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Ninth report on unilateral acts of States

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Addendum

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I. Introduction

1. The International Law Commission considered the eighth report on unilateral acts of States[1] at its 2852nd to 2855th meetings, held on 15 and 19-21 July 2005. In accordance with the views expressed by the Working Group and the members of the Commission, as well as the Governments represented in the Sixth Committee, that report presented a number of examples of unilateral acts of States. While not all of these examples represented unilateral acts in the sense with which the Commission is concerned, they served to facilitate progress in the deliberations on the subject.

2. In the course of the Commission's discussions, it was once again pointed out that "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".[2] Other members, however, thought that it was possible to establish such a regime,[3] albeit with the qualifications described below.

3. It was also pointed out, during the Commission's discussions on the topic, that "the practice studied so far, supplemented perhaps by further study of other acts ... might provide the basis for a formal definition that nevertheless retained some flexibility".[4] After establishing such a definition, "the Commission should study the capacity and authority of the author of a unilateral act".[5] It was also suggested that a "summary of the Commission's work on the subject, in the form of a declaration accompanied by general or preliminary conclusions and covering all the points which had been accepted by consensus", should be prepared.[6] It was further noted that it was 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".[7]

4. Another view, which had been put forward in the Commission a number of times before, was that "unilateral acts were so diverse, and so various and complex in nature, that they could not be codified in the form of draft articles";[8] an "'expository'[9] 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". Given the difficulties that the Commission had encountered in attempting to agree on general rules, it would be better, in the view of some members, to "aim in the direction of guidelines or principles which could help and guide States while providing for greater certainty in the matter".[10]

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[1] A/CN.4/557.

[2] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 303, view expressed by Mr. Escarameia, Mr. Brownlie and Mr. Koskenniemi.

[3] Ibid., views of Mr. Kamto, Mr. Pellet, Mr. Candioti and Mr. Xue, among others.

[4] Ibid., view of Mr. Fomba.

[5] Ibid., para. 305, in particular the views of Mr. Escarameia and Mr. Candioti.

[6] Ibid., para. 307, views of Mr. Candioti and Mr. Xue.

[7] Ibid., para. 309, view of Mr. Pellet.

[8] Ibid., para. 310, views of Mr. Koskenniemi and Mr. Brownlie.

[9] Ibid., view of Mr. Brownlie.

[10] Ibid., para. 314, views of Mr. Candioti and Mr. Pellet, among others.

5. Another issue that was considered in the course of the Commission's discussions at its last session[11] and at the meetings of the Working Group[12] was that of the "revocability of a unilateral act", which, it was said, must be taken up if the topic was to be thoroughly studied;[13] it is therefore addressed in detail in the present report.

6. The report and the Commission's deliberations thereon were considered by Member States in the Sixth Committee during the 2005 session of the General Assembly. At the meetings held between 24 October and 3 November 2005, government representatives highlighted the difficulty of the topic[14] and expressed some concern about the slow progress of the Commission's work,[15] as well as their agreement with the approach taken in the Special Rapporteur's eighth report;[16] they also raised more specific issues in relation to the topic. It was mentioned that the scope of the topic should be restricted to the obligation a State could assume through a unilateral declaration, the conditions governing its validity[17] and its effects on third States, including the corresponding rights of those States. That would obviate the need to examine the enormously complex issue of conduct.[18]

7. As to how the work on this topic should proceed, some delegations stressed the need to conclude the study in 2006[19] through the formulation of general conclusions based on the Commission's previous work,[20] albeit without losing sight

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[11] Ibid., para. 315.

[12] Under the chairmanship of Mr. Pellet, the open-ended Working Group held four meetings (11 and 18 May, 1 June and 25 July 2005). See ibid., paras. 327-332.

[13] At the request of the members of the International Law Commission, its Chairman, Mr. Momtaz, told government representatives in the General Assembly's Sixth Committee that the Commission would welcome comments from Governments on practice regarding the revocation or revision of unilateral acts, their particular circumstances and conditions, the effects of revocation or revision of a unilateral act, and the range of possible reactions from third parties (A/C.6/60/SR.13, para. 80).

[14] A/C.6/60/SR.11, para. 59, statement by the representative of Spain; A/C.6/60/SR.16, para. 12, statement by the representative of the Russian Federation; A/C.6/60/SR.19, para. 14, statement by the representative of the Libyan Arab Jamahiriya; A/C.6/60/SR.20, para. 38, statement by the representative of the Bolivarian Republic of Venezuela.

[15] A/C.6/60/SR.11, para. 46, statement by the representative of Morocco; A/C.6/60/SR.14, para. 52, statement by the representative of Japan; A/C.6/60/SR.15, para. 10, statement by the representative of the Republic of Korea; A/C.6/60/SR.16, para. 52, statement by the representative of Guatemala; para. 72, statement by the representative of Kenya.

[16] A/C.6/60/SR.14, para. 10, statement by the representative of Austria; para. 44, statement by the representative of New Zealand; para. 52, statement by the representative of Japan; A/C.6/60/SR.16, para. 12, statement by the representative of the Russian Federation; para. 21, statement by the representative of Poland; para. 46, statement by the representative of Chile.

[17] A/C.6/60/SR.11, para. 59, statement by the representative of Spain; para. 74, statement by the representative of France.

[18] Ibid., para. 59, statement by the representative of Spain; para. 74, statement by the representative of France; A/C.6/60/SR.16, para. 22, statement by the representative of Poland; along the same lines, the representative of Chile took the view that it would be better to consolidate the progress achieved with respect to unilateral acts *stricto sensu* before embarking on a detailed study of conduct (ibid., para. 48).

[19] A/C.6/60/SR.15, para. 10, statement by the representative of the Republic of Korea; A/C.6/60/SR.16, para. 35, statement by the representative of Portugal.

[20] A/C.6/60/SR.12, para. 42, statement by the representative of Denmark on behalf of the Nordic countries; A/C.6/60/SR.13, para. 106, statement by the representative of Argentina; A/C.6/60/SR.15, para. 18, statement by the representative of China.

of the specific nature of unilateral acts; that is, without modelling the conclusions too closely on the provisions of the Vienna Convention on the Law of Treaties.[21] Other delegations, however, felt that provisions on the law of treaties could be useful as a point of departure and could even be used as a framework, mutatis mutandis.[22] One delegation said that the view it had expressed at previous sessions, to the effect that the topic should be set aside, had not changed;[23] another said that the difficulty of defining the nature of such acts suggested that they were unamenable to codification or progressive development.[24] Other delegations felt that the Commission's consideration of the topic made a positive contribution by identifying and clarifying the concept of unilateral acts[25] so that ideas or guiding principles could be formulated on the topic;[26] that might provide a good foundation to serve as a first step towards possible codification.

8. In response to the concerns expressed by the members of the Commission, and with a view to facilitating the consideration of the topic, the Special Rapporteur is submitting his ninth report this year. The report is divided into two parts, the first of which refers to the grounds for invalidity of unilateral acts and the modification and suspension of such acts, together with other related concepts. While these issues have arisen in the course of previous years' deliberations, they have not been formally presented in the Special Rapporteur's reports. The second part of the present report deals with topics that have been considered before, from a structural standpoint, in the Commission and in the Working Group established in 2004 and 2005 and chaired by Mr. Alain Pellet: the definition of unilateral acts in a way that distinguishes them from other acts which, although apparently unilateral, actually constitute a treaty relationship and are therefore subject to the regime established by the Vienna Convention on the Law of Treaties. In turn, such acts, as manifestations of will in the strict sense, are distinguished from unilateral conduct that may produce similar legal effects. On this same subject, reference is made to the addressee or addressees of a unilateral act, although this does not affect the fact that the topic is limited to unilateral acts formulated by States. In this regard, the report presents two proposals that could form part of the definition of such acts and could determine the scope of the draft guiding principles; second, the report presents proposed language related to the formulation of the act: capacity of the State, persons authorized to act and to enter into legal commitments on the State's behalf in its international relations, and the subsequent confirmation of an act formulated without authorization; third, proposed language is suggested in relation to the basis for the binding nature of unilateral acts; and lastly, a draft guiding principle is presented in relation to the interpretation of unilateral acts. A list of all the guiding principles being proposed, including those concerning the invalidity, termination and suspension of unilateral acts, which are discussed in part one, is presented in document A/CN.4/569.

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[21] A/C.6/60/SR.14, para. 44, statement by the representative of New Zealand.

[22] A/C.6/60/SR.15, para. 10, statement by the representative of the Republic of Korea; A/C.6/60/SR.16, para. 54, statement by the representative of Guatemala.

[23] A/C.6/60/SR.14, para. 7, statement by the representative of the United Kingdom.

[24] A/C.6/60/SR.15, para. 2, statement by the representative of the United States of America.

[25] A/C.6/60/SR.16, para. 48, statement by the representative of Chile; para. 52, statement by the representative of Guatemala; A/C.6/60/SR.17, para. 6, statement by the representative of Cuba; A/C.6/60/SR.18, para. 74, statement by the representative of Belarus.

[26] A/C.6/60/SR.18, para. 93, statement by the representative of Malaysia.

9. The Special Rapporteur proposes that part one of this report be considered in plenary session and that part two be referred to the Working Group for further consideration, in line with the Working Group's mandate and in order to expedite the work on the topic at the current session.

II. Part One

A. Validity and duration of unilateral acts

10. In this part we address the question of the validity and duration of unilateral acts of States, a topic which, though discussed by the Commission at previous sessions, must be examined in more detail in order to provide the basis for the guiding principles being proposed. Both the Commission and the Sixth Committee have expressed the need to address this topic as thoroughly as possible. With this objective in mind, we will attempt to describe the status of the issue, in the literature and in practice, notwithstanding the paucity of precedents.

1. Grounds for invalidity

11. The question of the validity of unilateral acts of States has been considered only rarely and tangentially in the legal literature.[27] While in the realm of the law of treaties the possible grounds for their invalidity, termination and suspension have been the subject of a huge number of studies and opinions in the literature,[28] this has not been the case in the area that concerns us.[29] This is not to say that the topic has not sparked any interest; quite the contrary. In fact, almost as soon the Commission began to discuss this topic, government representatives in the Sixth Committee expressed the view that, in the future, the Commission should focus on aspects concerning the elaboration and conditions of validity of unilateral acts.[30] The Commission itself referred to a Working Group questions relating to the causes of invalidity; this was "a delicate matter which ... warranted more extensive study,

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[27] Our analysis of this issue draws to a large extent on the conclusions put forward by M. I. Torres Cazorla in *Los actos unilaterales de los Estados en el derecho internacional contemporáneo*, paper submitted during the second round of candidacy for the post of full professor, University of Málaga, 2001, unpublished, pp. 117-172.

[28] It should be borne in mind that the 1969 Vienna Convention devotes 31 articles (42 to 72) and an annex to the invalidity, termination and suspension of the operation of treaties (part V). The Convention's goal was a laudable one: to lend stability and legal security to treaty relations by limiting the invalidity, termination and suspension of the operation of treaties to a few exceptional circumstances.

[29] The view expressed by E. Pecourt García, in "El principio del *estoppel* en derecho internacional público", *Revista Española de Derecho Internacional* (R.E.D.I.), vol. 15 (1962), p. 125, may therefore continue to be valid, even though it was expressed before the Vienna Convention on the Law of Treaties came into being. That view, which could also be applied to unilateral acts of States, is that "The absence of an organic doctrine and a set of uniform principles governing the validity and invalidity of international legal acts makes it almost impossible to study those concepts in relation to a specific type of act, within a framework of general validity. This means that we have to consider the question of the validity and invalidity of different types of international acts within relatively autonomous conceptual and regulatory frameworks".

[30] The statements made by the representatives of Austria (A/C.6/53/SR.15, para. 10) and Romania (A/C.6/53/SR.18, para. 3) illustrate this point particularly well.

along with the consideration of the question of the conditions of validity of a unilateral act".[31]

12. Views have been expressed in the literature to the effect that the principle of good faith creates a need to ensure compliance with unilateral commitments. This principle, in turn, reflects the moral obligation to honour one's promises or, alternatively, the social requirement of ensuring the stability of international relations, and is achieved through the sincerity of the declaring State or the expectation created among third parties that the unilateral act will be observed.[32] The same body of opinion holds that "thus, with regard to the fundamental requirement of stability in international relations, unilateral commitments offer guarantees of solidity comparable to those of treaty commitments".[33] This assessment also highlights the affinity between these two concepts — unilateral acts and international treaties — and illustrates one of the reasons why, in our view, the study of this topic should consider the provisions of the Vienna Convention that concern the possible invalidity, termination or suspension of treaties, even though these provisions cannot be transposed wholesale to the realm of unilateral acts, owing to the peculiar characteristics of such acts.[34]

13. The second major issue that the study will have to address is the near absence of discussion about the contingencies that may affect unilateral acts; there is a similar dearth of examples in international practice. Furthermore, attempts to extrapolate certain concepts emanating from internal law have given rise to some doubts in the literature, which not even case law, in the few instances in which it has dealt with this subject, has been able to dispel. As Guggenheim correctly pointed out: "by introducing into international law the private law theory relating to defects of consent, we are transposing into the sphere of inter-State relations a doctrine that was originally applied in the sphere of internal law, forgetting that a coherent theory on defects of consent can only be developed through a lengthy accumulation of precedents, which are lacking in international law".[35]

14. Perhaps as a consequence of this attempt to extrapolate rules of internal law to the international plane, the literature distinguishes between defects that directly affect the expression of will per se, thereby depriving it of its very essence, and defects that affect the will of the subject, rendering it irregular, but not necessarily eliminating it. Following this line of reasoning, the consequences initially arising from these two situations could also be different. Thus, as Venturini points out, "in

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[31] A/CN.4/519, paras. 4-6 and 19.

[32] J. Charpentier, "Engagements unilateraux et engagements conventionnels: différences et convergences", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewsky* (The Hague, Boston, London, 1996), p. 378.

[33] Ibid., p. 380.

[34] Both ideas are highlighted by M. Akehurst, in "The Hierarchy of the Sources of International Law", *British Yearbook of International Law* (*B.Y.B.I.L.*), vol. 47 (1974-75), pp. 280 and 281, where he states that "these acts are so heterogeneous that it is very difficult to generalize about them … in other circumstances unilateral acts are sources of law, or at least of legal rights and obligations … Such acts are similar in their effects to treaties, and probably have the same hierarchical value as treaties; that is to say, a State can, by promise or waiver, lose liberties or rights which it enjoyed under treaties or customary rules, although a subsequent treaty or custom can extinguish the obligations assumed in the promise or revive the rights lost by the waiver".

[35] P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", *Recueil des Cours* (*Collected Courses of The Hague Academy of International Law*), vol. 74 (1949), p. 197.

the first case, the legal act, deprived of one of its constituent parts, must be considered null and void, while in the second case, mere irregularity, which is not manifest, simply means that the subject concerned has the right to challenge the act".[36] Taking a more pragmatic view, Verzijl believed that such distinctions, extrapolated from different legal systems,[37] might also be of interest for the purposes of public international law and might be applicable in particular to unilateral acts. [38]

15. This, then, is practically virgin territory, in which references in the literature are scarce — or tend to refer to the law of treaties — and practice is almost non-existent. These are all aspects which, of course, curtail and restrict the scope of our study of the topic, but we will nonetheless try, to the extent possible, to provide examples to illustrate the concepts discussed.

16. To what extent could the grounds for invalidity provided in the 1969 Vienna Convention on the Law of Treaties be applicable to unilateral acts? It has been said that "when they operate as sources of legal rights and obligations, the common requirements for validity of unilateral acts are essentially the same as for validity of treaties".[39] According to this view, the requirements for validity would therefore be as follows: the unilateral act must have been issued by a person with the capacity to formulate it; its content must be materially possible and not prohibited by a peremptory norm of general international law (*jus cogens*); and the intention expressed by the author of the unilateral act must correspond to the author's true intention and must not be affected by defects or invalidating factors. As to the form that unilateral acts should take, it is assumed that there is considerable freedom here; however, as the same body of opinion points out, there are some unilateral acts for which formal notification is required in order to publicize them in a timely

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[36] G. Venturini, "La portée et les effets juridiques des attitudes et des actes uniláteraux des États", *Recueil des Cours*, vol. 112 (1964), p. 420, although this author acknowledges that the distinction between invalidity and voidability has not been fully accepted in the literature. In fact, in the end the Vienna Convention on the Law of Treaties made no such distinction.

[37] J. Verzijl, "La validité et la nullité des actes juridiques internationaux", *Revue de Droit International (R.D.I.)*, vol. 15 (1935), p. 298, who cites as examples the absolute non-existence of an act, as opposed to invalidity as such; invalidity and voidability; absolute invalidity and relative invalidity; invalidity that can be declared by the courts *proprio motu* versus invalidity that must be recognized because the parties so decide; total invalidity and partial invalidity; invalidity that can be remedied versus invalidity that cannot; and invalidity with *ex nunc* and *ex tunc* effects.

[38] Ibid., p. 306.

[39] V. D. Degan, "Unilateral Act as a Source of Particular International Law", *Finnish Yearbook of International Law*, vol. 5 (1994), pp. 187 and 188. Practically the same view was upheld by K. Skubiszewsky, "Unilateral Acts of States", in Bedjaoui, M. (ed.), *International Law: Achievements and Prospects* (Dordrecht, Boston, London, 1991), p. 230, where the author states the following: "Any unilateral act must express the true intention of its author. Hence unilateral acts obtained by error, fraud or corruption of a State representative are voidable, and those which result from coercion (whether of the State representative or the State itself) are null and void. In this respect there exists much analogy between invalidity of treaties and unilateral acts".

fashion and give them legal security[40] (as is the case, for example, in the law of the sea with respect to the delineation of baselines and the delimitation of the respective zones).[41] As stated in previous reports and again at the beginning of this report, unilateral acts of this kind are linked to a treaty regime and are therefore governed by the specific treaty regime in which they are subsumed.

17. The grounds for invalidity that will be discussed here will be divided into the following three categories: (a) invalidity of a unilateral act on the ground that the representative lacks competence; (b) grounds for invalidity related to the expression of consent; and (c) invalidity of a unilateral act on the ground that it is contrary to a norm of *jus cogens*.

(a) Invalidity of a unilateral act on the ground that the representative lacks competence

18. As will be discussed in detail in part two, from international practice it can be inferred that, in addition to persons representing the State at the highest level, there are others who, by virtue of their functions and in a specific context, can act and enter into commitments on the State's behalf in its international relations, by formulating legally binding unilateral acts.

19. In accordance with the majority of legal experts and international practice, it may be assumed that those persons that represent the State at the highest level and therefore have the capacity to express the consent of the State in a treaty context also have the capacity to bind their State by means of unilateral acts. This is an extrapolation — with all the risks that analogies entail — of article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties. However, the international plane presents many complexities in this regard, of which we will mention one in particular: the possibility that other persons, some of whom are mentioned in the article in question (diplomatic agents or representatives to an international conference) and some of whom are not (persons who produce appropriate full powers), may have some capacity to bind the State they represent. This question was discussed previously with regard to persons qualified to act and to enter into commitments on behalf of the State.

20. What would happen if a State representative were to overstep his or her authority? This question is more directly related to the approach widely taken in internal law. The respective constitutional texts tend to provide a fairly exhaustive list of which national bodies can participate — and how — in expressing the

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[40] The International Court of Justice took a very strict approach in this respect in its recent decision in the dispute between the Democratic Republic of the Congo and Rwanda, para. 41, in which, referring specifically to the withdrawal of reservations, it stated the following: "Thus a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State's domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other States parties to the treaty in question".

[41] This is because of the unique nature of such acts, which are governed by treaties regarding the law of the sea. In this respect, as stated by E. Ruiloba García, in *Circunstancias especiales y equidad en la delimitación de los espacios marítimos* (Zaragoza, 2001), p. 34, "maritime delimitation is heterogeneous in nature, insofar as each case of delimitation has its own specific characteristics that make it unique and unrepeatable, like a snowflake".

consent of the State to be bound where international treaties are concerned, but not where unilateral acts are concerned.[42]

21. The Vienna Convention's provisions on the possible factors affecting the competence of the State representative to bind the State by means of treaties reflect a cautious approach based on the premise that such provisions are in the nature of exceptions and, therefore, on the principle of preserving and maintaining the treaty relationship. We believe that the same principle must be given primacy where unilateral acts are concerned; failure to do so would generate distrust in international relations and, as a consequence, jeopardize the use of unilateral acts as a way for States to act and commit themselves at that level. Furthermore, the situation of uncertainty and failure to honour promises which invocation of one of the grounds for invalidity currently being discussed could create would tip the scales in favour of validating, where possible, a unilateral act that has this defect. In order to clarify this issue, we believe it would be very useful to discuss again, at least briefly, two of the provisions of part V of the 1969 Vienna Convention, in order to verify whether or not these provisions could be applicable to the subject that concerns us.

(i) Article 46 of the 1969 Vienna Convention

22. As is well known, the first paragraph of article 46, entitled "Provisions of internal law regarding competence to conclude treaties", states the following: "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance".[43]

23. The negative wording of this provision reflects the fact that it concerns an exception; in principle, no State may invoke a provision of its internal law regarding competence to conclude treaties with a view to declaring an agreement null and

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[42] In this sense, we fully share the view expressed by Remiro Brotóns to the effect that "the constitutional enshrinement of parliamentary participation in treaties reflects a *static* vision of the ways in which international rules and obligations are produced. Treaties are by no means the only way. Autonomous unilateral acts of international relevance (recognition, promise, protest, reprisal) come to mind ... This is an area in which the Chambers — and sometimes even the Government, as a collegiate body — does not participate, even though it is illogical that something may be *promised* without the Chambers, but may be *undertaken* only with them by means of a treaty. In order clarify this *grey area* we need a *new vision* that offers solutions *other than* participation by the Chambers, in line with the fluidity of these commitments and the way they are incorporated into positive law. At the moment, only a few State systems have dared to venture into this territory, and the Spanish system is not one of them. The Constitutions of Denmark (art. 19.3) and Sweden (chap. X, arts. 2, 6-8; XIII, art. 2) can be cited as examples of an innovative model for full participation — but not strict control — by the Chambers in the most significant foreign policy decisions, whatever form they may take. These Constitutions provide for the establishment of smaller representative bodies, ready to meet at a moment's notice, which gather confidential information on developments in international relations and are consulted by the Government *before* important decisions are adopted". See A. Remiro Brotóns, *Derecho Internacional Público. 2. Derecho de los Tratados* (Madrid, 1987), p. 116.

[43] The explanation of what is understood by manifest violation is found in the second paragraph of the same article, which states that a violation is manifest "if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith". In this respect, see T. Meron, "Article 46 of the Vienna Convention on the Law of Treaties (*Ultra vires Treaties*): Some Recent Cases", *B.Y.B.I.L.*, vol. 49 (1978), pp. 175-199.

void. If this is true for treaties, the question arises as to whether this solution can be extrapolated to unilateral acts. With regard to the view expressed by the Permanent Court of International Justice in 1932 in the case of the *Treatment of Polish nationals in Danzig*,[44] it should be pointed out that the 1969 Convention adopted a more nuanced position in this respect. This may be because the International Law Commission, in view of historical precedents, took the realistic view[45] that some room should be left for certain particularly drastic cases,[46] such as those described in the articles to which we are referring in this section. In principle, this is based on a concern for preserving the validity of treaties and considering the situations referred to below as exceptions.

24. We need to discuss whether it is possible to invoke, as a ground for invalidating a unilateral act, the fact that the act was formulated in manifest violation of a provision of internal law that is of fundamental importance and concerns competence to conclude treaties. As pointed out above, the main problem here is that constitutional texts tend to specify the mechanisms and bodies that can participate in expressing the consent of the State where international treaties are concerned, but not where unilateral acts are concerned.

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[44] Permanent Court of International Justice, Series A./B., No. 44, p. 24, which reads as follows: "It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig".

[45] However, see the *Yearbook of the International Law Commission, 1966*, vol. II, *Reports of the Commission to the General Assembly*, 1966, p. 241, para. 7, which refers to this question, pointing out that "State practice furnishes examples of claims that treaties were invalid on constitutional grounds, but in none of them was that claim admitted by the other party to the dispute. Moreover, in three instances — the admission of Luxembourg to the League, the Politis incident and the membership of Argentina — the League of Nations seems to have acted upon the principle that a consent given on the international plane by an ostensibly competent State agent is not invalidated by the subsequent disclosure that the agent lacked constitutional authority to commit his State".

[46] A historic example of a unilateral act that was contrary to important constitutional rules, making its performance impossible, was the case of *George Croft* (Portugal v. United Kingdom), which was resolved on 7 February 1856. This case is reproduced in Coussirat-Coustére, V. and Eisemann, P. M., *Répertoire de la Jurisprudence Arbitrale Internationale*, vol. I, 1794-1918 (Dordrecht, Boston, London, 1989), p. 46, as follows: "If at any time the Portuguese Government, or its legal representative, had given to the British Government, in its usual forms of international intercourse, a promise that Mr. Croft should be assisted in obtaining the satisfaction of his claims, or that he was to be held harmless in regard thereto, that there could be no doubt that a perfectly valid title to satisfaction or indemnification from the Portuguese state would arise therefrom, since those are constitutional forms recognized by the law of nations, in which the international obligations of one country towards another are contracted. But the same cannot be asserted of a case where nothing else is apparent but an order which the government issued to its own authorities in favour of a foreign subject, without any promise having been previously made to that subject's government. If in such a case the order meets with constitutional obstacles, which render its execution impossible, no claim founded on international law can be made upon the government for damages on account of its order not having been carried into execution".

25. Article 46 of the Vienna Convention lays down three conditions for invoking the invalidity of a treaty: (a) the violation invoked must concern a rule of internal law of fundamental importance, meaning the Constitution and laws that have constitutional force and are in effect at the time (for this requirement to apply to unilateral acts, these laws would have to be in force both when the unilateral act in question was formulated and when the alleged invalidity is claimed); (b) the rule in question must concern competence to conclude treaties, a phrase which, if interpreted in its strictest sense, could, in our view, be extrapolated to unilateral acts, with the qualifications discussed below; and (c) the violation of internal law must be manifest, meaning that it must be objectively evident to any State dealing with the matter normally and in good faith.[47]

26. In his second report, the Special Rapporteur proposed an article which, following fairly closely the provisions of the Vienna Convention, set out in seven paragraphs the possible grounds for invalidating a unilateral act. The draft article read as follows:

"**Article 7**

Invalidity of unilateral acts

A State may invoke the invalidity of a unilateral act:

(...)

7. If the expression of a State's consent to be bound by a unilateral act has been in clear violation of a norm of fundamental importance to its domestic law".[48]

27. This draft article was less restrictive than article 46 of the Vienna Convention, since it referred to a clear violation of a norm of fundamental importance, but did not specifically indicate that the norm should concern the competence to express consent (in this instance with respect to unilateral acts).[49]

28. The corresponding draft article presented in the third report the following year, article 5 (paragraph 8), was even more laconic, and established the following as grounds for invalidity: "If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it".[50] This wording elicited various reactions from the members of the Commission, as set out in the report on the work of its fifty-second session: "In the view of some members, the paragraph, as drafted, might be interpreted as giving priority to domestic law over commitments under international law, and this would be unacceptable. Some members also wondered whether the paragraph might not lend itself to a situation

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[47] T. O. Elias, "The Validity of Treaties", *Recueil des Cours*, vol. 134 (1971), pp. 357 and 358; see also *Yearbook ... 1966*, vol. II, p. 242, para. 11. The Commission concluded that it would be impracticable and inadvisable to try to specify in advance the cases in which a violation of internal law may be held to be "manifest", since the question must depend to a large extent on the particular circumstances of each case.

[48] A/CN.4/500/Add.1, para. 109.

[49] During discussions at the fifty-first session of the Commission, members expressed divergent views with respect to this article; some members maintained that this norm should follow article 46 of the Vienna Convention more closely, while others believed that the provision should reflect the flexibility inherent in unilateral acts. See A/54/10, para. 559.

[50] A/CN.4/505, para. 167.

whereby a State would utilize the provisions of its own national law to evade international obligations which it had assumed by a valid unilateral act".[51] Furthermore, one of the suggestions made in the course of these discussions was that this paragraph should bring out the fact that, at the time the act was formulated, there had been a breach of an internal norm of fundamental importance to domestic or constitutional law concerning the capacity to assume international obligations or to formulate legal acts at the international level.[52] If that proposal was not accepted, the very general nature of the draft article might suggest that any violation of a norm of domestic law, albeit one of substantial importance, could cause the unilateral act to be declared invalid, with the risks that that entailed.

29. Our inclination, which closely mirrors the arguments raised in Vienna and reflected in the 1969 Convention, is to take a restrictive approach to the grounds for invalidity in general and the one mentioned in the preceding paragraph in particular. In the interest of legal security, State representatives must be cautious in undertaking international commitments and, by extension, unilateral acts. Similarly, there is always the possibility of subsequently confirming the act in question. This solution not only avoids the drastic step of declaring an act invalid, but also puts the State in a much better position with respect to the undertaking of commitments and the honouring of promises.[53]

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[51] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 602.

[52] Ibid., para. 603.

[53] An interesting case in this regard was resolved by the Constitutional Court of Guatemala in its ruling of 3 November 1992, which affirmed the validity of a series of actions undertaken by the President of the Republic, Jorge Serrano Elías, by virtue of which he had recognized Belize and established diplomatic relations with it. The historic confrontation between Belize and Guatemala gave rise to article 19.1 of the transitory provisions of the 1985 Constitution of Guatemala, which states: "The Executive is empowered to take steps aimed at resolving the status of Guatemala's rights with respect to Belize, in line with its national interests. Any final agreement must be submitted by the Congress of the Republic to the popular consultation procedure established under article 173 of the Constitution". The issue at stake was whether the recognition of Belize by Guatemala should be considered a "final agreement" and, if so, whether the manifestations and consequences of the President's actions should be considered invalid. The majority opinion of the judges who participated in the issuing of this ruling of the Constitutional Court was that the act of recognition was a result of the changes this dispute had undergone as a result of the independence of this territory from Great Britain, without it being regarded as final step, in the sense and with the effects implied by the Constitution. Nevertheless, a different position was taken in the "reasoned dissent" of the President of the Court and two judges; following González Vega, who presented the same solution maintained by this minority, in the absence of participation by the Congress of the Republic and the people, the act of recognizing Belize did not represent the decision of the State, and therefore could produce no legal effect or be executed. That author therefore concluded the following: "Here is the clear consequence upheld by the minority in the Constitutional Court: the invalidity of the act of recognition, and implicitly its revocability, since it was issued by an organ without competence under the Guatemalan Constitution". There are perhaps many factors that led the Constitutional Court to adopt its decision, such as the changes on the international scene, and the desire to avoid casting doubt on the Guatemalan position because of an act carried out by its highest representative. In this regard, see A.J. González Vega, "El reconocimiento de Belice ante la Corte de Constitucionalidad de Guatemala: la sentencia de 3 de noviembre de 1992", *R.E.D.I.*, vol. 45 (1993), pp. 580-585. Another case similar to the previous one was considered in the eight report (A/CN.4/557, paras. 13-35) and concerned a 1952 note from the Minister for Foreign Affairs of Colombia on the "Los Monjes" group of islands.

30. In accordance with the foregoing, the following draft guiding principle on compliance of the unilateral act with the domestic legal order could be formulated:

"**Invalidity of a unilateral act that conflicts with a norm of fundamental importance to the domestic law of the State formulating it**

A State that has formulated a unilateral act may not invoke as grounds for invalidity the fact that the act conflicts with its domestic law, unless it conflicts with a norm of fundamental importance to its domestic law and the contradiction is manifest".

(ii) Specific restrictions on authority to express the consent of a State

31. Article 47 of the Vienna Convention, entitled "Specific restrictions on authority to express the consent of a State", is directly related to the topic of our discussion. According to that article, "If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent".

32. This rule is even more restrictive than article 46, discussed above. Nahlik's firm opinion in relation to both rules is that "practical cases in which either of the two articles concerned could be invoked will be extremely rare".[54] However, the application of the concept contained in article 47 cannot be extrapolated in toto to unilateral acts, given the aforementioned special features of these acts, which stem, principally, from the very means by which they are formulated. In contrast with international treaties, wherein State representatives would be able to inform the representatives of other States of any restrictions on the expression of consent, the very essence of a unilateral act, in respect of which there are no other negotiating parties, renders the aforementioned provision meaningless. In fact, this was not among the grounds for invalidity mentioned in the second and third reports, although those reports did refer to one of the initial provisions of the draft articles: the one concerning the possibility of subsequent confirmation of a unilateral act, which was discussed earlier.

33. Two aspects were added to the similar provision in the Vienna Convention: the reference to the act of committing the State on the international plane (an essential aspect of unilateral acts, even though it could also be considered applicable to treaty law), and the provision on compulsory confirmation.

34. On this basis, the following draft guiding principle is presented, on the understanding that it might not be necessary, as another guiding principle on the confirmation or validation of a unilateral act has already been formulated and has been submitted for the consideration of the Working Group:

"**Invalidity of an act formulated by a person not qualified to do so**

A unilateral act formulated by a person not authorized or qualified to do so may be declared invalid, without prejudice to the possibility that the State from which the act was issued may confirm it in accordance with guiding principle 4".

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[54] S. E. Nahlik, "The Grounds of Invalidity and Termination of Treaties", *American Journal of International Law (AJIL)*, vol. 65 (1971), p. 741.

(b) Grounds for invalidity related to the expression of consent

35. All the possible grounds for invalidity studied in this section share the common denominator of flawed consent to be bound by a unilateral act. The 1969 Vienna Convention again serves as a reference point. Three of these grounds (error, fraud and coercion) are rooted in the Roman-law tradition and were introduced into the Convention for basically two reasons: because they served as a type of safety valve in case any of these circumstances arose, although this rarely happens, and because their inclusion would obviate any argument that the Convention's provisions on grounds for invalidity were not exhaustive, thereby preventing States from seeking other possible grounds for invalidity. We will now look at each of them.

(i) Error

36. In its 1966 report to the General Assembly, which contained the draft articles on the law of treaties and commentaries thereon, the Commission stressed that "the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent. Almost all the recorded instances concern geographical errors, and most of them concern errors in maps".[55] If this is true with respect to treaties, it should also be true with respect to unilateral acts.

37. There have been very few cases, in either international practice or existing case law, in which error has been cited as a ground justifying a declaration of invalidity. There are, however, some illustrative cases. For example, in the *Legal status of Eastern Greenland* case, Judge Anzilotti, in his dissenting opinion, stated that "A question of a totally different kind is whether the declaration of the Norwegian Minister for Foreign Affairs was vitiated, owing to a mistake on a material point, i.e. because it was made in ignorance of the fact that the extension of Danish sovereignty would involve a corresponding extension of the monopoly and of the régime of exclusion ... My own opinion is that there was no mistake at all, and that the Danish Government's silence on the so-called monopoly question, and the absence of any observation or reservation in regard to it in M. Ihlen's reply, are easily accounted for by the character of this overture, which was made with a future settlement in view. But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. *If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a government could be ignorant of the legitimate consequences following upon an extension of sovereignty*; I would add that, of all the governments in the world, that of Norway was the least likely to be ignorant of the Danish methods of administration in Greenland, or of the part played therein by the monopoly system and the régime of exclusion".[56]

38. It is generally recognized that, in order to vitiate the consent of a State in a treaty, an error must relate to an issue that forms an essential basis of the State's consent to be bound by the treaty; we believe that this same solution should be applied, mutatis mutandis, to unilateral acts of States.[57]

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[55] *Yearbook ... 1966*, vol. II, p. 243.

[56] Italics added by the Special Rapporteur; see Permanent Court of International Justice, Series A./B., No. 53, p. 92.

[57] As highlighted by A. Oraison, in *L'erreur dans les traites* (Paris, 1972), p. 39.

39. In his second report to the Commission, the Special Rapporteur proposed a provision that was almost identical to the provision of the Vienna Convention concerning error (article 48), although it condensed into one paragraph the basic features that such an error must have, as follows:

> "**A State may invoke the invalidity of a unilateral act:**
>
> **1. If the expression of the State's consent to formulate the act was based on an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error".**[58]

40. Various opinions were expressed on the matter within the Commission. For example, it was said that the wording should be further disassociated from the Vienna Convention, taking into account the difference between unilateral acts and international treaties;[59] it was also suggested that the word "consent" should not be used because of its treaty connotations.[60] This suggestion was retained in the third report, which kept the entire draft article unchanged except the opening phrase, which read, "If the act was formulated on the basis", instead of the phrasing previously used ("If the expression of the State's consent to formulate the act was based").[61]

41. In reality, we believe that error, as a circumstance that can lead to the invalidity of a unilateral act, must have been an essential determinant of the State's conduct. Moreover, the requirement of good faith — directly linked to the fact that the State claiming invalidity must not have contributed to the error by its own conduct — serves to prevent possible conduct whose ultimate aim is to release the State in question from commitments undertaken in the international sphere.

42. Error must be claimed by the State that formulated the unilateral act and committed the error, although a hypothetical situation could arise in which a third State that is the beneficiary of the unilateral act discovers, in view of the circumstances of the case, that there has been an error and so informs the author State. In an even more unusual case, it could also transpire that the error was caused by the fraudulent conduct of a third party, which would give rise to two possible causes of invalidity and would void the unilateral act in question, unless the circumstances of the case and the will of the State having formulated the act make it advisable that the act should remain in effect, through its confirmation.

43. The first paragraph of draft guiding principle 7, which is reproduced below, addresses this potential cause of invalidity; the remaining paragraphs on grounds for invalidity will be cited further on, after the commentary relating to each of them:

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[58] A/CN.4/500/Add.1, para. 109, article 7, para. 1.

[59] The view was expressed that an error of fact committed by a State when formulating a declaration should be easier to correct than an error related to an international treaty, given the flexibility and speed with which unilateral acts are usually formulated, as opposed to treaties. See A/54/10, para. 555.

[60] A/55/10, para. 593.

[61] A/CN.4/505, para. 167.

"**Invalidity of unilateral acts**

1. (a) A State that is the author of a unilateral act may not invoke error as grounds for declaring the act invalid, unless the act was formulated on the basis of an error of fact or a situation that was assumed by the State to exist at the time when the act was formulated and that fact or that situation formed an essential basis of its consent to be bound by the unilateral act.

(b) The foregoing shall not apply if the author State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of the possibility of such an error".[62]

(ii) Fraud

44. In accordance with article 49 of the Vienna Convention, "If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty". We should therefore consider whether this cause of invalidity of an international treaty could be applied, mutatis mutandis, to a unilateral act. In Sicault's view, both fraud[63] and error are causes of invalidity that are fully applicable to unilateral acts. The reference to both causes is probably due to the fine line between them, which has been illustrated on several occasions in the legal literature.[64]

45. If this cause of invalidity is accepted in the case of unilateral acts, it should be subject to the same conditions required in order for fraud to be taken into consideration in a treaty context. Remiro Brotóns highlights three elements of the conduct of a third party that must be present in order for the conduct to be qualified as fraudulent and for the act whose formulation was induced to be declared invalid: (a) a material element, referred to as fraudulent conduct, which, in the Commission's view, encompasses "any false statements, misrepresentations or other deceitful proceedings"; (b) a psychological element, meaning the will or intention to mislead (in the context of unilateral acts, the will to induce the State formulating the act to implement the provisions thereof, regardless of their nature); and (c) a result, achieved by fraudulent means. In this connection, it is said that the fraud must be of an essential nature.[65]

46. With regard to unilateral acts, the proposal submitted to the Commission in the second report appears in paragraph 2 of what was then draft article 7, according to which, "If a State has been induced to formulate an act by the fraudulent conduct of

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[62] To allow for the invocation of error by States other than the State that formulated the unilateral act, the following wording is submitted to the Commission for its consideration: "Error may be invoked as grounds for declaring a unilateral act invalid if the act was formulated on the basis of an error of fact or a situation that was assumed by the State to exist at the time when the act was formulated and that fact or that situation formed an essential basis of its consent to be bound by the unilateral act".

[63] J.-D. Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", *Revue Générale de Droit International Public (R.G.D.I.P.),* vol. 83 (1979), p. 667: "it must be admitted that if the author of a unilateral undertaking has been induced to enter into that undertaking by the fraudulent conduct of another subject of public international law, it may invoke the fraud as invalidating its consent to be bound by the undertaking".

[64] A. Oraison, "Le dol dans la conclusion des traités", *R.G.D.I.P.*, vol. 75 (1971), p. 622.

[65] A. Remiro Brotóns, op. cit., p. 435.

another State", it may invoke the invalidity of the act.[66] The report went on to state that "Fraud can even occur through omission, as when a State which has knowledge of certain realities does not convey it, thus inducing another State to formulate a legal act".[67] However, this last point elicited various criticisms from several members of the Commission, who took the view that that interpretation might encroach on "certain accepted ways whereby States led their foreign policy and convinced other States to join in that policy".[68] We will have to rely on interpretation to draw a distinction between situations in which fraud is present and those in which it is not.

47. The same draft guiding principle on grounds for invalidity contains a second paragraph, which reads as follows:

(continued)

"**2. Fraud may be invoked as grounds for declaring a unilateral act invalid if the author State was induced to formulate the act by the fraudulent conduct of another State**".

(iii) Corruption of a representative

48. Although this cause of invalidity was a late addition to the draft articles that became the Vienna Convention, because it was originally thought to be subsumed under the concept of fraud, a decision was taken to include it in the text as article 50, which reads as follows: "If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty". Of course, the strength of the term "corruption" makes it necessary to define the concept precisely. The customary decorations and hospitality which are a normal part of diplomatic practice would not be regarded as corruption; something extra would be required.[69] The lack of precedents may be due to the fact that States are reluctant to admit that their representatives are responsible for giving this defective form of consent.[70]

49. The role played by this potential cause of invalidity in the context of unilateral acts could be almost identical to the role it plays in the treaty context; an analysis of the way in which that cause was described in the second report revealed certain limitations, which were subsequently removed in the third report. The original draft text (article 7, paragraph 3) read as follows:

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[66] A/CN.4/500/Add.1, para. 109, and draft article 5, para. 2, of the third report (A/CN.4/505), para. 167, which is identical.

[67] A/CN.4/500/Add.1, para. 136.

[68] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 555.

[69] For a definition of the term "corruption" see *Yearbook ... 1966*, p. 245, para. 4, which specifies that "only acts calculated to exercise a substantial influence on the disposition of the representative to conclude the treaty may be invoked as invalidating the expression of consent which he has purported to give on behalf of his State", not "a small courtesy or favour" that may be shown to him in connection with the conclusion of the treaty.

[70] As I. Sinclair states in *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, 1984), p. 175: "There is no doubt a practical safeguard in that States will be reluctant to admit that their own representatives have been corrupted".

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

(...) 3. If the expression of a State's consent to be bound by a unilateral act has been procured through the corruption of its representative directly or indirectly by another State".[71]

50. The phrase "If the expression of a State's consent to be bound" limits the scope of application of the draft article, which was further refined in the third report to read as follows: "If the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State".[72] The first part of the provision contains the amendment; it now reads "If the act has been formulated", and the term "representative" has been replaced with the phrase "person formulating it", which, while more general, introduces a greater degree of uncertainty.

51. A cause of this nature is certainly necessary and useful, given that the realities of international relations may give rise to such acts. Some members of the Commission expressed their support for its inclusion because of the need to combat that situation universally, as underlined by the Inter-American Convention against Corruption, adopted in Caracas on 29 March 1996,[73] and the Criminal Law Convention on Corruption, adopted by the Council of Europe on 27 January 1999, and its Additional Protocol of 2003.[74] Another interesting development, described in the Commission's 2000 report to the General Assembly, was the question raised as to whether it was necessary to narrow down the possibility of corruption to "direct or indirect action by another State". This point highlighted something that has become an undeniable fact of international life today, given the enormous power that certain entities can acquire; namely, that "the possibility could not be ruled out that the person formulating the unilateral act might be corrupted by another person or by an enterprise".[75]

52. In line with the foregoing, paragraph 3 of the draft guiding principle would read as follows:

(continued)

"**3. Corruption of the representative of the State may be invoked as grounds for declaring a unilateral act invalid if the act was formulated owing to the corruption of the person formulating it**".

(iv) Coercion

53. Together with error and fraud, and bearing in mind the nuances discussed below, coercion is the third cause of invalidity provided for in the 1969 Vienna Convention, and one which finds its origin in the strong tradition of Roman law. The Vienna Convention covers coercion of two types: coercion of a representative of a State (article 51) and coercion of the State itself by the threat or use of force (article 52). Both types seem to be fully applicable to unilateral acts of States.

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[71] A/CN.4/500/Add.1, para. 109.

[72] A/CN.4/505, para. 167.

[73] The text of the Convention and the status of ratifications can be found at www.oas.org.

[74] The text and related information can be found at http://conventions.coe.int.

[75] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 594.

a. Coercion of a representative of a State

54. In practice, there have been a number of cases in which coercion of a State representative, sometimes to the point where the latter fears for his or her life, has led to the conclusion of agreements and even to the formulation of acts which, without that coercion, would not have existed.[76] The notion of coercion, which must be used against a representative (as an individual, not as an organ of the State), encompasses a wide variety of situations, including, as pointed out by the Commission in its commentary on the draft articles, "any form of constraint or threat" affecting the representative's physical integrity, freedom, career, property or social or family situation.

55. In the treaty context, one of the principal characteristics distinguishing coercion from corruption is the fact that the former can be employed by anyone, while the latter is only recognized when it is employed by another negotiating State. With regard to unilateral acts, there is value in incorporating both these elements into the definition of the two aforementioned concepts, since there is nothing to preclude the possibility that corruption may be imputable to individuals or entities which are not States as such, but whose ability to exert pressure may corrupt a representative by inducing him or her to undertake a commitment which, in the absence of such corruption, would not have been made.

56. It might be unwise to impose excessive restrictions on this cause of invalidity, such as those that were apparent in draft article 7 of the second report, which provided that the invalidity of a unilateral act could be invoked "If the expression of a State's consent to be bound by a unilateral act has been procured by the coercion of its representative through acts or threats directed against him".[77] The expression "directed against him" could be interpreted to mean that such coercion — in Spanish, "*coacción*" is a more appropriate term than "*coerción*", since the latter implies an element of physical force that is not necessarily present — could also be directed against the representative's immediate personal interests (such as his or her property or family) and thereby produce the desired result.

57. The following year's proposal included a number of amendments similar to those discussed in relation to corruption, but the rest of the aforementioned elements were generally retained; the proposal read as follows: "If the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him".[78] The particular conclusiveness of this cause of invalidity was noted by the Commission, which took the view that "the use of coercion on the person formulating the act was a special case, since, in those circumstances, the person involved was not expressing the will of the State he was supposed to represent, but that of the State using coercion. Without a will, there was no legal act and, if there was no act, there was nothing to be invalidated. Whereas

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[76] An interesting example can be found in A. Remiro Brotóns, op.cit., p. 438. "Once there, having been taken prisoner on 20 April, he was threatened with the death penalty for having committed high treason against his father, Charles IV, unless he abdicated, which he did on 6 May. One day earlier, in exchange for monetary compensation, Charles IV had ceded his rights to Napoleon, who, in turn, ceded them to his brother Joseph. Those acts were considered invalid on grounds of fraud and violence by the Cádiz Cortes, which subsequently, in 1811, issued a Decree proclaiming the invalidity of any undertaking made by Ferdinand VII while he was imprisoned at Valencey".

[77] A/CN.4/500/Add.1, para. 109.

[78] A/CN.4/505, para. 167.

other paragraphs were cases of *negotium nullum*, the paragraph in question was a case of *non negotium*".[79] Accordingly, this situation gives rise to initial invalidity, since the act in question never existed, having been invalid from the outset.

58. The relevant paragraph of the draft guiding principle on grounds for invalidity could read as follows:

(continued)

"**4. Coercion of the person who formulated a unilateral act may be invoked as grounds for declaring its invalidity if that person formulated it as a result of acts or threats directed against him or her**".

b. Coercion of a State by the threat or use of force

59. This is the most important and most modern cause of invalidity of treaties, and its genesis and development are linked to the prohibition of the threat or use of force in international relations and the scope of that prohibition, which has put an end to one of the traditional methods of acquiring territory (annexation), a practice that was usually sanctioned by means of an international treaty. However, a number of issues directly related to this cause of invalidity must be addressed. The first relates to the type of force referred to in article 52 of the Vienna Convention; the Declaration that was incorporated into the Final Act of the Conference, which reflects the position taken by a large group of States (particularly those belonging to the group of developing countries), demonstrates the gulf between these countries (which favoured a broad interpretation of the concept of force) and the restrictive position that ultimately triumphed.[80] However, a question inevitably arises as to whether the same concept of force used in 1969 should be retained in the current international context or whether, with a view also to extrapolating the concept to future unilateral acts, a broader interpretation should be considered.

60. First, the second report more or less reproduced — in almost identical terms, except for the heading — the provisions of the Vienna Convention; it therefore identified as a cause of invalidity the situation produced "If the formulation of the unilateral 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".[81]

61. In the course of the Commission's deliberations, a suggestion was made to the effect that an additional cause of invalidity should be included, namely unilateral acts formulated in violation of a United Nations Security Council resolution adopted under Chapter VII of the Charter, for example an act of recognition formulated in violation of a Security Council resolution which called on Members of the Organization not to recognize a particular entity as a State.[82] Echoing this suggestion, the third report proposed that a unilateral act could be regarded as

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[79] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 595.

[80] A/CONF.39/11/Add.2. As S. E. Nahlik points out in loc. cit., p. 744, the Declaration was the result of a compromise reached between the two positions, which limited article 52 of the Convention to such cases as would fall under the prohibition already found in the principles contained in the Charter of the United Nations.

[81] A/CN.4/500/Add.1, para. 109.

[82] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 560. This suggestion was made by Mr. Dugard (A/CN.4/SR.2595) and also by the representative of Poland in the Sixth Committee (A/C.6/54/SR.25).

invalid "If, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council",[83] with no further qualification.

62. The debates that have taken place within the Commission itself as to whether or not to include this paragraph have been difficult: while some members have expressed support for the proposal, others have proposed that the scope of the paragraph should be more limited, and still others have called for its deletion. There is no doubt that cases may arise in which a unilateral act might conflict with a Security Council decision adopted after the act was formulated; this would not necessarily lead to invalidation of the unilateral act, but instead may simply lead to its suspension until such time as, to cite an example, a Security Council sanction is lifted.[84] It might be appropriate to ask whether such a situation — relating to Security Council decisions — is covered by the provisions on peremptory norms, which are binding for all States. The basis for this could be an interpretation of Article 2, paragraph 6, and Articles 25 and 103 of the Charter of the United Nations;[85] accordingly, unilateral acts formulated in violation of such a norm would not be valid, and the operation of those formulated prior to the adoption of that norm would be suspended until such time as the decision was no longer in effect. The Commission should carefully consider and decide whether such a ground for invalidity should be included.

63. A further issue relating directly to the use of force and to the current normative framework concerns recognition and the role that it plays. Here we come into conflict with those who subscribe to the doctrine of "limits on freedom of recognition". One of the most relevant of those limits, potentially falling within the scope of the subject that concerns us here, is that relating to the non-recognition of States founded through intervention or the use of force.[86]

64. Various cases are cited in repertoires of practice, which refer to numerous circumstances relating to recognition, such as the *Fritz Jellinek and others v. Victor G. Lévy* case resolved by the Commercial Court of the Seine in its decision of 18 January 1940, in which the court refused to consider valid the expropriation of assets and other acts leading to the use of force by Germany against Czechoslovakia;[87] the Court of Paris, in its decision of 21 July 1953 concerning the

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[83] A/CN.4/505, para. 167.

[84] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10) para. 601.

[85] Assuming, of course, that interpretation of those articles is not strictly literal; for example, Article 103 of the Charter should provide for obligations undertaken not only through treaties but also through unilateral acts if it is to apply in such cases. The Article states that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". From this it could logically be inferred that any unilateral act conflicting with such a provision would have no effect. In that respect, Article 25 of the Charter, which establishes that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter", clearly defines the nature of those decisions. Moreover, if we limit our consideration to decisions relating to the maintenance of international peace and security, the Charter even provides for application with respect to non-Member States of the Organization — whose number today is negligible — under Article 2, paragraph 6, which states that "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".

[86] On this subject, see A. J. Rodríguez Carrión, *Lecciones de Derecho Internacional Público*, 5th ed. (Madrid, 2002), p. 92, for a discussion of those limits and various examples.

[87] The Court ruled that "the French courts cannot allow acts of violent dispossession carried out by the

case of *Administration des Domaines v. Dame Sorkin*, affirmed that no legal effects would follow from annexation or forced occupation,[88] as previously ruled by the Criminal Division of the Court of Cassation in its decision of 24 July 1946 (case of *Wagner and others*).[89] Similar rulings are found in many other case law decisions.[90] More recent cases include non-recognition of the annexation by Israel of the Golan Heights and the ensuing protests,[91] direct opposition to the creation of a Turkish Cypriot State[92] and the occupation of Kuwait by Iraq.[93]

65. However, that position has not always been consistent; situations can be somewhat ambiguous as regards recognition, as in the case of Manchukuo: many States members of the League of Nations maintained trade relations with that entity and gave a certain level of recognition to acts formulated by it, despite the condemnation issued by the League.[94] However, there have been a number of cases in which courts (usually national courts) have ruled against the recognition of certain territorial annexations, considering them invalid and therefore lacking legal effect,[95] particularly since the Second World War. To some extent this issue is

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German Reich against so-called 'non-Aryan' citizens, on that ground alone and without appropriate indemnification, to produce any effect within the territory of the Republic". See A. Ch. Kiss, *Répertoire de la pratique française en matière de Droit International Public* (1790-1958) (Paris), vol. I, p. 29.

[88] A. Ch. Kiss, op. cit., vol. I, p. 28: "Given the fact that Auschwitz, or more precisely, Osweicim, lies on Polish territory; it follows that the local law was Polish law, which de facto annexation or occupation by force could not invalidate."

[89] "Whereas the alleged declaration of annexation of Alsace by Germany, invoked as an argument, was nothing more than a unilateral act that could not modify legally the provisions of the treaty signed at Versailles on 28 June 1919 by the representatives of the German State"; see A. Ch. Kiss, op. cit., vol. I, p. 29.

[90] Op. cit., vol. I, pp. 30-34, recounts various similar decisions by French courts.

[91] That non-recognition was expressed in numerous spheres: by the United States of America, the Ministries of Foreign Affairs of States members of the European Community, the Governments of Arab States, the Security Council, the General Assembly and the annual World Health Assembly of the World Health Organization (WHO), among others (see *R.G.D.I.P.*, vol. 86 (1982), p. 598, and *B.Y.B.I.L.*, vol. 52 (1981), p. 516).

[92] When, on 15 November 1983, a Turkish Cypriot State in northern Cyprus was proclaimed, the Turkish Cypriot Assembly declared that "the two Peoples [Greek and Turkish] ... are destined to co-exist side by side in the island ... The Turkish Republic of Northern Cyprus ... will not unite with any other State ... [it] shall adhere to no other policy than non-alignment ... the proclamation of the Turkish Republic of Northern Cyprus will not hinder but facilitate ... the establishment of a federation". The declaration was recognized by Turkey, but categorically rejected by Greece, the United Kingdom, France, the Federal Republic of Germany, Italy, the United States of America, Canada, Australia, India, Japan, the Union of Soviet Socialist Republics and the States of the socialist bloc. The proclamation was condemned by the United Nations Security Council and by the Council of Europe; the former considered it as legally invalid and called for its withdrawal under Security Council resolution 541 (1983) (*R.G.D.I.P.*, vol. 88 (1984), p. 432).

[93] On 8 August 1990, the Spanish Office of Diplomatic Information issued the following communiqué: "The Government of Spain, in accordance with the Charter of the United Nations, considers unacceptable the acquisition of territories by force and therefore rejects and does not recognize the annexation of the State of Kuwait by the Republic of Iraq, proclaimed on this day by Baghdad" (*Actividades, Textos y Documentos de la Política Exterior Española* (1991), p. 53, and *R.E.D.I.*, vol. 43 (1991), p. 144).

[94] P. Guggenheim, loc. cit., p. 229.

[95] Many of these cases are cited by P. Guggenheim, loc. cit., p. 232, and are also recounted in *Annual Digest and Reports of Public International Law Cases*, (*AD*), *Years 1919-1942* (*supplementary volume*), case No. 123, decision of the Cantonal Court of Utrecht of

related directly to section (c) below, which concerns the presumed invalidity of a unilateral act that is contrary to a peremptory norm.

66. The following guiding principle could be formulated under principle 7, "Invalidity of unilateral acts":

(continued)

"**5. Any unilateral act formulated as a result of the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations is invalid**".

(c) Invalidity of a unilateral act on the ground that it is contrary to a norm of *jus cogens*.

67. The capacity to formulate unilateral acts is fundamentally limited by *jus cogens* norms,[96] since any unilateral act that conflicts with such norms is invalid, if we assume that the provisions of article 53 of the Vienna Convention on the Law of Treaties apply[97] in general, and again mutatis mutandis, to unilateral acts.

68. Leaving aside the various opinions as to what norms might have the status of *jus cogens*,[98] and the difficult debates that led ultimately to the inclusion of that

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8 September 1941; *AD, Years 1943-1945*, case No. 9, non-recognition by United States of annexation of Estonia, and cases Nos. 8 and 54, contained in the same volume, relating to recognition of the annexation by Germany of Austria; *AD, Years 1935-1937*, case No. 38 resolved on 11 May 1937 by the British Supreme Court.

[96] However, some authors are highly critical of the application to unilateral acts of tenets of treaty law relating to *jus cogens*. For example, P. Weil, in "Le droit international en quête de son identité. Cours général de droit international public" *Recueil des Cours*, vol. 237 (1992), p. 282, writes that "in short, we must cease referring to *jus cogens* in relation to unilateral acts or actions by States, and leave that theory to treaty law, where it should have remained".

[97] "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[98] Examples of these opinions can be found in L. Alexidze, "Legal Nature of *jus cogens* in Contemporary International Law", *Recueil des Cours*, vol. 172 (1981), pp. 219-270; J. A. Carrillo Salcedo, "Reflections on the Existence of a Hierarchy of Norms in International Law", *European Journal of International Law* (*E.J.I.L.*), vol. 8 (1997), pp. 583-595; R. Casado Raigón, *Notas sobre el jus cogens internacional* (Córdoba, 1991); R. Casado Raigón and E. M. Vázquez Gómez, "La impronta del *jus cogens* en el proyecto de artículos de la Comisión de Derecho Internacional sobre la responsabilidad del Estado por hechos internacionalmente ilícitos", in *Soberanía del Estado y Derecho Internacional. Homenaje al profesor Juan Antonio Carrillo Salcedo*, vol. I, (Sevilla, 2005), pp. 343-360; G. M. Danilenko, "International *Jus Cogens*: Issues of Law Making", *E.J.I.L.*, vol. 2 (1991), pp. 42-65; A. Fernández Tomás, "El *jus cogens* y las obligaciones derivadas de normas imperativas: entre el mito y la realidad", in *Soberanía del Estado y Derecho Internacional. Homenaje al profesor Juan Antonio Carrillo Salcedo*, vol. I, op. cit., pp. 619-638; G. Gaja, "*Jus cogens* Beyond the Vienna Convention", *Recueil des Cours* vol. 172 (1981), pp. 271-316; A. Gómez Robledo, "Le *jus cogens* international: sa genèse, sa nature, ses fonctions", *Recueil des Cours*, vol. 172 (1981), pp. 9-217; "El *jus cogens* internacional (estudio histórico crítico)" (Mexico City, 1982); C. Gutiérrez Espada, "Sobre las normas imperativas del Derecho Internacional", in *Pacis Artes. Obra Homenaje al profesor Julio Diego González Campos*, vol. I (Madrid, 2005), pp. 273-290; L. Hannikainen, "*Peremptory Norms* (*Jus Cogens*) *in International Law. Historical Development, Criteria, Present Status*" (Helsinki, 1988); E. P. Nicoloudis, "*La nullité de jus cogens et le développement contemporain du droit international public*" (Athens, 1974); Ch. Rozakis, "The Concept of *jus cogens* in the Law of Treaties" (Amsterdam, 1976); J. Sztucki, "*Jus cogens* and the Vienna Convention on the Law of Treaties" (Vienna, 1974); A. Verdross, "*Jus Dispositivum and Jus Cogens* in International

concept in the Vienna Convention,[99] we will now examine the relationship between the unilateral act and the fact that it may conflict with a *jus cogens* norm. In considering that question it should be borne in mind that, as pointed out by I. Brownlie, "the particular corollaries of the concept of *jus cogens* are still being explored".[100]

69. Peremptory norms "are a constraint on the capacity to formulate unilateral legal acts; this would include some norms deriving from the Charter of the United Nations and others contained in basic conventions, such as those relating to slavery and genocide, among many others".[101] Any unilateral act conflicting with such a norm would be considered invalid ab initio, it could therefore be expected to cause protests from the time of its formulation. However, practice in this regard is virtually non-existent.[102]

70. Following the same line of argument, it is relevant to highlight opinion No. 10 of 4 July 1992 issued by the Badinter Commission with reference to recognition of the Federal Republic of Yugoslavia (Serbia and Montenegro). Paragraph 4 of that text states that "while recognition is not a prerequisite for the foundation of a State and has only declarative value, it is nonetheless a discretionary act which other States may perform when they choose and in a manner of their own choosing, subject only to respect for the guiding norms of general international law, particularly those which prohibit the use of force in relations with other States or those which guarantee the rights of ethnic, religious or linguistic minorities".[103] It is interesting to note that the paragraph presents "guiding" or peremptory norms as limiting freedom of recognition, from which it is logical to infer that such norms apply to all unilateral acts, of which recognition is but one example, and perhaps the most controversial of all.[104] In that regard it is appropriate to recall the position that was adopted by virtually the entire international community with respect to the non-recognition of the South African bantustans[105] or the presence of South Africa in

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Law", *A.J.I.L.*, vol. 60 (1966), pp. 55-63; M. Virally, "Réflexions sur le *jus cogens*", pp. 5-29; *Annuaire Français de Droit International (A.F.D.I.)*, vol. XII (1966), pp. 5-29; J. H. H. Weiler and A. L. Paulus, "The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?", *E.J.I.L.*, vol. 8 (1997), pp. 546-565.

[99] A/CN.4/500/Add.1, para. 139.

[100] *Principles of Public International Law*, 6th ed. (Oxford, 2003), p. 490.

[101] A/CN.4/500/Add.1, para. 140.

[102] As pointed out by J. H. W. Verzijl in *International Law in Historical Perspective*, vol. VI (Leiden, 1973), pp. 76 and 77: "As concerns unilateral acts, I only cite here the cases of occupation of a part of the high seas, for example contiguous to the territorial sea; the annexation of foreign territory in the course of a war prior to the conclusion of a peace treaty; a declaration of contraband relative to objects and materials which are insusceptible of such a declaration; adherence or accession to an open convention contrary to the conditions upon which the admissibility of such an adherence or accession depends; the establishment of a so-called pacific blockade pretending to produce legal effects to the detriment of a third State, etc."

[103] The Spanish translation of opinion No. 10 is reproduced from J. M. Ortega Terol, *Textos y documentos sobre los desmembramientos de la Unión Soviética y de Yugoslavia* (Cuenca, 1996), p. 92. As highlighted by N. Navarro Batista in "La práctica comunitaria sobre reconocimiento de Estados: nuevas tendencias", *Revista de instituciones europeas*, vol. 22 (1995), p. 484, attention should be drawn to the "conditionality" to which the acts of recognition in question are subject in such cases. Hence the author affirms that "in reality, the efforts undertaken in the literature to underline the unconditional nature of acts of recognition seem to be less a reflection of State practice than a (laudable) attempt to restrict a reality that is considered rather unfortunate and too susceptible to political fickleness".

[104] J. Verhoeven, "La reconnaissance internationale: déclin ou renouveau?", *A.F.D.I.*, vol. XXXIX (1993), in particular pp. 32-39.

[105] The Minister for Foreign Affairs of the United Kingdom responded as follows: "The United Kingdom,

Namibia;[106] the policy of apartheid pursued in those territories and the obstacles to Namibia's independence were cited, respectively, as the grounds for non-recognition of situations conflicting with true peremptory norms.[107] States are increasingly voicing opposition to the adoption by other States of internal norms that conflict with certain non-derogable norms.[108]

71. In view of the above, a possible guiding principle, following on from the above-mentioned paragraphs, could be as follows:

(continued)

"**6. Any unilateral act which at the time of its formulation is contrary to (or conflicts with) a peremptory norm of general international law (*jus cogens*) is invalid**".

72. Having analysed the various possible grounds for invalidity that may be invoked with respect to a unilateral act, we must ask ourselves who would have the authority to declare the presumed invalidity of that act, and what possible channels might be established under international law — bearing in mind that we are in the territory of legal speculation — to give effect to such a declaration. This is a highly abstract area in which, if a third party (usually an international court of law or arbitration) could declare, ex officio or otherwise, the invalidity of a unilateral act, most of those ambiguities would disappear. However, it is clear that what would presumably be gained in terms of legal certainty would be lost in terms of the very essence of unilateral acts, which would be subject to a regime that was not accepted for inclusion even in the Vienna Convention on the Law of Treaties.

73. What does appear to be logical is that a State that formulates a unilateral act should normally be able to invoke its invalidity, with the caveat that special attention must be paid to good faith in this context; otherwise, any State wishing to eliminate commitments that it had undertaken previously through unilateral acts would declare those acts invalid ipso facto, thus creating a situation of considerable uncertainty and raising numerous doubts as to the seriousness with which that State

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like all other countries except South Africa, does not recognise Transkei, Bophuthatswana, Venda and Ciskei as independent, sovereign States. British officials therefore do not have any dealings with anyone who purports to represent their so-called 'Governments'" (*B.Y.B.I.L.*, vol. 53 (1982), p. 358).

[106] The Minister for Foreign Affairs of the United Kingdom stated that "The question of recognition does not arise. As a matter of fact, a system of courts exists in Namibia as part of South Africa's administration of that territory. We do not recognise that South Africa has any right to continue to administer Namibia ... We do not intervene during the course of judicial proceedings in Namibia or elsewhere and that has been the policy of successive governments" (*B.Y.B.I.L.*, vol. 58 (1987), p. 528).

[107] On this issue, A. Cassese, in *International Law* (Oxford, 2001), p. 144, states that "It would follow among other things that whenever an entity with all the hallmarks of statehood emerges as a result of aggression, or is grounded on systematic denial of the rights of minorities or of human rights, other States are legally bound to withhold recognition".

[108] See inter alia the example cited by A. Cassese, op. cit., p. 430, endnote No. 94, concerning the message relating to the Convention on the Prevention and Punishment of the Crime of Genocide and the corresponding revision of criminal law sent to the Parliament by the Federal Council of the Swiss Government on 31 March 1999, which stated that "Given that the prohibition of genocide is a peremptory norm of *jus gentium* (*jus cogens*), States cannot agree to reject it. Therefore, a peace treaty that sanctions amnesty for acts of genocide should not be considered as legally valid. Consequently, from the perspective of international law, a national law that authorizes or itself prescribes an act of genocide against a certain group may in no case serve to legitimize the conduct of the perpetrators of such an act or their accomplices".

conducts its foreign policy, and conflicting with the very spirit in which such acts are examined, which seeks to ensure confidence and legal certainty in international relations. In that context, good faith assumes a role of particular importance when such commitments are undertaken.

74. However, are all grounds for invalidity equal, or should key distinctions be made between them with respect both to their effects and to who is authorized to declare such invalidity? In principle, if the same criteria that emerged from the United Nations Conference on the Law of Treaties — which gave rise to the 1969 Vienna Convention — are applied, a dual regime may emerge. Thus, we could speak of relative or partial invalidity (with reference to articles 46 to 50 of the Convention) in cases where the invocation of invalidity is regarded essentially as the exclusive right of the party affected and the effects of such invalidity are limited, except where the ground invoked is the illicit conduct of another party. So-called "absolute" invalidity would apply in the event of invocation of one of the other grounds for invalidity cited above (coercion — of a representative of a State or of a State — or incompatibility between the act and a *jus cogens* norm), in which case invalidity may be invoked not only by the State that formulated the treaty (or, for our purposes, the unilateral act), but also by any other State, bearing in mind the much more serious nature of these circumstances.

75. As in other areas of international law, the problem lies in the impossibility of identifying a body that has the competence to ensure that unilateral acts comply with this regime or the authority to declare an act invalid, either ex officio or by submission of the State that formulated the act or of a third State aware of the existence of that ground for invalidity. Given that problems in addressing this issue have already arisen in relation to international treaties, an area in which normative channels appear to be much more clearly defined, we believe that with respect to unilateral acts it is all but impossible, given the current international situation, to propose and adopt a mechanism to settle any disputes that may arise in connection with unilateral acts and their possible invalidity. The very term "unilateral" suggests that perhaps the only viable and genuine alternative could be for the State that has formulated the unilateral act to function as the entity that has the authority — and the obligation, if the gravity of the case so requires — to draw attention to any defects in the act, thereby making the situation known and preventing the act from continuing to produce effects.

76. Of course, the consideration of this topic is fundamentally speculative, since applicable law is still somewhat uncertain, despite the effort to draw up guiding principles on the subject. In any event, as in the context of the law of treaties, the topic is important, if controversial. It should be studied in a possible subsequent phase of the work in this area.

77. Another question which is related to the invalidity of unilateral acts and to which there is no generally accepted answer is whether or not a presumably invalid unilateral act can be validated. The answer to this question, whether affirmative or negative, must be qualified to reflect the particular circumstances of each case, as no definitive "yes" or "no" answers can be given in relation to unilateral acts. It could, in any case, be argued that, with respect to especially serious grounds for invalidity — coercion or the fact that the unilateral act in question conflicts with a

norm of *jus cogens* — the possibility of validation is quite remote.[109] The situation is likely to be different, or at least the validation is unlikely to be so problematic, with respect to other circumstances that can give rise to invalidity. Cases of error, fraud or a representative's overstepping his or her authority, among others, probably could be validated if the subsequent conduct of the State having formulated the unilateral act clearly warrants this consequence.

78. Even the International Court of Justice, in some of its judgments, points to this possibility of validation, although the judgments in question refer to international treaties. This was clearly apparent, for example, in the ruling handed down in the *Case concerning the arbitral award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*.[110] Similarly, the judgment in the *Case concerning the Temple of Preah Vihear* is also very illustrative, although it actually addresses the question of whether the subsequent conduct of one of the parties to a dispute can be deemed to validate a purportedly erroneous initial act.[111]

B. Termination and suspension of unilateral acts and other related concepts

79. Having considered possible grounds for the invalidity of unilateral acts, we shall now examine the application of such acts, especially with regard to the duration of their effects over time. This includes the termination, suspension, modification and revocation of an act.

80. In relation to unilateral acts, the principle of good faith is a kind of substantive paradigm that implies that such acts should be maintained over time. Logically, as Barberis notes, "the author of a unilateral legal act does not have the power to arbitrarily establish, by means of another unilateral legal act, a rule that derogates

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[109] Except in situations that are almost purely hypothetical; for example, if a new norm of *jus cogens* were to emerge with which the unilateral act previously considered invalid is consistent, or even if a fundamental change in circumstances were to prompt a State to formulate a unilateral act that is identical in substance to an act formulated under coercion, even though the element of coercion is absent in the case of the latter act. If the intention of the State that formulates the new unilateral act is to apply it retroactively to the time when the presumably invalid act was formulated, should that right be denied or, conversely, should the previous unilateral act be validated without qualification? We believe that the latter option is valid if it accurately reflects the State's intention.

[110] *Case concerning the arbitral award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)* (*I.C.J. Reports 1960*, especially pp. 213 and 214), in which it is stated that "In the judgement 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. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived. The attitude of the Nicaraguan authorities during that period was in conformity with Article VII of the Gámez-Bonilla Treaty which provided that the arbitral decision whatever it might be — and this, in the view of the Court, includes the decision of the King of Spain as arbitrator — 'shall be held as a perfect, binding and perpetual Treaty between the High Contracting Parties, and shall not be subject to appeal'".

[111] *I.C.J. Reports 1962*, pp. 22-24 (among others).

from the one established by means of the earlier act".[112] Virtually the same opinion has been expressed by Venturini, who notes that, with respect to unilateral acts, "revocation is permissible only in such cases as may be provided for in the general rules of the international legal system because the binding effect of these acts would otherwise be left entirely to the discretion of their authors".[113]

81. The Commission is faced with the arduous task of trying to identify the rules of general international law under which a unilateral act may be revoked.[114] The Special Rapporteur wonders whether there is any certainty to be derived from international practice in this area — of which there has been very little — or from the literature — which also offers few examples — as to what circumstances would make it permissible to terminate, modify or suspend the application of a unilateral act.

82. Before venturing into this uncharted territory, we must define, at least at a basic level, the various concepts to which we will be referring: the possibility of terminating a unilateral act (although in many cases the literature uses the term "revocation" to refer to this situation, since it concerns unilateral acts) and the possibility of suspending a unilateral act or modifying its content; this last situation often entails the formulation of a new unilateral act (or even the conclusion of a treaty containing the modified version of the original unilateral act). The cases that can arise in this connection are as varied as international circumstances themselves. We will therefore attempt to cover as many hypothetical situations as possible, bearing in mind, however, that neither practice nor the literature offers much information in this regard. Accordingly, we must investigate relevant treaties, identifying possibilities that can be extrapolated to unilateral acts as a category, and try to determine the consequences they may entail for such acts.

83. In relation to unilateral acts, two terms are used interchangeably in the literature to refer to the cessation of the effects of an act of this kind: "revocation", which is used very frequently, and "termination", which is of course implied by the other term. In our view, there is a nuance of meaning that differentiates between the two concepts, even though they are used interchangeably. Termination may be due to external factors (such as a situation in which the subject matter of the unilateral act has ceased to exist or a fundamental change has taken place in the circumstances that gave rise to the act) or even intrinsic ones (the inclusion of a time limit or even a resolutory condition in the unilateral act, provided that its purpose is legitimate and it does not impose obligations on third parties without their consent). The term "revoke" implies that something (in this case, a unilateral act) is considered to have been terminated or to have no further effect because the State having formulated it so intends.[115] We believe that the word "termination" is broader, as it also covers

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[112] J. A. Barberis, "Los actos jurídicos unilaterales como fuente del Derecho Internacional Público", in *Obra homenaje a M. Diez de Velasco* (Madrid, 1993), p. 113.

[113] G. Venturini, loc. cit., p. 421.

[114] As early as 1998, when the Special Rapporteur submitted his first report, some members of the Commission mentioned the need to study these issues; see the views of Mr. Hafner and Mr. Yamada, in *Yearbook ... 1998*, vol. I, pp. 56 and 57, paras. 71 and 72, and of Mr. Pambou-Tchivounda and Mr. Herdocia Sacasa, in ibid., p. 57, paras. 76-78.

[115] According to the definition given in the dictionary published by the Real Academia Española (Spanish Royal Academy), the Spanish term "*revocar*" means to render ineffective a concession, mandate or decision [*Translator's note*: According to the *Concise Oxford English Dictionary*, the English term "revoke" means to "end the validity or operation of (a decree, decision or

other situations in which a unilateral act ceases to have effect as a result of circumstances unrelated to the will of the State having formulated the act.

84. Suspension — unlike termination, which is definitive — means the provisional and temporary cessation of the observance of the unilateral act in question. Contrary to what might, in principle, be assumed, these two concepts have many features in common; this may be one of the main reasons they are dealt with together in the Vienna Convention, in part V, section 3.

85. Circumstances may arise in which unilateral acts must be adapted to reflect contemporary realities; nothing is immutable, and unilateral acts need not necessarily be an exception. The question, then, is why the modification of their content should not be allowed, as it is in the case of international treaties. The crucial point is that, in the case of unilateral acts, it is the will of the party formulating them that determines whether the act should continue to have the same content or whether it can be modified in some way; otherwise, we would be dealing with something else (a bilateral agreement, in most cases), not a unilateral act. The possibility of modifying a unilateral act is therefore the prerogative of the party having formulated it, although the changes made should not affect the essence of the original unilateral act, since, if they did, they would in fact amount to a new unilateral act that invalidates the earlier one.

86. The absence, in the literature, of discussion of the (possible) modification of unilateral acts directly mirrors the situation with respect to the modification of treaties. This is a logical consequence of the very nature of the international system.[116]

87. To ensure that our discussion of these concepts is based on a precise understanding of them, we must, at the outset, analyse their content. It may happen "that a State formulates a promise for a period of 10 years or makes the promise subject to a resolutory condition. In such cases, if the term of the promise expires or the condition is met, the promise ceases to have effect, with no need for any act of revocation. It may also happen that the author of the promise or waiver has expressly provided for the possibility of revoking it under certain circumstances. But if neither the context nor the nature of the unilateral legal act gives rise to the possibility of revocation, the unilateral promise or unilateral waiver is, in principle, irrevocable".[117] There have also, as international case law has affirmed from time to time, been acts that can be revoked, but with certain limitations, as the International

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promise)"]. In the Vienna Convention the term "revocation" is used in article 37; that provision was cited in the Commission by Mr. Galicki as a possible source of guidance in this regard (see *Yearbook ... 1998*, vol. I, p. 59, para. 10).

[116] O. Casanovas y La Rosa, "La modificación de los acuerdos internacionales por la práctica posterior", *R.E.D.I.*, vol. 21 (1968), p. 330, indicates that "whereas in domestic legal systems most contracts are implemented on a one-time basis and ongoing contracts are less common, in the international system there are many treaties and agreements whose purpose is to regulate the relations between the parties on a more or less permanent basis. If we add the observation that the international system does not impose the formal requirements which, in the field of private law, are necessary for the validity of many contracts, nor does it have any authorities with compulsory jurisdiction that can determine, at any given time, the exact nature of the rights and obligations of the parties in case of dispute, it may easily be supposed that the modification of agreements through subsequent practice may apply much more broadly in the international sphere than in the domestic sphere. However, the discussion of situations of this type in international case law has been infrequent and, in some respects, ambiguous".

[117] J. A. Barberis, op. cit., p. 113.

Court of Justice highlighted in the *Case concerning military and paramilitary activities in and against Nicaragua*, in its judgment of 26 November 1984 on the jurisdiction of the Court and the admissibility of the application. According to the Court, the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.[118]

88. Also relevant in this regard is the view expressed by Gutiérrez Espada, who states: "It seems reasonable to assume that, in principle, any unilateral act may be revoked by its author, unless the circumstances unequivocally and categorically indicate otherwise. While we may invoke the 'denunciation' of treaties by way of analogy, we must also bear in mind that denunciation is possible only in certain conditions; the revocability of unilateral acts is likewise subject to certain limitations".[119] Virtually the same position is expressed in the opinion of Judge Mosler in the above-mentioned *Case concerning military and paramilitary activities in and against Nicaragua*.[120]

89. There are some situations in which unilateral acts may be modified or terminated even though these outcomes are not genuinely intended by their author. Inability to comply, the fact that the subject matter has ceased to exist or a fundamental change in circumstances are valid reasons to terminate or modify a unilateral act, while the emergence of a new peremptory norm of general international law will terminate any unilateral act that conflicts with it.

90. When the law of treaties was being codified, Mr. G. Fitzmaurice, who at the time was the Special Rapporteur on the subject, submitted a draft article 22, the second paragraph of which provided as follows (expressly referring to the possibility that a unilateral act may be revocable): "Unless the declaration specifies its own irrevocability, the State or States in whose favour it was made cannot object to its withdrawal or modification at the will of the declarant State; provided that, if this has consequences analogous to those indicated in paragraph 4 (c) of article 20 of the present text,[121] the declarant State shall be liable to pay compensation, or make other appropriate reparation, in respect of the loss or damage caused".

91. The content of article 37, paragraph 2, of the 1969 Vienna Convention is similar to this proposal.[122] Thus, if the intention referred to in that article is absent, the right in question may be revocable;[123] however, no reference is made to the

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[118] *I.C.J. Reports 1984*, p. 420.

[119] C. Gutiérrez Espada, *Derecho Internacional Público* (Madrid, 1995), p. 597.

[120] *I.C.J. Reports 1984*, p. 466.

[121] This refers to a situation in which a third State, by acting in such a way as to exercise the rights conferred by the treaty, incurs damage over and above what it would have incurred if it had not so acted or had not exercised any such rights. See *Yearbook ... 1960*, vol. II, p. 81.

[122] When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

[123] Contrary to what might be assumed, and according to F. Capotorti, in "L'extinction et la suspension des traités", *Recueil des cours*, vol. 134 (1971), p. 496, on this point the Vienna Convention took a significant step forward in relation to the traditional view — reflected, for example, in the Harvard Draft — that rights conferred on third parties by an international treaty are in all cases revocable by the parties; at least the Vienna Convention limits this possibility to some extent, when the treaty in question so provides.

possibility of reparation for potential harm caused. This issue is related to international responsibility, which the codifiers did not address.

92. Interpreting this provision and relating it directly to the issue of interest here — that is, to unilateral acts — Uríos Moliner affirms, rightly in our view, that "declarations of this kind are in principle irrevocable and not subject to modification unless this possibility is implied by the terms of the declaration and the circumstances and conditions necessary for this purpose, as laid down in the declaration, are met, or the party or parties having suffered the harm give their consent, or there is a fundamental change in the circumstances that gave rise to the declaration".[124] In short, the aim is to ensure the maintenance of unilateral acts, which may be terminated or have their provisions modified or suspended only in exceptional and non-arbitrary situations.

93. It is clear that this subject area has given rise to many differences of opinion, which are directly reflected in the debates of the Sixth Committee; the idea that unilateral acts are irrevocable unless their addressees consent to their revocation[125] has been challenged by other views. These include the position that a unilateral act may be revoked if it is made subject to a time limit or to the fulfilment of a condition, or to general principles such as *rebus sic stantibus*,[126] the exception for force majeure or other principles. It might even be said that certain acts should be considered revocable under all but the most limited circumstances.[127]

94. We believe that Germany was correct when, in its reply to the questionnaire on unilateral acts, it pointed out that the question of whether or not a unilateral act could be revoked could not be assessed in the abstract without regard to the concrete circumstances of the act in question; any attempt to subject the issue to an abstract, across-the-board principle would be meaningless.[128] Other State representatives supported the idea that unilateral acts could be revoked.[129] The views expressed are

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[124] S. Uríos Moliner, *Actos unilaterales y Derecho Internacional Público. Delimitación de una figura susceptible de un régimen jurídico común,* paper submitted during the second round of candidacy for the post of full professor, Universitat Jaume I, 2001, copy courtesy of its author, p. 125.

[125] The representative of the Republic of Korea said that, in order to protect the rights of addressees and preserve international legal stability, it should not be permissible for States to revoke or modify unilateral acts without the consent of the other States concerned (A/C.6/60/SR.15, para. 10). The representative of Belarus said that unilateral acts could be terminated by States only by agreement with subjects of international law that had taken note of them and modified their conduct accordingly (A/C.6/60/SR.18, para. 75).

[126] The representative of the Republic of Korea said that the principle of *rebus sic stantibus* could also be considered as grounds for the revocability and modification of unilateral acts (A/C.6/60/SR.15, para. 10).

[127] See also the summary of the discussion held in the Sixth Committee after the introduction of the Special Rapporteur's second report (A/CN.4/504, para. 156).

[128] A/CN.4/511. As far back as 1973, J. H. W. Verzijl, in op. cit., vol. VI, expressed the same view on page 106, stating: "Their susceptibility of unilateral withdrawal depends on their specific character and cannot, therefore, be discussed as a problem capable of a solution which applies to all cases". The same idea was expressed in the Sixth Committee, at the most recent session, by the representative of Japan (A/C.6/60/SR.14, para. 54), who noted that his Government considered that the revocability and modification of unilateral acts depended on the form, content, authors and addressees of the act, and must be determined by examining each category or type of unilateral act.

[129] These included the representatives of El Salvador and Georgia, although Finland, Israel and Italy took a more nuanced approach by referring to that possibility, but with certain limitations (see A/CN.4/511).

indicative of a wide variety of approaches. We will therefore attempt to draw a distinction between situations that were provided for at the time a unilateral act was formulated or that stem directly from the will of the party having formulated it, on the one hand, and circumstances in which an external factor gives rise to the change in question, on the other.

1. Situations arising from the will of the party formulating the unilateral act

95. A State that formulates a unilateral act, as a manifestation of its will, may suspend or modify the act or limit its duration, if the intent to do so was clearly expressed, like the unilateral act in question, at the time or times when the act was formulated.

96. Logically, it should be possible to impose a time limit on a unilateral act[130] by clearly stating this condition at the time the act is formulated. We believe that the same logic would apply in the case of a suspension of operation, if some sort of moratorium — or period during which the act shall not apply — is provided for at the time of its formulation. The act would regain its legal effects at a later date (once the period provided for had expired or the established condition had been fulfilled).

97. The termination, suspension or modification of a unilateral act becomes more complex when the possibility of doing so is not — as is more often the case — provided for at the time the act is formulated. In this case the question arises as to whether it is possible to do so, taking into account that it would be the State which formulated the act that also seeks to terminate it. The question becomes even more complex in the case of unilateral acts which have generated, or which may generate, expectations among third parties. The little information to be gleaned from practice and from the literature is discussed below.

98. It has been asserted that, in general terms, the author of a unilateral promise may revoke it or modify its content, provided that the addressees of the promise have expressly given their consent, or that there is no opposition from the persons affected by it. This idea, which may appear very reasonable in theory, is less so in the case of a promise which has *erga omnes* effects,[131] or whose addressees are undetermined, or where there are doubts as to their identity. Rubin makes an interesting point in this context, asserting that "it is certainly possible in some cases for a single party legally to terminate its apparent treaty obligations without violating the principle of good faith. There is no apparent reason why obligations assumed by unilateral declaration should be harder to terminate than obligations assumed by treaty".[132]

99. In the Security Council, the representative of France expressed a similar sentiment with respect to Egypt's declaration on the Suez Canal.[133] He then

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[130] Such a time limit may, as in the case of international treaties, take various forms: a fixed date, the passage of a period of time or the fulfilment of a given event which acts as a resolutory condition are perhaps the most common forms. The time limit may even be determined by the cessation of a given activity, which implies the acceptance of an obligation from that moment onward.

[131] J.-D. Sicault, loc. cit., p. 650.

[132] A. P. Rubin, "The International Legal Effects of Unilateral Declarations", *A.J.I.L.*, vol. 71 (1977), p. 10.

[133] Declaration (with letter of transmittal to the Secretary-General of the United Nations) on the

proceeded to question the declaration's irrevocability, which he did not believe to have the same value as the promise itself, stating: "a unilateral declaration, even if registered, obviously cannot be anything more than a unilateral act, and we must draw the conclusion from these findings that, just as the Declaration was issued unilaterally, it can be amended or annulled in the same manner".[134] The Secretary-General of the United Nations adopted an almost identical position at a press conference held on 25 April 1957 concerning the same declaration.[135] Because this was a period when even the very definition of a unilateral act was unclear, the intent of the formulating State affected the possibility of revoking such an act.

100. The main problem lies in the fact that a promise generates — or may generate — expectations on the part of third parties, which appear to have a certain right to assume that such a promise will be honoured, within limits. In this regard, Jacqué states that "a unilateral promise creates, for the benefit of its addressee(s), as soon as they are informed of its existence, a right to expect that the author of the promise will honour its commitment. However, just as treaty law authorizes the parties, under certain circumstances, to terminate a treaty before it expires, the Court does not guarantee the irrevocability and absolute immutability of a unilateral promise".[136] However, the Court's own words of 1974 suggest that such a possibility of revocation is not, and is very far from being, absolute: "The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an *arbitrary power* of reconsideration" (our italics).[137]

101. The question of whether or not a promise can be revoked raises difficult issues which can be resolved only by referring to the concrete circumstances of the case. While the principle of good faith plays a vitally important role here, since the

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Suez Canal and the arrangements for its operation, made at Cairo on 24 April 1957, by which the Egyptian Government undertook to abide by its obligations under the 1888 Convention. United Nations, *Treaty Series*, vol. 265, No. 3821.

[134] A. Ch. Kiss, *Répertoire*, op. cit., vol. I, p. 618, Security Council meeting of 26 April 1957. A virtually identical position regarding the possibility of revoking a unilateral act was also taken by the French Minister for Foreign Affairs during a meeting of the Ministers for Foreign Affairs of France, the United States, the United Kingdom and the Soviet Union, held in Geneva on 8 November 1955: "It is quite true that the guarantees currently enjoyed by the USSR because of the existence of the measures taken by Western defence organizations are unilateral in nature, and therefore revocable" (see A. Ch. Kiss, op. cit., vol. I, p. 618).

[135] In which he stated, "The registration as such does not make the document irrevocable, because it is ... binding upon the party submitting it, with the character they have given to the document itself. That is to say ... it can be superseded ... by another declaration ..." (cited by J. Dehaussy, "La déclaration egyptiennes de 1957 sur le canal de suez", *A.F.D.I.*, vol. 6 (1960), p. 180, footnote No. 32).

[136] J. P. Jacqué, "A propos de la promesse unilatérale", in *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Paris, 1981), p. 342.

[137] See *I.C.J. Reports 1974*, p. 270, para. 51. The Court would express a similar opinion in the *Case concerning military and paramilitary activities in and against Nicaragua* (jurisdiction and admissibility) of 26 November 1984, stating that the unilateral nature of declarations does not signify that the State making the declaration is free to amend their scope and contents as it pleases (see *I.C.J. Reports 1984*, p. 418, para. 59). The Court pronounces itself as follows: "the unilateral nature of declarations" (which refers to declarations of acceptance of the jurisdiction of the Court, although we believe that this idea can be extrapolated in a generalized way to all unilateral declarations that may be formulated by States) "does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases".

promise generates certain expectations which could be disappointed if the promise is revoked, this undertaking need not be regarded as a perpetual obligation from which the State can never free itself. A relative, flexible position should therefore be adopted, as noted by De Visscher: "whose relativity, *ratione personae, ratione temporis* and *ratione materiae*, should be seen in the light of the political and legal context of each case".[138] Such relativism may lead to problems, but the law must be applied in a manner that takes into account its capacity to adapt to circumstances. Thus, in considering whether a promise may be changed (through termination, suspension or modification), special attention should be paid to the circumstances that make such a change necessary, as well as to the good faith of the State that formulated the unilateral act and wishes to change it. In fact, it could even be argued, moving further into the realm of alternatives characterized as *de lege ferenda*, that when expectations generated among third parties are seriously disappointed, it should be possible to request reparation if it can be proved that the State seeking to terminate or radically alter the content of the obligation that it assumed unilaterally is acting arbitrarily or in bad faith.

102. Turning to the concept of recognition, we find that ideas on this subject have gone through a number of different phases, with the result that the views expressed in the literature as to whether or not an act of recognition is revocable have changed considerably. Practice in this area is almost non-existent, and opinions have been divided between the assertion of the irrevocable nature of recognition[139] (or, at least, of what has been called de jure recognition) and de facto recognition (which is considered to be provisional and therefore revocable). Since the extent of the difference of opinion is matched by the lack of any significant practice that might offer a certain degree of clarity, it is best to adopt a cautious approach.

103. Such caution is demonstrated, for example, by certain authors who, while starting from the assumption that recognition is revocable, assert that "recognition may be revoked and there exists no right to its maintenance. However, as long as the recognition is not withdrawn, the beneficiary or beneficiaries have the right to demand that its author respect the obligations deriving from the act by which it has recognized a certain situation".[140] The same position has been taken by other

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[138] P. De Visscher, "Remarques sur l'évolution de la jurisprudence de la Cour Internationale de Justice relative au fondement obligatoire de certains actes unilatéraux", *Études de droit international en l'honneur du Juge Manfred Lachs* (The Hague, Boston, Lancaster, 1984), p. 464. Let us consider a real case in which the sociopolitical circumstances of the State which made the promise prevented the performance thereof. In a statement, Japanese Prime Minister Zeuko Suzuki indicated that Japan, after holding the appropriate consultations with the United States, would authorize the transit of ships carrying nuclear weapons (*R.G.D.I.P.*, vol. 85 (1981), p. 905). He was thus publicly expressing a derogation from one of the three basic principles underlying Japan's nuclear policy: non-possession, non-production and non-introduction of this type of weapon in Japan. The furore caused by these remarks forced the Minister to reverse course, and he subsequently announced to the press that Japan would deny such authorization. This position was reiterated on 9 August 1984 by Japanese Prime Minister M. Y. Nakasone, who, during a ceremony commemorating the nuclear attack on Nagasaki, stated that Japan would not permit United States warships carrying nuclear missiles to use its ports (*R.G.D.I.P.*, vol. 89 (1985), p. 166).

[139] Very illuminating in this respect are the proposals noted by J. Verhoeven, in *La reconnaissance internationale dans la pratique contemporaine. Les relations publiques internationales* (Paris, 1975), p. 650, footnote No. 69.

[140] J. P. Jacqué, *Éléments pour une théorie de l'acte juridique en droit international* (Paris, 1972), p. 337.

authors, who distinguish between purely unilateral recognition, which they believe is revocable, and situations where an act of recognition is included in an international treaty, in which case the opposite effect is produced. At the present time, it seems that this position not only gives rise to many uncertainties, but also asserts a distinction whereby treaty provisions are assumed to offer more security and certainty than unilateral acts. We believe that this distinction is simply not realistic, given the current state of affairs.

104. The consequences deriving from recognition are so significant that care must be taken in making categorical assertions about its potential revocability. One complex case involved the former Yugoslav republics, which at a certain point recognized (through treaty provisions) the continuity of what was then called[141] the Federal Republic of Yugoslavia (Serbia and Montenegro);[142] this situation led to an obvious contradiction with respect to the Convention on the Rights of the Child. The events occurred as follows: on 3 January 1991 the Socialist Federal Republic of Yugoslavia ratified the Convention, making a reservation to article 9, paragraph 1,[143] which it then withdrew (this time as the Federal Republic of Yugoslavia) on 28 January 1997.[144] This action led to subsequent communications from Slovenia (28 May 1997), Croatia (3 June 1997), Bosnia and Herzegovina (4 June 1997)[145] and the former Yugoslav Republic of Macedonia (10 October 1997).[146] Slovenia, Croatia, and Bosnia and Herzegovina asserted that "the State which in 1991 notified its ratification of the Convention on the Rights of the Child and made the reservation was the former Socialist Federal Republic of Yugoslavia, but the State which on 28 January 1997 notified the withdrawal of its reservation was the Federal Republic of Yugoslavia". Moreover, they drew attention to Security Council resolutions 757 (1992) and 777 (1992) and to General Assembly resolution

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[141] In this regard, see a discussion of the situation concerning the name of the Federal Republic of Yugoslavia in M. I. Torres Cazorla, "El último cambio de Yugoslavia: de la República Federativa de Yugoslavia (Serbia y Montenegro) a la Unión de Serbia y Montenegro", *R.E.D.I.*, vol. 55 (2003), pp. 487-492.

[142] See para. 17 of the judgment of the International Court of Justice of 11 July 1996, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Yugoslavia), in *I.C.J. Reports 1996*. In this case it is clear that Bosnia and Herzegovina wanted the Federal Republic of Yugoslavia to be considered as a successor State, with that position being accepted, at least with respect to the 1948 Convention, by the Court. The respective accords signed bilaterally between the Federal Republic of Yugoslavia and the other former Yugoslav republics, aimed at normalizing their relations, appeared to accept the idea of the continuity of the personality of the Socialist Federal Republic of Yugoslavia in the Federal Republic of Yugoslavia (Serbia and Montenegro). Examples in this regard include article 4 of the Agreement on the Regulation of Relations and Promotion of Cooperation between the Republic of Macedonia and the Federal Republic of Yugoslavia of 8 April 1996 (*International Legal Materials* (*I.L.M.*), vol. 35 (1996), p. 1248); article 5 of the agreement with Croatia, of 23 August 1996 (ibid., p. 1221); and paragraph IV of the Joint Statement with Bosnia and Herzegovina, of 3 October 1996 (*Review of International Affairs*, No. 1049-1050, p. 15). For an analysis of these and other related questions, see M. I. Torres Cazorla, "Rights of Private Persons on State Succession: An Approach to the Most Recent Cases", in P. M. Eisemann and M. Koskenniemi (eds.), *La succession d'États: la codification à l'épreuve des faits/State Succession: Codification Tested Against the Facts*, The Hague Academy of International Law (The Hague, 2000), pp. 674-676.

[143] United Nations, *Treaty Series*, vol. 1577, No. 27531.

[144] Resolution of 7 October 1997 (*Boletín Oficial del Estado (B.O.E.)*, No. 248, 16 October 1997).

[145] Resolution of 26 January 1998 *(B.O.E.*, No. 37, 12 February 1998).

[146] Resolution of 6 October 1998 (*B.O.E.*, No. 253, 22 October 1998).

47/1, which indicated that the Socialist Federal Republic of Yugoslavia had ceased to exist and that the Federal Republic of Yugoslavia could not be considered its sole successor. In view of the ambiguity involved (a reserving State that has ceased to exist and a presumed successor that withdraws a reservation that it did not make), the Secretary-General was requested to clarify the situation. The former Yugoslav Republic of Macedonia stated "that the Federal Republic of Yugoslavia has not given notification of its succession to the Convention, nor has it acceded to the Convention in any other appropriate manner in conformity with international treaty law. Consequently, the Federal Republic of Yugoslavia is not, and cannot be considered, a party to the Convention". Thus, although initially the former Yugoslav republics had appeared to recognize the continuity of the Federal Republic of Yugoslavia, they expressed the opposite view a year later.[147] The complex situation in which the Federal Republic of Yugoslavia found itself for almost a decade thus illustrates how such problematic circumstances can arise.[148]

105. We believe that the circumstances of the case, good faith and the possibility that a unilateral act may have generated expectations in third parties must be the essential elements to be taken into account in determining whether a State can put forward a further expression of unilateral will which modifies the initial unilateral act.[149] However, any attempt to establish fixed rules on this subject is inevitably frustrated by the very nature of the unilateral act, which is infinitely flexible. The absence (albeit deliberate and desired by States) of a body responsible for considering and resolving potentially problematic situations which might arise in this respect is another important obstacle to be considered, and is at this point insuperable. We believe that only Article 33 of the Charter of the United Nations, with the freedom it allows regarding the choice of the means for the pacific settlement of disputes, can serve as a guide in this respect.

106. A situation which combines elements of the two situations mentioned above and which generally implies the possibility of terminating a unilateral act normally arises when the unilateral act in question has been performed in its entirety. Such cases may involve a wide variety of circumstances: for example, the unilateral act may be completed through a single action (as with a promise to cancel a debt) or the obligation constituting the unilateral act may have a specific content which, once exhausted, renders the continued validity of the act futile. In a treaty context, performance serves as a reason for the expiry of so-called contractual treaties, which

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[147] An exhaustive account of this situation is contained in M. I. Torres Cazorla, "El Derecho del Menor a una nacionalidad: análisis de los recientes casos de sucesión de Estados", in *Los Derechos del Niño (Estudios con motivo del X Aniversario de la Convención de los Derechos del Niño)*, United Nations Association in Spain, Ministry of Labour and Social Affairs (Barcelona, Madrid, 2002), pp. 200 and 201.

[148] An excellent discussion of all these issues can be found in J. M. Ortega Terol, "Aspectos teóricos y prácticos de la continuidad en la identidad del Estado", *A.D.I.*, vol. 15 (1999), pp. 287-300.

[149] This further manifestation of will which seeks to terminate the unilateral act could even consist of the signing of an international treaty whose content is contrary to that of the previous unilateral act. This could give rise to a number of possible situations: the State or States for which the previous unilateral act generated certain expectations might also be parties to the treaty, in which case no problems would arise; or they might not be parties, in which case obligations of various and sometimes contradictory kinds would arise, thereby leading to a problem of non-compliance, with either the unilateral act or the treaty. The issue of international responsibility would be a matter of considerable interest in this particular connection.

are defined as treaties that give rise to legal relationships of a specific nature. Once the obligation arising from such a treaty is fulfilled, the treaty ceases to operate.[150]

107. Various guiding principles relating to the possible grounds for termination mentioned above might be formulated as a single draft principle, which would initially include the following grounds, submitted for the consideration of the Commission:

"**Termination of unilateral acts** (first part)

A unilateral act may be terminated or revoked by the formulating State:

(a) If a specific time limit for termination of the act was set at the time of its formulation (or if termination was implicit following the performance of one or more acts);

(b) If the act was subject to a resolutory condition at the time of its formulation."

108. Termination of a unilateral act because its subject matter has ceased to exist is to a certain degree related to another cause, which we shall consider in the next section: the potential termination, modification or suspension of operation due to supervening impossibility of performance. This cause, unlike those with which we are currently concerned, was included in the 1969 Vienna Convention.

2. Situations arising from circumstances unrelated to the will of the party formulating the unilateral act

109. The grounds for termination, modification or suspension of an international treaty have long been a central focus of study and have given rise to considerable misgivings, particularly in cases where such changes have been brought about or intended by only one of the parties to the treaty. Although these misgivings are well founded, questions also arise with respect to other grounds where a situation unrelated to the will of the formulating State — of a unilateral act, in this case — leads to the termination, modification or suspension of the act.[151] In our analysis of the different situations which could lead to such changes, we will first examine several possibilities that are expressly provided for in the Vienna Convention[152] and that could apply to unilateral acts, and we will then, in the next section, consider other circumstances.[153]

(a) Situations provided for in the Vienna Convention on the Law of Treaties

110. Article 61 of the Vienna Convention concerns a ground for terminating or suspending the operation of an international treaty which, in our opinion, is fully applicable to unilateral acts. This ground, supervening impossibility of performance,

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[150] See F. Capotorti, loc. cit., pp. 525 and 526.

[151] This is in line with F. Capotorti, loc. cit., p. 514.

[152] The first part of the analysis will deal with supervening impossibility of performance, fundamental change of circumstances, emergence of a new peremptory norm of general international law (*jus cogens*) and, to a degree, severance of diplomatic or consular relations (articles 61 to 64 of the Vienna Convention).

[153] These circumstances include the subsequent emergence of a new international custom, a war or State succession, all of which could result in the modification of the unilateral act in question, as will be shown.

could also justify the termination of a unilateral act if, as stated in article 61, "the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty", or the suspension of the act's operation if the impossibility is merely temporary. The rule of *ad impossibilia nemo tenetur* is fully applicable in this case, since the State would otherwise be obliged to do the impossible. The loss or disappearance of an object indispensable for the execution of the unilateral act is the basic feature of this ground for termination (for example, the loss of a territory or a strip of coastline with respect to which the unilateral act produced effects).[154]

111. The impossibility referred to in article 61, which is applicable by analogy to unilateral acts, must have the following characteristics: (a) the impossibility must be supervening; (b) the impossibility must be definitive or irreversible, since it would otherwise lead to suspension rather than termination; and (c) it must affect an object which is indispensable for the execution of the act, since the impossibility must be instrumental, although not necessarily physical or material.

112. An interesting question arises if the State that formulated the unilateral act contributed by its own conduct to the emergence of the material impossibility and is ultimately responsible for the loss. However, it is important to distinguish between two factors which are not differentiated in the Vienna Convention: the situation of loss, which could — and logically should — lead to the termination or possible suspension of the unilateral act, and the possible international responsibility incurred by the State which, through its conduct, caused the material impossibility. This does not mean that the party concerned cannot invoke impossibility, which is a fact, but rather that it cannot be absolved of its international responsibility vis-à-vis third parties. This issue is likely to cause controversy in the majority of cases, which can be settled by the means provided under international law.

113. The invocation of a fundamental change of circumstances as a ground for terminating an international treaty is one of the most extensively studied issues in the legal literature.[155] The contrast between this ground and the rule of *pacta sunt servanda* is one of the most complex debates in treaty law.[156] The necessary flexibility of the international order, where the will of the State and the external reality that determines it play a fundamental role, demonstrates the significance of this clause; this is only logical since the strict application of the principle *pacta sunt servanda*, without exception, "will violate the *pacta* principle itself by giving it a

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[154] As noted in the literature, this circumstance is somewhat similar to a fundamental change of circumstances, which will be analysed further on. In "Terminación y suspensión de los tratados" from *Essays in honour of Judge T. O. Elias*, vol. I (Dordrecht, Boston, London, 1992), p. 103, J. M. Ruda writes, "It is undeniable that the disappearance or destruction of the object of the treaty constitutes a fundamental change in the circumstances that existed at the time the treaty was concluded, but ILC interprets these situations as two legally distinct grounds. The difference, in our understanding, is that supervening impossibility of performance is an objective criterion, whereas a fundamental change of circumstances is determined subjectively; this distinction is worthy of separate study".

[155] G. Haraszti, "Treaties and the Fundamental Change of Circumstances", *Recueil des Cours*, vol. 146 (1975), pp. 47-60.

[156] The bibliography on this subject is extensive. We will simply mention the statement made by E. Van Bogaert prior to the conclusion of the studies which led to the Vienna Convention, in "Le sens de la clause 'rebus sic stantibus' dans le droit des gens actuel", *R.G.D.I.P.*, vol. 70 (1966), p. 50, to the effect that "it is useful to note that *pacta sunt servanda* and *rebus sic stantibus* are the two elements which ensure that the law is efficient and, at the same time, equitable".

sacred, almost mystical, character and elevating it to a *noli me tangere*".[157] The importance of this ground for termination may be the primary and ultimate reason for the degree of detail and the negative wording of article 62 of the Vienna Convention, which limit the possibility of invoking that circumstance. This reflects the restrictive position taken in the literature on the possible invocation of this ground, as a logical consequence of the need to prevent arbitrary actions which otherwise might be taken. Regarding the fundamental character that the changed circumstance must have, it has been logically affirmed in the literature that "The changed circumstance must be fundamental; it must affect, as has been said, the *fundamentum* or very basis of the treaty, and must be extraordinary in that it transcends or exceeds the ordinary changes that are rightly and typically anticipated in the drawing up of private contracts or international treaties".[158]

114. The definition of a fundamental change of circumstances is subject to a wide variety of interpretations and may even be applied to a situation of war between the parties. In the *Rann of Kutch* case between India and Pakistan, India compared the "Ihlen declaration", which was taken into account by the Permanent Court of International Justice in the dispute between Denmark and Norway, to the circumstances of the current case, declaring before the Tribunal that "the Ihlen declaration was made at a time when there was no dispute between Denmark and Norway; the attitude changed when the dispute arose subsequently. The declaration cannot be put on a par with one sentence in one letter after an acute dispute had arisen and when 'parties are fighting each other, as it were, in correspondence over a particular attitude'".[159]

115. It has been maintained that article 61 (supervening impossibility of performance) and article 62 (fundamental change of circumstances) of the Vienna Convention on the Law of Treaties[160] could be applied mutatis mutandis to certain unilateral acts (particularly those which give rise to obligations), given that the conditions for modification and termination are very close to those provided for in treaty law with respect to the suspension or termination of obligations arising from an international treaty.[161] However, in the context of unilateral acts such situations

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[157] A. Poch G. De Caviedes, "De la clause 'rebus sic stantibus' à la clause de révision dans les Conventions internationales", *Recueil des Cours*, vol. 118 (1966), p. 168.

[158] A. Poch G. De Caviedes, loc. cit., p. 170.

[159] *International Law Reports*, vol. 50 (1976), p. 379.

[160] According to J.-D. Sicault, loc. cit., pp. 654 and 655, a fundamental change of circumstances may be invoked by a State that formulates a unilateral promise as a ground for revoking the promise, if the following three conditions are met: (a) the existence of those circumstances must have constituted an essential basis of the consent to be bound by the promise; (b) the change of circumstances must radically transform obligations still to be performed under the unilateral act; and (c) the change of circumstances must not have resulted from a breach by the author of the promise of an international obligation (either of an obligation under the promise or of any other obligation).

[161] There is one particularly sensitive area in which States often show great suspicion or formulate protests when other parties adopt controversial conduct: issues related to disarmament or to moratoriums on nuclear testing. What is more, States often make commitments that are not strictly unilateral but are directly related to the conduct of another State. One example of this was the announcement by the Soviet Union on 18 December 1986 that it would resume nuclear testing whenever the United States did so, thereby ending the moratorium which had been in place since 6 August 1985. After the United States conducted an underground nuclear test on 3 February 1987 at the Nevada nuclear testing ground (followed by further tests on 11 February and 18 March), the Soviet Government officially announced on 4 February that the United

entail an additional circumstance which normally does not occur in treaty law, namely the unilateral modification of the content of the unilateral act. This explains the cautious attitude of the International Court of Justice in its consideration of the invocation of a fundamental change of circumstances, as shown by the *Gabcîkovo-Nagymaros* case: "A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases".[162]

116. Sometimes the psychological element or the belief by the formulating State that there has been a fundamental change in the circumstances that prompted it to adopt its initial position take on special importance. An interesting example is the position adopted by Poland, which initially notified the International Labour Organization (ILO) of its withdrawal from that organization and subsequently invalidated the withdrawal through another notification the day before the initial notice was to have taken effect.[163]

117. Could the severance of diplomatic or consular relations result in such a change as to bring about the termination or suspension — or perhaps modification — of a unilateral act? In principle, if we were to follow the approach that was taken in codifying international treaties, such a severance of relations need not bring about significant changes, except as could otherwise be inferred from the contents of the unilateral act itself (for example, if diplomatic or consular relations are a condition without which the unilateral act would not have been formulated or if it would be very difficult to carry out in the absence of this circumstance). Accordingly, article 63 of the 1969 Vienna Convention provides that "The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty". The Vienna Convention uses the word "indispensable"; thus it may be inferred that the same requirement should apply to unilateral acts. However, we are reluctant to subscribe to that view; indeed, it is our understanding that typically, where diplomatic or consular relations have been severed, it is highly unlikely that the State which formulated the act will be prepared to continue to carry it out, at least in the same manner.

States action had ended the moratorium. The Soviet Union resumed nuclear testing on 26 February in Kazakhstan (*R.G.D.I.P.*, vol. 91 (1987), p. 945).

[162] *I.C.J. Reports 1997*, p. 65, para. 104.

[163] On 17 November 1984, Poland, through its representative in Geneva, gave notice to the ILO Governing Body of its withdrawal from that organization. Its letter reiterated the charges it had been levelling for three years against ILO, including interference in Poland's internal affairs, a continuing anti-Polish campaign and a hostile attitude towards Poland (*R.G.D.I.P.*, vol. 89 (1985), p. 467). That notice would be rendered invalid when, on the morning of 16 November 1987, the Polish Government informed the Director-General of ILO that it was withdrawing its previous notice, being satisfied that the problems caused by actions taken against Poland within ILO, which had made it impossible for Poland to participate in the organization's work, would be settled once and for all. Poland's withdrawal from the organization was to have become effective on 16 November 1987 at midnight (*R.G.D.I.P.*, vol. 92 (1988), pp. 407).

118. The emergence of a new peremptory norm of general international law (*jus cogens*), as provided in article 64 of the 1969 Vienna Convention, more or less stands in logical correlation to article 53 of the Convention, to which we have already referred. Article 64 provides that "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". However, despite the words at the end of that article (becomes void and terminates), we are dealing here with a case of extinction upon the emergence of a norm of *jus cogens* and not properly of invalidity, as discussed earlier. The consequences of this are substantial: the effects which the treaty produced up until the new norm's emergence will remain unaffected wherever possible, as opposed to what would occur in a case of invalidity as such. That is the major distinction between the two provisions mentioned above.

119. In view of the foregoing, the following paragraphs may be formulated with regard to other possible causes of termination under the above-mentioned guiding principle:

"**Termination of unilateral acts** (continued)

A unilateral act may be terminated or revoked by the formulating State:

(...)

(c) If the subject matter of the unilateral act has ceased to exist;

(d) If there has been a fundamental change in the circumstances that prompted the formulation of the act (*rebus sic stantibus*) which renders its fulfilment impossible;

(e) If a peremptory norm of international law has emerged following its formulation which conflicts with the act."

(b) Situations not expressly provided for in the Vienna Convention on the Law of Treaties

120. An issue of relevance that arises with respect to unilateral acts is whether a customary rule that emerges subsequent to the formulation of a unilateral act may result in the termination, modification or suspension of the act as being in conflict with that rule. This issue, the answer to which is uncertain, was raised by the Commission when the law of treaties was being codified. However, the Commission decided, given the numerous difficulties involved in the controversial issue of the possible conflict between treaty and customary rules, that the issue was too complex to be covered in all its aspects without jeopardizing the work of codification and progressive development.[164] Possibly, a normative basis on which to tackle this issue may be found in the area of universal or general custom; on the other hand, we find regional custom more problematic, given that the existence of a unilateral act contrary to what is claimed to be regional or even local custom could act as a serious impediment to such custom gaining currency or even being opposable to the State which formulated the unilateral act. Practice shows that the opposite situation is more frequent; that is to say, the existence of many unilateral acts on a particular

[164] F. Capotorti, loc. cit., p. 518.

matter tends to bring about a change in the legal regime in effect until that time. Such a new approach may even be set forth in a treaty.[165]

121. A second case not addressed in the 1969 Vienna Convention is the issue as to what happens to unilateral acts when their author undergoes a substantial transformation. In other words, what happens in case of State succession? Should the previous undertakings entered into under unilateral acts remain in force or do such undertakings become ineffective when such a circumstance occurs, especially in cases where the predecessor State disappears? This issue, which is not easy where international treaties are concerned,[166] is even less so in the case of unilateral acts, where the conflict between two competing needs that arise at the international level becomes even more evident: the need to ensure a certain stability in international relations, with adherence to international undertakings deriving from unilateral acts being a key reflection of this. In each case, the solution will depend on the particular circumstances, as well as whether it is still possible for the State or States emerging from the succession to comply with the unilateral act. In our view, there are no criteria that point a priori to a restrictive approach one way or another. Clearly, however, where a State has undergone a very significant transformation as a result of a succession, the unilateral act may as a result be modified.

122. On the other hand, there also arises the issue as to whether the outbreak of an armed conflict can cause the termination or suspension of a unilateral act in effect between the two belligerent States. As with the issue discussed above, the Vienna Convention on the Law of Treaties merely states that it does not cover this situation. Article 73 of the Vienna Convention expressly states that "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States". Given its controversial nature, this issue was set aside. The Commission has now reverted to it and appointed

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[165] This is what occurred, for example, in the law of the sea with respect to the extension of the territorial sea to 12 nautical miles and the establishment of the exclusive economic zone, the origin of which is directly tied to the concept of a "patrimonial sea". A. S. de Gaston provides an overview of all these issues and an illustrative listing of unilateral acts of States (sorted by continent) in "Los actos jurídicos internacionales unilaterales con especial atinencia a los intereses marítimos argentinos", *Anuario Argentino de Derecho Internacional, vol. 1* (1983), pp. 260, 261 and 295-357.

[166] The lack of an international consensus in favour of the principle of continuity with respect to international treaties to which the predecessor was a party, as opposed to the "tabula rasa" approach, is becoming evident. This is demonstrated by two factors. The first is the limited acceptance of the 1978 Vienna Convention on Succession of States in respect of Treaties, which resulted in it not securing the number of ratifications required for its entry into force until 1996. The second factor is reflected in the many divergences observed in international practice over the last decade, with continuity, notification of succession, accession to or termination of the effects of the international treaties of the predecessor all being frequently observed. As M. Koskenniemi has highlighted in "Report of the Director of Studies of the English-speaking Section of the Centre", in *La succession d'Etats: la codification à l'épreuve des faits/State Succession:Codification Tested Against the Facts* (The Hague, Boston, London, 2000), p. 89, "The only relatively undoubted normative conclusion one can draw remains procedural: that States should negotiate in good faith. That obligation is not, however, dependent on the 1978 Vienna Convention but on a structural requirement of the diplomatic system".

Mr. Ian Brownlie as Special Rapporteur for the topic; he submitted his first report in 2005.[167]

123. On this point, it is our view that, more clearly than in any other circumstance, we must look to the unilateral act at issue to be able to determine whether war affects the performance of a particular unilateral act. Perhaps, where the act constitutes a promise or waiver which operates to the advantage of the State with which the author State is at war, the author State may elect to terminate it or, at a minimum, to suspend it. In addition, a fundamental change of circumstances may even be invoked. A highly politicized institution such as recognition is usually subject to change in cases of armed conflict and may even give rise to other situations, such as recognition of the state of armed conflict, with the consequences that this entails.[168]

124. The above discussion on the validity, grounds for invalidity and application of unilateral acts, which is heavily influenced by the Vienna regime, is intended to complement earlier reports, to clarify these issues to the extent possible and, indeed, to provide the Commission with a set of guiding principles in this specific area. All these comments, with the exception of those relating to suspension, have already been set out in the relevant section, but we elected to reiterate them as a whole at this juncture in order not to lose sight of the overall picture.

"**Suspension of unilateral acts**

A unilateral act may be suspended by the formulating State:

(a) If a circumstance that would allow for its suspension was specified at the time of its formulation;

(b) If the act was subject to a suspensive condition at the time of its formulation;

(c) If its subject matter has temporarily ceased to exist;

(d) If there has been a fundamental change in the circumstances that prompted the formulation of the act which temporarily renders its fulfilment impossible."

III. Part Two: draft guiding principles for consideration by the Working Group

125. As mentioned at the beginning of this report, the Commission is being provided with draft guiding principles on the various issues discussed earlier in the Commission and in the Sixth Committee of the General Assembly. These draft guiding principles could be considered by the Working Group to be reconvened this year. This set of guiding principles covers the validity and termination of unilateral acts, a topic discussed in part one of this report.

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[167] In 2005, the initial report (A/CN.4/552) was submitted together with a memorandum by the Secretariat entitled "The effect of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1).

[168] For an exhaustive discussion of this issue, see J. Verhoeven, op. cit., pp. 100-167.

A. Definition of a unilateral act

126. One of the most extensively debated issues in the Commission since it began considering this topic in 1997 has been the definition of a unilateral act, which is crucial for developing rules or guiding principles governing the operation of such acts. The first issue in this regard is the distinction between unilateral legal acts and unilateral acts of States not aimed at establishing or confirming a legal relationship; that is, unilateral political acts. From the outset, special emphasis has been placed on the need to make a distinction between the two types, which is a difficult proposition for the purposes of which it is crucial to determine the intention of the author State. Unilateral legal acts would, of course, be subject to international law and failure to comply therewith would cause the author State to incur international responsibility. Unilateral political acts would commit the State only in the political context, and the State would incur only political consequences for non-compliance.

127. Without revisiting the topic, it should be recalled that the Commission has held detailed discussions in the plenary and the Working Group on some acts that are within the framework of international political relations and, as such, fall outside the scope of international law, including the unilateral declarations of nuclear-weapon States referred to as negative security assurances, formulated at various levels and in various international bodies and contexts. In the view of the majority of members, such declarations are political in nature and as such are not legally binding on the declaring States. A detailed review of the texts of such declarations and of the circumstances or contexts in which they were formulated shows that the declaring States had no intention of entering into legal obligations in connection with such negative security assurances. These were therefore unilateral political declarations not subject to international law.

128. From the outset the members also generally agreed to single out those unilateral legal acts of States that are clearly part of a treaty relationship and as such fall under the Vienna Convention on the Law of Treaties. These are acts which are unilateral in form, that is, formulated by a single State — but are part of a treaty relationship. Examples include signature, ratification, formulation and withdrawal of reservations, notification and deposit of relevant treaty instruments, among others. A unilateral act, *stricto sensu*, establishes a relationship between the author State and the addressee or addressees, but this relationship is distinct from a treaty relationship.

129. Another category to be identified is unilateral acts connected with a particular regime authorized by a specific set of rules. Declarations establishing exclusive economic zones or, in general, the delimitation of maritime zones are examples of such acts.

130. Also excluded are declarations of acceptance of the compulsory jurisdiction of the International Court of Justice, which, although they are also unilateral as to their form, fall under the Vienna regime on the law of treaties. While such declarations are formally unilateral, most international scholarship and case law consider them as being part of a treaty relationship and as such falling within the Vienna regime. However, these are sui generis optional declarations to which certain rules, such as the rules of interpretation, should be applied more flexibly. It should be recalled, in this regard, that in the *Case concerning military and paramilitary activities*, the United States of America contended that such declarations are sui generis, "are not treaties, and are not governed by the law of treaties, and States have the sovereign

right to qualify an acceptance of the Court's compulsory jurisdiction, which is an inherent feature of the Optional-Clause system as reflected in, and developed by, State practice".[169]

131. While mindful of their sui generis nature, as it had been in previous cases, such as the *Anglo-Iranian Oil Co.* case, the Court took the view that such declarations were indeed part of a treaty relationship. Declarations accepting the Court's jurisdiction, it noted, were not a treaty text resulting from negotiations between two or more States but "the result of unilateral drafting".[170] The fact that such declarations are registered and deposited with the Secretary-General of the United Nations supports this view. From a reading of the Court's 1984 decision, it may be concluded that, even though such declarations fall under a treaty regime, the fact that they were unilaterally drafted should be taken into account when interpreting them.

132. The unilateral acts that have been under consideration by the Commission since 1997, namely unilateral declarations made by one or more States with a view to producing certain legal effects, should be distinguished, at least as far as their formulation or realization are concerned, from equally unilateral conduct which, without being an act in the strict sense of the term, is capable of producing similar legal effects. Considering both unilateral acts and unilateral conduct in the same study was not deemed acceptable by the majority, although some members and some Governments were of the view that their consideration should be related, since, even though they could be "formulated" or "realized" under different circumstances, they could have similar effects. Although, in our view, there are clear differences between acts and conduct, at least with regard to their formulation, it was felt that conduct should not be excluded from the study and from adequate consideration by the Commission. The guiding principles with regard to unilateral acts in the strict sense could be applicable mutatis mutandis to unilateral conduct by States.

133. Based on the reports of the Special Rapporteur, the Commission reviewed very thoroughly a series of classic unilateral acts which are considered as such by most legal scholars (recognition, promise, waiver, protest), and concluded that, while it was a useful intellectual exercise that in some ways enriched the international doctrine on the subject, the Commission was aware that the characterization of the act does not alter its legal effects. A unilateral act, as the Commission concluded at the time, may be characterized in various ways, without influencing the legal effects that the author of the act is seeking to produce. Independently of its characterization, what was important was to determine whether the author State, at the time it formulated the act, intended to commit itself legally in relation to the addressee or addressees.

134. The unilateral act of interest to the Commission is a declaration, made by one or more States, whose form — it should be made clear — is not important and which contains an expression of unilateral will formulated with the intention of assuming certain obligations or of confirming certain rights. It is an act whose process of elaboration differs from the process of elaboration of a treaty in which two or more States participate; this makes it difficult to determine the intention of the author to be legally bound.

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[169] *I.C.J. Reports 1984*, para. 53.

[170] *I.C.J. Reports 1952*, p. 105.

135. The author of the act seeks through such a declaration "to produce certain legal effects", a more generic expression that encompasses both the obligations that the declaring State may assume and the rights that it may reaffirm through such an act. This question has been extensively debated in the literature and in the Commission. A State, it was affirmed, may assume unilateral obligations in the exercise of its sovereignty, but cannot impose obligations on another State without the latter's consent, as was established in the regime on the law of treaties. However, some members expressed the view that to refer exclusively to the assumption of obligations would limit the scope of the draft articles and that reference should be made to the production of legal effects that cover both the possibility of assuming obligations and that of reaffirming rights.

136. A unilateral act should be formulated "under international law", since it is itself derived from international law and thus becomes a source of obligations[171] (and even of the reaffirmation of rights), like treaty or customary norms or acts of international organizations.

137. As a reflection of what has been stated above and in accordance with the results of the Commission's deliberations and the conclusions of the Working Group established to consider the question, the following draft guiding principle is presented. The draft text covers in general terms the constituent elements of the draft definition which the Special Rapporteur presented in his first report and which served at the time as an initial basis of discussion to develop the study of the subject.

"**Principle 1**

Definition of a unilateral act

A unilateral act of a State means a unilateral declaration formulated by a State with the intent of producing certain legal effects under international law."

138. In the context of the definition and its scope, reference should now be made to the addressee (or addressees) of the act. While the subject under consideration and the draft guiding principles concern unilateral acts formulated by a State, it is important to note that such acts may be addressed to another State, to a group of States, to the international community as a whole, to an international organization or to any other entity subject to international law.

139. It is therefore necessary to include a reference to this characteristic in the definition (second paragraph). The Commission is presented with two options for this paragraph, the first of which enumerates the possible addressees of unilateral acts, thereby giving the paragraph a more restrictive character, while the second and broader option specifies that a unilateral act must be formulated in accordance with international law, but does not specify to whom it must be addressed.[172]

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[171] In this connection, reference must be made to the terms used by the International Court of Justice in its recent judgment of 3 February 2006 on admissibility in the *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, para. 45 (in which it uses the expression "unilateral commitment having legal effects"), and para. 46 (in which it refers to "performance, on behalf of the said State, of unilateral acts having the force of international commitments").

[172] It suffices to recall in this regard some of the examples mentioned in the eighth report, which

“Paragraph 2 of principle 1

Addressees of unilateral acts of States

Option A

A unilateral act may be addressed to one or more States, the international community as a whole, one or more international organizations or any other entity subject to international law.

Option B

A unilateral act formulated in accordance with international law will produce legal effects, regardless of whom it was addressed to.”

B. Formulation of a unilateral act

1. Capacity of a State to formulate a unilateral act

140. As is the case under the law of treaties, the State has capacity to formulate unilateral acts. Indeed, the State may, in the exercise of its sovereignty, formulate declarations with the intent to produce certain legal effects, assuming unilateral obligations that, given their nature, do not require acceptance or any reaction on the part of the addressee. The term used is “formulate”, which is similar to the terms “elaboration” or “conclusion” used in treaty law. Indeed, it has been noted that “formulation” reflects the unilateral form of the act, while the “elaboration” or “conclusion” of a treaty presumes agreement or a common intent, which is unnecessary in the context of unilateral acts.

141. In this way, closely following the language of the 1969 Vienna Convention on the Law of Treaties (article 6), every State has capacity to formulate a unilateral act, provided, in this case, that it is done “in accordance with international law”. The guiding principle would therefore be drafted as follows:

“**Principle 2**

Capacity of States to formulate unilateral acts

Every State possesses capacity to formulate unilateral acts in accordance with international law”.

2. Persons having competence to formulate unilateral acts on behalf of a State

142. A somewhat more complex question concerning the formulation of unilateral acts is that of the competence of the persons who can formulate an act of this nature on behalf of the State and commit the State in its international relations. The question has been considered by the Commission on various occasions, particularly during the debates that followed the presentation of the second and third reports. As will be recalled, the Special Rapporteur presented some general and preliminary ideas on the subject, which were consistent with the opinions expressed both by the

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include among the addressees of a unilateral act even the officers of an international organization or entities that are not States as such. See A/CN.4/557, pp. 11-13 and 26-30.

members of the Commission and by some of the States that responded to the questionnaire sent out by the Secretariat.[173]

143. As the formula which we must take as the point of departure, in accordance with the Vienna regime on the law of treaties, certain persons may without authorization act and bind the State in its international relations (Heads of State, Heads of Government and Ministers for Foreign Affairs), on the assumption that these individuals have full powers to do so. As the International Court of Justice recently observed in accordance with its consistent jurisprudence, "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments".[174]

144. The first paragraph of the draft guiding principle, which contains this general rule, would read as follows:

"**Principle 3**

Competence to formulate unilateral acts on behalf of the State[175]

1. By virtue of their office, Heads of State, Heads of Government and ministers for foreign affairs are considered to represent their State and to have the capacity to formulate unilateral acts on its behalf".[176]

145. In addition to the persons referred to in draft principle 3, paragraph 1, there might be other persons who could act on behalf of the State and bind it by formulating a unilateral declaration. Within the Sixth Committee, various opinions have been expressed indicating a reluctance to broaden the circle of persons qualified to formulate unilateral acts.[177] Moreover, within the Commission itself, a number of members cited examples to show that, although in many cases representatives to international conferences had made declarations that appeared to

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[173] See, for example, the opinions of Argentina and Israel in A/CN.4/511.

[174] Judgment of 3 February 2006, *Democratic Republic of the Congo v. Rwanda*, para. 46.

[175] This heading reflects the wording suggested by Mr. Pambou-Tchivounda (*Yearbook ... 2000*, vol. I, p. 128, para. 31).

[176] The need to have a restrictive criterion for determining who has the capacity to bind the State through the formulation of unilateral acts was stressed by many of the States that answered the questionnaire sent out by the Secretariat (see A/CN.4/511). In that regard, in a meeting of the Commission Mr. Momtaz expressed the view that the capacity to formulate a unilateral act should be restricted to those persons mentioned in article 7, paragraph 2 (a), of the Vienna Convention on the Law of Treaties (see A/CN.4/SR.2723).

[177] The representative of Chile, for instance, in discussing the possibility of adopting a flexible criterion for determining which persons should have the capacity to formulate unilateral acts, said that his delegation was opposed to adopting rules more flexible than those contained in the Vienna Convention on the Law of Treaties. See A/C.6/60/SR.16, para. 47, in which he stated that such flexibility was dangerous and could lead to abuses, since it was left to the addressee State to determine whether the person who had formulated a given declaration without being formally empowered to do so was actually authorized to bind the State that person claimed to represent. Under article 7, paragraph 1 (b), of the Vienna Convention, flexibility in the matter of representing the State was limited to the practice of the States concerned, so that the decision was not left to one State alone. The representative of Kenya agreed and expressed the view that the category of persons with capacity to bind the State should be restricted to that defined in article 7 of the Convention (A/C.6/60/SR.16, para. 73).

be binding in some way on the States they were representing, ultimately that did not prove to be the case.[178]

146. It is true that this provision raises many problems, as indicated above; nonetheless, it is a common practice, especially in the context of certain international bodies or organizations, for representatives of the State other than those mentioned above to perform acts by which they may and in fact do bind the State that they represent.[179]

147. In the Commission's deliberations, the possibility has been put forward that persons other than the Head of State or Government or the Minister for Foreign Affairs may also be authorized under international law to act on behalf of and bind the State in this sphere. During these debates the view has been expressed that a person other than those mentioned might act and bind the State in this sphere if that person can be considered authorized to do so. This narrow innovation would reflect the evolving nature of international relations and the possibility that some persons may be empowered to act and do in fact act on behalf of the State. The special nature of unilateral acts, in this view, makes it necessary to devise a more flexible rule than the rule for treaties, while framing it in such a way that only in specific cases and circumstances may the State be bound by persons other than those traditionally contemplated under the Vienna regime.

148. The International Court of Justice, in its decision of 3 February 2006 on the jurisdiction of the Court and the admissibility of the application filed by the Democratic Republic of the Congo against Rwanda, noted that "with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials".[180] This cite supports the notion that persons other than those authorized to act on behalf of the State in the treaty sphere may bind the State through the formulation of a unilateral statement or declaration, as can be inferred from the text of the Court's decision in the cited case, with reference to the actions of the Minister of Justice of Rwanda.

149. We should add that, in addition to the possibility of inferring from practice that a person may act on behalf of and bind the State that he/she represents in a given sphere, the circumstances in which a particular unilateral act has been formulated are also relevant, as we will see below. The manner in which it was formulated, the terms of the declaration (and, as the Court indicated, the clarity and precision of those terms) and the context, which together provide all the relevant information surrounding the unilateral act, will be critical factors.

150. On the understanding that the above question will be considered in greater detail further on in relation to the interpretation of unilateral acts, we will now present paragraph 2 of guiding principle 3, which is worded as follows:

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[178] See the examples cited by Mr. Hafner in *Yearbook ... 1999*, vol. I, p. 205, para. 34.

[179] Consider, for example, what occurs when State representatives, who are of ministerial rank but are not necessarily ministers for foreign affairs, meet in the Council of the European Union.

[180] See para. 47 of the decision cited.

"**2. In addition to the persons mentioned in the previous paragraph, other persons may be considered able to formulate unilateral acts on behalf of the State if that may be inferred from the practice followed in that regard by the formulating State and from the circumstances in which the act was formulated**."

3. Subsequent confirmation of a unilateral act formulated without authorization

151. As is the case in treaty law, a unilateral act may be confirmed by the State when it has been formulated by a person not authorized or qualified to do so. In previous reports the Special Rapporteur suggested that, given the nature of unilateral acts, such confirmation must be explicit; however, that view did not meet with broad support from the members of the Commission.

152. In addition to the consideration given to the question in part one of the ninth report in relation to the grounds for invalidity of a unilateral act, we will now present the following draft guiding principle concerning confirmation:

"**Principle 4**

Subsequent confirmation of an act formulated by a person without authorization (or not qualified to do so)

A unilateral act formulated by a person not authorized (or qualified) to act on behalf of the State, in accordance with the previous guiding principles, may be confirmed subsequently by the State either expressly or through conclusive acts from which such confirmation can be clearly inferred".

C. Basis for the binding nature of unilateral acts

153. Since the first report on the topic was submitted to the Commission,[181] the question of the basis of unilateral acts, that is, what makes them binding, has come up for discussion on a number of occasions, but there has been no unanimity of opinion on the matter. Without going into great detail and reverting to previous reports and debates in the Commission, we merely note that neither the legal literature[182] nor the members of the Commission have taken a unified position that would allow us to determine clearly what constitutes the basis for the binding nature of unilateral acts.[183]

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[181] A/CN.4/486, paras. 152-162.

[182] On this point, D. Bondía García, in *Régimen jurídico de los actos unilaterales de los Estados* (Barcelona, 2004), notably on page 76, chooses to offer a dual basis: a subjective criterion, consisting in the intent of the State to give binding effect to the unilateral act, and an objective criterion, which is based on the protection of legitimate confidence (good faith); in another example from the Spanish legal literature, R. Zafra Espinosa de los Monteros, in *Aproximación a una teoría de los actos unilaterales de los Estados*, a work presented in a competitive examination for the post of full professor at the University of Seville, 2002 (copy courtesy of the author), pp. 54-56, opts to follow closely the view expressed by the International Court of Justice in the *Nuclear Tests* cases and makes good faith and mutual trust the basis of the binding character.

[183] An attempt was made to base the binding nature of unilateral acts on a rule such as *acta sunt servanda* or *declaratio est servanda*, but that solution met with many criticisms. Some members

154. One basic principle that must be taken into account is good faith, if we follow the view expressed by the International Court of Justice in 1974: "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. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected".[184]

155. Realistically, the intention of the State that formulated the unilateral act also constitutes an element that must be given considerable weight in determining the basis of the binding nature of unilateral acts. This opinion, expressed within the Commission,[185] finds support in the legal literature[186] and the decisions of the International Court of Justice.[187] In the decision of 3 February 2006 cited above, the Court reaffirmed the necessity of taking into account the "actual content [of a statement] as well as the circumstances in which it was made" (in other words, its context); the Court goes on to say that "a statement of this kind can create legal obligations only if it is made in clear and specific terms".[188]

156. In the light of the foregoing a guiding principle could be framed concerning the basis for the binding nature of unilateral acts, worded as follows:[189]

"**Principle 10**

Basis for the binding nature of unilateral acts

The binding nature of the unilateral acts of States is based on the principle of good faith and the intent to be bound of the State that formulated the act".

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of the Commission went so far as to say that "there was no need to invent any special rule, such as *declaratio est servanda* ... The principle of good faith was enough" (view of Mr. Lukashuk, *Yearbook ... 1998*, vol. I, p. 37, para. 47).

184 *I.C.J. Reports 1974*, p. 268, para. 46.

185 A/CN.4/505, paras. 35-36.

186 In this regards, see R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford, 1994), p. 35; see also D. Bondía García, op. cit., pp. 76 and 77.

187 Turning once again to *Nuclear Tests (Australia v. France)*, for example, we find: "in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made" (*I.C.J. Reports 1974*, p. 269, para. 49).

188 See the decision of the International Court of Justice in *Democratic Republic of the Congo v. Rwanda*, paras. 49 and 50.

189 The numerical placement of this draft guiding principle was changed because the Special Rapporteur feels that the proposed principles outlined in part one of this report, on the grounds for invalidity and termination of unilateral acts, should be presented first, before this guiding principle, as can be seen in document A/CN.4/569, where all the principles are laid out in consecutive order.

D. Interpretation of unilateral acts

157. Given the nature of unilateral acts, to formulate rules of interpretation for them similar to those already existing for treaties proves practically impossible. In both the fourth and the fifth reports[190] presented to the Commission, a few preliminary criteria were formulated to offer some guidelines for the interpretation of unilateral acts. The diverse views expressed by Commission members illustrated clearly the many difficulties involved in arriving at generally acceptable criteria for interpreting unilateral acts.[191] Some of the suggestions of the Special Rapporteur in the above-mentioned reports, such as a reference to recourse to the preparatory work, preambles or annexes, which are useful in connection with international treaties, had to be abandoned, because they did not find favour with the majority of the Commission members[192] or of the authors of the legal literature.[193]

158. We should point out that the unilateral statements considered by the International Court of Justice, whether or not they were formulated in the context of a treaty relationship, were subject to interpretation, so that it is appropriate to mention them at this point. The Court concluded that a restrictive interpretation was called for when States made statements by which their freedom of action was to be limited, and it stressed the need to consider the circumstances in which such a unilateral act was formulated, as well as the clarity and precision of its terms, as mentioned earlier.[194]

159. All the above elements may be used to interpret a unilateral act; in this sphere context plays a key role and must be given considerable weight when assessing a unilateral act and deducing the possible legal consequences deriving from it.

160. Following that line of thought, we arrive at the following draft guiding principle:

"**Principle 11**

Interpretation of unilateral acts

The context in which a unilateral act was formulated by a State, together with the clarity and precision of its terms, shall be given weight in interpreting it".

161. The Special Rapporteur believes that he has fulfilled the task entrusted to him by the Commission by presenting the draft guiding principles, duly supported by

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[190] In this regard, see A/CN.4/519, paras. 101-154, and A/CN.4/525/Add.1, paras. 120-135, where a general rule of interpretation and some supplementary means of interpretation were put forward.

[191] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), in particular paras. 239-244. At that time it was felt to be premature to deal with the issue of interpretation; some members felt that the provisions of the Vienna Convention could be helpful, while others expressed just the opposite view, given the unique nature of unilateral acts. The notions of object and purpose and of the context of a unilateral act were stressed during that session of the Commission.

[192] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 405 and 406.

[193] See J. D'Aspremont Lynden, "Les travaux de la Commission du droit international relatifs aux actes unilatéraux des États", *R.G.D.I.P.*, vol. 109 (2005), pp. 180 and 181, devoted in particular to the interpretation of unilateral acts.

[194] *I.C.J. Reports 1974*, p. 267, para. 44, and *Democratic Republic of the Congo v. Rwanda*, paras. 49 and 50.

reasoning, applicable to unilateral acts of States. If the Commission thinks it is appropriate, the draft principles could be referred to the Working Group and at a later stage to the Drafting Committee for consideration. The Special Rapporteur feels that the guiding principles could be useful to States in assessing in practice the effects that might be produced by unilateral acts of States, a topic that the Commission has been considering since 1997.