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Report of the International Law Commission on the work of its fifty-eighth session (2006)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat

Addendum

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H. Unilateral acts of States

1. General comments

1. Delegations commended the Commission, the Special Rapporteur and the Working Group for the adoption of the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations". Some delegations supported the approach taken by the Commission in giving priority to the study of unilateral acts that implied, on the part of the author State, an express manifestation of a will to be bound (unilateral acts *stricto sensu*). However, the diversity of unilateral acts and the usefulness of achieving a characterization of different types of unilateral acts were also stressed. Mention was made of the possible links between certain unilateral acts and expectations raised by State conduct as well as the concept of implied agreement. The view was also expressed that the Guiding Principles required further examination, and doubts were raised as to the appropriateness of transposing to unilateral acts certain rules applying to treaties, such as the concept of "nullity".

2. Definition and binding force of a unilateral declaration ("unilateral act *stricto sensu*")

2. Support was expressed for the definition of "unilateral act *stricto sensu*" as contained in Guiding Principle 1. As to the binding force of a unilateral declaration, some delegations stressed the decisive role of the intention of the author State. According to another view, international law and, in particular, the principle of good faith played a prominent role in determining the binding force of a unilateral declaration. It was also held that a State might become bound by a unilateral declaration even though such might not have been its intent. Some delegations supported Guiding Principle 3, dealing with the criteria for the determination of the legal effects of a unilateral declaration, which included the content of the declaration, the factual circumstances in which the declaration was made and the reactions to which the declaration gave rise. Support was also expressed for Guiding Principle 7, indicating that a unilateral declaration entailed obligations only if it was formulated in clear and specific terms and that, in case of doubt as to the scope of the obligations resulting from such a declaration, a restrictive interpretation should prevail. Concern was expressed about the idea, enunciated in the commentary to Guiding Principle 6, according to which a declaration addressed to the international community might contain *erga omnes* undertakings.

3. Power to bind a State by a unilateral declaration

3. It was considered unclear which authorities other than Heads of State, Heads of Government or ministers for foreign affairs were able to bind a State by a unilateral declaration, and whether the same criteria should apply in this regard to unilateral declarations with a specific addressee and to those addressed to the international community as a whole. A restrictive approach was proposed, requiring that individuals other than Heads of State, Heads of Government or ministers for foreign affairs be given specific and express authorization in order to bind the State by a unilateral declaration. Similarly, the view was expressed that individuals other than Heads of State, Heads of Government or ministers for foreign affairs might bind a State by a unilateral declaration only in exceptional situations requiring irrefutable evidence that the State was willing to be bound by such individuals.

4. Validity of a unilateral declaration

4. Support was expressed for Guiding Principle 8, stating the nullity of a unilateral declaration in conflict with a peremptory norm of general international law. It was also observed that coercion exercised on the representative of a State in order to obtain a unilateral declaration would automatically nullify such a declaration.

5. Revocation of a unilateral declaration

5. With respect to Guiding Principle 10 dealing with the revocation of a unilateral declaration, it was considered that the whole question of the arbitrary revocation of a unilateral declaration was debatable or required further clarification. It was also remarked that the rules applicable to treaties did not necessarily apply to unilateral declarations, and that a fundamental change in the circumstances allowed a State to revoke a unilateral declaration notwithstanding other considerations set out in article 62 of the 1969 Vienna Convention on the Law of Treaties.

6. Further work on the topic

6. Divergent views were expressed as to whether the Commission should continue its consideration of this topic. Some delegations were of the opinion that the Guiding Principles should conclude the work of the Commission on this topic. It was also believed that the text of the Guiding Principles was ripe for submission to the General Assembly. According to another view, the Guiding Principles could be a step towards the elaboration by the Commission of a set of guidelines on unilateral acts, aimed at directing States in their practice. While doubts were raised as to the advisability of proceeding to codification, given the insufficiency and inconsistency of the practice in this field, regrets were also expressed that the Commission did not further consider this topic by drawing analogies from the law of treaties.

I. Fragmentation of international law: difficulties arising from the diversification and expansion of international law

1. General comments

7. The Study Group on the fragmentation of international law and its Chairman were commended for the work done on the topic, in particular in giving shape to a difficult and complex subject and guiding it to completion. Procedurally and substantively, the Study Group made a foray into uncharted waters: it not only considered a subject that did not necessarily lead to codification or progressive development of international law, but also sought to help explain and understand a phenomenon in an existing legal environment. Unsurprisingly, the work of the Study Group had drawn considerable attention and was of interest to Governments, academics and practitioners alike and, according to one view, its academic accomplishment would in turn stimulate much discussion in the field. According to another viewpoint, the Study Group's report demonstrated that the problem of fragmentation was a real and practical one and not merely of academic interest.

8. Some delegations reiterated their concerns regarding the consideration of the topic by the Commission in the first place, and such concerns were not allayed by the methods used in the treatment of the topic. The fact that the Commission had

devoted only a few meetings to the consideration of the report and had merely taken note of it was considered surprising. In doing so, the Commission appeared to be acting only as a temporary receptacle for a study conducted outside its remit, the conclusions of which were not to be attributed to it. Some other delegations were uneasy that there was limited opportunity for Governments to discuss the work of the Study Group as it progressed. It was recalled that government comments remained an important element in the Commission's work, and that this was a consultative procedure that should be retained in future projects. Some questions were also raised regarding the relationship between the conclusions and the analytical study, which appeared not to be a product of the Study Group as a whole.

9. Nevertheless, the Commission's decision to conclude work on the topic by taking note of the conclusions and commending them to the General Assembly was appreciated. In particular, delegations welcomed the 42 conclusions adopted by the Study Group along the lines originally intended.

10. It was asserted that the 42 conclusions were not only an important contribution to the unity of international law but were also formulated simply, were neutral and were well-founded in case law. The conclusions were also practical and should prove useful to practitioners and legal advisers as guidelines in dealing with the practical consequences of the widening scope and expansion of international law. It was hoped the General Assembly would take note of the conclusions and refer them to the attention of States and that they would be used as regularly as the Commission's articles on responsibility of States for internationally wrongful acts.

11. The conclusions convincingly demonstrated that the task of the Commission was not only limited to codification. They were a good example of the valuable non-traditional kinds of work that the Commission might undertake in the future. Since the topic was not a fruitful field for progressive development, it was suited to such an outcome as presented by the Study Group rather than to the development of a more prescriptive or proscriptive set of principles. The conclusions as framed were not representative of customary international law or necessarily a desirable direction for progressive development.

12. Delegations also welcomed the analytical study as a scholarly contribution and agreed with the Commission's decision to post it on its website, so that it would be available to a wider audience, and to have it published in the *Yearbook of the International Law Commission*. Its wider circulation would foster a better understanding of ways to approach the fragmentation of international law.

13. Commenting on the background context against which the fragmentation of international law was to be perceived, some delegations did not view this fragmentation as an inherently negative phenomenon, but as a sign of the vitality of international law and its increasing relevance. The fragmentation of international law was largely a result of an uncoordinated expansion of international law from being a tool for regulating formal diplomacy to an instrument for dealing with a huge variety of international activities. By regulating real and potential problems through a variety of legal instruments and institutions, States created an environment that posed challenges for fragmentation, which, in some cases, could lead to conflicts between different rules and regimes, thereby undermining their implementation.

14. As regards the approaches taken by the Study Group in addressing the topic, some delegations welcomed the emphasis placed on the systemic nature of international law, the interrelationship of the different categories of norms and the optimal methods of interpreting and applying international law. While there was no homogeneous system of international law, the point was made that international law was a true "system", with rules capable of resolving the problems of contradictory legal regimes and conflicting norms.

15. Some other delegations acknowledged as useful the primary focus of the Study Group on States as creators of legal norms; the emphasis on the dispositive character of most international law; the attention to the principle *pacta tertiis nec nocent nec prosunt*; and the correct attachment for analysis to the Vienna Convention on the Law of Treaties or the principles reflected therein as the general framework of reference and as a means for addressing fragmentation of international law and assuring its unity.

16. Some delegations found regrettable and not entirely satisfactory the fact that the Study Group focused on the substantive aspects of fragmentation, thereby leaving its institutional aspects to be dealt with by the institutions themselves. Since such institutions were a creation of States, and their competencies ultimately were subject to the will of States irrespective of such institutions' strengths or independence. As such, institutional competencies and their relation to and place in the substantive legal system merited further examination. It was also pointed out that the proliferation of adjudicatory bodies, sometimes with overlapping jurisdiction, had a distinct impact on the integrity of international law. It was therefore necessary that the international community remain alert to the interplay between the substantive and institutional aspects of fragmentation.

2. Specific comments concerning the conclusions of the Study Group

17. Some delegations concurred with the content of the conclusions *grosso modo*. Clearly, their wording, with frequent resort to vague expressions, such as "often" or "mostly", revealed the legal problems connected with the topic and reflected the fact that the general system of international law did not provide clear guidance on how to resolve possible conflicts of norms.

18. It was understood, with regard to conclusion 2, that the meaning of validity of a norm "that two norms are valid in regard to a situation means that they each cover the facts of which the situation consists" only applied to the conclusions of the Study Group, as that meaning substantially differed from the common usage of the term. The principle of harmonization as reflected in conclusion 4 corresponded to the principle *ut res magis valeat quam pereat* and permeated the whole set of conclusions.

(a) The maxim *lex specialis derogat legi generali*

19. An observation was made that conclusion 5 should take into account that article 38 of the Statute of the International Court of Justice was generally construed as *lex specialis* in the sense that treaties normally prevail over general customary international law and there was ample practice on which the concept of the prevalence of treaties was founded.

20. The point was made that conclusion 7 did not cover all aspects of the rationale of the *lex specialis* principle. In particular, the reference to "a more equitable result" could become meaningful only if it was understood in terms of its original Aristotelian meaning and not only in the light of its present use as criterion of distributive justice.

21. With regard to the effect of the special law on particular types of general law as addressed in conclusion 10, it was noted that it had to be kept in mind that general law would continue to give direction for the interpretation and application of the special law only insofar as it was reconcilable with the general rule of interpretation according to article 31 of the Vienna Convention on the Law of Treaties. The conclusion raised certain questions and substantially blurred the scope of the *lex specialis* principle. Ordinarily, a special rule was adopted in order to deviate from the general rule. It could therefore hardly be said that a special rule would never frustrate the purpose of the general law.

(b) Special (self-contained) regimes

22. The point was made that the study undertaken in respect of special (self-contained) regimes, together with conclusions 11 to 16 relating thereto, constituted a particularly interesting contribution. It was suggested that the use of the term "self-contained" ought to be avoided, since it implied a complete separation of a regime, as if it were immune from outside influence. Instead "separate" or "specialized" fields of international law was preferred. In this regard, it was noted that the World Trade Organization law, in view of the unique character of its adjudicatory procedure, should be given special attention when studying the impact of specialized fields of international law on the integrity of the system.

23. On the other hand, it was stated that the meaning of "self-contained regimes" in conclusion 12 seemed to be too broad and the extension of the term to all the rules and principles that were usually used to describe particular forms of specializations, such as trade law, seemed inappropriate. In accordance with the *dictum* of the International Court of Justice in the *Hostages* case, only those legal regimes that provide their own system of sanctions in case of breach were covered by the term.

24. The comment was also made that the concept of the "failure of a special regime" addressed in conclusion 16 was not yet clearly developed, in practice or doctrine. The examples furnished in that conclusion only raised more questions than answers. In particular, it was not clear why persistent non-compliance with the obligations under a particular system should be understood as a failure or whether persistent non-compliance was only the consequence of a persistent lack of application of the sanctions procedures of the system.

(c) Article 31 (3) (c) of the Vienna Convention on the Law of Treaties

25. Some delegations acknowledged that article 31 of the Vienna Convention provided an invaluable instrument for reconciling the different rules resulting from diversification. Its paragraph 3 (c) had only attracted recent interest and its implications were yet to be fully assessed. It was therefore highly commendable that the Study Group had dealt with questions concerning its interpretation. Paragraph (b) of conclusion 19 nevertheless raised certain questions, as it was unclear which principles of international law should be deemed as generally recognized. Some

other delegations highlighted as useful the development of the objective of "systemic integration", as well as "open or evolving concepts".

(d) Conflicts between successive norms

26. With regard to conclusions 24 to 30, the point was made that while it was true that the relationship between two or more treaties covering related subject-matters was sometimes far from clear, the situation was less erratic and haphazard than portrayed by the Study Group. States at diplomatic conferences were well aware of the possible overlap and, as a matter of policy choice, deliberately left such matters unregulated to avoid unravelling or reopening an existing text. Safeguard clauses in treaties were clear evidence of the negotiators' dilemma and of their decision, in such cases, to postpone the question of how to harmonize one treaty with another to the application stage. In so doing, States assumed that two different regimes can be interpreted and applied harmoniously in an integrated manner.

27. It was noted with respect to conclusion 26 that "the substantive rights of treaty parties or third party beneficiaries should not be undermined" was a clear obligation rather than a mere recommendation. It was observed that conclusion 27 did not provide clear guidance as to how the conflict between *lex posterior* and *lex specialis* should be resolved, since the criteria used were too general.

(e) Hierarchy in international law, *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations

28. Some delegations particularly welcomed the Study Group's conclusions 31 to 42. It was axiomatic that fundamental principles of international law such as *pacta sunt servanda*, the precedence of *jus cogens* over all other obligations under international law and the opposability of *erga omnes* obligations to all States would continue to serve as means of addressing fragmentation and were vital to preserving the integrity of international law. These principles could be further strengthened by States' practice, judicial decisions and doctrine.

29. Some delegations concurred with the assertion in conclusion 42 that conflicts between rules of international law should be resolved in accordance with the principle of harmonization; fully appreciated the importance of the principle of harmonization in interpretation; and found it a sensible principle in the contemporary practice.

3. Future work emanating from the report of the Study Group

30. As regards possible future work arising from the work of the Study Group, the point was made that it might be advisable for the Commission to study and ultimately recommend guidelines for the application of article 31, paragraph 3 (c), of the Vienna Convention. While its broad formulation supplied the interpreter of a treaty with a valuable tool for reconciling conflicting rules, the Commission could also build on the case law of the International Court of Justice, including the *Oil Platforms* case.

31. Moreover, since the reconciliation of conflicts is often postponed to the application stage, the key question was whether the Vienna Convention provides sufficient tools to deal with treaty interpretation in a world of multiple "conflicts" of norms and regimes. While a number of important ideas had emerged from the Study

Group's conclusions, clearer common understandings or interpretative standards of treaty interpretation merited further study. In this connection, it was suggested that the Commission consider, as a restatement of the law, answering the question: "Adapting international treaties to changing circumstances: what constitutes subsequent agreement and subsequent practice, and in which way do they affect the implementation and interpretation of treaties?"