55/SR.20), para. 28.

⁷⁹ *P.C.I.J.* (see footnote 72 above), p. 13.

⁸⁰ *Fisheries, Judgment, I.C.J. Reports 1951*, p. 139.

⁸¹ *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 23.

78. Some have stated that the State may even carry out unilateral acts “without knowing it”, independently of its intention. Clearly, this would seem possible, as it can occur in other legal spheres. But it is worth asking ourselves whether that expression of will, which could have different connotations, constitutes a unilateral act in the sense that interests us. This should also be examined carefully so that it may be included or excluded once and for all, and so that an adequate definition can be elaborated.

79. Other acts, even treaty acts, can be confused with the unilateral acts with which the Commission is concerned. This is the case of treaties that grant rights or impose obligations on third parties which have not taken part in their elaboration. Such treaty acts may be considered unilateral acts of a collective or treaty origin in favour of third parties; however, they are really collateral agreements or agreements with stipulations in favour of third parties, as envisaged in the 1969 Vienna Convention and provided for in its articles 35 and 36. In any case, for a third State to be bound by a treaty, it must expressly accept any obligations deriving therefrom, or, in the second case, accept the rights that may derive from that treaty in whose elaboration the State did not take part, as less rigidly envisaged in the Convention.

80. As indicated above, the definition of a unilateral act is fundamental, and its consideration should take into account all unilateral acts in order to arrive at a broad, non-exclusive definition.

81. The text of the article proposed by the Special Rapporteur and transmitted to the Drafting Committee is as follows:

“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.”

B. Conditions of validity and causes of invalidity of unilateral acts

82. The second question addressed in this chapter concerns the conditions of validity and causes of invalidity of unilateral acts; the latter aspect was partially considered by the Commission at its fifty-second session, in 2000, on the basis of the third report submitted by the Special Rapporteur.⁸²

83. This year the Working Group of the Commission will take up the draft article submitted by the Special Rapporteur on invalidity of unilateral acts; in that connection, it will need to take into account the discussions in the Commission and the views expressed by representatives in the Sixth Committee in 2000 and 2001, along with the clarifications and additions provided in the Working Group. Before addressing the matter again, several issues

will be considered in an effort to clarify the status of the discussion, namely, conditions of validity of unilateral acts and the general regime governing the invalidity of unilateral acts, issues that, as has been pointed out, are clearly closely related. Preliminary comments will also be made on two issues related to invalidity: loss of the right to invoke a cause of invalidity or a ground for termination of a unilateral act, or to suspend its application, and the relation between domestic law and competence to formulate an act. Preliminary consideration will also be given to other issues relating to the non-application of the act, namely, termination and suspension.

84. A unilateral act is valid and can therefore produce its legal effects if certain conditions are met, as provided for in the Vienna regime concerning treaties. Articles 42–53 and 69–71 of the 1969 Vienna Convention should be recalled in this context.

85. Following the Vienna regime to some extent, and using it as a guide, the conditions of validity of the unilateral acts which are of concern would be: formulation of the act by a State, by a representative authorized or qualified to act on its behalf and commit it at the international level; lawfulness of the object and purpose, which must not conflict with a peremptory norm of international law; and the manifestation of will, free of defects. Certain other related issues should be considered at the same time as validity and causes of invalidity, such as the relation between unilateral acts and prior obligations assumed by the author State.

86. In order to regulate the functioning of unilateral acts, the conditions of validity of such acts do not need to be set forth in a specific provision of the draft articles, any more than they were in the Vienna Conventions. When the Commission elaborated the draft articles on the law of treaties, it considered a draft article (art. 30), which established a general rule concerning validity of treaties and which was subsequently not adopted.⁸³ The view at the time was that such a rule was unnecessary and that, accordingly, the draft article submitted by the Special Rapporteur should be deleted.

87. In any case, it should be underlined that the inclusion of draft articles on the causes of invalidity of unilateral acts cannot weaken the principle established in this context to serve as a basis for the binding character of such acts (*acta sunt servanda*) and the stability and mutual confidence that should govern international legal relations, any more than the provisions included in the 1969 Vienna Convention that deal with the *acta sunt servanda* principle.

88. Only the State can formulate unilateral acts, at least in the context in which the Commission has addressed the

⁸² See footnote 4 above.

⁸³ The Special Rapporteur on the law of treaties submitted draft article 30 “in order to underline that any treaty concluded and brought into force in accordance with the draft articles governing the conclusion and entry into force of treaties is to be considered as being in force and in operation unless the contrary is shown to result from the application of the articles dealing with the invalidity, termination and suspension of the operation of treaties” (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 65, para. 1).

topic. The State has legal capacity to formulate unilateral acts, just as it has to conclude treaties, a point that was clearly reflected in the 1969 Vienna Convention. Such capacity is beyond doubt, as reflected in draft article 2, submitted in the third report of the Special Rapporteur, which was referred to the Drafting Committee.⁸⁴ Of course, while the draft article is limited to the State, that does not exclude other subjects of international law from also having the capacity to formulate such acts. The limitation results from the mandate given to the Commission to study the topic and from the object and purpose defined in accordance with that mandate.

89. Moreover, only qualified persons can act on behalf of the State and commit it in its international relations, a point addressed in draft article 3, which has already been considered by the Commission and referred to the Drafting Committee. There is no question regarding the representativeness of the Head of State,⁸⁵ the Head of Government or the Minister for Foreign Affairs,⁸⁶ as set forth in article 7 of the 1969 Vienna Convention, on which the draft concerning unilateral acts is based. The point, as noted in the second report submitted by the Special Rapporteur, is that unilateral acts can be formulated only by a person qualified to act on behalf of the State and commit it at the international level. According to the report: "States can be engaged at the international level only by their representatives, as that term is understood in international law, that is, those persons who by virtue of their office or other circumstances are qualified for that purpose."⁸⁷

90. The determination of the persons capable of formulating unilateral acts on behalf of the State depends on the circumstances and on the internal structure and nature of the act.

91. In addition to the persons referred to in the previous paragraph, the Special Rapporteur suggested that other persons could be qualified to formulate a unilateral act on behalf of the State. The determination of persons qualified for that purpose, it should be specified, depends both on domestic, mainly constitutional, law, and on international law. It will be recalled that when the Special Rapporteur submitted his second report to the Commission, he noted that the "intention of the State that formulated the act and the good faith that should apply in international relations made it possible to assume that other representatives could also engage the State without the need

for special powers, and that was clearly shown in international practice".⁸⁸ The conclusion could have been drawn, however, that that could happen only on the basis of a restrictive criterion. When the Commission discussed the topic, it concluded that, while it was possible to add to the persons qualified to act on behalf of the State, it should be approached restrictively; that view was also expressed by some Governments, such as Argentina, which, in replying to the above-mentioned questionnaire from the Commission, pointed out that "any addition of other persons or organs to this established norm of customary law must be approached restrictively, bearing in mind contemporary international realities".⁸⁹ As one Government stated in its reply to the 1999 questionnaire: "According to a well-established norm of general international law, acts of the Head of State, Head of Government or Minister for Foreign Affairs are attributable to the State. However, there is a possibility that other ministers or officials ... may also act unilaterally on behalf of the State."⁹⁰

92. Pursuant to the preparatory work of the 1969 Vienna Convention and the Commission's studies and discussions on the subject, State practice, legal doctrine and case law concur that the assumption of obligations is a limitative power; in other words, that the explicit powers of governmental representatives should be taken into account, although the general rule prevents the domestic norms from being invoked in order to challenge the validity of a treaty.⁹¹

93. The same cannot be said for the current status of international law concerning international responsibility, where, as reflected in the draft articles elaborated by the Commission, of which the General Assembly took note in 2001, particularly articles 7–9 thereof, the international responsibility of a State can arise through the conduct of its representatives, even though they have not been authorized for that purpose, and even through "[t]he conduct of a person or group of persons ... if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct", and through "[t]he conduct of a person or group of persons ... if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".⁹² It should be noted, however, that in such situations reference is made to explicit obligations previously recognized by States or by international law in general.⁹³ Clearly, the need to guarantee legal relations and mutual confidence justify such an extension of

⁸⁴ *Yearbook ... 2000* (see footnote 4 above), p. 257, para. 92.

⁸⁵ ICJ affirmed in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that "the power of a Head of State to act on behalf of the State in its international relations is universally recognized" (*Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 11, para. 13).

⁸⁶ PCIJ noted in the *Legal Status of Eastern Greenland* case that: "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government ... is binding upon the country to which the Minister belongs" (see footnote 7 above), p. 71. The ICJ decision in the *Nuclear Tests* cases also establishes the capacity of the Minister for Foreign Affairs to act on behalf of the State and commit it in its international relations, *I.C.J. Reports 1974* (see footnote 10 above), pp. 266–269 (*Australia v. France*), and pp. 471–474 (*New Zealand v. France*).

⁸⁷ *Yearbook ... 1999* (see footnote 4 above), p. 204, para. 79.

⁸⁸ *Ibid.*, vol. I, 2593rd meeting, p. 187, para. 34.

⁸⁹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/511, p. 271, para. 2.

⁹⁰ *Ibid.*, reply by Argentina, para. 1.

⁹¹ In 1966 the Commission noted that "when the violation of internal law regarding competence to conclude treaties would be objectively evident to any State dealing with the matter normally and in good faith, the consent to the treaty purported to be given on behalf of the State may be repudiated" (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 242, para. (11) of the commentary to article 43).

⁹² General Assembly resolution 56/83 of 12 December 2001, annex, arts. 8–9.

⁹³ See *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

responsibility, although it is envisaged restrictively. In that connection, it is interesting to note the reply to the above-mentioned questionnaire by another Government, which stated that: "It could be argued that in the realm of unilateral acts, all persons who may be deemed mandated by virtue of their tasks and powers to make pronouncements that may be relied upon by third States can be regarded as having the capacity to commit the State."⁹⁴

94. A second condition of validity of unilateral acts is the lawfulness of their object and purpose. A unilateral act that conflicts with a peremptory norm of international law is absolutely invalid. The invalidity of an act because it is contrary to a peremptory norm or *jus cogens* should be distinguished from the situation that exists when a unilateral act conflicts with a previous act, be it a conventional or a unilateral act. In that regard, as one author rightly points out: "When ... the subsequent act is contrary to previous norms having the character of *jus cogens*, the Court is obliged to dismiss its application, on grounds of absolute invalidity."⁹⁵ Thus, the State is free to formulate unilateral acts outside the framework of international law, but such acts cannot be contrary to *jus cogens* norms. This means that a State cannot avail itself of the possibility of going outside the international legal order in order to transgress peremptory legal norms.⁹⁶

95. The question of the effects of a unilateral act that is contrary to a previous act, be it a conventional or a unilateral act, and in fact contrary to a norm of general international law, will be addressed below. It is well known, however, that a unilateral act should not contravene existing treaty norms, as affirmed by legal doctrine and judicial precedents. In the *Legal Status of Eastern Greenland* case, PCIJ considered that the 1931 declaration of occupation of that territory by Norway was "unlawful and invalid",⁹⁷ as it constituted a violation of the existing legal situation.

96. ICJ expressed a similar view in the *Continental Shelf* case, involving a dispute between Tunisia and the Libyan Arab Jamahiriya, when it stated that: "The Court would therefore observe at the outset that an attempt by a unilateral act to establish international maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law."⁹⁸

97. The final condition of validity of a unilateral act concerns the manifestation of will, which must be free of defects, as set forth in the law of treaties; the Special Rapporteur specifically addresses that issue in his third report.⁹⁹

98. The regime governing invalidity is certainly one of the more complex aspects of the study of legal acts in gen-

eral. In the present context, invalidity logically refers to international legal acts, in other words, acts intended to produce legal effects at the international level in accordance with the author's intention. Prior to Vienna, this regime, of extreme importance in the domestic sphere, had not been examined in greater depth in the context of international law. Previously existing rules of customary law were embodied in the 1969 Vienna Convention. The strong influence of domestic law can also be seen in the elaboration of the rules on invalidity contained in the Vienna Conventions.

99. Consideration of the regime concerning invalidity of legal acts involves a variety of situations which reflect its complexity. It is necessary to distinguish between absolute and relative invalidity, between non-existence of the act and invalidity, between invalid acts and acts that can be made invalid, between partial invalidity and total invalidity; all of this is mentioned in some way in the law of treaties codified in Vienna. Absolute invalidity means that the act cannot be confirmed or validated; this happens when the act conflicts with a peremptory norm of international law or of *jus cogens* or when the act is formulated as a result of coercion of the representative of the State or when similar pressure is brought to bear on the State that is the author of the act, contrary to international law. Where there is relative invalidity, on the other hand, it is possible to confirm or validate the act. Such would be the case, for example, when the author State has erred or when the will has been expressed in violation of a fundamental domestic norm regarding competence to formulate the act. The author State may, of its own free will or through behaviour in relation to the act, confirm or validate it.

100. Invalidity arises in relation to conventional acts and in relation to unilateral acts and in either case can relate to both form and substance. In the former case, the specificities of each one of these acts must be taken into account. While the expression of will is the same, the unilateral nature of the latter affects whatever conception one may seek to have of the defects and causes in general that may affect its validity. The unilateral act may be considered invalid if there are defects in its formulation, essentially related to the expression of will; it may also be regarded as invalid if it conflicts with an earlier norm or a peremptory norm of *jus cogens*. In the former context, it can simply be said that the invalidity is related to the incapacity of the subject formulating the act and the incapacity of the person carrying it out, to the object and its lawfulness, and to the expression of will or defects in the declaration of intent. In the latter context, one would be dealing with the fact that the act conflicts with a peremptory norm of international law.

101. The form of the act, it should be remembered, does not affect its validity, as Judge Anzilotti pointed out in 1933, in his dissenting opinion in the case concerning the *Legal Status of Eastern Greenland*,¹⁰⁰ which view was reaffirmed by ICJ in the case concerning the *Temple of Preah Vihear* and in the *Nuclear Tests* cases.

⁹⁴ *Yearbook ... 2000* (see footnote 89 above), reply by the Netherlands, p. 272.

⁹⁵ Verzijl, "La validité et la nullité des actes juridiques internationaux", p. 321.

⁹⁶ Barberis, "Los actos jurídicos unilaterales como fuente del derecho internacional público", p. 112.

⁹⁷ *P.C.I.J.* (see footnote 7 above), p. 75.

⁹⁸ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 66, para. 87.

⁹⁹ See footnote 4 above.

¹⁰⁰ *P.C.I.J.* (see footnote 7 above), p. 71.

102. In the case concerning the *Temple of Preah Vihear*, ICJ stated:

Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.¹⁰¹

103. In the *Nuclear Tests* cases, ICJ stated that:

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive.¹⁰²

104. In his third report¹⁰³ the Special Rapporteur presented some of the causes of invalidity, which gave rise to comments both in the Commission and by representatives of States in the Sixth Committee; they will all have to be considered again in order to clarify the state of deliberations on this topic and to facilitate progress this year. Implementation of the Vienna rules was mentioned by some representatives in the Sixth Committee. It was pointed out, in this context, that invalidity of unilateral acts was an area in which it was acceptable to apply, *mutatis mutandis*, the norms of the 1969 Vienna Convention; according to another view, it would be dangerous to rigorously apply the Vienna norms to unilateral acts in view of the distinctive nature of such acts.¹⁰⁴

105. The causes relating to invalidity of unilateral acts were dealt with in draft article 5 which was referred to the Working Group for further consideration. Some of them relate to the expression of will, while others refer to conflict with a preemptory norm or a decision of the Security Council.

106. As regards defects in the expression of will, the issue poses no serious difficulties. The rules set forth in the 1969 Vienna Convention apply to a large extent to the expression of unilateral will.

107. As regards unilateral acts that conflict with a preemptory norm of international law or *jus cogens*, at the fifty-second session of the Commission, in 2000, several views were expressed concerning the importance of this cause of invalidity and it was indicated, *inter alia*, that such acts were invalid *ab initio*.

108. As regards unilateral acts that conflict with a decision of the Security Council, it was pointed out that, under Article 25 of the Charter of the United Nations, Members States were already bound to carry out the decisions of

the Council. It was also suggested that the norm contained in Article 103 of the Charter could also apply to unilateral acts, so that obligations contracted under the Charter should take precedence over all other obligations deriving from a treaty or a unilateral act.¹⁰⁵

109. The possibility that a State might lose the right to invoke a cause of invalidity or a ground for putting an end to the act by its behaviour, whether implicit or explicit, deserves special comment; these issues have been tackled already both in legal doctrine and in judicial practice in the context of the law of treaties, which must be considered as a guide. In the view of some: "Following the conclusion of a treaty the conduct of the Parties becomes part of the agreement. This creates an obligation that makes it possible to overcome the initial obstacles to implementation of the treaty: defects in the agreement." The author goes on to say that: "There is no defect—or almost no defect—in an agreement which cannot be overcome by the subsequent conduct of the Parties. The law of nations acknowledges that Contracting Parties may, by their subsequent attitude, regularize a treaty that is invalid *ab initio*."¹⁰⁶ There are also judicial precedents dealing with this issue. In the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, ICJ ruled that Nicaragua could not challenge the award because it had applied the treaty that contained the arbitral clause. The Court stated that: "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award."¹⁰⁷

110. The issue that arises in the context of unilateral acts is somewhat different, and in this context a distinction would have to be made according to the legal effects of the act. The situation might be different according to whether a protest, a recognition, a promise or a renunciation is being dealt with. Questions arise as to whether it is possible to include a common clause, applicable to all unilateral acts. In the case of a renunciation, for example, the author State can invoke the invalidity of the act if it considers that the conditions required for the declaration or act to be considered valid have not all been met. In the case of a promise the same comment could apply. A unilateral act whereby a State undertakes to assume a particular conduct in the future may be invalid if the author State invokes a cause of invalidity. In the case of a protest, the issue could be approached from a different angle. While the author State can hardly invoke the invalidity of the act, it might be possible for the State to which the act is directed to do so.

111. In view of all this, it would have to be considered whether the author State or the State that can invoke

¹⁰⁵ *Ibid.*, para. 277.

¹⁰⁶ Cot, "La conduite subséquente des Parties à un traité", p. 658. Cahier also points out that "it is acknowledged that the State can confirm a treaty ... The principle that a party cannot maintain a legal position that is in contradiction with its past conduct, makes up in part for the lack of prescription in international law" ("Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le droit des traités", p. 677).

¹⁰⁷ *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 213.

¹⁰¹ *Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 31.

¹⁰² *I.C.J. Reports 1974* (see footnote 10 above), pp. 267–268, para. 45 (*Australia v. France*), and p. 473, para. 48 (*New Zealand v. France*).

¹⁰³ See footnote 4 above.

¹⁰⁴ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session (A/CN.4/513), paras. 271–272.

the invalidity of the act can lose the right to do so by its conduct or its attitude, whether implicit or explicit. A State that formulates an act containing a promise and acts expressly or behaves in such a manner as to suggest that it accepts that the act is valid cannot later on invoke the invalidity of the declaration. As in the context of the law of treaties—article 45 of the 1969 Vienna Convention—the possibility might be considered of drafting a rule that would be applicable to unilateral acts, although it would have to be determined whether a rule of this nature could be applicable to all unilateral acts.

112. Furthermore, it is important, also in the context of the non-application of unilateral acts, to refer to two other issues—termination and suspension of the act—which are considered and resolved in relation to treaties in the 1969 Vienna Convention, particularly articles 54–64. In the context of unilateral acts, due to the characteristics of such acts, the situation is far more complex. The question is whether it is possible to transfer this regime to the context of unilateral acts and whether it is possible to speak of the “end” and “suspension” of such acts. Once again, this raises the difficulty of transferring the Vienna rules to the regime that one is trying to elaborate. Also in this context, there is the question of the different kinds of acts, according to their legal effects. A unilateral act containing a promise must be looked at differently from a unilateral act whereby a State renounces or recognizes a particular situation. In chapter II of the present report this issue will be looked at in greater depth.

113. Reference must also briefly be made to another aspect related to invalidity, the treatment of which is also based on the Vienna regime: domestic law concerning competence to formulate unilateral acts and the particular restriction of the power to express will. According to the Vienna regime, an act may be invalid if it is formulated in violation of a provision of domestic law concerning competence to formulate such acts, but this cause may be invoked only if the violation is manifest and if it concerns a norm of fundamental importance to the domestic law of the State.

114. Although the first issue seems applicable to unilateral acts, the second presents difficulties. Constitutions and domestic legal orders in general refer to treaties and international agreements but not to unilateral acts, which are not considered in the same way in that context. This issue will also be tackled at greater length in chapter II of the present report.

115. Lastly, it is noted that, as regards form, criticisms were expressed regarding the presentation of the causes of invalidity in a single draft article in the third report of the Special Rapporteur,¹⁰⁸ as opposed to the formulation in the Vienna regime where articles 46–53 contain separate provisions for each cause. The new presentation of the causes in separate provisions makes it necessary to introduce the requisite changes. The new draft articles may serve as a basis for discussion in the Working Group which will have to be set up during this session.

¹⁰⁸ See footnote 4 above.

116. The new draft articles 5 (a) to 5 (h) present within brackets, as a desirable alternative, a reference to the State [or States] that formulated a unilateral act. This alternative will reflect expressly the invocation of invalidity in the case of unilateral acts having a collective origin. If this alternative is accepted it might also be desirable to reflect just as expressly in the definition in article 1, the possibility of a collective unilateral act referred to in the said draft article as the unequivocal expression of will of “one or more States” or of “one or more other States”. Another possibility would be to explain in the commentaries being prepared on article 1, that it relates to unilateral acts which may have an individual or collective origin and that this, in the context of article 5, may enable one of the author States to invoke the cause of invalidity.

117. The new wording specifies that it is possible to invoke a defect in “the expression of will” and absolute invalidity if the act conflicts with a peremptory norm of international law or *jus cogens* and if it is a result of coercion of the person formulating it on behalf of the State.

118. Lastly, it will be noted that it also specifies who can invoke the invalidity of unilateral acts. One case would be when the invalidity is relative; another would be when the unilateral act is invalid because it is contrary to a peremptory norm of international law or of *jus cogens* or because it was formulated as a result of coercion of the State, contrary to international law. In the first case it is understood that only the State or States that formulated the act could invoke the invalidity of the act, whereas in the latter case any State could invoke its invalidity.

119. The draft article could read as follows:

“Article 5 (a). Error

“A State [or States] that formulate[s] a unilateral act may invoke error as a defect in the expression of will if [said] 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 [expression of will] [consent] to be bound by the act. The foregoing shall not apply if the author State [or States] contributed by its [their] own conduct to the error or if the circumstances were such as to put that State [or those States] on notice of a possible error.

“Article 5 (b). Fraud

“A State [or States] that formulate[s] a unilateral act may invoke fraud as a defect in the expression of will if it has/they have been induced to formulate an act by the fraudulent conduct of another State.

“Article 5 (c). Corruption of the representative of the State

“A State [or States] that formulate[s] a unilateral act may invoke a defect in the expression of will if the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State.

“Article 5 (d). *Coercion of the person formulating the act*

“A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him.

“Article 5 (e). *Coercion by the threat or use of force*

“A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act 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.

“Article 5 (f). *Unilateral act contrary to a peremptory norm of international law (jus cogens)*

“A State may invoke the absolute invalidity of a unilateral act formulated by one or more States if, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law.

“Article 5 (g). *Unilateral act contrary to a decision of the Security Council*

“A State may invoke the absolute invalidity of a unilateral act formulated by one or more States if, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council.

“Article 5 (h). *Unilateral act contrary to a fundamental norm of the domestic law of the State formulating it*

“A State [or States] that formulate[s] a unilateral act may invoke the invalidity of the act if it conflicts with a norm of fundamental importance to the domestic law of the State formulating it.”

C. Interpretation of unilateral acts

120. In the fourth report¹⁰⁹ the Special Rapporteur dealt with the interpretation of unilateral acts, which, while different from the formulation of such acts in that it falls within the context of their application, may be subject to common rules, that is, rules which can be applied to all unilateral acts, irrespective of their classification, content and legal effects.

121. When the topic was taken up at the fifty-third session of the Commission, in 2001, some members felt that consideration of the rules of interpretation was premature and that they should be dealt with at a later stage in the elaboration of the draft. Nonetheless, the Special Rapporteur is of the view that it is useful to consider them in this phase of the Commission’s study of the topic, particularly since, as he has suggested, the rules of interpretation can be elaborated separately from the content and legal effects of unilateral acts.

122. The reference to Vienna is always the subject of commentaries. In the case of interpretation, some members agreed that, in view of the fundamental differences between conventional and unilateral acts, the provisions of the Vienna regime, while important, should be adapted to the specific character of unilateral acts. This view is not shared by all members, some of whom believe that the provisions of the Vienna Conventions on the law of treaties are too vague to be applied to unilateral acts.

123. In this connection, the most recent opinion given by ICJ on declarations of acceptance of its compulsory jurisdiction should be noted. Although it might not be “of a strictly unilateral nature”,¹¹⁰ it is a unilateral declaration from the formal point of view and hence, as the Court itself indicated, a *sui generis* declaration. This was in connection with the examination by the Court of the declaration of acceptance of jurisdiction in the *Fisheries Jurisdiction* case, which, in its 1998 preliminary decision, indicated that:

A declaration of acceptance of the compulsory jurisdiction of the Court ... is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute, and “makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance” (*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1998*, p. 291, para. 25).¹¹¹

124. ICJ indicated, with regard to the interpretation of such declarations, that:

The régime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties ... Spain has suggested in its pleadings that “[t]his does not mean that the legal rules and the art of interpreting declarations (and reservations) do not coincide with those governing the interpretation of treaties”. The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court’s jurisdiction.¹¹²

125. In 2001, some delegations in the Sixth Committee expressed support for the Special Rapporteur’s approach of adopting the rules of interpretation contained in the 1969 Vienna Convention. However, doubts were also expressed that this would be feasible, given the specific nature of unilateral acts. Some felt that the starting point should be the interpretative needs of the unilateral act, followed by a finding of whether such needs would be well served by the appropriate rules of the Convention.¹¹³ Others felt that the intention of the author State should be a main criterion, and thus greater emphasis should be given to preparatory work which offered a clear indication of the intent.¹¹⁴ Members also said that the object and purpose of the unilateral act, which the

¹¹⁰ See footnote 57 above.

¹¹¹ *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 453, para. 46.

¹¹² *Ibid.*

¹¹³ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-sixth session (A/CN.4/521), para. 114.

¹¹⁴ *Ibid.*, para. 115.

¹⁰⁹ *Ibid.*

Rapporteur considered fundamentally treaty-based, should be taken into account for the purposes of interpretation.¹¹⁵

126. It should be recalled, and on this there is broad agreement, that the general rule of interpretation of the unilateral act should be based on good faith, and on its conformity with the ordinary meaning attributed to the terms of the declaration, in its context and in the light of the author's intent.

127. In the *Fisheries Jurisdiction* case, ICJ, in analysing the declarations of acceptance of its jurisdiction, clearly indicated that it interpreted the relevant words of a declaration in a natural and reasonable way, having due regard to the intention of the State concerned, which may be deduced not only from the text of the relevant clause, but also from the context in which that clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.¹¹⁶

128. Unilateral acts, by their very nature, should be interpreted differently from conventional acts. On the one hand, as indicated in the fourth report submitted by the Special Rapporteur: "The interests of legal certainty require that the main criterion should be the will expressed in the text ... and, furthermore, as ICJ itself pointed out in the *Nuclear Tests* case referred to above, such acts should be interpreted restrictively."¹¹⁷ Some Governments also indicated that the restrictive criterion should predominate in the interpretation of the unilateral act.¹¹⁸ In general, legal doctrine supports this view. Thus, for example, Grotius says that: "The measure of correct interpretation is the inference of intent from the most probable indications."¹¹⁹

129. The purpose of the interpretation is to determine the intention of the State, which can be deduced from the declaration formulated and other elements considered, such as the preparatory work and the circumstances at the time of the formulation of the act. The term "intention" is fundamental. The display of will is the necessary expression of the formulation of the act, while intention is the meaning which the author intends to give to the act. Intention, however, would not be sufficient in the determination of the act, since the said intention must be known to the addressee or addressees, or at least they must have had an opportunity to become aware of it.

130. Article (a), paragraph 2, proposed in 2001, specified that the context comprised "in addition to the text, its preamble and annexes".¹²⁰ On this, it must be specified that there were some doubts as to the preambular part but, in the view of the Special Rapporteur, the elaboration of a legal act, whether it is a conventional act or a unilateral act, can be preceded by a preambular part, as

illustrated by the 1957 Declaration by Egypt on the Suez Canal (para. 6 above) and, less clearly, the declarations by France considered by ICJ in the *Nuclear Tests* cases, referred to in previous reports. The same assessment can be made with regard to the annexes. There is no reason why a unilateral act cannot be followed by or composed of annexes, in addition to its operative part.

131. The phrase "given to the terms of the declaration in their context and in the light of the intention of the author State" (art. (a), para. 1) constitutes an important reference in establishing the general rule of interpretation of these acts. Consideration of the context, far from being contradictory, complements the unilateral act for the purposes of interpretation.

132. Recourse to the preparatory work submitted by the Special Rapporteur in 2001 in the draft he submitted to the Commission at that time¹²¹ was questioned by some members who felt that it was not possible and that, moreover, access to it would be difficult, considering that it might include the internal correspondence of ministries of foreign affairs or other organs of State. While consideration of the preparatory work from a perspective other than that of the Vienna regime is important in this context, the Special Rapporteur believes that, given the observations formulated at the previous session, the Commission could reconsider this case in order to determine whether or not such work, given the difficulties in obtaining or having access to it—which, in fact, depends on the unilateral decision of the requested State—could be considered in the draft articles on supplementary means of interpretation, as set forth in the relevant article of the 1969 Vienna Convention. This reference is therefore left between square brackets in the revised version of the draft submitted in the fourth report on unilateral acts of States.¹²²

133. With reference to the "object and purpose" of the act, the Special Rapporteur continues to believe that both terms have a fundamentally treaty-based connotation and, as such, there should be no reference to them in the rules of interpretation of unilateral acts. In this case, as proposed in the draft article submitted in 2001, unilateral acts should be interpreted "in the light of the intention of the author State" (art. (a), para. 1).

134. Finally, although this is not reflected in the draft article on interpretation, it can be said that the restrictive criterion must predominate in the exercise of the interpretation of such acts, as upheld by legal doctrine, affirmed by Governments and indicated by case law. In this latter context, it is to be noted that—although it was in reference to promises only—ICJ in the *Nuclear Tests* cases concluded: "When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."¹²³

¹¹⁵ *Ibid.*, para. 116.

¹¹⁶ *I.C.J. Reports 1998* (see footnote 111 above), p. 454, paras. 47 and 49.

¹¹⁷ *Yearbook ... 2001* (see footnote 4 above), p. 132, para. 126.

¹¹⁸ Commentary by Argentina (see footnote 89 above).

¹¹⁹ Grotius, *De jure belli ac pacis, libri tres* (book II, chap. XVI), in *The Classics of International Law*, p. 409.

¹²⁰ *Yearbook ... 2001* (see footnote 4 above), p. 135–136, para. 154.

¹²¹ *Ibid.*

¹²² See footnote 4 above.

¹²³ *I.C.J. Reports 1974* (see footnote 10 above), p. 267, para. 44 (*Australia v. France*), and p. 473, para. 47 (*New Zealand v. France*).

135. The following draft article is the version likely to be considered by the Commission at its fifty-fourth session, in 2002:

“INTERPRETATION

“*Article (a). General rule of interpretation*

“1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.

“2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.

“3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States.

“*Article (b). Supplementary means of interpretation*

“Recourse may be had to supplementary means of interpretation, including [the preparatory work and] the circumstances of the formulation of the act, in order to confirm the meaning resulting from the application of article (a), or to determine the meaning when the interpretation according to article (a):

“(a) Leaves the meaning ambiguous or obscure; or

“(b) Leads to a result which is manifestly absurd or unreasonable.”

D. Classification of unilateral acts and structure of the draft articles

136. In both the Commission and the Sixth Committee, there has been a significant tendency to consider that it is not possible to apply common rules to all unilateral acts, even though, as the Special Rapporteur has noted, this might be possible with regard to some aspects, such as those relating to their formulation and particularly their elaboration: definition, capacity to formulate acts, qualified persons, conditions of validity and causes of invalidity, which are related to the manifestation of will that is common to all acts, irrespective of their content, and even, as has been seen above in the context of their application, of the rules relating to the interpretation of such acts.

137. The Special Rapporteur considers that the classification of these acts goes beyond a simple academic exercise and appears to be fundamental for structuring the draft articles, since grouping the acts on the basis of their effects or any other criteria would simplify that task. As he has said, this requires valid criteria to be established and that is clearly a complex matter, as can be seen from his fourth report¹²⁴ in which he examined the matter at length, in the light of a large body of literature, conclud-

ing that these acts could be grouped into two major categories, around which the draft articles governing their functioning could be structured. Otherwise, in view of the diversity of legal effects of the many kinds of unilateral acts, it would be impossible to structure a set of draft articles without the risk of excluding some acts. As will be recalled, the Special Rapporteur indicated that unilateral acts could be grouped into two principal categories: acts by which the State assumes obligations and unilateral acts by which the State reaffirms its rights. There is fairly broad agreement that these acts cannot impose obligations on third States that have not taken part in their elaboration, without the latter's consent. However, the fact cannot be overlooked that some authors maintain that this possibility is feasible. According to this point of view, a State can formulate an act in order to establish rights and, consequently, impose obligations on third States, an issue that has been examined in this report and in previous ones.

138. Certainly, opinions regarding this exercise were not unanimously favourable, and they were even less so with regard to the criteria that might be established to group these acts together and, on that basis, structure the draft articles envisaged by the Commission. Several members of the Commission have indicated that classification is neither an easy nor a reliable task, and even that it is too academic, whereas the issue deserves a more practical approach. Moreover, one member considered that, besides lacking in importance, classification created unnecessary confusion. It was indicated, and this is true, that case law has attached greater importance to determining whether an act was binding in nature, than to the type of act in question.

139. During the debate during the fifty-third session, in 2001, some members indicated that certain acts could belong to both categories; these included declarations of neutrality, by which a State not only assumed obligations but also reaffirmed its rights, or a declaration of war. Clearly, it is not easy to qualify some acts and place them in a single classification. With regard to this assertion, it is worth pondering whether declarations of neutrality can constitute autonomous unilateral acts or whether they constitute waivers and promises; in other words, whether their legal effects are similar to those of waivers and promises.

140. Indeed, when a State formulates a declaration by which it waives a right, it may at the same time be recognizing a legal claim of another State and promising to behave in a certain way in the future. A declaration of neutrality, which should not be classified as a simple act but rather as a mixed act by which, as mentioned above, a State could assume obligations while reaffirming rights, clearly illustrates the difficulties posed by the classification and qualification of unilateral acts.

141. Members of the Sixth Committee also expressed divergent opinions about the classification of unilateral acts. Some were of the view that classification is unnecessary or valid only from an academic point of view, while others considered it to be an important step in the elaboration of rules on the topic. It was also suggested that a

¹²⁴ See footnote 4 above.

classification could be elaborated provisionally based on the criterion of legal effects.

142. A decision must be taken on this matter in order to deal with the topic because, as the Special Rapporteur indicates, there appears to be general agreement within the Commission and the Sixth Committee that it is not possible to elaborate common rules applicable to all acts and that, accordingly, in view of the diversity of the acts and their legal effects, the rules applicable to the different acts or the different categories of acts must be grouped together.

143. For several reasons, it does not seem possible to have recourse to an extreme and excessively broad conception in the sense that groups of rules could be elaborated for each of the material acts to which the literature refers most frequently, for several reasons: first, as indicated, the diversity of these acts and their uncertainties, and secondly, the impossibility of qualifying them easily, which to some extent has implications for their legal effects.

144. The Commission has held (and this can be seen in the questionnaire prepared in 1999) that the most important unilateral acts are promise, recognition, waiver and protest. Thus, the reply from Argentina indicated that: "A clear distinction must be drawn among the four traditional kinds of unilateral act: promise, waiver, recognition and protest."¹²⁵ This assumption is useful, but it still does not resolve the problem of the diversity of unilateral acts and

¹²⁵ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/511, p. 275, para. 1.

how they may be determined easily. There are no specific criteria for defining them, nor is there a unanimous opinion on all their aspects—nor even, it appears, on the existence of a determinate number of acts. To accept such an idea would imply considering an excessively broad structure, one even impossible to establish definitively, owing to the uncertainty that apparently exists with regard to material acts.

145. Classification is undoubtedly important, even though it is a complex task, not devoid of difficulties. The Special Rapporteur hopes that the Commission will continue to examine the issue and that a decision will be taken during the current year's session.

146. Although discussions should continue on the question of classification, it is possible to continue on the basis of a conclusion that could be reached for different reasons, including those of a practical nature: some rules, including those relating to the formulation of the act and its interpretation, may be regarded as common to all acts.

147. Acts are a unilateral manifestation of will, an element that appears to be essential, even though a final definition of such acts has not been determined. The manifestation of will, in addition to being common to all such acts, is a single one. All the unilateral acts that are of interest derive from that manifestation, and that characteristic allows them to be the subject of common rules. Thus, draft articles have been submitted on definition, the capacity of States, persons qualified to formulate the act, subsequent confirmation of the act, factors vitiating consent and even a general regime governing conditions of validity and causes of invalidity of the act.

CHAPTER II

Consideration of other questions that may give rise to additional draft articles that can be applied to all unilateral acts

148. There are other aspects of the topic that can be the subject of rules applicable to all unilateral acts that meet the definition used thus far, regardless of their content or legal effect: observance of unilateral acts, which leads again to consideration of the well-established rule of the law of treaties, *pacta sunt servanda*, and the need for norms that establish the binding nature of unilateral acts; the application of such acts in time, which raises, among other questions, the issue of the non-retroactivity of an act; and, lastly, the application of unilateral acts in space.

149. As has often been noted, while it would seem possible to formulate rules that are applicable to all unilateral acts regardless of their content or material aspects, and especially in respect of their elaboration or formulation, this does not seem to be the case when dealing with aspects that call for different treatment owing to the diversity of such acts, such as matters relating to an act's legal effects. If one takes as a reference those unilateral acts that are considered most common—protest, renunciation or recognition—it will be seen that, while their

form is the same, their legal effects may differ. It has been suggested that promises might be studied as unilateral acts for which specific rules could be elaborated to regulate their functioning. Part two of the draft articles, on rules applicable to unilateral acts by which States assume obligations, is offered for the Commission's consideration on this basis. This part looks at the revocation, modification, extinction and suspension of unilateral acts. A general reference is also made to conditional unilateral acts, even though they are not included as a separate category in this part.

A. General rule concerning observance of all unilateral acts

150. In the law of treaties, as reflected in article 26 of the 1969 Vienna Convention, the *pacta sunt servanda* rule governs or underlies the binding nature of the treaty. This rule needs no further commentary. It has been amply considered in doctrine together with the principle of good faith and has been considered in some cases by

international tribunals,¹²⁶ a topic which the Special Rapporteur touched on briefly in his first report.¹²⁷

151. The question of the nature of unilateral acts and the basis for their binding nature has been discussed in doctrine and in the Commission. As noted in the first report on unilateral acts of States, the fundamental rule of the law of treaties, *pacta sunt servanda*, from which their binding nature derives cannot be easily assimilated by or transferred to unilateral acts; yet it ought to be possible to consider the establishment of a similar norm that would provide a basis for unilateral acts if they are considered to be binding and to have legal effects.

152. Consideration of the binding nature of unilateral acts has generated a more important controversy in doctrine, although in recent years the discussion would seem to reflect a tendency to consider such acts as binding on a State when they are formulated in accordance with the requisite criteria. As has been noted: “During the first phase, which occurred during the 1960s, a unilateral undertaking was understood as being either an offer that acquired normative value once it was accepted by the State or States to which it had been addressed, or as a counter-offer by the other State.”¹²⁸ There are of course those who contend that since such acts are not contemplated in Article 38 of the ICJ Statute such a view is difficult to uphold. In the Special Rapporteur’s view, this flexible provision must evolve along with society and international relations and be adapted to conform with reality.

153. Some authors, who tend to be consensualists, reject the binding nature of such acts, concluding that they are acts of a political nature.¹²⁹ What is more, some authors consider that a promise, even though unilateral as to form, cannot be binding if it is not accepted by the addressee and cite as grounds for this argument the *Lamu Island* arbitral decision (1889), a dispute involving Germany and the United Kingdom. The declarations by the Sultans of Zanzibar were not binding. The arbitrator in that decision held that “in order to transform this intent into a unilateral promise that is equivalent to a convention, the agreement of wills must have been manifested by the express promise of one of the parties, together with the acceptance of the other”.¹³⁰ Some consider a unilateral promise to be unnecessary, since the full legal effect can be conferred through incorporation in a conventional context. Indeed, it has been pointed out by some that similar institutions, such as acquiescence or estoppel, may be used to the same effect.

154. The voluntarists, on the other hand, accept the binding nature of a unilateral act and find its basis in the expressed will of the formulating State, an argument that has its basis in the *pollicitatio* of Roman law. Some authors¹³¹ maintain that the basis of unilateral acts is to be found in the sovereign will of States and in the principle of *promissorum implendorum obligatio*, which derives from the *pacta sunt servanda* rule. Generally speaking, the binding nature of unilateral acts would seem to have its basis in good faith.¹³² If a unilateral act is undertaken with this intention, then there is no reason why such an act cannot be considered binding from this point of view. Some authors have questioned the binding nature of the unilateral promise,¹³³ while others consider that “there is no logical reason not to confer [on a promise] a nature identical to that of a unilateral promise”.¹³⁴ In any event, as many have noted, such acts are binding: “It is in this confidence in the given word that the basis of the promise’s validity is to be found.”¹³⁵

155. The fact that the different institutions in international law that regulate the behaviour of States in their international relations are so similar sometimes poses serious problems when endeavouring to classify a particular legal act as unilateral. Thus it can be seen that a promise is sometimes confused with estoppel, which in the view of some makes it impossible to modify a previous position. One could say that the effect of estoppel is exactly the same as that of a promise. It will be recalled, however, that there is a fundamental difference between the two. For estoppel to produce effects, a third State must have acted on the basis of that behaviour. In the present instance this means that the author of the declaration has made an undertaking, but also that the third State believes in good faith that that undertaking is genuine. A promise may also be confused with a stipulation according rights to third States, which is referred to in article 36, paragraph 1, of the 1969 Vienna Convention. The unilateral act of interest here, as noted above, is a heteronormative act, that is to say, a manifestation of will by which one or more subjects of international law create norms that are applicable to third parties which can have rights conferred on them even though they did not participate in the elaboration of the act. The difference here, it must be recalled, is that while the act in question may appear to be a unilateral act of conventional origin, its legal effects are produced only when it is accepted by the addressee. One might even say that a stipulation in favour of a third party constitutes an offer that requires an acceptance, a fact that makes it conventional in nature and distinguishes it from a

¹²⁶ See, for example, *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 212, and the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947–1948*, p. 91 (joint dissenting opinion).

¹²⁷ See footnote 3 above.

¹²⁸ Weil, “Le droit international en quête de son identité: cours général de droit international public”, p. 156.

¹²⁹ Garner, “The international binding force of unilateral oral declarations”.

¹³⁰ Arbitral award of Baron Lambertmont in the *Lamu Island* dispute, in Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. V, p. 4942.

¹³¹ Degan, *Sources of International Law*.

¹³² Reuter, *op. cit.*, 7th ed., p. 164; Guggenheim, *Traité de droit international public*, p. 280; Suy, *op. cit.*, p. 151; and Sicault, who noted that: “One may therefore conclude, at the close of this review, that good faith constitutes the basis of the binding nature of unilateral undertakings, provided that this notion is not construed to mean solely a duty of loyalty but also the protection of legitimate confidence, which is indispensable to the security of international relations, where emphasis must ultimately be placed” (“Du caractère obligatoire des engagements unilatéraux en droit international public”, p. 686).

¹³³ Quadri, “General course”, p. 364.

¹³⁴ Venturini, “The scope and legal effects of the behaviour and unilateral acts of States”, pp. 401–402.

¹³⁵ Suy, *op. cit.*, p. 151.

unilateral act, which, like a truly unilateral promise, requires no acceptance or any reaction signifying acceptance from the addressee.

156. Once again, the acts that have been viewed as typifying the unilateral acts covered by this project of codification and progressive development are not always unilateral in the sense that is of interest here. Thus, for example, recognition may be conventional in nature, as is the case, among many others, of the recognition of the United States under the Treaty of Peace, signed in Paris on 3 September 1783, which was concluded between Great Britain and the United States.¹³⁶

157. ICJ has also recognized the binding nature of such acts, even though it refers to a particular type, the promise. For the Court, the declarations by the French authorities produced their effect automatically, without the need for any tacit acceptance thereof. In its 1974 decisions in the *Nuclear Tests* cases the Court concluded that:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should be bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.¹³⁷

158. The source of the obligation in the case of a promise is the promise itself, the unilateral act that has been formulated, and not the explicit or tacit agreement of the addressee. Consequently the basis for this binding nature is to be found, as in the case of treaties, in good faith. Here ICJ clearly states:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.¹³⁸

159. If other unilateral acts are looked at, it can be seen that they are similarly accorded a binding character both in doctrine and in practice. Thus, for example, it will be seen that the recognition of States produces legal effects and imposes specific obligations on the State formulating the act. Attention is drawn here to the declaration made by the representative of France in a case before PCIJ during an open session held on 4 August 1931, in which he affirmed that: "Recognition of [a State's] independence implies, on the one hand, that the acts of its Government

are considered binding under international law on the State being recognized and, on the other hand, that the rules of international law will be applied to that State."¹³⁹

160. Renunciation is another unilateral act—although nothing prevents it from having a conventional character—which has specific legal effects. Just as a State may voluntarily assume unilateral obligations, so can it voluntarily renounce a law or a legal claim. Renunciation, which, as both doctrine and jurisprudence have made clear, is not presumed¹⁴⁰ but must be expressed,¹⁴¹ is a unilateral act by virtue of which a State voluntarily gives up a subjective right. The legal effect of renunciations has been considered by international tribunals, which ascribe to them a binding character, as was done in the cases related to the Ihlen declaration (para. 6 above), by which Norway promised, recognized and even renounced in favour of Denmark; while this renunciation involved a transfer rather than an abdication, which to some authors might constitute a treaty relationship, such an affirmation is unacceptable, since it undermines the unilateral character of the act. PCIJ considered this question and issued an opinion on it. In its decision of 11 November 1912 in the *Russian Indemnity* case between Russia and Turkey involving debt and the payment of interest, the Court attributed a binding character to Russia's renunciation of interest payments on its debt to Turkey.¹⁴²

161. The unilateral assumption of new obligations without the need for the addressee's acceptance is possible under international law. A State may assume obligations by means of a promise, a recognition or a renunciation independently of their acceptance by the addressee, which distinguishes these, as noted earlier, from other, similar institutions. In the first case, it has been noted that the State making a declaration, and thus a promise in the sense herein understood, assumes the obligation to act in conformity with the terms of that declaration, which could thus be considered to have the same character as a norm incorporated in a treaty.¹⁴³ By recognition, the State that accepts a legal modification assumes obligations that are implied by this act—for example, the concrete obligations that arise from recognition of a State. The recognizing State thereafter considers a specific entity to be an entity having legal capacity and legal personality under international law, even though it may already have this status conferred on it by the reasons that make it a subject of international law.

162. It is important for the draft articles under study that a provision be elaborated that reflects the binding nature of unilateral acts. This provision as it stands in the proposed text speaks of any unilateral act "in force", which

¹³⁹ *Customs Régime between Germany and Austria, P.C.I.J., Series C, No. 53*, p. 569; and Kiss, *Répertoire de la pratique française en matière de droit international public*, p. 4 (quoted by Torres Cazorla, *loc. cit.*, p. 55).

¹⁴⁰ See the arbitral award of 10 June 1931 in the *Campbell* case, UNRIAA (see footnote 68 above), p. 1156; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 22; and "Lotus", *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18.

¹⁴¹ Jacqué, *op. cit.*, p. 342.

¹⁴² UNRIAA, vol. XI (Sales No. 61.V.4), p. 446; English translation in *American Journal of International Law*, vol. 7, No. 1 (1913), p. 200.

¹⁴³ Sørensen, "General principles of international law", p. 57.

¹³⁶ Bevans, ed., *Treaties and Other International Agreements of the United States of America 1776–1949*, p. 8.

¹³⁷ *I.C.J. Reports 1974* (see footnote 10 above), p. 267, para. 43 (*Australia v. France*), and p. 472, para. 46 (*New Zealand v. France*).

¹³⁸ *Ibid.*, p. 268, para. 46, and p. 473, para. 49.

refers to the time of its formulation, that is, to the time when the legal effects of the act become operative and the act becomes opposable against the author State or States by the addressee or addressees. While the term “in force” has its origin in treaty language and would appear to be limited to that sphere, it can also be applied to unilateral acts. Entry into force must be understood as the time a particular legal act begins to produce its effects. From here on it will be necessary to distinguish between the binding nature of an act, which in turn implies its enforceability and opposability, and the act’s applicability, which may, of course, occur at a different time. In any event, this question will be dealt with in greater detail further on. On the basis of the foregoing, and adhering somewhat closely to the Vienna Conventions on the law of treaties, the following draft article is hereby proposed:

“Article 7. Acta sunt servanda

“Any unilateral act in force shall obligate the State or States formulating it and must be implemented in good faith.”

B. Application of a unilateral act in time

163. The question of the application of legal acts, particularly treaties and unilateral acts, in time is not limited to non-retroactivity, which has been dealt with in a clearly formulated principle that will be considered later. Application in time presupposes taking into account both the entry into force or the commencement of the effects of the unilateral act, which is in turn related to opposability and enforceability, and its application, which may take place prior to this time or even after the act has ceased to produce its legal effects, so long as the author State has declared or in some way manifested a distinct intention.

164. In the area of treaty law, the principle that governs the application of a treaty is that of non-retroactivity. Indeed, treaties are not applied to prior situations unless the parties so agree, as clearly stipulated in article 28 of the 1969 Vienna Convention. This principle, which is applicable to all legal acts, is widely referred to in doctrine and in jurisprudence. Thus it has been said by some that: “The principle of non-retroactivity is a general principle applicable to all international legal acts.”¹⁴⁴ In the *Ambatielos* case, ICJ pointed out that it was impossible to consider that a treaty had been in force prior to the exchange of ratifications and that, in the absence of a special clause or object necessitating retroactive application, it would be impossible to say that one of its provisions had previously been in force. Specifically, the Court noted that accepting the Greek argument would mean

giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty ... shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.¹⁴⁵

¹⁴⁴ Daillier and Pellet, *Droit international public*, p. 219, para. 140.

¹⁴⁵ *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 40.

165. It would seem possible to apply to unilateral acts the principle of the law of treaties that holds that a treaty can be applied only in relation to events or questions that arise or exist while the treaty is in force unless the parties have a different intention, either explicit or implicit. The will of a State, the intention expressed in its declaration or the intention that can be perceived from an interpretation of the declaration is fundamental to the application of the act in time. A unilateral act cannot be applied to prior situations or events occurring prior to its formulation unless the author State had a different intention in mind. The principle of the non-retroactivity of a legal act is not absolute. A State may derogate from it and voluntarily change the scope of temporal application of its act.

166. There is no need to draw a different conclusion in the case of unilateral acts. In principle, a unilateral act begins to produce its effects at the time it is formulated. Recognition, for example, as is well documented in doctrine, begins to have legal effect the moment the act of recognition is formulated, and it does not, in principle, have a retroactive character, a fact that has been emphasized in jurisprudence, which says that it “is not a principle accepted by the best recognized opinions of authors on international law, as is alleged, that the recognition of a new State relates back to a period prior to such recognition”.¹⁴⁶

167. As noted above, one must distinguish between the problem of the application of the act in its operative form, which can refer to events or situations occurring prior to its formulation or events and situations occurring after its entry into force, and its entry into force, a term of art in treaty law that may be applied to unilateral acts. The question of entry into force or determination of the moment when an act begins to produce legal effects will be considered in chapter III of this report.

168. An article on application in time in the strict sense meant here might be worded as follows:

“Article 8. Non-retroactivity of unilateral acts

“A unilateral act shall be applicable to events or situations occurring after its formulation, unless the State or States authors of the act have manifested in any way a different intention.”

C. Territorial application of a unilateral act

169. The question of the territorial application of a unilateral act must also be considered in the light of the solution contemplated in the 1969 Vienna Convention, particularly in article 29 thereof.¹⁴⁷ In the realm of treaties, this question, as the first Special Rapporteur on the law of treaties, Sir Humphrey Waldock, noted in his commentary on draft article 58 (Application of a treaty to the territories of a contracting State), application of a treaty is not limited to a particular territory, but also to

¹⁴⁶ Quoted by Torres Cazorla, *loc. cit.*, p. 58, referring to *Eugene L. Didier, adm. et al. v. Chile*, between Chile and the United States (9 April 1894) (Moore, *op. cit.*, vol. IV, p. 4332).

¹⁴⁷ Article 29 reads: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”

territories which the parties have purported to bind by the treaty and which, therefore, are the territories affected by the rights and obligations set up by the treaty. Thus, although the enjoyment of the rights and the performance of the obligations contained in a treaty may be localized in a particular territory or area, as in the case of Antarctica, it is the territories with respect to which each party contracted in entering into the treaty which determine its territorial scope.¹⁴⁸

170. In codifying the topic in the context of the law of treaties, it is important to note that the Special Rapporteur, in his commentary on the same article, refers to the object of the article and to a rule of general application. With regard to the subject of the article, the Special Rapporteur notes that “the object of [article 58] is to provide a rule to cover cases where the intention of the parties concerning the territorial scope of the treaty is not clear”; a general rule is then proposed: “The rule that a treaty is to be presumed to apply with respect to all territories under the sovereignty of the contracting parties means that each State must make its intention plain, expressly or by implication, in any case where it does not intend to enter into the engagements of the treaty on behalf of and with respect to all its territory.”¹⁴⁹

¹⁴⁸ Third report on the law of treaties, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 12, para. (1).

¹⁴⁹ *Ibid.*, paras. (3)–(4).

171. This question has been amply considered in doctrine within the framework of the law of treaties, so that any further commentary here would be excessive. The question that arises is whether the principle established in this context can be transferred to the regime of unilateral acts. A review of some of the declarations containing unilateral acts in the sense that is of interest to the Commission, such as those relating to the recognition of States or the renunciation of certain territories, indicates that in no case does the author State specify the space to which the declaration applies, leading to the conclusion that, most often, the general principle cited above is applied.

172. Accordingly, the principle and the exception thereto, although of conventional origin, can be combined in a single provision that would read:

“Article 9. Territorial application of unilateral acts

“A unilateral act is binding on the State that formulates it in respect of its entire territory, unless a different intention can be inferred or otherwise determined.”

CHAPTER III

Entry into force in the context of the law of treaties and determination of the moment when a unilateral act begins to produce legal effects

173. A treaty produces legal effects once the parties have definitively expressed their intent to be bound by it. Here, of course, one is disregarding the effects a treaty may produce in respect of third parties, which are more likely to involve the extension of rights or the imposition of duties on a third State, subject to its consent in both cases.

174. A unilateral act, however, produces legal effects at the time it is formulated, even though, as noted above, it may be applicable to situations or events occurring prior to its formulation as well as after its entry into force. A unilateral act comes into existence at the time it is formulated if, as noted earlier, it meets the requisite conditions of validity. In the case of the unilateral acts of interest to the Commission, according to the most solid doctrine and international jurisprudence, it is not necessary for the addressee to accept or react in any way for the act to produce its legal effects. ICJ, in its *Nuclear Tests* decisions, which have been amply reviewed from the standpoint of doctrine (although the Court was referring to a specific unilateral act, such as promises, all these forms characterize a category of acts under which States assume obligations), tended to support the existence in international law of such acts that, while unilateral in form, produce legal effects by themselves: “[No] subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.”¹⁵⁰

175. A unilateral act is thus opposable against the State that formulates it from the moment of formulation. The addressee State may demand that the author State implement the act. This enforceability, which is also often mentioned in doctrine, refers to the capacity of the party to whom an obligation has been addressed to request performance by the author. It may well be asked whether, under the definition of unilateral acts that the Commission has created which reflects their variety, this assessment can now be considered to be valid for all cases. In the case of promises, for example, as can be inferred from the ICJ decision, the declarations by the French authorities produced their legal effects from the moment they were formulated.

176. At the same time, an act by which a State recognizes a *de facto* or *de jure* situation originates at the moment it is formulated, even though its application may have a retroactive character if the declaring State expresses or demonstrates that intention. In general, it can be deduced from a review of practice that acts of recognition produce their effects from the time they are formulated unless they reflect a different intention. From the declarations reviewed it can be inferred that the declaring States did not intend for their declarations to be applicable prior to or at a time other than the time of their formulation, which possibility should not, however, be ruled out.

¹⁵⁰ *I.C.J. Reports 1974* (see footnote 10 above), p. 267, para. 43, and p. 472, para. 46.

CHAPTER V

Structure of the draft articles and future work of the Special Rapporteur

177. Thus far, as can be seen, a series of draft articles has been presented and revised; some of these will be considered by the Drafting Committee, others have been referred back to the Working Group that is to meet during the current session while still others are being submitted to the Commission for consideration for the first time.

178. The draft articles have been organized to contain a part one (arts. 1–4), which covers the general rules applicable to all unilateral acts, regardless of their substantive content and category: definition, capacity of the State, persons authorized to formulate unilateral acts and confirmation of a unilateral act formulated by an unauthorized person. These draft articles have been transmitted to the Drafting Committee.

179. In addition, if the Commission should conclude that the conditions of validity and causes of invalidity are generally applicable, part one will include an article 5, now being submitted in a new form to reflect the observations and comments of members of the Commission and representatives on the Sixth Committee; this text will be considered by the Working Group of the Commission which is to be re-established to consider the topic again this year.

180. Part one will also include article 6, on determination of the moment at which a unilateral act begins to produce its legal effects; this is to some extent, and bearing in mind the differences between the regime applicable to the law of treaties and the regime applicable to unilateral acts, roughly equivalent to entry into force in the former. No text is being submitted on this point, as the Special Rapporteur thought it might be more useful for the Commission to discuss this aspect of the topic and give him appropriate guidance so that he can present specific wording in his sixth report, due in 2003.

181. Articles 7–9 deal with the observance and application of unilateral acts and are to be considered by the Commission at the current session: one draft article concerns observance of unilateral acts (*acta sunt servanda*), one deals with the application of unilateral acts in time (non-retroactivity) and one with the application of unilateral acts in space (territorial application).

182. Part one will conclude with articles 10–11, which concern the interpretation of unilateral acts. It will be recalled that the Special Rapporteur submitted draft articles in his fourth report that were given preliminary consideration at the Commission's fifty-third session, in 2001. The draft articles are now being submitted in a

slightly revised form, taking into account the comments and observations made by members of the Commission and the Sixth Committee in 2001.

183. Lastly, part two of the draft articles will deal with the elaboration of rules applicable to specific types of acts, as the Commission suggested in 2001 at its fifty-third session. These will be rules applicable to unilateral acts by which States assume unilateral obligations, a concept that to a certain extent describes an international promise, which is understood as having a unilateral character. For the time being, the Special Rapporteur will limit himself to setting out three possible rules applicable to this category of act which might differ from the rules applicable to other unilateral acts. They concern the revocability, modification, and suspension and termination of unilateral acts.

184. It is important to look more closely at these aspects, which will be discussed in the Special Rapporteur's sixth report to the Commission. Important questions will be raised, such as the possibility of revoking those unilateral acts which, like promises, involve the assumption of unilateral obligations by the formulating State. In principle, and in a very preliminary way, it might perhaps be concluded that an act of recognition or a promise is irrevocable. In fact, while the act is elaborated or formulated unilaterally, without the participation of the addressee, once the latter acquires the right, that is, when the act produces its effect, the author State may not revoke or even modify the act, much less suspend it, without cause or justification unless the addressee so agrees. The basis for this would seem to lie in the confidence and the expectations that are necessarily created, as previously noted, which constitute the legal security that must exist in international relations.

185. Also to be discussed is the topic of conditional unilateral acts. In principle, a unilateral act would not appear to be subject to any conditions, since making it so would place the act in the context of a conventional relationship or, more precisely, a relationship of offer and acceptance. In the case of recognition, doctrine unanimously holds this to be impossible. The Special Rapporteur would like to invite comments and guidance from members of the Commission in order to facilitate the preparation of his sixth report, which will take up this question among others.

186. The Special Rapporteur offers for the Commission's consideration the following structure for the draft articles:

*Part One. General rules***A. Elaboration of unilateral acts**

- Article 1. Definition of unilateral acts
- Article 2. Capacity of States
- Article 3. Persons authorized to formulate unilateral acts
- Article 4. Confirmation of a unilateral act formulated without authorization
- Article 5. Conditions of validity and causes of invalidity of unilateral acts
- Article 5 (a). Error
- Article 5 (b). Fraud
- Article 5 (c). Corruption of the representative of the State
- Article 5 (d). Coercion of the person formulating the act
- Article 5 (e). Coercion by the threat or use of force
- Article 5 (f). Unilateral act contrary to a peremptory norm of international law (*jus cogens*)
- Article 5 (g). Unilateral act contrary to a decision of the Security Council

- Article 5 (h). Unilateral act contrary to a fundamental norm of the domestic law of the State formulating it

B. Moment at which a unilateral act begins to produce legal effects

- Article 6. Moment at which a unilateral act begins to produce legal effects

C. Observance and application of unilateral acts

- Article 7. *Acta sunt servanda*
- Article 8. Non-retroactivity of unilateral acts
- Article 9. Territorial application of unilateral acts

D. Interpretation of unilateral acts

- Article 10. General rule of interpretation
- Article 11. Supplementary means of interpretation

Part Two. Rules applicable to unilateral acts by which States assume obligations

- Article 12. Revocation of unilateral acts
- Article 13. Modification of unilateral acts
- Article 14. Termination and suspension of the application of unilateral acts