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### International Law Commission

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## DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION

Rapporteur: Mr. Qizhi He

### CHAPTER VIII

#### UNILATERAL ACTS OF STATES

##### A. Introduction

1. In the report on the work of its forty-eighth session, in 1996, the Commission proposed to the General 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.<sup>1</sup>
2. The General Assembly, in paragraph 13 of resolution 51/160, *inter alia*, invited the Commission to further examine the topic “Unilateral Acts of States” and to indicate its scope and content.

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<sup>1</sup> *Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10)*, p. 230 and pp. 328-329.

3. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility 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.<sup>2</sup>

4. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodríguez Cedeño, Special Rapporteur on the topic.<sup>3</sup>

5. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission's decision to include the topic in its agenda.

6. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic.<sup>4</sup> As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

7. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of 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.<sup>5</sup>

8. At its fifty-first session in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.<sup>6</sup> As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

9. The Working Group reported to the Commission on issues related 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

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<sup>2</sup> *Official Records of the General Assembly, Fifty-second session, Supplement No. 10 (A/52/10)*, paras. 196-210 and 194.

<sup>3</sup> *Ibid.*, paras. 212 and 234.

<sup>4</sup> A/CN.4/486.

<sup>5</sup> *Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10)*, paras. 192-201.

<sup>6</sup> A/CN.4/500 and Add.1.

consultation with the Special Rapporteur, requesting materials and inquiring 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.

10. At its fifty-second session in 2000, the Commission considered the third report of the Special Rapporteur on the topic,<sup>7</sup> along with the text of the replies received from States<sup>8</sup> to the questionnaire on the topic circulated on 30 September 1999. The Commission at its 2633rd meeting on 7 June 2000 decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

#### **B. Consideration of the topic at the present session**

11. At the present session the Commission had before it the fourth report by the Special Rapporteur (A/CN.4/519).

12. The Commission considered the fourth report of the Special Rapporteur at its 2693rd, 2695th and 2696th meetings on 20, 25 and 26 July 2001, respectively.

##### **1. Introduction by the Special Rapporteur of his fourth report**

13. The Special Rapporteur indicated that his fourth report dealt with two fundamental issues: the elaboration of criteria upon which to proceed with a classification of unilateral acts and the interpretation of unilateral acts, in the context of the rules applicable to all unilateral acts, regardless of their material content.

14. The Special Rapporteur noted that the report had been prepared on the basis of a wide range of literature, comments by members of the Commission and by Governments, as well as jurisprudence and some State practice referred to therein. It was stressed that, after an initial period of scepticism, most Governments had viewed the work undertaken on the topic more favourably. Furthermore, he indicated that it was important to reach agreements on the General Part of the topic, particularly as regards the structure; it did not seem feasible nor convenient to elaborate draft articles in other areas.

15. The Special Rapporteur noted that guidance was requested of the Commission on the issues relating to the causes of invalidity of unilateral acts, the determination of the moment when the legal effects of a unilateral act come into being, which would in turn lead to

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<sup>7</sup> A/CN.4/505.

<sup>8</sup> A/CN.4/500 and Add.1.

determining the moment when it is opposable or enforceable. He explained that it was of fundamental importance to distinguish the moment at which the act came into being, producing legal effects while retaining its unilateral nature, from the moment at which it materialized, thus taking on a bilateral element while never losing its strictly unilateral nature.

16. As regards the issue of silence in relation to unilateral acts, the Special Rapporteur noted that silence cannot be defined as a legal act in the sense being dealt with by the Commission.

17. As regards interpretative declarations, the Special Rapporteur indicated that, in general, they were linked to a prior text, but was of the view that in cases where the declarations went beyond the obligations contained in the treaty, the declarations would become independent acts whereby a State could assume international commitments; these interpretative declarations would thus be included among the unilateral acts falling within the scope of the topic.

18. On the contrary, countermeasures, in the view of the Special Rapporteur, could not be considered within the same context because they constitute a reaction by a State, thus lacking the necessary autonomy, and because they are not expressly formulated with the intention of producing legal effects.

19. The Special Rapporteur indicated that the classification of unilateral acts was difficult; an act may be qualified in different ways and fall under one or more categories of the classical unilateral acts. He proposed to proceed with a classification based on the legal effects criterion. Consequently, there would be two major categories: acts whereby a State undertakes obligations and acts whereby a State reaffirms a right. Examples of the former include promises, waivers and even recognitions, while the latter category is exemplified by protests. He also proposed that the Commission focus itself on the acts falling under the first category previously indicated.

20. With regard to the interpretation of unilateral acts and their applicable rules, in the view of the Special Rapporteur, the rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties can constitute a valid reference in the elaboration of rules for the interpretation of unilateral acts, as was evidenced by some arbitral awards. He also affirmed that such rules of interpretation would be common to all unilateral acts. In this regard, he noted that the interpretation of an act in good faith and in relation to the context in which it took place would certainly be applicable to unilateral acts. The context would also include, for the purposes of interpretation, the preambular part of a declaration and annexes. Subsequent practice could also, according to the Special Rapporteur, be important in the interpretation of unilateral acts.

21. On the contrary, he was of the view that the object and purpose of a treaty could not be resorted to in order to interpret a unilateral act; the reasoning being that it dealt with terms specifically applicable to treaty relations. The Special Rapporteur was of the view that the supplementary means of interpretation, such as the preparatory work and the circumstances under which a unilateral act takes place, could be considered when interpreting the act. In the case of the preparatory work, though difficult to obtain in many cases, it could nonetheless be useful as a subsidiary recourse of interpretation, as jurisprudence cited in the report indicated. There was also practice by international tribunals of resort to the circumstances in order to interpret the intent of a State making a unilateral act.

22. Finally, the Special Rapporteur indicated that the two draft articles he proposed,<sup>9</sup> on a general rule of interpretation and on supplementary means of interpretation, were based on the Vienna provisions yet had been modified to the specificity of the unilateral act.

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<sup>9</sup> 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.

## 2. Summary of the debate

23. Some members reiterated the importance of the topic and expressed satisfaction with references made in the report to doctrine and judicial decisions on unilateral acts, though it was also stated that additional factual information on the cases cited would be most helpful in analysing the legal validity of unilateral acts.

24. It was said that more attention could be given to the incidence of unilateral acts, though it was acknowledged that this could prove rather complicated since tribunals resort to unilateral acts when there is not much else for them to rely on.

25. Some members were of the view that the topic of unilateral acts was unfit for codification, especially in light of the difficulties encountered in defining and classifying the acts. They felt that the emphasis placed on the autonomy of States and the concept of the “act” continued to pose difficulties; in this connection preference was voiced to speak of a “matrix of State conduct” which requires some kind of reaction by another State.

26. It was also stated that continued discussion on highly theoretical issues related to the topic tended to diminish the relative and fragile clarity which had been achieved and, in this connection, the point was made that approaching the topic in more practical terms could be more conducive to making progress on it.

27. As regards the scope of the topic, the point was made that it remained too narrow and that it should be expanded to include non-autonomous unilateral acts. In addition, hope was expressed that the issues of estoppel, particularly its relationship with waivers, and silence could be elaborated upon further. Nonetheless, support was also voiced for maintaining a restrictive definition of unilateral acts encompassing acts which create rights and obligations as a source of international law.

28. Attention was drawn to the fact that in some cases, such as effective occupation, a series of unilateral acts were needed in order for legal effects to occur, while the fourth report seemed to restrict itself to single unilateral acts. Doubts were also expressed regarding the relevance of referring to interpretative declarations and to countermeasures in the context of unilateral acts.

29. Different views were expressed regarding the classification of unilateral acts proposed by the Special Rapporteur. According to one view, there were acts which could fall under both categories, such as a declaration of neutrality according to which a State assumed not only obligations but also reaffirmed its rights, or a declaration of war. Another view considered that the second category proposed, that of unilateral acts by which a State reaffirmed rights, needed

to be expanded so as to encompass acts which create or affirm rights. Still another view expressed serious doubts about the classification proposed, particularly the second category where additional light was needed on the concept of reaffirmation of rights; for example whether this category would include reaffirmation of rights over territories.

30. The point was also made that it would be possible to elaborate additional criteria for classification of unilateral acts, as suggested by some States. This could in turn serve to draw up a set of draft articles on the basis of the jurisprudence of the International Court of Justice and State practice; the Special Rapporteur could then consider drafting separate guidelines showing to which category a general rule may or may not be applicable.

31. A contrary view was expressed in the sense that classification itself was not all that important and even created unnecessary confusion; in this connection it was noted that the jurisprudence on the topic had attached much greater importance to determining whether the act was binding in nature, not the type of act involved.

32. Divergent views were expressed on the proposal by the Special Rapporteur for draft articles on the interpretation of unilateral acts. According to one view, it was premature to deal with the issue of interpretation since such an endeavour could wait until a comprehensive set of draft articles has been prepared.

33. It was also noted that the word “interpretation” was used in two ways in Part II of the fourth report: both as signifying the methodology of inquiring into whether an act was unilateral and only secondarily in its usual sense. The point was also made that the report seemed to mix the determination of criteria used to establish whether an act was indeed of a unilateral nature with the interpretation *strictu sensu* of a unilateral act.

34. While some members shared the view of the Special Rapporteur that the provisions of the 1969 and 1986 Vienna Conventions could serve as a basis for developing rules of interpretation for unilateral acts, others felt that said provisions were too general to be of use for that purpose. The provisions of the Vienna Conventions could not be followed by analogy due to the rather unique nature of unilateral acts; for example, the preparatory work in the case of unilateral acts could go back several decades. Hence any reliance on said provisions should be minimal.

35. It was stated that, among the rules for interpretation, one analogous to the basic rule established with regard to treaties by article 31, paragraph 1 of the 1969 Vienna Convention on the Law of Treaties, could be drafted to the effect that an act should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the act in their context and in the light of its object.

36. The point was made that a reference to the object and purpose of a unilateral act should not be omitted for the purposes of interpretation. In this regard it was noted that a State's intention when engaging in a unilateral act was relevant in two situations: in determining the existence of a unilateral act, a question that had been central to the *Nuclear Tests* case, and in determining how the act was to be interpreted, although the International Court of Justice had not always made a clear distinction between the two questions.

37. It was stated that the suggested draft articles contained some contradictory elements in that they posed intention as a primary criterion yet placed among the supplementary means of interpretation the main ways in which intention could be asserted in connection with a unilateral act, namely preparatory work and the circumstances at the time of the act's formulation. Some doubts were expressed on giving paramount importance to intention in the interpretation of unilateral acts and consequently preference was voiced for the approach of the International Court of Justice to give due regard to intention but which had not interpreted unilateral acts in the light of intention. States other than the author State were entitled to rely on the act per se, not on the intentions which might be subjective and which, in many cases, are quite elusive. However, according to one view, the real will of the author State should constitute the decisive factor in the interpretation of unilateral acts since, in many cases, the contents of the unilateral act did not correspond to the State's real will, since it was adopted under strong pressure by other States or international public opinion and committed the State in a manner that went beyond what it might really consider necessary. There was thus a dichotomy between the real will and the declared will of the State, a matter which favoured adopting a restrictive interpretation to the unilateral act. Other members held a different opinion, since it was quite difficult to try to determine the real will of a State; it would be thus preferable to resort to nullifying the act.



38. It was noted that draft article 1 on unilateral acts does not restrict such acts to a written form and that, subject to maintaining said definition, the rules for interpretation would need to be tailored accordingly since the provisions of the 1969 Vienna Convention are limited to written agreements. It was also indicated that, unlike the case of treaties, greater emphasis should be given to subjective interpretation in the case of unilateral acts.

39. It was stated that the two draft articles proposed did not foresee that a unilateral act should create obligations. Some doubts were expressed regarding the application of the concept of a preamble to unilateral acts. With regard to the context as a means of interpretation of a unilateral act, it was stated that the concept should be broadened in the case of unilateral acts taken in relation to treaties.

40. It was stated that reference to the preparatory work as a means to interpret a unilateral act was acceptable with the proviso that it be reasonably accessible to the State entitled to rely on the act.

41. Several drafting suggestions were made regarding the two draft articles proposed. Support was expressed by several members for the preparation of a consolidated set of draft articles at the next session, which could then be considered by the Drafting Committee.

### **3. Special Rapporteur's concluding remarks**

42. In summarizing the debate, the Special Rapporteur noted that although some doubts continue to linger on the complexities entailed in developing the topic, most members were convinced of the importance of unilateral acts and felt that the topic could be pursued.

43. On the issue of classification of unilateral acts, the Special Rapporteur expressed his preference for the proposal put forward in his fourth report, though he did not exclude the possibility of studying, at a future time, the classical unilateral acts referred to in the doctrine. The structure of the set of draft articles should be based on the classification of the acts and the criterion of legal effects seemed valid; this would not however exclude an analysis of the effects of each unilateral act.

44. As regards the issue of State practice, his view was that some of it had been reflected in the jurisprudence, but agreed on the need to obtain additional evidence of such practice. In this connection, he indicated that the Working Group was considering the preparation of questions inviting States to provide additional information on State practice on unilateral acts.

45. Concerning the rules for the interpretation of unilateral acts, the Special Rapporteur reiterated his view that they were applicable to all kinds of unilateral acts and could therefore be included in the General Part of the set of draft articles. He agreed with the need to differentiate between the declared will and the real will of a State, but emphasized that the former gave much more legal certainty and security to international legal relations.

46. As regards the fact that the preparatory work was not necessarily accessible to all but the author State, thus placing other States in a disadvantaged position, the Special Rapporteur suggested that said preparatory work be considered as part of the relevant circumstances.

#### **4. The Working Group**

47. At its 2695th meeting, on 25 July 2001, the Commission established an open-ended Working Group. The Working Group on Unilateral Acts of States, chaired by the Special Rapporteur, held two meetings, on 25 July and 1 August 2001. The Commission, at its 2701st meeting on 3 August 2001, took note of the oral report of the Chairman of the Working Group. At the recommendation of the Working Group the Commission requested that the Secretariat circulate a questionnaire to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

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