

Chapter IX

UNILATERAL ACTS OF STATES

A. Introduction

275. In its report to the General Assembly on the work of its forty-eighth session (1996), the Commission proposed to the Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.²⁰³

276. In paragraph 13 of resolution 51/160 of 16 December 1996, the General Assembly, *inter alia*, invited the Commission to examine further the topic “Unilateral Acts of States” and to indicate its scope and content.

277. At its forty-ninth session (1997), the Commission established a Working Group on the topic which reported to the Commission on the admissibility and feasibility of a study on the topic, its possible scope and content, and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.²⁰⁴

278. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodríguez Cedeño as Special Rapporteur on the topic.²⁰⁵

279. In paragraph 8 of its resolution 52/156 of 15 December 1997, the General Assembly endorsed the Commission’s decision to include the topic in its work programme.

280. At its fiftieth session (1998), the Commission had before it and considered the Special Rapporteur’s first report on the topic.²⁰⁶ As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

281. The Working Group reported to the Commission on issues relating to the scope of the topic, its approach, the definition of a unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.²⁰⁷

282. At its fifty-first session (1999), the Commission had before it and considered the Special Rapporteur’s second report on the topic.²⁰⁸ As a result of its discussion,

the Commission decided to reconvene the Working Group on Unilateral Acts of States.

283. The Working Group reported to the Commission on issues relating to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic, as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and enquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission’s study of the topic.

284. At its fifty-second session (2000), the Commission considered the third report of the Special Rapporteur on the topic,²⁰⁹ together with the text of the replies received from States²¹⁰ to the questionnaire on the topic, which was circulated on 30 September 1999. The Commission decided to refer revised draft articles 1–4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

285. At its fifty-third session (2001), the Commission considered the fourth report of the Special Rapporteur²¹¹ and established an open-ended Working Group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice in formulating and interpreting unilateral acts.²¹²

286. At its fifty-fourth session (2002), the Commission considered the fifth report of the Special Rapporteur,²¹³ as well as the replies received from States²¹⁴ to the questionnaire on the topic, which was circulated on 31 August 2001.²¹⁵ The Commission also established an open-ended Working Group.

²⁰³ *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248 and p. 133, annex II.

²⁰⁴ *Yearbook ... 1997*, vol. II (Part Two), p. 64, para. 194 and pp. 64–65, paras. 194 and 196–210.

²⁰⁵ *Ibid.*, p. 66, paras. 212 and p. 71, para. 234.

²⁰⁶ *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

²⁰⁷ *Ibid.*, vol. II (Part Two), pp. 158–159, paras. 192–201.

²⁰⁸ *Yearbook ... 1999*, vol. II (Part One), p. 195, document A/CN.4/500 and Add.1.

²⁰⁹ *Yearbook ... 2000*, vol. II (Part One), p. 247, document A/CN.4/505.

²¹⁰ *Ibid.*, p. 265, document A/CN.4/511.

²¹¹ *Yearbook ... 2001*, vol. II (Part One), p. 115, document A/CN.4/519.

²¹² *Ibid.*, vol. II (Part Two), paras. 29 and 254. The text of the questionnaire is available on the Commission website [http://untreaty.un.org/ilc/sessions/53/english/unilateral_acts_questionnaire\(e\).pdf](http://untreaty.un.org/ilc/sessions/53/english/unilateral_acts_questionnaire(e).pdf).

²¹³ *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/525 and Add.1–2.

²¹⁴ *Ibid.*, document A/CN.4/524.

²¹⁵ See footnote 212 above.

287. At its fifty-fifth session (2003), the Commission considered the sixth report of the Special Rapporteur.²¹⁶

288. The Commission established an open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet. The Working Group held six meetings.

289. During the same session, the Commission considered and adopted the recommendations contained in parts one and two of the report of the Working Group on the scope of the topic and the method of work.²¹⁷

290. At its fifty-sixth session (2004), the Commission considered the seventh report of the Special Rapporteur.²¹⁸

291. At its 2818th meeting, on 16 July 2004, the Commission established an open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet. The Working Group held four meetings.

292. At its 2829th meeting, on 5 August 2004, the Commission took note of the oral report of the Working Group.

293. The Working Group agreed to retain a sample of unilateral acts sufficiently documented to allow for an in-depth analysis. It also established a grid which would permit the use of uniform analytical tools.²¹⁹ Individual members of the Working Group took up a number of studies, which would be effected in accordance with the established grid. It was agreed that these studies should be transmitted to the Special Rapporteur before 30 November 2004. It was decided that the synthesis, based exclusively on these studies, would be entrusted to the Special Rapporteur who would take them into consideration in order to draw the relevant conclusions in his eighth report.²²⁰

B. Consideration of the topic at the present session

294. At the present session, the Commission had before it the Special Rapporteur's eighth report (A/CN.4/557) which it considered at its 2852nd–2855th meetings on 15 and 19–21 July 2005.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS EIGHTH REPORT

295. Introducing his eighth report on unilateral acts of States, the Special Rapporteur reminded the Commission that the working group chaired by Mr. Pellet had selected and discussed several examples of State practice in accordance with the list of criteria it had established.

296. The Special Rapporteur also alluded to the discussions in the Sixth Committee, where the need to establish a definition of unilateral acts and some general rules that could apply to them had been mentioned. Any such definition should be flexible enough to allow States some room for manoeuvre.

297. The report offered a fairly detailed presentation of 11 examples or types of unilateral acts of various kinds. The examples were a fairly broad and representative sample of unilateral acts, ranging from a diplomatic note on recognition of one State's sovereignty over an archipelago to statements by the authorities of a United Nations host country about tax exemptions and other privileges and immunities.

298. The examples selected also contained statements of general application, renouncing sovereignty over a Territory, or protesting about the legal regimes applicable to the territorial seas of Caspian Sea States.

299. The report also presented the conclusions drawn from the cases discussed. It was noted that the acts varied widely in form, content, authors and addressees. The addressees could be specific States, international organizations, groups of States or the international community as a whole.

300. The Special Rapporteur hoped that the discussion of the acts analysed in his report would be constructive, and that they might lead to a definition of unilateral acts of States such as had been called for in the Sixth Committee.

2. SUMMARY OF THE DEBATE

301. Several members voiced satisfaction over the examples analysed in the eighth report and said that the topic was one of constant interest to them. Some, however, said that the conclusions should have been set out in greater detail.

302. Some members thought it was evident from the study of the examples cited in the eighth report that the existence of unilateral acts producing legal effects and creating specific commitments was now beyond dispute, a point that could be corroborated by international jurisprudence.²²¹

303. On the other hand, for some members the diversity of effects and the importance of the setting in which acts occurred made it very difficult to arrive at a "theory" or "regime" of unilateral acts. Some other members, however, thought that it was possible to establish such a regime. It was pointed out that while some factors, such as the timing or, perhaps, the form of acts, did not appear to play a decisive role, others, such as the essence of an act, who performed it and on what authority, seemed to be crucial features. That being so, the part played by the addressees, their reactions and the reactions of third parties should not be overlooked. It was pointed out, therefore, that the

²¹⁶ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/534.

²¹⁷ *Ibid.*, vol. II (Part Two), paras. 303–308.

²¹⁸ *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/542.

²¹⁹ The grid included the following elements: date, author/organ, competence of author/organ, form, content, context and circumstances, aim, addressees, reactions of addressees, reactions of third parties, basis, implementation, modification, termination/revocation, legal scope, decision of a judge or an arbitrator, comments and literature, *ibid.*, vol. II (Part Two), para. 247 and footnote 516.

²²⁰ *Ibid.*, para. 247.

²²¹ See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22 at p. 71; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253 at pp. 266–267; *Nuclear Tests (New Zealand v. France), ibid.*, p. 457 at pp. 471–472; *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6 at p. 21.

practice studied so far, supplemented perhaps by further study of other acts (for example those on which there was ICJ case law, such as the *Frontier Dispute (Burkina Faso v. Republic of Mali)*,²²² might provide the basis for a formal definition that nevertheless retained some flexibility. It might thus be possible to consider enlarging the circle of persons who could enter into commitments binding on the State beyond that defined by article 7 of the 1969 Vienna Convention by studying cases of declarations of other members of the executive, as well as legislative acts and judicial decisions. A position should also be reached on certain questions of terminology (the difference between unilateral acts in the strict sense and conduct) and questions relating to the form of unilateral acts (such as written or oral statements). The consequences of unilateral acts and the question of responsibility in the event that the resulting obligations were breached could be studied later on.

304. The value of the topic, it was said, was that it showed States the extent to which they could be bound by their own voluntary commitments. It was therefore necessary to identify the conditions under which constraints arose, in order to avoid “surprises”.

305. Consequently, establishing a definition (which could extend to several draft articles, all as precise as possible), the Commission should study the capacity and authority of the author of a unilateral act. It would be premature to study State conduct which might have consequences equivalent to those of unilateral acts.

306. As regards the validity of unilateral acts, one of the hardest aspects of the topic and one bound up with the capacity and authority of the author, it would be helpful to make a comparison with the relevant provisions of the 1969 Vienna Convention in order to determine the hierarchy and distribution of authority between international and domestic law as regards the formulation and performance of international commitments.

307. A summary of the Commission’s work on the subject was suggested, in the form of a declaration accompanied by general or preliminary conclusions and covering all the points which had been accepted by consensus. The starting point for such conclusions could be that international law attributed certain legal effects to acts freely undertaken by States without other States necessarily being involved. The conclusions could also address the form (written or unwritten) of unilateral acts, their effects, their considerable variety, their relationship to the principle of good faith, when they were performed and when they produced effects, and the conduct by which States evidenced an intent entailing legal consequences.

308. It was pointed out that other factors also needed to be taken into account in arriving at such preliminary conclusions, such as addressees’ reactions and the domestic procedures for performance of the unilateral act.

309. It was also important not to overlook the need to ensure that States were still free to make political

statements at any time without feeling constrained by the possibility of having to accept legal commitments.

310. Another view expressed was that so-called unilateral acts were so diverse, and so various and complex in nature, that they could not be codified in the form of draft articles. It would not be possible to compile an exhaustive list, and the value of such an undertaking was therefore questionable. It might even be wondered whether the underlying notion of a legal act was sufficiently universal and well recognized. An “expository” study of the topic would thus be the best way to proceed, since the setting in which acts were performed was crucial to their identification. Not even the existence of international jurisprudence responding to particular needs or arguments in each case was sufficient justification for taking a fundamentally theoretical approach to unilateral acts. Producing draft articles could lead to misunderstandings and further confuse an already complicated and difficult topic.

311. It was also pointed out that unilateral acts could be identified as such only *ex post facto*. They were in essence a triggering mechanism which could result in rights (but not obligations) being attributed to third States. That was what distinguished them from treaties, which operated in a strictly reciprocal framework. In fact, they appeared at a necessary but insufficient threshold for the establishment of an appropriate analytical model. Where that threshold, by nature vague and variable, actually lay would be extremely difficult to determine.

312. On the other hand, it was observed that the task at hand was precisely to determine exactly where the threshold lay, uncertain and difficult though it appeared to be to grasp beyond what point States would be bound. Even if that point were to be identified *ex post facto*, it would at least not be identified arbitrarily. But the important thing was to establish, by means of codification, a mechanism for identifying such acts even before the fact. It was, moreover, untrue to say that States could not impose obligations on other States by means of unilateral acts. Acts having to do with the delimitation of maritime areas proved the contrary. The opinion was also expressed that, in essence, the Commission needed to define the lawfulness or validity of unilateral acts.

313. It was also pointed out that States’ intentions were still crucial. While the intent to enter into commitments or create legal obligations depended on the circumstances and the setting, it could often be identified only by the form it took. On the other hand, the fact that form *per se* did not appear to be decisive in the identification of a unilateral act differentiated unilateral acts from international treaties.

314. According to some members, it would in any event be difficult to agree on general rules, and the Commission should therefore aim in the direction of guidelines or principles which could help and guide States while providing for greater certainty in the matter.

315. It was also pointed out that, besides States’ intentions and the conditions, the authorization, the authority or the competence and capacity of the author and the deciding factors which gave an act its legal effect, if the topic

²²² *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554.

was to be thoroughly studied, consideration must be given to the revocability of a unilateral act. If such acts were not accepted by other States or did not raise any legitimate expectations for these States, or were not treated by other States as a basis for valid legal engagements, they could in theory be revoked at will.

316. Some members remarked that the unilateral acts *par excellence* that ought to be examined were autonomous acts qualifying as sources of international law, and not those stemming from a customary source. The term autonomous acts should not be confused with auto-normative acts (imposing obligations on the author) and hetero-normative acts (imposing obligations on other States).

3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

317. Summarizing the discussion, the Special Rapporteur mentioned the great difficulty of identifying unilateral acts as sources of international law. Although some members saw no value in codifying unilateral acts, the establishment of principles for identifying the legal regime applicable to such acts would without question make for greater certainty and stability in international relations. Besides, guaranteed confidence and stability needed to be kept in balance with States' freedom of action.

318. When taking States' freedom of action into consideration, it went without saying that there were political acts by which States did not intend to enter into legal obligations. Although it was sometimes difficult to tell the two kinds of acts apart, it was nevertheless true that the intent of the State to commit itself was an important feature of the identification.

319. The fact that by a unilateral act a relation may be established with one or more States does not mean that we are necessarily in the presence of an act of conventional character.

320. The conduct of the State should also be considered in relation to the unilateral act, though that could be done at a later stage.

321. Reaching a common position on the definition did not seem easy; at all events, a number of factors or elements unrelated to the act itself would have to be taken into consideration.

322. On the question of legal effects, these, although highly diverse (promises, renunciation, recognition and so on), needed to be considered in the light of their conformity with international law.

323. The 1969 Vienna Convention might provide a framework and guidance for the formulation of a number of principles on unilateral acts, but they should not be transposed or reproduced wholesale, given the difference in kind between treaties and unilateral acts.

324. The Special Rapporteur had deliberately reached only limited conclusions in his report; they were the outcome of a study of specific practical cases, and could be supplemented and fleshed out by studies of further cases

or by the comments and observations of Commission members.

325. The Special Rapporteur concluded by suggesting that he would be entirely in favour of the proposal that he should submit general conclusions or proposals the following year.

326. The Working Group on Unilateral Acts could consider the points that had arisen out of the debate, and put forward recommendations as to the orientation and substance of the proposals which would thus reflect the outcome of several years' work on the subject by the Commission.

4. CONCLUSIONS OF THE WORKING GROUP

327. The open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet, was reconstituted on 11 May 2005.

328. The Working Group held four meetings, on 11 and 18 May, 1 June and 25 July 2005. The first three meetings were devoted to an analysis of specific cases in accordance with the grid established at the fifty-sixth session of the Commission (2004)²²³ and the conclusions that could be drawn from that analysis.

329. At its 2855th meeting, on 21 July 2005, at the conclusion of the debate on the topic "Unilateral acts of States", the Commission requested the Working Group to consider the points raised in the debate on which there was general agreement which might form the basis of preliminary conclusions or proposals on the topic that the Commission could consider at its fifty-eighth session. The Working Group began its consideration of elements that could be included in preliminary conclusions without prejudice to their subsequent qualification.

330. At its 2859th meeting, on 28 July 2005, the Commission took note of the oral report of the Working Group.

331. The Working Group acknowledged that while it could be stated in principle that the unilateral conduct of States could produce legal effects, whatever form that unilateral conduct might take, it would attempt to establish some preliminary conclusions in relation to unilateral acts *sensu stricto*. The Working Group also briefly considered questions relating to the variety of unilateral acts and their effects, the importance of circumstances in assessing their nature and effects, their relationship to other obligations of their authors under international law and the conditions of their revision and revocability.

332. The Working Group stands ready to assist the Special Rapporteur, if necessary, in the formulation and development of preliminary conclusions, which could then be submitted to the Commission at its fifty-eighth session (2006), together with illustrative examples of practice drawn from the notes prepared by members of the Working Group.

²²³ See footnote 219 above.