

Definition of Unilateral Acts of States

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1. In this essay, I wish to address the topic of the definition of unilateral acts of States.¹ I shall present my own approach to defining unilateral acts and eventually submit for discussion their definition. The reasons for the desirability and advisability of defining unilateral acts have been given by the International Law Commission. They include: (a) their constantly growing significance, (b) sufficient amount of materials for their codification, (c) the improving of legal security, certainty, predictability and stability in international relations, and consequently (d) the strengthening of the international rule of law.² These reasons may be convincing in and of themselves, but there is a further reason that may be even more compelling. In view of the recently adopted Draft Articles on Responsibility of States for internationally wrongful acts (adopted by the International Law Commission at its fifty-third session (2001)) (DASR),³ it is perhaps paradoxical that presently there exists a written legal regime governing the *breach* of an international obligation which has been assumed by a unilateral act, but there is no written legal regime that governs the very *assumption* of international obligations by unilateral acts.⁴ In the case of treaties, one has to recall, the assumption of treaty obligations was defined first and their breach only afterwards. In the case of unilateral acts, it appears that the situation will be exactly reverse.⁵

2. There presently exists no generally accepted definition of unilateral acts in international law. There exists no treaty defining unilateral acts as a general legal concept⁶ and there is no all-

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¹ See generally on unilateral acts of States, I. Brownlie, *Principles of Public International Law* (5th edn Clarendon Press Oxford 1998) 641-8.

² International Law Commission, 'Report of the International Law Commission on the Work of its 49th Session' (12 May–18 July 1997) UN Doc. A/52/10 para. 196.

³ International Law Commission, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April–1 June 2001; 2 July–10 August 2001) UN Doc. A/56/10 chp.IV.E.2.

⁴ Cf Article 12 of the DASR and Commentary to the Article.

⁵ This might also be the case with international agreements *not* concluded in written form. Cf Vienna Convention on the Law of Treaties (signed 23 May 1966, entered into force 27 January 1980) UN Doc. A/CONF. 39/27 (23 May 1969), 1155 UNTS 331, 8 *ILM* (1969) 679, 63 *AJIL* (1969) 875-903 (VCLT69) Article 2(1)(a).

⁶ However, there exist many treaties that provide for a mandatory notification. One of the older is the General Act of the African Conference (signed 26 February 1885) 76 British and Foreign State Papers 4, 17 Australian Treaty Series (1920), <<http://www.austlii.edu.au/au/other/dfat/treaties/1920/17.html>> (last visited 8 November 2004) (Act of Berlin) Articles XIX, XX, XXXIV (cf Lord Gore-Booth (ed.), *Satow's Guide to Diplomatic Practice* (5th edn Longman London New York 1979) 259). Other examples of multilateral treaties providing for a mandatory notification include: Declaration Concerning the

encompassing definition of them in customary international law either.⁷ Doubts may thus be cast on the very existence of unilateral acts as a legal institution.⁸

3. Attempts to define unilateral acts of States within the International Law Commission have so far not proven to be successful. The outcome of the work of the Commission is still uncertain,

Laws of Naval War (signed 26 February 1909, was not ratified, did not enter into force) 208 Consolidated Treaty Series 338, 104 British and Foreign State Papers 242 (Declaration of London) Articles 8, 11-13, 15-16, 23, 25-26, 43, 45; The Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71; Vienna Convention on Diplomatic Relations (adopted 14 April 1961, signed 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (VCDR) Articles 5, 9-10, 13, 17, 19, 39, 43.

Treaties may also provide for an obligation not to recognize a certain legal fact. An example is the Anti-War Treaty of Non-Aggression and Conciliation (signed 10 October 1933, entered into force 13 November 1935) 163 LNTS 395 (Saavedra Lamas Treaty) Article II.

A treaty may also subject “every unilateral act changing the present political situation of one of the States of the Little Entente in relation to an outside State” to “the unanimous consent of the Council of the Little Entente.” (The Little Entente Pact (signed 16 February 1933, entered into force 30 May 1933) (Yugoslavia–Rumania–Czech Republic) 27 *AJIL Supplement: Official Documents* (1933) 117-119 Article 6). An example of a treaty stipulating recognition of statehood is the General Framework Agreement for Peace in Bosnia and Herzegovina (signed & entered into force 14 December 1995) 35 *ILM* (1996) 75 (Dayton Peace Agreement) Article X.

A special example of a unilateral act regulated by a treaty is the ‘optional clause’ (cf Statute of the International Court of Justice (signed 26 June 1945, entered into force 6 May 1946) XV UNCTAD 355, PCIJ Series D N^o 1, ICJ Acts and Documents Concerning the Organization of the Court N^o 5 (1989) Article 36 (2)-(5)).

The above examples should be regarded as no more but a very limited selection of some of the relevant treaties.

⁷ International jurisprudence on the topic of unilateral acts of States is not as scarce as is sometimes asserted. Besides the more renowned examples such as the *Nuclear Tests* cases, the *Frontier Dispute* case, the *North Sea Continental Shelf* cases, the *Nicaragua* case, the *Eastern Greenland* case, or the *Norwegian Fisheries* case, there are many more and it is perhaps noteworthy that the very first case decided by the Permanent Court of International Justice considered the legal effects of what could be regarded as a unilateral act.

In the *Wimbledon* case the Court decided “that Article 380 of the Treaty of Versailles ... should have prevented Germany from applying to the Kiel Canal the Neutrality Order promulgated by her...” (*Case of the S.S. "Wimbledon" (Judgment) (United Kingdom, France, Japan v Germany; Poland intervening)*, 1923 PCIJ Reports Series A, N^o 1, 33). This conclusion underlines a possibility for Germany to enforce its Neutrality Order in principle, but not in the particular instance of the Kiel Canal for which it had previously accepted international obligations in the Treaty of Versailles. It also establishes a hierarchy between the treaty and the Neutrality Order, ie a unilateral act, which both refer to the same issue of international concern (Kiel Canal). A version of the related underlying principle of precedence of international over internal obligations is today enshrined in Article 27 of the VCLT⁶⁹.

⁸ Cf International Law Commission ‘Report of the International Law Commission on the Work of its 54th Session’ (29 April–7 June 2002; 22 July–16 August 2002) UN Doc. A/57/10 201, para. 333.

especially since it has been dealing with the topic with some considerable difficulties since 1997.⁹

4. In my opinion, the following approach is appropriate.

Firstly, reference should be made to the notion of *State conduct*. For the purposes of defining unilateral acts, impermissible State conduct, most notably internationally wrongful acts, should be excluded because it implicates a different legal regime, ie the law of State responsibility.¹⁰ The first line of demarcation is thus the boundary of *the principle of permissibility*, which of course is not always easy to be determined.¹¹

5. *Secondly*, reference should be made to *the principle of participation*. All State conduct that is permissible by operation of the principle of permissibility can be further divided according to the principle of participation, ie according to the criterion of whether one or two (or more)

⁹ See Reports by the International Law Commission: ‘Report of the International Law Commission on the Work of its 48th Session’ (6 May 26–July 1996) UN Doc. A/51/10; ‘Report of the International Law Commission on the Work of its 49th Session’ (12 May–18 July 1997) UN Doc. A/52/10; ‘Report of the International Law Commission on the Work of its 50th Session’ (20 April–12 June 1998; 27 July–14 August 1998) UN Doc. A/53/10; ‘Report of the International Law Commission on the Work of its 51st Session’ (3 May–23 July 1999) UN Doc. A/54/10; ‘Report of the International Law Commission on the Work of its 52nd Session’ (1 May 9–June 2000; 10 July–18 August 2000) UN Doc. A/55/10; ‘Report of the International Law Commission on the Work of its 53rd Session’ (23 April–1 June 2001; 2 July–10 August 2001) UN Doc. A/56/10; ‘Report of the International Law Commission on the Work of its 54th Session’ (29 April–7 June 2002; 22 July–16 August 2002) UN Doc. A/57/10; ‘Report of the International Law Commission on the Work of its 55th Session’ (5 May–6 June 2003; 7 July–8 August 2003) UN Doc. A/58/10; ‘Report of the International Law Commission on the Work of its 56th Session’ (3 May–4 June 2004; 5 July–6 August 2004) UN Doc. A/59/10.

See also Reports by the Special Rapporteur on unilateral acts of States to the International Law Commission: ‘First Report on Unilateral Acts of States By Mr. Victor Rodríguez-Cedeño, Special Rapporteur’ (5 March 1998) UN Doc. A/CN.4/486; ‘Second Report on Unilateral Acts of States By Mr. Victor Rodríguez-Cedeño, Special Rapporteur’ (14 April 1999) UN Doc. A/CN.4/500 & Add. 1; ‘Third Report on Unilateral Acts of States By Mr. Victor Rodríguez-Cedeño, Special Rapporteur’ (17 February 2000) UN Doc. A/CN.4/505 ; ‘Fourth Report on Unilateral Acts of States By Mr. Victor Rodríguez-Cedeño, Special Rapporteur’ (30 May 2001) UN Doc. A/CN.4/519; ‘Fifth Report on Unilateral Acts of States By Mr. Victor Rodríguez-Cedeño, Special Rapporteur’ (4 April 2002) UN Doc. A/CN.4/525 & Add. 1; ‘Sixth Report on Unilateral Acts of States By Mr. Victor Rodríguez-Cedeño, Special Rapporteur’ (30 May 2003) UN Doc. A/CN.4/534; ‘Seventh Report on Unilateral Acts of States By Mr. Victor Rodríguez-Cedeño, Special Rapporteur’ (22 April 2004) UN Doc. A/CN.4/542.

¹⁰ Cf DASR Part Two (Content of the International Responsibility of a State).

¹¹ On the problem of time in the international law-making see: Crawford, Viles, ‘International Law on a given day’, in K. Ginther, *et al.* (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität* (1994) 45-68.

Given the peculiarities of the international law-making it is perhaps safe to advance a view that it is possible to know what represents an impermissible State conduct, in cases where State conduct is defined primarily by customary international law, *ex post facto* only. This view seems consistent with the assertion that customary international law should be viewed as a process rather than as a static edifice.

States are required to participate in order to bring about a particular legal effect. To illustrate this point, two examples could be borrowed from diplomatic law. The function of a diplomatic agent comes to an end on either “notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end” or on “notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member of the mission”.¹² In both cases, a single State is sufficiently competent alone and without any need to reach an agreement with any other State to bring about the specific legal effect, ie the end of the function of a diplomatic agent. On the other hand, “the establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent”.¹³ In this case, a single State is not sufficiently competent alone and has to reach an agreement with a particular State to bring about the specific legal effect, ie the establishment of diplomatic relations. There is therefore an interrelationship between the particular State(s) that are required to participate and the particular legal effect. In this sense, the principle of participation can be seen as a function of the particular legal effect and vice versa. Moreover, it can be said that in principle as soon as legal interests of other independent State(s) are involved, their participation is required in some form or another.

On the basis of the principle of participation, *permissible State conduct*, which can be labelled *international legal transactions*, can be divided into bilateral and multilateral legal transactions on one hand and unilateral legal transactions on the other hand.

Bilateral (or multilateral) legal transactions or *international agreements*, of which treaties are the most prominent examples, are those legal transactions for which the convergence of certain conducts of two (or more) States has to be manifested so as to give rise to the corresponding legal effects in accordance with international law.

Unilateral legal transactions or *unilateral acts* are those legal transactions for which *a contrario* the convergence of certain conducts of two (or more) States does not have to be manifested so as to give rise to the corresponding legal effects in accordance with international law. For them a certain conduct of one State is perfectly sufficient and there is no need for any participation of other States. It is understood that several States can act unilaterally in, eg a joint declaration or a joint protest, but this raises a further question of bilaterization and multilateralization of unilateral legal transactions.

The distinction between bilateral and multilateral legal transactions on one hand and unilateral legal transactions on the other hand is more than just a theoretical elaboration of international transactions. Most importantly, it involves choices of legal and political nature restricting the scope of actions of States in international law. In principle, international obligations assumed by a treaty cannot be changed or terminated by a unilateral act without some form of consent on the part of the other parties to the treaty. Thus, as soon as there is a treaty on a particular matter, the State in question is no longer entirely free to act unilaterally without incurring responsibility for such an action.¹⁴

6. *Thirdly, the notion of legal effects* should be clarified. It denotes the creation, modification, suspension, termination, etc., of *international rights and obligations*. I leave the question of opposable situations aside as they too can be explained with the language of rights and obligations.

¹² Article 43 of the VCDR.

¹³ Article 2 of the VCDR.

¹⁴ Cf Article 12 of the DASR.

In simple terms and before going into further details, a *unilateral act* denotes a unilateral legal transaction that creates international rights and obligations otherwise than by agreement; in other words, all international legal transactions of a State other than treaties, consultations and negotiations.¹⁵

Therefore, the common characteristic of all unilateral acts is that rights and obligations that they create come into existence as a result of the conduct of one State and that the conduct of that State alone operates as the only relevant factor, ie is sufficient. The State thus creates rights and obligations by its own conduct (action or inaction) alone, without the need for agreement with any other State.

7. *Fourthly*, since the entire notion of unilateral acts revolves around *a certain conduct of one State*, this legally relevant State conduct needs further explanation.

The two most important principles in the creation and implementation of international rights and obligations are the principle of consent and the principle of good faith. State conduct is in the present context relevant only as far as it represents one of the legally recognized means of manifesting State consent to be legally bound. Manifestations of State consent for the purpose of concluding treaties, ie bilateral and multilateral legal transactions, have been defined in Article 11 of the VCLT69 as *the means of expressing consent to be bound by a treaty* (signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, accession and any other means if so agreed). The most important part of the definition of unilateral acts should be the elaboration of *the means of manifesting (or expressing) unilateral consent to be bound by a unilateral act*.

The State's capacity to act (or not to act) unilaterally in a given case or a set of circumstances and the corresponding legal effects are not directly based on the specific consent of other State(s), but rather on the individual right of the State in question. This absence of the specific consent of other State(s) is the essential meaning of the term »unilateral« in the context of unilateral acts.

With respect to the individual right of the State, the notion of the reserved domain of domestic jurisdiction might have some influence. However, it has to be understood that the notion of reserved domain is essentially a relative one. Besides, the problems it sometimes serves to explain are better explained by reference to State's internal competence and State responsibility.¹⁶

In any case and bearing in mind in particular the principle of permissibility, the State's capacity to act (or not to act) is in the case of unilateral acts entirely dependent on the question, whether the State in question has that particular right or not. If it does, its conduct will be described as a unilateral act, if not, it will be placed within the State responsibility context. Whether the individual right of the State originates from a principle of international law expressly permitting it to act in a particular manner or from a principle not prohibiting it to so act appears to be of secondary importance in the present context.

The reason for emphasising that the State's capacity to act (or not to act) unilaterally in a given case or a set of circumstances and the corresponding legal effects are not *directly* based on the specific consent of other State(s) can be seen from the above first example borrowed from diplomatic law. In the example, it is evident that even when a State is sufficiently competent alone and does not need to reach any agreement with any other State to bring about the specific

¹⁵ Cf Sir Robert Jennings, Sir Arthur Watts, *Oppenheim's International Law* (9th edn Longman London New York 1992) 1187.

¹⁶ Cf Brownlie, 293-4.

legal effect, there exists an *indirect* consent of the other State(s) to the described possibility in the very act of ratification of the VCDR. Mutatis mutandis, this applies also to customary international law.

8. *Finally*, unilateral acts should be also seen from the perspective of their legal effects. From this perspective, unilateral acts of States can be regarded *as a result* of certain legally relevant State conduct, as such representing one of *the legally recognized means of manifesting (or expressing) unilateral consent to be bound by a unilateral act*. These means will be labelled as *precipitating conduct*, because they precipitate or give rise to a unilateral act and are creative of international rights and obligations.

This objective and result-oriented approach in defining unilateral acts represents a significant departure from the approach taken by the International Law Commission's Special Rapporteur on unilateral acts of States. The Special Rapporteur still operates under the assumption of State intentions with respect to the legal effects of State conduct and possibility of the creation of international rights and obligations, whereas the above approach primarily considers the actual result, not a mere potentiality or likelihood of it.

Moreover, it should be borne in mind that State intentions may or may not have a decisive role for the creation of international rights and obligations by means of a unilateral act. In my opinion, intention cannot play a decisive role in the definition itself. At the very best, it can only have a subordinate role.

In the *Temple* case which arose out of a complex situation surrounding the circumstances of the territorial delimitation between Siam (later Thailand) and French Indo-China (later Cambodia) the International Court of Justice founded its decision on a map which "in its inception, and at the moment of its production, [it] had no binding character",¹⁷ regardless of the fact that the map had been produced by the French authorities "in response to a request made by the Siamese authorities".¹⁸ Notwithstanding all this, the Court subsequently approached the consideration of circumstances that could confer upon this initially non-binding map the binding character.¹⁹

The relevant circumstances isolated by the Court were: (1) the wide publication and communication of the relevant map, including but clearly going well above the mere (2) interchange between the French and Siamese Government, which would have, according to the Court, sufficed in law, (3) the communication of the map to the Siamese members of the responsible Mixed Commission, (4) the letter from the Siamese Minister in Paris to the Foreign Minister in Bangkok, (5) the Siamese Interior Minister's expression of thank, together with a request for more copies of the map, to the French Minister in Bangkok. It would appear from the Judgment that the Court placed special emphasis upon the last element, ie the expression of gratitude and the request for more copies of such maps, although it would be difficult to maintain that the Court relied on this element exclusively. All in all, the Court found that "the Siamese authorities by their conduct acknowledged the receipt, and recognized the character, of these maps...".²⁰ The Court thus *de facto* found evidences of consent in these instances and rejected the Siamese contention that the relevant map was not binding. It will be self-explanatory that the Siamese intentions, according to which Siam did not intend thereby to assume any obligations, as

¹⁷ *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merits) (Judgment of 15 June 1962)*, ICJ Reports (1962) 6, 21.

¹⁸ *Ibid.*

¹⁹ *Ibid*, 22 *sqq.*

²⁰ *Ibid*, 24.

are implicit in the contention, did not represent any significant factor in the Court's consideration. The Court relied its finding of acknowledgement by conduct on objectively evident facts.

Although the above would appear to have been sufficient *per se*, the Court also found Siamese acquiescence to the map in that it considered the circumstances as requiring "some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it."²¹ In the absence of any such reaction, the Court simply concluded with the finding of acquiescence.

Moreover, the Court further expressly pronounced "that there is no legal foundation for the consequence it is attempted to deduce from the fact that no one in Thailand at that time may have known of the importance of the Temple or have been troubling about it."²² It will be clear from the foregoing that the role of the Siamese intentions was not at all significant. The primary emphasis was upon objectively cognisable facts, ie on the actual result, and not upon any potential Siamese intentions. Additionally, the Court also rejected the Thai plea of error.²³

Furthermore, the Court found instances of subsequent conduct confirming original acceptance and precluding a denial of it.²⁴ In this particular context, the Court appeared to have in fact considered what it called "Thailand's state of mind"²⁵ (*sic!*). However, it interpreted it in line with other objectively evident facts, thus affirming the above position which is being advanced here, viz. that State intentions can at best have a subordinate role.

The same line of reasoning could also be found in the Court's qualification of the quasi-official Siamese visit to the disputed area. The fact that the Siamese person in question had been officially received there by a French official "with the French flag flying",²⁶ the written admission of the Siamese person "that France, through her resident, had acted as the host country",²⁷ and the Siamese complete lack of any reaction (to the fact that the French were regarding the area as part of their sovereignty) sufficed for the Court to have found "a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim."²⁸ The Court again placed primary confidence upon objectively evident facts rather than any possible speculative intentions.

Quite apart from the actual acceptance of the map, the Court later on considered Thailand to have forfeited its possibility to deny the acceptance of the map on account of the subsequent course of events (after the acceptance of the map). Although this preclusion did not alone decide the case, the objective approach of the Court can also be found in it.

It needs to be also emphasised, that the Siamese consent to the map had been inferred from the conduct of various individuals, holding different governmental positions, whose actions were regarded as imputable or attributable to Thailand, if one uses the State responsibility vocabulary. Perhaps the law of treaties vocabulary is more appropriate here given that we are dealing with the assumption of obligations. The individuals in question could thus be regarded as

²¹ *Ibid*, 23.

²² *Ibid*, 25.

²³ *Ibid*, 27.

²⁴ *Ibid*, 27-9.

²⁵ *Ibid*, 28.

²⁶ *Ibid*, 30.

²⁷ *Ibid*.

²⁸ *Ibid*, 31.

State representatives who were objectively held to be legally committing the State. This is crucial in understanding the Siamese consent to the map.

In this regard, the question arises as to whether consent should primarily be seen as an aspect of the attitude of the State to the act or as imputability or attribution of the conduct of the author of the act to the State. This can be controversial. Within the State responsibility context, a similar question of the elements of an internationally wrongful act of a State has been solved so as to combine both elements. Therefore, the relevant wrongful conduct must also be attributable to the State.²⁹ However, this approach could be criticised because imputability could also be seen as “a superfluous notion”, even “a fiction”, given that the major question always concerns “whether there has been a breach of duty”.³⁰ The DASR Commentaries seem to have recognised the problem by recognising the close link between attributability and breach, while at the same time maintaining the analytical distinction between the two.³¹ It remains to be seen whether consent will be primarily seen as an aspect of the attitude of the State to the act or as imputability or attribution of the conduct of the author of the act to the State. However, it is felt that the combined approach is likely to prevail despite the fact that it could be similarly criticised because the major issue seem to be whether there was an assumption of obligations or not. The test in this regard should be objective rather than subjective so that a State should be considered to have assumed obligations on the basis of some objective criteria and not on the basis of subjective and possibly speculative intentions.

It should be emphasized that it is the consent of the acting State which alone operates as the determining factor in the creation (or otherwise) of international rights and obligations by means of a unilateral act.

The role played by the means of expressing consent to be bound by a treaty in the law of treaties is, or rather should be, in the ‘law of unilateral acts of States’ performed by the means of manifesting (or expressing) unilateral consent to be bound by a unilateral act, ie precipitating conduct. Precipitating conduct is the critical element of the definition of unilateral acts. It represents their formal aspect (*instrumentum*) and it involves the elaboration of the principle of good faith and the principle of consent for the creation (or otherwise) of international rights and obligations by means of unilateral acts. International rights and obligations, or rather their creation, modification, suspension and termination, represent the substantive aspect (*negotium*) of unilateral acts.

9. In sum, I propose the following definition:

Unilateral acts of States are international legal transactions (permissible State conduct), representing legally recognized means of manifesting (or expressing) unilateral consent to be bound (precipitating conduct) and creating, modifying, suspending or terminating international rights and obligations in accordance with international law.

This stipulative definition will not satisfy everybody, but it is thought that it is sufficiently open and that it will place the debate on unilateral acts of States into a more appropriate context.

10. In the *Temple* case, the Court considered, *inter alia*, the Siamese expression of gratitude and the request for more copies of the relevant maps (*permissible State conduct*) as an example of *legally recognized means of manifesting (or expressing) unilateral consent to be bound*, ie the

²⁹ Cf Article 2 and Chapter II of the DASR and the Commentaries to the relevant Articles.

³⁰ Brownlie, 438-9.

³¹ Cf Commentary to Chapter II, para. (4) of the DASR.

precipitating conduct, which together with some other elements precipitated the Siamese acceptance (by conduct) of the map thus creating specific international rights and obligations, ie Siamese recognition of the disputed area as being part of the Cambodian territory.

Prima facie, it is therefore possible to view the Court's conclusion in the *Temple* case as an implicit assumption of the existence of a unilateral act which was binding for Thailand/Siam. It is also possible to explain the Court's conclusion by reference to estoppel and preclusion, especially since the Court itself never actually pronounced the existence of a unilateral act. On the other hand, with respect to Thai conduct after the acceptance of the map, the Court did in fact considered Thailand as being precluded from denying the acceptance. In fact, it would appear that in the circumstances of the case both the theory of unilateral acts and the theory of preclusion played their respective roles and were in fact mutually supplementing each other. Moreover, it is possible to explain the Court's conclusion by reference to the concept of opposability. Whether the entire situation is best explained by reference to unilateral act, to estoppel and preclusion or even opposability can be a matter of some debate, however it will be evident that the relations and boundaries of the various legal concepts are far from being clear and unproblematic.

Nevertheless, it is perhaps safe to advance the view that estoppel and preclusion operate primarily as a procedural instrument in the context of some previously relevant fact, whereas the theory of unilateral acts should operate quite independently – which is not to say isolated – from any previous fact, even in contravention to it, and its application should be a matter of the existence of substantive rather than merely procedural obligations. Yet, what is clear and unproblematic is the fact that the principle underlying all the explanations is the same, ie the principle of good faith.

11. The future work on the topic of unilateral acts of States should focus on examples of precipitating conduct and analyse their legal effects. In particular, and perhaps most importantly, it should determine the legal effects of particular forms of precipitating conduct. It should be borne in mind that there are many examples of precipitating conduct; to name but a few: declaration by a State agent before an international tribunal,³² notification in accordance with the treaty clause,³³ conferment of nationality upon an individual,³⁴ protest against a particular use of force,³⁵ etc. The task of defining unilateral acts of States could therefore prove to be more difficult and cumbersome than initially thought.

12. Let me conclude with the assertion that the debate on unilateral acts of States should concentrate on the three important elements of the above definition:

- *permissible State conduct*, ie international legal transactions;
- the creation, modification, suspension or termination of *international rights and obligations*, ie the substance of unilateral acts of States; and
- *precipitating conduct*, ie means of manifesting (or expressing) unilateral consent to be bound.

³² Cf *The Mavrommatis Jerusalem Concessions (Judgment N^o. 5) (Greece v United Kingdom)*, 1925 PCIJ Reports Series A, N^o. 5, 37.

“... this statement, the binding character of which is beyond question ...”

³³ Eg Articles 5, 9-10, 13, 17, 19, 39, 43 of the VCDR.

³⁴ *Nottebohm Case (Liechtenstein v Guatemala) (Judgment of April 6, 1955) (Second Phase)*, ICJ Reports (1955) 4.

³⁵ *Protests/Condemnation Re Attacks on Yugoslavia by NATO (Russian Federation, Belarus, China, Cuba, India, Ukraine) 93 AJIL (1999) 633.*