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Some unfinished new thoughts on unilateral acts of states as a source of international law

Summary

The unilateral acts of states in the form of a declaration concerning a legal or factual situation may create legal obligations for the state making the declaration when made with the intent to be bound. In such circumstances the intention confers on the declaration the character of a legal undertaking by the state to act in accordance with the undertaking. In this article the author revisits the hitherto restrictive definitions of the unilateral act as a source of international law in view of changed practices brought about by the progressive development and codification of the law of treaties.

Enkele onvoltooide nuwe gedagtes oor die eensydige handeling van state as 'n bron van die internasionale publiekreg

Die eensydige handeling van 'n staat in die vorm van 'n verklaring oor 'n juridiese of feitlike aangeleentheid kan verpligtinge vir die staat wat die verklaring maak, meebring, indien dit gedoen is met die bedoeling om bindende werking te hê. In sulke omstandighede het die bedoeling die effek dat die verklaring die karakter van 'n bindende onderneming deur die staat om in ooreenstemming daarmee te handel, aanneem. In hierdie artikel heroorweeg die outeur die tot dusver restriktiewe definisies van 'n eensydige handeling as 'n bron van die internasionale reg in die lig van veranderde praktyke meegebring deur die progressiewe ontwikkeling en kodifikasie van die internasionale verdragsreg.

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1 Introduction

The traditional sources of public international law are mentioned in Article 38 of the Statute of the International Court of Justice according to which the International Court shall apply in disputes submitted to it:

- a international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b international custom, as evidence of a general practice accepted as law;
- c the general principles of law recognized by civilized nations.

Article 38 also adds, as subsidiary means for the determination of rules of law, "judicial decisions and the teachings of the most highly qualified publicists of the various nations".

It is clear that these sources of international law, as drafted nearly eighty years ago, no longer reflect the realities of international relations. The Charter of the United Nations indicates that decisions of the Security Council, adopted in accordance with the Charter, are binding upon all Members.¹ Furthermore, the General Assembly of the United Nations has limited powers of decision, mainly concerning budgetary matters as provided for in Article 17 of the Charter.²

These articles of the United Nations Charter and analogous provisions in the constitutions of other intergovernmental and supranational organizations confirm that international obligations of states are derived from other sources than those mentioned in Article 38 of the Statute of the International Court of Justice. To the extent that states, the primary actors in international relations and principle subjects of international law, decide to participate in organized and institutionalized relations, they commit themselves to accepting the obligations stemming from this participation. The binding decisions of these organs and organizations can be viewed as *collective unilateral* decisions or acts.

These legal acts are *unilateral* in the sense that they emanate from one single legal entity (such as the Security Council), but they are *collective* in the sense that they have been taken within a multilateral organ, after lengthy negotiations and in accordance with the agreed rules on decision-making. While *acts of international organizations* have been the object of innumerable³ publications, their unilateral character has hardly been the object of serious discussions. It is not the purpose here to deal with these acts although their unilateral nature is recognised as indicated and qualified above.

1 Art 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

2 Art 17: "1. The General Assembly shall consider and approve the budget of the Organization. 2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly".

3 See Schachter 1991:84-105.

2. Terminological difficulties

When dealing with unilateral acts of States we are confronted with two major difficulties of a semantic nature. The first problem is one of linguistics and concerns the qualification of a unilateral act for which the English language does not seem to be very helpful. Whereas in French, Spanish, Italian and German, a unilateral act is qualified as an *acte juridique*, *acto juridico*, *negozio giuridico*, *Rechtsgeschäft*, the English version is simply *unilateral act*. This expression does not explain the subtleties behind the German words *Rechtsgeschäft* and *Rechtshandlung*, or the difference between the Italian words *atto* and *negocio*.

If, in the English language, one adds the word *legal* one runs into serious difficulties because a legal act is an act emanating from an authority (the government, the legislature or the judiciary) acting *intra vires*, as distinct from illegal acts which may be either *ultra vires* or acts violating a norm.

In international law, national unilateral acts, be they legal or illegal, emanating from national authorities, are mere facts. But some of the unilateral acts can be elements of state practice contributing to the formation of a customary rule of international law or otherwise affecting the rights and obligations of a State in its international relations. Behind some of the legal acts there is an *intention* to create legal situations. It is this intention which distinguishes some acts from others and which justifies the supplementary qualification which we find in the German, French, Italian and Spanish expressions.

3. Defining unilateral acts

A second, and perhaps even greater difficulty, concerns the *definition* of unilateral acts. In a previous study,⁴ I proposed a rather restrictive view of unilateral acts because emphasis was put, in particular, upon the *autonomous* character of these acts. What does it mean? Firstly, it means that a unilateral act produces legal effects by its own and not as an element of a negotiating process. A well-known example of a unilateral act which is not autonomous is the often quoted *Ihlen-declaration* which was, in fact, a response by the Norwegian Minister of Foreign Affairs upon a request by the Danish authorities. The declaration, therefore, does not stand on its own and cannot be seen as a unilateral act *sensu stricto*.

Secondly, autonomy also means that the unilateral act produces legal effects without the necessary intervention of a matching act by another State. A declaration of a State party to the Statute of the International Court of Justice under Article 36, 2, recognizing as compulsory the jurisdiction of the Court, is without effect as long as there is no matching declaration by the responding party. The compulsory jurisdiction of the Court is the legal effect of two matching declarations.

4 Suy 1962:XII and 290.

Thirdly, a unilateral act which is part of a treaty-making process cannot be considered as an autonomous act if the legal effects are produced in the provisions of the treaty, with, or sometimes, without the concurrence of a unilateral act from other parties. *Ratification, accession, reservation, denunciation* are not unilateral acts *strictu sensu*. They are *adjunctive* unilateral acts.⁵ Karl Zemanek summarizes the situation as follows:

Adjunctive legal acts are elements of the treaty-making or custom-forming process and have to be evaluated in the context of these processes. Autonomous unilateral legal acts are communications under, not about, rules of the existing legal order and intend to confirm or to change the legal position of the author state in application of the respective rule of international law.⁶

The Argentinian international lawyer and diplomat, Julio Barberis, interprets the autonomy as “a manifestation of the will not linked with any conventional act”.⁷ In a recent study, summarizing the development of doctrine and state practice, I ventured to give the following definition of unilateral legal acts:

Unilateral legal acts are declarations of the will emanating from one subject of international law aiming at a legal effect. The characteristics of a unilateral legal act are that it contains the declaration of the will of only one subject of international law, and that this declaration has an effect without the involvement by other subjects of international law. This important characteristic leads to the expression ‘autonomous unilateral legal act’.⁸

This restrictive definition of unilateral acts of states was confirmed in the following *dictum* of the International Court of Justice in the *Nuclear Test Cases*:

It is well recognized that declarations made by way of a unilateral act, concerning legal or factual situations, may have the effect of creating legal obligations... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being henceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, not even any reply or reaction from other States, is required for the declaration to take

5 This expression is used by Zemanek 1997:193-195.

6 Zemanek 1997:193-194. It should be noted that Zemanek uses the expression ‘unilateral *legal* acts’.

7 Barberis 1994:133-135.

8 Suy & Angelet 2001:319-321: “Einseitige Rechtsgeschäfte sind vom Völkerrechtssubjekt ausgehende Willenserklärungen, die auf einen rechtlichen Erfolg gerichtet sind. Kennzeichnend für das einseitige Rechtsgeschäft ist, dass es die Willenserklärung nur eines Völkerrechtssubjekts enthält und dass die Willenserklärung ohne Mitwirkung anderer Völkerrechtssubjekte wirksam wird. Dieses rechtlich relevante Merkmal führt auch zur Bezeichnung ‘selbständiges einseitiges Rechtsgeschäft’”.

effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made".⁹

4. Rethinking the constitutive element of unilateral acts

Today, however, and in the light of the progressive development and codification of the law of treaties, I wonder if the constituent element of autonomy of unilateral acts should not be somewhat revised or shaded. This rethinking is inspired by some provisions in the Vienna Convention on the Law of Treaties (VCLT) concerning both *reservations* and *denunciations*.

The VCLT defines a 'reservation' as "a unilateral statement". A multilateral convention may provide for the possibility of making reservations. If one or more states make use of the possibility of making a reservation, this reservation is a unilateral act fitting within the treaty-making process. It would not be an autonomous unilateral act as described above.

Sometimes, however, international treaties contain an express provision excluding reservations,¹⁰ or otherwise prohibiting reservations to certain provisions. If, nevertheless, reservations to these provisions were made, they would certainly be unilateral acts, but without the legal consequences intended by the author.

It must be emphasized, however, that recent state practice has witnessed the appearance of forbidden reservations under the cloak and disguise of *interpretative declarations*. Obviously, one will have to proceed to a careful examination and interpretation of these declarations in order to determine whether they are reservations. If they are reservations, no effect can be attached to them because the treaty forbids them. But authentic interpretative declarations could very well be considered as genuine autonomous unilateral acts generating the legal effects intended by the author.

Many an international multilateral treaty does not contain a provision on reservations either allowing or forbidding them. If a party were to make a reservation, it would have the effect of limiting the applicability of the treaty to the declaring party, provided the reservation is not in conflict with the object and purpose of the treaty. This is a rule of customary international law incorporated in Article 19 of the Vienna Convention on the Law of Treaties.¹¹ But the treaty itself, which is silent on the possibility of reservations, does not intervene in determining the effects of the reservation. One may, therefore, ask whether a reservation to a multilateral treaty which does not contain a provision on reservations, should not be considered as a truly autonomous unilateral act, the specific effects of which are solely determined by the declaring party.

9 Australia v France, New Zealand v France, ICJ Reports 1974, at 267 and 472.

10 This is the case with most of the international disarmament and human rights conventions.

11 Article 19 permits the formulation of a reservation unless: "(c) the reservation is incompatible with the object and purpose of the treaty".

The same may be said, *mutatis mutandis*, about the act of *denouncing* a treaty or a treaty obligation. If the treaty authorizes the denunciation, the act will be an application of the treaty provision, and the procedure and legal effects will be those foreseen by the treaty or by customary law as codified in the Vienna Convention on the Law of Treaties. If the treaty expressly forbids a unilateral termination, the act will be an invalid one. But if the treaty is silent on the matter of unilateral termination, this denunciation will only be valid "if it is established that the parties intended to admit the possibility of denunciation or withdrawal", or "when a right of denunciation or withdrawal may be implied by the nature of the treaty".¹² Is this latter hypothesis not another example of an autonomous unilateral act the validity and the effects of which are not linked to another treaty provision?

5. Examples of unilateral declarations

There is another interesting phenomenon which may also be considered as further revising the view that unilateral statements and undertakings in treaty relations, such as ratifications, reservations and denunciations, do not belong to the category of autonomous unilateral acts. Professor Jean Charpentier has indicated that States sometimes *approve* of or declare to *be in agreement with* certain treaties or provisions of treaties. He uses the French word *adhésion* which may be confusing because in the French text of the Vienna Convention on the law of treaties, *adhésion* is used as "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty".¹³ In the English terminology on the law of treaties, this *adhésion* is indicated by the word *accession*. What Charpentier has in mind is the fact that States, without becoming a party to a treaty, adhere to the principles of the treaty.¹⁴ He mentions France's acceptance of the NPT prior to its accession in 1992, and the declaration of the European Space Agency of 12 December 1978, adhering to the rights and obligations of the 1974 Convention on the registration of objects launched into space.

Similar examples may be the unilateral declarations against torture issued by States on the basis of the UN General Assembly resolution of 1977, prior to the entry into force of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by the General Assembly on 10 December 1984,¹⁵ and the famous unilateral commitment by Egypt to respect the Constantinople Convention on the freedom of navigation through the Suez Canal.¹⁶ One may add to these examples the promulgation by Secretary-General Kofi Annan of the *Observance by the United Nations Forces of international humanitarian law*.¹⁷ Without expressly referring to the

¹² See Article 56 of the Vienna Convention on the Law of Treaties.

¹³ See Article 2 (*Use of terms*), 1(b) combined with Article 15 (*Consent to be bound by a treaty expressed by accession*).

¹⁴ Charpentier 1994:367, 371.

¹⁵ For the text see Suy 1996:513ff.

¹⁶ See UN Doc A/CN/4/486, 15, footnote.

¹⁷ (1999) 38 *ILM* 1656.

Geneva Conventions of 1949 and the Additional Protocols of 1977, this promulgation states that “(t)he fundamental principles and rules of international law set out in the present Bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants”.¹⁸

On 17 June 1982, the then Foreign Minister Gromyko of the then Soviet Union made a solemn pledge before the General Assembly of the United Nations that his country would not be the first to use nuclear weapons. This may be viewed as a political statement, nicely fitting a propaganda exercise. But Gromyko, on behalf of the Soviet Union, added: “this obligation enters into force immediately at the moment it is proclaimed before the UN General Assembly”.¹⁹ This language clearly indicates that it was the intention to make a legal commitment. The Russian Federation’s change of military strategy which was announced early 2000 in fact withdraws this commitment. One may argue that the theory of a fundamental change of circumstances (*rebus sic stantibus*) is applicable to these unilateral ‘adherences’ and other commitments.²⁰

All these examples show that unilateral declarations containing pledges, commitments, undertakings and promises to accept treaty obligations although the authors of these declarations do not wish or cannot become parties to the treaty, may create legal obligations and expectations. It is, therefore, suggested that Art 11 of the 1969 Vienna Convention on the Law of Treaties²¹ be broadened by including *autonomous* unilateral commitments. Or, to put it differently, the codification of the international law on unilateral acts should contain a provision reflecting that consent to be bound by a treaty or by treaty provisions can be given through such commitments by subjects of international law which do not wish or cannot become a party to the treaty.²²

It should be noted that this phenomenon of ‘adherence’ to treaty obligations, as described by Jean Charpentier, should not be confused with the unilateral commitments by states to follow a course of conduct without any reference to treaty provisions, although the distinction is a very subtle one, and it is submitted that the famous *dictum* of the International Court of Justice in the *Nuclear Test Cases* may be equally applicable to both types of commitments.²³

18 The *Bulletin* contains a resumé of the basic provisions of the Conventions and of the Additional Protocols. It may be mentioned here that the International Committee of the Red Cross had insisted on such a commitment by the United Nations for the last thirty years. It is only since the Security Council authorized UN Peacekeeping Operations to use force under Chapter VII of the Charter that the United Nations formally accepted to make this commitment.

19 A/S 12/AC. 1/10 of 17 June 1982.

20 See further on Revocability.

21 Article 11 — *Means of expressing consent to be bound by a treaty*. “The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”.

22 See draft articles 6 and 7 of the International Law Commission, A/CN.4/500/Add. 1.

23 See above and footnote 9.

6. The withdrawal of unilateral acts

If unilateral acts may create legal effects for the States having made the declarations, the question then arises whether these acts may be *withdrawn* thus annihilating the effects. It is of course very tempting to state that a unilateral act, as defined in the restrictive way explained above and confirmed by the International Court of Justice, may be revoked. It is submitted, however, that in order to approach the issue of *revocability* of an unilateral act, one has to look, first of all, at the *nature* of the act, at its *legal effects* as well as at the *attitude of third parties*.

Looking at the *nature* of the unilateral act, one may perhaps agree that a State may withdraw a *protest*, *viz*, a declaration or statement in which a State formally refuses to accept and recognize a given factual or legal situation, with the effect that this fact or situation will not be opposable to that State. Here one could perhaps refer by analogy to the rule concerning the withdrawal of objections to reservations as expressed in Article 22, & 2, of the Vienna Convention on the Law of Treaties: "Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time".

The revocability of a *recognition* is perhaps a more difficult issue because the recognition implies that the declaring state accepts the recognized fact or situation which becomes opposable to the recognizing State, especially if the recognition creates a legal expectation in a third State that the recognizing State will adhere to its decision. A recognition could, indeed, be interpreted as a positive commitment to accept the recognized fact or situation, and the withdrawal of such commitment would amount to a *venire contra (f)actum proprium*. In the case of the *Territorial Dispute between Libya and Chad*, the International Court of Justice ruled that the recognition of a frontier is "to draw the legal consequences from its existence, to respect it and to renounce to contest it in the future".²⁴

The situation would certainly be similar if a State would wish to revoke or withdraw a unilateral *commitment* or *promise*. If it is accepted that unilateral commitments are subject to the rule *pacta sunt servanda*,²⁵ one would also be compelled to accept that, *mutatis mutandis*, the provisions concerning the withdrawal or denunciation in the Vienna Convention on the Law of Treaties would equally be applicable to unilateral commitments.

24 ICJ Reports 1994: 22 & 42. See also Judge Adjibolla's opinion: "Libya is estopped from denying the 1955 Treaty boundary since it has acquiesced in and in fact recognized it", *ICJ Reports* 1994:83.

25 Nuclear Test cases, *Australia v France* and *New Zealand v France*, ICJ Reports 1974:268 and 419: "One of the basic principles governing the creation and performance of legal obligations ... is the principle of good faith ... 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". See also *Suy* 1962:44-45, and *ditto* Paul Guggenheim's Foreword, V-VI.

A unilateral act by a state could not be revoked when it has created legitimate expectations in third States and when the withdrawal would cause a prejudice. This raises the issue of *estoppel* which is a very complex one, not only because of substance, but also because of its different meanings in common law and in other legal systems.

7. Estoppel

Sir Robert Jennings and Sir Arthur Watts deal with estoppel in the chapter on the *Responsibility of States*, and only in a footnote from which the opening sentence reads: "Questions of protest and acquiescence are often associated with considerations of preclusion 'the analogue in international law of rules of estoppel known to common law jurisdictions'".²⁶ Professor Ian Brownlie has a cautious view on estoppel. He refers first to the three essentials of estoppel as developed by Professor Bowett,²⁷ viz. "(1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement". He then points out that "estoppel in municipal law is regarded with great caution, and that the 'principle' has no particular coherence in international law, its incidence and effects not being uniform".²⁸

In view of the case law of the International Court of Justice, and without going into the intricacies of *estoppel* as a procedural rule in anglo-american law, one may be tempted to follow Professor Bowett's analysis, adding a few nuances. Firstly, there should be a clear and unambiguous representation or commitment, either through a declaration or through conduct. Secondly, this representation must be voluntary and unconditional viz autonomous. Thirdly, it should emanate from an authorized person or entity capable to act for and on behalf of a State. Fourthly, a third party must have relied in good faith on the commitment which has thus created legal expectations. Finally, the withdrawal, challenge or revocation must be to the detriment of the relying party. For these reasons, protest and acquiescence or consent viz absent of protest are key elements in the so-called rule of estoppel or preclusion, the correct rendering of which in French may be *forclusion*. However, if a unilateral commitment is a clear undertaking of a legal obligation, the author would be precluded from renouncing, revoking or withdrawing his commitment irrespective of the reliance of the third party and of its detriment. If the legal basis of a unilateral commitment is *pacta sunt servanda* and *bona fides*, there is no reason why estoppel should enter the picture.

²⁶ Jennings & Watts 1992:527 footnote 6.

²⁷ Bowet 1957:176,202.

²⁸ Brownlie 1990:641.

8. Conclusion

The General Assembly of the United Nations decided in 1996 that 'Unilateral Acts of States' was a topic which was ripe for codification, and entrusted the International Law Commission to start work on this item. Although the Commission, following in this the Special Rapporteur, has adopted the restrictive definition of unilateral acts, it is not yet clear in which direction the codification efforts will develop. The Special Rapporteur seems to favour the position that the Vienna Convention on the Law of Treaties is the befitting framework for the unilateral acts of States, in the sense that certain provisions of the Convention dealing with interpretation and validity could be applicable to unilateral acts. This may be true to a limited extent and insofar as commitments and promises are concerned. There are definitely similarities between treaties and unilateral commitments, but the approach to codify the international law on unilateral acts as an extension of the law of treaties, or as being analogous to it, entails some dangers because it overlooks the fact that not all unilateral acts are commitments or promises. The International Law Commission is at a rather early stage of its labours in codifying this topic, and it is to be hoped that, during the forthcoming sessions of the Commission, a more realistic approach will be adopted, leading to a set of rules which do not transcribe the principles of the law of treaties for another and different scenario.

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