Miskolc Journal of International Law
MISKOLCI NEMZETKÖZI JOGI KÖZLEMÉNYEK

VOLUME 7. (2010) NO. 1. PP. 33-60.

Erzsébet Csatlós[1]:

The Legal Regime of Unilateral Act of States

I. Introduction

As the unilateral act of States has appeared more and more often in the area of international law and raised different questions concerning its place in the regime of international legal sources as the respect for the rule of law is fundamental to the effective protection of the security of law. But what if it does not work on international level, because there is no effective international legal instrument for a problem? Can States handle the problem by themselves and adopt unilateral acts to ensure the regulation of a question concerning their interests?

There is an increasingly pronounced practice on the part of States of performing unilateral political or legal acts in their foreign relations, which are often indeterminate, and that such acts, based on good faith and on the need to build mutual confidence, appear to be both useful and necessary at a time when international relations are becoming more and more dynamic. For this reason, the legal regime of this kind of act in the international legal order needs to be legally cleared.

Generally, a unilateral act of a State means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to the international community.[2]

In Roman times, unilateral acts had no legal importance and this concept had not changed for centuries. In the 16th century it was Grotius who first referred to promise as a source of obligation, a sufficient declaration of will, in order to give a genuine right to the addressee to claim its execution.[3] After Grotius, it was Jellinek who also supported the concept of *promissum implendorum obligatio*[4] as he invented the doctrine of "auto-limitation" as the basis of international law and of legal effects of treaties as well. According to him, the basis of legal obligations of States was merely their unilateral will to restrain their own freedom of action and not the

[1] Erzsébet Csatlós is PhD-student in the Department of International and European Law of the Faculty of Law of the University of Szeged

2 Fifth report on unilateral acts of States by Victor Rodríguez Cedeño, Special Rapporteur. ILC 54th session. U.N. Doc. A/CN.4/525 at 51. [U.N. Doc. A/CN.4/525]

3 Grotius, Hugo: *A háború és béke jogáról*. Pallas Stúdió-Atraktor Kft, Budapest, 1999.II. könyv XI. fejezet.

4 Latin, Obligation to keep promises.

principle of *pacta sunt servanda* 5which implies in fact collective will of all parties of a treaty to assume and to carry out a legal obligation. The first one who incorporated unilateral acts of States in his system of international law was the Italian scholar, Anzilotti. He qualified these kinds of acts as manifestations of the will of States in the domain of international relations which produce legal effect in so far as an international order providing them exists. Concerning his thoughts, there are four types of unilateral acts – notification, recognition, protest and waiver – producing legal effects and he also worked out the basic characteristics of them.[6]

Some authors, especially after issuing the 1974 judgments by the International Court of Justice (ICJ) on *Nuclear Test cases,* recognize these categories as a genuine kind of acceptance of legal duties in regard to another State, a group of States, or *erga omnes*.[7]

On international ground, States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral act is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community. State practice in relation to unilateral legal acts is manifested in many forms and circumstances, it has been a subject of study in many legal writings and has been touched by judgments of the ICJ and other international tribunals. The importance of settling the legal status of unilateral acts is also shown in the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of act and its legal consequences in international law.[8]

The problematic of relation between the sources of international law and the unilateral act of States was first put on the agenda of the United Nation's International Law Commission (ILC) in 1949[9] just two years after its establishment but long decades had passed until the real work could began after the forty-eighth session in 1996. The declared aim of the ILC was to promote the progressive development of international law and its codification, [10] as its work was a synthesis of the existing legal approach of unilateral acts embodied in the practice of States and in the judgments of international tribunals.[11] The ILC has started a long work to put an end to the unsettled legal position of unilateral act of States among the sources of international law but the effort has not (yet) been crowned with success, the work has stuck in the form of a draft convention, thus the question of legal estimation of this kind of act still relies on existing customary rule of jurisprudence and of State practice.

5 Latin, Agreements are to be kept.
6 Degan, Vladimir.: *Developments in International Law: Sources of International Law*, Martinus Nijhoff Publishers, The Netherlands. 1997. at 259. [Degan]
7 *Ibid* at 262.
8 U.N. Doc. A/CN.4/525, at 196.
9 *Survey of International Law in Relation to the Work of Codification of the International law Commission*. U.N. Doc. A/CN.4/1/Rev.1. 10 February 1949. at 22.
10 *North Sea Continental Shelf cases (Federal Republic of Germany/Netherlands)* Judge ad hoc Sorensen's Dissenting Opinion [1967] I.C.J. Rep. 3. at 242-3. [North Sea Continental Shelf cases]
11 Shaw, Malcolm N.: *International Law*. Cambridge University Press. 2003. at 114.; Report of the International Law Commission on the work of its forty-ninth session, GA Res. A/52/156 (1998), p. 3. at 8.

II. The Legal Regime of Unilateral Acts of States

As unilateral acts and treaties have something in common namely that they are the expression of State intention, thus the regime of the law of the treaties often serves as basis for that of unilateral acts.

2.1. The definition

A unilateral act of a State means a unilateral declaration formulated by a State with the intent of producing certain legal effects under international law.[12]

Some treats the term "unilateral legal act" as a synonym for the expression "unilateral declaration".[13] It is worth noting that the term "unilateral declaration" has appeared in earlier works of the ILC within the context of treaty law. The term "declaration" is useful in that, most, if not all unilateral acts of a State are formulated in declarations which, in turn, contain a variety of material acts. Even in the work of the ILC the word "declaration" has been replaced by the word "act" by the fifth report, which was considered to be broader and less exclusive than the word "declaration", as it would cover all unilateral acts, especially those which might not be formulated by means of a declaration, although unilateral acts in general, regardless of their name, content and legal effects, are formulated by means of a declaration.[14]

It is an act whose process of elaboration differs from the process of elaboration of a treaty in which two or more States participate; and this fact makes it difficult to determine the intention of the author to be legally bound.[15] As no exclusive definition has already been created for the notion, it is worth regard the generally accepted legal characteristics of unilateral acts to drawn further consequences of the legal estimation of a unilateral State act.

2.2. The question of delimitation

The diminution of the scope of unilateral acts and the exclusion of certain unilaterally formed acts are generally accepted in practice: the acts of other subjects of international law, especially those of international organizations, including judicial bodies (authoritative acts); acts which are outside the scope of international law (political acts); wrongful acts and acts which under international law may engage the international responsibility of States do not constitute a unilateral act in the strict sense. They fall within other domains of international law which are also

12 Ninth report on unilateral acts of States By Víctor Rodríguez Cedeño, Special Rapporteur. ILC 58th session U.N. Doc. A/CN.4/569/Add.1., at 137.[U.N. Doc. A/CN.4/569/Add.1.]
13 Second report on unilateral acts of States By Victor Rodríguez Cedeño, Special Rapporteur. ILC 51th session U.N. Doc. A/CN.4/500 at 45. [U.N. Doc. A/CN.4/500]
14 Fifth report on unilateral acts of States By Victor Rodríguez Cedeño, Special Rapporteur. ILC 54th session. U.N. Doc. A/CN.4/525 at 51. [U.N. Doc. A/CN.4/525]
15 U.N.Doc. A/CN.4/569/Add.1. at 134.

treated separately by the ILC, too, as there are acts which are legal acts or forms of expression of the will of States, but not purely unilateral in nature.[16] In the following lines the most problematic issues are discussed.

2.2.1. Unilateral legal acts of international organizations

The decisions of an international body can produce legal effects insofar as the member States, within the exercise of their sovereignty, may have endowed that body with legal competence, but their acts have to be taken up separately owing to the importance of such acts in international life.[17] These acts are based on the authorization of States party to the organization incorporated in fundamental documents governing the function of the organization, therefore the legal effects and the addressee of the elaborated acts can never be questionable.

2.2.2. Political acts of States

The legal acts of a State need to be also separate from their political acts. A formally political act adopted in a formally political context may be purely political; it may contain intentions or desires in relation to another State in a purely political context. A legal act differs from a political act by its very nature: that is, by virtue of its scope, its effects and the mechanism for ensuring compliance by the States which are bound by it. It is the intention of the State which formulates or issues a declaration which really must determine its legal or political character: in other words, whether that State intends to enter into a legal engagement or a political engagement. State practice appears to indicate that in their international relations States formulate purely political unilateral or bilateral declarations. Admittedly, the political act can also produce important effects in the sphere of international relations. By making engagements on this level, States may assume political obligations which - although they are outside the sphere of international law -, are nonetheless of fundamental importance in relations between States.[18]

2.2.3. Acts and conducts which do not constitute international legal acts in the strict sense of the term

A State may engage in conduct and perform a series of acts of various kinds which define its participation in the international sphere. Such conducts and such acts are not always clear and unambiguous in nature and they are far from being capable of classification in a convenient and definitive form, for example the silence of a State may acquire rights and assume obligationsin the same time. Silence is a form of expression of will, it may constitute an offer (*qui tacet consentire videtur.)* Silence may indicate the will to recognize as legitimate a particular state of affairs and the State may also express by its silence its opposition to a *de facto* or *de jure* situation: (*qui tacet negat).*

16 First report on unilateral acts of States By Victor Rodríguez-Cedeño, Special Rapporteur. ILC 50th session. U.N. Doc. A/CN.4/486. at 23. [U.N. Doc. A/CN.4/486]
17 U.N. Doc. A/CN.4/486. at 30-38.
18 *Ibid* at 40-41.; A/CN.4/569/Add.1, at 127.

According to much of the literature, silence, as a reactive behavior and a unilateral form of expression of will, cannot be considered a legal act. However silence is not an act or an autonomous manifestation of will, and it certainly cannot constitute a formal unilateral legal act.[19]

The other category which is not covered by the general notion of unilateral act is notification. Despite its unilateral character from the formal point of view, notification does not produce effects *per se*, as it is connected to a pre-existing act. Notification is an act of will by which a third party is made aware of a fact, a situation, an action or a document capable of producing legal effects and therefore to be considered as legally known by the party to which it was addressed.[20] In the point of view of the ILC notification is not a legal act in the strict sense, since it creates neither rights nor obligations except insofar as it relates to the fulfillment of a previously assumed obligation, as, for instance, in the case of the mandatory notification.[21]

The ILC also separates out various forms of State conduct which, although have no intention of producing legal effects, may nevertheless engage or commit a State. International jurisprudence has considered this kind of conduct on various occasions, which is not intended to create specific legal effects. The basis of such conduct is not the unequivocal intention to engage or commit oneself, contrarily legal acts, on the other hand, have as their basis the clear and unequivocal intention to produce specific legal effects and hence can be excluded from the scope of the unilateral acts in a strict sense.

2.2.4. Acts which fall into treaty sphere

There are acts which are unilateral in form — that is, formulated by a single State— but are part of a treaty relationship. Examples include signature, ratification, formulation and withdrawal of reservations, notification and deposit of relevant treaty instruments, among others. A unilateral act, *stricto sensu*, establishes a relationship between the author State and the addressee or addressees, but this relationship is distinct from a treaty relationship.[22] This subject is examined under the title „Treaty v. unilateral act"

2.2.5. Silence

Silence is not a legal act in the strict sense of the term, and some say that it is not a unilateral legal act at all, although it has legal effect but it also lacks the intentional element,[23] others insist that it is a particular mode of expression of will.[24]

19 U.N. Doc. A/CN.4/486 at 48-53.
20 U.N. Doc. A/CN.4/486. at 53. *See also* Rousseau, Charles: *Droit International Public, Tome I, Introduction et Sources.* Sirey (1970), at 421. [Rousseau]
21 Mandatory notification is provided for in the Act of Berlin of 26 February 1885, the London declaration relating to maritime warfare of 26 February 1929, and the Antarctic Treaty of 1 December 1959. *See* U.N. Doc. A/CN.4/486. at 54.
22 U.N. Doc. A/CN.4/569/Add.1. at 128.
23 Summary record of the 2596th meeting. Topic:Unilateral acts of States. U.N. Doc. A/CN.4/SR.2596. opinion of Mr. Kateka at 13. [U.N. Doc. A/CN.4/SR.2596]
24 Rousseau, at 430.

Those who raise objection against its unilateral legal act nature conclude that in the case of a promise, for example, it would appear impossible for a State to promise or offer something by means of silence. Some types of silence definitely do not and cannot constitute a unilateral act, others may be described as intentional silence, expressing acquiescence, and therefore do constitute such an act.[25] The same observation can be made with regard to a declaration of war, cessation of hostilities or neutrality, but on the other hand, in cases involving waiver, protest or recognition it might be thought that the State can certainly formulate a legal act by means of silence, for instance when a State recognizes an armed group as a belligerent in a conflict situation by means of silence 26 Moreover, silence has a special role in producing legal effects in some multilateral conventions, as in treaty law[27] for example or in the law of the sea concerning the implied consent for scientific research.[28]

However, autonomy is not a significant element of the definition of unilateral acts in the point of view of the ILC, it seems to be a principle characteristic for the qualification, and it is always a question of examination whether such an act is or is not linked to a previous act.

In the view of the ILC, silence cannot be an independent manifestation of will, since it is a reaction to a preexisting act or situation.29 This concept does not deny the fact that silence is a unilateral act in form, but regarding its legal effects it reaches beyond the unilateral context into a bilateral context some way which does not, however, mean that the act takes place in a treaty context but it is close to it,30 thus it is not a legal act in the sense being dealt with here.

2.2.6. Acquiescence

In connection with silence, the problem of acquiescence, which may be derived from silence, also needs to be discussed. Acquiescence occurs in circumstances where a protest is called for and does not happen or does not happen in time. In other words, a situation arises which would seem to require a response denoting disagreement and, since this does not transpire, the state making no objection is understood to have accepted the new situation.[31] It takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection,[32] and its significance is expressed by the importance for a State which enjoys a right on the basis of a customary rule which has not yet been fully consolidated, or when all aspects of its application in individual situations are still a matter of dispute.[33] In other words, that acquiescence

25 Seventh report on unilateral acts of States By Victor Rodríguez Cedeño, Special Rapporteur. ILC 56th session. U.N. Doc. A/CN.4/542 at 190. [U.N. Doc. A/CN.4/542]
26 Third report on unilateral acts of States By Victor Rodríguez Cedeño, Special Rapporteur. ILC 52th session. U.N. Doc. A/CN.4/505 at 129-130. [U.N. Doc. A/CN.4/505]
27 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331, Article 62. para 2. [VCLT]
28 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3, Art. 252. [UNCLOS]
29 U.N. Doc. A/CN.4/505 at 131.; Fourth report on unilateral acts of States By Victor Rodríguez Cedeño, Special Rapporteur. ILC 53th session. UN. Doc. A/CN.4/519 at 26. [UN. Doc. A/CN.4/519]
30 U.N. Doc. A/CN.4/505 at 132-133.
31 Shaw, Malcolm N.: *International Law*. Cambridge University Press. 2003. at 437.
32 MacGibbon, I. C.: "The Scope of Acquiescence in International Law", *B.Y.B.I.L.*, vol. 31 (1954) p. 143.
33 Degan, Vladimir.: *Developments in International Law: Sources of International Law*, Martinus Nijhoff Publishers, The Netherlands. 1997. at 353.

is an admission or acknowledgement of the legality of a controversial practice, or that it even serves to consolidate an originally illegal practice, because if a State that has admitted or consented cannot raise future objections to the claim, by virtue of the principle of estoppel or 'contrary act', thus it becomes an essential element in the formation and establishment of a custom. Acquiescence also seems to have served as a means of clarifying certain doubtful aspects in need of interpretation, as in the case concerning the *Boundary Agreement of 1858 between Costa Rica and Nicaragua*, whereby the arbitrator stated that, despite the fact that acquiescence could not replace the necessary ratification of the agreement, it is a strong evidence and valuable as a guide in determining doubtful questions of interpretation.34

In order for acquiescence produce legal effects, however, it is necessary for the party whose implicit consent is involved to have had knowledge of the facts against which the State refrained from making a protest; the facts must be generally known, if they have not been officially communicated.[35]

2.2.7. Estoppel

Estoppel is a legal technique whereby a State is bound by its former declaration in a certain case and cannot afterwards alter its position. According to the Anglo-Saxon doctrine the principle of estoppel rise from the maxim of *adversus factus suum quis venire non potest*, thus it is a mechanism applicable in the international sphere which primarily deals with creating a certain amount of legal security, preventing States from acting against their own acts.[36] Its significance in international law is embodied in its evidential and often practical importance.37. In international law, estoppel is a consequence of the principle of good faith which also governs the rules on the legal effects of unilateral acts. As its connection with unilateral acts it seems, that a unilateral act could give rise to an estoppel, but it is a consequence of the act and no category of acts which would constitute 'estoppel acts' seems to exist, the only link between the two categories is that, in certain circumstances, a unilateral act could form the basis for an estoppel.[38] It is not in itself a unilateral act but the consequence of such an act or acts, moreover, the most characteristic element of estoppel is not the conduct of the State, but rather the confidence created in the other State thus it serves as a mechanism that eventually validates given circumstances which otherwise would have permitted the nullification of the legal act in question.[39] The question of estoppel can be interested in connection with the modification of unilateral acts by the State formulating them.

34 *See*, Berrios, Bertha: San Juan River -- Border dispute between Costa Rica and Nicaragua. <http://www.geog.umd.edu/academic/undergrad/harper/Berrios.pdf > (08.12.2009))
35 U.N. Doc. A/CN.4/542 at 192.
36 *Ibid*, at 197.
37 Shaw,at 439.
38 U.N. Doc. A/CN.4/542 at 196.
39 *Temple of Preah Vihear (Cambodia v. Thailand)* [1961] I.C.J. Rep. 17. at 32.

In order to estoppel shall be revoked, it is necessary that the original act - whether it is a unilateral act or not - or the 'attitude' to which the State is bound, shall be clear and unequivocal.[40]

2.3. The place of unilateral acts in the sources of international law and international obligations

A State can, in accordance with international law, assume engagements and acquire legal obligations at international level through the expression of its will. It conducts from the exercise of the power of auto-limitation that if a State is mandated to conclude treaties, it can also act and undertake engagements unilaterally. It is well recognized today, both in the case law and in the doctrine. [41]

Article 38 of the Statute of the ICJ gives an illustrative, non –restrictive provision of the main sources of international law in the practice of its procedures, but generally the main sources of obligation in international law are those legal acts which are performed with the intent to produce legal effects in international law, so the State can incure obligations through formal acts which are not necessarily sources of international law, within the meaning referred to in Article 38.[42]

However, much of the doctrine concludes that unilateral act of States does not constitute a source of international law,[43] but it does not mean that a State cannot create international law through its unilateral acts. Some of these acts can give rise to rights, duties or legal relationships, but they do not, because of that fact, constitute a source of international law.[44]

International tribunals have not taken a position on the question of whether unilateral acts are sources of international law or not; they satisfied with the statement in the *Nuclear Tests case* of 1974, that such acts are sources of international obligations.[45] This confirms that the ICJ, effectively concluded that unilateral acts formulated by means of a declaration may constitute source of international obligations.

40 *Case concerning the payment of Various Serbian Loans issued in France (French Republic v. Kingdom of Serbs, Croates and Slovenes)* P.C.I.J., (Ser. A), Nos. 20/21, at 39 [Case of Serbian Loans]
41 See *Nuclear Tests (New Zealand v. France Australia v. France),*[1974] I.C.J. Rep. 253 and 457. at 43.
42 U.N. Doc. A/CN.4/486. at 63-71.
43 As Triepel declared for instance, the will of a single State cannot be the source of international law. Brunet, René: *Droit international et droit interne.* Paris-Oxford. 1920. at 32.
44 U.N. Doc. A/CN.4/486. at 81.
45 *Nuclear Tests* case, paras 43.

2.4. The characteristic features of unilateral acts

As none of the sources of international law contains an exhaustive definition of unilateral acts of States, it is advisable to examine the main characteristics of these acts derived from the existing jurisprudence and practice of States.

2.4.1. Formulation of unilateral acts: the single expression of will of the author and its addressee

a) The author of unilateral acts

Every State possesses capacity to formulate unilateral acts in accordance with international law in the exercise of its sovereignty with the intent to produce certain legal effects, assuming unilateral obligations that, given their nature, do not require acceptance or any reaction on the part of the addressee.[46] As a State cannot act by itself, just by its representatives, thus this question is to be examined in the further topics.

i. Persons having competence to formulate unilateral acts on behalf of a State

With other words a unilateral act is an expression of will which is attributable to a State, that is intended to produce legal effects and which does not depend for its effectiveness on any other legal act.[47] A unilateral act will only be attributable and opposable to the State if it is formed by a representatives of a State who is capable of committing it at the international level as in the *Gulf of Maine* case, when the ICJ did not recognize the written statements of an official of the USA who had not have the necessary authority to commit that statement.[48] On the other hand, in the *Nuclear Tests* cases, the statements of the President of the French Republic, the Minister for Foreign Affairs and the Minister of Defense were taken into account.[49] For this delicate issue concerning the authorization of persons to act on behalf of the State and engage it at the international level, Article 7 of the VCLT gives an appropriate answer in relation to treaties which is also applicable to unilateral acts. Additionally, the ILC states that the head of delegation could not engage the State in the context of a conference, and a specific case was recalled in which a head of delegation at an international conference had made a commitment which subsequently had been considered not to be binding on the Government he represented.[50] In relation to this issue, it seems to be important to distinguish among the various types of declarations which may be formulated by a State through the head of its delegation at an international conference, because declarations may have different meaning when the State formulates them outside the context of ongoing negotiations. In any event, an international conference presents a perfectly

46 U.N. Doc A/CN.4/505. at 92.; U.N. Doc A/CN.4/569/Add.1. at 140.**;** Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations 2006. ILC 58th session. U.N. Doc. A/61/10. **[**U.N. Doc. A/61/10] at 2-4.
47 U.N. Doc. A/CN.4/486 at 133.
48 Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment (Canada/United States of America) [1984] I.C.J. Reports 246.at 126-154.
49 *Nuclear test case,* paras. 35-41, 49, 51 and 53.
50 Statement by Mr. Kateka, U.N. Doc.A/CN.4/SR.2596 at 6.

appropriate opportunity for a person to formulate a unilateral act on behalf of the State.[51] This would be the case of unilateral declarations formulated in the context of pledging conferences, at which States pledge to provide voluntary contributions which may then be demanded by the recipients. The question is whether these unilateral acts are merely political or legally binding. In practice, there do not seem to have been any cases in which a State to which such a declaration was addressed has subsequently demanded the fulfillment of the promise made by the declaring State; however the nature of such acts is therefore hard to determine.[52]

According to the State practice of UN member States, the similar rule in the law of treaties (Art. 7.) and in accordance with its consistent jurisprudence, it can be stated that it is a well-established rule of international law that - by virtue of their office - Heads of State, Heads of Government and ministers for foreign affairs are deemed to represent their States and to have the capacity to formulate unilateral acts on its behalf.[53]

In addition, there might be other persons who could act on behalf of the State and bind it by formulating a unilateral declaration. The special nature of unilateral acts, in this view, makes it necessary to devise a more flexible rule than the rule for treaties, but only in specific cases and circumstances. The ICJ supports that persons other than those authorized to act on behalf of the State in the treaty sphere may bind the State through the formulation of a unilateral statement or declaration, as it is clearly seen in the decision of the *case of the Democratic Republic of the Congo against Rwanda* in 2006 whereby the ICJ noted that

> "…with increasing frequency in modern international relations other persons 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".[54]

ii. Subsequent confirmation of a unilateral act formulated without authorization

It is necessary to add that there are also cases when the unilateral act is formulated by a person who is not authorized to act on behalf of a State, but his statement gets legal effect with the subsequent confirmation by its State.[55] As it is the case in treaty law, a unilateral act may be

51 Statement by Mr. Pellet, ibid.
52 U.N. Doc.A/CN.4/SR.2596, at 103-104.; *Nuclear Tests case*s, at 49-50.; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections,(1996) (II) I.C.J. Rep. 622 at 44.; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),*(2002) I.C.J. Rep. 21 at 53.; *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* (2006) Jurisdiction of the Court and Admissibility of the Application, at 46.[Case concerning armed activities on the territory of the Congo]
53 U.N. Doc A/CN.4/569/Add.1, at 144.
54 *Case Concerning armed activities on the territory of Congo,* at 47.
55 U.N. Doc A/CN.4/505, at 121.

confirmed by the State when it has been formulated by a person not authorized or qualified to do so, but given the nature of unilateral acts, such confirmation must be explicit.[56]

b) The single expression of will

Will is a constituent of consent and is also necessary to the formation of the legal act. Will should, of course, be seen as a psychological element (internal will) and as an element of externalization (declared will).[57]

A single expression of will can also express the intention of more States on the same side of a particular question, but it also means that the elaboration of the act is attributable to all of them. In this context it is advisable to examine those *joint declarations* which establish a unilateral relationship between States and which, although they are adopted in a political context and do not have a clearly legal form, contain unilateral obligations which are binding upon the States that are parties to them. It was the case with the joint declaration by the Presidents of Venezuela and Mexico, issued at San José, Costa Rica, on August 1980 in which they agreed on an energy cooperation program for the countries of Central America and the Caribbean, assuming certain obligations, which could be regarded as legal in nature, for the benefit of third States which had not participated in the formulation of the declaration. The legal nature of the obligation in question may be inferred from the fact that they were subsequently carried out by the two countries and were later reaffirmed by means of declarations with the same content.[58]

c) Addressee of the unilateral act

Unilateral acts may be addressed to the *international community as a whole* – for instance Egypt's declaration regarding the Suez Canal, the Truman Proclamation, or the French statements concerning nuclear tests. The addressee may be only *one particular State***,** too, like in the case of the Colombian diplomatic note addressed to Venezuela, the Cuban declarations concerning the supply of vaccines to Uruguay, the protests by the Russian Federation against Turkmenistan and Azerbaijan and the Ihlen Declaration**.**[59]

2.4.2. The form of the will

Additionally, the manifestation of the acts –in oral or in written form- has no significance, the written version symbolize only the importance of an oral one so as it proves its existence. As Juge Anzilotti mentioned in his dissenting opinion in the *Legal Status of Eastern Greenland* case, that there is no rule in international law requiring that agreements of this kind need to be in writing in order to be valid.[60] Several years later this thought was enforced in the judgment of the *Nuclear*

56 U.N. Doc A/CN.4/569/Add.1., at 151.
57 U.N. Doc A/CN.4/525., at 58.
58 U.N. Doc A/CN.4/486., at 83.
59 U.N. Doc A/61/10., at 6 (1)-(2)
60 *Legal Status of the South-Eastern Territory of Greenland (Denmark v. Norway)*,(1933) P.C.I.J. (Ser. A/B) N. 53. at. at 91. [Easter Greenland case]

Tests[61] cases concerning that there are no international rule to impose any special requirement to the form of a declaration so as in the case concerning the *Temple of Preah Vihear.*[62] The sole relevant question is the intention, thus the form has no importance.

2.4.3. The autonomy of the act

Autonomy means to symbolize the relationship between the act with another legal act or another expression of will. An autonomic act does not depend on any other act whether it is prior, simultaneous or subsequent. Some of the doctrine indicate, [63]that a State may assume international obligations vis-à-vis another State by making a public declaration which is not dependent for its validity upon any reciprocal undertaking or *quid pro quo* or upon any subsequent conduct implying its acceptance.[64] Some authors reject the requirement of autonomy for the delimitation of unilateral acts because it is too imprecise. [65] However, autonomy appears to be accepted by most of the authors as the determining criterion for identifying unilateral acts of States. The UN Secretariat shared the same opinion when in its survey of international law of 1971, it made a distinction between dependent and independent acts.[66] Additionally, this is the criterion which helps the distinction between unilateral State acts and those formally unilateral acts which fall under the treaty sphere.

Concerning its content, the unilateral act, in general, is a heteronormative act, in which the author State creates a new legal relationship with a third State which does not participate in the elaboration of the act. However, it can create obligations only for the States which perform them. A State which formulates a strictly unilateral legal promise certainly creates rights for a third State and there will be one State which elaborates the act and obligations and another which, without participating in its elaboration, acquires rights.[67]

The criterion of autonomy cannot be interpreted too strictly. It is true that an autonomic legal act is not linked to other rules, but each and every act of international law shall respect the general rules of international law. This very broad approach cannot be the yardstick for determining the autonomy of the act.[68] For sum up, it can be stated that unilateral acts do not depend on a prior, that is to say, on an earlier expression of will, although it is true that all unilateral acts are based on international law.

61 *Nuclear tests case*, para. 45.
62 U.N. Doc A/CN.4/486, at 31.; U.N. Doc. A/61/10., at 5.; *The Mavrommatis Jerusalem Concessions (Greek Republic v.Great Britain)*, (1924) P.C.I.J. (Ser. A) No. 5 at 34.[Mavrommatis case]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, (1996) I.C.J. Rep. 612 at 24 and 26.; *Temple of Preah Vihear (Cambodia v. Thailand)* [1961] I.C.J. Rep. 17 at 31.; *Nuclear Tests cases,* at 48.
63 Remarks of Mr. R. Rosenstock and Mr. I. Lukashuk. Ibid.
64 Brownlie, Ian: *Principles of Public International Law* Third Edition. Clarendon Press Oxford. 1979. at 638.
65 Remarks of Mr. A. Pellet and Mr. E. Candioti. Summary record of the 2603rd meeting, U.N. Doc. A/CN.4/SR.2603 Yearbook of the International Law Commission 1999, Vol. I. at 260. [UN Doc A/CN.4/SR.2603]
66 U.N. Doc A/CN.4/569/Add.1., at 137.
67 U.N. Doc A/CN.4/569/Add.1., at 143-146.
68 U.N. Doc A/CN.4/505, at 61.

In another point of view, autonomy signifies that unilateral acts produce legal effects irrespective whether or not they are accepted by the addressee and their legal effects is independent of any other interference of another party. In legal literature those unilateral acts whose legal effects needs the acceptance of another party, is called non autonomous unilateral act.[69] The relevant doctrine is concluded in the *Nuclear Tests* cases as the ICJ states that a State may contract international obligations without any need for a third State to accept them or to act in a manner that might imply their acceptance as a condition of their legal validity.

The criterion of autonomy of unilateral acts generated a debate in the ILC. Some said that it was not a necessary element of the definition, and it was of secondary importance, others implied it into the definition without any special phrase. Generally, the experts of public law are on the same idea that autonomy is an appropriate term to identify that this kind of act does not fall within the contractual sphere and it signifies that strictly unilateral acts produces legal effect by their own, without any legal act of another party. However, autonomy is finally omitted from essential elements of the definition of unilateral acts, but it still constitutes their fundamental characteristic feature.

2.4.4. Unequivocal character of unilateral acts and notoriety

It is essential that a unilateral act formulated by a State should be known, at least bythe addressee of the act.[70] It seems logic as it would have no reason to act without the notice of the international community or at least its directly affected environment, thus the second report stated that the expression of will must not only be autonomous or non-dependent but the expression of will must be formulated unequivocally and publicly. The expression of will must always be clear and comprehensible by the international community.[71] Publicity is necessary to the legal security and confidence in international relations and it must be implied that it is not lifelike to have a unilateral act with binding force but no one knows about it.

2.5. The legal basis of their binding nature

Unilateral declarations in general can be legally binding on a State, if *that* is the intention of the State – as in the case concerning the *Frontier Dispute (Burkina Faso v. Republic of Mali)*, whereby the ICJ pointed out its practice concerning legal basis of unilateral acts as it stated that if the declaration is formulated in accordance with international law it all depends on the intention of the State in question.[72] Before this new wave of judgments, the legally binding character of a

69 Nagy, Károly: *Nemzetközi jog*. Püski, 1998. at 52.
70 U.N. Doc. A/CN.4/505, at 78.
71 Official Records of the General Assembly, 55th session, Supplement No. 10, U.N. Doc. A/55/10. para. 553.[U.N. Doc. A/55/10]
72 *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, (1986) I.C.J. Rep. 573 at 39.; *Eastern Greenland case,* at 71.; *See also*, *Mavrommatis case,* at 37.; *Case concerning certain German Interests in Polish Upper Silesia (The Merits) (Germany v. Polish Republic)* (1925) P.C.I.J. (Ser. A) No. 7. at 13.[Polish Upper Silesia case];; *Case of the Free Zones of*

unilateral act was rejected by international forum, as the example of the *Island of Lamu* case shows, in which the arbitrator considered the oral declarations, the promise of the Sultan of Zanzibar, and concluded that the declarations were not binding because they had not been accepted by the other party, that is to say, because they did not form a treaty-based relationship.[73]

The principle of *pacta sunt servanda*, which is the legal basis for the binding nature of treaties, is also the basis of the international legal system and that of international relationships thus unilateral declaration is binding upon the State which formulates it by virtue of the same principle.[74] It is the judgment of the *Nuclear Tests cases* which contributed to the naissance of this doctrinal base that the State which formulates the declaration is bound to fulfill the obligation which it assumes because of the intention of the State making the declaration.[75]
The need to create greater confidence in international relations is also another justification for the binding nature of unilateral declarations. The third State has placed trust in the conduct or in the statement constituting the unilateral act and in the author of that act not attempting to go back on its word. A more specific formulation of the general rule of good faith *contra factum proprium non concedit venire*[76] should therefore determine the opposability of the unilateral act vis-à-vis its author.[77]

Additionally, Grotius relies on another principle to explain the binding character of a unilateral act namely the principle of *promissorium implendorum obligatio* that is the obligation to keep promise, which is not inferior to *pacta sunt servanda*, but serves another legal basis for the obligation to be binding.[78]

Summarizing the facts, the binding nature of unilateral acts of States is based on the principle of good faith and the intent to be bound the State that formulated the act but only if it stated in clear and specific terms. To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise[79]

Upper Savoy and the District of Gex (France v. Switzerland) (1932) P.C.I.J. (Ser. A/B) No. 46. at 170-172. [Upper Savoy case]
73 Moore, J. B.: *History and Digest of International Arbitrations to which the United States has been a Party*. Vol. 5 (1898) at 4940.
74 *Nuclear tests case,* 24 at 46.; U.N. Doc. A/CN.4/569/Add.1. at 154.**;** U.N. Doc. A/61/10, at 1. 9.
75 U.N. Doc. A/CN.4/569/Add.1., at 155.
76 No one may set himself in contradiction to his own previous conduct (latine)
77 U.N. Doc. A/CN.4/486., at 161-162.
78 Degan, at 286.
79 U.N. Doc. A/CN.4/569/Add.1., at 156.**;** U.N. Doc. A/61/10, at 3. and 7.

2.6. The legal effects and third parties

The expression of will is related to the obligations assumed by the State in relation to one or more other States.[80]

Unilateral acts appear to be able to create new obligations for third States however this situation is incompatible with the principle of international law reflected in Article 34 of the VCLT. In accordance with this article and the jurisprudence,[81] namely the principle of *pacta tertiis nec nocent nec prosunt,* treaties may not create obligations for a third State unless that State expressly accepts the obligation in writing.[82] Furthermore, State practice and doctrine reflect an almost unanimous rejection of the extraterritorial application of internal legislation for the purpose of creating obligations for third States. [83] This theory is also confirmed in practice; for exemple in the judgment in the case of the declaration of the Government of Nicaragua concerning the treaty delimiting the maritime boundary in the Caribbean Sea between Honduras and Colombia, which might affect Nicaragua's rights, states that this treaty is, for Nicaragua, in legal terms is called *res inter alios acta*, that is to say, it does not create any right for either Honduras or Colombia in relation to Nicaragua. It is also a rule of customary international law and of treaty law that a legal instrument does not create any obligations or rights for a third State without its consent.[84] Other judicial precedents are also clear on this matter, as can be seen, in particular, from the decisions of the PCIJ on the case concerning certain German interests in Polish Upper Silesia[85] and on that concerning the free zones.[86] The legal doctrine reflects the almost unanimous view that a State cannot impose obligations on another State without the latter's consent, however, no unilateral act can impose obligations on other States, but it can activate certain duties of States which have them under general international law or under treaties.

The State can also impose obligations on one or more States by means of a unilateral act, which may originate internally but be applicable internationally under international law.[87] That would be the case of establishing the exercise of sovereign rights, especially in relation to the exclusive economic zone, which is now based on a rule of general international law set out in the United Nations Convention on the Law of the Sea, although some writers believe that these acts belong to internal law and not to international law.

80 U.N. Doc. A/CN. 4./500.
81 *Polish Upper Silesia case,* at 29.; *Island of Palmas case*, U.N. Reports of International Arbitral Awards. Vol. II. 850. at 842 and 870 [Palmas case]
82 U.N. Doc**.** A/CN.4/525., at 60.
83 Declaration on Unilateral Measures, 23-24 August 1997, Asunción, A/52/347, annex IV, para. 2.
84 U.N. Doc**.** A/CN.4/505., at 50.
85 *Polish Upper Silesia*, at 29.
86 *Upper Savoy case*, at 141.
87 U.N. Doc**.** A/CN.4/505 at 36.

2.7. Invalidity of unilateral acts

The causes of invalidity of an act are, in general, similar to those which may arise in a treaty context and since the consent to be bound by a treaty and the consent to a unilateral commitment were both expressions of the will of State, it seems logical that similar reasons for invalidity should apply to both types of statements in respect of their specific characteristics, so the grounds for invalidity provided in the VCLT can also be a pattern to unilateral acts. When the unilateral acts operate as sources of legal rights and obligations, the common requirements for their validity are essentially the same as the requirements for the validity of treaties.[88] According to this view, the requirements for validity would therefore be as follows: the unilateral act must have been issued by a person who is authorised to proceed and the content of the unilateral act must correspond to the author's true intention. Regarding this logical argument invalidity reasons can be divided into two groups: one relating to the person who formulates the unilateral act and another on the ground of the expression of will and its content.

2.7.1. Grounds for invalidity on the ground that the representative lacks competence

Concerning the lack of competence, it can be due to two reasons: the representative violates the domestic rule which entitled him to act behalf on its State or the representative has no authorization at all to act on behalf of the State.

a) Violation of a norm of fundamental importance in domestic law

In accordance with the majority opinion of legal experts and international practice, it may be assumed that those persons that represent the State at the highest level and therefore have the capacity to express the consent of the State in a treaty context also have the capacity to bind their State by means of unilateral acts.[89] It is always regulated in the domestic law of the State that national bodies can participate — and how — in expressing the consent of the State to be bound when international treaties are concerned, but not when unilateral acts are concerned.
The question is whether it is possible to invoke, as a ground for invalidating a unilateral act, the fact that the act was formulated in violation of a provision of internal law that is of fundamental importance and concerns competence to conclude treaties.

Article 46 of the VCLT regulates this question for treaties as it declares that no State may invoke a provision of its internal law regarding competence to conclude treaties with a view to declaring an agreement null unless that violation was manifest and concerned a rule of its internal law of fundamental importance concern competence to conclude treaties. The draft article elaborated by the ILC was less restrictive than Article 46 of the Vienna Convention, since it referred to a clear

88 Degan, V. D.: "Unilateral Act as a Source of Particular International Law", *Finnish Yearbook of International Law*. vol. 5 (1994) at 187-188.
89 VCLT Article 7, paragraph 2 (a); A/CN.4/569/Add.1., at 19.

violation of a norm of fundamental importance, but did not specifically indicate that the norm should concern the competence to express consent as this latter issue has not been defined yet.[90]

b) Invalidity of an act formulated by a person not qualified to do so

In treaty law if the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to the expression of such consent.[91] Compared to the view of the ILC, treaty law seems to be more restrictive, as the regulation for unilateral acts says that a unilateral act formulated by a person not authorized or qualified to do so may be declared invalid, without prejudice to the possibility that the State from which the act was issued may confirm it.[92]

2.7.2. Grounds for invalidity related to the expression of consent

The VCLT serves as a reference point again. Three of these grounds, namely error, fraud and coercion, are rooted in the Roman-law tradition; the others are the products of recent times.

a) Unilateral act based on error of fact or a situation

According to the ILC's opinion, a State's expression of will can certainly be based on error, and that is a justified cause of invalidity just in the same way as in the case of treaties.[93]

In the practice of international tribunals the cause of invalidity based on error has been a subject of many procedures for example in the in the *Legal status of Eastern Greenland* case, whereby Juge Anzilotti examined carefully the mistake of Mr. Ihlen in his dissenting opinion and declared „if a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a government could be ignorant of the legitimate consequences following upon an extension of sovereignty".[94]

The unilateral act is invalid if it was formulated on the basis of an error of fact or a situation which was assumed by the appealing State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound and the State invoking invalidity had not contributed by its own conduct to the error or if the circumstances.[95]

b) Unilateral act formulated by the fraudulent conduct of another State

90 U.N. Doc. A/CN.4/569/Add.1, at 27.
91VCLT Article 47.
92*Ibid.*
93 U.N. Doc. A/CN.4/505., at 139-141.
94 *Eastern Greenland case*, at 92.
95 U.N. Doc. A/CN.4/505., at 139. See especially *Eastern Greenland* case, ibid; *See Temple of Preah Vihear* and *Mavrommatis* case

The general practice of States does not exactly appear to be one of inducing other States to assume certain obligations based on deceit since the necessary confidence and transparency in relations between States are the common interest of all the States in international relations and there are hardly any examples of an invalid act because of fraud.[96] By the way, the ILC considers that the cause of invalidity of an international treaty could be fully applied, *mutatis mutandis*, to a unilateral act.[97]

In this context, there are three elements of the conduct of a third party that must be present in order for the conduct to be qualified as fraudulent and for the act whose formulation was induced to be declared invalid: (a) a material element, referred to as fraudulent conduct, which, in the Commission's view, encompasses "any false statements, misrepresentations or other deceitful proceedings"; (b) a psychological element, meaning the will or intention to mislead (in the context of unilateral acts, the will to induce the State formulating the act to implement the provisions thereof, regardless of their nature); and (c) a result, achieved by fraudulent means. In this connection, it is said that the fraud must be of an essential nature.[98]
Fraud can even occur through omission, as when a State which has knowledge of certain realities, does not convey it, thus inducing another State to formulate a legal act.[99]

c) Unilateral act as a result of corruption of the person formulating it through direct or indirect action by another State

The role played by this potential cause of invalidity in the context of unilateral acts could be almost identical to the role it plays in the treaty context.[100]

First of all, the term "corruption" needs to be précised. The customary decorations and hospitality which are a normal part of diplomatic practice would not be regarded as corruption; something extra would be required.[101] The lack of precedents may be due to the fact that States are reluctant to admit that their representatives are responsible for giving this defective form of consent.[102] In the relevant article of the VCLT the term corruption was defined with the expression "direct or indirect action by another State". This point highlighted something that has become an undeniable fact of international life today, namely. the possibility that could not be ruled out that the person formulating the unilateral act might be corrupted by another person or by an enterprise.[103] Contrarily to the provisions concerning treaties, the ILC wishes to reach the same aim with a more general guidance which says that the corruption of the representative of the State may be invoked as grounds for declaring a unilateral act invalid if the act was formulated

96 U.N. Doc. A/CN.4/505., at 144.
97 U.N. Doc. A/CN.4/569/Add.1., at 44-45. See also: J.-D. Sicault: "Du caractère obligatoire des engagements unilatéraux en droit international public".R.G.D.I.P. Vol. 83 (1979) at 667.
98 U.N. Doc. A/CN.4/569/Add.1., at 45.
99 U.N. Doc. A/CN.4/500/Add.1., at 136.
100 U.N. Doc. A/CN.4/569/Add.1., at 49.
101 UN Doc A/CN.4/SR.2603., at 245.
102 U.N. Doc A/CN.4/569/Add.1., at 48.
103 U.N. Doc A/55/10., at 594.

owing to the corruption of the person formulating it.[104] As it is seen the word „corruption" is *expressis verbis* applied but the term "representative" has been replaced with the phrase "person formulating it", which is more general, therefore introduces a greater degree of uncertainty.

d) Unilateral act as a result of coercion

The VCLT covers coercion of two types: coercion of a representative of a State (Article 51) and coercion of the State itself by the threat or use of force (Article 52). Both types seem to be fully applicable to unilateral acts of States.[105]

i. Coercion of a representative of a State

The notion of coercion - which must be used against a representative, the one who forms the unilateral act of State - encompasses a wide variety of situations, including any form of constraint or threat affecting the physical integrity of the representative, freedom, career, property or social or family situation.[106]

Coercion and corruption show a basic similarity, and in treaty context the doctrine of distinguishing them has already been worked out. In this view, coercion can be employed by anyone, while corruption is only recognized when it is employed by another negotiating State.
The question of this ground for invalidity caused many debates in the ILC. Some took the view that the use of coercion on the person formulating the act was a special case, since, in those circumstances, the person involved was not expressing the will of the State he was supposed to represent, but that of the State using coercion. Without a will, there was no legal act and, if there was no act, there was nothing to be invalidated. [107] Others were on the point of view that it is a case of *negotium nullum*.[108]
As a consensus the ILC states that the coercion of the person who formulated a unilateral act may be invoked as a ground for declaring its invalidity if that person formulated it as a result of acts or threats directed against him or her.[109]

ii. Coercion of a State by the threat or use of force

The prohibition of the threat or use of force in international relations has already been declared several times in modern history. As a general rule, a unilateral act that conflicts with the principles included in the Charter of the United Nations and, more specifically, the obligation contained in Article 2, paragraph 4, which is a peremptory norm of *ius cogens*, is *nulo ab initio*. It is necessary to underline the fact that under this provision the acts formulated in violation of a United Nations

104 U.N. Doc A/CN.4/569/Add.1., at 49-50.
105 *Ibid* at 53.
106 *Ibid* at 54.
107 U.N. Doc. A/CN.4/569/Add.1., at 57.
108 U.N. Doc. A/55/10., at 595.
109 *Ibid* at 58.

Security Council resolution adopted under Chapter VII of the Charter are also strictly understood.[110]

2.7.3. Unilateral act which conflicts with a peremptory norm of international law

Peremptory norm is a fundamental principle of international law which is accepted by the international community of States as a norm from which no derogation is ever permitted and which can be modified only by a subsequent norm of general international law having the same character.[111]

Peremptory norms "are a constraint on the capacity to formulate unilateral legal acts; this would include some norms deriving from the Charter of the United Nations and others contained in basic conventions, such as those relating to slavery and genocide, among many others".[112] Any unilateral act conflicting with such a norm would be considered invalid *ab initio*, it could therefore be expected to cause protests from the time of its formulation. [113] The ILC accepts this point of view, thus any unilateral act which at the time of its formulation is contrary to (or conflicts with) a peremptory norm of general international law (*jus cogens*) is invalid.[114]

This is the point where it is necessary to make a short statement of role of unilateral acts in the development of international law, especially in the domain of the law of the sea. This reason of invalidity signifies that - by *a contrario* interpretation - there is no obstacle for States to act unilaterally and turn aside from the international provisions and with other leaders establish a new practice and legal order in a specific area of law as it was seen several times in maritime law. Some authors goes even further and are highly critical of the application to unilateral acts of tenets of treaty law relating to *jus cogens*, like Weil, who writes that "in short, we must cease referring to *jus cogens* in relation to unilateral acts or actions by States, and leave that theory to treaty law, where it should have remained".[115] Treaty or not, each and every act on international ground whether it is oral or written, unilateral or not, shall respect the existing rule of law and its fundamental principles.

2.8. Effects of unilateral acts in time: termination and suspension

There are some legal institutions existing in the domain of termination of treaties that are necessary to be examined in the relation of unilateral acts as these kinds of acts are obviously have some kind of duration of effects, too. This list of questions includes the problematic of termination, suspension, modification and revocation of an act.

110 *Ibid* at 59-66.
111 VCLT Article 53.
112 U.N. Doc. A/CN.4/500/Add.1., at 140.
113 A/CN.4/569/Add.1., at 69.
114 *Ibid* at 71.; U.N. Doc. A/61/10., at 8.
115 Weil, P: "Le droit international en quête de son identité. Cours général de droit international public" Recueil des Cours." Vol. 237 (1992) at 282.

Regarding unilateral acts, the words termination and revocation are used interchangeably to signify the cessation of effects of an act of this kind. According to the ILC there is a nuance of meaning that differentiates between the two concepts, as termination may be due to external factors or even intrinsic ones, while the term "revoke" implies that something, namely a unilateral act, is considered to have been terminated or to have no further effect because the State having formulated it so intends. As for suspension, it means the provisional and temporary cessation of the observance of the unilateral act in question. The other hinge is the possible modification of an act like that as circumstances may arise in which unilateral acts must be adapted to reflect contemporary realities.[116] The problem is, that a unilateral act is the expression of the will of its author, therefore the modification is a prerogative of the party formulating it although the changes made should not affect the essence of the original unilateral act, since, if they did, they would in fact amount to a new unilateral act that invalidates the earlier one, so that would raise rather the question of revocation.
However, there are situations which have effects on unilateral acts namely those who arise from the will of the author of it and those which are in connection with the circumstances unrelated to the will.

2.8.1. Situations arising from the will of the party formulating the unilateral act

A State that formulates a unilateral act, as a manifestation of its will, may suspend or modify the act or limit its duration, if the intent to do so was clearly expressed at the time or times when the act was formulated.[117]

The main problem is with the promise, which generates expectations on the part of third parties, and creates, for the benefit of its addressee(s), as soon as they are informed of its existence, a right to expect that the author of the promise will honor its commitment. The principle of good faith plays a vitally important role here, since the promise generates certain expectations which could be disappointed if the promise is revoked, this undertaking do not need to be regarded as a perpetual obligation from which the State can never free itself. For this reason and of course for the principle of legal security the ILC declares acceptable the termination and revocation of a unilateral act if a specific time limit for termination of the act was set at the time of its formulation or if termination was implicit following the performance of one or more acts; and if the act was subject to a resolutely condition at the time of its formulation.[118]

2.8.2. Situation arising from the circumstances unrelated to the will of the party formulating the unilateral act

According to the ILC, Article 61 of the VCLT concerning supervening impossibility of performance and Article 62 regulating the fundamental change of circumstances could be applied *mutatis mutandis* to unilateral acts. The principle of *ad impossibilia nemo tenetur,* the loss or disappearance of an object indispensable for the execution of the unilateral act is the basic feature

116 U.N. Doc. A/CN.4/569/Add.1., at 83.
117 *Ibid* at 95-96.
118 *Ibid* at 95-108.

of this ground for termination, as in this case the subject matter of the unilateral act has ceased to exist; just as the fundamental change of circumstances, which renders the fulfillment of the unilateral act impossible. The emergence of a new peremptory norm of general international law provided for in Article 64 is also a logical end for a unilateral act, just like in treaty law, although it is not a common case of termination, in principle, it can occur.[119]

Regarding the suspension of unilateral acts, it is also possible if this possibility was specified at this time of the formulation of the act, or if the act was subject to a suspense condition at the time of its formulation.[120]

2.9. Interpretation

As a general rule, when interpreting legal acts, reference has always been made to the declared will and true will of the author State or States. International case law and doctrine have generally favored the criterion of declared will, while also taking into consideration the true will expressed by the author State or States.[121] As for the instruments of interpretation, in the *Laguna del Desierto* case between Chile and Argentina it was pointed out that under international law there are rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral act, an arbitral award or the resolution of an international organization. These are thus general rules of interpretation dictated by the natural and ordinary meaning of words, reference to context and effectiveness.[122]

As it is seen, in several cases the provisions of the VCLT could be applied for unilateral acts as well, thus it is advisable to examine whether it is the same case in the question of interpretation. Concerning treaty law the principle of declared will is used but in case of ambiguity the context, object and purpose of the act, any subsequent agreements and practices, and even any relevant rules of international law applicable between the author State and the addressee State is examined, so as the supplementary means of interpretation is cited such as the preparatory work of the treaty and the circumstances of its conclusion.[123] Regarding the basic principles of law, there seems to have any burden to apply the rules of interpretation on unilateral acts laid down in the VCLT, adapted, of course, to the specific characteristics of unilateral acts. The general rule of interpretation set out in Article 31 of VCLT whereby it is stated that treaties shall be interpreted in good faith, is entirely applicable to unilateral acts in a great part due to statements of the ICJ done in the *Nuclear Tests cases* in 1974 declaring the following:

119 *Ibid* at 110-118.; See especially, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, 2006. ILC 58th session. U.N. Doc. A/61/10. at 9. [U.N. Doc. A/61/10]
120 *Ibid* at 120-124.
121 U.N. Doc. A/CN.4/519., at 114.
122 Arbitral Award of 21 October 1994. Dispute concerning the course of the Frontier between B.P. 62. and Mount Fitzroy (Argentina/Chile) RGDIP 1996 vol. 2. at 552.
123 VCLT Article 31-32.

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation ... 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."[124]

Good faith and the meaning of the terms are therefore the point of departure of the interpretation process.[125]

As pointed out above, the aim of interpretation is to determine the intention of the author which is in the case of unilateral acts is even more difficult, as there are no formal criteria existing and in many cases they are expressed orally without putting them in writing. Concerning those who are expressed in written form, the rules of interpretation appears to be accepted exactly the same as that of treaties. Even in written forms, the ICJ does not attach strictly to the grammatical interpretation of the text, it is more important to seek the interpretation which is in harmony with a natural and reasonable way of reading the text.[126] The interest of legal certainty also requires that the main criterion should be the will expressed in the text weather it is written or oral, particularly in the case of acts by which the State concerned assumes unilateral obligations, When a State makes statements by which its freedom of action is to be limited, a restrictive interpretation is called for as in was pointed out in the *Nuclear Tests cases*.[127] In the case of waivers, in particular, it should be noted that the rule of no presumption would then be a rule of restrictive interpretation; in cases where there is a doubt as to the will to waive, it should be assumed that the subject of law did not wish to do so.[128]
Summarizing the doctrinal background, obligations must be interpreted in a restrictive manner. While interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, the clarity and precision of its terms together with the context and the circumstances in which it was formulated.[129]

III. Treaty v. Unilateral Acts

Until the Congress of Vienna in 1815, bilateral and multilateral treaties were infrequent and customary international law developed mainly through unilateral practice and acts of States.
The majority of unilateral acts fall within the sphere of treaty relations, others, however, may be understood to fall outside that sphere and so to require specific rules to govern their operation.[130]

124 *Nuclear Tests cases,* at 46.
125 U.N. Doc. A/CN.4/519., at 134.
126 *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* [1952] I.C.J. Rep. 93. at 104.
127 *Nuclear Tests cases* at 44.
128 U.N. Doc. A/CN.4/519., at 128.
129 U.N. Doc. A/CN.4/569/Add.1., at 160.; U.N. Doc. A/61/10., at 7.
130 U.N. Doc. A/CN.4/486., at 60.

The distinction between unilateral acts and treaties are not always clear, but as a basis, generally a treaty does not consist of unilateral undertakings of contracting States. It consists of the concordance of will of all the parties with the aim to achieve a legal effect in international law. [131] For this reason the principle of *pacta sunt servanda* and that of the *prommisorium implendorum obligatio* is not fully the same.

Some unilateral acts are mostly understood as acceptance of an offer made by another State or any subject of international law, producing finally an agreement, but there are differences.
In the following lines some problematic issues are arisen to make a distinction between strictly unilateral acts and those declarations which, however, shows some elements of unilateralism, fall within the sphere of treaty law. These categories are the (a) acts linked to the law of treaties; (b) acts which constitute the exercise of a power granted by a provision of a treaty; (c) acts of domestic scope which do not have effects at the international level; (d) acts which form part of a treaty-based relationship, such as offer and acceptance; (e) acts relating to the recognition of the compulsory jurisdiction of the International Court of Justice, in accordance with Article 36 of its Statute; and (f) acts performed in connection with proceedings before an international judicial body and acts which may enable a State to invoke an estoppel in a trial.
Below, the most frequent and problematic issues are discussed.

3.1. Acts fall within the sphere of the law of treaties

Acts of signature, ratification and deposit of an instrument of ratification, denunciation, suspension, termination and accession, and acts by means of which a State formulates a reservation are legal acts which are unilateral in form but in respect of which it may be affirmed without difficulty and without the need for further comment, that they fall within the sphere of the law of treaties as such.[132]

The signing of a treaty is a formal unilateral act by means of which a State consents to accept the negotiated text in whose formulation it participated. Its legal effect is undeniable since the State accepts the engagements which have been undertaken and which it may later ratify.[133] As for ratification, it is an act envisaged in a pre-existing text, whereby a State confirms its intention of being bound by that text. It is not a legal act *per se*; it is similar to notification as it involves an act which does not create a legal relationship but forms part of the process whereby a State makes an engagement at the international level. The same comment may be made about accession, denunciation and the formulation of reservations. These acts, although they appear to be strictly unilateral, are linked to a pre-existing international agreement or customary rule, and they are just the conditions for the application of a status or regime of international law.[134] The same is valid

131 Degan, at 278.
132 U.N. Doc. A/CN.4/486., at 97; Degan, at 279.
133 U.N. Doc. A/CN.4/486., at 98.
134 *Ibid* at 98-99.

to the other acts related to treaty making, namely suspension, termination and accession.[135] However, the PCIJ has concluded that such declarations are unilateral acts as it was the conclusion in the *Phosphates in Morocco* case: the declaration of the French Government of the ratification is a unilateral act, but the ICJ also added in the in the *Norwegian Loans* case that it falls under the rule of treaty law. [136]

3.2. Acts which constitute the exercise of a power granted by a provision of a treaty

Another category to be identified is unilateral acts connected with a particular regime authorized by a specific set of rules. Declarations establishing exclusive economic zones or, in general, the delimitation of maritime zones are examples of such acts. The act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law, as it is stated in the *Fisheries case.*[137]These acts are linked to a pre-existing international agreement which established previously the conditions and modalities of unilateral acts to produce legal effects, thus they do not create obligations for third States, because they are simply declarative acts. It is the pre-existing norm, which creates rights and obligations; the unilateral act just makes it enter into force.[138]

3.3. Acts relating to the recognition of the compulsory jurisdiction of the International Court of Justice, in accordance with Article 36 of its Statute

There is also a kind of unilateral declaration which is formulated under Article 36 of the Statute of the ICJ which are unilateral acts in form attributable to a single subject of international law, but they fall under the regime of the law of treaties as it is stated in the *Anglo-Iranian Oil Co.* case, whereby the ICJ took the view that such declarations were indeed part of a treaty relationship. Declarations accepting the jurisdiction of the ICJ were not a treaty text resulting from negotiations between two or more States but "the result of unilateral drafting".[139]The fact that such declarations are registered and deposited with the Secretary-General of the United Nations supports this view.

They take the form of unilateral acts, but it produces effects only if a corresponding act has been performed, thus it can be concluded that legal relations stemming from an acceptance are contractual in nature. The ICJ has already faced the question of legal sphere of this kind of act several times. Judge Armand-Ugón stated in his dissenting opinion in the *Barcelona Traction* case

135 *Ibid* at 97.
136 *Phosphates in Morocco (Preliminary Objections)(Kingdom of Italy v. French Republic)* [1938] P.C.I.J., [Ser. A/B] No. 74.at 23.,*Case of Certain Norwegian Loans (France v. Norway)* (1957) I.C.J. Reports 9. at 23-24. *See also* U.N. Doc. A/CN.4/486. at 117.
137 *See Fisheries case, (United Kingdom v. Norway)* (1951) I.C.J. Rep. 116 at 132. [Fisheries case]]
138 U.N. Doc. A/CN.4/486. at 106-109.
139 I.C.J. Reports 1952, p. 105; A/CN.4/486. at 115-116.; A/CN.4/569/Add.1 p. 130.

that the relation of the parties from which the declaration concerning compulsory jurisdiction of the ICJ is resulted has the same force and the same legal content as a provision in a treaty.140 Even though these declarations are unilateral acts facultative made, as the ICJ stated in the *Nicaragua case*, they establish bilateral engagements with other States which accept the same obligation of compulsory jurisdiction, thus the unilateral nature of declarations does not signify that the State making the declaration is free to amend the contents of its solemn commitments as it pleases.141 As these declarations are legally equivalent to the jurisdictional clause embodied in a treaty or a convention therefore they can not be modified without the consent of the parties, as it is said in the *Barcelona Traction, Light and Power Co., Limited* case.[142]

3.4. Acts performed in connection with proceedings before an international judicial body and acts which may enable a State to invoke an estoppel in a trial

There is another category of acts to discuss relating to declarations made by the agents of a State in the course of proceedings before an international tribunal. There is a general agreement that such declarations, which are unilateral in their forms, are binding on the State in whose name they are made, even if they are *ultra vires* acts.[143] The problem is that it is difficult to classify them as autonomous because these declarations are related to the claim or legal position of the other State party to the proceedings.

The stipulation in favor of third parties also needs to be discussed. It is a product of domestic contract law whereby the parties to an agreement make a promise whose beneficiary is a third party. It is an act which is contractual in origin, unilateral in form, but requires the acceptance of the beneficiary third State in order to be valid or to be revoked or modified. The difference between a unilateral legal act emanating from a contractual relationship and a purely unilateral act is that in the first case the acceptance of the third State is required, while in the second case such acceptance is not required. [144]

IV. Customary law and Unilateral Acts

A consideration should be given to acts and conducts which contribute to the formation of international custom. It is well known that the customary process is not complete unless two elements are brought together: the repeated performance of acts known as precedents (the material element or *consuetudo*) and the feeling or belief of subjects of law that the performance of

140 *Barcelona Traction, Light and Power Company Limited, Preliminary Objections, (Belgium v. Spain)* (1964) I.C.J. Rep. 6 at 135.[Barcelona Traction case]
141 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Jurisdiction and Admissibility,* (1984) I.C.J. Rep. 392. at 60.
142 *Barcelona Traction case* at 135.
143 U.N. Doc. A/CN.4/486. at 125.
144 U.N. Doc. A/CN.4/486. at 124.

such acts is obligatory because the law requires it – hence the concept of a psychological element, the *opinio juris sive necessitatis*.

Apart from the different doctrinal approaches to the unilateral acts, its three constitutional elements are no doubt the manifestation of will of a State, the independence and autonomy of the will, which is imputable to the State performing it and the implication of no obligation to a third State.

There seems to be no doubt about the importance of unilateral acts of States in the formation of custom. This may be seen in the case of acts related to the law of the sea performed since the eighteenth century which later made possible the codification of international rules on the subject.[145]

The State, through its acts or conduct, can participate in or start on the formation of a customary rule.[146] Notwithstanding the fact that, at first, unilateral acts were in confront with the existing international customs as it was seen in the case of the Truman Proclamation on the sea's biological resources and on the mineral resources of the seabed and the ocean floor in 1945. This event was ultimately the point of departure of a new international custom concerning the law of the sea and it set a direction which was followed by numerous States and by five years from the Proclamations, almost all the Latin American States elaborated unilateral acts to extend their national territory over their continental shelves. [147] Finally, it was in the case of the *North Sea Continental Shelf* when the ICJ recognized the possibility to act that way origin from the Proclamations.[148]

Of course objections can be raised that a municipal legislation of one single State is negligible element of required State practice, but in practice, great powers have more influence than others on the formation of a custom, as their conducts endanger others to act similarly.149

As it is seen, recognition - expressed or tacit - and protest or rejection play a determining role in the formation of custom. It is worth pointing out that a custom, as acknowledged by a part of international doctrine and jurisprudence, has its origins in various acts whether they are the expression of one or more subjects of international law. [150] Rousseau has already mentioned several treaties which can serve as precedent or constituent element of a custom.[151] The primary importance of such acts is that it constitutes evidence of the subjective element of acceptance or rejection.

145 Degan, at 253.
146 U.N. Doc. A/CN.4/486. at 102.
147 Dupuy, René Jean – Vignes, Daniel: *A Handbook on the New Law of the Sea*. Martinus Nijhoff Publishers. 1991. at 37.
148 *North Sea Continental Shelf case* at 63.
149 Franckx, Erik: "The New USSR Legislation on Pollution Prevention in the Exclusive Economic Zone" .International Journal of Estuarine and Coastal Law. 1986. at 158.
150 U.N. Doc. A/CN.4/486. at 102.
151 Rousseau, at 334-337.

Sometimes the acts – not to mention behavior, attitudes and conduct – of a State in relation to custom may be excluded from the category of strictly unilateral acts, since their effects amount to a kind of tacit international agreement. They are unilateral in form and they may appear to be autonomous, but these acts generally produce effects when they coincide with other acts of a similar nature and so contribute to the formation of a customary rule. It should also be noted, however, that an act forming part of the process of the creation of international custom is not necessarily excluded from the category of strictly unilateral acts if the act, independently of this function as a source of custom, reflects an autonomous substantive unilateral act creating a new juridical relationship and this is the basic condition for a unilateral act.[152]

V. Conclusions

Technological changes of the time and the disturbances require changes also in the existing law. It is not a matter of recording old rules, but one of making new ones, and there are no other ways of doing this than by agreement or unilateral action, and when agreement is not forthcoming, then by unilateral action alone.153 But in order to ensure the effectiveness of legal security in international legal relationship it is necessary to respect some guiding principles elaborated by jurisprudence and customary law as long as the regime of unilateral act of States is not regulated definitively and *erga omnes*.

152 U.N. Doc. A/CN.4/486. at 104.
153 O'Connell, D. P.: *The International Law of the Sea*. Vol. 1. Clarendon Press Oxford. 1982. p. 31.