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Przemysław Saganek, *Unilateral Acts of States in Public International Law*, Brill Nijhoff, Leiden, Boston: 2015, pp. 662[1]

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Unilateral acts of states (UAS – plural form; when *a* unilateral act of state is referred to, the term "a UAS" is used) seem to be often referred to as a recently discovered source of law and/or source of international obligations. It might be said that the debate among international lawyers on the significance of UAS is a recent occurrence. However, despite its relative novelty and theoretical attractiveness, UAS do not enjoy a wide interest in the doctrine of international law. International lawyers do not pay much attention to UAS, as evidenced by the fact that some manuals of international law still omit the subject in their discussion on sources. Over the past six decades only a few books and articles have been written on the subject.[2] One reason for this scarcity of scholarly attention might be that the topic is controversial and there are diversified views on it. The definition of UAS is not clear enough at its core and its boundaries remain controversial. This book by Professor Przemysław Saganek aims to fill this gap and thus enrich the scholarship on international law. Perhaps it will be a spark that will stimulate the interest of other authors in UAS.

It needs to be mentioned at the outset that the book clearly reflects prodigious research and erudition. The author took into account the decisions of international courts and tribunals as well as the work of the International Law Commission (ILC). He also relies on publications devoted to the topic by scholars from various legal backgrounds: English, French, German, Italian, Spanish and Polish. The book is without doubt the result of diligent and arduous work, and the author offers insightful criticism and assessments of the current state of international law, arriving at a number of interesting and significant conclusions.

The entire work is filled with deep reflections which might give rise to polemics and be contested under various theoretical headings, but their main value is that they are always thought-provoking. Saganek formulates his own original conclusions with

[1] This review is a modified version of the review of the original Polish version of the book, published in Journal of Law, Economics and Sociology (2013), vol. LXXV, no. 2, pp. 285-290.

[2] *See e.g.* G. Biscottini, *Contributo alla teoria degli atti unilaterali nel diritto internazionale*, Giuffrè, Milano: 1951; Ch. Eckart, *Promises of States under International Law*, Hart Publishing, Oxford and Portland: 2012; A. Martinez Punal, *Actos unilaterales, promesa, silencio y nomogenesis en el derecho internacional*, Andavira, Santiago de Compostela: 2011; K. Skubiszewski, *Unilateral Acts of States*, in: M. Bedjaoui (ed.) *International Law: Achievements and Prospects*, Nijhoff, Dordrecht: 1991, pp. 261-289; E. Suy, *Les actes juridiques unilateraux en droit international public*, Paris: 1962; M.I. Torres Cazorla, *Los actos unilaterales de los Estados*, Tecnos, Madrid: 2010.

respect to UAS, the area which – as the reader can readily observe – is one of the most theoretically difficult in public international law. He shows that the issues surrounding the role of UAS, as well as its types and typology, still remains a manifestly controversial aspect of the topic in public international law. (see: pp. 86, 634-636).

The book is divided into four Parts: I. General theory of unilateral acts; II. The search for unilateral acts: survey of fields and topics of international law; III. Creation of obligations by means of unilateral declarations: the problem of unilateral promises; and IV. Other classical unilateral acts. In addition the reader is introduced to the basic problems the book addresses in a concise introduction, and the results of the research are presented in the final thought-provoking conclusions. It is quite visible, from the perspective of the entire book, that the theoretical considerations set out in the first Part play a crucial role. This in no way implies that the other three Parts of the book do not deserve attention, as they contain many essential conclusions of both a theoretical and practical nature.

Saganek's book aims to provide an all-encompassing, systematic framework for dealing with the topic of UAS. The first part of the book comprises an in-depth consideration of the numerous questions relating to the terminology and definition of UAS (pp. 9-85). The author analyses each element of definition, starting from the term "act," which he aptly recognizes as broad and not limited to one category. Despite his in-depth analysis, Professor Saganek omits from his considerations the notion of an act in the law of international responsibility, even though he mentions this subject while discussing the work of the ILC (pp. 52, 65). Perhaps he could have devoted more space to the questions concerning state responsibility, since a more thorough analysis of the notion of act as a UAS and an internationally wrongful act might have led him to different or new conclusions or, alternatively, might have constituted confirmation of his findings. This observation seems particularly relevant since the author himself tries to prove that one should not speak of a competence stemming from international law to adopt such acts, but rather of the attribution of such acts to a state (pp. 144-145). The element of attribution has been thoroughly analysed in the law of state responsibility, which indicates that: (1) there are links between the law of state responsibility and the law of UAS; and (2) the law of state responsibility may contribute to the development of the law of UAS. Hence, it may be regretted that the author did not take a closer look at UAS from the perspective of international responsibility.

The chapter concerning the autonomy of UAS merits special attention (pp. 59-67). The author argues that the issue is in fact quite complex and his aim is to classify and describe rather than to determine the legal force of an act. Nevertheless, he also reminds us that it is precisely this autonomy that is the crucial criterion of UAS. An act must be autonomous, otherwise it cannot be treated as unilateral in the proper meaning of the term (pp. 67, 85). In this context, it seems that Saganek follows N. Quoc Dinh when he eventually accepts that autonomy is not a necessary condition for the delimitation of UAS.[3] While this conclusion is arguably correct, the book does not precisely enough

[3] N. Quoc Dinh, P. Daillier, A. Pellet, *Droit international public*, LGDJ, Paris: 1994, at 355.

address to the relevance of the criterion of autonomy of UAS for the definition of such acts. In particular, one may ask in which cases and under what circumstances a non-autonomous act may be regarded as a UAS. The author seems not to address this matter.

Saganek correctly tries to distinguish between domestic and international acts (p. 73). With respect to collective acts he relies on the sound assumption according to which no treaty could be qualified as a unilateral act. The same applies to acts which are not treaties but emerge by definition only within the framework of cooperation between two or more states (p. 70). Therefore, the notion of UAS does not encompass elements inherent in the very definition of a treaty. This might be of particular relevance in the case of collective recognition. The author also aptly concludes that the gist of a unilateral act is that such an act creates a legal effect (the creation of obligations for the author state; their transformation; or the elimination of rights held by the author state). Therefore, in his study he concentrates on the search for legal effects of whatever type, rather than looking for a very precise type of legal effect.

The above remark is related to another observation. Saganek follows the above discussion by focusing on the legal effects of acts referred to as UAS (pp. 73-79). He adopts the sound assumption that in identifying UAS he will concentrate on the search for legal effects of whatever type. Therefore, if a given act leads to the creation of an international obligation (rights and/or duties) for the author state or its transformation or termination, then it should be regarded as a UAS. If one accepts such a view, then the creation of any legal effect would be a decisive requirement for recognizing the existence of a UAS. Such reasoning is inevitably connected with the question relating to the place of UAS in the theory of sources of international law. Despite the fact that Article 38 of the Statute of the International Court of Justice (ICJ) does not list UAS as a basis for its decisions, the writings of eminent lawyers have almost unanimously accepted that UAS are a formal source of international law or, at least, may have an impact on these sources. At the same time it is beyond any doubt that UAS are a source of international obligations.[4] It should be added that it is an exceptional case when the views of international lawyers are so congruent on a matter.

Unfortunately, in the first edition of his book (in Polish) Saganek devoted no more than two pages to this issue which is of utmost theoretical importance. This was perhaps the most significant shortcoming of this edition. In the English version, the perfunctory treatment of this critical topic in the earlier edition has been augmented by a single, but still small, section in chapter 2 (pp. 79-81); hence the exploration of this crucial topic continues to under-represent the extent to which it influences the whole discussion on

[4] *See e.g.* I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford: 2008, at 640-641; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public international law. Systemic issues], C.H. Beck, Warszawa: 2004, pp. 110 et seq.; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie* [Outline of public international law], LexisNexis, Warszawa: 2011, at 158-162; R. Jennings, A. Watts, *Oppenheim's International Law*, Oxford University Press, Oxford: 2008, vol. I, at 1190; M.N. Shaw, *International Law*, Cambridge University Press, Cambridge: 2008, pp. 121-122.

UAS. Nonetheless the second edition constitutes a significant improvement over the first in this respect. The book has been rewritten, not merely updated, and the new section discusses the problem of UAS and the sources of international law. This is an improvement in substance as well. It seems that the author tends towards the conclusion that UAS may be a source of international law, but do not always have to be. They certainly can give rise to legal obligations. The question whether UAS are a source of international law depends upon the type of UAS. One must exclude above all protests and waivers as such a source. The case is different with respect to promises. In consequence, one cannot see a source of law in every UAS. Saganek considers this topic as "manifestly a theoretical question" and avoids giving a strict and precise answer. In doing so, he seems to steer clear of controversy, and the reader feels as if he or she is reading an account of views on the matter, with merely a nod toward whatever contentions exist. It fact, his treatment of the matter suggests that he does not consider this question grave enough. It is this reviewer's humble opinion that the author could take a much bolder approach without disrupting the excellent tenor of his remarks and considerations. It seems that the most crucial question he should have dealt with was the establishment of criteria, the fulfilment of which would meet the threshold of a source of international law. This issue is missing in this otherwise outstanding work.

Saganek also considers the issue of sources of international law in the next section, devoted to the legal foundations of the binding force of UAS in public international law (pp. 82-84). It should be added that this issue is also discussed by the author with respect to promises (pp. 336-440, and particularly pp. 401-406), where Saganek broadens his previous conclusions while analysing selected writings of international lawyers. The examination of the legal basis for the binding force of UAS forms part of a larger problem concerning the legitimacy of international law, which is closely connected with the study of material sources of international law. In this regard the author's discussion is also rather modest, as he relies to a large extent on the writings of eminent scholars. It would seem that due to the importance of the matter the author could have paid more attention to the legal basis for the binding force of promises. The author does list a few bases, such as the principle of good faith, *ius aequum*, recognition, estoppel, legitimate expectations, consent, and the theory of self-limitation. In the first part of his book Saganek does not consider each basis independently, but rather focuses on reaching general conclusions. However, it seems that the search for the legal basis for the binding force of a promise is a theoretically attractive field which could have forced the author to discuss the issues concerning the legitimacy of international law in general. The author himself seems to agree with this conclusion when referring to the legal foundations of the binding effect of treaties (pp. 341-345). In this context, he makes a number of valuable analyses, observations and statements, which stimulate the book's readers to engage in critical thinking. Eventually, it seems that he bases the binding force of promises on the principle of good faith. He concludes that the judicial decisions and scholarly writings recognize this principle as a basis for the binding force of UAS. In the reviewer's opinion, this is the best part of the book.

The above remarks are intended to show that the question of the legal basis for the binding force of UAS could have formed one of the most important scholarly issues with respect to UAS, which should have been discussed separately, systematically and exhaustively in the book. It might be underscored that the bases indicated by the author are often closely connected (e.g. the principle of good faith and the protection of legitimate expectations) and elaborated on by international lawyers. A presentation of the main views, their critical assessment, and polemics in the context of UAS should not have presented any major difficulties for Saganek, considering his impressive knowledge of scholarly writings and the fact that certain related rules of international law are discussed from their very basics throughout the whole book. To sum up, a more thorough research into the legal basis for the binding force of UAS would without doubt have enriched Saganek's outstanding work.

This last remark compels another observation. The essence of UAS boils down to a declaration of will by a state. This is noted by the author himself, who on numerous occasions underlines this element and quotes abundantly from the literature. Based on the assumption that a treaty consists of a concordance of wills between two or more subjects of international law with the intent to create a legal relationship consisting of rights and duties for all parties, it needs to be underlined that UAS are in many respects strictly connected with the law of treaties. This relationship is noted by the author, who invokes the ILC when discussing the validity of UAS in light of the Vienna Convention on the Law of Treaties (pp. 112-166). This is a very attractive part of the book, which forces the reader to seriously consider of the essence of UAS. Saganek comes to many pertinent conclusions, extensively citing the work of the ILC and the relevant scholarship. However in my opinion his conclusions are too modest and one may feel a bit disappointed that the author did not discuss the issue in a broader fashion and elaborate on the results he arrived at. Saganek concludes this chapter of his book by saying that the doctrinal suggestions to apply the principles of the VCLT to unilateral acts has turned out to be well justified overall, albeit with some exceptions. He makes this point deftly, alerting the reader that there are certain parallels between the law of treaties and the law of UAS. In this regard it should be noted that both treaties and UAS (at least some of them) have many common aspects. They both form a source of international law and a source of international obligations. They both stem from the will of states. International law does not hierarchize treaties and UAS in the catalogue of sources of law and international obligations. The methods for analyzing both treaties and UAS should be closely related. Bearing in mind the fact that the law of treaties is much more developed than the law of UAS, the latter should borrow from the former to the extent necessary to meet the needs of the law of UAS, in particular with reference to the existence and validity of such acts. I come back to this issue below.

Parts II-IV of the book examine concrete unilateral acts of states. The author places special emphasis on promise (pp. 336-437), recognition (pp. 441-562), waiver (pp. 563-601) and protest (pp. 602-631). It is noteworthy that Saganek does not limit himself to these well-known examples and searches for other acts in various fields of public

international law. Therefore, he goes beyond the classic literature on UAS and deals with, *inter alia*, reservations, objections and declarations made upon acceptance of a treaty (pp. 188-205), territory (pp. 216-249), nationality (pp. 251-262), diplomatic law (pp. 282-302) and the use of force (pp. 303-333). The author makes many thought-provoking observations while analyzing state practice, international judicial decisions, and the teachings of eminent scholars. This approach makes for more interesting reading as the international literature mostly does not comment on these branches of international law in the light of UAS. Saganek's work thus fills this gap. The author tries to discuss each topic exhaustively and each chapter of the book is summarized by concise and clear conclusions.

My next remark concerns an act of promise. As already noted, UAS are related to treaties, since they stem from states which express their will to create legal effects in the sphere of international relations. Therefore, the analysis of promise, which is a classical UAS, should be based on the similar or the same methodology as in the case of treaties. This is particularly important when one considers the existence and validity of promise. This topic should be examined with reference to international practice, with special regard to the decisions of international courts and tribunals. While the author takes international practice into consideration in the book, he does not attempt to establish the criteria governing the creation of international obligations. The author correctly presumes that the will and public character of an act will have a decisive character, but at the same time it seems that these two elements should be established on the basis of text and relevant circumstances (context), i.e. that a promise has been made in a similar way as in the case of treaties, and their methodology established by the ICJ and other international courts and tribunals.[5] The author is aware of the fact that the ICJ has posited such criteria with respect to the facultative clause of compulsory jurisdiction of the Court (Article 36.2 of its Statute), when it stated that: "[t]he intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served."[6] The conclusion stemming from the decisions of the ICJ appears to be that the methodology with respect to ascertaining the existence of an international agreement and a UAS is the same. Thus the establishment of the will, intent, and the public character of a promise should be based on the analysis of a given text and the circumstances in which the promise has been made. Saganek makes a very accurate observation that the answer to the question concerning the creation of an international obligation may not be given without the examination of a particular promise. For instance, he correctly states that statements on public conferences leave no doubts as to the circumstances in which a promise may be

[5] ICJ, *Aegean Sea Continental Shelf (Greece v. Turkey)* (Judgment), [1978] ICJ Rep., para. 96; ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Judgment), [1994] ICJ Rep., para. 23; ITLOS, *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment), 14 March 2012, case no. 16, paras. 88-92.

[6] ICJ, *Fisheries Jurisdiction (Spain v. Canada)* (Judgment), [1998] ICJ Rep., para. 49.

duly undertaken.[7] The case would be different if an agent before the ICJ makes a unilateral promise on behalf of his state.[8] It seems that in this context it is necessary to establish and describe at least the basic contours of the methodology for ascertaining a promise or, alternatively, to verify whether such a methodology may be devised.[9]

The next issue is whether one can apply the methodology for ascertaining the true nature of international agreements which has been developed by the ICJ and its predecessor, the PCIJ. A tentative examination would seem to lead to an affirmative answer. The author himself refers to the methodology established by the World Court (in particular in the *Qatar v. Bahrain* case) when he clearly states, relying on the work of the ILC, that the private intention of a given official is of no importance (p. 396).

Last but not least, it is worthwhile considering, as the author quite appropriately does, what the relationship is between the "will" and the "intention" of a state. Saganek rightly contends that there is no possibility to detach the term "intention" from the term "will". In this vein, one may consider and eventually find a distinction between the will and the intent, without however finding any essential differences, as both concepts are derived from states and express the voluntarist vision of international law. For the sake of argument, it might be assumed that a unilateral act consists in an expression of will attributable to a state and governed by international law, the intent of which is to create legal effects in international relations. Having in mind the above definition of a treaty, one may more clearly see a difference between the will and the intention. A concordance of wills of two or more state does not lead automatically to an international agreement, since the parties may conclude a political agreement as well. The element of intent to create legal effects on the international plane forms a treaty. Hence as Saganek correctly points out, the establishment of intention should be objectively, and not subjectively, assessed. To sum up, the element of intent decides whether a given instrument is a political agreement creating political obligations, or an international document creating legal rights and duties. In this regard Saganek quotes M. N. Shaw to conclude that the principle of good faith plays a crucial role (p. 395), a statement which should be endorsed.

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[7] *See* ICJ, *Aegean Sea Continental Shelf (Greece* v. *Turkey)*, paras. 95-107; ICJ, *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment), [1986] ICJ Rep., paras. 36-40.

[8] *See inter alia* PCIJ, *Mavrommatis Jerusalem Concessions*, Judgment of 26 March 1925, PCIJ Publ., Series A, No. 5, p. 37; PCIJ, *German Interests in Polish Upper Silesia (Merits)*, Judgment of 25 May 1926, PCIJ Publ., Series A, No. 7, p. 13; *Legal Status of Eastern Greenland*, Judgment of 5 April 1933, PCIJ Publ., Series A/B, No. 53, pp. 36, 71; ICJ, *Nuclear Tests (Australia v. France)* (Judgment) [1974] ICJ Rep., paras. 43, 46 (*see also* ICJ, *Nuclear Tests (New Zealand v. France)* (Judgment), [1974] ICJ Rep., paras. 46, 49); ICJ, *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, paras. 170-176. *See* Verbatim Record, ITLOS/PV.11/2, 8 September 2011, p. 5; A. P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71(1) American Journal of International Law 1 (1977), p. 3.

[9] In the context of treaties, J. Klabbers searched for such a methodology and noticed that the decision in *Qatar v. Bahrain*: "establishes something of a methodology for ascertaining the true nature of an international instrument." *See* J. Klabbers, *The Concept of Treaty in International Law*, Kluwer Law International, The Hague, London, Boston: 1996, p. 215.

The author also devotes considerable attention to the classical act of recognition, and here his considerations are both interesting and valuable. The same can be said with respect to waiver and protest. The author rightly concludes that protest may be explicit or implied. From this perspective, an interesting problem remains, namely whether the non-appearance before a domestic court may be regarded as a protest to its jurisdiction. If this is so, one may contend that protest in exceptional circumstances may be implied from non-appearance (silence).

In sum, this book has several strengths. Saganek must be applauded for taking up a difficult and complex subject. His theoretical discussion on the various aspects of UAS presents an in-depth analysis and compels the reader to rethink the whole concept of UAS, both as a source of international law and as a source of international obligations. The breadth of issues and the richness of arguments manifestly prove that the author fully committed himself to the subject matter. In the field of the theory of UAS, there is a growing consensus that their full understanding can only be achieved by a sound grasp of their definition, criteria, and legal foundation. This book compellingly delivers an anatomy of how unilateral acts of state are taken. An added value of Saganek's book is his discussion on the legal foundation of UAS and their place in public international law. In addition, the book is an excellent stand-alone resource; perhaps not a one-stop shop, but a point of departure for a more detailed discussion of various aspects of UAS, including the various types of acts and international law itself.

Of course it is not possible, in a review of such a book, to comment in detail on every aspect of UAS. But it should follow from this brief description that the book under review is a well researched and very erudite piece, giving evidence of the author's sound knowledge of international law. Saganek does not avoid thorny issues and confidently presents and defends his views. I would venture to conclude that anyone with a genuine interest in the process of law creation would immediately identify with the book and regard it as an impressive work on the sources of law and obligations. I would expect that Saganek's book will find its way onto the shelves of many lawyers dealing with the sources of law in public international law.

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