



# Interpretation of Unilateral Acts in International Law

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## Abstract

The article explores the question of interpretation of unilateral acts in international law both from the perspective of ascertaining their binding force (law determination) and from the perspective of ascertaining their content (content determination). It argues that the objective intention of the author to be bound is what distinguishes binding commitments of unilateral origin from non-binding ones. In turn, this involves the interpretation of a unilateral act in accordance with its content and the circumstances surrounding its making. In practice, the use of clear and specific wording in conjunction with a set of contextual indicators are indicia of the intention to create a binding unilateral commitment. Against this backdrop, the article continues by addressing the question of interpretation of unilateral acts from the standpoint of ascertaining their content. It shows that the text of the act is the primary consideration in determining its content—and that its context as well as the circumstances surrounding its making are also interpretative elements that need to be taken into account. Due to the unilateral origin of these acts the interpretative rule applicable to international agreements can only be used as a point of reference when it comes to interpreting the content of these acts. In this light, the article concludes that more practice is needed in order to elucidate the exact role and weight that should be ascribed to non-textual elements in the context of interpreting unilateral acts. At the same time, the article argues in favour of adopting a broader approach to the concept of ‘interpretation’ in international law. Viewing interpretation not merely as content determination but also as law ascertainment allows us to better assess the persuasive value of arguments in favour or against certain interpretative rules when practice is scant—as is the case with unilateral acts.

**Keywords** Unilateral acts · Interpretation · Intention to be bound · Restrictive standard of interpretation · Guiding Principles applicable to unilateral acts · Contextual indicators

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## 1 Introduction

More than 40 years ago the International Court of Justice (ICJ) in a now (in)famous passage confirmed that unilateral acts can produce legal effects in international law.<sup>1</sup> By doing so, it ended a long-standing controversy regarding the binding nature of these acts that had arisen before the Permanent Court of International Justice (PCIJ) in the context of the *Eastern Greenland* case.<sup>2</sup> Unilateral acts have featured occasionally, albeit consistently, in international judicial practice.<sup>3</sup> More recently, the relevant doctrine was invoked by Advocate General Sharpston in her 2014 Opinion in the *Venezuela Fisheries* case<sup>4</sup> in order to justify the binding force of a declaration issued by the European Union (EU) granting fishing opportunities in EU waters to Venezuelan fishing vessels and by the ICJ in its 2018 *Obligation to Negotiate Access to the Pacific Ocean* judgment in order to ascertain the legal relevance of certain statements made by Chile.<sup>5</sup> Despite these developments and the fact that the International Law Commission (ILC) spent 10 years studying the topic—an effort that culminated in the adoption of a set of Guiding Principles applicable to the unilateral declarations of States<sup>6</sup>—certain aspects of the legal framework governing these acts remain largely under-researched.<sup>7</sup> These include questions of interpretation of unilateral acts. The scant attention paid in the literature to the issue of interpretation of these acts was highlighted in one of the early reports of the International Law Association (ILA) Study Group on ‘The Content and Evolution of Rules of Interpretation’.<sup>8</sup> Recent practice also attests to the need to do so: the Court of Justice of the European Union (CJEU) clearly sidestepped the question of the (rather obvious) unilateral nature of the undertaking of the EU towards Venezuela in its 2014 ruling—despite the express invitation of Advocate General Sharpston to address it.<sup>9</sup>

<sup>1</sup> *Nuclear Tests cases (Australia/France)*, ICJ Reports 1974, p. 253; *Nuclear Tests cases (New Zealand/France)*, ICJ Reports 1974, p. 457. The Court’s judgments in these two cases are almost identical. Hereinafter, all references made to the *Nuclear Tests* case will concern the case between Australia and France.

<sup>2</sup> *Legal Status of Eastern Greenland* case, 1933 PCIJ Series A/B, No. 53, p. 22.

<sup>3</sup> See for example: *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America)*, ICJ Reports 1986, p. 14; *Case concerning the Frontier Dispute*, ICJ Reports 1986, p. 554; *Case concerning Armed Activities in the Territory of the Congo* (New Application: 2002), ICJ Reports 2006, p. 1.

<sup>4</sup> Joined Cases C-103/12 and C-165/12, *European Parliament and European Commission v. Council of the European Union*, Opinion of Advocate General Sharpston, ECLI:EU:C:2014:334, paras. 69–87. Note, however, that the CJEU concluded that the declaration at bar culminated in the conclusion of an international agreement, Joined Cases C-103/12 and C-165/12, *European Parliament and European Commission v. Council of the European Union*, ECLI:EU:C:2014:2400, para. 73.

<sup>5</sup> *Obligation to Negotiate Access to the Pacific Ocean* case, ICJ Reports 2018, paras. 146–148.

<sup>6</sup> Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto, adopted by the ILC at its 58th session, ILC Yearbook 2006, Vol. II, Part 2.

<sup>7</sup> There are only a few monographs dedicated to the multifaceted phenomenon of unilateral acts in international law. See Suy (1962), Eckart (2012), Kassoti (2015), Saganek (2015).

<sup>8</sup> Content and Evolution of the Rules of Interpretation, Preliminary Report of the ILA Study Group 2016, p. 10, available at <https://www.ila-hq.org/index.php/study-groups>.

<sup>9</sup> For comment and analysis, see Kassoti and Vatsov (2019).

In this light, the present paper purports to explore the question of interpretation of unilateral acts under international law. On one level, the value of doing so is rather straightforward: unilateral acts are widely regarded as sources of international law<sup>10</sup>—and the relevance of interpretation in the study and professional practice of international law is self-evident. This is particularly the case if one bears in mind that only a few in-depth studies of these types of acts exist.<sup>11</sup> On another level—and in a very limited fashion as a detailed account would be beyond its scope—the article purports to briefly touch upon the debate on the concept of ‘interpretation’ in international law and, more particularly, to confirm the value of extending the notion of ‘interpretation’ to law-making processes—by using the example of unilateral acts.

According to mainstream legal thinking, the interpretative process mainly relates to the task of ‘giving meaning’ to the terms of an internationally binding instrument.<sup>12</sup> As Venzke eloquently puts it:

According to an orthodox view, international law is made the moment it comes into existence through the recognized channels of legal sources [...]. The act of interpretation is then imagined as an act of discovery downstream [...]. The international legal norm is supposed to contain within itself what the act of interpretation discovers.<sup>13</sup>

However, by limiting the relevant process to a ‘quest for meaning’ one loses sight of the fact that interpretation also involves the process of ascertaining whether the concepts or terms to be interpreted have crossed the threshold of normativity. In other words, if interpretation purports to clarify the meaning of ‘legal terms’, then the first part of the exercise (namely that of ascertaining that the terms to be given meaning are ‘legal terms’) should not be overlooked. It should be borne in mind that the ICJ expressly referred to the task of identifying the legal pedigree of a unilateral act as ‘interpretation’ in the *Nuclear Tests* case; according to the Court ‘the intention [of being bound] is to be ascertained by *interpretation* of the act’.<sup>14</sup>

In this light, this contribution subscribes to the view that interpretation serves two main functions, namely that of determining what qualifies as a legal norm (law ascertainment) and that of determining the meaning of a given norm (content determination).<sup>15</sup> According to d’Aspremont:

Even though both content-determination and law-ascertainment processes are interpretative activities of a delineating and definitional nature, each process performs a different function. The former purports to elucidate the content of rules with a view to determining the standard of behaviour or normative guidance provided by them. The latter seeks to determine whether a given norm

<sup>10</sup> Shaw (2017) pp. 90–91; Harris and Sivakumaran (2015), pp. 44–50.

<sup>11</sup> Suy (1962); Eckart (2012); Kassoti (2015); Saganek (2015).

<sup>12</sup> Gardiner (2015), p. 27.

<sup>13</sup> Venzke (2017), p. 404.

<sup>14</sup> *Nuclear Tests* cases, *supra* n. 1, para. 44 (emphasis added).

<sup>15</sup> D’Aspremont (2015), p. 118.

qualifies as a legal norm and can claim to be part of the international legal order.<sup>16</sup>

In a similar vein, Hollis makes a distinction between ‘expository’ interpretative processes which constitute essentially ‘an effort to ascribe a treaty text (or some other international legal norm) with meaning’<sup>17</sup> and ‘existential’ interpretative processes which ‘confirm—or even establish—the existence of the subject interpreted within (or outside) the corpus of international law’.<sup>18</sup> The same approach was espoused by the ILC Special Rapporteur on Unilateral Acts of States. Rodríguez Cedeño, in his second report on the topic, stressed the importance of the element of intention in the context of interpretation with a view to establishing both the meaning and the legal character of a unilateral act.<sup>19</sup> In this light, the article will cover both aspects of interpretation, i.e. interpretation of unilateral acts for the purpose of ascertaining their binding nature and interpretation of unilateral acts for the purpose of ascertaining their content.

First, doing so has a descriptive value—as explained above, in practice, the term ‘interpretation’ is used to describe both law ascertainment and content determination. Secondly, understanding sources in interpretive terms also allows us to understand the linkages between where international law comes from and what it means.<sup>20</sup> In other words content determination is not done in a vacuum; when it comes to customary international law, for example, the requisite elements for the formation of a customary rule (and hence, the sources doctrine) guide the interpretative process of such a rule.<sup>21</sup> In turn, this allows us to recognize instances of mutual impact and to evaluate better how choices made in one field may affect interpretation in another. In order to illustrate this point Hollis notes that: ‘Calling for sources theory to shift from a consensual orientation to one founded on justice, for example, may devalue interpretative theories emphasizing text and authors while privileging those tied to teleology’.<sup>22</sup>

As will become apparent below, practice in relation to interpretation in the sense of content determination in the context of unilateral acts is relatively scant. This is not so shocking. By way of contrast to treaties, unilateral acts remain an ‘outsider’ in the game of means through which States choose to enter into binding commitments

<sup>16</sup> *Ibid.*, p. 121.

<sup>17</sup> Hollis (2015), p. 84. See also Dworkin (1986), pp. 66–67.

<sup>18</sup> Hollis (2015).

<sup>19</sup> Rodríguez Cedeño, Second Report on Unilateral Acts of States, UN Doc. A/CN.4/500 and Add. 1 (1999), paras. 121–125.

<sup>20</sup> Hollis (2017), p. 423.

<sup>21</sup> In *Hadžihasanović*, The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that: ‘In the absence of anything to the contrary, it is the task of a court to interpret the underlying State practice and *opinio juris* [...] as bearing its normal meaning that military organization implies responsible command and that responsible command in turn implies command responsibility’. *Prosecutor v. Enver Hadžihasanović, Mehmed Alagic, Amir Kubura*, Decision on Interlocutory Appeal challenging Jurisdiction in relation to Command Responsibility, IT-01-47-AR72, 16 July 2003, para. 17. For issues of interpretation of customary international law, see generally Merkouris, Kammerhofer and Arajärvi (2022).

<sup>22</sup> Hollis (2017), p. 424.

on the international plane. This—in conjunction with the strict standard of interpretation applied in practice by international judicial bodies—implies that there is scarce material from which to draw ‘rules of interpretation’ for unilateral acts. In this light, and as will be explained below, scholars have put forward different arguments in favour or against certain interpretive rules—in the absence of actual practice. Understanding the inter-relationship between interpretation in the context of law ascertainment and interpretation in the context of content determination offers additional means and a fresh vantage point of view for assessing the persuasive value of such arguments.

The article is structured as follows: Sect. 2 purports to delimit the scope of the enquiry. For this purpose, a distinction is made between autonomous unilateral acts with binding effects on the international plane and non-autonomous unilateral acts that do not create any legal effects. Only the former will be examined here. Section 3 focuses on the interpretation of unilateral acts from the viewpoint of ascertaining their binding force, while Sect. 4 focuses on the interpretation of unilateral acts from the viewpoint of ascertaining their content. Section 5 provides some concluding remarks.

## 2 Unilateral Acts in Their Infinite Variety: Definition and Scope of Enquiry

From the outset, it needs to be noted that the identification of rules of interpretation, or any rules for that matter, applicable to unilateral acts presupposes a minimum degree of homogeneity of these acts. In other words, any attempt at elucidating the legal framework pertaining to unilateral acts assumes that there is, in fact, a coherent category of ‘unilateral acts’ with enough similarities that a common set of rules would arguably apply thereto.

However, in international law, unilateral acts are as various as they are numerous.<sup>23</sup> States frequently use unilateral acts in the form of declarations, *communiqués*, or otherwise, to convey to other States, or to the international community at large, a wide array of factual or legal situations. There are unilateral acts pertaining to the law of international personality, such as the recognition of States or a proclamation of independence; unilateral acts pertaining to the territorial status of States, such as acts of territorial or sea delimitation; unilateral acts pertaining to the judicial settlement of international disputes, such as declarations accepting the compulsory jurisdiction of the ICJ, or declarations made in the course of judicial proceedings. In light of the great diversity in which unilateral acts manifest themselves in international law, the hurdles of identifying common denominators upon which the grouping of such acts could be based become apparent.

The existence of a wide spectrum of acts that are designated as ‘unilateral’ in practice means that it is difficult to identify common rules that are easily transferrable from one category of these acts to another and thus it necessitates delimiting the

<sup>23</sup> Combacau and Sur (1993), p. 213.

object of study at a preliminary stage. In turn, the question of delimitation is closely connected to that of the definition of unilateral acts.

International jurisprudence is of little avail in this matter. The ICJ, far from dwelling on issues of definition, has been more concerned with the particular circumstances under which binding force may be attributed to a unilateral act. Doctrine has also largely failed to produce a precise and all-embracing definition.<sup>24</sup> At best, most definitions have been too general in scope to provide any concrete degree of orientation. As Fiedler observes ‘attempts to reach a general definition by way of abstraction have failed because of the versatility of the various categories that need to be summarized under a common heading’.<sup>25</sup> Thus, for example, Rigaldies describes unilateral acts as ‘an expression of will envisaged in public international law as emanating from a single subject of law and resulting in the modification of the legal order’.<sup>26</sup> For Jacque unilateral acts ‘emanate from a single expression of will and create norms intended to apply to subjects of law who have not participated in the formulation of the act’.<sup>27</sup> According to the ILC, unilateral declarations ‘publicly made and manifesting the will to be bound may have the effect of creating legal obligations’.<sup>28</sup>

However, in light of the wide spectrum of acts that the term ‘unilateral acts’ may be ascribed to, the aforementioned definitions are problematic. More closely observed, these definitions seem to be too narrow. In Jacque’s and in Rigaldie’s definitions the intention of the author State is the determinant factor in attributing legal effects to unilateral acts. However, intention is only one of the elements to be considered in ascertaining the legal nature of a unilateral act; of equal importance here are the context in which the act occurred and the effect of relevant rules of law.<sup>29</sup> Thus, for example, in the case of recognition, the intention of the recognizing State alone is not enough to establish that the recognized State will be validly considered, *vis-à-vis* the recognizing one, as an international person, namely as a person that possesses all rights and duties that complement the attribution of Statehood under international law.<sup>30</sup> More importantly, the lawful granting of recognition is subject to the observance of customary rules on recognition, such as the obligation not to recognize the annexation of territory by the use of force.<sup>31</sup> Similarly, the definition

<sup>24</sup> For an overview of different definitions of unilateral acts, see Saganek (2015), pp. 32–85; Eckart (2012), pp. 1823; Kassoti (2015), pp. 30–34.

<sup>25</sup> Fiedler (1984), p. 1018.

<sup>26</sup> Rigaldies (1980–1981), p. 417, as quoted in Rodríguez Cedeño, Fifth Report on Unilateral Acts of States, UN Doc. A/CN.4/525 (2002), p. 99, para. 57.

<sup>27</sup> Jacque (1981), p. 339, as quoted in Rodríguez Cedeño, *ibid*.

<sup>28</sup> Guiding Principle 1 of the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, *supra* n. 6, p. 369. For a detailed account of the various attempts to arrive at a generally agreed definition within the Commission, see Eckart (2012), p. 18, fn. 3.

<sup>29</sup> Crawford (2012), p. 415.

<sup>30</sup> These include the ability to conclude treaties and the acquisition of immunity from the jurisdiction of the courts of the recognising States. For a discussion of the most important consequences of the recognition of new States see Jennings and Watts (1992), p. 130 and pp. 158–160.

<sup>31</sup> See Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia (1992), Opinion No. 10, para. 4, in which it is stated that ‘[...] while recognition is not a prerequisite for the foundation of a State and is purely declaratory in its impact, it is nonetheless

provided by the ILC fails to accurately describe unilateral acts. More particularly, the Commission's definition lacks any reference to the unilateral nature of these acts and, taken at face value, it seems to suggest that publicity is one of the requirements for the act to be legally valid. However, such a conclusion is not justified on the basis of relevant judicial practice.<sup>32</sup> As will be explained below, although publicity is an indicator of the manifest intention of the author to become bound by means of a unilateral act, the fact that an act was not made publicly does not mean that it may not create legal effects. Upon contemplation, the weaknesses of the aforementioned definitions result from the fact that they attempt to describe in the abstract a phenomenon as diverse as unilateral acts.

Arguably, the heterogeneity of unilateral acts makes it impossible to arrive at a generic definition, similar to that given to international agreements under Article 2(1) of the Vienna Convention on the Law of Treaties (VCLT).<sup>33</sup> Thus, it is submitted that unilateral acts should be defined on the basis of the essential elements of their legal nature. Such a definition would have the benefit of accurately describing unilateral acts while being broad enough to take into account the diverse legal environments in which these acts occur in practice. In the same vein, Saganek avoids furnishing an abstract, doctrinal definition of unilateral acts and focuses instead on the essential elements of their legal nature for the purpose of eliminating certain acts from the ambit of his study on the topic.<sup>34</sup>

This approach is also justified by the actual practice of international judicial bodies in relation to other legal acts. When called upon to determine whether a certain instrument is an international agreement or not, international judges do not generally attempt to fit the instrument into the definition of the VCLT. Instead, they focus on the existence of the elements of an international agreement, always taking into account the legal and factual context within which the instrument in question came into being.<sup>35</sup>

What are, then, the essential elements of the legal nature of unilateral acts upon which the definition of unilateral acts may be based? The Court in the *Nuclear Tests* case identified the element of unilateralism and the element of the intention of the

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Footnote 31 (continued)

a discretionary act that other States may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law, and particularly those prohibiting the use of force in dealings with other States or guaranteeing the rights of ethnic, religious or linguistic minorities'. An example of the application of the rule of the non-recognition of entities that came about by means of illegal occupation is the case of Northern Cyprus. In 1974, Turkey invaded Northern Cyprus and, 9 years later, an entity by the name of the Turkish Republic of Northern Cyprus was declared to have been established in that area. In response to this declaration, the UN Security Council issued a resolution proclaiming the invalidity of the Turkish declaration and calling upon Member States to refrain from recognizing the entity in question. See Resolution 541, UN Doc. S/RES/541, 18 November 1983.

<sup>32</sup> For the same criticism, see Eckart (2012), pp. 239–242.

<sup>33</sup> Vienna Convention on the Law of Treaties, adopted on 22 May 1969, 1155 UNTS 331, 8 ILM 679.

<sup>34</sup> Saganek (2015), pp. 55–59.

<sup>35</sup> Klabbbers (1996), p. 72; Fitzmaurice (2002), p. 168.

author State to become bound as the essentials of the legal nature of unilateral acts. According to the Court:

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 upon the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.<sup>36</sup>

There is also consensus in doctrine that unilateralism and the intention to be bound are the essential elements of the legal nature of unilateral acts.<sup>37</sup>

These two elements of the definition of unilateral acts are of assistance in delimiting the scope of the phenomenon under investigation. As will be explained below, the element of the intention to be bound refers to the juridical character of these acts and is thus of importance in distinguishing between legally relevant unilateral acts and unilateral acts that do not produce legal effects on the international plane—thus it is crucial in the context of interpretation as law ascertainment. The element of unilateralism is two-pronged. According to Cedeño: ‘A unilateral act thus existed when it was formally unilateral, when it did not depend on a pre-existing act (first form of autonomy) and when the obligation was independent of its acceptance by another State (second form of autonomy)’.<sup>38</sup>

In a narrow sense, unilateralism refers to the autonomy of the act to produce legal effects independently of any kind of acceptance, reliance or even reaction on the part of the addressee. As the Court stressed in the *Nuclear Tests* case:

An undertaking of this kind, 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 by which the pronouncement by the State was made.<sup>39</sup>

In the literature, unilateralism has been employed in a broader sense to connote the autonomy of unilateral acts to produce effects independently of any pre-existing legal norm either of treaty or customary international law.<sup>40</sup> More particularly, Zemanek makes an important distinction between ‘adjunctive’ and ‘autonomous’ unilateral acts.<sup>41</sup> In his view, all unilateral acts that constitute elements of a larger

<sup>36</sup> *Nuclear Tests* cases, *supra* n. 1, para. 43.

<sup>37</sup> Eckart (2012), pp. 38–40; Rodríguez Cedeño, First Report on Unilateral Acts of States, UN Doc. A/CN.4/486 (1998), pp. 335–336, paras. 133–151.

<sup>38</sup> Rodríguez Cedeño, ILC, Summary Record of the 2593<sup>rd</sup> Meeting, UN Doc. A/CN.4/SR.2593 (1999), para. 12.

<sup>39</sup> *Nuclear Tests* cases, *supra* n. 1, para. 43.

<sup>40</sup> For early references to the concept of autonomy in the context of unilateral acts, see Suy (1962), p. 30.

<sup>41</sup> Zemanek (1998), p. 210.



law-creating process belong to the category of adjunctive unilateral acts (such as acts pertaining to the custom or treaty-making process) and, therefore, they have to be discussed in the context of these processes.<sup>42</sup> On the other hand, autonomous unilateral acts are ‘communications under, not about, rules of the existing international order and intend to confirm or to change the legal position of the author State in the application of the respective rule of international law’.<sup>43</sup> According to Zemanek, all unilateral acts performed with the intention to establish rights and/or obligations for the author State fall into this category. Virally made a similar taxonomy. He classified unilateral acts into acts that are part of the treaty-making process, acts that contribute to the formation of custom and acts that have an independent significance in international law.<sup>44</sup>

The distinction between autonomous and non-autonomous unilateral acts has been characterised as ‘a true turning-point in the doctrine of unilateral acts of states’<sup>45</sup> and, with a few exceptions,<sup>46</sup> it has been widely accepted in the literature.<sup>47</sup> Different types of unilateral acts may fall under the category of ‘autonomous unilateral acts’. At first, acts that have come to acquire an independent legal status in international law (having been standardized in form through a process of repetition)<sup>48</sup> belong to this category. These include all ‘traditional’ unilateral acts, such as recognition, protest, waiver, etc. Furthermore, acts that lead directly to the creation of obligations for the author State, such as unilateral acts of a gratuitous character, also belong to this category. These acts are autonomous to the extent that they create obligations for the author State in accordance with its intention and without the existence of a broader contractual framework. Thus, for example, the statements made by France in the context of the *Nuclear Tests* case are autonomous inasmuch as the declarant State intended to become bound according to the content of its statements and irrespective of the existence of a *quid pro quod*.

The distinction between autonomous and non-autonomous unilateral acts has also featured heavily in the reports of the ILC Special Rapporteur on the topic as a tool for delimiting the ambit of the Commission’s work.<sup>49</sup> Similarly, the ILC Working

<sup>42</sup> Ibid.

<sup>43</sup> Zemanek (1997), pp. 193–194.

<sup>44</sup> Virally (1968), p. 155.

<sup>45</sup> Saganek (2015), p. 59.

<sup>46</sup> Eckart (2012), pp. 55–67.

<sup>47</sup> Quoc Dinh et al. (1992), pp. 355–357; Suy (1962), p. 30; Saganek (2015), pp. 59–67; Kassoti (2015), pp. 46–55. Although not employing the term ‘autonomy’ as such, Fitzmaurice also differentiated between unilateral declarations that are unilateral both in form and in substance and declarations that are unilateral merely in form and not in substance. According to him, in the latter case ‘the contractual element is present. The Declaration is unilateral in form, but it is contractual in substance, either because it is one of two or more similar Declarations intended to be interdependent and interlocking, or because it is linked to the action of another State, which either forms the *quid pro quo* for it, or in respect of which it is itself the *quid pro quo*. Such a situation gives rise to a “treaty position” in which the text or texts concerned will clearly fall to be interpreted according to the normal rules of treaty interpretation’. Fitzmaurice (1958), p. 229.

<sup>48</sup> Zemanek (1998), p. 198.

<sup>49</sup> Rodríguez Cedeño, First Report on Unilateral Acts of States, *supra* n. 37, paras. 105–110, 136–137, 170. Rodríguez Cedeño, Ninth Report on Unilateral Acts of States, UN Doc. A/CN.4/500 AND ADD. 1 (1999), para. 129.

Group on the topic stated in 2000 that the ILC's work should cover 'non-dependent acts in the sense that the legal effects they produce are not pre-determined by conventional or customary law but are established, as to their nature and extent, by the will of the author state'.<sup>50</sup> However, there was disagreement among the ILC members as to whether the element of autonomy should be included in the definition of unilateral acts. For instance, Pellet argued that:

The Commission, which wanted to produce a general system of unilateral acts and not a list of special regimes, could leave aside certain unilateral acts, such as ratifications or reservations, because they were governed by special rules, but not because of their lack of autonomy.<sup>51</sup>

As a result, no reference to autonomy is made in the Guiding Principles on the topic and thus, from a technical point of view, it remains unclear whether the Principles cover non-autonomous unilateral acts.<sup>52</sup> In the literature, the only existing book-length study on the topic that has not espoused the distinction between autonomous and non-autonomous unilateral acts for the purpose of delimiting the scope of the subject matter in question is that of Eckart's. According to Eckart:

All acts issued by a single subject of international law having the apparently willed legal effects by themselves are and remain unilateral acts. The question is merely whether the 'default rules' on unilateral acts are going to be applicable to them, or whether a set of special rules already exists and applies to the act in question [...]. The matter is therefore one of *lex specialis*.<sup>53</sup>

Following this line of argumentation, Eckart argues that even an offer, the example *par excellence* of a non-autonomous unilateral act, should be considered as a unilateral act proper since '[i]t does not require another manifestation of will in order to have its legal effect'.<sup>54</sup>

One is left wondering whether the argument against the distinction between autonomous and non-autonomous is much more than legal hair-splitting. At this juncture, one needs to recall the function underpinning any exercise of defining and classifying unilateral acts. The distinction between autonomous and non-autonomous unilateral acts has been widely employed in order to identify a group of more or less homogeneous acts which lend themselves to treatment on the basis of common rules and to exclude acts that are regulated by other legal regimes. Thus, drawing *general conclusions* about unilateral acts on the basis of acts such as offers, reservations or even declarations accepting the jurisdiction of the ICJ would be unhelpful since these acts are regulated (at least partly) by the law of treaties.<sup>55</sup> As the Special Rapporteur noted in his third report on the topic: '[I]t is true that all

<sup>50</sup> Report of the ILC on the work of its 52nd session, UN Doc. A/55/10 (2000), para. 621.

<sup>51</sup> A. Pellet, ILC, Summary Record of the 2525th meeting, UN Doc. A/CN.4/SR.2525, para. 43.

<sup>52</sup> Tomuschat (2008), p. 1491.

<sup>53</sup> Eckart (2012), p. 67.

<sup>54</sup> *Ibid.*, p. 60 (emphasis in the original).

<sup>55</sup> Saganek makes the same point. See Saganek (2015), p. 66.

unilateral acts are based on international law [...]. [T]his very broad approach cannot be the yardstick for determining the autonomy of the act. The point is to exclude, by means of this criterion, acts linked to other regimes, such as all acts linked to treaty law'.<sup>56</sup>

In turn, the fact that an act commonly designated as 'unilateral' is a non-autonomous unilateral act does not preclude the fact that some of the rules pertaining to autonomous acts may apply thereto *mutatis mutandis* and taking into account the legal context within which they arise. This is the position adopted by the ILC in relation to reservations to treaties. In its 2011 Guide to Practice on Reservations to Treaties, the Commission stated in relation to the interpretation of reservations that:

Since reservations are unilateral acts, the Commission based itself on the guidelines for interpreting such acts contained in the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which it adopted in 2006. It should not be forgotten, however, that reservations are acts attached to a treaty, the legal effect of which they purport to modify or exclude. Consequently, the treaty is the context that should be taken into account for the purposes of interpreting the reservation [...]. [T]he exogenous elements to consider in the interpretation of the reservation should include the object and purpose of the treaty, since the reservation is a *non-autonomous unilateral act*, which only produces an effect within the framework of the treaty.<sup>57</sup>

In this light, the distinction between autonomous and non-autonomous unilateral acts remains important. This is so because it provides us with a material criterion for distinguishing between unilateral acts whose legal nature, and thus, their source of normativity, is distinct from that of other acts of unilateral origin that are however regulated by other regimes<sup>58</sup>—without excluding the possibility that some rules pertaining to the former may be applicable to the latter *mutatis mutandis* and taking into account the context within which the latter arise. For this reason, the present article is confined to the identification of rules of interpretation pertaining to autonomous unilateral acts, as these were described above.

As a final note, it needs to be stressed that in practice one may also encounter acts which are unilateral in origin or form but have an important contractual dimension, such as Optional Clause declarations under the ICJ Statute<sup>59</sup> and the World Trade Organization's (WTO's) Schedules of Commitments.<sup>60</sup> These acts are non-autonomous to the extent that there is a strong contractual element at the root of their legal

<sup>56</sup> Rodríguez Cedeño, Third Report on Unilateral Acts of States, UN Doc. A/CN.4/505 (2000), at pp. 60–61, paras. 60–61.

<sup>57</sup> Guide to Practice on Reservations to Treaties with commentaries, adopted by the ILC at its 63rd session, ILC Yearbook 2011, Vol. II, Part 2, pp. 275, 277 (emphasis added). For analysis and comment see Chow (2017).

<sup>58</sup> In the same vein, Saganek (2015), p. 67.

<sup>59</sup> See Art. 36(2) of the Statute of the International Court of Justice, 1945, available at <https://www.icj-cij.org/en/statute>.

<sup>60</sup> Orkhelashvili (2008), pp. 297–298.

normativity,<sup>61</sup> but their unilateral origin/form has an influence on their interpretation (content determination).<sup>62</sup> In this sense, they may be regarded of a *sui generis*

<sup>61</sup> The ICJ has repeatedly stressed the treaty character of Art. 36(2) declarations. In the *Right of Passage* case, the ICJ referred to ‘the consensual bond, which is the basis of the Optional Clause [...]’, *Case concerning Right of Passage over Indian Territory*, ICJ Reports 1957, p. 146. In the *Nicaragua* case, the Court stated that: ‘In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other states accepting the same obligation of compulsory jurisdiction’. *Case concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1984, para. 60. In the *Fisheries Jurisdiction* case, the Court stated that: ‘A declaration of acceptance of the compulsory jurisdiction of the Court [...] is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute [...]’. *Fisheries Jurisdiction case (Spain v. Canada)*, ICJ Reports 1998, para. 46. In a similar vein, the WTO Appellate Body has stressed in relation to Schedules of Commitments that the fact that ‘Members’ Schedules are an integral part of the General Agreement on Tariffs and Trade (GATT) 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members’. WTO Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R, 5 June 1998, para. 109 (emphasis in the original). In *US—Gambling Services*, the Appellate Body underscored that: ‘In the context of GATT 1994, the Appellate Body has observed that, although each Member’s Schedule represents the tariff commitments that bind *one* Member, Schedules also represent a common agreement among *all* Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention’. WTO Appellate Body, *United States—Measures Affecting the Cross—Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, para. 149.

<sup>62</sup> In relation to declarations under Art. 36(2) of the ICJ Statute, the Court has emphasized that their unilateral character needs to be taken into account in interpreting them. In the *Anglo-Iranian Oil Co.* case, the Court argued that: ‘[The United Kingdom] asserts that a legal text should be interpreted in such a way that a reason and meaning should be attributed to every word in the text. It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration’. *Anglo-Iranian Oil Co.* case, ICJ Reports 1952, p. 105. In this light, the ICJ placed particular emphasis on the intention of the author State, *ibid.* More particularly, the Court considered that, in the light of the denunciation by Iran of all treaties with other States relating to the regime of capitulations, it was unlikely that it was the intention of Iran in accepting the Court’s jurisdiction to submit disputes concerning these unilaterally denounced treaties to the jurisdiction of the Court. Note, however, that Judge Read disagreed with the majority of the Court on this point. In his view, the unilateral nature of a declaration made under Art. 36(2) did not justify a departure from principles of interpretation applied to international treaties proper. In his own words: ‘I am unable to accept the contention that the principles of international law which govern the interpretation of treaties cannot be applied to the Persian Declaration [the Iranian Declaration], because it is unilateral. Admittedly it was drafted unilaterally. On the other hand, it was related, in express terms, to Article 36 of the Statute, and to the declarations of other States which had already deposited, or which might in the future deposit, reciprocal declarations. It was intended to establish legal relationships with such States, consensual in their character, within the regime established by the provisions of Article 36’. See the Dissenting Opinion of Judge Read in the *Anglo-Iranian Oil Co.* case, *ibid.*, p. 142. The Court has stressed on a number of occasions the relevance of the intention of the author State in the context of interpreting Art. 36(2) declarations. See *Aegean Sea Continental Shelf* case, ICJ Reports 1978, p. 29; *Fisheries Jurisdiction* case, *supra* n. 61, para. 49. The intention of the author State is to be deduced primarily from the text of the declaration itself (*Aerial Incident of 10 August 1999*, ICJ Reports 2000, para. 44) and the relevant words are to be interpreted in a ‘natural and reasonable way’ (*Anglo-Iranian Oil Co.* case, *ibid.*, p. 104; *Fisheries Jurisdiction* case, *supra* n. 61, para. 47; *Whaling in the Antarctic*, ICJ Reports 2000, para. 36). In this light, Tomuschat concludes that: ‘if there any departure from the general rules of treaty interpreta-

nature.<sup>63</sup> For this reason, they are treated separately to unilateral acts proper in the literature<sup>64</sup>—and thus, they also fall outside the ambit of the present article.

### 3 Interpretation of Unilateral Acts (Law Ascertainment)

Both in international judicial practice and in the literature,<sup>65</sup> the main criterion for distinguishing between unilateral acts with binding effects and those of a political nature is the author State's intention to be bound thereby. In the *Nuclear Tests* case, the ICJ emphasised that: '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, the State being thenceforth legally required to follow a course of conduct consistent with the declaration'.<sup>66</sup> In more recent case law, the element of intention has continued to play a major part in drawing the line between legal undertakings and mere political statements of unilateral origin.<sup>67</sup> It is also important to mention that the element of the intention to be bound

Footnote 62 (continued)

tion in international law, the distance can only be slight'. Tomuschat (2019), p. 719. As far as the interpretation of WTO Schedules of Commitments is concerned, the Appellate Body has consistently treated them as international agreements for the purposes of interpretation, see WTO Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, *supra* n. 61, para. 109; WTO Appellate Body, *European Communities—Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R, 13 July 1998, paras. 82–83; WTO Appellate Body, *European Communities—Customs Classification of Boneless Chicken Cuts*, WT/269/AB/R, WT/286/AB/R, 12 September 2005, paras. 148, 175. See also Orakhelashvili (2008), pp. 477–480. However, in the literature, it has been suggested that, due to their unilateral origin, these commitments should be treated as unilateral acts for the purposes of interpretation; see Van Damme (2007), pp. 13 et seq.; Ortino (2006), p. 124. Cf. Peat who warns against drawing an analogy between unilateral acts and schedules of commitments, Peat (2019), pp. 95–96.

<sup>63</sup> As far as Optional Clause declarations are concerned, in the *Fisheries Jurisdiction* case the ICJ expressly stated, in response to Spain's contention that legal rules relating to the interpretation of declarations made under Art. 36(2) of the Court's Statute may coincide with those governing the interpretation of treaties, that the regime of the Vienna Convention on the Law of Treaties 'may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction'. See the *Fisheries Jurisdiction* case, *supra* n. 61, para. 46. See also, Fitzmaurice (1999), Tomuschat (2019), Kassoti (2015), p. 53. In relation to WTO Schedules of Commitments, see Van Damme (2007), p. 20. See also, ILA Study Group on the Content and Evolution of the Rules of Interpretation, *supra* n. 8, p. 10.

<sup>64</sup> Suy (1962), pp. 142; Eckart (2012), pp. 69–75; Kassoti (2015), pp. 51–54; Saganek (2015), pp. 205–208.

<sup>65</sup> See for example, Eckart (2012), pp. 208–211; Kassoti (2015), pp. 143–146; Saganek (2015), pp. 387–399.

<sup>66</sup> *Nuclear Tests* case, *supra* n. 1, para. 43.

<sup>67</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* n. 3, paras. 257–261; *Case concerning the Frontier Dispute*, *supra* n. 3, paras. 39–40; WTO, Report of the Panel *Case Concerning Sects. 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, fn. 612, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds152\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm); PCA, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland/UK)*, Final Award, 2 July 2003, para. 89, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1158](http://www.pca-cpa.org/showpage.asp?pag_id=1158); *Obligation to Negotiate Access to the Pacific Ocean* case, *supra* n. 5, para. 146; Opinion of Advocate General Sharpston, *supra* n. 4, para. 89.

features heavily both in the reports prepared by the Special Rapporteur<sup>68</sup> and in the 2006 Guiding Principles adopted by the ILC.<sup>69</sup> According to Guiding Principle 1: ‘Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations’.<sup>70</sup> As far as the debate within the ILC is concerned, there was broad consensus among the members that intention was the main condition for attributing legal effects to unilateral declarations.<sup>71</sup> Pellet, one the most vociferous proponents of the Commission’s project to codify unilateral acts, stated during the 2002 debate that:

International law was not based entirely on the expression of the will of the States but it was plain that, insofar as they were bound by treaty obligations and by unilateral acts, it was by their own individual or collective wish [...]. Why were States bound under the treaty mechanism? It was because they wished to be bound and limit their freedom of action. The same was true when States formulated unilateral acts. It was indispensable to orderly relations between States that they should be bound by the expression of their will.<sup>72</sup>

As is the case with international agreements,<sup>73</sup> intention here refers to the objective, i.e. the manifest will of the author State, and not to their subjective, or actual will. In other words, what one is looking for—in ascertaining whether a certain instrument is a binding unilateral act or not—is not what the States really had in mind when they issued a unilateral act—something that would be impossible to fathom—but what was manifested to the outside world.

A close examination of the ICJ’s judgment in the *Nuclear Tests* case reveals that the Court indicated that, as with international agreements, what one is seeking when ascertaining the legal nature of a unilateral act is the ‘objective’ or ‘manifest’ will of the author. Two points in the judgment corroborate this view. The first one relates to the rules stipulated by the ICJ regarding the method of ascertaining the intention to be bound and the second to the references made by the Court to good faith and to other States’ reliance on a unilateral act.

First, the Court, having proclaimed the general rule that a unilateral declaration may be binding if it expresses the intention of its author to be bound,<sup>74</sup> proceeded to state that: ‘intention is to be ascertained by interpretation of the act’.<sup>75</sup> In a later

<sup>68</sup> See for example Rodríguez Cedeño, First Report on Unilateral Acts of States, *supra* n. 37, p. 319.

<sup>69</sup> Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, adopted by the ILC at its 58th session, *supra* n. 6.

<sup>70</sup> *Ibid.*

<sup>71</sup> See for example the statements made by Brownlie, Pambou-Tchivoudva, Chee and Addo in Summary Record of the 2772nd Meeting, UN Doc. A/CN.4/SR.2772, ILC Yearbook 2003, Vol. I, pp. 144–145.

<sup>72</sup> See Summary Record of the 2722<sup>nd</sup> Meeting, UN Doc. A/CN.4/SR.2722, ILC Yearbook 2002, Vol. I, p. 75, para. 54.

<sup>73</sup> Klabbbers (1996), p. 65; Fitzmaurice (2002), pp. 165–168. This proposition is borne out by international judicial practice, see for example *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, ICJ Reports 1994, pp. 120–121; the *Aegean Sea Continental Shelf* case, *supra* n. 62, p. 39. For an overview of the relevant case law, see Kassoti (2015), pp. 134–136.

<sup>74</sup> *Nuclear Tests* case, *supra* n. 1, para. 43.

<sup>75</sup> *Ibid.*, para. 44.

part of the judgment, the method of interpreting the act was clarified: ‘It is from the actual substance of these statements and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced’.<sup>76</sup> The fact that the Court referred to the actual terms of the unilateral instrument and to the context surrounding its making as the means for ascertaining the intention to be bound points to an objective construction of the criterion of intent.<sup>77</sup>

Another part of the judgment that supports this proposition is the part in which the Court made reference to the role of good faith and to other States’ reliance on a unilateral act. The Court stressed that:

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 co-operation [...] Thus, interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.<sup>78</sup>

By appealing to the principle of good faith and to the trust, confidence and reliance that other States may place in what was manifested to them by a unilateral act, the Court clearly supported an objective understanding of the requisite element of intention. Had the Court adopted the contrary view, i.e. that what matters is only what the author had in mind at the time of formulating the act, there would be no reason to refer to good faith and to other States’ reliance. The same opinion, namely that intention in the context of unilateral acts refers to the objective intention of the author State to be bound, also finds widespread support in theory.<sup>79</sup>

How is one to ascertain that a given instrument of unilateral character does or does not express the objective intention of its author to create binding obligations? According to the ICJ this task involves interpreting the intention of the author State in accordance with its content and the context attending its making.<sup>80</sup> It needs to be highlighted that the standard of interpretation to be applied to unilateral acts is a restrictive one. In other words, in cases of doubt, there is a presumption that the author State *did not* possess the requisite degree of intention to become bound. In the words of the Court:

Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound [...]. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.<sup>81</sup>

Adopting a more rigid standard of interpretation in the context of unilateral acts is understandable; the Court was anxious to ensure that obligations going beyond

<sup>76</sup> Ibid., para. 51.

<sup>77</sup> Fitzmaurice (1958), p. 230.

<sup>78</sup> *Nuclear Tests* case, *supra* n. 1, para. 46.

<sup>79</sup> Orakhelashvili (2008), p. 466; Eckart (2012), pp. 208–211; Kassoti (2015), pp. 146–149.

<sup>80</sup> *Nuclear Tests* case, *supra* n. 1, para. 51.

<sup>81</sup> Ibid., para. 44.



those intended by the declarant would not be opposable against it, thereby echoing a well-established principle of international law to the effect that States may not be bound against their will.<sup>82</sup>

The restrictive standard of interpretation applicable to unilateral acts has also been espoused by other international adjudicatory bodies<sup>83</sup> and is also reflected in the 2006 Guiding Principles. According to Guiding Principle 7: ‘A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted *in a restrictive manner*’.<sup>84</sup>

At this juncture, one may legitimately wonder whether the above-mentioned restrictive standard of interpretation put forward by the ICJ and endorsed by the ILC refers to law ascertainment or rather content determination. While the ICJ’s dictum may seem vague at first blush, the context within which it was made strongly suggests that the restrictive standard applies to the phase of ascertaining whether a legal obligation exists (law ascertainment). It is important to stress that the Court’s reference to this restrictive approach comes exactly after it highlights that ‘not all unilateral acts imply obligation’—thereby strongly suggesting that the relevant standard applies in the context of the initial determination of whether or not a State has expressed its intention to be bound.<sup>85</sup> Although the text of Guiding Principle 7 is not very clear, it does seem to point towards the same conclusion: the call for restrictive interpretation is made in the context of providing guidance on *how* to assess whether a given act entails *obligations*. It is noteworthy that, right after the call for applying a restrictive approach, the text of Guiding Principle 7 continues by providing guidance regarding how to interpret the *content* of a unilateral act<sup>86</sup>—something that buttresses the view that the restrictive approach is indeed reserved for the phase of law ascertainment.

The text of a unilateral act is the primary indicator of the author’s (manifest) intention to become bound. According to the *Nuclear Tests* judgment, a commitment phrased in clear and specific terms evidences the intention of the author State

<sup>82</sup> In the *Lotus* case, the PCIJ stated that: ‘International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed*’ (emphasis added). *The Case of the S.S. Lotus*, 1927 PCIJ Series A, No. 10, p. 18.

<sup>83</sup> *Case concerning Sects. 301-310 of the Trade Act of 1974*, *supra* n. 61, para. 7.118.

<sup>84</sup> Guiding Principle 7 of the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, *supra* n. 6, p. 377 (emphasis added).

<sup>85</sup> Eckart also adopts the same view. Eckart (2012), pp. 212–213.

<sup>86</sup> Guiding Principle 7 reads in full: ‘A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated’. Eckart attributes the fact that Guiding Principle 7 is not clear on this to hasty drafting on behalf of the Commission. Eckart (2012), p. 213.



to be bound by its terms in law.<sup>87</sup> The importance of clear and specific wording for the purpose of inferring an intention to be bound was also stressed in the *Armed Activities* case<sup>88</sup> and, more recently, in the 2018 *Obligation to Negotiate Access to the Pacific Ocean* judgment.<sup>89</sup> Expressing an intention to be bound in clear and specific terms does not necessarily involve the use of particular phrases, such as ‘our State undertakes to [...]’ or ‘we solemnly proclaim to [...]’. Rather, the case law indicates that it is sufficient that an intention to undertake a binding commitment can clearly be deduced from the text of the act.<sup>90</sup>

On the other hand, the use of broad terms and the absence of a precise time-frame for carrying out the commitment usually indicate a political act and not a binding undertaking. In the *Armed Activities* case, the Court found that the statement made by the Rwandan Minister regarding the future withdrawals of reservations to human rights treaties was not made ‘in sufficiently specific terms’ and lacked a ‘precise time-frame for such withdrawals’.<sup>91</sup> Thus, it was concluded that the Rwandan statement was too indeterminate to be considered as a unilateral binding commitment.<sup>92</sup> More recently, in the context of the *Obligation to Negotiate Access to the Pacific Ocean* case, the Court relied primarily on the wording of a series of unilateral declarations issued by Chile in order to conclude that they did not incorporate a legal undertaking, but merely showed Chile’s willingness to negotiate Bolivia’s access to the Pacific Ocean.<sup>93</sup> Finally, the significance of clear and specific wording for ascertaining the existence of a legal commitment has also been enshrined in the 2006 Guiding Principles. According to Guiding Principle 7, ‘A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms’.<sup>94</sup>

Apart from the content of a unilateral act, the circumstances in which the act was made can also be indicative of the author’s manifest intention to become bound. On the basis of relevant case law, the remainder of this section will provide an overview of the main factors that are typically taken into account in interpreting the legal effects of a unilateral act. These include: the publicity of the act; the forum in which the act was made; and, finally, the authority that formulated the act on behalf of the author State.

<sup>87</sup> *Nuclear Tests* case, *supra* n. 1, paras. 43, 46, 51 and 53.

<sup>88</sup> *Armed Activities* case, *supra* n. 3, para. 50. The relevant statement here reads ‘Rwanda is one of the countries that has ratified the greatest number of international human rights instruments [...] The few instruments not yet ratified will shortly be ratified and past reservations not yet withdrawn will shortly be withdrawn’. *Ibid.*, para. 45.

<sup>89</sup> *Obligation to Negotiate Access to the Pacific Ocean* case, *supra* n. 5, para. 146. Here, for instance, the Court noted that the wording of Chile’s declaration to the effect that it was willing ‘to seek that Bolivia acquire its own outlet to the sea’ and to ‘to give an ear to any Bolivian proposal aimed at solving its land-locked condition’ was not indicative of a willingness to undertake a legal obligation, *ibid.*, para. 147. See also the Opinion of Advocate General Sharpston, *supra* n. 4, para. 89.

<sup>90</sup> *Nuclear Tests* case, *supra* n. 1, para. 51.

<sup>91</sup> *Armed Activities* case, *supra* n. 3, paras. 50–51.

<sup>92</sup> *Ibid.*, para. 52.

<sup>93</sup> *Obligation to Negotiate Access to the Pacific Ocean* case, *supra* n. 5, para. 147.

<sup>94</sup> Guiding Principle 7, *supra* n. 86.

An important indicator of the manifest intent to be bound is the publicity of the act. The ICJ, in ascertaining the binding effects of the French statements in the *Nuclear Tests* case, repeatedly referred to the fact that those statements were made in public. For example, in paragraph 43 of the *Nuclear Tests* judgment it is stated that: ‘An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding’.<sup>95</sup> The Court went on to add that:

The unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes* [...] In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective.<sup>96</sup>

The evidentiary value of publicity was also mentioned in the discussions within the ILC. In 1998, Brownlie noted that: ‘The criterion of publicity [...] was certainly relevant in terms of evidence and of the identification of those to whom the act was addressed’.<sup>97</sup> Publicity also features in the 2006 Guiding Principles as the main indicator of the intention of the author to assume obligations of a legal nature. According to Guiding Principle 1: ‘Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations’.<sup>98</sup> The commentary to Guiding Principle 1 explicitly states that the public nature of declarations represents an important indication of their authors’ intention to commit themselves.<sup>99</sup>

The forum in which the act was made, and more particularly the fact that a unilateral act is given in the context of judicial proceedings, is also an indicator of the manifest intention of its author to become bound thereby. This was already acknowledged by the PCIJ in the *Mavrommatis Palestine Concessions* case<sup>100</sup> and the *Certain German Interests in Polish Upper Silesia* case.<sup>101</sup> Both cases involved unilateral acts in the form of declarations made in the course of judicial proceedings.<sup>102</sup> In both cases the Court upheld the binding character of the declarations and was keen to stress the added significance that making such declarations before a court entailed.<sup>103</sup>

<sup>95</sup> *Nuclear Tests* case, *supra* n. 1, para. 43.

<sup>96</sup> *Ibid.*, paras. 50–51.

<sup>97</sup> Summary Record of the 2527th Meeting, UN Doc. A/CN.4/SR.2527, ILC Yearbook 1998, Vol. I, p. 59, para. 15.

<sup>98</sup> Guiding Principle 1, *supra* n. 6, p. 370.

<sup>99</sup> Commentary to Guiding Principle 1, *ibid.*

<sup>100</sup> *The Mavrommatis Palestine Concessions* case, 1924 PCIJ Series A, No. 2, p. 6.

<sup>101</sup> *Case concerning certain German Interests in Polish Upper Silesia*, 1926 PCIJ Series A, No. 7, p. 4.

<sup>102</sup> *The Mavrommatis Palestine Concessions* case, *supra* n. 100, p. 37; *Case concerning certain German Interests in Polish Upper Silesia*, *supra* n. 101, p. 13.

<sup>103</sup> *The Mavrommatis Palestine Concessions* case, *supra* n. 100; *Case concerning certain German Interests in Polish Upper Silesia*, *supra* n. 101.

Not only the PCIJ, but also the ICJ, has on numerous occasions acknowledged the fact that a declaration made during judicial proceedings usually evidences the manifest intention of its author to be bound. In the context of the *Pulp Mills* case,<sup>104</sup> Argentina submitted a request for the indication of provisional measures in order to safeguard its rights deriving from the 1975 Statute of the River Uruguay.<sup>105</sup> During the oral proceedings, the agent of Uruguay expressly affirmed the latter's intention to comply in full with the Statute.<sup>106</sup> The Court took note of 'these commitments' and concluded that there were no grounds for it to indicate the provisional measures requested by Argentina.<sup>107</sup> In the *Questions relating to the Obligation to Prosecute or Extradite* case, the Court highlighted the fact that a 'formal assurance' was given before it by the Senegalese representative (to the effect that Senegal would not allow Habré, the former President of Chad, to leave the territory of the country) and thus there was no need to indicate provisional measures.<sup>108</sup>

By way of contrast, the assurances given by Nicaragua and Australia in the context of more recent case law fell short of eliminating the risk of irreparable damage to Costa Rica's and Timor-Leste's rights respectively. It is important to note at the outset that the Court did not question that the undertakings were binding on Nicaragua and Australia as a matter of international law. Rather, they were deemed insufficient since either they violated previous orders of the Court, or the intention of the author State was qualified by certain temporal and substantive reservations.

In the *Certain Activities Carried Out by Nicaragua in the Border Area* case, Costa Rica instituted proceedings against Nicaragua for a number of actions including the construction of a canal (referred to in Spanish as *caño*) across Costa Rican territory.<sup>109</sup> By an order issued on 8 March 2011, the Court indicated that both parties 'shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security'.<sup>110</sup> On 24 September 2013, Costa Rica filed a request for the indication of new provisional measures on the basis of satellite imagery showing that Nicaragua had commenced construction

<sup>104</sup> *Case concerning Pulp Mills on the River Uruguay*, ICJ Reports 2010, p. 14.

<sup>105</sup> *Case concerning Pulp Mills on the River Uruguay*, Order of 13 July 2006, ICJ Reports 2006, paras. 12–20.

<sup>106</sup> *Ibid.*, para. 56.

<sup>107</sup> *Ibid.*, para. 84 (emphasis added).

<sup>108</sup> *Questions Relating to the Obligation to Prosecute or Extradite*, Order of 28 May 2009, ICJ Reports 2009, paras. 72–73. Note, however, that Judge Cañado Trindade has been a vociferous critic of the Court's reliance upon unilateral acts in the course of international proceedings. Although the Judge accepts the binding nature of the unilateral acts of States in the domain of inter-State relations, he argues that these acts are ill-suited to the realm of international legal procedure. In his view, the unilateral nature of such acts creates uncertainties that are inherently incompatible with international legal proceedings. Separate Opinion of Judge Cañado Trindade in *Questions relating to the Obligation to Prosecute or Extradite*, ICJ Reports 2012, paras. 73–78.

<sup>109</sup> *Certain Activities Carried Out by Nicaragua in the Border Area*, Order of 22 November 2013, ICJ Reports 2013, para. 1.

<sup>110</sup> *Certain Activities Carried Out by Nicaragua in the Border Area*, Order of 8 March 2011, ICJ Reports 2011, para. 86.

of two new artificial *caños* in the disputed territory.<sup>111</sup> During the oral proceedings, the Nicaraguan agent expressly stated that his government ‘considers itself bound not to undertake activities likely to connect any of the two new *caños* with the sea and to prevent any person or group of persons from doing so’.<sup>112</sup> Although the Court took note of these assurances, it was not convinced that they removed the imminent risk of irreparable prejudice to Costa Rica’s rights since, as Nicaragua conceded, persons under its jurisdiction had already violated the Court’s previous order.<sup>113</sup> Thus, the Court indicated new provisional measures.<sup>114</sup>

Similarly, the written and oral assurances given by Australia in the context of the *Questions Relating to the Seizure and Detention of certain Documents and Data* case did not suffice to prevent the risk of irreparable damage to Timor-Leste’s rights. The dispute in question concerned the seizure and subsequent detention of certain documents and data from the Canberra-based office of a legal adviser to Timor-Leste by Australian agents in March 2013.<sup>115</sup> The seized material included documents, data and correspondence between Timor-Leste and its legal advisers relating to the pending arbitral proceedings between Timor-Leste and Australia under the Timor Sea Treaty of 20 May 2002.<sup>116</sup> During the course of the proceedings pertaining to the provisional measures request filed by Timor-Leste, Australia gave a series of written and oral assurances to Timor-Leste regarding the seized material.<sup>117</sup> The Court had no difficulty in drawing the conclusion that the undertaking of 21 January 2014 was binding upon Australia, since the latter had expressly and repeatedly manifested its intention to become bound thereby: ‘The Court has no reason to believe that the written undertaking [...] will not be implemented by Australia. Once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed’.<sup>118</sup> However, what was problematic for the Court was that the intention of Australia was qualified by two reservations. The first was of a temporal nature; the Court noted that the commitment of Australia to keep the seized material sealed was only given until the Court’s decision on the request for the indication of provisional measures.<sup>119</sup> Secondly, the Court was also concerned with the national security reservation contained in paragraph 3 of the written undertaking. The reservation opened up a possibility of making use of the seized material for national security purposes, thereby not completely eliminating

<sup>111</sup> *Certain Activities Carried Out by Nicaragua in the Border Area*, Order of 22 November 2013, *supra* n. 109, para. 13.

<sup>112</sup> *Ibid.*, para. 50.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*, paras. 51–56.

<sup>115</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data*, Order of 3 March 2014, ICJ Reports 2014, p. 147.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, para. 38.

<sup>118</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data*, *supra* n. 115, para. 44.

<sup>119</sup> *Ibid.*, para. 46.

the risk of the disclosure of the highly sensitive information in question.<sup>120</sup> Thus, the Court decided to indicate certain provisional measures including ordering Australia to ensure that the seized material would not in any way or at any time be used to the disadvantage of Timor-Leste until the case at hand had been concluded and to keep under seal the seized documents and data until a further decision by the Court.<sup>121</sup>

Finally, the authority that formulated the unilateral act on behalf of the author State is also relevant in establishing whether the act expresses a manifest intention to become bound. The relevant jurisprudence of the ICJ makes it clear that declarations emanating from Heads of States carry a great deal of evidentiary weight. In the *Nuclear Tests* case, the Court stressed that: ‘Of the statements made by the French Government now before the Court, the most essential are clearly those made by the President of the Republic’.<sup>122</sup> Furthermore, in its Order of 28 May 2009—in the context of the *Case concerning Questions relating to the Obligation to Prosecute or Extradite*—the Court indicated that it was understandable for Belgium to become concerned by the statement regarding the possibility of Habré leaving Senegal, since that statement came from the Senegalese Head of State,<sup>123</sup> before ruling that the statements made before it by the representatives of Senegal clarified the previous statement by the Head of State and unequivocally expressed Senegal’s intention not to allow Habré to leave Senegal.<sup>124</sup>

The fact that statements made by Heads of States constitute an indicator of the manifest intention to become bound does not mean that declarations or acts stemming from other authorities are not valid unilateral acts. At this juncture, it is important to differentiate between the validity of a unilateral act and the question of proving a manifest intent to be bound. As far as validity is concerned, the Court made it clear in the *Armed Activities* case that not only Heads of States, but also Heads of Government, Ministers for Foreign Affairs and other representatives of a State in specific fields may formulate binding unilateral acts in areas falling within their competences.<sup>125</sup> However, the fact that a number of State officials may legally bind the State through their unilateral declarations as a matter of law, does not negate the claim made here, namely that international courts and tribunals—in determining whether a unilateral act evidences a manifest intention to be bound—will attach more evidentiary value to statements made by the upper echelons of a State.

To sum up, this section focused on the interpretation of unilateral acts from the standpoint of ascertaining their binding force (law ascertainment). The section began by showing that the author’s objective intention to be bound is the criterion for distinguishing between binding unilateral acts and political acts of unilateral origin. It continued by arguing that ascertaining the author’s objective intention to be

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<sup>120</sup> Ibid.

<sup>121</sup> Ibid., para. 55.

<sup>122</sup> *Nuclear Tests* case, *supra* n. 1, para. 49.

<sup>123</sup> *Questions Relating to the Obligation to Prosecute or Extradite*, Order of 28 May 2009, *supra* n. 108, para. 70.

<sup>124</sup> Ibid.

<sup>125</sup> *Armed Activities* case, *supra* n. 3, paras. 46–47.

bound involves the interpretation of the act in accordance with its content and the circumstances in which it was made and that the standard of interpretation to be applied in this context is a restrictive one. Against this background, it was shown that, in practice, the use of clear and specific wording in conjunction with a set of contextual indicators that include the publicity of the act, the forum in which it was made as well as the authority that formulated the act on behalf of the author State are highly indicative of the intention to undertake a legal commitment by means of a unilateral act.

#### 4 Interpretation of Unilateral Acts (Content Ascertainment)

By way of contrast to the question of interpretation of unilateral acts from the standpoint of ascertaining their binding effect, the question of interpretation of these acts for the purpose of ascertaining their content has received relatively little attention both in the literature and in the relevant work of the ILC. This is the case since, in practice, there have been only a handful of cases where a unilateral act has been found to be binding and thus its content had to be interpreted.

Rodríguez Cedeño took up the issue of interpretation of unilateral acts in his fourth report on the topic. One of the main issues was whether the rule of interpretation contained in the VCLT applied by analogy to unilateral acts or whether it could only serve as a point of reference.<sup>126</sup> The Special Rapporteur pointed to the fundamental difference between unilateral acts and international agreements which ‘resides in the fact that [...] a unilateral act is a manifestation of will of one or more States, in individual, collective or concerted form, in which other States, and in particular the addressee State, do not participate’.<sup>127</sup> The Special Rapporteur argued that legal certainty dictates that in interpreting unilateral acts priority must be given to the intention of the author as this is manifested in the text of the act.<sup>128</sup> Thus, Rodríguez Cedeño suggested a ‘flexible parallel approach’ to Article 31(1) and (2) VCLT<sup>129</sup>—a proposition that found broad consensus among members of the ILC.<sup>130</sup>

Guiding Principle 7 and the accompanying commentary reflect this approach. According to Guiding Principle 7: ‘In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated’.<sup>131</sup>

The accompanying commentary clarifies that:

<sup>126</sup> Rodríguez Cedeño, Fourth Report on Unilateral Acts of States, UN Doc. A/CN.4/519 (2001), paras. 108–110.

<sup>127</sup> *Ibid.*, para. 109.

<sup>128</sup> *Ibid.*, para. 126.

<sup>129</sup> *Ibid.*, para. 108.

<sup>130</sup> Rodríguez Cedeño, Fifth Report on Unilateral Acts of States, *supra* n. 26, para. 126.

<sup>131</sup> Guiding Principle 7 of the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, *supra* n. 6, p. 377.

[B]y analogy with article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, priority consideration must be given to the text of the unilateral declaration, which best reflects its author's intentions. In addition, as acknowledged by the Court '... account must be taken of all the circumstances in which the act occurred', which constitutes an application by analogy of article 31, paragraph 2, of the 1969 Vienna Convention.<sup>132</sup>

In the literature, criticism has been voiced against the limited analogy to the VCLT canon of interpretation.<sup>133</sup> More particularly, Orakhelashvili argues that '[p]ractice instead shows that unilateral acts and statements are interpreted in a similar if not the same way as other international acts'.<sup>134</sup> This line of criticism, however, seems rather misplaced. There are reasons that militate against a lock, stock and barrel transposition of the regime of Article 31 VCLT to unilateral acts. At this juncture, recourse should be had to the ICJ's pronouncements on the rules of interpretation governing Optional Clause declarations. These findings are relevant for all unilateral acts since the Court emphasised how the unilateral character of these declarations impacts on the rules of interpretation applicable thereto.<sup>135</sup> In this line of case law, the ICJ has clarified that:

The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties [...] The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction.<sup>136</sup>

In this context, the Court has expressly stated that the unilateral drafting of the instrument justifies placing particular emphasis on the intention of the author State<sup>137</sup>—an element which is to be deduced primarily from the text of the declaration itself.<sup>138</sup> Thus, Guiding Principle 7 espouses the ICJ's approach to interpretation of unilateral acts; the unilateral character of these acts implies that there is

<sup>132</sup> Commentary to Guiding Principle 7, *ibid.*, pp. 377–378.

<sup>133</sup> Orakhelashvili (2008), pp. 466–468; Eckart (2012), pp. 212–214.

<sup>134</sup> Orakhelashvili (2008), p. 467.

<sup>135</sup> In the same vein, Eckart (2012), p. 215; Fitzmaurice (1999), pp. 130–131. This is also the view endorsed by the ILC Special Rapporteur and the Commission. Although the Special Rapporteur and the ILC considered that the legal nature of Optional Clause declarations is different to unilateral acts proper since the former result in the establishment of an essentially contractual obligation, they have relied on the ICJ's jurisprudence regarding the interpretation of such declarations in order to extrapolate broader conclusions regarding the interpretation of unilateral acts proper—*exactly because* in this line of case law the Court has stressed the unilateral character of these declarations. See for example, Rodríguez Cedeño, Fifth Report on Unilateral Acts of States, *supra* n. 26, para. 123; Commentary to Guiding Principle 7, *supra* n. 6, p. 378.

<sup>136</sup> *Fisheries Jurisdiction case (Spain v. Canada)*, *supra* n. 61, para. 46.

<sup>137</sup> *Aegean Sea Continental Shelf case*, *supra* n. 62, p. 29; *Fisheries Jurisdiction case*, *supra* n. 61, para. 49.

<sup>138</sup> *Fisheries Jurisdiction case*, *supra* n. 61, para. 48; *Anglo-Iranian Oil Co. case*, *supra* n. 62, p. 107; *Aerial Incident of 10 August 1999*, *supra* n. 62, para. 44.



no automatic transposition of the Vienna rule. Instead, exactly because these instruments are not the result of negotiations but of unilateral drafting, emphasis is placed on the intention of the author State as this is manifested first and foremost through the text of the act—also taking into account its context and the circumstances surrounding its making. The arbitral award in the *Laguna del Desierto* case<sup>139</sup> also lends support to the view that the Vienna regime of interpretation does not automatically apply to all international legal instruments and acts. According to the arbitral tribunal:

International law has rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral instrument, an arbitral award, or a resolution of an international organization. For example, the rule of the natural and ordinary meaning of the terms, the rule of reference to the context and the rule of the practical effect are all general rules of interpretation. There are also norms that establish standards of interpretation for specific categories of rules.<sup>140</sup>

The persuasive force of Orakhelashvili's criticism is further blunted if one examines the practice that, according to the author, supports the proposition that unilateral acts are interpreted in a similar if not the same way as other international acts. More particularly, Orakhelashvili relies on the interpretation of the Ihlen declaration in the context of the *Eastern Greenland* case,<sup>141</sup> as well as of the 1921 Albanian declaration in the context of the *Minority Schools in Albania* case<sup>142</sup> in order to substantiate the view that the regime of treaty interpretation applies to unilateral acts too.<sup>143</sup> However, Orakhelashvili simply assumes that these acts are unilateral undertakings—something that does not seem to be the case upon closer scrutiny.

The *Eastern Greenland* case concerned a dispute between Denmark and Norway over the sovereignty of Eastern Greenland. One of the main arguments adduced by the applicant was that the Norwegian Government had, in the past, recognized the applicant's sovereignty over the disputed territory through a series of engagements, including *inter alia* a Declaration made by the Norwegian Minister of Foreign Affairs, Mr. Ihlen, in the context of negotiations with his Danish counterpart.<sup>144</sup> According to the minutes of the discussion between the two Ministers, the Danish Minister indicated the willingness of his government to refrain from raising any objection regarding Spitzbergen at the then forthcoming Paris Peace Conference and, at the same time, requested assurances to the effect that Norway would not oppose the Danish claim over the whole of Greenland at the same Conference.<sup>145</sup>

<sup>139</sup> Arbitral tribunal, *Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy*, RIAA XXII, 21 October 1994, p. 3.

<sup>140</sup> *Ibid.*, paras. 72–73. The arbitral tribunal then went on to specify the rules of interpretation applicable to arbitral awards, see *ibid.*, paras. 73 et seq.

<sup>141</sup> *Legal Status of Eastern Greenland* case, *supra* n. 2.

<sup>142</sup> *Minority Schools in Albania*, Advisory Opinion, 1935 PCIJ Series A/B, No. 64, p. 5.

<sup>143</sup> Orakhelashvili (2008), p. 468.

<sup>144</sup> *Legal Status of Eastern Greenland* case, *supra* n. 2, p. 69.

<sup>145</sup> *Ibid.*, p. 36.



After a few days, Mr. Ihlen replied that ‘the plans of the Royal [Danish] Government respecting the Danish sovereignty over the whole of Greenland [...] would meet no difficulties on the part of Norway’.<sup>146</sup> Having excluded the possibility that the Declaration was an admission of an already existing legal situation, the Court endeavoured to establish whether the statement itself created an obligation of future conduct for Norway. Indeed, the majority of the judges found that this was the case. In the words of the Court: ‘The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs’.<sup>147</sup> Thus, the Court concluded that, on the basis of this oral undertaking, Norway was obliged to refrain from contesting Danish sovereignty over the whole of Greenland.<sup>148</sup>

Although the Court did not mention the formal source of Norway’s obligation, the emphasis given to the contextual framework within which the statement took place (negotiations), to the fact that the declaration was made as a response to a request by the agent of another State, as well as to the interdependence between the Danish claim over Greenland and the Norwegian claim over Spitzbergen demonstrate that the Court viewed the Declaration from a contractual perspective.<sup>149</sup> This opinion is also shared by the majority of international lawyers and the *Eastern Greenland* case features in most textbooks of international law as the standard example confirming the validity of informal agreements.<sup>150</sup> Furthermore, the *Eastern Greenland* case has been consistently referred to by the successive Special Rapporteurs of the ILC on the Law of Treaties as judicial practice in support of the view that the form, written or otherwise, of an agreement does not affect its binding force in international law.<sup>151</sup>

<sup>146</sup> Ibid.

<sup>147</sup> Ibid., p. 70.

<sup>148</sup> Ibid.

<sup>149</sup> See for example Garner (1933); Joint Dissenting Opinion of Judge Spender and Judge Fitzmaurice in the *South West Africa* cases, ICJ Reports 1962, pp. 475–476.

<sup>150</sup> See for example the literature cited in Harris (2010), p. 47, fn. 147; Hollis (2012), p. 24; McNair (1961), p. 10.

<sup>151</sup> In his Report on the Law of Treaties, Special Rapporteur Brierly remarked that ‘the binding nature of oral agreements has been recognised by the Permanent Court of International Justice’ and cited *inter alia* the *Eastern Greenland* case as proof thereof. See Brierly, Report on the Law of Treaties, ILC Yearbook 1950, Vol. II, p. 227. His successor, Lauterpacht, was more sceptical about the value of the judgment in question. In his own words: ‘There is slight—and occasionally exotic—authority in support of the view that a treaty may be the result of an oral agreement. It is not certain to what extent certain passages in the judgment of the Permanent Court of International Justice in the case of *Eastern Greenland* [...] can be regarded as supporting this view. It is probable that, as the fact and the contents of the oral declaration made, in that case, by the Norwegian Minister for Foreign Affairs were not disputed, the Court did not address itself to that question at all’. See Lauterpacht, Report on the Law of Treaties, ILC Yearbook 1953, Vol. II, p. 159. However, this point was not picked up by the next Special Rapporteur of the ILC on the same subject, Fitzmaurice, who concurred with Brierly on the question of the validity of oral agreements and also referred to the relevant passages of Brierly’s Report, including the case law mentioned therein, in support of his position. See Fitzmaurice, Report on the Law of Treaties, ILC Yearbook 1956, Vol. II, p. 117. The next Special Rapporteur, Waldock, was of the same persuasion and mentioned the *Eastern Greenland* case as an instance of State practice confirming the validity and enforceability of oral

Similarly, the 1921 Albanian declaration concerning the protection of minorities made to the Council of the League of Nations is best viewed as a bilateral undertaking, rather than a unilateral act, due to the existence of a pattern of offer and acceptance. In December 1920 the Assembly of the League of Nations adopted a recommendation according to which: ‘in the event of Albania, the Baltic and Caucasian States being admitted into the League, the Assembly requests that they should take the necessary measures to enforce the principles of the Minorities Treaties, and that they should arrange with the Council the details required to carry this object into effect’.<sup>152</sup> Subsequently, Albania was admitted to the League of Nations on 17 December 1920. On 2 October 1921, Albania made a declaration before the Council of the League of Nations concerning the protection of racial, religious and linguistic minorities in its territory.<sup>153</sup> The Council took note of the declaration in a resolution. In 1933 Albania amended its Constitution and provided for the abolition of all private schools—including those used by the Greek minority. This amendment triggered a request for an advisory opinion by the Permanent Court as to whether the decision to abolish private schools was in conformity with the 1921 declaration.

Although the Court did not question the binding force of the Albanian declaration, it carefully avoided pronouncing on its exact legal nature. Nowhere in the judgment does it become clear whether the Court considered it as a bilateral or a unilateral undertaking. According to the Court: ‘The declaration of 2 October 1921 belongs to the numerous category of *international acts* designed for the protection of minorities’.<sup>154</sup>

Upon closer scrutiny, the claim that the Albanian declaration forms part of a reciprocal relationship seems more convincing. First, the text of the 1920 recommendation by the Assembly of the League of Nations was drafted in such a way as to indicate that the declaration was a precondition for the admission of Albania to the League of Nations. More particularly, a close reading of the 1920 recommendation shows that it was construed as an offer to Albania and to other States: if they accepted to issue declarations concerning the protection of minorities in their respective territories, they would be admitted to the League. The proposition that the Albanian declaration fits into the pattern of offer and acceptance is also supported by the text of the advisory opinion: ‘what the Council of the League of Nations *asked Albania to accept*, and what *Albania did accept*, was a regime of minority protection substantially the same as that which had been already agreed upon with other States [...]’.<sup>155</sup> Secondly, the context within which the declaration was made warrants the

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Footnote 151 (continued)

agreements. He stated: ‘In short, without going further into the matter, paragraph 2 acknowledges the existence of oral agreements such as that resulting from the Ihlen Declaration in the Eastern Greenland Case [...] and it puts on record that their omission from the draft articles is not to be understood as in any way affecting the legal position to them’. Waldock, First Report on the Law of Treaties, ILC Yearbook 1962, Vol. II, p. 35.

<sup>152</sup> *Minority Schools in Albania*, *supra* n. 142.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*, p. 15 (emphasis added).

<sup>155</sup> *Ibid.*, p. 16 (emphasis added).

conclusion that it was part of a bilateral exchange. Before the declaration was made, negotiations had taken place between Albania and a representative of the Council of the League and it was only after agreement had been reached, that the declaration was made by Albania.<sup>156</sup> Finally, the UN Secretary-General also endorsed the position that the Albanian declaration constituted in essence the acceptance of an offer made by the League of Nations in his 1950 Study of the Legal Validity of the Undertakings concerning Minorities.<sup>157</sup>

There are further reasons that militate against the view put forward by Orakhelashvili. As mentioned in the introduction, being aware of the dichotomy between interpretation in the context of law ascertainment and interpretation in the context of content determination entails that we are also aware of the impact of the one on the other. This, in turn, allows us to assess the persuasive force of arguments made in one context with reference to the other. *In concreto*, the argument to the effect of applying by analogy the Vienna rule of interpretation to unilateral acts (by way of contrast to simply taking it as a point of reference) is not convincing from the viewpoint of the sources doctrine. In the law of treaties, the goal of interpretation is to provide by objective means the *common* intention of the parties.<sup>158</sup> As Judge Schwebel stressed in his Dissenting Opinion in the *Maritime Delimitation and Territorial Questions* case: “‘The intention of the parties’”, in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To speak of “the” intention of “the parties” as meaning diverse intentions of each party is oxymoronic.<sup>159</sup> By way of contrast, and as the preceding discussion showed, the binding force of a unilateral act originates in the objective intention of its author to be bound *unilaterally*. Hence, the source of the binding force of unilateral acts (the unilateral objective intention to be bound) scaffolds (or should scaffold) how interpreters should approach content determination in the context of unilateral acts. Hence, transposing the interpretative rule of the Vienna Convention into unilateral acts—without taking into account the different context in which these acts occur—would be tantamount to disregarding essential features of the origin and nature of such acts.

In the literature, criticism has also been levelled against the restrictive standard of interpretation of the scope of obligations assumed unilaterally—a standard that (seemingly at least) the Guiding Principles have endorsed. According to Guiding Principle 7: ‘In the case of doubt as to the scope of obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner’. Orakhelashvili and Eckart have criticised this approach arguing that the restrictive standard applies to the interpretation of unilateral acts from the viewpoint of law ascertainment, but not to the interpretation of the obligation’s scope.<sup>160</sup> According

<sup>156</sup> ECOSOC, Study of the Legal Validity of the Undertakings concerning Minorities, UN Doc. E/CN.4/367 (1950), p. 13.

<sup>157</sup> Ibid.

<sup>158</sup> PCA, *Railway Land Arbitration*, Case No. 2012–01, Award of 30 October 2014, para. 43.

<sup>159</sup> Dissenting Opinion of Judge Schwebel in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, ICJ Reports 1994, p. 27.

<sup>160</sup> Orakhelashvili (2008), pp. 467–468; Eckart (2012), pp. 212–214.

to Palchetti: ‘[I]f one accepts the view that unilateral acts must be interpreted restrictively, this would represent a significant departure from the general rules of interpretation applicable to treaties, which only provide a method of interpretation without going to the substance of treaty provisions’.<sup>161</sup>

This criticism is not without merit; there seems to be no evidence to buttress the proposition that obligations undertaken by means of a unilateral act should be interpreted in a restrictive manner. While it is true that the ICJ stated in the *Nuclear Tests* case that ‘[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for’,<sup>162</sup> this statement pertains to the task of assessing whether a unilateral act is binding, i.e. to interpretation for the purpose of law ascertainment, and not to the task of establishing the scope of an obligation resulting from a unilateral act, i.e. to interpretation for the purpose of content ascertainment. This is evidenced by the fact that the call for a restrictive interpretation comes immediately after the Court observed that: ‘Of course, not all unilateral acts imply obligation; but a state may choose to take up a certain position in relation to a particular matter with the intention of being bound—the *intention is to be ascertained by interpretation of the act*’.<sup>163</sup> This leaves little doubt that the restrictive standard of interpretation is to be applied at the initial stage, namely at the stage of ascertaining the legal effects of a unilateral act. Judicial practice also confirms that unilateral acts are interpreted in a restrictive manner; in all these cases, however, the ICJ interpreted the act restrictively at the initial stage of determining whether the act manifested the intention of its author to be bound thereby.<sup>164</sup>

How is then one to account for the position adopted by the ILC? Upon closer inspection, it seems that the phrasing of the Guidelines is the result of hasty drafting rather than an attempt to introduce a restrictive standard for interpreting the scope of obligations assumed by means of a unilateral act. The text of the Guiding Principles itself supports this view. The sentence advocating in favour of a restrictive standard of interpretation is clearly distinguished from the next sentence which states how the content of a unilateral act is to be interpreted.<sup>165</sup> This suggests that the sentence in question does not refer to the task of interpretation from the viewpoint of content ascertainment, but to that of interpretation from the point of view of law ascertainment. In other words, it seems that Guiding Principle 7 urges caution not at the stage of interpreting the content of an obligation, but at the stage of deciding whether or not a State has manifested the intention to be bound thereby. The commentary to Guiding Principle 7 also buttresses this proposition. Point (2) of the commentary which pertains to the restrictive standard of interpretation expressly states that: ‘[t]he interpreter must [...] proceed with great caution in *determining the legal effects of unilateral declarations*, in particular when the unilateral declaration has

<sup>161</sup> Palchetti (2019), p. 97.

<sup>162</sup> *Nuclear Tests* cases, *supra* n. 1, para. 44.

<sup>163</sup> *Ibid.* (emphasis added).

<sup>164</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* n. 3, para. 261; *Case concerning the Frontier Dispute*, *supra* n. 3, para. 40; *Armed Activities* case, *supra* n. 3, para. 52.

<sup>165</sup> For the text of Guiding Principle 7, see *supra* n. 86.

no specific addressee'.<sup>166</sup> It is also worth noting that the method and means of interpretation of a unilateral declaration are tackled in a separate section of the commentary to Guiding Principle 7.<sup>167</sup> The reports produced by the Special Rapporteur further support the argument made here; the references made by Rodríguez Cedeño to the restrictive criterion pertained to the task of ascertaining the binding nature, as opposed to the contents, of a unilateral act.<sup>168</sup>

As mentioned above, cases where international courts have actually found a unilateral declaration to be binding and thus had to interpret its contents are few and far between. Thus, while the Guiding Principles mention context and surrounding circumstances as additional interpretative factors, there is virtually no practice where these were actually employed in order to provide additional textual support. The Special Rapporteur had proposed to lay down a draft article to the effect that 'context for the purpose of interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes'.<sup>169</sup> Furthermore, he proposed to have recourse to an act's preparatory work as supplementary means of interpretation.<sup>170</sup> However, both propositions were abandoned since they did not find favour with the majority of the members.<sup>171</sup>

This is so because in practice such acts do not include a preamble and annexes and on the rare occasion that this may be the case these factors can be taken into account as part of the context—thereby eliminating the need to make a special reference thereto in the Guiding Principles.<sup>172</sup> As far as the issue of preparatory work is concerned, the Special Rapporteur's proposal proved to be much more contentious. More particularly, it was argued that such preparatory work could not be easily accessible to other States—thereby raising questions of legal certainty and inequality. As Pellet stressed during the debate within the ILC:

In the case of treaties it was difficult to judge the exact role of preparatory work in the interpretation and the impossibility of access to some such work often meant that in practice it had to be disregarded. That was even more true with regard to unilateral acts, not only because the preparatory work did not always exist, or was not accessible, but also and chiefly because when it was accessible it was unequally accessible. In the case of treaties all the States which took part in their negotiation or adoption had an equal opportunity to have recourse to the preparatory work, but that was not the case with the preparatory work of a unilateral act, which only the author and not the addressee could in general

<sup>166</sup> Commentary to Guiding Principle 7 of the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, *supra* n. 6, p. 377 (emphasis added).

<sup>167</sup> Point (3), *ibid.*, p. 378.

<sup>168</sup> Rodríguez Cedeño, Fourth Report on Unilateral Acts of States, *supra* n. 126, paras. 126–127; Rodríguez Cedeño, Fifth Report on Unilateral Acts of States, *supra* n. 26, para. 153.

<sup>169</sup> Rodríguez Cedeño, Fourth Report on Unilateral Acts of States, *supra* n. 126, para. 154.

<sup>170</sup> *Ibid.*, paras. 145–148.

<sup>171</sup> Rodríguez Cedeño, Ninth Report on Unilateral Acts of States, *supra* n. 49, para. 157.

<sup>172</sup> Report of the ILC on the work of its 53rd session, ILC Yearbook 2001, Vol. II, Part 2, para. 246; Report of the ILC on the work of its 54th session, ILC Yearbook 2002, Vol. II, Part 2, para. 405.

know about. If one insisted on the role of preparatory work, one was introducing an inequality in the event of divergent interpretation between author and addressee. Express mention of it in a draft article concerning the interpretation of unilateral acts was excessive and could lead to flagrant inequalities between interested States.<sup>173</sup>

In this light, the preparatory work leading to the adoption of a unilateral act is of limited relevance as an interpretative tool—with the possible exception where such work is reasonably accessible to the addressee.<sup>174</sup>

Overall, the picture that emerges is that only a few general propositions can be made in relation to content determination in the context of unilateral acts. At the same time, existing practice suggests putting strong emphasis on the text of the act. Bearing in mind the fact that these acts are not the result of a ‘meeting of minds’ but of unilateral drafting—the extant textualist approach seems justified; in scaffolding the contours of meaning of a unilateral act, the text of the act is the most reliable indicator of the author’s intention. More by way of practice is needed in order to elucidate the exact weight and role to be attached to non-textual elements.

## 5 Conclusion

The article examined the question of interpretation of unilateral acts. It was shown that interpretation in international law serves two main functions; that of ascertaining whether an act has binding force (interpretation as law ascertainment) and that of ascertaining its content (interpretation as content ascertainment). It continued by delimiting the scope of unilateral acts under examination. A distinction was drawn between autonomous unilateral acts with binding effects and non-autonomous unilateral acts that have no binding force and thus fall outside the scope of this article.

The article turned next to the question of interpretation of unilateral acts from the viewpoint of ascertaining their binding force (interpretation as law ascertainment). It was shown that the task of distinguishing between unilateral legal undertakings and mere political statements of unilateral origin necessitates interpreting the act in order to identify whether its author intended to be bound thereby. In this context, intention refers to the objective or manifest intention of a State to be bound—rather than to a subjective, psychological element. Next, a number of indicators of the manifest intent to be bound were identified on the basis of relevant practice. These include the text of the act, the forum in which the act was made, as well as the authority which formulated the act on behalf of the author State.

Against this background, the article continued by addressing the question of interpretation of unilateral acts from the standpoint of ascertaining their content. Due to the scant practice on the topic, only a few general remarks can be formulated on

<sup>173</sup> Statement by Pellet, Summary record of the 2695th meeting, ILC Yearbook 2001, Vol. I, para. 6. See also the statement by Gaja, Summary record of the 2695th meeting, *ibid.*, para. 16.

<sup>174</sup> Statement by Gaja, *ibid.*

this issue by way of orientation. The text of the act is the primary consideration in determining its content—and that its context as well as the circumstances surrounding its making are also interpretative elements that need to be taken into account. Furthermore, the ILC's approach of not applying by analogy Article 31 VCLT to unilateral acts but only using it as a point of reference is justified not only in the light of practice pertaining to the interpretation of optional clause declarations, but also from the viewpoint of the sources doctrine. The article further argues that other potential interpretative tools such as the preamble and annexes of a unilateral act as well as the preparatory work leading to the adoption of a unilateral act are, in reality, of little interpretative relevance. This is the case since, in practice, unilateral acts do not normally include a preamble and annexes and the preparatory work pertaining thereto raises questions of accessibility by the addressee. In this light, more practice is needed in order to elucidate the exact role and weight that should be ascribed to non-textual elements in the context of interpreting unilateral acts.

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## References

- Chow PYS (2017) Reservations as unilateral acts? Examining the International Law Commission's approach to reservations. *Int Comp Law Q* 66:335–365
- Combacau J, Sur S (1993) *Droit international public*. Montchrestien, Paris
- Crawford J (2012) *Brownlie's principles of public international Law*. Oxford University Press, Oxford
- d'Aspremont J (2015) The multidimensional process of interpretation: content-determination and law-ascertainment distinguished. In: Bianchi A, Peat D, Windsor M (eds) *Interpretation in international law*. Oxford University Press, Oxford, pp 111–130
- Dworkin R (1986) *Law's empire*. Harvard University Press, Cambridge
- Eckart C (2012) *Promises of states under international law*. Hart Publishing, Oxford
- Fiedler W (1984) Unilateral acts in international law. In: Berhardt R (ed) *Encyclopedia of public international law*, vol IV. North-Holland, Amsterdam, pp 1018–1023
- Fitzmaurice G (1958) The law and procedure of the International Court of Justice 1951–54: treaty interpretation and other treaty points. *Br Yearb Int Law* 33:203–293
- Fitzmaurice M (1999) The optional clause system and the law of treaties: issues of interpretation in recent jurisprudence of the International Court of Justice. *Austr Yearb Int Law* 20:127–159
- Fitzmaurice M (2002) The identification and character of treaties and treaty obligations between states in international law. *Br Yearb Int Law* 73:141–185
- Gardiner R (2015) *Treaty interpretation*, 2nd edn. Oxford University Press, Oxford
- Garner JW (1933) The international binding force of unilateral oral declarations. *Am J Int Law* 27:493–497
- Harris DJ (2010) *Cases and materials on international law*, 7th edn. Sweet & Maxwell, London



- Harris DJ, Sivakumaran S (2015) *Cases and materials on international law*, 8th edn. Sweet & Maxwell, London
- Hollis DB (2012) Defining treaties. In: Hollis DB (ed) *The Oxford guide to treaties*. Oxford University Press, Oxford, pp 11–45
- Hollis DB (2015) The existential function of interpretation in international law. In: Bianchi A, Peat D, Windsor M (eds) *Interpretation in international law*. Oxford University Press, Oxford, pp 79–110
- Hollis DB (2017) Sources in interpretation theories: an interdependent relationship. In: Besson S, d'Aspremont J (eds) *The Oxford handbook on the sources of international law*. Oxford University Press, Oxford, pp 422–443
- Jacque J-P (1981) A propos de la promesse unilatérale. In: Reuter P (ed) *Mélanges offerts à Paul Reuter: le droit international: unité et diversité*. A. Pedone, Paris, pp 327–345
- Jennings R, Watts A (1992) *Oppenheim's international law*, 9th edn, vol 1: Peace. Longman, London
- Kassoti E (2015) The juridical nature of unilateral acts of states in international law. Brill, Leiden
- Kassoti E, Vatsov M (2019) A missed opportunity? Unilateral declarations by the European Union and the European Court of Justice's Venezuelan Fisheries judgment. *Int J Marit Coast Law* 35:55–81
- Klabbers J (1996) The concept of treaty in international law. Kluwer Law International, The Hague
- Merkouris P, Kammerhofer J, Arajärvi N (eds) (2022) *The theory, practice and interpretation of customary international law*. Cambridge University Press, Cambridge
- McNair A (1961) *The law of treaties*. Clarendon Press, Oxford
- Orakhelashvili A (2008) *The interpretation of acts and rules in public international law*. Oxford University Press, Oxford
- Ortino F (2006) Treaty interpretation and the WTO Appellate Body Report in US–Gambling: a critique. *J Int Econ Law* 9:117–148
- Palchetti P (2019) Evolutionary interpretation of unilateral acts of states and international organisations. In: Abi-Saab G, Keith K, Marceau G, Marquet C (eds) *Evolutionary interpretation and international law*. Hart Publishing, Oxford, pp 91–100
- Peat D (2019) *Comparative reasoning in international courts and tribunals*. Cambridge University Press, Cambridge
- Quoc Dinh N, Daillier P, Pellet A (1992) *Droit international public*, 4th edn. LGDJ, Paris
- Rigaldies F (1980–1981) Contribution à l'étude de l'acte juridique unilatéral et droit international public. *Revue Jurid Thémis* 15:417–451
- Saganek P (2015) *Unilateral acts of states in international law*. Brill, Leiden
- Shaw M (2017) *International law*, 8th edn. Cambridge University Press, Cambridge
- Suy E (1962) *Les actes juridiques unilatéraux en droit international public*. LGDJ, Paris
- Tomuschat C (2008) Unilateral acts under international law. In: Meziou K (ed) *Droits et culture: mélanges en l'honneur du doyen Yadh Ben Achour*. Centre de Publication Universitaire, Tunis, pp 1487–1508
- Tomuschat C (2019) Article 36. In: Zimmermann A, Tams CJ (eds) *The Statute of the International Court of Justice: a commentary*, 3rd edn. Oxford University Press, Oxford, pp 712–798
- Van Damme I (2007) The interpretation of schedules of commitments. *J World Trade* 41:1–52
- Venzke I (2017) Sources in interpretation theories: the international law-making process. In: Besson S, d'Aspremont J (eds) *The Oxford handbook on the sources of international law*. Oxford University Press, Oxford, pp 401–421
- Virally M (1968) The sources of international law. In: Sørensen M (ed) *Manual of public international law*. Macmillan, London, pp 116–174
- Zemanek K (1997) The legal foundations of the international system. *Recueil des Cours* 266:13–335
- Zemanek K (1998) Unilateral legal acts revisited. In: Wellens K (ed) *International law: theory and practice: essays in honour of Eric Suy*. Martinus Nijhoff, The Hague, pp 209–221

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