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INTERNATIONAL LAW COMMISSION  
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**UNILATERAL ACTS OF STATES**

**Report of the Chairman of the Working Group**

1. At the present session, the Commission established a working group<sup>1</sup> which held six meetings on 8, 9, 10 and 24 July 2003. It endeavoured to find a consensus on:

The definition of the scope of the topic; and

The method to be followed in dealing with it as effectively as possible.

2. When it had completed its work, the Working Group adopted the following recommendations by consensus.<sup>2</sup>

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<sup>1</sup> The Working Group was composed of: Mr. A. Pellet (Chairman), Mr. E. Candioti, Mr. C. Chee, Mr. J. Dugard, Mr. C. Economides, Ms. P. Escarameia, Mr. G. Gaja, Mr. J. Kateka, Mr. W. Mansfield, Mr. M. Matheson, Mr. T. Melescanu, Mr. D. Momtaz, Mr. V. Rodríguez Cedeño, Mr. B. Sepúlveda, Ms. H. Xue.

<sup>2</sup> The text of the first three recommendations was discussed in detail by the Working Group, but, owing to the lack of time, the same was not true of the following three, which were prepared by the Chairman in cooperation with the Special Rapporteur on completion of the Group's discussions.

## **1. Scope of the topic**

3. As a result of fairly lengthy discussions, the Working Group agreed on the following compromise text, which it adopted by consensus. Like any compromise, this text is based on mutual concessions between the positions involved: it does not completely satisfy anyone, but is acceptable to all.

4. The Working Group strongly recommends that the Commission should endorse this compromise and regard it as a guide both for the Special Rapporteur's future work and for its own discussions, which should avoid calling it into question because, otherwise, the work on the topic will become bogged down once more and the errors of the past will be committed again, since the contradictory instructions given to the Special Rapporteur are partly responsible for the current situation.

5. In the Working Group's opinion, the consensus reached strikes a balance between the views which were expressed by its members and which reflect the differences of opinion in the Commission as a whole on the scope of the topic.

6. The Chairman of the Working Group submitted a commentary on the consensus text to the Group in order to make its meaning clearer. The Group reviewed the main points of the commentary, but the Chairman is solely responsible for the details of what he has written. These commentaries are annexed hereto.

### **Recommendation 1**

*1. For the purposes of the present study, a unilateral act of a State is a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law.*

### **Recommendation 2**

*2. The study will also deal with the conduct of States which, in certain circumstances, may create obligations or other legal effects under international law similar to those of unilateral acts as described above.*

### **Recommendation 3**

3. *In relation to unilateral acts as described in paragraph 1, the study will propose draft articles accompanied by commentaries. In relation to the conduct referred to in paragraph 2, the study will examine State practice and, if appropriate, may adopt guidelines/recommendations.*

## **2. Method of work**

7. The Working Group would have liked to be able to submit specific recommendations to the Commission on the method to be followed in achieving the objectives defined above. It was unfortunately not able to do so within the time available to it and will simply make the following suggestions, which the Special Rapporteur might wish to take into account in his next report.

8. The Special Rapporteur, who is mainly responsible for these recommendations, informed the Working Group that, with the assistance of the University of Malaga and students from the International Law Seminar, he had already assembled a large amount of documentation on State practice.

### **Recommendation 4**

4. *The report which the Special Rapporteur will submit to the Commission at its next session will be exclusively as complete a presentation as possible of the practice of States in respect of unilateral acts. It should also include information originating with the author of the act or conduct and the reactions of the other States or other actors concerned.*

### **Recommendation 5**

5. *The material assembled on an empirical basis should also include elements making it possible to identify not only the rules applicable to unilateral acts stricto sensu, with a view to the preparation of draft articles accompanied by commentaries, but also the rules which might apply to State conduct producing similar effects.*

**Recommendation 6**

6. *An orderly classification of State practice should, insofar as possible, provide answers to the following questions:*

*What were the reasons for the unilateral act or conduct of the State?*

*What are the criteria for the validity of the express or implied commitment of the State and, in particular, but not exclusively, the criteria relating to the competence of the organ responsible for the act or conduct?*

*In which circumstances and under which conditions can the unilateral commitment be modified or withdrawn?*

**Recommendation 7**

7. *In his next report, the Special Rapporteur will not submit the legal rules which may be deduced from the material thus submitted. They will be dealt with in later reports so that specific draft articles or recommendations may be prepared.*

## Annex

### Commentaries on the scope of the topic

- (1) The three above-mentioned recommendations on the scope of the topic reflect the consensus in the Working Group on the scope of the topic if unilateral acts of States. In the opinion of the members of the Working Group, they strike a satisfactory balance between the view of some members of the Commission who would like the study to be limited to formal expressions of will by a State and the position of other members that the most interesting aspect of the topic is precisely conduct of States which does not take the form of a formal statement of will, but nevertheless produces legal effects.
- (2) Like any compromise, the present one is obviously not fully in keeping with the wishes of the advocates of either of the two positions in question. Those for whom a legal act is inconceivable without the will to create legal effects (usually obligations) agreed that the study entrusted to the Special Rapporteur might (and should) include research on conduct of States having effects comparable to those of legal acts *stricto sensu*. Those who were in favour of the broadening of the concept agreed that conduct of States other than a unilateral expression of will or consent was not part of the strict definition of unilateral acts and did not lend itself to an exercise in the codification or progressive development of international law in the traditional form of draft articles accompanied by commentaries.
- (3) It is understood that paragraph 1 of the above consensus is intended to define *the purpose of the draft articles* referred to in paragraph 3 of the consensus text and is not a definition of unilateral acts *stricto sensu* themselves. The definition will have to be finalized by the Drafting Committee in due course. In that case, however, it must be understood that the definition of unilateral acts for the purposes of the draft articles will be based on the approach adopted in paragraph 1 above.
- (4) In order to determine the scope of the draft articles on unilateral acts of States, the Working Group used three criteria:

A formal criterion: there must be a statement;

By one State;

Purporting to create obligations or other legal effects under international law.

According to the Working Group, these criteria are necessary, but they are not necessarily exhaustive. Moreover, each one warrants brief explanations which it was not considered essential to include in the paragraph, but which are nonetheless an integral part of the consensus.

(5) The formal element (a statement expressing will or consent) is, according to the Working Group, the distinguishing factor making it possible to tell the difference between unilateral acts *stricto sensu*, as referred to in paragraph 1, and conduct having similar effects, as referred to in paragraph 2. The Working Group considered that it did not have to decide what the purpose of such expression was: in some cases, the State is expressing its *will* to be bound (this is the case of promise), while, in others, it is more accurate to say that it *consents* to be bound (waiver or recognition, perhaps). In both cases, however, such expression must be voluntary; this is not part of the definition of the topic (much less its scope), but of the legal regime governing it.

(6) The idea that, in principle, a *unilateral* act emanates from one State would appear, *prima facie*, to be obvious. Some members of the Working Group were, however, of the opinion that unilateral acts may originate with a group of States, while others considered that they were mixed acts of a unilateral nature in respect of their addressees and conventional acts in the relations of their authors *inter se*. That question will have to be discussed in the commentary to the article defining unilateral acts for the purposes of the draft and decided in the body of the draft.

(7) The Working Group also discussed at length whether:

The basic criterion for a unilateral act was the creation of, or the will to create, legal effects; and

Such legal effects were exclusively the creation of obligations or more than that.

With regard to the first point, it considered that, by referring only to the actual creation of legal effects, it would be overlooking the fact that wrongful acts were unilateral acts as well, in accordance, moreover, with the position taken in the 1969 Vienna Convention on the Law of

Treaties. It was also pointed out that some unilateral acts did not *create* obligations, but simply took note of or confirmed them. These are the reasons why the Working Group finally decided in favour of a broad definition.

(8) However, the Working Group did not take a decision on the sensitive question whether the draft articles should relate only to “autonomous” unilateral acts, as opposed to what some of its members referred to as “dependent”<sup>3</sup> unilateral acts. Some members of the Group are of the opinion that this second category of unilateral acts should not be taken into account as part of the topic because it involves categories of very specific acts which are based on specific “legitimations” and whose legal status is well known. Other members consider that these particular cases are not fundamentally different from those in which there is no apparent “legitimation”, since, in such cases, there is a general “legitimation” by which States have capacity to assume obligations unilaterally under international law. They take the view that the rules applicable to such acts might help to shed some light on the work as a whole. The Working Group did not adopt a position on this matter. A reasonable solution would probably be not to consider such unilateral acts,<sup>4</sup> but not to hesitate to use the rules applicable thereto in order to derive, where appropriate, any general rules.

(9) The Working Group did not, however, consider it necessary to explain:

That a unilateral act had to be subject to international law, since that was more than obvious and would duplicate the term “under international law” at the end of paragraph 1; some members of the Working Group regretted such silence because of their concern to ensure symmetry with the definition of treaties contained in article 2, paragraph 1, of the 1969 Vienna Convention;

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<sup>3</sup> Cf. the unilateral determination of the extent of maritime zones over which a State has jurisdiction, within the limits defined and permitted by international law. Many acts of this kind are to be found in the law of treaties (expression of consent to be bound, reservations, etc.). States also adopt unilateral acts pursuant to decisions by international organizations.

<sup>4</sup> Comment by the Chairman: *no* category of unilateral acts should be studied as such.

Who should or could be its addressees, although it was understood that the commentary would make it clear that such an act could be addressed to one or more other States or to the international community [of States] as a whole and even, perhaps, to any other subject of law.

(10) The wording of paragraph 2 is meant to be neutral: it simply indicates that the conduct in question must be taken into account in the study. It clearly indicates that, in any event, everything depends on circumstances, thereby showing that any generalization is impossible.

(11) This is why the Working Group considered it appropriate not only to provide for the inclusion of types of conduct whose legal regime is uncertain in the context of the study of the topic, but also not to make such types of conduct the subject of draft articles designed to be applicable in all circumstances. It appeared that the still unknown effects of such conduct would lend themselves more to the adoption of recommendations or guidelines that would enable States to be aware of the legal risks involved in certain types of conduct (active or passive).

(12) In the Working Group's opinion, such a solution can be applied only on the basis of an in-depth study of the practice of States, since the purpose of such a study is above all to determine whether and *in which circumstances* the unilateral conduct of States has effects comparable to those resulting from formal statements.

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