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CHAPTER VII

UNILATERAL ACTS OF STATES

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
A. Introduction		
B. Consideration of the topic at the present session		
1. Introduction by the Special Rapporteur of his sixth report		
2. Summary of the debate		
3. Special Rapporteur's concluding remarks		

CHAPTER VII

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.¹
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.
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.²
4. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodriguez Cedeño, Special Rapporteur on the topic.³
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.⁴ As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

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

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

³ *Ibid.*, paras. 212 and 234.

⁴ A/CN.4/486.

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.⁵
8. At its fifty-first session in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.⁶ 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 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,⁷ along with the text of the replies received from States⁸ 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.
11. At its fifty-third session in 2001, the Commission considered the fourth report of the Special Rapporteur⁹ and established an open-ended Working Group. At the recommendation of

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

⁶ A/CN.4/500 and Add.1.

⁷ A/CN.4/505.

⁸ A/CN.4/500 and Add.1.

⁹ A/CN.4/519.

the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

12. At its fifty-fourth session in 2002, the Commission considered the fifth report of the Special Rapporteur,¹⁰ as well as the text of the replies received from States to the questionnaire on the topic circulated on 31 August 2001.¹¹ The Commission also established an open-ended Working Group.

B. Consideration of the topic at the present session

13. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/534). The Commission considered the sixth report at its 2770th, 2771st, 2772nd, 2773rd and 2774th meetings from 7 to 11 July 2003, respectively.

14. At its 2771st meeting, the Commission established an open-ended Working Group on unilateral acts of States.

1. Introduction by the Special Rapporteur of his sixth report

15. The Special Rapporteur, said that the sixth report dealt in a very preliminary and general manner with one type of unilateral act, recognition, with special emphasis on recognition of States, as some members of the Commission and some representatives in the Sixth Committee had suggested.

16. To define the nature of a unilateral legal act *stricto sensu* was not easy, but that in no way meant that it did not exist. There was no doubt that declarations that took the form of unilateral acts could have the effect of creating legal obligations, as the International Court of Justice indicated in its decisions in the *Nuclear Tests* case.

17. The Special Rapporteur recalled that the Commission had said in 1997 that it was possible to engage in codification and progressive development, for which the topic was ripe.

¹⁰ A/CN.4/525 and Add.1, Corr.1, Corr.2 (Arabic and English only) and Add.2.

¹¹ A/CN.4/524.

18. However, while government opinions had not been numerous, they were fundamental to the consideration of the topic. The fact that practice had not been sufficiently analysed was one of the major obstacles the Special Rapporteur had encountered.

19. Unilateral acts were formulated frequently, but, without knowing the views of States, it was not easy to determine what the nature of the act was and whether the State that had formulated it had the intention of acquiring legal obligations and whether it considered that the act was binding or that it was simply as a policy statement, the result of diplomatic practice.

20. It was difficult to tell what final form the Commission's work might take. The Special Rapporteur indicated that, if it proved impossible to draft general or specific rules on unilateral acts, consideration might be given to the possibility of preparing guidelines based on general principles that would enable States to act and that would provide practice on the basis of which work of codification and progressive development could be carried out. Whatever the final product, the Special Rapporteur believed that rules applicable to unilateral acts in general could be established.

21. In the first place, a unilateral act in general and an act of recognition in particular must be formulated by persons authorized to act at the international level and to bind the State they represented. Moreover, the act must be freely expressed, and that made its validity subject to various conditions.

22. The binding nature of a unilateral act might be based on a specific rule, "*acta sunt servanda*", taken from the "*pacta sunt servanda*" rule that governed the law of treaties. It might also be stated as a general principle that a unilateral act was binding on a State from the moment it was formulated or the moment specified in the statement by which the State expressed its will. The act would then be binding. Similarly, the act could not be modified, suspended or revoked unilaterally by its author and its interpretation must be based on a restrictive criterion.

23. The aim of the sixth report was to bring the definition and examination of a specific material act - recognition - into line with the Commission's work on unilateral acts in general.

24. Chapter I dealt with the various forms of recognition and ended with an outline definition that could be aligned with the draft definition of unilateral acts in general. The Special Rapporteur attempted to show that the draft definition considered by the Commission could encompass the category of specific acts constituted by recognition. What was most important was to determine whether it was a unilateral act in the sense of a unilateral expression of will formulated with the intention of producing certain legal effects.

25. The Special Rapporteur said that the institution of recognition did not always coincide with the unilateral act of recognition. A State could recognize a situation or a legal claim by means of a whole range of acts or conduct. In his view, implicit recognition, which undoubtedly had legal effects, could be excluded from the study of the acts the Commission was seeking to define.

26. Silence, which had been interpreted as recognition, for example, in the cases concerning the *Temple Preah Vihear* or the “Right of Passage over Indian territory”, must, even though it produced legal effects, be excluded from unilateral acts proper.

27. Recognition based on a treaty, acts of recognition expressed through a United Nations resolution and acts emanating from international organizations should also be eliminated from the scope of the study.

28. In chapter I, the Special Rapporteur raised some questions that were crucial to the adoption of a draft definition of the unilateral act of recognition, especially with regard to the criteria for the formulation of such an act and its discretionary nature.

29. There were no criteria governing the formulation of an act of recognition. The recognition of States and the recognition of a state of belligerency, insurgency or neutrality also seemed not to be subject to specific criteria and the same seemed to apply also to situations of a territorial nature.

30. The Special Rapporteur referred to non-recognition. A State could be prohibited from recognizing *de facto* or *de jure* situations, but it was not obliged to take action or to formulate such non-recognition.

31. The report also generally discussed the possibility that the act of recognition, besides being declaratory, might be hedged around with conditions, something which might appear inconsistent with its unilateral nature.
32. The intention of the author State was an important element, since the legal nature of the act lay in the expression of intent to recognize and in the creation of an expectation.
33. The Special Rapporteur considered that the form taken by the act of recognition, which could be formulated in writing or orally, was, in itself, of no importance. The best approach was to retain the act of recognition expressly formulated for that purpose. A definition of the act of recognition was contained in paragraph 67 of the report.
34. Chapter II of the report dealt briefly with the validity of the unilateral act of recognition by following closely the precedent set with regard to the unilateral act in general: the capacity of the State and of persons; the expression of will of the addressee(s); the lawful object and, more specifically, conformity with peremptory norms of international law.
35. Chapter III examined the question of the legal effects of the act of recognition, in particular, and the basis for its binding nature, referring once again to the precedent of the unilateral act in general. The Special Rapporteur pointed out first of all that, according to most legal writers, the act of recognition was declarative and not constitutive.
36. The recognizing State had to conduct itself in accordance with its statement, as in the case of estoppel. From the moment the statement was made or from the time specified therein, the State or other addressee could request the author State to act in accordance with its statement.
37. The binding nature of the unilateral act in general and of recognition in particular must be justified, whence the adoption of a rule based on *pacta sunt servanda* and called *acta sunt servanda*. Legal certainty must also prevail in the context of unilateral acts.
38. Chapter IV dealt in general with the application of the act of recognition with a view to drawing conclusions about the possibility whether and conditions under which a State might revoke a unilateral act. A brief reference was also made to the spatial and temporal application of the unilateral act in the case of the recognition of States in particular.

39. The modification, suspension and revocation of unilateral acts were also examined, namely, whether States could modify, suspend or revoke acts unilaterally, in the same way as they had formulated them. A general principle could be established whereby the author could not terminate the act unilaterally unless that possibility was provided for in the act or there had been some fundamental change in circumstances. The revocation of the act would thus depend on the conduct and attitude of the addressee.

40. In conclusion, the Special Rapporteur said that the sixth report was general in nature and that further consideration was required to see how the Commission should complete its work on the topic. It was worthwhile establishing some general principles and relevant practice should also be studied; some bibliographical research was being conducted.
