Unilateral Acts anno 2017

With Special Consideration of Social Media Usage

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ABBREVIATIONS

ICJ - International Court of Justice
ILC - The International Law Commission
PCIJ - Permanent Court of International Justice
VCLT - Vienna Convention on the Law of Treaties
Art. - Article
ed./eds. - Editor(s)
e.g. - For example (exempli gratia)
i.e. - That is (id est)
Ibid. - In the same place (ibidem)
p. - Page
para./paras. - Paragraph(s)
pt. - Part
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1 Introduction

1.1 Introductory remarks

Unilateral acts of states have largely been overlooked by international legal scholars. Often given a backseat to the treaty, unilateral acts are rarely afforded more than a few pages in academic volumes on public international law. Naturally, the instrument of the treaty deserves much attention: it is the most widely used instrument of making international legal transactions among subjects of international law. However, as the only other instrument that is capable of binding states to their wills through the application of the principle pacta sunt servanda,¹ the unilateral act remains remarkably neglected.

The Vienna Convention on the Law of Treaties (VCLT) provides rules governing international legal transactions made by way of treaty in a predictable and familiar manner. The rules found therein are highly useful when making international legal transactions regarding important matters, as states often seek optimum predictability and stability in the effects of such transactions. The law of treaties is well-developed and sets out an efficient regime for entering into and executing international agreements, and its rules are therefore sought to be adhered to by states wishing to enter into commitments with other states.²

However, with the strong tradition of focusing on the law of treaties as the main governing set of rules for international transactions, legal scholars may tend to pay little attention to the variety of other ways international obligations can be assumed.³ Some obligations may arise from customary international law or other sources of international law. Among these are the obligations produced when a state unilaterally engages the principle of good faith, such as obligations assumed by a state through unilateral acts. Much like individuals in a state adhering to the rule of law are free to operate as they see fit as long as it is not prohibited by law, a state is free – by virtue of their sovereignty – to unilaterally assume obligations regarding matters they can unilaterally govern barring prohibition by international law.⁴

In earlier times, diplomatic relations often took place behind closed doors, further away from the public eye, and therefore, the public perception of them was more easily manageable. In our times, with easy access to news and live, direct video coverage from important events,

¹ See below pt. 3.1
³ Thirlway Hugh, I General Principles and Sources of Law, Division A: General Principles, Ch.II: International Rights and Obligations (Oxford University Press, 2013). p. 81
⁴ James Crawford, Brownlie's Principles of Public International Law (Oxford University Press, 2012). p. 51
diplomatic relations seem to have taken on a more fragmented nature. The more formalized forums such as the United Nations and its associated organs are still of fundamental importance, but Heads of State and other world leaders also increasingly make quick statements directed at the world-at-large, witnessed by the large increase in politicians’ activity on social media.\(^5\) In this thesis, I seek to examine the unilateral act and its role in international law, and to present ideas on how to approach the subject in a fast-paced world of instant, global communication and near-universal publicity.

1.2 Structure and methodology

This thesis is divided into five main parts. Following this first, introductory chapter, I will in Chapter two present the development of unilateral acts from when they were formally acknowledged by the Permanent Court of International Justice (PCIJ) in 1933 until modern times. Understanding how unilateral acts have been considered throughout history, and the reasons behind the substantive rules governing them is vital for the consideration of how the principles embodied within the rules should be applied today. Moreover, I will further clarify different kinds of unilateral acts, and thoroughly delimit the main object of this thesis; namely the strictly unilateral act.\(^6\)

Chapter three will examine the place of unilateral acts in the international legal order, as well as current law of strictly unilateral acts, hereunder the substantive rules governing their formation and modification.

Chapter four will first present recent changes in the way the world communicates, and their possible effects in the law of unilateral acts. After a short introduction, I will examine whether and under which conditions the criteria for the establishment of unilateral acts can be fulfilled via statements in social media, followed by a conclusion in Chapter five.

Having its roots in uncodified international custom, there is no authoritative text setting out the rules governing unilateral acts. However, the International Court of Justice (ICJ) and its predecessor have touched upon unilateral acts a number of times, and in doing so, determined criteria for their existence. Moreover, unilateral acts were the object of a larger study by the International Law Commission (ILC) from 1997 to 2006, and there exists a significant amount of quality research connected to their work.\(^7\) As the substantive rules governing unilateral acts are expressed in ICJ jurisprudence and theory, including the work done by the ILC, I will rely heavily on these sources in Chapter two and three. In Chapter four, however, I

\(^5\) See below Chapter 4.
\(^6\) See below pt. 2.2.1
\(^7\) See below pt. 2.1.2
refer to fewer legal sources. This is for the simple reason that there has not been any jurisprudence touching upon the subject. To my knowledge, there exists to date no scholarly work that examines the interplay between unilateral acts and novel forms of communication. Therefore, Chapter four will rely on sources of law analogously applied for the purposes of unilateral acts, as well as a significant number of extra-legal sources, such as research done by communication and conflict theorists.

2 The development of unilateral acts

2.1 Historical background

2.1.1 A century of unilateral acts

Oral agreements or declarations between states with corresponding legal effects have existed for as long as states have existed.\(^8\) Unilateral acts of states have many similarities to such oral agreements, namely that they are often unwritten and subject to dispute after their occurrence. However, as the term suggests – they differ in that they are unilaterally binding, that is, their legal content is reliant on the unilateral act itself, independently of any corresponding act or declaration of another state.\(^9\)

Nowadays, the most common instrument of creating obligations and rights between states are bilateral or multilateral agreements or treaties – or, at least, they are the instruments that have received the most attention from international courts and legal scholars. However, they are by far not the only sources of international law.\(^10\) Embodied within international custom and general practice, another important and frequently used source is the unilateral act.\(^11\) The acts of declaring war or peace, acknowledgement of other states or governments, as well as making public announcements to the international community or to other States when diplomatic relations have soured, are all unilateral acts. As Zemanek writes, “unilateral acts have become the most frequent tool of State interaction. They weave, so to speak, the daily web of international relations.”\(^12\) Not nearly all of them are legal acts, but a significant portion of them could have legal relevance, should a dispute relating to their application arise.


\(^9\) See below pt. 2.2

\(^10\) See Art. 38 Statute of the International Court of Justice, San Francisco, 26 June 1945, and below, Chapter 3


\(^12\) Ibid.
The legal significance of unilateral acts first gained widespread attention during the years of the PCIJ. The first case to confirm the existence of obligations arising out of a unilateral act was the case of the *Legal Status of Eastern Greenland* (Denmark v. Norway).\(^{13}\) In the judgment, the PCIJ accepted an oral (although later transcribed) unilateral declaration made in 1919 by the Norwegian Foreign Minister *M. Ihlen* as binding upon the Norwegian State: “The court considers it beyond all dispute that a [declaration] given by the Minister for Foreign Affairs on behalf of his government […] in regard to a question falling within his province is binding upon the country to which the Minister belongs.”\(^{14}\) The declaration in question amounted to a renunciation of a Norwegian claim to sovereignty.\(^{15}\)

Since then, the ICJ in a number of cases has recognized various forms of unilateral acts as sources to determine international obligations, considering unilateral acts both as directly effecting legal obligations,\(^{16}\) and indirectly by using them to clarify and interpret the content of other obligations arising out of treaties or other agreements.\(^{17}\) In the ICJ’s judgments as well as in legal scholarship, one can observe a clear aim of distinguishing between the unilateral acts of states of political content, and those which also embody a legal content.\(^{18}\) However, some acts clearly have aspects of both a political and a legal content. One example is a press conference held by the French State regarding atmospheric nuclear tests in the Pacific Ocean,\(^{19}\) which the ICJ in the *Nuclear Tests* cases considered to be a source of a legal obligation. Such televised press conferences were non-existent a few decades earlier, and thus a new source of international obligations emerged. When studying unilateral acts of states, one needs to review the characteristics of new forms of communication between states as technology further develops – in order to determine whether and in which sense states can assume obligations through these new forms of communication.\(^{20}\) Whereas earlier communication between states usually occurred through rather formalized diplomatic channels, the fast technological development of the past few decades has allowed for a great variety of new forms of communication.

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\(^{13}\) *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5)

\(^{14}\) Ibid., para. 192

\(^{15}\) Zemanek, "Unilateral Legal Acts Revisited/Ed. K. Wellens." p. 215


\(^{17}\) See for example the *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986: I.C.J. Reports 1986, p. 132 para 261, where the ICJ considers the content of commitments in light of unilateral communications.


\(^{19}\) See below pt. 3.1.2.

communication, such as through telephone, fax, public media, and in later years through e-mail, announcements on the internet and via social media.  

2.1.2 Codifying the law of unilateral acts

The ICJ judgments regarding unilateral acts of states have often left room for uncertainties, and until the 1990’s, no legal studies by an international body examined these unresolved issues. Aware of these shortcomings, the International Law Commission (ILC) proposed in 1996 to begin work on the codification of the law of unilateral acts of states, using the law of treaties as a helpful point of departure due to their many similarities.  

The aim of the ILC was to begin the work of codifying an important and frequently utilized source of international law, inspired by having successfully done so with the law of treaties in the VCLT. After ten years of research and discussion, the ILC adopted ten “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations” (hereafter: Guiding Principles). As the name implies, these principles are not strictly binding upon any state, and they only directly apply to unilateral acts in the form of formal declarations – so-called unilateral acts *stricto sensu*. This excludes a multitude of other unilateral acts that are also capable of creating legal obligations. However, the ILC’s failure to include them must be ascribed to the difficulties of reaching agreement on absolute principles that should govern such a multifaceted phenomenon as the unilateral act entirely. There should be no doubt as to whether other unilateral acts can be of a binding nature too, as they undoubtedly can, evidenced by international custom and confirmed by ICJ judgments.  

21 Ibid.  
23 Ibid.  
25 See below pt. 2.2.1  
27 See for example *Case Concerning the Temple of Preah Vihear, (Cambodia v. Thailand)*, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6, on p.32, where the ICJ combines the concepts of acquiescence and estoppel. More on this below, pt. 2.2.2
While the Guiding Principles are not a binding as international law in and of themselves, they are an expression of the international customary law applicable to unilateral acts.\textsuperscript{28} The work of the Special Rapporteur to the ILC on the subject also provides an excellent compilation of sources to illuminate the customary law of unilateral acts. It is important to note that the ILC is not an authoritative body, and its work is not binding upon any state until it is expressed in a treaty or convention (or recognized as customary law). Nonetheless, the ILC is reliable and trusted in its research, and it often clarifies the rules of customary international law by which states already are bound. In the following, I will rely heavily on the guidance of the ILC and its work on unilateral acts of states.

### 2.2 Clarifying the term “Unilateral Acts of States”

In its conclusions on unilateral acts of states put forth to the United Nations General Assembly in 2006, the ILC provides a useful division of unilateral acts primarily into two categories.\textsuperscript{29} One of the categories deals with the various unilateral acts that are executed within the framework of other rules of international law, such as within the framework of the Law of the Sea. Illustrious of such unilateral acts are the various domestic legal acts that define a coastal state’s territorial sea and contiguous zone, such as the Norwegian Territorial Sea and Contiguous Zone Act.\textsuperscript{30} Such acts, while domestic in origin, are also considered unilateral acts on the international plane, since they by a unilateral act confer rights on the author state to the detriment of the rights of other states. However, such acts are also executed in conformity with the regulatory framework of the United Nations Convention on the Law of the Sea,\textsuperscript{31} a well-established regime prescribed by an international convention, and do therefore not give rise to controversy about their binding force on the international plane. Another example would be the acts of signature or ratification of treaties, which are in fact unilateral, but simultaneously governed by the VCLT regime.

In the other primary category suggested by the ILC are unilateral acts that are “formulated by States in exercise of their freedom to act on the international plane”.\textsuperscript{32}

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\textsuperscript{28} As evidence of a general practice accepted by law, see Art. 38 ICJ Statute. The place of unilateral acts in the international legal order is disputed; the most common view is that they are a separate formal source of international law, akin to treaty and international customary law, see below Chapter 3. However, the secondary rules governing the instrument of the unilateral act itself are to be found in international customary law, as evidenced by state practice and opinio juris, similar to the status of treaties prior to the VCLT.


\textsuperscript{32} Supra note 29.
meaning of the term, there are numerous actions a State can undertake that can be considered unilateral acts.\textsuperscript{33} For example, in the context of international negotiation, even the individual acts of offer and acceptance can be viewed separately as unilateral acts by the offeror and the acceptor; as Rubin writes: “Every legally significant act in a legal system that posits individual legal personality is, in a sense, unilateral.”\textsuperscript{34} However, such a wide meaning of the term will not be utilized for the purposes of this thesis, nor was it researched by the ILC, owing to the fact that these are not \textit{strictly} unilateral acts; they happen within the context of international negotiations, and thusly require something of a \textit{quid pro quo} nature to take effect.\textsuperscript{35}

2.2.1 The strictly unilateral act

The ICJ first defined the \textit{strictly unilateral act} in the \textit{Nuclear Tests} cases:

“[A unilateral declaration], if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act”\textsuperscript{36}

In accordance with the above, a further clarification of the term “strictly unilateral act” was suggested by the Special Rapporteur to the ILC on Unilateral Acts of States in his first report to the working group:

“[A] unilateral act is an expression of will which is attributable to one or more subjects of international law, which is intended to produce legal effects and which does not depend for its effectiveness on any other legal act.”\textsuperscript{37}

The Special Rapporteur maintains that this criterion must be supplemented by considering the autonomy of the act, meaning one must look to whether the unilateral act is independent of other legal acts.\textsuperscript{38} In my view, the criterion of autonomy is sufficiently clear within his definition – not only must the legal effectiveness of the act originate from a manifestation of will, it

\textsuperscript{33} Yearbook of the International Law Commission, 1997, Vol. II, Part two. p. 64, para. 198
\textsuperscript{34} Rubin, “The International Legal Effects of Unilateral Declarations.” p. 8
\textsuperscript{35} Nuclear Tests case (Australia v. France), para. 43
\textsuperscript{36} Ibid.
\textsuperscript{37} First report on unilateral acts of States, International Law Commission, 5 March 1998, para. 133
\textsuperscript{38} Zemanek, "Unilateral Legal Acts Revisited/Ed. K. Wellens.” p. 210
must also be effective independently of any other act. Using the above definition, a strictly unilateral act of a state exists when such an act is attributable to one or more states, and not to any other subject of international law. For the remainder of the thesis, unless stated otherwise, this is the meaning that will be given to the term “unilateral act(s) of state(s)”.

It is important to note that an act in conformity with the above criterion is still unilateral even though it is attributable to two or more states. Unilateral acts can be both individual or collective. The defining factor that brings about the unilateral character of unilateral acts is their independence of any other act, not the number of states that undertake it. Camille Goodman provides a useful clarification: “[I]nternational legal acts can be divided into unilateral, bilateral or multilateral acts, according to whether the law attaches legal effects to the manifestation of will of one subject, or requires the concurrence of two or more.” The legal effects of a unilateral act does not require the concurrence of two or more subjects, but the manifestation of will may still be concurrent among multiple subjects.

2.2.2 Estoppel and the unilateral act

Moreover, the relationship between the institutions of the unilateral act and that of international estoppel requires clarification. Crawford writes: “The two institutions were imported in international law from the systems of civil and common law respectively, and grew up separately, shading into each other.” The similarities between the two institutions might be the source of some confusion among scholars discussing unilateral acts, and deserves some attention.

Unilateral acts are public expressions by a state manifesting the will to be legally bound by their terms. Estoppel, however, is a more general legal construct imported from municipal law, where states might find themselves bound by statements of facts or conduct that was not intended to be binding. In a separate concurring opinion in the Temple of Preah Vihear case, ICJ Judge Gerald Fitzmaurice stated that

“The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have “relied upon” the

39 First report on unilateral acts of States, International Law Commission, 5 March 1998, para. 135
41 Crawford, Brownlie’s Principles of Public International Law. p. 421
42 See for example Megan L Wagner, “Jurisdiction by Estoppel in the International Court of Justice,” California Law Review 74, no. 5 (1986). on p. 1782, where the author considers the ICJ to actually have applied the principle of estoppel, instead of considering France have formulated a strictly unilateral act.
statements or conduct of the other party, either to its own detriment or to the other’s advantage.\[^{43}\]

This can, at first glance, seem similar to the effects of a unilateral act. However, estoppel is fundamentally different from the strictly unilateral act, as the conduct relied upon by the party invoking estoppel does not need to be a manifestation of will. Both institutions are based on the principle of good faith, but while the strictly unilateral act is a legal act by a state intended to produce legal effects, the institution of international estoppel is a tool used to ensure international stability and consistency in state behaviour.\[^{44}\] Invocation of international estoppel often involves reliance on unilateral behaviour of some kind, but that behaviour needs not amount to a strictly unilateral act.

Wagner points out that the distinction between a unilateral statement of fact and a unilateral promise can be difficult.\[^{45}\] As an example, she points to the Nuclear Tests cases and wonders whether the series of statements by the French authorities were simply a statement of the fact that they would not carry out further atmospheric nuclear tests, or whether they constituted a unilateral promise not to do so.\[^{46}\] She argues that under either result, binding states to unilateral declarations under a good faith doctrine is, in effect, estoppel – quoting Justice Stanley Mosk of the California Supreme Court: “If an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck.”\[^{47}\]

Such a simplification is, in my view, counterproductive. The great variety in characteristics of friendly and less friendly international relations demands nuanced regimes for binding states outside of the thoroughly regulated treaty system. One of the main purposes of the United Nations is to have an arena on which to reach consensus on rules that all participant states are bound by, in order to reduce game-playing\[^{48}\] among states and to develop friendly relations

\[^{43}\] Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Separate opinion of Sir Gerald Fitzmaurice, on p. 63

\[^{44}\] Rubin, “The International Legal Effects of Unilateral Declarations.” p. 17 and Crawford, Brownlie's Principles of Public International Law. p. 421

\[^{45}\] Wagner, “Jurisdiction by Estoppel in the International Court of Justice.” on p. 1782

\[^{46}\] See more on this distinction below pt. 3.1.1.

\[^{47}\] Wagner, loc. cit.

\[^{48}\] In the sense of game theory, e.g. a variation of the prisoner’s dilemma: every state will act in self-interest to produce the best result for itself even if there are better solutions available by cooperation, if there are no overarching rules to which everyone adheres. A great victory for the international community in this sense was the conclusion of UNCLOS, which protects all states from the tragedy of the commons on the sea. Without a set of rules to which everyone presumably adheres, all states would in self-interest extract as much resources as possible out of the sea, producing an unsustainable situation which would result in detriment to all.
between them. This function was clearly visible during the work towards the guiding principles on unilateral declarations, which took the ILC ten years to complete, and with a substantial amount of disagreement on the rules governing unilateral declarations. This process was also evidence that the international community clearly sees the strictly unilateral act as a different legal instrument than that of estoppel, a question of which there can be no doubt today. To reduce all legally binding acts outside of the regulated forms such as treaty, to estoppel, might be a dangerous and destabilizing development, and deprives the community of states of the opportunity to participate in the development of the rules to which they are bound. One should also note that the Special Rapporteur to the ILC considered estoppel in several of his reports, but clearly distinguished it from strictly unilateral acts. Accordingly, the main difference is in the source of the obligation: an obligation created by a strictly unilateral act arises out of that state’s declaration of intent, whereas with estoppel, the obligations arises out of the expectations created in other states by certain conduct.

2.2.3 An anti-inconsistency rule in international law?

Another suggested explanation for the obligation that was deemed to exist in the Case Concerning the Temple of Preah Vihear was put forth in another separate but concurring opinion by ICJ Judge Alfaro. Dissatisfied with the application of estoppel, a legal construct adopted from domestic law with widely differing application criteria across municipal jurisdictions, he presented a more far-reaching ‘anti-inconsistency rule’ in international law. The principle that was in fact applied in the case, as Alfaro understood it, was “that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation.” The terms of ‘estoppel’, ‘forclusion’ and ‘preclusion’ would all fall within the ambit of such a principle. The substance of the principle “is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible [...] Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another state.”

In my opinion, Alfaro correctly describes the explanation for the existence of legal constructs such as estoppel or the strictly unilateral act, but it is not the construct governing the binding

49 Art. 1 Charter of the United Nations, 26 June 1945.
50 Crawford, Brownlie’s Principles of Public International Law. p. 422
51 Second report on unilateral acts of States, International Law Commission, 14 April and 10 May 1999, para. 13
52 Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Separate opinion of Vice-President Alfaro.
53 Ibid., p. 39
54 Ibid.
55 Ibid., p. 40
nature of legal facts one would normally refer to as estoppel or unilateral acts. Rather, I would say there is an anti-inconsistency tendency in international law. Estoppel and unilateral acts are indeed legal constructs designed to promote international consistency and stability, but much like unilateral acts should not be reduced to estoppel, nor should all consistency-promoting constructs be reduced to variations of an anti-inconsistency rule. Moreover; neither the constructs of estoppel nor the anti-inconsistency rule explain the result in the Nuclear Tests cases: Sir Gerald Fitzmaurice states that the party invoking estoppel must have relied upon the statements or conduct of the other party either to its own detriment or the other’s advantage, while Alfaro suggests the anti-inconsistency rule prevents states from benefiting from their own inconsistent behaviour. In the Nuclear Tests cases, France neither benefited from their own behaviour, no circumstance detrimental to Australia or New Zealand had yet occurred, nor had they relied on the behaviour of France: The claimants’ distrust of the binding nature of the French statements were one of the very reasons they brought the case before the ICJ.

2.2.4 Distinguishing between a unilateral declaration and a unilateral act

There appears to exist some confusion between the terms “unilateral declaration” and “unilateral act”, as the terms are oftentimes applied to what appears to be the same phenomenon. The terms also seem to have undergone a development since the Eastern Greenland case. In this case, the PCIJ referred to an oral statement undertaken by the Norwegian Foreign Minister during a talk with his Danish counterpart as a “declaration”57. In the Nuclear Tests case (Australia v. France), the ICJ makes some general statements on the nature of declarations made by way of unilateral acts:

“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. […] When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking”58.

However, the Court continues by saying that the form does not matter:

56 Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Separate opinion of Vice-President Alfaro. p. 40
57 Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5) para. 191
58 Nuclear Tests case (Australia v. France) para. 43
“Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form.”59

Here, the Court refers to more general “statements” as opposed to “declarations”. The ICJ does not draw any clear distinction between the terms, recognizing that a binding unilateral act may be undertaken in the form of a statement, which may in turn be considered to be a declaration. However, whether the act deemed to be a declaration or something else seemingly has no bearing on its legal effects.

The Guiding Principles adopted by the ILC do not offer much help with the distinction either, as they do not include a definition of what a “declaration” is. The full name of the document is “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations”. In principle no. 1, declarations capable of creating legal obligations must be made publicly and manifest the will to be bound. However, the principles fail to distinguish declarations from other unilateral acts, which may also be publicly made and manifest the will to be bound.

However, the Special Rapporteur did consider this question in his first report on unilateral acts to the ILC. After stating that “[i]t is difficult in practice to find substantive unilateral acts that are not expressed or embodied in a declaration,”60 he goes on to list the most common examples of such declarations; namely promise, protest, waiver and recognition.61 The Special Rapporteur considered the declaration to be the most common instrument for a state to assume obligations unilaterally, just as the treaty is the most common procedure or instrument for states to conclude agreements under the law of treaties. Consequently, some members in the ILC’s Sixth Committee were concerned that restricting the study of unilateral acts to only unilateral declarations was too narrow.62 Therefore, the scope of the new Draft Article 1 was changed from “unilateral declarations” to “unilateral act”.63

The confusion within the ILC seems to have arisen out of conflicting views on how to approach the subject matter: one view was that one should identify rules applicable to a formal instrument through which a unilateral obligation is assumed (i.e. a declaration), while the oth-

59 Ibid., para. 45
60 First report on unilateral acts of States, ILC. 1998. para. 73
61 See also Crawford, Brownlie’s Principles of Public International Law. p. 416
62 Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session prepared by the Secretariat, ILC, 2000. Paras. 137-139
63 Third report on unilateral acts of States, ILC, 2000. para. 37
er view emphasized the need to identify rules governing the material content of the act (i.e. a promise, protest, waiver or recognition) in order to have uniform rules for all strictly unilateral acts.\textsuperscript{64}

As a consequence, declarations must be viewed as the most common instrument for assuming a unilateral obligation, although not necessarily the only one.\textsuperscript{65} The fact that the final document adopted by the ILC only is directly applicable to declarations is a result of the fact that it is easier to reach consensus on the most common and familiar form for unilateral acts, namely the declaration.\textsuperscript{66} This does not preclude that the principles embodied within the Guiding Principles as customary law are not analogously applicable to other forms of unilateral acts. Furthermore, in determining what a declaration is, one must rely on the ordinary meaning of the term: a statement, publicly made, orally or in writing.\textsuperscript{67} In the following, the term “unilateral declaration” and “unilateral act” can be considered synonymous unless explicitly stated otherwise. Although the two terms do not coincide fully,\textsuperscript{68} it will suffice for the practical purposes of this thesis.

\section{3 Unilateral acts as sources of international law}

Scholars disagree on whether unilateral acts are an independent source of international law, or if they are simply a source of international obligations, derivative of other rules of international law.\textsuperscript{69} The discussion is near identical to the discussion on whether treaties are a source of international law or merely of international obligations.\textsuperscript{70}

Art. 38 of the Statute of the International Court of Justice (ICJ Statute) provides an overview of the main formal sources of international law: international convention, international custom, general principles of law recognized by civilized nations, and, as subsidiary means for determination: judicial decisions and the teachings of the most highly qualified publicists of the various nations.\textsuperscript{71} Naturally, Art. 38 ICJ Statute is highly authoritative: the statutes set out, in treaty form, the agreed-upon rules by which the ICJ – the most authoritative judicial body in international law – shall determine questions of international law. According to Art. 92 UN

\begin{thebibliography}{99}
\bibitem{64} Second report on unilateral acts of States, ILC, 1999. paras. 44-45
\bibitem{65} Ibid.
\bibitem{67} Second report on unilateral acts of States, ILC, 1999. para. 50
\bibitem{68} For example, a number of scholars include acquiescence under the term “unilateral act”. See for example
\bibitem{69} Zemanek, "Unilateral Legal Acts Revisited/Ed. K. Wellens." p. 218
\bibitem{71} Art. 38 ICJ Statute
\end{thebibliography}
Charte, the ICJ Statute is an integral part of the charter itself. The sources listed in Art. 38 ICJ Statute are therefore an expression of the mandatory law by which all member states consider themselves bound. In this context, it is natural to view the formal sources listed in Art. 38 as exhaustive.

However, the sources of international law as listed in Art. 38 ICJ Statute are not exhaustive. Albeit not expressly listed, unilateral acts of states and resolutions of some international organizations are widely recognized as sources of international law too, as evidenced by ICJ case law and by state practice. When discussing this matter, it is important to have a clear distinction between formal sources of international law and the resulting legal content. According to the Special Rapporteur on unilateral acts of states, “[f]ormal sources of international law are methods or procedures for elaborating international law and international norms. A clear distinction should be drawn between such procedures and methods and the content of the resulting instrument.” Some of these formal sources are listed in the Art. 38 ICJ Statutes; e.g. the instrument of conventions or treaties, or the procedure of determining international custom as evidenced through a general practice accepted by law. These procedures or instruments can be observed separately from the legal rights and obligations they effect.

Degan partly agrees. After stating that it seems the term ‘sources of international law’ has several and distinct meanings, he continues: “In its simplest sense, the term “source of law” means the source of legal rights and obligations of parties to a legal instrument. In this sense a treaty is the source of rights and obligations for its parties. The same can be said for these unilateral acts of States which are a source of international law”. However, he claims such an interpretation is “correct, but not sufficient”. Degan views the forms or origin of international sources of law as the “law-creating processes”, and the law-determining agencies as the verifiers of an alleged rule. Without the interaction of both, there will be no international legal norm, right or obligation:

“The main agency of conclusion and operation of a treaty is a concordance of wills of two or more subjects of international law […], intended to achieve an effect in international law by creating a legal relationship of mutual rights and duties. In absence of that, there is no treaty. In the same sense, a source of international law is the will of one State issuing an unilateral act, intended to achieve an effect in international law by

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72 E.g. the Nuclear Tests cases and the Declaration on the Suez Canal and the arrangements for its operation, United Nations, Treaty Series, vol. 265, No. 3821, p. 300
73 First report on unilateral acts of States, ILC, 1998. Para. 65
75 Ibid.
assuming a new legal obligation or by waiving its actual legal rights, or in some circumstances by acquiring new rights. In absence of such a will the matter is not of a source, i.e. a law creating process."76

Degan does not deny unilateral acts their place as formal sources of international law, he simply elaborates on one of the criteria for their existence: the will of the author state to be bound according to the terms of the unilateral act. He sees this as the “verifier” of the obligation created by the unilateral act. I partly disagree with this view, as elaborated below.

The Special Rapporteur’s view seems similar to Degan’s, although he takes a different approach: “[I]n the field of treaties, it is important to distinguish between the procedure for elaborating a treaty and the agreement which is concluded and which is reflected in the instrument [...] In the same way, in the context of unilateral acts of States in general, it is important to distinguish between the declaration, as a procedure for creating legal norms, and its content or substance.”77

It becomes clear that unilateral acts should rightly be considered as formal sources of international law. In my view, the discussion on the legal character of unilateral acts is more legal-philosophic or linguistic than legal in nature, and as such, only an academic exercise with a negligible degree of practical applicability. Whether one views the wills of the parties as a separate source of international law or simply as a criterion for the determination of a binding unilateral act or treaty makes no practical difference. So long as there is consensus that unilateral acts and treaties are a source of law in the sense that international rights and obligations emanate from them, and the will or intent of the parties are an essential part of their validity, the obligation exists regardless of the academic classification. Without either the act or the will, there is no international obligation. It is, however, important to note that the majority view of international scholarship and the opinion of the ICJ is that the legal effects of unilateral acts is founded in the principle of good faith, whereas will or intent is simply considered a condition for the validity of the act.78

Therefore, it is most practical to view the unilateral act itself as a formal source of international law, and as such, very much of the nature like a treaty: a set procedure is required for their creation, while international rights and obligations arise out of the end product. To discuss whether treaties and unilateral acts are sources of law or only of obligations might be an interesting exercise for the mind, but to quote Zemanek:

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76 Ibid., p. 9
77 First report on unilateral acts of States, ILC, 1997. Para. 65
78 See Nuclear Tests case (Australia v. France), para. 46 and ILC Guiding Principle no. 1
“The usefulness of this dogmatic distinction is doubtful. [...] The distinction is inapt for unilateral acts which contribute to the formation of custom, although custom is considered to be a source of law, unilateral acts may be the source of that custom and the two can then hardly be separated. And it is incorrect with respect to autonomous legal acts which are not executed in a single performance but have a lasting effect, requiring a continuing conduct. [...] It is difficult to see a difference, as far as its quality as a legal source is concerned, between this way of creating a legal duty and its creation by treaty.”

Thus, to the extent one considers treaties to be a source of international law, one should equally consider unilateral acts as a source of international law. However, treaties too have been criticized for being more akin to a contract within municipal legislation, governed by the law of contract. Similarly, it is claimed, that the treaty simply is a contractual instrument, governed by the actual rules of international law whose sources are to be found elsewhere.

Another, non-contradicting view that might help illustrate the matter can be ascribed to Degan: According to him, rules of international law can be divided into two groups: rules of general international law, that bind “indiscriminately all international persons if applicable on them”. Rules of particular international law belong to a second group. They are “obligatory for a limited number of international persons but not for all of them, as for instance: for parties to a treaty, for parties to a particular customary rule, or for a State which assumed certain legal obligations unilaterally”. These groups of rules, in turn, fall within the more overarching concept of “international legal order” which is understood as “rules of positive international law in force at a given time, arising from all the main sources of international law. The matter is therefore of rules from all treaties in force, whatever their parties may be, of all general and particular customary rules, and of relevant unilateral acts of states.” Within this framework, the unilateral act would be governed by rules of customary general international law, while at the same time being a source of particular international law, as a part of the international legal order.

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81 Degan, Sources of International Law, p. 11
82 Ibid, p. 10
3.1 The binding nature of unilateral acts

The principle *pacta sunt servanda* is fundamental in determining contractual obligations within all domestic legal systems, and it also lays the foundation for the creation of obligations and rights on the international plane. The application of this principle in relation to treaty obligations is codified in Art. 26 VCLT, but its application in relation to unilateral acts of states is based on customary international law. The principle is for the purposes of unilateral acts translated into the principle *acta sunt servanda*. The contents of these principles are near identical: the former can be translated into “agreements must be kept”, whereas the latter can be translated into “acts must be kept”. These principles are both based on the principle of good faith: “Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.” In the above quote, the ICJ referred to a series of statements by the French state that, observed in their context, produced an international obligation. The principle is also applicable to forms of unilateral acts other than the formal declaration: “The rule of good faith is, without any doubt whatever, applicable to all categories of unilateral acts.”

Moreover, the VCLT can serve for guidance on the conditions that must exist for an obligation assumed by a unilateral act to be binding, as the requirements for their validity are essentially the same as the requirements for the validity of treaties. The conditions are:

1) The author must express a will or an intent to be bound by the terms of the act
2) The author must be a sovereign state represented by a competent authority or organ
3) The content of the obligation must be admissible, meaning it must be achievable and not forbidden by law
4) It must have the correct form.

In the following, I will examine these four criteria more closely.

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84 Oxford dictionaries, [https://en.oxforddictionaries.com/definition/pacta_sunt_servanda][08.10.2017]
85 *Nuclear Tests case (Australia v. France)* para. 46
86 See below pt. 3.1.2.
88 See Degan, *Sources of International Law*, p. 286
89 Ibid.
3.1.1 Intent to be bound

The importance of the consent or will to be bound by the terms of a treaty is apparent in Arts. 11-15 VCLT. The principles contained therein are equally applicable to unilateral acts. The requirement of intent or will to be bound is closely linked to the principle of state sovereignty in international law. Just as treaties are not binding upon states that are not parties to them and bilateral agreements do not confer obligations on third parties, unilateral conduct of a state that does not contain an expression of a will or an intent to be bound, does not normally bind the state. This is because in all three cases, the unbound state has not expressed a will or an intent to be bound by the associated terms. The state does therefore not express any consent, which is a necessary requirement for the respect of state sovereignty: “The expression of will is closely linked to the legal act and, consequently, the unilateral act. Will is a constituent of consent and is also necessary for the formation of the legal act.”

Therefore, for a unilateral act to create international obligations for its author state, the state must somehow display an intent to be bound according to the terms of the unilateral act. The ILC Guiding Principle no. 1 states that “Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations”. As is pointed out by Cedeño and Cazorla, there are two main perspectives from which to approach the question of when a declaration has legal effects, depending on the legal-cultural origins of the observer. One perspective is that for a unilateral act to be legally binding, it must contain an “express manifestation of a will to be bound on part of the author State.” The other is the view that “any unilateral behaviour by the State producing legal effects on the international plane may be categorized as a unilateral act”. Due to the easier consensus on issues relating to binding unilateral acts in the first sense, so-called unilateral acts stricto sensu, which most often take the form of formal declarations, they were the focus of the ILC during its research towards the Guiding Principles. However, the ILC acknowledged in the preamble to the Guiding Principles that a state might also be bound by other conduct than formal declarations, such as “mere informal conduct including, in certain situations, silence”.

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90 With the possible exception for acquiescence or estoppel, see above pt. 2.2.2 and 2.2.3
91 Fifth report on unilateral acts of states, ILC, 2002 para. 58
94 Ibid.
95 Ibid.
No matter the behaviour that constitutes the binding unilateral act, declaration or otherwise, the act must imply that the author state intends to adhere to its terms. Showcasing the tension between the two above mentioned perspectives on the binding force of unilateral acts, the preamble of the Guiding Principles also states that “in practice, it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law”. However, the expectations of other said subjects would only be legitimate if the author state had displayed apparent intent to adhere to its own terms, i.e. if the state has acted in such a way as to create legitimate expectations on the part of other states. If the state that has created legitimate expectations later tries to change its course, it may violate the principle of good faith. In my view, the practical differences in applying the requirement of intent are negligible, as the result will be the same after all the necessary considerations. Thus, it appears the apparent discord between the viewpoints is only interesting in an academic context. A more useful distinction is the one between expressions of intent to create international obligations, and expressions of political intent – for example a state representative making general statements about working towards achieving certain climate goals. Unilateral expressions of intent to create international obligations will be unilateral acts of state, whereas a simple expression of political intent remains without legal effects. Of course, this distinction is also undoubtedly difficult to apply, and one will have to consider all the circumstances and context of a certain behaviour by a state.

On the other hand, if a state should more deviously express an apparent intent or will to be bound by the terms of its unilateral act, and later deny that it did so, this would certainly violate the principle of good faith and undermines international trust and cooperation. As the ICJ stated in the Nuclear Tests cases, trust and confidence are inherent in international cooperation. The author state should therefore be considered bound by its behaviour – this consequence also emanates from the principle of estoppel.

Finally, when considering whether a state has expressed sufficient intent to be bound, it follows from the Nuclear Tests cases that a restrictive interpretative approach must be kept: “When states make statements by which their freedom of action is to be limited, a restrictive

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96 See for example https://www.regjeringen.no/en/aktuelt/norway-brazil-cooperation/id2558980/ Statements such as “Norway is committed to the partnership with Brazil on reducing deforestation” are, taken by themselves, without legal effect.


98 Nuclear Tests case (Australia v. France) para. 46
interpretation is called for.” This is another safeguard to not accidentally consider a state bound to wider obligations than it itself had intended.

3.1.2 Competent authority or representative

For a unilateral act to be legally binding, it must be authored by a competent state organ or representative. One may look to Art. 7 VCLT and its section on invalidity of treaties for guidance on this matter, as the principles embodied in these provisions are also applicable to unilateral acts as general principles of international law. Chiefly, one finds that the respective act must have been formulated by a state organ or representative authorized, according to the domestic laws of the state, to bind the state on the international plane. However, if the unilateral act is in violation of such authorization, the state may only invoke invalidity if the violation is manifest – which it is only if it is “objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.” The Guiding Principles no. 4, like Art. 7 VCLT, considers Heads of State, Heads of Government and Ministers of Foreign Affairs as competent to formulate such unilateral acts, in line with customary international law.

This requirement of competence invariably is a challenge within the sphere of unilateral acts. In contrast to a treaty-making process that is comparably well-prescribed, predictable and familiar to the actors operating within it, the broad spectrum of varied unilateral acts can be undertaken by various state actors, with unclear boundaries of what authority they have according to domestic laws. Zemanek writes:

“The answer to the general question as to who may legally commit a State in international law depends on the relative merit which one attaches to two conflicting concerns: one is the necessity to protect the trust of other states in the authority of an apparently competent State agent; the other is the respect for the autonomy of a State to determine the competence of its organs, which it usually does in its constitution. These conflicting concerns are treated differently in the rules concerning the conclusion of treaties on the one hand, and in the processes leading to the formation of custom or to a commitment by a unilateral legal act on the other.”

99 Nuclear Tests case (Australia v. France) para. 44
100 Fifth report on unilateral acts of states, ILC, 2002 paras. 84 and 85
101 Art. 46 VCLT
The competence to formulate unilateral acts is rarely, if ever, prescribed in constitutions. Constitutions may give certain powers to certain ministers, among them the powers to represent the state internationally to the Head of State, Head of Government and the Foreign Minister. However, these representatives are not exclusively the ones who formulate unilateral acts, binding or not. Other ministers as well as state organs may do so as well, as the Nuclear Tests cases illustrate: in addition to statements by the French President and Foreign Minister, the ICJ also deemed a statement by the French Embassy in Wellington and statements by the French Defence Minister to be relevant in the determination of the obligations which the French state had put upon itself.\textsuperscript{103}

However, even though the person formulating the act may be assumed to have the competence to formulate the act according to international law, he or she may not be authorized to do so under the respective state’s constitution. This was the setting in the Eastern Greenland case: The Norwegian Foreign Minister did not have constitutional authority to make the promise that he gave his Danish colleague, namely a de facto renunciation of the Norwegian claim to sovereignty over the area. Yet, the PCIJ, in considering the statement by the Norwegian Foreign Minister, stated that it was “beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government […] in regard to a question falling within his province, is binding upon the country to which the minister belongs.”\textsuperscript{104}

Later judgments suggest the case might have had a different outcome today. Nowadays, one would have to consider the rules of invalidity as expressed in Art. 46 VCLT, which provide for the invalidation of consent if there has been a manifest violation of a rule of internal law of fundamental importance, and only if the violation would be “objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”\textsuperscript{105} Interestingly, the rules embodied in Art. 46 were already binding as customary law during the proceedings of the Eastern Greenland case, although the PCIJ does not discuss this matter. In addition, Art. 3 para 1 (d) of the Vienna Convention on Diplomatic Relations would presume that the Danish Minister in the Eastern Greenland case would be familiar with the constitutional limitations governing the Norwegian Foreign Minister.\textsuperscript{106} Questions of such fundamental importance as the renunciation of a claim to sovereignty would demand knowledge of the constitutional rules of the host country on part of the foreign diplomat.\textsuperscript{107}

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\textsuperscript{103} Nuclear Tests case (Australia v. France) paras. 35-40
\textsuperscript{104} Eastern Greenland Case, on p. 53
\textsuperscript{105} Art. 46 VCLT
\textsuperscript{107} Ibid.
\end{flushright}
Another case illustrous of the developments is the 1951 *Fisheries Case* (UK v. Norway). The ICJ considered whether Norway’s method of drawing baselines was in accordance with international law. The UK argued that “the Norwegian system of delimitation was not known to [the UK] and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against [the UK].”\(^{108}\) The ICJ did not agree with this view, and said that the UK could not have been ignorant of two relevant Norwegian decrees of 1869 and 1889 regulating the matter, due to the country’s own interest in the matter as a neighbouring Coastal State:

“The notoriety of the facts, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom.”\(^{109}\)

This suggests that today a stricter standard applies to the good faith of states wishing to rely on unilateral acts, than was applied in the *Eastern Greenland* case. States nowadays have a more far-reaching duty to investigate the powers of an authority or representative formulating a unilateral act. In the *Eastern Greenland* case, the ICJ did not comment on the Norwegian claim that the Norwegian Minister did not have the powers to renounce a territorial claim, which is a rule of fundamental importance within the meaning of Art. 46 VCLT,\(^{110}\) and analogously applicable to unilateral acts. The court simply stated that such a statement is beyond all dispute binding upon the country of the Minister who makes it. Today, if it had found that it was “objectively evident” that the Norwegian Foreign Minister did not have the powers to make such a promise, the unilateral act could be rendered invalid. It is not given that the result would be different, but the ICJ would likely have investigated the matter more thoroughly.

I find that these considerations as to who can formulate binding unilateral acts can be summarised as follows: In the sphere of unilateral acts, an observer seeking to clarify whether a unilateral act is valid or not, must assess, in good faith, whether the act falls within the ambit of the regular function of the state authority or representative who produced it. If there is any circumstance that should reasonably give rise to suspicion about their competence, a state examining the act should be sceptical towards its validity. On the other hand, as strict a stand-


\(^{109}\) Ibid., p. 139

ard for competency as Art. 7 VCLT is not required. This would severely hamper the smooth functioning of international relations and raise the transaction costs between states significantly.

3.1.3 An admissible lawful object

Just like in the law of treaties, a unilateral act conflicting with a peremptory norm of international law (jus cogens) will be void. The principle is embodied in Art. 53 VCLT, where the principle is expressed for the purposes of the law of treaties. The principle does, however, not only apply to treaties – it applies to all acts of states. If the object of the unilateral act is in violation of such a norm, no competent expression of will or intent can repair its fundamental defects. The same applies if the object of the act is materially impossible – no expression of will can ever make its object realisable. If the unilateral act amounts to an unlawful threat or use of force, violating the principles expressed in Art. 2 (4) of the Charter of the United Nations, not only is it invalid – it may also invoke state responsibility, and may therefore have legal effects in that sense.

3.1.4 A correct form

In the sphere of unilateral acts, international law does not demand a specific form with which to formulate the act – contrary to most other international legal acts, which often require a certain form to be valid. The essential condition of the binding nature of a unilateral act is intent itself, and its author is free to choose the form through which that intent shall be expressed. This is explicitly stated by the ICJ in the *Nuclear Tests* cases. When referring to a series of statements by French authorities, the Court states:

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112 An economic term referring to the overall cost to a party of negotiating, entering into and executing agreements, comprised of information seeking costs, negotiation costs and enforcement costs among others.

113 See also Zemanek, op. cit. on p. 213


116 E.g. in the law of treaties, art. 2 para. 1 (a) VCLT
“With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference.”\textsuperscript{117}

The statements the Court was referring to, were produced by various authorities in various forms: one was a note sent by the French embassy in Wellington,\textsuperscript{118} in addition to a communiqué issued by the Office of the President of the French Republic,\textsuperscript{119} statements made by the French President, the Ministers of Foreign Affairs and Defence,\textsuperscript{120} and finally, an oral statement made by the French President at a press conference.\textsuperscript{121} The case truly showcases the variety of forms through which unilateral acts can be expressed. The case of the Declaration on the Suez Canal and the arrangements for its operation provides another example of forms unilateral acts can take, notably a unilateral act formulated by Egypt, but registered with and accepted by the UN Secretariat as an “international instrument” under the UN Charter Art. 102 and published in the United Nations Treaty Series.\textsuperscript{122}

However, there is one necessary and absolute requirement for the form of unilateral acts: they must be made public, although not necessarily directed at the party invoking the act. In this regard, the ICJ stated in Nuclear Tests: “[A declaration], if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding”.\textsuperscript{123} The need for a unilateral act to be expressed publicly is obvious: without publicity, its content can still be modified by its author(s), and it is in that sense not final. Similarly, leaked documents from discussions in governments etc. cannot be binding: they are not the final expression of will from the state, and other states may therefore not rely on them.

3.2 The modification of unilateral acts

It is fitting to also briefly mention the criteria for the revocation of a unilateral act. Just as treaties may be modified or revoked subject to specific rules,\textsuperscript{124} so may a unilateral act. However, due to being unilateral in nature, no participation is required from other states, and therefore the author state may also modify the unilateral act unilaterally. Thus, the criteria for mod-

\textsuperscript{117} Nuclear Tests case (Australia v. France), para. 45
\textsuperscript{118} Ibid., para. 35
\textsuperscript{119} Ibid., para. 34
\textsuperscript{120} Ibid., para. 36
\textsuperscript{121} Ibid., para. 37
\textsuperscript{122} United Nations, Treaty Series, vol. 265, No. 3821, p. 300
\textsuperscript{123} Nuclear Tests case, (Australia v. France) para. 43
\textsuperscript{124} See in particular Parts IV and V VCLT
ification or revocation of obligations assumed by a unilateral act are less strict than the criteria for modification or revocation of treaty obligations. Yet, this access is not unlimited. The ILC Guiding Principle no. 10 reads:

10. A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:
(a) Any specific terms of the declarations relating to revocation;
(b) The extent to which those to whom the obligations are owed have relied on such obligations;
(c) The extent to which there has been a fundamental change in the circumstances.

Primarily, it follows that the author state may, in the issuance of the unilateral act, dictate the terms of its modification. Revocation must be read as including a modification of obligations, because a modification may entail the revocation of individual obligations assumed through the act. In assessing the arbitrariness of the revocation, consideration should be given to facts closely resembling those of international estoppel or Alfaro’s anti-inconsistency rule; those notions have clearly inspired the rules of unilateral acts. Commenting on this relationship, Crawford considers that before tribunals, the principle of estoppel “may operate to resolve ambiguities and as a principle of equity and justice: here it becomes part of the reasoning. Elsewhere, its content is taken up by the principles noted [on unilateral acts], which are interrelated.” The rules on the revocation of unilateral acts are an excellent example of this interrelationship.

Having explained the sources of and criteria for unilateral acts, I will from now focus on statements formulated in social media. More specifically, I will examine whether and under which conditions they may amount to unilateral acts.

125 See above pt. 2.2.3
126 Crawford, Brownlie’s Principles of Public International Law. p. 421
4 Social media and unilateral acts

4.1 A shift in communications

We are currently witnessing the adolescence of a new form of communication. In 2000, an estimated 6.8% of the world’s population had access to the internet, whereas in 2016, that number had increased to 46.1%.\(^{127}\) The internet has permeated nearly all sides of social life, and continues to do so. In its early years, the internet was mainly used as a quicker form of communication in the form of e-mail, simple forums or bulletin boards, as well as for nascent shopping websites such as eBay and Amazon. It was characterized by users mostly remaining passive viewers of content uploaded by site administrators.\(^{128}\) In the early 2000’s, a new philosophy webpage design emerged: users were now encouraged to take a more active role in creating content, by uploading videos, creating their own profiles and connecting with other users.\(^{129}\) This gave rise to the emergence of websites such as Youtube, Facebook and Twitter, which remain hugely popular and influential to this day. By collecting usage data from their respective users, the social networking sites are able to offer highly efficient advertising space directed at key demographics, based on the users’ interests and online habits, keeping large parts of the economy afloat.\(^{130}\)

Politicians and world leaders entered the game somewhat late, but the past few years have shown that they are not willing to be left behind by the change in technology. As of 2014, more than 76% of world leaders had active accounts on social media such as Facebook and Twitter.\(^{131}\) As witnessed by anyone with access to daily news, U.S. President Trump famously relied heavily on social media during the U.S. presidential election campaign, and still has a very strong presence on it.\(^{132}\) According to Trump himself, he uses social media to challenge views promulgated by the traditional media, and in order to get his word out directly to his supporters.\(^{133}\) Being a presidential challenger, Trump used unusually adversarial and direct


\(^{128}\) Balachander Krishnamurthy and Graham Cormode, "Key Differences between Web 1.0 and Web 2.0," *First Monday* 13, no. 6 (2008).

\(^{129}\) Ibid.


\(^{132}\) Ibid.

language to clearly distinguish himself from the old establishment, coining slogans like ‘drain the swamp’.

The traditional view among communication and conflict theorists, before the advent and spread of the internet, was that the masses remained passive receivers of elite messages. According to these scholars, there are primarily two types of adversarial public communication: elite-level communication and mass-based appeals. Elite level communication includes diplomacy, political negotiations, as well as the signalling of intentions with allies and adversaries. Mass-based appeals “involve leaders and challengers seeking to coordinate mass behaviour, or inhibit it, by controlling the narrative and manipulating the mass channels of communication”. However, social media provides for a new form of communication: the traditional agenda-setting media can now be bypassed at will. Leaders, both incumbents and challengers, can communicate directly with the masses and the masses can now also respond, opening up easy, direct channels of communication from the masses to elites. In the words of Donald Trump: “The Fake News Media hates when I use what has turned out to be my very powerful Social Media - over 100 million people! I can go around them”.

Therefore, social media has many functions: leaders can use it to communicate messages to other elites (such as a challenger criticizing an incumbent, or a government communicating a message to foreign leaders), they can use it to garner support domestically, and they can communicate directly with their supporting base and opponents. Social media knows no borders (except for restrictions in certain countries such as China), and can also contain diplomatic messages. When studying social media activity and its effects, it is important to have these different functions in mind.

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134 Such as in this tweet: “Crooked @HillaryClinton’s foundation is a CRIMINAL ENTERPRISE. Time to #DrainTheSwamp!” https://twitter.com/realdonaldtrump/status/788923410353008640
136 Ibid. loc. cit.
137 Ibid.
138 Ibid.
139 Ibid.
140 https://twitter.com/realdonaldtrump/status/875690204564258816
141 Barberá and Zeitzoff, "The New Public Address System: Why Do World Leaders Adopt Social Media?,” p. 8
142 Ibid.
4.2 Unilateral act by tweet?

The shift in communication we currently are witnessing has far-reaching ramifications, just as is the case every time a new type of communication is invented.\(^{143}\) Legal scholars should therefore also pay close attention to such changes. The sphere of social media has received some attention from international legal scholars, but it is mostly directed at the power of online movements,\(^{144}\) or at understanding or harmonizing online governance law.\(^{145}\) To date, I have not found any scholarly articles exploring the legal effects of competent state representatives’ activity on social media. This thesis intends to mitigate this research gap.

Even though legal scholars might be hesitant to investigate such an informal and populist tool like social media, we should. Statements by state leaders with powers to bind their states, such as Presidents and Ministers for Foreign Affairs are being created on social media every single day. Arguably the world’s most powerful person, the U.S. president, is using social media more than any other leader. As elaborated above in Section 3.1, social media activity serves several purposes for world leaders; one important one is to get messages out to their respective domestic populations, e.g. to garner support for their political platform. Another one is to convey messages to foreign populations, foreign leaders or the world-at-large. Both these functions are easily observed in the September tweets from President Trump directed at North Korea. In one tweet, president Trump said:

“Just heard Foreign Minister of North Korea speak at U.N. If he echoes thoughts of Little Rocket Man, they won’t be around much longer!”\(^{146}\)

Such a statement serves both as a message of assurance to the domestic U.S. population, and as a warning to the North Korean government. Out of many possible interpretations, it is not unnatural to draw the conclusion that this amounts to a threat of violence. Indeed, this is exactly how North Korea interpreted the message. Only a short time after Trump’s tweet, North Korea’s Foreign Minister Ri Yong-ho declared that it amounted to a declaration of war: “[L]ast weekend Trump claimed that our leadership won’t be around much longer, and hence at last he declared war on our country [...]” Given the fact that this came from someone who

\(^{143}\) As a powerful example, the invention of the printing press allowed Martin Luther’s ideas to spread easily through pamphlets, and directly lead to the decline of the power of the Roman Catholic Church.

\(^{144}\) See for example the statements by the former prosecutor for the International Criminal Court: http://www.bbc.com/news/world-africa-17303179


\(^{146}\) https://twitter.com/realDonaldTrump/status/911789314169823232
holds the seat of the US presidency, this is clearly a declaration of war.”\textsuperscript{147} The U.S. later denied that it had declared war.

While exchanges like the above can never amount to a strictly unilateral act,\textsuperscript{148} it clearly shows the diplomatic ramifications of social media activity, and thus, the need to study it from a legal perspective. The question of whether the above statement amounts to a legally relevant fact, such as the unlawful threat of the use of force in violation of Art. 2(4) UN Charter can be left open. Rather, this thesis will focus on whether and under which conditions social media activity may amount to a strictly unilateral act. International obligations arising out of social media activity will likely only be in the form of unilateral acts or arise from the rules of international estoppel, since bilateral or multilateral agreements will usually be concluded in the more formalized treaty form.

The base criteria set out above in section 3.1 above govern strictly unilateral acts in general, and, as such, they are also applicable to statements made in social media. In considering unilateral acts, the ICJ explicitly noted that “[w]ith regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements.”\textsuperscript{149} Moreover, since statements on social media may fall within the ordinary meaning of “declarations”\textsuperscript{150}, the ILC Guiding Principles are also directly applicable.

4.2.1 Intent to be bound on social media

As with unilateral acts assumed in other forms, a unilateral act assumed by a statement on social media must display an intent to be bound by its terms in order to be binding.\textsuperscript{151} This criterion operates, in essence, no differently when applied to statements on social media compared to other forms of unilateral acts. It is, however, necessary be aware of the manner in which the social media is utilized: does the statement contain a message aimed at domestic audiences, or is it a message to foreign audiences containing an obligation upon which other states may rely? The distinction is vital and follows from the principle of state sovereignty. In the Asylum Case, the ICJ highlighted the importance of refraining from interfering in the domestic affairs of states. Colombia claimed it had the right to, unilaterally and binding upon

\textsuperscript{147} See \url{https://www.theguardian.com/world/2017/sep/25/north-koreas-foreign-minister-says-trump-has-declared-war-on-country}

\textsuperscript{148} The object of such an act would be an unlawful one, such as commitment to the unlawful use of force in violation of Art. 2 (4) UN Charter, or dependent on other acts such as a Security Council resolution. see above pt. 3.1.3 and below pt. 4.2.3

\textsuperscript{149} Nuclear Tests Case (Australia v. France) para 45. Also above pt. 3.1.4

\textsuperscript{150} See above pt. 2.2.4

\textsuperscript{151} See above pt. 3.1.1
Peru, qualify a Peruvian national wanted for a domestic offence in Peru as having a right to asylum. The Court stated that “such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of States”. A unilateral act cannot arise from a statement that was intended exclusively for domestic purposes, because a domestic act to that effect would lead to undue foreign interference in the domestic affairs of states. On the other hand, leaders in democratic states are accountable for their statements, and should not be considered unbound by policy statements with international implications even if only used to collect domestic support. This is also stressed by Zemanek, who points out that inter-state communication via public media “may be ostensibly addressed to the public at large, yet they may concurrently convey a message to other States. […] They require careful examination to determine whether an international effect was intended or whether they served only a domestic purpose”.

As clearly demonstrated by the Nuclear Tests cases, it can be difficult to determine whether a statement was made for exclusively domestic purposes, or if it also contains international obligations. As one of the formative parts of a unilateral act, the ICJ considered a press release by the President of the French Republic, in which he says:

“[O]n this question of nuclear tests, you know that the Prime Minister had publicly expressed himself […] He had indicated that French nuclear testing would continue. I had myself made it clear that this round of nuclear tests would be the last, and so the members of the Government were completely informed in this respect.”

Another statement forming the unilateral act was made by the French Minister of Defence in an interview on French television, where he said that “the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.”

These statements were not directed at Australia, New Zealand or the international community at large, but primarily at a domestic French audience. The court stated: “It is true that these statements have not been made before the Court, but they are in the public domain, and are known to the Australian Government […] It will be necessary to consider all these statements.” The Court seemingly considers the statement to be relevant because they concerned an international matter and were made public by state representatives with presumed powers.

154 Nuclear Tests Case (Australia v. France) para. 37
155 Ibid., para. 38
156 Ibid., para. 32
to bind their state. Whether the message is intended for foreign or domestic audiences seems to be less relevant, so long as the sufficient intent to be bound by the terms of the statement is displayed.

Thus, when state representatives make statements regarding international matters in social media, even if only intended for domestic audiences, possible international effects can nevertheless not be ignored. One must also keep in mind, however, that social media might be used as a domestic political tool to gain popularity to a larger degree than press conferences or television interviews, especially preceding elections. It is important to ascertain whether the statement embodies an obligation or is merely an expression of political will or enthusiasm. This will be particularly interesting when president Trump, known for his use of social media, is up for re-election; the tweets made in that future context will then be authored by a state leader with the power to bind the U.S., not merely a presidential contender.

4.2.2 Competent authority on social media

The question of determining who is competent to author unilateral acts on social media is complicated by the fact that many state leaders have several different profiles through which they post statements or comments. For example, President Trump controls and uses his private profile @realDonaldTrump as well as the official account of the president, @POTUS, which is handed down from each president to the next. Similarly, the Norwegian Prime Minister has her own private Facebook page, whereas the office of the Prime Minister and the government as a whole both have their own page, both of which the Prime Minister is ultimately responsible for. One solution would be to consider the official accounts only to have the authority to produce binding content. However, such a clear-cut distinction does not necessarily reflect reality: Trump primarily uses his private account even for matters relating to governance of the U.S., whereas the @POTUS account mainly contains copies, so-called ‘re-tweets’ of some content from Trump’s private account.

The Nuclear Tests cases further complicate the question, as they made it clear Heads of State and Ministers for Foreign Affairs do not exclusively have the power to author statements amounting to unilateral acts, but also state organs such as embassies abroad.

I suggest it would be useful to draw analogies to the rules of state attribution of internationally wrongful acts. According to Crawford, in order to hold states bound by consensual obligations, “the normal rules of authorization under treaty law apply.; in order to attribute conduct to them for the purposes of determining their compliance with such obligations, the normal
rules of attribution for the purposes of state responsibility apply.” However, the ICJ has made clear that the rules of authorization are not as strict for unilateral acts as they are under treaty law: “with increasing frequency in modern international relations other persons [than those authorized under the VCLT] representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials”.

Therefore, I find it useful to balance the rules of authorization under treaty law and the rules of state attribution for the purposes of unilateral acts, especially when formulated in social media. The rules on state attribution are contained in the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts. Albeit not ratified, they are considered customary law. In the commentary to the chapter on attribution of conduct to a state, the ILC emphasizes that “the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the state.” And further, “[a]s a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility.” Draft Article no. 5 reads:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever positions it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of that state.

Naturally, this provision is not directly transferrable to unilateral acts. For example, judicial bodies cannot undertake unilateral acts. However, one can adapt the principles embodied within this provision for the purposes of unilateral acts. There can be no analogy drawn from

157 Crawford, Brownlie’s Principles of Public International Law. p. 415  
160 Ibid., p. 38 para. 2  
161 Ibid., p. 39 para. 4
the rules of state attribution to the competency to conclude a treaty, because the rules of attribution are intended to clarify when a state is responsible for a breach of international obligations. Under the law of treaties, international obligations may only be created by entities according to the rules of the law of treaties, and they do not coincide with the entities that may engage the responsibility of a state.\footnote{See also Zemanek, "Unilateral Legal Acts Revisited/Ed. K. Wellens." p. 216} However, due to the less strict competency requirements for unilateral acts, one may draw analogies from the rules of state attribution: if there exists rules for the attribution of responsibility for acts of states, a state should be considered bound by and responsible for unilateral acts embodied within a statement attributable to it by those same rules. Thus a state should be considered responsible for the act, and therefore bound by it, if a social media profile under control, direction or instigation by persons or state organs that would otherwise be considered competent to author a unilateral act, authors a statement that embodies unilateral obligations.

4.2.3 An admissible lawful object

The criterion of ‘admissible lawful object’ will likely often be lacking in statements in social media. It is closely linked to the display of intent to be bound: to date, most internationally and diplomatically relevant social media activity is either couched in an opinionated or vague form, or they contain warnings or veiled threats which may never embody an obligation by which the author state is bound. Dmitri Medvedev, the Russian Foreign Minister, provides a good example:

“Today we see even worse examples of violence than in South Ossetia. One thing remains certain: Russia is always ready to defend its citizens”\footnote{https://twitter.com/MedvedevRussiaE/status/894940346337173504}

Just like a treaty or an agreement on the unlawful use of force would be unlawful as it is in conflict with \textit{jus cogens},\footnote{Mark E. Villiger, \textit{Commentary on the 1969 Vienna Convention on the Law of Treaties} (Leiden: BRILL, 2009). p. 674} so would an attempted unilateral act to that effect be. Even if the statement amounted to a warning on the lawful use of force for self-defensive purposes\footnote{See Art. 51 UN Charter} or after a Security Council resolution,\footnote{See Art. 43 UN Charter} it would not be considered a \textit{strictly unilateral act}: the rights to self-defence or use of force in accordance with Security Council resolutions arise out of other facts, namely the aggression of another state and the resolution respectively. Its legal effectiveness is therefore reliant upon other acts, and it is thus not a \textit{strictly unilateral act}. The

\footnote{162 See also Zemanek, "Unilateral Legal Acts Revisited/Ed. K. Wellens." p. 216} \footnote{163 https://twitter.com/MedvedevRussiaE/status/894940346337173504} \footnote{164 Mark E. Villiger, \textit{Commentary on the 1969 Vienna Convention on the Law of Treaties} (Leiden: BRILL, 2009). p. 674} \footnote{165 See Art. 51 UN Charter} \footnote{166 See Art. 43 UN Charter}
object of a unilateral act via a statement in social media must be unilaterally governable by the state authoring the statement.

4.2.4 A certain form

This criterion does not need any special consideration for statements in social media, as statements in the domain of social media are public by nature. I refer to the explanation above Chapter 2.4.4.

4.3 Interplay between unilateral acts and social media

While we may not see many unilateral acts couched in the form of social media, we might see more interplay between unilateral acts and statements in social media. Governmental social media accounts are likely to be checked by a team of experts before being posted, and it seems as though more traditional forms are still preferred for assuming obligations through declarations. However, statements in social media can be helpful in determining and clarifying the intent of a state and the exact content of an obligation assumed by a unilateral act. Art. 31 VCLT lists the primary means of interpretation of treaties: its context, defined by the treaty text, preamble and annexes, as well as subsequent agreement or practice between the states, and relevant rules of international law.

Being unilateral in nature, no subsequent agreement with another state is necessary to make authoritative statements for the interpretation of unilateral acts, contrary to what is the case in the law of treaties. As the fundamental operative part of a unilateral act is a state’s intent to be bound, said state can also unilaterally elaborate on the content of that intent. Therefore, just as subsequent agreement or practice between states can be a means of interpretation of a treaty, preceding or subsequent unilateral declarations or statements can be a means of interpretation of a unilateral act. The ILC Special Rapporteur points out that “the elaboration of a legal act, whether for a conventional act or a unilateral act, can be preceded by a preambular part [...] The same assessment can be made regarding the annexes. There is no reason why a unilateral act cannot be followed by or composed of annexes, in addition to its operative part.”

167 [http://www.trumptwitterarchive.com/archive](http://www.trumptwitterarchive.com/archive) is a search engine for all the tweets from president Trump, and typing the search terms ‘Russia’ or ‘China’ yield no results that may embody obligations.
168 Art. 31 VCLT, paras. 2 and 3
169 See Art. 31 paras. 2(b) and 3(a) VCLT. See also above pt. 3.2
170 Fifth Report on unilateral acts of States, ILC, 2002 para. 130
Some of the formative parts composing the unilateral act in the *Nuclear Tests* character seem to be of such a character.\(^{171}\)

However, one must keep in mind that a subsequent declaration cannot have such an effect as to arbitrarily revoke the obligation assumed by the unilateral act. Guiding Principle no. 10 unequivocally states that “[a] unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily.”\(^{172}\)

An interplay between the principle of international estoppel and social media activity is also possible. Social media profiles under the direction of executive branches of governments regularly post statements exposing their view of factual circumstances, on which other countries may rely. Should that happen, states might find themselves bound by their statements according to the rules of international estoppel.\(^{173}\)

### 5 Conclusion

While it is clear that unilateral acts are a part of the international legal order, they are the source of a significant amount of disagreement among legal scholars, even within the ICJ itself.\(^{174}\) Opinions on the origin of obligations based on unilateral acts differ greatly among legal scholars. Deniers of the strictly unilateral act claim the obligation is founded in estoppel or other consistency-promoting legal constructs based on good faith, whereas proponents of the strictly unilateral act may disagree on the source of their binding nature. Even though the legal reasoning may vary, the end result would rarely differ after applying any of these approaches: in the ICJ cases where there is disagreement on the source of the obligation, the judges still mostly agree as to the existence of the obligation.\(^{175}\)

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\(^{171}\) For example the statement by the French embassy in Wellington. See Nuclear Tests (Australia v. France) para. 35

\(^{172}\) Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, no. 10

\(^{173}\) See above pt. 2.2.2.

\(^{174}\) For example when Judge Alfaro based found an anti-inconsistency rule as the basis for the judgment in his separate opinion in the *Case Concerning the Temple at Preah Vihear*. See above pt. 2.2.3

\(^{175}\) Out of the three dissenting judges in the *Preah Vihear case*, Judge Quintana does not consider the unilateral behaviour of Thailand, Judge Wellington does not consider the Thai behaviour to amount to acquiescence or tacit acceptance (which in part founded Cambodia’s claim), while Judge Spencer does not recognize the acts of acquiescence or recognition as unilateral acts with independent legal force (page 141 of the judgment). Therefore, there was in effect only one judge that recognized the binding force of unilateral acts, but after considering the circumstances, nonetheless disagreed with the majority.
However uncertain the existence of the strictly unilateral act may have been earlier, the judgments handed down by the ICJ in the Nuclear Tests cases must be taken to definitively confirm the existence of the strictly unilateral act as a separate and independent instrument of international law, much like the treaty. As per today, strictly unilateral acts may be the most widely used uncodified legal method of assuming obligations, only variably accompanied by the states’ own explicit awareness. Unilateral acts are a frequently used legal construct which may bind states, but without clear and agreed-upon criteria, they may be a cause for uncertainty and confusion in the international community. Thus, the time may be ripe to consider the codification of this area of international law, just as the ILC envisaged in 1996.

Nonetheless, there are also good reasons to leave the unilateral act uncodified. As Zemanek writes; “unilateral acts have become the most frequent tool of State interaction. They weave, so to speak, the daily web of international relations.”176 Much like the many legal actions that affect personal lives, such as unwritten loan agreements, deeds or other simple obligations, a reference to the principle *pacta sunt servanda* embodied in legislation will usually suffice in domestic legal systems. Perhaps a similar consideration can be made for state interaction: states are, for the most part, aware of the commitments they undertake and the way they formulate declarations and other statements. They are conscious that for more important matters, a formal treaty or bilateral agreement is the appropriate form, in order to ensure optimal stability and predictability. However, they also know that a treaty requires a great amount of cost177 to both parties. A codification of the unilateral act may lead to a higher cost related to the formulation of such acts as well. If state interaction functions smoothly, as it for the most part does, perhaps scholars of international law should heed the age-old saying ‘if it’s not broken, don’t fix it’. If there is no real problem, the attempts at fixing the imagined problem would not improve the situation, and those efforts would be a waste of time and more likely affect the status quo negatively. At the end of the day, questions regarding unilateral acts are rarely brought before international courts or tribunals.

On the other hand, perhaps the rise of social media and the participation of state leaders on such platforms is about to break the hitherto uncodified practice of unilateral acts. Social media may have made top administrative positions available to persons that earlier would not have stood a chance.178 The U.S. President seems to have restrained himself somewhat after

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177 Such as information-seeking costs, negotiation costs and execution costs: all the resources that are spent in connection with entering into an agreement and thereafter ensuring it is adhered to by both parties.
178 Barberá and Zeitzoff, "The New Public Address System: Why Do World Leaders Adopt Social Media?." p. 21
ascending the presidency, perhaps aware of the possible consequences of his statements.\textsuperscript{179} At the same time, it was his presence on social media that got him elected: “Sorry folks, but if I would have relied on the Fake News of CNN, NBC, ABC, CBS, washpost or nytimes, I would have had ZERO chance winning [the White House]”.\textsuperscript{180} As he nears re-election, he might revert to the more aggressive social media strategy in order to repeat his success – at which time the consequences on the international plane will become more apparent.

The newfound accessibility to top administrative positions also means that those who may find themselves there are likely less familiar with the functioning of international relations, and do not necessarily adhere to the traditional view of international law. Their populist and rash behaviour on social media during their election campaigns may continue well into their election terms,\textsuperscript{181} challenging the international legal order: either international law will have to adapt to the specificities of such behaviour, or the leaders will have to respect international law. Crawford seems to suggest a move towards the former option. He considers that “the question which commitments or which representations engage the good faith of the state can only be decided situationally. It has never been the case that they all did, still less can this be true in the age of the twice-daily press conference and the internet.”\textsuperscript{182}

International legal scholars should be very aware of this possible development. Going forward, it is important to acknowledge the civil rights of populations to elect their leaders as they see fit, and for those leaders to operate freely within the limits of national sovereignty. However, this must be balanced with the consideration of international trust and cooperation: leaders in democratic societies are accountable domestically, and they have the authority to engage the good faith of the state through unilateral acts in any form they desire. If they are authoring statements amounting to unilateral acts in social media, there is no reason to treat those statements fundamentally different than unilateral acts formulated in other arenas. If statements in social media inspire the trust of other states, the only way to secure international trust and cooperation is to hold those statements to the same standards as set out by the Guiding Principles and customary law, both as strictly unilateral acts and as legal facts that may invoke international estoppel or the responsibility of the state. Therefore, in order to raise awareness and properly bring international law up to date in this new, fast-paced world of

\textsuperscript{179} Using the search terms ‘Russia’ or ‘China’ on http://www.trumptwitterarchive.com/archive yields more aggressive wording before Trump assumed the presidency, some of which may have had international legal effects if he had been competent to bind the U.S.A.

\textsuperscript{180} https://twitter.com/realdonaldtrump/status/872064426568036353

\textsuperscript{181} In another fresh example from the Twitter sphere, President Trump, according to himself, would never call Kim Jong-Un “short and fat”: https://twitter.com/realdonaldtrump/status/929511061954297857

\textsuperscript{182} Crawford, Brownlie’s Principles of Public International Law. p. 416
online international relations, I suggest unilateral acts should receive renewed attention from international legal scholars.
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**Domestic Legal Acts**