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ORIGINAL ARTICLE

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Unilateral declarations excluding bilateral relations under a multilateral treaty

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Abstract
Bilateral relations between states which are parties to a multilateral treaty may not be governed by that treaty. This may depend on an agreement between the two states concerned, which could subject their bilateral relations to a different regime that is considered to suit their specific needs better. The exclusion of bilateral relations under the multilateral treaty may also be the consequence of a unilateral expression of the will of one of these states, for instance in view of its non-recognition of the other state. The present article seeks to examine the conditions under which bilateral relations may be excluded on the basis of the unilateral determination of one of the states concerned.

Keywords: International Court of Justice; multilateral treaties; non-recognition of states; reservations; unilateral declarations

1. Introduction

Bilateral relations between two states which are parties to a multilateral treaty may not be governed by that treaty. This may depend on an agreement between the two states concerned, which could subject their bilateral relations to a different regime that is considered to suit their specific needs better. The exclusion of bilateral relations under the multilateral treaty may also be the consequence of a unilateral expression of the will of one of these states. The present article seeks to examine the conditions under which bilateral relations may be excluded on the basis of the unilateral determination of one of the states concerned.

The issue has recently become relevant in the case concerning the *Relocation of the United States Embassy to Jerusalem (Palestine* v. *United States of America)* before the International Court of Justice (ICJ). When Palestine acceded to the Vienna Convention on Diplomatic Relations (VCDR) and then to the Optional Protocol concerning the Compulsory Settlement of Disputes on that matter,[1] the United States declared that it did not 'consider itself to be in a treaty relationship' with Palestine under the VCDR and the related Optional Protocol.[2] An objection to the jurisdiction of the ICJ was raised by the United States when Palestine made an application to the Court contending that the respondent had breached the VCDR by establishing the premises of its diplomatic mission to Israel allegedly outside the territory of the receiving state. Although the United States declared that it would not appear in the judicial proceedings, the

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[1]On 2 April 2014 and on 22 March 2018 respectively.

[2]The declarations were dated 13 May 2014 with regard to the Vienna Convention, C.N. 256.2014.TREATIES-III.3, and 1 May 2018 in respect of the Optional Protocol, C.N.228.2018.TREATIES-III.5. Similar declarations were made by Canada, C.N.272.2014.TREATIES-III.3, and Israel, C.N.290.2014.TREATIES-III.3 and C.N.227.2018.TREATIES-III.5.

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Court requested both parties to address in their first written pleadings the issues of its jurisdiction and of the admissibility of the application.[3]

The United States contends that Palestine does not qualify 'as a sovereign State' and is not included in any of the categories of states which are entitled to ratify the VCDR and the Optional Protocol or accede to them.[4] Should this view be accepted, the consequence that the United States is not in a treaty relationship with Palestine would depend on the interpretation of the provisions of this Convention and Optional Protocol concerning which states or entities may become parties and not on a specific will to exclude bilateral relations expressed by the United States. The question of which states or entities may become parties to the Convention and Optional Protocol is outside the scope of the present article,[5] which discusses the unilateral declarations seeking to exclude bilateral relations on the assumption that the states concerned are parties to a multilateral treaty.

2. The exclusion of bilateral relations under a multilateral treaty according to the Vienna Convention on the Law of Treaties

In the Vienna Convention on the Law of Treaties (Vienna Convention) the exclusion of bilateral relations between states which are parties to a multilateral treaty is specifically envisaged only in the case that a state objects to a reservation made by another state. According to Article 20, paragraph 4(b), 'unless the treaty otherwise provides', 'an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State'. There exists, thus, a presumption that, irrespective of the reason for the objection, the objection by a state to another state's reservation does not produce the effect of excluding bilateral relations under the treaty. However, the text also indicates that such an exclusion may take place following an intention to this effect expressed by the objecting state.

State practice does not provide many examples of objections overriding the presumption. One example may be found in the statement of the Government of the Netherlands with regard to reservations made to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which confers on the ICJ jurisdiction over disputes concerning the interpretation or application of the same Convention. The Government of the Netherlands declared that it did not 'deem any State which has made or which will make such reservation a party to the Convention'.[6] There are, therefore, no bilateral relations under this Convention between the Netherlands and the states making a reservation to Article IX of the Genocide Convention.

A declaration of a state to the effect that a multilateral treaty will not apply to the bilateral relations with another state is not addressed elsewhere in the Vienna Convention. It does not come within the definition of reservation in the Vienna Convention.[7] For that purpose, Article

[3] *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, Order of 15 November 2018, [2018] ICJ Rep. 708.

[4] According to Art. 48, the 'Convention shall be open for signature [until 31 March 1962] by all States Members of the United Nations or of any of the specialized agencies Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly to become a Party to the Convention'. A state included in one of these categories is entitled to ratify the Convention or may accede to it under Art. 50. Art. VII of the Optional Protocol declares that it 'shall remain open for accession by all States which may become Parties to the Convention'.

[5] For a discussion of this issue see P. Bodeau-Livinec, 'L'opposition des Etats à l'accession de la Palestine aux traités multilatéraux dans le cadre onusien', in T. García (ed.), *La Palestine: d'un Etat non membre de l'Organisation des Nations Unies à un Etat souverain?* (2015), 61, at 61–78; S. Sakran, *The Legal Consequences of Limited Statehood: Palestine in Multilateral Frameworks* (2019).

[6] Netherlands Objection 27 December 1989, *Multilateral Treaties Deposited with the Secretary-General*, Ch. IV.1.

[7] For the distinction between reservations and the unilateral declarations under review see J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales* (1975), 431, at note 284; see also Bodeau-Livinec, *supra* note 5, at 74–5.

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2, paragraph 1(d), refers to a statement by which a state 'purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'. The declaration here under review goes beyond affecting the application of certain provisions of the treaty. It seeks to exclude all the effects of the treaty in the bilateral relations with the targeted state. Moreover, such a declaration can hardly be regarded as compatible 'with the object and purpose of the treaty', as would be required under Article 19 (*c*) of the Vienna Convention if it were considered a reservation.

The same conclusion, that the declarations under review are not to be considered as reservations, was reached in the Guide to Practice on Reservations to Treaties, adopted in 2011 by the International Law Commission (ILC). According to guideline 1.5.1:

> [a] unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize is outside the scope of the present Guide to Practice, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.[8]

The commentary to this guideline includes a reference to cases where 'the State making the statement expressly excludes the application of the treaty between itself and the non-recognized entity'.[9] While the guideline and its commentary refer to declarations concerning relations with a non-recognized entity, it is implied that all the declarations under review may not be characterized as reservations.

However, the differences between reservations to treaties and the declarations under review do not exclude the possibility that certain rules regarding reservations *may* be applied by analogy to the declarations in question.

During the preparatory work to the Vienna Convention, the declarations under review were considered in the context of the non-recognition of states. The ILC came to the conclusion that:

> any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related [such as] recognition of States and Governments.[10]

This conclusion led to the absence of any provision addressing the declarations under review. The omission was not intended to rule out the possibility for a state to determine the exclusion of bilateral relations with a non-recognized state or with a state otherwise identified. According to the last paragraph in the preamble of the Vienna Convention, 'the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention'.

3. The Implications of non-recognition for the applicability of a treaty

As is apparent from the previous paragraph, the bulk of the relevant practice concerning the exclusion of bilateral relations under a multilateral treaty relates to non-recognition.

Many declarations of states indicate that the conclusion of a multilateral treaty to which a non-recognized state or entity is a party does not imply that state or entity is recognized. Moreover, this applies even when contractual relations are established under the treaty with regard to the

[8] *Yearbook of the International Law Commission* (2011), Vol. II, Part Three, at 69.
[9] Ibid., at para. 2.
[10] *Yearbook of the International Law Commission* (1966), Vol. II, at 260.

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non-recognized state or entity.[11] This somehow contradictory attitude concerning non-recognition may reflect a policy of ensuring that a non-recognized state complies with the obligations under multilateral treaties that serve a general interest of the international community.

The practice of the United States offers some remarkable examples of this approach. A note by Hudson argued that contractual relations were established with a non-recognized state (the Soviet Union) under the 1928 General Pact for the Renunciation of War, which provides in its Article 3 for the deposit in Washington of instruments of adherence and declares that 'the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties thereto'. Hudson remarked that, on the part of the United States, 'no reservation or condition or understanding was thought to be necessary because of the non-recognition of the Government' of the Soviet Union.[12] An opinion addressed on 12 August 1963 to the Senate Committee on Foreign Relations by the Legal Adviser to the Department of State noted that '[t]he United States has also taken the position that, within the framework of a general multilateral treaty, it could even have dealings with a non-recognized regime without thereby recognizing it'.[13]

Unilateral declarations may, however, exclude bilateral relations with a non-recognized state under a multilateral treaty. There are several examples of declarations of states to the effect that bilateral relations under a treaty are excluded from a non-recognized state. One may refer for instance to the statements made by Bahrain, Kuwait, Libya, Oman, Qatar, Saudi Arabia, Sudan, Syria, United Arab Emirates, and Yemen with regard to their relations with Israel under the VCDR. The wording of these statements varies but they all point to the conclusion that their accession to this Convention 'shall in no way amount to recognition of nor the establishment of any treaty relation with Israel'.[14]

Practice thus shows that participation in a multilateral treaty alongside a non-recognized state does not affect recognition even in the absence of a unilateral declaration concerning bilateral relations. The exclusion of bilateral relations between a non-recognizing state and a non-recognized state under the treaty depends on the specific expression of the former state's will to that effect.

4. The unilateral expression of a will to exclude bilateral relations

The binding effect of a treaty is based on the consent expressed by the parties. When a non-recognized state falls within the category of states to which a multilateral treaty is open, any state ratifying the treaty or acceding to it would be bound towards the non-recognized state from the date when the treaty enters into force for both states as the result of their ratification or accession. A unilateral declaration to the effect that no bilateral relations come into existence with the non-recognized state would then appear to be conflicting with the provisions of the treaty concerning the acquisition of the status of state party. However, since the declaration in question specifically addresses the bilateral relations with the non-recognized state, it expresses a will of the declaring state that is intended to prevail over the will contained in the instrument of ratification or

[11]Several authors reach this conclusion in their analysis of state practice. See M. Lachs, 'Recognition and Modern Methods of International Co-Operation', (1959) 35 *British Year Book of International Law*, at 252–9; B. R. Bot, *Non-recognition and Treaty Relations* (1968), at 30–1, 139; H. M. Blix, 'Unilateral Recognition and Non-Recognition', (1970) 130 *Collected Courses of the Hague Academy of International Law*, at 681; Verhoeven, *supra* note 7, at 428–30; B. S. Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order* (1989), at 186; N. Angelet and C. Clavé, 'Article 74 of the 1969 Vienna Convention', in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), 1675, at 1682; J. Ker-Lindsay, 'Engagement without Recognition: The Limits of Domestic Interaction with Contested States', (2015) 91 *International Affairs*, at 267–85.

[12]M. O. Hudson, 'Recognition and multipartite treaties', (1929) 23 *American Journal of International Law* 126, at 132.

[13]R. B. Bilder et al., 'Contemporary practice of the United States relating to International Law', (1964) 58 *American Journal of International Law*, at 173.

[14]These words are taken from the statement of the United Arab Emirates, C.N.60.1977.TREATIES-5.

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accession. The declaring state thus *narrows* the consent given in the conclusion of the treaty with regard to the relations with the parties to the treaty from which bilateral relations have been excluded.

As we have seen,[15] the Vienna Convention envisages the exclusion of bilateral relations under a multilateral treaty as a possible consequence of an objection to a reservation. While the Vienna Convention does not provide for a similar effect due to other reasons, it does not rule out the possibility that a unilateral declaration concerning the exclusion of bilateral relations may reflect the lack of agreement between the two states concerned with regard to the applicability of the treaty to their bilateral relations.

In its commentary on guideline 1.5.1. in its Guide to Practice on Reservations to Treaties, the ILC noted that:

> a unilateral statement whereby a State expressly excludes the application of the treaty between itself and the entity it does not recognize ... clearly purports to have (and does have) a legal effect on the application of the treaty, which is entirely excluded, but only in the relations between the declaring State and the non-recognized entity.[16]

State practice confirms that in principle a declaration excluding bilateral relations under a treaty produces the sought legal consequences. However, there may be treaties that require that relations are established between all states parties; for instance, some treaties establishing an international organization.[17] In that case, by making a unilateral declaration to exclude bilateral relations a state would not express the required consent in order to become a party to the treaty.

In a decision of 12 December 2019, the Committee on the Elimination of Racial Discrimination acknowledged that 'under general international treaty law a State party to a multilateral treaty may exclude treaty relations with an entity it does not recognize, through a unilateral declaration'. However, the Committee considered that 'particular treaty regimes, due to their particular character, may depart from those general principles'.[18]

It would be hard to argue that a state acquires rights and obligations towards another state under a treaty when the former state refuses to agree to enter into bilateral relations with the latter.[19] A declaration to that effect may be criticized by the targeted state for political reasons, but the establishment of bilateral relations cannot be asserted.

Unilateral declarations concerning the exclusion of bilateral relations may be based on reasons other than non-recognition. For instance, according to Article 29 of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, a state may declare that 'the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention'. However, these unilateral declarations are generally made with regard to non-recognized states.[20]

Non-recognition does not necessarily lead to this type of unilateral declaration. Nor is the non-recognition of a state a requirement for a declaration concerning bilateral relations to produce effects. The fact that a state is non-recognized does not reflect an objective status but is the result of an assessment that has no constitutive effect, made by one or more states within their discretion.[21]

[15]See above, para. 2.

[16]*Yearbook of the International Law Commission supra* note 8, at 69, para. 5.

[17]Bot, *supra* note 11, at 135 gives as an example the Charter of the United Nations.

[18]Inter-State communication submitted by the State of Palestine against Israel, Doc. CERD/C/100/5, para. 3.13.

[19]According to Verhoeven, *supra* note 7, at 437–40, a unilateral declaration excluding bilateral relations under a treaty is invalid and does not produce any effect.

[20]It may also affect a non-recognized entity other than a state. For reasons of simplicity, this case is not expressly envisaged in the text.

[21]This has become the prevailing view. See, in particular, J.Verhoeven, 'La reconnaissance internationale: déclin ou renouveau?', (1993) 39 *Annuaire Français de Droit International* 7, at 29–32.

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A requirement that, for a unilateral declaration excluding bilateral relations to produce effect, the declaring state should not recognize the targeted state would make little sense because it would be based on the exercise of discretion by the declaring state. In any event, practice does not show that, in order to define their bilateral relations on the basis of a unilateral declaration, states engage in a discussion as to whether non-recognition is well-founded.

According to the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (1999), targeted states 'have made declarations such as: "... The Government of the State of ... will, in so far as concerns the substance of the matter, adopt towards the Government of [the other State] an attitude of complete reciprocity"'.[22] When they consider that the application of treaty provisions is based on reciprocity, they confirm that bilateral relations are not governed by the treaty.

5. The modalities of the expression of the will

In many instances of practice, the declaration of a state that bilateral relations with another state under a multilateral treaty are excluded is simultaneous with the ratification of the treaty or the accession to it. When this occurs, as well in the event that the unilateral declaration precedes ratification or accession by the declaring state, the declaration serves to determine the state's will in concluding the treaty, reducing the number of states with regard to which bilateral relations are established under the treaty.

When the unilateral declaration follows ratification or accession by the declaring state, that state would have already expressed its consent to be bound with regard to all the states that are included in the categories of the states to which the treaty is open. The unilateral declaration would involve taking out a consent already given with regard to one or more of such states.

However, at the time of ratification or accession, the declaring state may not have been aware of the will of the targeted state to become a party to the treaty. With regard to an objection to a reservation intending to preclude the entry into force of the treaty between the reserving and the objecting states, the Guide to Practice on Reservations to Treaties considers that the intention has to be expressed 'before the treaty would otherwise enter into force between them'.[23] This guideline does not seem consistent with Article 20, paragraph 5, of the Vienna Convention, which grants a state, for raising an objection to a reservation, 'a period of twelve months after it was notified of the reservation' or until 'the date on which it expressed its consent to be bound by the treaty, whichever is later'.

In any event, it would be difficult to draw an analogy between an objection to a reservation and a unilateral statement excluding bilateral relations. The reservation may have been announced but can produce effects only when it is made by a state when ratifying a treaty or acceding to it. It would make little sense for a state to make an objection before the reservation is notified. It is therefore reasonable to extend the time limit for an objection beyond the dates of the ratification or accession by the two states concerned.

A unilateral statement of exclusion of bilateral relations may target any states which are entitled to become parties to the treaty; thus, the targeted states may be identified before they ratify the treaty or accede to it. However, it may occur that a targeted state has come into existence after the date of ratification or accession of the declaring state, or that significant political developments have taken place after that date. States wishing to prevent the establishment of bilateral relations may not have had the opportunity to make a unilateral declaration to that effect. This raises the problem of whether bilateral relations, once established through the entry of the treaty into force between the states concerned, may be unilaterally terminated.

[22]ST/LEG/7/Rev.1, at 54.

[23]Guideline 2.6.7, *Yearbook of the International Law Commission supra* note 8, at 159.

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6. The expression of a will after ratification of the treaty or accession to it

While a declaration concerning the exclusion of bilateral relations that is made by a state at the time of its ratification or accession implies the absence of consent on the part of the declaring state with regard to the acquisition of rights or obligations under the treaty towards the targeted state, a declaration made after ratification or accession follows the expression of consent and seeks to terminate the effects of the treaty in the relations with that state.

A state is normally free to decide to accept being bound by a treaty, whether towards all the other parties to the treaty or only with regard to certain states. Once it has given its consent, the state's freedom becomes limited. Articles 54 to 64 of the Vienna Convention specify various circumstances under which a state party to a treaty may effect the termination of the treaty. No provision of the Vienna Convention gives a state discretion to undo its ties for political reasons. Even in the case of a material breach, only 'a party specially affected by the breach [may] invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state' (Article 60, paragraph 2(b)). The difference between suspension of the treaty and its termination with regard to the defaulting state may not be significant in practice, but the fact remains that by excluding bilateral relations under a treaty a state would not have to comply with the conditions stated in the Vienna Convention for the termination or suspension of the treaty with regard to the targeted state.

Unilateral declarations are usually made in response to an act of the targeted state concerning the treaty, such as the signature, ratification or accession. State practice does not seem to attribute relevance to the timing of the declarations under review, whether they affect or not a treaty that has become binding in the bilateral relations between the states concerned.

Should it be accepted that, with regard to a multilateral treaty, a unilateral declaration may lead to the termination of the bilateral relations under the treaty between the two states concerned, it would generally be of little relevance to determine whether the time limit for specifying the declaring state's will is extended and therefore the declaration has, in fact, prevented the establishment of bilateral relations. Whether the establishment of bilateral relations is prevented or whether those relations have come into existence and then been terminated, a unilateral declaration will exclude bilateral relations. However, the question of whether bilateral relations have come into existence for a period may under certain circumstances be relevant. For instance, a treaty providing for the judicial settlement of disputes could confer jurisdiction on the ICJ if a dispute covered by the compromissory clause has arisen and an application to submit the dispute to the Court precedes the date at which the unilateral declaration takes effect.

7. Concluding remarks

The absence in the Vienna Convention of provisions concerning unilateral declarations excluding bilateral relations does not only leave doubts about the solution of some of the issues which have been considered in the previous paragraphs. The Vienna Convention also fails to determine certain effects of these declarations, in particular the date at which a unilateral declaration concerning the bilateral relations under the treaty becomes operative. Another question is whether such a unilateral declaration may be withdrawn.

The latter question should be resolved in the affirmative. By withdrawing a unilateral declaration concerning bilateral relations with another state party to a treaty, a state re-establishes the full content of its will to conclude the treaty which had been expressed in its ratification or accession. The effect is analogous to that of the withdrawal of an objection to a reservation which is covered in Article 22 of the Vienna Convention. It should similarly take place when the targeted state receives notice from the depositary of the declaring state's withdrawal.

The date on which a declaration excluding bilateral relations under a treaty takes effect depends on the circumstances under which it is made. When the declaration is simultaneous with the

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ratification or accession of the declaring state, it affects the declaring state's will in the conclusion of the treaty, and bilateral relations are not established with the targeted state. Bilateral relations do not come into existence also when the declaration, although made later than ratification or accession, takes place before the declaring state becomes a party to the treaty. In the other cases of termination of bilateral relations, the declaration should take effect from the date of its notification to the targeted state by the depositary. There are no reasons for postponing the effect of the declaration to a later date. The targeted state cannot obviate the inexistence, on the part of the declaring state, of a will to continue bilateral relations under the treaty.

As was recalled above,[24] the silence of the Vienna Convention on the issues relating to the unilateral declarations under review was mainly due to the entanglement of these issues with those pertaining to recognition. In its turn, recognition is appraised in different ways in state practice and is often viewed as not affecting legal relations between states. A more comprehensive consideration of unilateral declarations excluding bilateral relations under a multilateral treaty would have allowed the ILC and subsequently the Vienna Conference on the Law of Treaties to review the issues. An examination of these issues could have led to stating some conditions for the unilateral declarations under review to produce their intended effects. Moreover, the effects produced by multilateral treaties would have been strengthened by stating a presumption that, unless a multilateral treaty provides otherwise, a state party to a treaty cannot alter by a unilateral declaration its rights and obligations towards another state under that treaty.

[24]See para. 3 in this article.

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