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The legal character of a unilateral state act

I. Introdution

Among the various more or less informal, or implied sources of international law, the unilateral state act is a peculiar one. It has appeared in international practice for many years, for instance in the form of recognition of a state or government; however the science of international law was not very keen on exploring this phenomenon. Indeed, it was noticed by Grotius or Pufendorf, however the one who examined the matter in more detail was D. Anzilotti in the 1920s.[1].

It was only with the 1974 ICJ judgment on nuclear experiments conducted by France in the South Pacific that the unilateral state act was introduced into the system of international law. The court in that ruling stated with the full force of its authority that a unilateral declaration of a state may exert legal effects in the field of international law. From that moment, international law, with very few exceptions, has shared the dictum of the Court. This judgment as well as the position of the International Law Commission (ILC) on the codification of unilateral states is a central point of reference in the following considerations.

Despite widespread acceptance of unilateral state acts as a source of international obligations for the performer of such an act, doubts remain about the very substance of its legal nature. The lack of a widely accepted definition, and worse yet, many of the known and cited state acts recognized by some internationalists as unilateral acts in the strict sense, by others are treated as established in the negotiating process. An example commonly referred to in the scholarly literature is the so-called Ihlen declaration; this is considered by the Court to be the standard unilateral state act, while the ILC presents it as the result of negotiations between the governments of Norway and Denmark. The rationality of the very basis of the division of unilateral state acts into acts related to international agreements and autonomous acts having legal effects alone, without any connection with other international instruments, is ruled out. And the variety of unilateral state acts seems almost unmanageable, as can be attested to by certain failed attempts at codification undertaken in this matter by ILC.

Lastly, the basic finding of the Court that the unilateral state act can be a source of binding commitments only for its author is becoming increasingly questionable. There are serious arguments that a unilateral state act can, in certain circumstances, become a source of international law and not just a source of international obligations for its creator. V.-D. Degan in his work on sources of international law came to the conclusion that it was difficult to find another branch of international law in which doctrinal con-

[1] See. e.g. V.-D. Degan, *Unilateral Act as a Source of Particular International Law*, "The Finish Yearbook of International Law", Vol. 5 (1994), pp. 150-152 and 156-159, or J.-D. Sicault, *Du caractère obligatoire des engagements unilatéraux en droit international public*, "Revue Générale du Droit International Public" (RGDIP), Tome 83/1979/3, pp. 636-637.

cepts would remain for so long a period in such sharp contradiction with international relations and practice as in the case of unilateral state acts[2].

In this concise overview of various opinions expressed in relation to the aforementioned issue, the author seeks to bring out and illustrate the distinctive, peculiar characteristics of the binding unilateral state act itself, to indicate the basis for its binding force and to draw attention to the possibility of an autonomous – and in some cases even non-autonomous – unilateral act taking on the character of a source of international law, and not just the source of international obligations. Our undertaking certainly does not fully elaborate these issues, but it can bring us closer to a possible solution. While in the general literature as well as in this study various kinds of manifestations of the will of the state are evoked in the form of a unilateral act, the more general findings presented refer, in fact, to only a few of them, such as promise, renouncement, notification and recognition. This narrowing of the findings refers in particular to the considerations contained in *Part IV* and in *General Conclusions*.

II. Conditions of validity of the act

The question of the validity of a unilateral state act is essential for establishing a credible basis for defining such an act of law. Naturally, in the definition it is the most general, basic criterion separating the unilateral state act from other acts and giving it its own distinctive features.

Both jurisdiction and doctrine quite consistently indicate that for the legal validity of a unilateral state the following conditions must be met:

- it must come from a state, more specifically from its competent authorities,
- its content and purpose cannot be contrary to international law,
- state intent must be expressed in a clear and unambiguous manner,
- in the form accessible to addressees[3].

Krzysztof Skubiszewski captures the basic question of validity of a unilateral act in one general statement: „Every autonomous act of the state, in order to be valid, must conform to the fundamental (substantial) norms of international law[4]. In other words, it must be recognized by the system of international law as binding, as being part of this system."

[2] V.-D. Degan, *Sources of International Law,* The Hague 1997, p. 253.

[3] See. e.g., ICJ, Reports 1974, Judgment *(Australia v. France*), p. 18, par. 43. Further quoted without indicating the parties to the dispute. C. Goodman, *Acta sunt servanda? A Regime for the Unilateral Acts of States at International Law* A paper presented at the 2005 ANSZIL Conference, p. 6, or J.-D. Sicault, *op. cit.*, p. 656-661. P. Saganek presents the case somewhat differently, *Akty jednostronne państw w prawie międzynarodowym*, Warszawa 2010, pp. 62-63.

[4] K. Skubiszewski, *Unilateral Acts of States*, [in:] M. Bedjaoui, (ed.), *International Law: Achievements and Prospects*, Paris 1991, p. 230.

1. Derivation from the competent authorities of the state

Like other unilateral acts, both doctrine and ILC seek inspiration in this regard in the Convention on the Law of Treaties. Art. 6 of said convention holds that each state has the capacity to enter into treaties, that is, to incur international obligations. It is considered that this provision could therefore also be applied directly to the unilateral act of a state[5].

Inspired by Article 6 of the Convention on the Law of Treaties is the draft of Art. 3 on unilateral acts, which in the second report prepared by the ILC's Special Rapporteur reads as follows: „Each State has the capacity to perform unilateral acts." The fundamental condition for the validity of such an act is the possibility of attributing it to a particular state. One should also consider the two-level legal basis of a unilateral state act. On the one hand, the procedure for adopting a unilateral state act is governed by national law, while, on the other hand, the validity of the legal effects of such an act is subject to the rigors of international law[6].

The next ILC report upheld the previous findings. However, a detailed analysis has been made of the issue of statements made by heads of state delegations at international conferences. Attention was paid to the great variety of such statements and the accompanying very different intentions and contents. It was agreed in the conclusion that an international conference declaration can only be binding if it is the intention of the state on whose behalf it is submitted. At the same time, it has been observed that the scope of the persons making such unilateral statements on behalf of their country is in practice broadened in comparison with the findings of the Convention on the Law of Treaties. This was reflected in the new draft of Art. 3 entitled „Persons authorized to formulate acts on behalf of the state." In paragraph 1, only head of state, head of government and minister of foreign affairs were mentioned. Paragraph 2 added that, in addition to persons deemed to be authorized to act on behalf of the state, in the practice of states the authorization may also be derived from „other circumstances in which their intention was to recognize a person as authorized to act on behalf of that State for a particular purpose"[7]. Finally, the results of the Commission's deliberations and the findings have been included in point 4 of the *Guiding Principles*:

> A unilateral declaration binds the state at an international level only if it is made by an *authority* with competence in that regard. The heads of state, heads of government and ministers of foreign affairs are competent to formulate such declarations. Other persons representing the

[5] See. e.g. V.R. Cedeño and M.I.T. Cazorla, *Unilateral Acts in International Law*, in*: Max Planck Encyclopedia of Public International Law, Heidelberg 2011*, p. 3, ILC, 2nd Report 1999, pp. 11-13, par. 60-70, ILC, 3rd Report 2000, pp. 12-13, par. 15-27, or ILC, *Guiding Principles applicable to unilateral declaration of states, with commentaries thereto*, 2006 (cited further as *Guiding Principles)* Text in: Yearbook of the International Law Commission, 2006, vol. II, part II, p. 372.

[6] ILC, 2nd Report 1999, pp. 12-13, par. 66-70.

[7] ILC, 3rd Report 2000, pp. 14-17, par. 93-115.

state in specific areas may be authorized to commit it by means of their declarations in areas within their competence[8].

In the commentary on the draft of this article, it was stated that its content was based on „*consistent* practice" of both the PCIJ and the current ICJ, on unilateral acts, and the competence of state bodies to represent and commit the state at international level[9]. It has also been added that the practice of states shows that unilateral declarations creating legal obligations are quite often formulated by the authorities of such states or the government or foreign minister, without the need to invoke their powers to bind the state in the field of international law[10]. In the judgment on the French nuclear tests, the Court included, among others, a declaration by the French Minister of Defense as a statement on behalf of the Government[11].

The Court spoke in its 2006 judgment in *Congo v. Rwanda* (§ 46) on those „other persons" making declarations on behalf of the state. It stated that in the increasing intensity of modern international relations, people representing the state in specific areas may be authorized to commit it if their statements are made „concerning matters within their function (*purview)*". This may be the case with *holders of technical ministerial portfolios* and even *certain officials*[12].

The practice in this regard is somewhat complicated[13]. K. Skubiszewski believes, not without reason, that the situation is clear when a representative of the state receives a clear mandate to take a specific legal act on behalf of the state. However, as he observes, in practice it happens rarely. Then we must look for support in general international law[14].

The issue of lack of or exceeding authority by the author of the unilateral act was considered by the International Law Commission. It was believed that due to the special nature of a unilateral act, a state could express recognition of the act affected by such a defect. This, however, must be done in an explicit manner. In the third report, there was even a draft of the relevant article thus formulated: „A unilateral act formulated by an unauthorized person (...) is deprived of legal power unless it is expressly confirmed by the state." This article was included in the draft of the *Guidelines*[15], but was not included in the final version.

[8] *Guiding Principles*, Principle 4.
[9] *Ibidem*, p. 372-374.
[10] *Ibidem*, p. 373.
[11] ICJ, Reports 1974, Judgment, p. 17, par. 38, 40.
[12] ICJ, Reports 2006, Judgement, p. 347, par. 46.
[13] See for example, K. Zemanek, *Unilateral Legal Acts Revisited*, [in:] K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honor of Eric Suy*, The Hague, 1998, pp. 213-217.
[14] K. Skubiszewski, *op. cit.*, p. 230.
[15] ILC, 9th Report 2006, as Rule 4, p. 2.

Both the Commission and doctrine were well-aware of two important cases of transgression of competence (in the light of national law) of state representatives to make commitments through unilateral action. The declaration of the King of Jordan in the *West Bank* case was considered to have been taken *ultra vires* in light of the Constitution of that Kingdom. Next, however, the validity of this act was confirmed by an appropriate act of domestic law. The second case was the declaration by the Colombian Foreign Minister on Venezuelan sovereignty over the Los Monjes archipelago. Although the Minister clearly exceeded his powers in this matter, the Colombian authorities did not question the validity of his statement in the international arena[16]. This may demonstrate that neither in theory nor in the practice of states is the question of the validity of a unilateral act at the level of international law bound up with its conformity with the law of the country in question. The two referenced cases of unilateral acts incompatible with national law had their impact at the international level before they were validated by national law. In the literature, however, it is arguable that the ICJ showed too much flexibility in recognizing the French Minister of Defense's statement as binding on France. Such recognition can be rated as premature, *rapid*.[17]

In the context of the issue of unilateral acts there is also mention of the law of armed conflict, which empowers military commanders to take certain acts in their dealings with their opponents. One can also raise the issue of the so-called *temporary international persons*, combatants (*belligerents*) and *insurgents* fighting for statehood or power in the state. It is known that the so-called temporary or transitional authorities do not have full powers, which are reserved only for sovereign states. Their international subjectivity is therefore dependent on recognition by other states. This kind of recognition is constitutive. The state granting recognition to the liberation movement or the fighting side may, according to their own will, recognize their unilateral acts if they are within the scope of their authority[18].

It can therefore generally be stated that both theory and practice in this matter, with respect to unilateral acts of states, do not differ from the practice or theory of international agreements. In both cases, the same principle applies to the validity of a legal act.

2. The lawful subject and purpose of the act

Internationalists' opinion on the requirement of compliance of a unilateral state act with international law is maintained rather in the sphere of general statements and indications. C. Goodman, for example, argues that a given unilateral act must be lawful in *nature*.

[16] See *Guiding Principles*, pp. 373-374.
[17] See e.g. J.D. Sicault, *op. cit.*, p. 660.
[18] V.-D. Degan, *Unilateral Act...*, p. 174.

It must have a proper purpose, that is, be possible to fulfil and not be forbidden by law. She underlines that the fundamental principle of the nullity of an unlawful legal act (*ius cogens*) also applies to unilateral acts[19]. V.-D. Degan also briefly states that the general requirements for the validity of unilateral acts are essentially the same as the validity of the treaties, and so: „their content cannot be unlawful by law." This means that it must be "*materially possible* and not forbidden by peremptory norms of general international law"[20]. Therefore, these authors limit the nullity of the unilateral state act to a situation when it violates norms of international law which are absolutely binding. This is essentially the prevailing view in the doctrine.

The ILC followed the general thought of doctrine in formulating point 8 of its *Guidelines*. It states: „A unilateral declaration which is in conflict with a peremptory norm of general international law is void"[21]. The difference between this and the views of doctrine in principle boils down to the association of unilateral validity of an act to the declaration of a state. As in the doctrine, such a requirement of validity was inspired by the Commission in Art. 53 of the Convention on the Law of Treaties[22]. This position of the doctrine and the Commission also complies with international practice and ICJ jurisprudence. The Court's ruling on armed conflict in Congolese territory (*Congo v. Rwanda*) provided for the possibility of recognizing Rwanda's unilateral declaration as invalid in case of its possible non-compliance with a *ius cogens* norm of international law[23].

Igor I. Lukashuk did not concur with this position of the majority of the Commission's members. He tried to convince the Commission that a state could not employ a unilateral act to not only work around universally binding norms of international law, but could also not violate relatively binding norms in that way. According to this member of the Commission, a departure from the latter is possible, but only in relations with other countries and with mutual consent. Therefore, a unilateral act incompatible „with any norm of universal international law must be declared invalid". That is, the state in its unilateral act cannot depart in its relations with other states from any general norm of the applicable international law. To considerable surprise, he adds that unilateral acts „aiming at making changes to existing international law – such as the Truman proclamation – *represent a separate problem*", which should be further considered[24]. Thus, the incompatibility of a unilateral state act with the applicable international law can be interpreted in various ways.

[19] C. Goodman, *op. cit.*, p. 13 and 26.
[20] V.-D. Degan, *Unilateral Act...*, pp. 187-188.
[21] *Guiding Principles*, p. 378, Principle 8.
[22] *Ibidem*, p. 378.
[23] ICJ Reports, 2002, par. 69, *Guiding Principles*, p. 379.
[24] Yearbook of the International Law Commission, 1999, vol. I, p. 189, par. 52, (hereinafter referred to as YILC), P. Saganek, *op. cit.*, p. 128.

Interesting in this matter is the moderate opinion of K. Skubiszewski formulated in his article about the requirements of the validity of a unilateral act. He states that any, and therefore also unilateral, act of a state must be in conformity with the fundamental (*substantial*) principles of international law under pain of invalidity. Such a view on the validity of unilateral acts stemmed from the existing difference between a negotiated treaty and a unilateral autonomous act of the state. This difference lies in the fact that two or more states may *deviate* in their mutual relations even from the „general international law", agreeing to depart in respect of specific legal norms, with the exception of *ius cogens*. No similar departure from the substantive norms of international law can be performed by a state or even a group of states in a unilateral legal act, under pain of nullity of such an act. The same also applies to the relationship between treaties and unilateral acts of states. The latter must comply with their treaty obligations[25]. There seems to be a clear tendency towards developing a hierarchy of norms of international law.

From the logic presented by K. Skubiszewski it follows that there is an essential criterion of narrowing the content and purpose of the unilateral state act, as compared to the generally shared position of scholars and the ILC expressed in the proposed Art. 8 of the *Guiding principles* and the previously mentioned ICJ position. This limitation is undoubtedly the result of a significant difference in the legal nature and role of the treaty in international law as compared to the role of the unilateral state act. It is the result of the legal logical interpretation of unilateral acts in the context of the entire contemporary system of international law. This interpretation is also in line with the emerging hierarchy of norms of this law, while maintaining its consistency and compatibility with the direction of its development.

On the other hand, the extreme view of I.I. Lukashuk that any departure of a unilateral act from any norm of international law makes it *ab initio* invalid, is too rigorous. P. Saganek is right in stating that any departure from *ius dispositivum* – whether *in plus* or *in minus* – requires the consent of a third country not to be taken into account. He believes that a unilateral act of departing from *iuris dispositivi* is binding. It is, however, ineffective to the extent that it tries to impose obligations on another country. It is effective in giving rights[26].

It should be added that the ILC's investigation into the ultimately agreed position on the nullity of a unilateral state act contradicting peremptory norms of international law did not go off without a hitch. This particularly applies the unilateral act of a state

[25] K. Skubiszewski, *op. cit.*, p. 230.

[26] P. Saganek, *op. cit.*, p. 130. This position was taken by the chairman of the ILC – see YILC, 1999, vol. I, p. 54.

which, despite its obvious incompatibility with the general norms of international law in force, is tolerated in the process of the formation of customary law.

As early as during the second and third sessions of the Commission devoted to unilateral acts, it was proposed that the principle of the law of treaties relating to their invalidity, when contrary to the principles of *iuris cogentis*, "should be applied with greater flexibility in the case of unilateral state acts". One of the members of the Commission even stated that he "would not agree that a unilateral act cannot depart from customary law", so from the general principles of international law. He acknowledges, however, that such an act incompatible with universal international law could not have legal effects unless it was accepted by its addressees. He explained that states can derogate from the norms of universal international law by mutual agreement[27]. However, as it is known, such an act unilaterally accepted by other states would lose its unilateral character. It would become an international agreement subject to the regime of the law of treaties.

The Commission's Special Rapporteur, V. Cedeño, referred in the context of the nullity of a unilateral act contrary to international law to the 1945 proclamation by President Truman mentioned earlier by Lukashuk. This proclamation broadly extended the scope of US jurisdiction to its continental shelf. The Rapporteur pointed out to the Commission that it is worth considering this crucial example of practice. In his view, this act "is an important milestone in the development of the international law of the sea". And although it was not in line with the earlier norms of the law of the sea, it played a decisive role in formulating a legal norm when it was accepted by states and then codified in the new Convention of the Law of the Sea. Hence, the Rapporteur draws the following conclusion: it does not seem appropriate to include a norm indicating the nullity of a unilateral act, because of its non-compliance with the universal norm of international law. Indeed, such an act, contrary to the norm of universal international law, is not invalid if other interested or affected States *agree* that although it is not compatible with existing international law, it is "part of the process of originating a new customary standard, and it was neither rejected nor protested by other states"[28].

In this interesting but somewhat brief report by the Commission's Rapporteur on the subject of a unilateral act that is contrary to a universal norm of international law, the following statement is particularly significant.

A unilateral act of a state incompatible with a universal norm of international law is invalid and will not have legal effects unless the states *agree* to it in some way or other. However, such recognition may result simply from a lack of protest or rejection. This could mean that silent tolerance is enough for it to become meaningful. The presentation

[27] ILC, 3rd Report 2000, p. 20, par. 152 and p. 22, par. 163.
[28] *Ibidem*, p. 22, par. 164-166.

of the role of a unilateral act of a state incompatible with universal international law in the process of establishing a new norm of international law should not constitute at present a particular novelty (*novum*). As V.-D. Degan admits, "customary international law has developed in certain important areas, mainly through unilateral practice and state acts. This applies in particular to areas of the law of the sea such as fishing, neutrality, or customs zones on the waters adjoining the land"[29]. Contemporary confirmation of the importance of such unilateral acts of government can be found in the dispute over the Norwegian Decrees of 1812 and 1869 or in the UK-Icelandic fisheries dispute[30].

It is difficult not to agree with the Rapporteur of the Commission, V.R. Cedeño, who tried to convince its members that even a unilateral act incompatible with the universal norm of international law could prove *valid* unless it was opposed or rejected by other states. This position finds obvious confirmation in international practice and does not seem to contradict the spirit of international law. This system is derived and based on the sovereign will of states. By not protesting, they voluntarily agree to a new legal regulation. Such a regulation, however, must emerge not from an unlawful act, but rather from a period of tolerated practice initiated by such act and must take the form of a customary norm.

3. Autonomy and unilateralism

A. Autonomy

The issue of autonomy has already appeared in the first report of the ILC rapporteur debating the special features of a unilateral state act. It was acknowledged that the autonomy of a unilateral act is an essential criterion for this type of act, and it was emphasized that such a view is shared by most authors[31]. Additionally, it was noted that a standalone unilateral state act should be examined from two different points of view. Firstly, it should be understood in terms of its relation to other legal acts or other statements of will, whether prior, simultaneous or subsequent. Secondly, the autonomy of the will must be interpreted in the context of the commitment it creates[32].

Despite the recognition of such an important role of autonomy in formulating the definition of a unilateral state act, the third report of the Special Rapporteur already expressed doubts as to whether this determinant should be included in the definition of a unilateral act. The problem was explored further. It was emphasized that the criterion of the autonomy of a unilateral act should not be understood too broadly. Although

[29] V.-D. Degan, *Unilateral Act.…*, p. 149-150.

[30] See. e.g., *Ibidem*, p. 149, K. Wolfke, *Custom in Present International Law*, 2nd ed., Dordrecht 1993, p. 149, or P. Saganek, *op. cit.*, p. 35.

[31] ILC, 1st Report, 1998, p. 26, paragraph 137.

[32] *Ibidem*, par. 136-139.

a piece of legislation may indeed be somehow related to prior norms, in particular the norms of universal international law, an overly broad view of such a relationship cannot be a determinant in establishing the autonomy of a unilateral act. This is rather related to the use of this criterion in the exclusion of acts associated with other legal regimes, with acts related to the law of treaties[33].

The second report referred to the discussion that took place in the Sixth Committee of the UN General Assembly, where autonomy was presented in the sense that a unilateral, autonomous act could have legal effects in the field of international law without the need for acceptance by other states or some other way of reacting to them. This observation was considered very important in arriving at the definition of a unilateral act[34]. The opinions varied on the issue of the inclusion of autonomy in the definition of a unilateral act[35].

A different view was shared by the working group set up in 1999 within the Commission. Some of its members were of the opinion that the notion of autonomy of a unilateral act is not important enough to be included in the text of the definition of a unilateral state act. It has a rather secondary meaning, so it should be omitted in formulating the definition. It was argued that if a piece of legislation is unilateral, then there is a presumption that its legitimacy is already there, and that is sufficient[36]. However, the problem was further studied.

Finally, the term "autonomy" was not included in the definition of a unilateral act, assuming that these acts were independent in the sense in which the ICJ stated in its ruling on French nuclear tests. They are independent of other regimes and "can have legal consequences regardless of whether they are accepted by their addressees, which reflects one form of autonomy..."[37]. Autonomy is therefore the criterion of a unilateral act that produces legal consequences for itself without linking it with other acts or other entities.

Naturally, the Commission debated the issue of the autonomy of a unilateral act based on relevant literature, in which there is a quite consistent view that the autonomy of a unilateral act signifies its ability to achieve its intended effect without needing to be associated with any other manifestation of will[38].

This issue is introduced exceedingly well by E. Suy, who summarises matters in three points. Firstly, the autonomy of a unilateral act means that it produces legal consequences by itself and not as an element of a negotiated process. Secondly, the autono-

[33] ILC, 3rd report, 2000, p.11, par. 60 and 61.
[34] ILC, 2nd Report, 1999, pp. 9-10, par. 47.
[35] ILC, 3rd Report, 2000, p. 11, par. 63 and 64.
[36] *Ibidem*.
[37] *Ibidem*, 5th Report, p.13, par. 53-54 and p. 12, par. 52
[38] See. e.g. G. Venturini, *La porte et les effets juridiques des attitudes et des actes unilatéraux des états*, RCADI, 1964, II, t. 112, pp. 367, 400, C. Goodman, *op. cit.*, p. 17, or E. Suy, *Les actes juridiques unilatéraux en droit intérnational public, Paris*, 1962, p. 11

my of a unilateral act means that it produces legal effects without the need for a similar act by another state or states. Thirdly, a unilateral act which is part of a negotiating process cannot be considered autonomous if the legal effects are the result of treaty provisions arising either from or without interoperability with other unilateral acts. As an example, E. Suy indicates ratification, accession, reservation, or denunciation of the treaty. These are not unilateral acts in the strict sense. They are defined in the scholarly literature as *adjunctive unilateral acts*[39].

Karl Zemanek presents the problem as follows: "Adjunctive acts are part of the process of contracting or creating custom and should be assessed in the context of these processes." On the other hand, unilateral autonomous acts are "*communications under, not about, rules* of the existing legal order and are intended to confirm or to change the legal position of the state being authored by applying the relevant norms of international law"[40]. The strong autonomy of the unilateral act is emphasized by J. Charpentier. It is precisely because of its failure to fulfill these conditions that it excludes from any involvement acts aimed at the creation or revision of the conventions of states such as ratification, accession or reservation. For example, simple accession to a treaty that is formally a unilateral act is intended to involve its author in a conventional way. This author emphasizes that the characteristic feature of unilateral autonomous act is *un engagement sans contrepartie*[41].

In short, it can be said that the autonomy of a unilateral act lies in the fact that the act itself produces legal effects and thus is therefore an autonomous source.

B. Unilateralism

In connection with the definition of a unilateral act, the issue of its unilateral nature was also considered within the Commission. Reference was made in this regard to the literature in which there was no significant difference between the authors presenting unilateralism as the "expression of will formulated by the subject matter of the international legal order with a view to producing legal effects at international level." It was found that for some authors 'unilateral acts are an expression of the will of a single legal entity, and for others unilateral act derives from a *single expression* of will and creates standards applicable to other subjects not taking part in the formulation of such act[42].

[39] E. Suy, *The Unilateral Acts of the United States of America, as a Source of International Law: Some New Thoughts and Frustrations*, [in:] *Droit du pouvoir, pouvoir du droit, Mélangs offerts à Jean Salmon*, Bruxelles 2007, pp. 632-633.

[40] K. Zemanek, *The Legal Foundations of the International System*, RCADI, vol. 266 (1997), pp. 193-195, E. Suy, *Unilateral Acts* ..., pp. 633-634.

[41] J. Charpentier, *Engagements unilatéraux et engagements conventionnels: Différances et convergences*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century:Essays in Honour of Krzysztof Skubiszewski*, The Hague 1996, pp. 371-373. E. Suy, *Les actes* ..., p. 126.

[42] ILC, 5th Report, 2002, pp. 12-13, par. 57.

Eric Suy's version of the definition of the nature of an unilateral act is as follows:

> Unilateral legal acts are declarations of will derived from one subject of international law aiming at producing legal effects. The characteristic feature of a legal unilateral act is that it contains a declaration of will of only one subject of international law and this declaration produces effects without the participation of other subjects of international law[43].

Camille Goodman clarifies this issue in the sense that the unilaterality of a legislative act is above all not the number of its authors, but their position in relation to the legal norms established in that act. This shows that while in bi – or multilateral treaties their creators are on par with all their subjects, in the unilateral commitment its creators become *promissors* of commitments made in favour of the beneficiaries of this standard. As an example, a joint declaration issued by the presidents of Venezuela and Mexico on August 3, 1980, which establishes a program of energy cooperation for the countries of Central America and the Caribbean, includes the acceptance of legal obligations by the two declaring states in favor of non-participating third countries in formulating this declaration[44]. The benefits of this act are derived only by its recipients. There is no reciprocity.

Jean-Didier Sicault confirms that in the text of the treaty there will always be an idea of mutual benefit sought by its parties. The opposite is the case when considering a unilateral obligation. There is no reciprocal benefit. The objective, however, is essential. It is necessary to go beyond the strict text of the act in which the author's obligation is based in order to understand its true objective. Then, it will turn out that the unilateral commitment contains only an obligation for its author or authors. There will be no indication of mutual benefit to the author of the commitment, which would be obvious if the text were negotiated[45].

It may be, however, that such a suggestion of looking beyond the text of a unilateral act or of the circumstances in which it was undertaken may not necessarily lead to the same result. Based on the example of the Ihlen's declaration, Goodman claims that if we take such a broad perspective on the formal text of the very declaration, it will often be possible to find other texts that can be linked to the one at hand. Then *the concept of external reciprocity* can be applied so that we may be able to perceive an agreement or bilateral character in almost every unilateral commitment[46]. Similar extremism would be seen in the multilateral treaties of a series of unilateral acts expressing consent to com-

[43] E. Suy, *Unilateral Acts ...*, p. 634. In his earlier work, he presented this in three points. The unilateralism of an international legal act depends on three conditions: 1) origin from one legal entity; 2) cannot be dependent on another legal act in their consequences and 3) cannot create obligations for other states; *id*., *Les actes* ..., p. 44. There is no mention of commitments in the new definition.

[44] C. Goodman, *op. cit.*, p. 7; E. Suy, *Les actes ...*, p. 126.

[45] J.-D. Sicault, *op. cit.*, p. 643.

[46] C. Goodman, *op. cit.*, pp. 7-8. The author invokes the publication of M. Virally, *Le princes de réciprocité dans le droit international contemporain*, 122 RCADI 46 (1967 III) and J.-D. Sicault, *op. cit.*, pp. 29 and 643.

mitments, such as signature, ratification or accession[47]. The author rightly recommends preserving sensible moderation in the evaluation of a unilateral act in connection with its too-broadly defined context. If a given legal measure can itself produce legal effects, it should not be excluded from the category of autonomous, unilateral acts[48].

It is true that an international agreement cannot be understood as a coincidence of various unilateral acts. But can a one-sided act, authored by two or more states, not raise doubts about its unilateral nature? Is it actually not too similar to agreements to the benefit of third countries? After all, these states must negotiate their obligations with the addressees of their agreement. On the other hand, it may be assumed that although the content of the act was negotiated, it was without its beneficiaries and was issued as a unilateral act.

4. Intention (will) of the state

The question of the legal nature and role of the state's intentions in its unilateral act was laid out by the ICJ in a rather decisive tone in the ruling on French nuclear tests. However, the ICJ did not derive its general findings directly from statements by representatives of the French government. The authorities did quite the opposite. The declarations made by the French sought to clarify and justify their legal character in the context of contemporary legal knowledge in this area. It was stated explicitly: "Before considering whether the declarations made by the French authorities correspond to the subject matter of the [Australian – J.K.] complaint ... first, it is necessary to establish the status and content of these declarations at international level"[49]. And then it was added: "There is a well-established view that declarations made through unilateral acts concerning legal or factual situations may create legal obligations as a result"[50]. In such a categorical and unequivocal statement of the Court one can sense a certain hint of exaggeration. Before the judgment was handed down in 1974 it was difficult to find in the science and practice of international law a "well-defined view" of the subject. Earlier, scholars were not much interested in this issue and had rather divergent views. On the other hand, there was quite a consistent view indicating that after the 1974 ruling of the Court on that subject, the science was revived[51].

The Court declares under what conditions a unilateral intention and state declaration may become binding:

[47] *Ibidem*, p.8. The author cites the publication quoted above: K. Zemanek, *Unilateral…*, pp. 210-211 and A.P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AJIL, I, 1977, p. 8.

[48] C. Goodman, *op. cit.*, p. 8, similarly J.-D. Sicault, *op. cit.*, p. 645, or G. Venturini, *op. cit.*, p. 400.

[49] ICJ, Reports 1974, Judgement, p. 18, par. 42.

[50] *Ibidem*, p.18, par. 43.

[51] See. P. P. Rubin, *op. cit.*, p. 7, 22, and especially 24, H. Thirlway, *The Sources of International Law*, Oxford 2014, pp. 44-48.

> When the intention of the state making the declaration is binding in accordance with its terms, such **intent shall give that declaration the character of a legal obligation** [emphasis J.K.] in the sense that the state becomes henceforth obliged to act legally from the declaration made[52].

The Court decided to make this rather categorical opinion even more precise. Namely, as noted by P. Saganek, in its ruling on the case of *Burkin v. Mali* the Court quoted the above-mentioned *passus* of its 1974 judgment, adding at the outset the important word "only"[53]. Thus, according to the Court, "only" the relevant intent of the state can give its unilateral declaration the power of a binding obligation.

Not all unilateral acts, however, contain a clear and unambiguous intent on this issue. Hence, the legal nature of the state's intention expressed in its declaration "must be determined by the interpretation of the act"[54]. According to the Court, such an interpretation of intention should be restrictive, that is to say, primarily to assess the subjective intention itself, taken by the state without a negotiating context. Nevertheless, the Court considers it necessary to include in this restrictive interpretation of the state's intentions the circumstances that accompanied its taking, and the effects it may have on international relations. In the case of the French Government's declarations, the Court stated that they were not *in vacuo*. They concerned a specific important issue and were publicly announced, even *erga omnes*. Thus, the nature and legal effects of these declarations "must be assessed in the general framework of security of international relations, taking into account the sphere of trust and credibility of such crucial factors in relations between states"[55].

It was not until the assessment of the legal validity of the French Government's subjective intentions, taking into account the circumstances in which this intention was manifested, that allowed the Court to recognize the declarations made by the French Government as credible, as binding that government in the sphere of international law. The critical role attributed by the Court to the circumstances accompanying intentions seems to indicate their importance in determining the legal character of the unilateral act. This happens, however, only when the intention expressed by the state is not sufficiently clear and raises doubts as to its purpose and legal nature.

The doctrine of international law, of course, also raises the intention of the state as a constitutive criterion of a binding unilateral act. Some authors simply end up repeating the Court's findings on this matter, while others seek to apply certain conditions with respect to the state's intentions without altering the substance of the Court's findings. It is therefore emphasized that the intention of the state to commit itself must be stated

[52] ICJ, Reports 1974, Judgement, p. 18, par. 43.
[53] ICJ, Reports 1986, p. 573, par. 39, P. Saganek, *op. cit.*, p. 365-366.
[54] ICJ, Reports 1974, Judgement, p. 18, par. 44.
[55] *Ibidem*, p. 20, par. 50 and 51.

in a pronounced way and be "specific in its content", devoid of defects and of an unconditional and definitive nature. The last prerequisite is generally understood in a sense that if the right is reserved by a country to withdraw their declaration after some time, then it can be concluded that it has not committed a legally binding obligation at all[56].

As mentioned before, there seems to be a common view claiming that since the power of a unilateral state act arises independently of the will of the addressee, then the origin of such an act derives from the voluntary attitude of its founder. It is voluntarism that results in detachment from the will of the possible recipient. On the other hand, it is stressed that the conduct of such a state is, nevertheless, subject to assessment by other entities, or at least observable by them. Hence, the question arises whether the element of will suffices to fully determine the legal effect of a unilateral state act. It may seem difficult at times to know whether the legal effect of a declaration of a unilateral state is a direct consequence of a manifested intention of the act's formulator, or whether the expectation of the other states concerned is fulfilled[57].

By sharing the essential findings of the Court on the role of state intentions in a unilateral act, however, various doubts arise as to the proper understanding of the manifested intention. There is a certain dose of anxiety in this regard, especially when it comes to the need to interpret the declared intent of the state, which is almost in every case individual. The question arises on what grounds one should consider it – as rather a declared or true, viable, intention. J.-D. Sicault refers in this regard to the Convention on the Law of Treaties. He notes that the Convention speaks quite extensively in favour of the system of declared will, albeit with clear reference to the context, purpose of the treaty and practice. He argues that such a view also exists in international jurisdiction, where a decisive preference is given to the will as declared. It is not, however, ruled out that, if necessary, the true intention of the parties to the treaty should be examined[58].

The author aptly notes that the difference is significant in the interpretation of the intentions of the state expressed in a unilateral act and in a bilateral or multilateral treaty. The intention expressed in the treaty is the result, very pendulous at times, of a negotiation process. This can facilitate determination of the negotiators' intentions. In contrast, the difficulty in pursuing the proper intention expressed in a unilateral act lies in the fact that the actual will can only be known to the author of the act in question. If they do not express their will clearly and unequivocally in a written or oral statement, neither the

[56] See. e.g. V.-D. Degan, *Unilateral Act*, *op. cit.*, pp. 171-172, W. Fiedler, *Unilateral Acts in International La*w, [in:] R. Bernhardt (ed.), *Encyclopedia of Public International Law*,Vol. 4, North-Holland, 2000, vol. 4. p. 1021, J. Charpentier, *op. cit.*, p. 373-375.

[57] See. e.g. A. Kozłowski, *Estoppel jako ogólna zasada prawa międzynarodowego*, Wroclaw 2009, pp. 71-72.

[58] J.-D. Sicault, *op. cit.*, pp. 647-648.

addressee nor the interpreter can have any means to fully understand it. In this situation, the addressees of the unilateral act have to perforce rely on the will to be declared[59].

Given this, the fundamental difference in the interpretation of treaties and unilateral acts is emphasized, considering the particular role played by the acts ascribed to the circumstances accompanying the manifestation of the will of the state. It has already been accepted in the literature that, in relation to the interpretation of a unilateral act, the role of the context and the circumstances in which the State's intent has been declared must be considered to a large extent[60].

Christian Eckart's position on the will or manifestation of the will is to be drawn directly from the paragraph on the French Declaration, which reads: "The legal consequences of a unilateral act must be deduced *from the actual substance* of these declarations and the circumstances surrounding them." (ICJ, Reports 1974, p. 20-21, par. 51). In his view, this statement from the Court indicates that the only sensible approach to the validity (*value*) of a statement is to rely on the "declared intention", that is the "manifested will of the state." It would be very difficult to come up with a possible, hidden, current will that the state had at the time of making its declaration. No one can know what a person is, and even more so as a state as an abstract and complex legal entity *really and actually intended when making a statement*[61].

In addition, according to Eckart, internal motives cannot play a greater role in the international law situation of stability and confidence in the declarations of a state. Such statements should therefore be judged according to their content and *at face value*. In the end, however, he believes, as well as others, that there may be special circumstances in which not only one can, but even the real intentions of the state must be sought by appropriate interpretation[62].

Proponents of the will of the real author of the unilateral act, however, argue that since intent is a constitutive element of the obligation of a unilateral state, the text itself, that is, the declared will, cannot be taken as the expression of a real intention. In some cases, one cannot count only on the tone of the will expressed in a written or oral statement, that is the will as declared. On the other hand, they also agree that with a view to elementary legal security we should, or even must, rely on the declared will[63].

Krzysztof Skubiszewski states that for the validity of a unilateral act, the will of the state expressed in it must "be" a *true* will. He does not, however, indicate how to reach

[59] *Ibidem*, pp. 647-648.

[60] V. R. Cedano and M.I.T. Cazorla, *op. cit.*, p. 5.

[61] Ch. Eckart, *Promises of States under International Law,* Oxford 2012, pp. 209-210.

[62] *Ibidem*, P. 210-211. This author devotes much attention to the interpretation of the state declaration, *ibidem*, pp. 211-218.

[63] J.-D. Sicault, *op. cit.*, pp. 647-648.

it, how to determine it. He merely states that it cannot point to any possible future behaviour of a given state without stressing a binding obligation to act. He nevertheless draws attention to the fact that the intention of the state to undertake such a commitment may come not only from the content of the oral or written statement. It is equally possible to derive it from the aims, character, particularities or circumstances surrounding the creation of the statement. Also, the subsequent conduct of the state may indicate that it intended to commit itself in a certain way. State intentions can therefore be sought in various manifestations of its behavior. In any case, however, the intention must be clear and there can be no doubt in this matter. Otherwise it could not be considered binding[64]. It is stressed that an impediment to the true and proper intent of the state also results in the absence, even in the general indication, of a particular form of unilateral act[65]. J. Charpentier says that the only requirement specified by international law in this matter is to communicate that intention to its intended recipient[66].

The Commission also took into account that the intention expressed by the state was subjective. It is of a psychological nature. The law in this case is created by subjective positivism. However, they were of the opinion that the state's intention to be legally effective must be a real, consciously and fully understood will. Hence, it does not agree with the view expressed in the Sixth Committee of the United Nations General Assembly that a State may form a unilaterally binding legal act without understanding its intention (A/CN. 4/505, item 119). The Commission is of the opinion that the intention of the creator of the unilateral act is the foundation of this act and explains that, since we recognize the act "manifests and reflects the intent of the state", it must be undertaken with a full understanding of its lawmaking endeavour. Therefore, there is no visible hint of a unilateral act if the state does not understand that it takes on responsibility in the form of certain international obligations. A unilateral act formulated by the state without full awareness of its substance and its legal effects is, in the Commission's view, rather a behaviour or "attitude" which, although it may have legal effects, cannot be regarded as legally binding. An important element in the legal act is the "determination of the will" of the state[67].

Taking into account the position of the Court and of the scholarship, the Commission stated its findings in this regard as follows: "Declarations made publicly and manifesting the will to commit can ultimately create legal obligations"[68]. So that cannot be the will itself as such, but it must be expressed publicly. Then it can only bind the legally

[64] K. Skubiszewski, *op. cit.*, p. 232.
[65] J. Charpentier, *op. cit.*, pp. 371-372, or V.-D. Degan, *Unilateral Act*…, p. 190.
[66] J. Charpentier,*op. cit.*, pp. 371-372.
[67] ILC, 3rd Report 2000, p. 7, par. 34.
[68] *Guiding Principles*, Principle 1.

concerned country. It must be determined and aware of legal consequences. It was confirmed in the 7th principle in its first sentence, which reads: "A unilateral declaration creates obligations for the state which formulates it only when it is expressed *in clear and specific terms*". Therefore, the will of the state must be expressed in a convincing way, or at least in a way that can be interpreted by the act or state.

Sometimes it is not just the difficulty of reaching the real intentions of the state manifested in its broad and varied context. More or less categorically, the constitutiveness of the will of the state itself is questioned. This subjective intention of the state is attempted to be complemented by some additional elements that interact with it in creating a binding legal norm. This is to be shown in some way the trust of the addressee of the unilateral act, the display of some "reciprocity", or, finally, the particular role attributed to the circumstances in which the act was taken. It is characteristic here to derive a new insight into the role of intent in a unilateral act of the very substance of the Court's ruling on the French declarations. It gives rise to a legal notion that is not entirely or completely incompatible with the Court's fundamental statement that the unilateral intention of the state binds the state at the time of its manifestation[69]. So that it has a stand-alone, autonomous constitutive character.

The delicate relativisation of this *dictum* of the Court is already seen in C. Goodman's view. It binds the various parts that make up the concept of unilateral act which the Court has invoked in its ruling. And on this basis, it proves that in a unilateral act the Court combines the subjective will of the state with the "objective standard". This occurs when the Court itself states that "the decisive intent" is not the intention expressed in the French declarations, but the intention "derived from the good faith, the trust of other States concerned and the circumstances in which that declaration was made" (ICJ, Reports 1974, s. 253, paragraph 43). According to C. Goodman, in these words the Court introduced an "objective standard", which made "the decisive intent not to directly derive from the French authorities, but derived precisely from the good faith, trust and circumstances of the French declarations"(ICJ, Reports 1974, Judgment, p. 14, paragraph 43)[70]. The Court's conclusions also claim that the intent of the State is only a condition of the validity of a unilateral act and is subject to the fundamental principle of good faith (ICJ, Reports 1974, Judgment, p. 19, paragraph 46).

Sergio Carbone is also of the opinion that, in fact, the Court's ruling on the French Declaration (ICJ, Reports 1974, Judgment, p. 474, paragraph 1) shows that a unilateral obligation will not become binding only on the sole intention of the state. This can only happen on the basis of a set of circumstances accompanying such intentions. It is these

[69] ICJ, Reports 1974, Judgement, p. 18, par. 43.
[70] C. Goodman, *op. cit.*, pp. 14-15.

circumstances, together with the intent of the state that create legitimate expectations that the state making a promise will act in accordance with the conditions contained therein. As a consequence, thanks to them the legitimate expectation of the addressee of the unilateral act can arise that will cause its author to act accordingly[71]. R. Quadri states that, to support the binding force of a promise, many authors emphasize the need to protect the expectations of the recipient of the promise. Hence, it was concluded that even the authors who recognized the promise's binding force believed that, in order for the ruling to have that effect, it must be formulated with the addressee's participation[72]. In this way, however, they render promises similar to agreements.

Thomas M. Franck expressly disagrees with the position of the Court that a unilateral act binds its author already at the time of its formation. In his view, this would mean that law may be derived directly from intention itself, whether or not it was subsequently adopted by the addressee or addressees. The author pointed out to the Court a very radical departure from "earlier concepts of binding commitments", and in any case from what is understood by Anglo-Saxon lawyers. He remarks that in the Anglo-Saxon law, where the institution of unilateral act originated, "reliance ... may seal a promise as much as acceptance seals an offer"[73].

The author adds that the law-making intent of a unilateral state act cannot be determined solely by "reference to the speaker's state of mind". The "state of mind of the audience" must also be taken into account. Where a country clearly and unequivocally expresses its will in a unilateral undertaking, there is no need at all for interpretation of that intention. However, one should investigate whether other states interested in the manifested intention "can confidently assume that this declaration has made a commitment". He concludes: "We can rightly assume that a unilateral statement cannot be regarded as binding (*as law*) until there is an element of trust or reciprocity" from the addressee of the statement[74].

In this concept, a unilateral act not only does not bind from its announcement, but the recipient's trust in the unilateral act addressed to him grows to complicity with the intent of assigning the act with binding force. It only binds when the intent of the commitment is to find some sign of trust in it on the part of the addressee. In support of his view Franck refers to the common law, in which the trust of the addressee of a unilateral act constitutes a "necessary element" of its binding force. He also invokes Corbin's authority, who says in this regard: "It is now clear that informal promises can be challenged

[71] S. Carbone*, Promise in International Law: A Confirmation of its Binding Force*, "Italian Yearbook of International Law", Vol. 1 (1975), pp. 168-169.

[72] R. Quadri, *Cours général de droit international public*, RCADI, 1964 / III, t. 113, p. 370.

[73] T.M. Franck, *The Decision of the ICJ in the Nuclear Tests Cases,* 69 AJIL, 1975, p. 619.

[74] *Ibidem*, pp. 616-617.

based on the action taken in trusting"[75]. This quote, however, indicates that the beneficiary can only claim their rights when they intend to use them or have already benefited from them. It is not a question of the binding force of the promise itself as such, but the protection of the effects it could cause after being used by the addressee.

Finally, Franck raises the question of whether the element of trust in the Anglo-Saxon sense is to be found in general in the ICJ decision taken on the French declaration. His response: "It seems not". It would be easier to find such confidence on the part of Australia and New Zealand if they withdrew their complaint from the Court following its ruling in this case. In fact, both countries have done the opposite, maintaining the view that the French government's declarations do not contain any legal obligation binding on that government. They still manifested "non-reliance on the French statements". To break the stalemate the Court decided to formulate its own views on the meaning and legal value of the French declaration, and thereby recognized their legal validity. Franck therefore claims that as a result trust was given to French declarations not from their addressees, Australia and New Zealand, but "by most of the International Court." Moreover, the author continues that it was precisely the Court, and not the states complaining against France, that is, the addressees, acted on the basis of confidence in these declarations, and departing from the jurisdiction in that matter, announced that the dispute has been completed[76]. It seems that to some extent the Court's activity grounded in trust in the French declarations could have been made easier by the fact that they were directed not to the states in dispute with France, but to the general collection of states, to the whole international community, *erga omnes*. The Court seemed to act on its behalf and not on behalf of the states complaining against France. One may have doubts whether it was competent to do so.

It seems that the role of trust in a unilateral act on the part of its addressee derived from the Court's judgment is misleading. The legal power of the creator's intentions are conflated with its effects. It is precisely the effects of a unilateral act that can only arise and acquire binding power when the act itself enters into force, and it enters into force when its recipient benefits in some real way. Only then will the legal consequences of this act become legally enforceable. The UN GA Sixth Committee expressed the view that autonomous acts cannot be effective in the legal sense unless they meet some form of reaction from the state concerned. An example of a unilateral declaration on continuity in the sphere of state succession was cited[77].

[75] *Ibidem*, p. 618.

[76] *Ibidem*, p. 618.

[77] *Topical summary of the debate in the Sixth Committee on the 2000 ILC Report*, ILC Report, 2000, A/CN.4/513, p. 45, par. 243. A. Kozłowski, *op. cit.*, p. 72.

Jean d'Aspremont proves that nothing can be more *loggerheads* in formal lawmaking than a criterion based on intentionality. This does not require the materialization of the intention in words or some material designation. Indeed, such a criterion ultimately lays down the identification of international legal acts as "a fickle and indiscernible psychological element". In his view, it is necessary to distinguish between the two kinds of intentions contained in a legal act, both conventionally and unilaterally: the intention relating to the nature of the norm must be distinguished from the intention relating to the content and scope of that norm. For the sake of law, only *the intent to make law* is counted. The intent relating to content is irrelevant when determining the nature of the international legal act in which the norm is embodied. Intention as a criterion in lawmaking should be replaced, both in practice and in the science of law, by "a systematic use of written linguistic indicators" in the process of concluding treaties and other international instruments. This would facilitate a clearer distinction between what is and what is not the law. This is, however, a quite isolated view and beyond the scope of these general considerations. In any case, this author is right in that setting the legal nature of a unilateral act is a "profoundly speculative operation intended to reconstruct the will of the author" of the act[78].

5. Form of unilateral act

In the 1974 *French nuclear tests* case, the Court took a very clear position on the form of a unilateral state act. It stated that international law does not deal with the form of a legal act, and does not lay down "any special or strict requirements". It explained that it is not important whether a unilateral declaration of will is manifested by the state orally or in writing[79]. On that occasion the Court recalled its earlier ruling, in which it stressed that international law did not provide for any formal rigor to the form that the intention of the state was taken[80].

The mere principle of freedom of choice of form for a unilateral state act does not raise doubts in the scholarship or practice. A few years before announcing the 1974 judgment cited above, E. Suy wrote that freedom of form with respect to a unilateral state act was recognized by all authors and confirmed by all the known examples taken from practice[81]. This freedom does not have to be limited to the choice between oral and written unilateral declarations. The will of a state can also be manifested by its proper behaviour in certain circumstances. Such behaviour of the state can take different forms again,

[78] J. d'Aspremont, *Formalism and the Sources of International Law. A Theory of Ascertainment of Legal Rules*, Oxford 2011, pp. 150 and 181.

[79] ICJ, Reports 1974, Judgement, p. 18, par. 45.

[80] *Ibidem*.

[81] E. Suy, *Les actes...*, p. 157.

and in some situations, even the failure of the state to act can have effects on the international level. He drew the attention of the ILC, claiming that certain forms of behaviour by the state could produce legal effects similar to those from unilateral acts, expressed in oral or written form[82].

Krzysztof Skubiszewski clarifies this issue by explaining that the representatives of states can, however, manifest without saying or writing anything their position in a given case through various types of activities. This may be i.e. by initiating an action, responding appropriately to actions taken by other states, and even by keeping silent[83]. It was the issue of expressing the will of a state, through its silence in a matter demanding the response of the state, that the ILC paid much attention too[84]. The Court confirmed this principle in its judgment in the dispute between Great Britain and Norway, accusing Britain of neglecting to take appropriate action at the right time[85].

This full freedom of choice of the form of unilateral state act, however, is bound by some rigor. First of all, such a manifestation of will must take a form in which it will be able to reach its addressee or addressees. It must be known and understood by them. Such a requirement was formulated both in the 1974 Court ruling and in the work of the ILC and is widely shared in the field of international law. It is admitted that the only lawful requirement in this matter is that the intention reaches the addressee[86]. In this case, "reaching" means the addressee somehow is familiarized with it.

A unilateral act does not, however, have to be addressed either personally or even to a specific addressee. It can be addressed to some group of states, to all states, or even to the entire community of states. As an example, the French declarations on the cessation of nuclear testing were delivered verbally, taken in very different places and circumstances by the various representatives of France and directed (aside from one) to the whole of the states, *erga omnes*. The Court assembled these various statements into one piece and ruled that they are credible and, when publicly disclosed, have acquired legally binding force[87]. Obviously, the will exercised by the State can also be communicated privately[88] without giving it a public character.

The addressees must, however, have the capacity to know the will contained in a unilateral act, to evaluate it and possibly to trust it in the sense that its author will act in accordance with it. Hence, it is concluded that a commitment undertaken, but not shared with the addressees, which they have not been seen, cannot have legally binding

[82] ILC, 7th report 2004, pp. 70-72, par. 170-186.
[83] K. Skubiszewski, *op. cit.*, p. 223.
[84] See. ILC, 4th Report 2001, pp. 5-10, par. 25-43.
[85] ICJ, Reports 1951, pp. 116, 138-139.
[86] J. Charpentier, *op. cit.*, pp. 371-372.
[87] ICJ, Reports 1974, Judgement, p. 20, par. 50-51.
[88] J.-D. Sicault, *op. cit.*, p. 671.

effects. A secret commitment cannot have binding power at all, because its author "cannot be bound by his thoughts"[89].

As regards the manner and means of informing the addressees of unilateral acts intended for them, there is also complete freedom in practice. In the literature, as S. Carbone states, there is no unanimity in this matter. Some believe that the state interested in a unilateral act should be officially informed about it by an *ad hoc* formal act, or rather in writing. Others believe that any means of communication can be used in this case. S. Carbone is of the opinion that the Court in 1974 resolved that problem decisively. It made the statement that the unilateral declaration became binding on the states concerned "in its fulfillment by the sole fact of its being made public"[90]. A similar interpretation of the Court's position on this subject was made by J.-D. Sicault and C. Goodman. They embrace this position in the sense that the proper communication of a unilateral act is about its effectiveness and its applicability. This is to be used with common sense. Unless the unilateral act is made public, it has no legal value and can be freely changed by its author. It is only after becoming acquainted with by its addressee that it acquires ultimate form and legal effectiveness. Then it can only be placed in opposition to the state being its author[91]. Therefore, these authors link the binding force of the act taken against its author with legal protection of its effects.

There is one more condition associated with the freedom of selection of form for a unilateral state act. The Court in the case *Temple of Preah Vihear* confirmed that states are free to do so, under the condition that any given declaration reveals a clear intention and goes on to say that in the case of a lawful act "the sole relevant question is whether the language employed in any given declaration does reveal a clear intention"[92]. According to K. Skubiszewski, regardless of freedom of form, intention cannot raise any doubts. If this is not the case, it is not possible to recognize a given manner of expressing will as legally binding[93].

The broad freedom in manner of expressing the intentions of a state and manner of communicating it to the addressee is thus subject to two conditions. The recipient must have the opportunity to familiarize themselves with it, and it must be understood without doubt.

6. Summary

The four basic requirements that are to be fulfilled for the legal validity of a unilateral state act seem to be sufficient grounds for constructing its notion as an act which itself

[89] See. e.g. V.-D. Degan, *Unilateral Act*…, pp. 189-190, or J.-D. Sicault, *op. cit.*, p. 671.

[90] S. Carbone, *op. cit.*, p. 170. This does not mean, however, that the declaration cannot be communicated to the interested State with the same effect in a non-public manner.

[91] C. Goodman, *op. cit.*, pp. 16-17, J.-D. Sicault, *op. cit.*, p. 671. See. W. Fiedler, *op. cit.*, p. 1022, or E. Suy, *Les actes*…, s. 150-151.

[92] ICJ, Reports 1961, pp. 31-32.

[93] K. Skubiszewski, *op. cit.*, p. 232.

produces binding legal effects. These generally accepted criteria, however, both in the literature and in practice, differ in terms of interpretation and renditions. There are various doubts about the theoretical and practical nature of this subject matter.

The first requirement for the state as the author of a binding unilateral act does not display serious discrepancies, neither in the scholarship nor in practice. The basis of the determinations was taken from Art. 26 of the Vienna Convention of the Law of Treaties. However, the scope of officers who may appear on behalf of a state in particular areas of their competence has been broadened.

The issue of the proper form of a unilateral state act remains as such in principle outside of legal regulation. Thus, it can take any shape. States must, however, be free to take into account the intended legal effectiveness of their undertaking. So, *nolens volens*, a one-sided act should take a form that will allow it to reach its addressee, and the addressee can understand the meaning of the message it contains. It must be therefore possible to know the intention of the creator of the adopted act. This can be a written or oral communication, or a result of a particular state behaviour.

The issue of unilateralism and autonomy of a unilateral state act causes more serious problems. It is simply difficult for specific unilateral acts to state precisely which are of an autonomous nature and which function in conjunction with other legal acts. Even the same, important and well-known unilateral state acts are judged by some as unilateral acts of an autonomous nature, while others as acts linked in their background with other legal acts. Even the Court's findings on this subject are questioned. What is more, views arise that the same unilateral state act exhibits a dual legal nature. Depending on the specific circumstances, it may function as a unilateral act in conjunction with other legal acts, while in other circumstances as an act of its own which produces the legal effects envisaged therein[94]. This seems to undermine the accepted rigid general criterion for the division of unilateral acts of a state into autonomous ones in their effects and those related to other acts, thus losing its statutory independence.

Divergent views are also presented regarding the will of the state as a constitutive factor in the formulation of a unilateral act. First of all, the question is whether it is a declared will, or a true, actual will. The question of the moment from which a unilateral state act is binding is also discussed in conjunction with the will of the state. A position in this matter was clearly occupied by both the Court and the ILC. The unilateral state act binds its creator from the moment it is made and communicated to its addressees. However, there is no need for any response from those recipients. Various doubts arise against this background. There are voices that the mere intent of the state cannot give effect to such an act. It may become fully binding only in conjunction with a clear dis-

[94] See above in part IV views on this issue by J. Charpentier, E, Suy, or K. Zemanek.

play of trust in it by the addressee. Assigning such a serious share of the addressee's trust in the creation of a unilateral state act could undermine its unilateral character.

In order to avoid such a charge, there seems to be a need of interpretation of the Court's standpoint in the sense that the addressee does not have to demonstrate confidence, since its implicit trust is accompanied by the unilateral act addressed to him at the time of arrival, and even from its inception. The originator of such an act could not withdraw it at any time. Such unilateral acts would lose this characteristic only if rejected by their addressee[95].

It seems that, regardless of other doubts, the binding of the presumed trust of the addressee to the unilateral act addressed to it at the moment of the act's inception is too abstract. Besides, it puts the creator of a unilateral act in too difficult of a legal situation compared with that of the beneficiary of the act. One would rather assume that the unilateral act binds its creator from the moment it is taken up and made public, for such was the sovereign will of its creator, and in such a capacity reaches its recipient. Then it can no longer be arbitrarily withdrawn or altered by its creator, because there is a legitimate presumption that the addressee is acquainted with its content and has placed trust in it, because he did not reject it. At this point, the change in the legal relationship between the creator and the addressee of the unilateral act foreseen in this act has taken place. Arbitrary withdrawal would already qualify for a complaint in such a situation. The principle of good faith could be invoked here in order to protect the confidence or interest of the addressee and to confer rights granted on a bilateral basis.

III. Grounds for binding power of a unilateral state act

1. *Dictum* of the Court

The issue presented in the title of this chapter is not entirely new. It has appeared in the doctrine of international law since the days of Grotius and Pufendorf. A broader and more in-depth discussion of it developed only after the publication of the 1974 ICJ ruling on the French declaration on the cessation of nuclear testing. In this judgment the Court formulated its position in this regard as follows:

> One of the basic principles governing the creation and performance of legal obligations, regardless of their source, is the principle of good faith[96].

In this regard, the principle of good faith is therefore applicable to both the creation and performance of obligations, regardless of the source from which they originate. Therefore, it is appropriate to refer also to the creation and performance of obligations

[95] See. e.g. Ch. Eckart, *op. cit.*, pp. 205-207.

[96] *Nuclear tests (Australia v. France)*, ICJ Reports 1974, Judgement, p.19, par. 46.

arising from unilateral state acts. In this respect, unilateral commitments are no different from other commitments entered into at international level. The Court added, in connection with the principle of good faith, that faith and trust must be intrinsic (*inherent*) in international cooperation and in increasingly closer relations[97].

Directly after the afore-mentioned *dictum,* the Court went a step further and clarified its position, stating that just as this (very rule), *pacta sunt servanda* in the law of treaties is based on good faith, the same is true of the binding nature of an international obligation adopted in a unilateral declaration[98]. Further clarification was given that the interested states may acquaint themselves with the unilateral binding declaration, trust it, and acquire the right to demand that the obligation thus created be respected in good faith by its creator.

The above-cited statement of the Court allows for the conclusion that the principle of good faith not only "governs" the creation and implementation of international obligations adopted in unilateral acts, but also that it is the basis of the binding force of such obligations. This is to say that both the source and the basis of the binding force of the unilateral act is the principle of good faith. This was particularly emphasized by P. de Visscher, who wrote that the Court based the binding force of the French declarations *sur base du seul principe général de la bonne foi*[99].

There is no doubt that the Court sought to strongly link the legal character of the unilateral act of the French government with the principle of good faith. Emphasis was put on the special role of this principle in international relations that are developing with increasing speed. The Court believed that it was the basis of those relations in which trust constitutes an essential element[100]. The exact role of this rule in relation to unilateral acts, however, was expressed by the Court in a very general way, causing various controversies in the literature.

2. Doctrine

Various attempts are made in the scholarship to explain the basis of the binding force of a unilateral state act. They are essentially based on the position of the Court quoted above. It is difficult, however, to strictly separate them, because they overlap in a narrower or wider range. This especially applies to followers of the rule of good faith, *pacta sunt servanda*, or other equivalent ones. This is basically about establishing a general

[97] *Ibidem*.

[98] *Ibidem*.

[99] P. de Visscher, *Remarques de l'évolution de la jurisprudence de la Cour Internationale de Justice, au de l'affaires au fondement de certains actes unilateraux*, in: J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague 1984, pp. 462-463.

[100] ICJ, Reports, 1974, Judgement, p. 19, par. 46.

legal principle of customary origin as the basis for the binding force of unilateral state acts. These are to be presented in a common perspective. A separate group will be joined by authors who, in determining the basis of the binding force of a unilateral act, attribute the recipient's trust to the act addressed to them. The third group would be supporters of the sovereign will of states as the source and basis for the binding force of their unilateral acts[101].

However, one can also find in the doctrine of international law authors who negate in general any legal power of unilateral acts of states. Thus, it is necessary to begin to reflect on these specific views prevailing in the scholarship regarding the basis of binding force of a unilateral state act or its absence thereof.

A. Denying the binding force of the unilateral state act

The fiercest opponents of recognition of unilateral state acts' binding force are A.-Ch. Kiss, R. Quadri, A.P. Rubin and M. Bos[102].

The most prominent of them is the well-known French internationalist A.-Ch. Kiss. He categorically denies that a unilateral act can be binding on the state from which it originates. He further notes that the basic principle of unilateral acts is that such acts cannot legally bind either the issuing state or any other states. He believes that it might have been the reason why doctrine has not shown any interest in the subject. Even more so, as he explains, no state can unilaterally create a rule of law which determines an international legal situation (*une règle de droit, qui détermine une situation juridique internationale*), as this requires the acceptance of such an act by another state or states[103].

Kiss advocates this standpoint in his research on the international practice of the French government. He cites quite convincing examples to counter France's recognition of the legal force of unilateral acts of states. At the same time, however, to the reader's surprise, he admits at the end of his reflections that there may or may not be some unilateral acts that produce certain, sometimes even very significant, effects. He does not specify, however, what kind of acts and effects these would be. They are recognised, but not dealt with[104].

On that same note, R. Quadri, the Italian internationalist, states that classical doctrine representatives were completely uninterested in unilateral acts at the level of inter-

[101] Ch. Eckart, following the doctrine and discussion at the ILC, lists three broadly shared answers to the question of why the state is bound by its promises. They referred to: a) the sovereignty and self-limitation of the state, b) its sovereign will, and c) the general principle of good will. Ch. Eckart, *op. cit.*, pp. 195-196.

[102] There are also other authors. See. eg P. Saganek, *op. cit.*, p. 311. W. Fiedler also criticized the legal nature of the promise. W. Fiedler, *Zur Verbindlichkeit einseitiger Versprechen in Völkerrecht*, in: German Yearbook of International Law, 1976, vol. 19.

[103] A.-Ch. Kiss, *Les actes unilateraux dans la pratique française du droit international*, RGDIP, 1961, vol. 65, pp. 317-318.

[104] *Ibidem*, pp. 318 and 331.

national law. It is only recently that their interest has begun growing. The first observation he makes in reading the doctrine is that the character of the unilateral act has always been negated. He observed that in international jurisprudence there always been a "unanimous negation" in this matter. Moreover, he states that no one dared even to quote a single precedent until the founding of the League of Nations in 1920. This applies to the so-called Minority Treaties. The author observes that again, the declarations submitted for the protection of national minorities were recognized by many internationalists as being of a negotiating nature, as contracts. Considering this matter, Quadri remarks that the representatives of the states to whom the obligations arising from such declarations referred declared as follows: I have the honor to accept (*j'ai honneur d'accepter*...). The well-known Norwegian-Danish case regarding Greenland is also explained as an agreed settlement of the case by way of a query posed by a representative of the Danish government to the Norwegian Minister for Foreign Affairs and his reply to the Danish inquiry. The author himself judges this *casus* in the same way[105].

Investigating the new doctrine of international law, Quadri does not find convincing arguments in support of the conviction that there is a new source of international law in the form of a unilateral act. In his view, the authors representing the opposing side are not able to convincingly prove that unilateral promises on their own can create a new source of international law. They seek notification, sometimes referring to the behaviour of the addressee of a unilateral act, which should show a positive attitude towards the unilateral act addressed to that addressee. The addressee should simply indicate that they trust the state who is the author of the promise[106].

Referring to analysis of both the practice and the doctrine of international law, Quadri concludes that *les promesses* themselves are not capable of producing the intended legal effect. They must always be made in the context of a treaty in order to achieve their objective, that is to achieve the intended legal effect. There is therefore no reason to engage in an effort to replace *la vénérable règle pacta sunt servanda* by *une règle de loin plus sévère et de portée très large*, that is *promissio est servanda*[107].

The third of the above-mentioned scholars opposed to assigning binding force to unilateral state acts is the American internationalist A. P. Rubin. Unlike the two others, this scholar has taken into account the ICJ ruling on French nuclear testing. The verdict shocked him deeply.

His reflections, similar to Quadri, began with an examination of both the doctrine and international practice in the matter prior to the above-mentioned judgment in 1974.

[105] League of Nations, Journal Officiel, 1923, p. 1311, R. Quadri, *op. cit.*, pp. 364-365.
[106] R. Quadri, *op. cit.*, p. 364.
[107] *Ibidem*, p. 364.

He argues that he found no basis for the Court's judgment, neither in the doctrine nor in court practice. Rubin claims that prior to the judgement issued on the French nuclear test, only one similar situation was known. He refers to the unilateral declaration of the Egyptian government of April 24, 1957. The Egyptian government promised to restore freedom of navigation through the Suez Canal. Nonetheless, he states that even in that case the opinions of internationalists were divided as to the legal nature of the declaration. In his view, this unilateral act of the Egyptian government, and other declarations analyzed by the researcher, arose in a more or less explicit negotiating context[108].

By way of conclusion, Rubin reiterates that until the ruling on above-ground French nuclear experiments carried out in 1974, neither the scholarship nor the practice of states showed "any consensus" indicating the binding force of unilateral declarations submitted by states. Like Quadri, he proves that the very intention expressed in such a declaration cannot create a binding obligation of international law. There must be additional factors such as negotiating context, confirmation of reaction from other states, or official declaration before the Court along with acceptance by the Court of Justice. As an example, Rubin recalls, again following Quadri, the case of East Greenland, in which "there was a response to the question of a diplomatic representative of a foreign state." Then – as he says – it was additionally recorded and initialed by the then-minister of foreign affairs of Norway[109].

In Rubin's view, the issue of French nuclear tests was devoid of any negotiating context. France has consciously and consistently tried to keep its statement far from the said circumstances, even away from the parties to the dispute and the Court itself. The lack of this factor – Rubin maintains – deprived the French government's declaration of the character of a legally binding agreement resulting from the agreement of states. Even if we were to accept – as stated in the ICJ judgment – that unilateral declarations may be binding on the sole intent of their author, this would not apply to the French declarations anyway. According to Rubin, it is not possible to see in them any element indicating their legally binding character. There is no credible intention to create a legal relationship. Rubin finds confirmation of his observation that France did not intend to be bound by its unilateral statements in *inter alia* French international law practice[110]. As did Quadri, he links the binding force of a unilateral act directly to the issue of its legal consequences.

This particular group of views should be accompanied by a theoretician M. Bos. By presenting his concept of sources of international law he also devoted a bit of attention to unilateral acts and stated that in a community of *homines liberi* no law of unilateral origin can exist at all. The source of international law must be at least bilateral. This does

[108] A.P. Rubin, *op. cit.*, pp. 3-6.
[109] *Ibidem*, pp. 4, 7-9.
[110] *Ibidem*, p. 28.

not, however, refer to the decisions of international organizations. Their decisions are, of course, also unilateral acts, but not in the same sense as unilateral state acts, not in the world of *homines liberi*[111]. In other respects, the juxtaposition of the international community of sovereign states with the community of "free people" seems quite surprising in this context. The problem of sources of law is quite different in a state-organized community than in an international community of sovereign states[112].

In this sharp criticism of the binding force of unilateral state acts, it is striking that all these authors allow for the possibility of existence, or even the existence in practice, of such acts in one form or the other. In any case, voices opposing the binding unilateral state acts are few and the denial is neither complete nor convincing. It is difficult to completely disregard the prevailing practice of states and the strongly emphasized position of the ICV and doctrine on this matter.

B. Seeking the basis of the binding force of a unilateral state act in the general principle of the law of customary origin

The development of the customary principle of good faith as the basis for the binding force of a unilateral state act was known in the scholarship before the judgment in 1974 on French nuclear testing. The influence of the E. Suy treatise, published in 1962, is emphasized as having a strong impact on the Court's judgment in this case[113]. Already at the beginning of this dissertation, E. Suy concludes emphatically: "in contrast to a few authors' opinions, we maintain the thesis that the purely unilateral promise exists in the law of nations and it is binding"[114]. He opposes artificially contrasting treaties with unilateral acts of states. He considers the recognition of treaties as binding based on the *l'unique raison* that they are grounded in the agreed will of certain subjects of international law, while at the same time refusing to recognize all the legal values of unilateral obligations of states (since that will not derive from the agreement of two or more states), as something that testifies to a very rigid formalism. Such an outlook loses sight of the proper meaning of the whole international legal *réglamentation*, which is to ensure the security and harmony of international relations[115]. Ch. Rousseau, having shared this view, stated that, by demonstrating that the binding force of the act does not necessarily have to be based on the existence of two consistent wills, it restores the unilateral *une finalité sociale*, which is very often lost from view even nowadays[116].

[111] M. Bos, *A Metodology of Internatiomnal Law,* Amsterdam 1984, p. 88.

[112] M. Virally, *The Sources of International Law*, in: M. Sǿrensen, ed., *Manuel of Public International Law*, New York, 1968, p. 120.

[113] See, e.g. P. Saganek, *op. cit.*, pp. 375-376

[114] E. Suy, *Les actes* ..., p. X.

[115] *Ibidem*, p. 271.

[116] Ch. Rousseau, *Review* in: RGDIP, 1962, t. LXVI, p. 876, quoted after J.-D. Sicault, *op. cit.*, p. 682.

Unlike an offer – writes Suy – which should be accepted by the addressee to acquire binding force, a unilateral promise is given trust from the moment it reaches the addressee. And it is at this moment that trust in the word given finds its foundation of validity. A higher interest in the security of international relations requires a promise to become binding once it is recognized by the state concerned. And this higher interest translates into the principle of good faith, which should govern (*regir*) all international relations[117].

According to E. Suy, international law is derived from the conventionally or unilaterally manifested will of subjects of international law, with which the norms of this legal order bring about legal effects corresponding to that will. The legal system thus determines the legal consequences of the adequately manifested will of the state[118]. It can be said that this system, on the one hand, ensures its subjects' sovereignty and free will, but on the other hand it delineates the area of their legal effectiveness.

Despite the continued emphasis on the essential similarity between the treaties and unilateral state acts, Suy denies that the binding power of a promise can be inferred directly from the principle of *pacta sunt servanda*. In his opinion, this principle explains only the binding force of treaties. He believes, however, that this principle could be broadened in the sense that *pactum* meant not only the contract, but also the *tous les engagements internationales*[119] and so the same with regards to the unilateral acts of states. By such an extension of the concept of *pactum* to unilateral acts, *la norme fondamentale, la source de la promesse* would take the character of a customary norm requiring respect for unilateral international obligations[120]. Accordingly, the legal basis for the binding force of a unilateral state act is to be a customary norm in the broader concept of the principle of *pacta sunt servanda* on the principle of *acta sunt servanda*.

Significant influence on the position of the ICJ on the unilateral state act is also attributed to the Italian scholar, G. Venturini. This author assumes that the competence of the state to incur an international obligation is precisely an attribute of its sovereignty. Accepting a commitment undoubtedly limits the scope of this sovereignty. But even such self-limitation is also an attribute of its sovereignty[121]. He supposes that the opposition to recognizing the binding force of unilateral obligations is derived from the concept of voluntary, conventional law, which is the foundation of *pacta sunt servanda*. Its followers seem not to notice the existence, alongside the law of treaties, of the law of customary origin, which contains universally binding norms. Therefore, the principle

[117] E. Suy, *Les actes...*, p. 151.
[118] *Ibidem*, pp. 43-44.
[119] *Ibidem*, pp. 44-45.
[120] *Ibidem*, p.151.
[121] G. Venturini, *op. cit.*, p. 401.

of *pacta sunt servanda* cannot be the only source of binding force in the whole system of international law[122].

Like E. Suy, Venturini emphasizes that an international agreement is nothing more than "the expression of the will of international entities with their rights able to undertake commitments to other entities. This will is presented as a legal act. A unilateral act is derived from the same source and is also intended to create a commitment". Invoking the views of E. Suy, he states that a unilateral declaration itself in a particular case "produces the effects of the principle of good faith and security of international relations constituting one of the sources of the binding nature of international obligations[123]. Thus, the author sees no logical reason not to recognize the binding legal character of unilateral state acts. The difference between a contract and a unilateral act is simply that the treaty obligation is subject to the principle of reciprocity which justifies its immutability, while at first glance unilateral commitments seem to be lacking[124]. Thus, it is necessary to examine practice in order to make a promise more concrete in a *de volonté effective* declaration without reciprocity. It should also be properly served and clearly addressed, so that the addressee is clear. Addressees should be able to be confident in the act of the promising state[125].

With regards to the issue of a unilateral act's binding force, Venturini attempts to present a clear position. He considers that it is precisely these important considerations – good faith and security of international relations – that justify the nature of binding unilateral promises, as well as the binding nature of the treaties. Both are an expression of the general competence of a state based on the same constitutional norm of international public order *relative à la production juridique volontaire*[126]. J.-D. Sicault believes that in his Hague lecture Venturini gave the fullest possible theoretical expression explaining the binding force of unilateral acts[127].

[122] *Ibidem*, p. 400-401. See also J.-D. Sicault, *op. cit.*, p. 684

[123] *Ibidem*, p. 403.

[124] *Ibidem*, p. 402 and 367, see J. Charpentier, *op. cit.*, p. 376

[125] G. Venturini, *op. cit.*, pp. 400-401.

[126] *Ibidem*, p. 403.

[127] There seems to be no doubt, Sicault writes, that these views could serve the Court in its justification for the binding force of unilateral acts. The distinctive features of the binding force of a unilateral act in the Venturini concept are:

1) Strong emphasis on the sovereign will of the state to embrace international obligations both in the conventional and unilateral contexts. And in one case, the sovereign will of the state creates an international commitment.
2) The obligation incurred in a unilateral act must relate to and be limited to a particular case. It cannot have the character of a general obligation, not exhaustive in one particular case.
3) Venturini says that the feature of a unilateral act is not to establish an advantage for its author, who can always keep what he promises. The purpose of the unilateral act is to create benefits for the recipient of the promise. This is done „in the name of the principle of elementary justice, of objective justification for such protection."

The views of later authors regarding the binding force of unilateral acts are more or less closely related to the judgment of the Court of 1974, and revolve around it. Many of these authors affirm, and in a way justify, the correctness of the interpreted ICJ position on this matter, such as P. de Visscher and C. Goodman.

Paul de Visscher is enthusiastic about the 1974 judgments of the Court. Among other things, he states: "In the doctrinal plane, the *l'intérêt majeur* of the judgments of December 1974 contains their contribution to the general theory of sources, and especially to the general principle of good faith as a binding foundation"[128]. The researcher explains that the Court ascertained "purely unilateral acts" (*actes juridiques unilateraux purs*) in the French declarations of cessation of nuclear testing, and justified their binding force on the basis of "the only principle of general good faith"[129]. In these judgments he notices the proclamation of the "autonomy of the general principle of good faith as a source of positive law". The Court was to express it in the words already cited:

> One of the basic principles governing the creation and application of legal obligations, regardless of their source, is the principle of good faith .... Just as the principle of *pacta sunt servanda* in treaty law is based on good faith, so is [based on it – J.K.] the binding nature of the international obligation adopted by way of unilateral declaration...[130].

In the opinion of that author, the judgments of the Court concerning these declarations are of exceptional importance for the science and the practice of international law. These are the "fundamental tendencies of the progressive development of international law", and the autonomous principle of good faith assumes the character of a source of international obligations, a source of positive law[131]. The principle of good faith, which was formerly recognized as the principle of international morality, as the right idea of sovereignty, now tends to be more explicit and more positive. Thus, the 1974 judgments opened, according to de Visscher, a new stage in the development of international law, affirming without any reservations *la fonction autonome du principe de la bonne foi dans la création des obligations juridiques*[132]. Thus, the binding force of the unilateral act is the "autonomous principle of good faith" as a general rule of binding nature.

The Court's conclusions also serve as the direct source of the particularly interesting arguments made by C. Goodman. In her extensive review of international literature dealing with unilateral acts she proclaims the concept of moving the basis of the binding

4) Finally, the view that the basis for binding unilateral declarations is the principle of good faith in close connection with the security of international relations. J.-D. Sicault, *op. cit.*, p. 684.

[128] P. de Visscher, *op. cit.*, p. 461.

[129] *Ibidem*, pp. 462-463.

[130] ICJ, Reports, 1974, Judgement, p. 19, par. 46, P. de Visscher, *op. cit.*, p. 463.

[131] P. de Visscher, *op. cit.*, pp. 463-464.

[132] *Ibidem*, pp. 463-464.

force of international obligations "from the subjective expressions of the will to the objective foundation of good faith". Goodman observes that although the ICJ clearly and explicitly stated in its judgment on French nuclear tests that "just as the principle of *pacta sunt servanda* in the law of treaties is based on good faith, the same is true of the binding nature of unilateral acts. There are divergent opinions in this issue." Views representing a subjective perspective on the subject matter are confronted with those presenting objective perspectives based on good faith[133]. The subjective explanation of good faith in the context of the judgment of the ICJ in 1974 leads, in her opinion, to an extreme view. The unilateral act does not have any independent status in international law, nor does it give rise to legal effects at the level of international law, and moreover, it is argued that the possible basis for the binding force of such an act would be the presumed consent of the addressee of the unilateral act, estoppel or finally autonomy of expressing the will of the state[134].

Camille Goodman seeks to undermine the notion that the binding force of both treaties and unilateral state acts is derived from the autonomy of sovereign states. She proves that the binding force of a treaty or unilateral act is derived from the principle of good faith, the accompaniment of which is based on presumption. She disagrees with the belief that the principle of good faith or *pacta sunt servanda* applies only to the fulfillment of the commitments made, and thus they are unable to justify the binding power of the undertaking *at its conception*. She believes that, in fact, it is precisely in the execution of the commitments that makes them binding. She agrees that the manifestation of the creative will of the sovereign state is a very important condition of *validity* of a commitment, but "nothing more." Its binding nature comes from the "objective principle of good faith"[135]. Thus, the subjective will of the sovereign state is contrasted by Goodman with "the objective basis of good faith"[136].

The author also dealt in her work with the relationship between the principle of *pacta sunt servanda* and the principle of good faith. She observed that it is rarely possible

[133] C. Goodman, *op. cit.*, p. 18.

[134] *Ibidem*.

[135] *Ibidem*, pp. 22-23.

[136] Drawing on the views of scholars and the practice of states, Goodman tries to explain her position in a historical perspective. As it is well known, since the earliest times, the sovereign will have expressed sovereign will in concluding treaties accompanied by grand ceremonies, such as the oath. They emphasized the importance and sanctity of the undertakings and were testimony of good faith. It was realized that adherence to the principle of good faith was inevitable to ensure minimum cooperation and the necessary tolerance for „the emergence of the human community." As the number of treaties concluded increased, the principle of good morals began to manifest itself as a binding principle. Understood in the sense that the parties to the treaty include it in good faith and that they will act in good faith in its execution. Hence, the author concludes that the expression of will confirmed by signature, notification or ratification serves only to mark the intention of the party committing to it. Although this is an essential condition for the validity of a given contract, the presumed good faith that accompanies it from the beginning, gives it binding force.

to find a clear link between two such important principles of international law. She notes that the principle of *pacta sunt servanda* is generally conceived as mandating the performance of binding treaties. However, it does not actually determine the content of the commitment. This is in line with the positivist view that created norms should be respected, but only until a *norm-abolishing act* appears. In fact, good faith plays, in Goodman's view, a broader but more remote role. It serves to delineate the content of a given commitment, to correct any defects of will or formality, where this requires honesty. It can also serve to broaden the scope of binding legislation. In this view, good faith is presented as an *over-reaching and reconsiling principle of law, which founds and legitimizes other rules including pacta sunt servanda, rebus sic stantibus, or estoppel.* One can even imagine the possibility of interfering with the principle of good faith in solving conflicts of law[137]. However, she acknowledges that the nature of a unilateral international obligation can also be seen as deriving its legal force from the principle of *pacta sunt servanda*, but *conceptualized* as a "special emanation" of the application of the principle of good faith[138].

She raises another two arguments to justify her opinion. She claims that states acquire rights and contract by expressing their will contained in a certain *instrumentum*, which provides evidence of this undertaking, both when they are done in the form of a treaty (through a *pactum*) or in a unilateral declaration. The similarity in terms of validity applies both to the existence of a legally valid *instrumentum* establishing a treaty and to the existence of legal validity of a unilateral commitment. She therefore considers that the term *pactum* can fairly directly cover both conventional and unilateral acts without prejudice to the substantive change of their criteria[139]. It seems that here Goodman has fallen into the formalism that she had accused other authors of. The introduction of the term *instrumentum* is of course a purely formalist approach, which cannot erase differences between unilateral and bilateral acts. Agreements and settlements cannot quite be considered equivalent to a promise.

Secondly, Goodman notes that the scholarly literature suggests that the new notion of *promissio est servanda*, reflecting the autonomous nature of a unilateral act, should be transformed so that the principle of p*acta sunt servanda* can also be applied to unilateral acts. There are also proposed constructs such as *acta sunt servanda*, or the ILC's *declara-*

[137] *Ibidem*, pp. 23-24.

[138] Goodman sees the lack of logic in the fact that despite the recognition of good faith as the *ultimate basis* not only of conventional but unilateral acts, it is a question of whether its specific application in the *acta sunt servanda* has a similar reference to both types of these acts, it raises objections. Both states and commentators maintain that this principle applies strictly to the commitments made by the pact, so it cannot be applied to unilateral acts. Goodman believes that this is a misleading, unilateral, even narrow and formalist view. *Ibidem*, p. 24.

[139] *Ibidem*, pp. 24-25.

tio est servanda (ILC, 1st report 1999, p. 29, paragraph 157). That is true – agrees Goodman – that none of the proposed maximum could cover all unilateral acts (e.g. protest), but the Vienna Convention (1969) does not refer to any kind of treaty[140].

Finally, these considerations lead Goodman to conclude that the *acta sunt servanda* proposed by the ILC seems to be the most flexible formula and consistent with the concept of a unilateral act as state behaviour. She believes that such a rule is essential to ensure stability and security in international relations, which the ICJ was seeking in respect of the nuclear tests. If such a principle were to be *synthesized* in a pragmatic program, then it would be possible to develop an inclusive *overall regime* that would allow the regulation of unilateral acts in a manner that would be useful to states and the international legal system[141].

The concept of good faith as the basis of the binding force of unilateral acts is also explicitly touted by J.-D. Sicault. He rejects accusations that good faith is too entangled in morality or loyalty and is not a legal principle. He argues that good faith is the foundation of the legal power of unilateral obligations in states. However, he insists that it should not be taken as a duty of loyalty, but as a protection of the legitimate trust necessary for the security of international relations.[142] In this view, good faith clearly represents not only the basis for the binding force of a unilateral state act, but also protection of the recipient's trust and security of international relations.

Przemysław Saganek criticizes the efforts of scholars and the ILC seeking to establish a common basis for the binding force of all kinds of unilateral state acts in the form of *acta sunt servanda* or *declaratio est servanda*. He firmly advocates the position that nothing in this case can be said with complete certainty until we draw up a comprehensive list of these very diverse legal acts. Regardless of whether such a postulate is real, Saganek is right to point out that these searches, due to the state of our knowledge in this complex matter, should be directed towards individual categories of unilateral states, such as promise, renunciation or recognition[143].

Both scholars and the ILC seem to be moving in this narrow direction, mainly following the ruling of the 1974 Court, which formally confined itself only to establishing a legal basis for a unilateral declaration (promise). It is often difficult, however, to stick strictly to promises and suggestions or arrangements, formulated alternatively, referring to a certain group are made, some even to all unilateral state acts.

According to Saganek, the question of the legal basis of the binding force of a promise has intrigued and interested the doctrine much more than the legal effects of a uni-

[140] *Ibidem*, p. 22.
[141] *Ibidem*, p. 24.
[142] J.-D. Sicault, *op. cit.*, pp. 684-686.
[143] P. Saganek, *op. cit.*, pp. 87-88.

lateral promise. Observing the perspectives of scholars, he notes that it is possible to distinguish "several levels of discourse". He limits the spectrum to only two. The first deals with the question "of the very nature of international law," while the other, more practical, is seeking a specific standard that gives the legal force of a unilateral declaration[144].

Saganek places in this first plane the views of E. Suy, who argues that the theory of autolimitation of the state cannot be sufficient to establish the binding force of a promise. This power must come from international law itself. On the other hand, the second level is seeking a specific rule or principle which underlies the binding force of a one-sided promise. Here again, Saganek quotes Suy's views, who considers that such a principle may be that of *pacta sunt servanda*. He states, however, that besides this principle, there is a customary norm on which the binding force of the promise is based. Of course, as long as the promise fulfills the conditions required for its validity. Behind such a customary principle is the principle of good faith[145]. Saganek believes that Suy in a "brilliant way had predicted the future development of ICJ case law", and perhaps even "showed it the way". As proof of these observations, the following sentence from the Court's ruling is shown: "One of the basic principles governing the creation and exercise of legal obligations is the principle of good faith"[146].

In the end, however, the author concludes that the principle of "having the duty to keep a promise unilaterally, respecting a unilaterally made renunciation, recognition, etc." means the prohibition of any unilaterally performed act of this kind. In his view, such a norm must be of a customary standard, as is the unquestioned customary origin of the *pacta sunt servanda* rule. The problem, however, lies in the fact that the author of these statements is questioning the existence of the principle he suggests. It does not bother him, however, to say that the "principle of *acta sunt servanda*", possibly with some refinement or restriction, applies, but only as a general principle of law recognized by civilized nations. Again, however, this is also troublesome, because these civilized nations interpret and apply this general principle in a system of national law[147]. Eventually, it seems that nothing is certain in here. We find ourselves in a circle of assumptions with a tendency to seek the basis of the binding force of certain unilateral acts in customary law, from which the principle of *pacta sunt servanda* is derived. These considerations are reminiscent of the earlier findings of W. Czapliński, who stated that the princi-

[144] *Ibidem*, pp. 375-376.
[145] *Ibidem*, pp. 375-376.
[146] *Ibidem*, p. 376.
[147] *Ibidem*, pp. 377-378.

ple of good faith is based on the unilateral acts of states. It has a customary character and widens the traditional understanding of the principle of *pacta sunt servanda*[148].

Lastly, at the end of his deliberations, Saganek again states that the admission of the principle of good faith as a legal basis for binding unilateral declarations in the jurisprudence and doctrine also raises his doubts. He doubts whether the principle of good faith in the light of the Court's case law on French above-ground nuclear tests would be opposed to the principle of simply the will of the state. But again, he adds that the reference to general principles of law should not be opposed to the existence of a customary norm which underlies the binding force of a unilateral declaration[149].

From the meandering conduct of Saganek's reflections on the basis of the binding power of a unilateral declaration, it appears, however, that he is in favour of the existence of a customary principle that he has not finally identified.

In the search for a legal principle of customary character as the basis of the binding force of a unilateral act, V.-D. Degan reaches to the work of Grotius. Like others, he begins his deliberations on the basis of the binding force of unilateral acts by stating that there is no peremptory norm of universal international law which forbids a sovereign state to accept a binding legal obligation, even in a unilateral act. He binds, like many other internationalists, unilateral acts to the free will of a sovereign state. The unilateral act finds its place in the system of international law. It derives from the will of the sovereign state and is binding. Degan says to the Court that a promise must be recognized *as a genuine kind of acceptance of legal duties* of the author of such a promise in respect of the addressee, and may even be associated with *erga omnes*[150].

Unlike the previously cited authors, Degan does not bind the legal basis for unilateral acts only with the general principle of good faith. In his opinion, the legal basis of this issue lies in the principle already pointed out by Grotius, namely in the praxis *promissorum implemendorum obligatio* – that is, the obligation to fulfill promises. This principle is no less important (*inferior*) than the general principle of *pacta sunt servanda*. These two legal bases of binding international obligations are equally important, yet not identical[151]. The difference between these is derived by Degan from the difference between the acts to which these principles apply. He states that although the differentiation between unilateral acts and treaties is not always quite clear in practice, a treaty does not at all consist of the unilateral actions of negotiating parties, as some authors suggest. The

[148] W. Czapliński, *Akty jednostronne w prawie międzynarodowym*. International Affairs 1988, No. 6, pp. 107-109. This position was confirmed in a later publication: W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*, 2nd ed., Warszawa 2004, p. 121.

[149] P. Saganek, *op. cit.*, pp 378-379

[150] V.-D. Degan, *Unilateral Act*…, pp. 151, 178, 186.

[151] *Ibidem*, p. 178.

treaty contains the will of all its parties seeking to bring effect to international law. Without such an agreement the will of all its parties will not arise. In a unilateral act no agreement is made, no other party is present. There is only one state's will to bring about results in international law for the purpose of the unilateral act. According to Degan, exactly for this reason these two general principles of law – *promissorum implemendorum obligatio* and *pacta sunt servanda* – cannot be fully identical. This does not mean, however, that a unilateral promise can be considered as a source of less important, lesser legal status than a treaty. The deeper analysis of these two different types of international law sometimes shows the relative nature of their disparities in practice. He states that in many acts perceived by most writers in the context of the negotiation "one is not able to find even a fiction of agreement". This is the case, for instance, in the case of a treaty validation that would otherwise be invalid or expire[152].

Grotius's principle of "promises to keep" is known in literature. It was also referred to by the ILC, but no attempt was made to make it a binding customary rule. In addition, it refers only to promises, and it was difficult to turn it into a principle of general significance.

This urgent search for a general standard of international customary law as the basis for the binding force of unilateral action brings to mind the views of H. Kelsen on the basis of the binding force of treaties. It is well known that his basis for the binding force of treaties is "the customary principle of international law, usually expressed in the form of *pacta sunt servanda*". This formula justifies ("is the reason for") the binding force of the treaties and is the "source" of all the law created by the treaties[153]. A similar customary rule of law seeks to base its binding force on a unilateral act. Many authors seem to believe in the existence of such a principle. The differences are related to closer characterizations. Searching for the right name for this rule seems to be a purely formal and irrelevant endeavour. For example: should it be *pacta sunt servanda* or *acta sunt servanda?* Each refers to the same thing. The essence of the matter is that the principle of good faith can be contrasted with the sovereign will of the state as the basis for the binding force of their unilateral act at the level of international law.

C. A closely aligned principle of good faith with the presumed trust of the addressee

Many supporters of the Court's position find it difficult to accept that the binding power of unilateral promises is based on the principle of good faith and that it binds and produces legal effects upon reaching the addressee without the need for any reaction on its

[152] *Ibidem*, pp, 180-181.

[153] H. Kelsen, *Principles of International Law,* New York, 1956, p. 314.

part, without showing any sign of trust in the received promise. They are trying to discern such trust in some way, to link it with the promise and the principle of good faith.

This problem existed in the scholarship before the appearance of the Court's ruling on French declarations. As an example, G. Venturini proclaimed that a unilateral promise by itself can create an international commitment. He added, however, that the binding nature of such a promise lies in the protection of the recipient's trust in the promise addressed to him. Hence, for Venturini it was obvious that "trust is essential to the binding nature of unilateral promises". Moreover, he believes that "the nature of a promise is to assume (presuppose) that the addressees trust it, that they feel connected to it, and that it is in the position of presuming the recipient's trust in the promise they have received and that such confidence is necessary to obtain binding power"[154]. Similarly, in the 1950s, L. Brierly stated, "The possible explanation of the binding force of the so-called unilateral declaration of *rights, against the declarant*, can be found in the theory of the presumed consent of the beneficiary"[155].

Thomas M. Franck, recognizing the binding force of the unilateral act, criticizes the Court's view that a unilateral declaration could have come into force as soon as it was adopted. In his opinion, this would mean that law may arise from a unilateral statement without linking it with the recipient's trust. He considers that "a unilateral statement cannot be regarded as *law* until there is some element of reciprocity or trust from its addressee"[156].

These and other similar views appear not only in doctrine. During discussions of the ILC, it was also possible to hear that "the autonomy of a unilateral act is *totally conditional*, because the obligations it creates are not derived from the unilateral expression of the will of the state which issued such an act, but rather from the compatibility of such will with the interests of other states"[157].

Recently, Ch. Eckart has endeavored to link the position of the Court with the recipient's trust in the promise received. Like others, he criticized the Court's view that a unilateral promise could be binding upon reaching the addressee without the need for him to show the trust of the recipient. He states: "Without trust there is no reason for the author of a given promise to feel compelled to respect his or her words on the basis of good faith"[158]. His interpretation of the Court's position on this issue has also been derived from the quoted paragraph on the French declarations:

[154] G. Venturini, *op. cit.*, pp. 403-404.
[155] J. L. Brierly, YILC, 1950, vol. II, p. 227.
[156] T. M. Franck,*op. cit.*, pp. 616-617.
[157] ILC, 3rd Report 2000, p. 11, par. 65.
[158] Ch. Eckart, *op. cit.*, p. 206.

> One of the basic principles governing the creation and exercise of legal obligations, regardless of their source, is the principle of good faith. *Trust and confidence* are closely linked to international cooperation, especially at a time when this cooperation is becoming more and more important in many areas[159].

Trust and confidence, as Ch. Eckart explains, is a *legitimate interest* of recipient of a given promise. It proves that the promising state is obliged to fulfill its promise even when it changes its opinion in this matter, or because it has stated so, or even because it so wished, but because of the protection of the legitimate interest of the addressee of his promise. He argues that only by referring to this "external factor" can one explain the binding force of the declaration[160]. Thus, the reliance of the addressee is contrasted with the freedom of form here. The pledge eventually acquires the binding force on the basis of the trust of the addressee.

As is known, according to the position of the Court and many of its commentators, the promise of a state is binding from the moment it reaches the addressee, without the need for any response from them. To reconcile the Court's position with its interpretation, Eckart assumes that, from the legal order itself, there must be a presumption of such confidence at the moment of the pledge reaching its addressees. He says: "... the legal order actually *presumes* that the addressee *will be present and will be reliant upon the very minute it has been received*. It actually binds *the minute it is made* and cannot be changed or withdrawn by its author *at will*"[161]. Eckart believes that the Court's ruling on the French declarations is just about to go in the right direction. Only accepting that "the addressee's actual reliance on a statement which is beneficial and not rejected is presumed to exist" allows the binding force of a binding promise in good faith without the need for any reaction on the part of the addressee[162].

Irrespective of the rightness of accepting the presumption that the trustee (or interest) of a recipient of a promise can be linked to the moment it reaches the addressee, and even at the very moment of taking the pledge, the role of the principle of good faith is reduced here rather to protect the recipient's trust in the promise that had been made. The protection of trust in practice is intended to guard the consequences of the promise associated with the recipient's trust. The will embodied in the promise and trust in that promise is to be the basis of its binding force, not interpreted from the judgment of the Court, and the principle of good faith widely shared.

The more prominent views expressed by internationalists clearly demonstrate that the principle of good faith, as indicated by the Court itself, cannot, as such, be the basis

[159] ICJ, Reports 1974, Judgement, p. 19, par. 46.
[160] Ch. Eckart, *op. cit.*, p. 203.
[161] *Ibidem*, pp. 203 and 206.
[162] *Ibidem*, pp. 206-207.

for the binding force of the unilateral state act. A more specific customary principle similar to the principle of *pacta sunt servanda* is sought. Alternatively, its role depends on merging with some or all of the presumed trusting beneficiaries of the unilateral act addressed to it. He raised the issue of G. Venturini even before the Court's 1974 judgment. C. Goodman, arguing that the binding nature of a unilateral act provides the "objective principle of good faith", essentially reduces its role to ensuring proper fulfillment of obligations. In Goodman's view, it is precisely in the execution of the commitments that they are binding.

What is particularly important in this case is that the Court itself doubts that the principle of good faith can be considered a source of unilateral commitments. Confirmation of this can be found in the Court's subsequent judgments detailing the general statements in the 1974 judgment. In a 1988 judgment, the Court, citing its general view on the role of the good faith principle from 1974, explained that this principle "does not constitute a source of commitment, where it somehow already had existed". In a literal sense: "it is not in itself a source of obligation where none would otherwise exist"[163]. Not without significance is the fact that this explanation of the Court was literally repeated 10 years later in the *Cameroon v. Nigeria* case[164].

D. Sovereign will of the state

In the doctrine there is a view shared equally broadly which maintains that the basis of the binding force of a unilateral state act is not good faith, but the sovereign will of its creator. And what is characteristic, this position, unlike the previous, is convincing and quite clearly presented, as can be easily seen in the examples cited.

In the Polish scholarship, K. Skubiszewski gives his opinion directly and convincingly on the matter of unilateral state acts' binding force. In his deliberations on this very issue, he puts strong emphasis on the role of the author of the unilateral act. He says that the state can, according to its will, give binding force to its unilateral acts. The decisive factor in this case is the intent of the state. The state is bound by its unilateral act, because it is its intention. The confirmation of this principle is found in the practice of the international judiciary system. However, he states that it was only in nuclear test cases that the Court explicitly emphasized the role of intention in the unilateral act[165].

Skubiszewski tries to somehow synchronize the will of the state with the principle of good faith. He says: "The state's intent is binding, and it ties in with the principle of good faith." Further he explains that this principle is affected by the effect of the act since its publication or communication to the concerned State or States. He then adds that

[163] ICJ, Reports 1988, p. 105, par. 94.
[164] ICJ, Reports 1998, p. 297, par. 39.
[165] K. Skubiszewski, *op. cit.*, pp. 231-232.

it is the principle of good faith that obliges a state to act in accordance with its intentions and to commit itself to its unilateral act. At the same time, however, it stipulates that *the act remains its own creation*. So the unilateral state act remains the *creation* of the will or the intent of the state, not the principle of good faith. Skubiszewski does not elaborate this topic, however. In any case, such a basis does not constitute an agreement with the state to which the unilateral act is addressed. Such an act is not an offer that requires approval. But the *reliance* on a unilateral act by the interested state can affect its application, for example on its revocation in special circumstances. However, it does not affect its binding power[166]. In this regard, the scholar fully shares the Court's position.

Skubiszewski's arguments show a convincing combination of the basis of the force binding a unilateral state act with the principle of good faith. He combines the principle of good faith with a unilateral act only from the moment of this act reaching the addressee. Thus, he does not bind it to the very basis of the binding force of a unilateral act, but rather to the effects it has caused. It is supposed to ensure respect and performance in good faith[167].

Such an opinion is also quoted by A. Kozłowski. He believes that "the decisive factor, constitutive" of the binding force of a unilateral state act is its sovereign will. It comes from a voluntaristic basis. On the other hand, the principle of good faith is understood as the basis for the "normative effectiveness" of a unilateral act which "materializes in the form of the *acta sunt servanda* principle"[168].The principle of good faith can thus "materialize" in various forms under international law. In this case it can take the form of *pacta sunt servanda* as well as *acta sunt servanda*. Both are a special expression of the general principle of good faith that underpins and permeates the whole system of international law.

Equally firmly in the direction of the sovereign will of the state as the basis for the binding force of a unilateral act are the views of J. Charpentier. He comments on the issue of the basis for the binding force of a unilateral act in the context of the judgment of the Court of 1974. He wonders if, according to the Court's ruling, *pacta sunt servanda* does not refer to unilateral state acts, then the good faith referred to by the Court may be the cornerstone of the binding force of such an act. This doubt arises from his own interpretation that, in the view of the Court, the principle of good faith applies properly to the performance of bilateral obligations and not to the basis of the binding force of a unilateral act. He contradicts, like K. Skubiszewski, the generally widespread belief that the Court has set the principle of good faith as the basis for the binding force of promises. In this situation, Charpentier identifies the answer to this question directly in the autonomy of the will of the state. He asserted that "*le propre d'une personne juridique est de*

[166] *Ibidem*, p. 232.
[167] *Ibidem*.
[168] A. Kozłowski, *op. cit.*, pp. 71-73.

pouvoir s'engager valablement par une manifestation libre de la volonté"[169]. W. Fiedler also states that the decisive factor for the binding force of a unilateral act is *the intention of the declaring state to be bound*. He adds, however, that such an intention must be deduced from the circumstances that accompany each individual case[170].

Jean Charpentier notices in the doctrine of international law tendencies for relationships of autonomy of the state with its sovereignty based on the introduction to the judgment of the ICJ in *Wimbledon: contracter de la Faculté des engagements internationaux est un précisément attribut de la souveraineté de l'Etat* (PCIJ, Series A, N ° 1, p. 25). According to this author the principle of *pacta sunt servanda* cannot have any significance, if, for instance, the signatories to the pact have no ability at all to commit by the free manifestation of their will. To reinforce this position, Charpentier invokes the idea of Venturini, who claims that the binding nature of unilateral promises should be justified in the same way as a binding treaty. In fact, both acts are an expression of the general will of obligation based on the same constitutional norm of the international legal order *relative à la production juridique volontaire*[171].

These views, as well as many other authors', are determined to return to a free and sovereign will of the state as the basis of any legally binding commitments undertaken by a sovereign state. So the formal side of the source of law, treaty, custom or unilateral act is of no significance here. One is the source of the binding force of such state acts in the international law.

Good faith is intertwined with the free will of the state. Reuter, however, favours the latter concept. In his view, for a unilateral commitment to achieve validity, it had to contain an expression such as *a non viciée, de la volonté normatrice* from its author. The element of intention or will becomes very significant here, even creative[172]. P. Reuter writes: "In principle, international law is not formalistic, so it attaches importance to the will as the core of the theory of the law"[173]. J. Pauwelyn explicitly states that the criterion of intent is generally accepted in order to distinguish what is and is not the law[174].

For a fuller justification of this position one can refer to the opinion of A. E. Zoller, the author of a work on good faith in international law. She refuses to distinguish between general principles such as *pacta sunt servanda* and *promissio est servanda*. In both cases the same issue is presented – *une parole qui a été donnée*. Hence, the

[169] Charpentier, *op. cit.*, p. 374.

[170] W. Fiedler, *op. cit.*, p. 1021.

[171] *Ibidem*, pp. 375-376.

[172] P. R. Reuter, Droit international public, Paris 1963, pp. 84-85, *Principles* ..., p. 581, J.-D. Sicault, *op. cit.*, p. 668.

[173] P. R. Reuter, *Principes*..., p. 581, J.-D. Sicault, *op. cit.*, p. 668.

[174] J. Pauwelyn, *Is it International Law or Not, and Does it Even Matter?*, [in:] J. Pauwelyn, R. A. Vessel, J. Wouters (eds.), *Informal International Lawmaking*, Oxford 2012, p. 134.

basis of the legal character of a state's obligations is the autonomy of its will, regardless of whether the international commitment undertaken has a negotiated or unilateral context. Ergo, it is not good faith, but "the will to commit determines the legal nature of the unilateral obligation". According to Zoller, good faith is not an autonomous concept from the legal point of view, capable of producing legal consequences by itself. So it cannot be a source of law[175].

Recently, Ch. Eckart protested sharply against the notion that the basis for the binding power of a state is solely its sovereign power in this area (will). Even the position of the PCIJ does not convince him, that "the right to incur international obligations is an attribute of state sovereignty (PCIJ, Judgment of 17 August 1923, Series A1, p. 25). He is not pleased with the absence of a clear explanation for why a sovereign pledge taken *at will* cannot be withdrawn *at will*, when a given sovereign changes its mind in that regard. He believes that since sovereign competence allows it to contract *at will*, the same competence should also give it the right to withdraw *at will*[176].

It seems that this author has simplified the underlying elements of his deliberations too much. It is as if he did not notice that the declaration of a sovereign state does not appear *in vacuo*. It is submitted to other sovereign states and, of course, within the framework of all sovereign states of law. And that even a sovereign state cannot simply act at any time and in any way *at its will*. In the ruling on the French declarations, the ICJ, with all its authority, ruled that public declarations cannot be withdrawn or altered arbitrarily by the French government[177]. The current legal order, permeated by the principle of good faith, does not allow this.

3. Grounds for the binding force of a unilateral state act in ILC guiding principles

In seeking the basis for the binding force of unilateral acts, the Commission, following the Court, refers to the law of the treaties. Art. 26 of the Vienna Convention on the Law of Treaties is invoked, which reads as follows: "Each treaty in force binds its parties and should be exercised in good faith." On the basis of that provision adopted by the Convention, the Commission stated: "... in like manner, unilateral declaration binds the state that formulated it by the same principle"[178]. Therefore, the Commission, on the basis of the binding force of both treaties and unilateral acts, has applied the same principle of good faith on the basis of Article 26 of the Vienna Convention on the Law of Treaties.

[175] A.E. Zoller, *La bonne foi en droit international public*, Paris 1977, pp. 51, 342-343.
[176] Ch. Eckart, *op. cit.*, pp. 198-200.
[177] ICJ, Reports 1974, Judgement, pp. 20-21, par. 51.
[178] ILC 1st Report 1998, p. 28, par. 153.

It seems, however, that the meaning of the quoted article from the law of the is somewhat different. In essence, it reads as follows: "Every treaty **in force** [highlighted – J.K.] is obligatory, and must be performed in good faith"[179]. This article does not refer to the basis of the binding force of treaties concluded. However, it is applicable to the performance of treaties already in force. It demands they be performed in good faith. This is the spirit in which it is understood and interpreted in the scholarship[180].

In the continuing appeal of the Commission to the principles of good faith and the principles of *pacta sunt servanda*, it was suggested that they could serve as a basis for the development of a more detailed norm in the form of *declaratio est servanda*. This would be a new and more specific norm, but one which seems to be of a fairly general nature. According to the Commission, although it would not cover all kinds of unilateral state acts, it could refer to such unilateral acts as pledge, rejection and recognition. Recognizing that the development of such a norm or general rule could raise doubts about unilateral acts other than the three mentioned above, such as protest, such fears should not prevent the development of the proposed *declaratio est servanda* rule. According to the Commission, it would not necessarily apply to all kinds of unilateral acts[181].

In these searches for a counterpart to the *pacta sunt servanda* rule in respect of unilateral acts, the Commission refers to the classical literature, to Grotius and Pufendorf, who attributed binding force to the promise, and Grotius was aware of the general principle *promissorum implemendorum obligatio*[182]. Eventually, however, this line of inquiry was abandoned, and the Commission remained with a principle already known much earlier in the scholarship. For instance, E. Suy and G. Venturini proclaimed that the binding force of obligations stemming from a unilateral declaration comes from "the very principle of good faith and security of international relations"[183]. It was precisely on the basis of the views of these authors, which the Commission was familiar with, and the Court's position expressed in the 1974 judgment, that the first Guiding Principle was formulated, which reads as follows:

> Declarations done publicly and manifesting the will of commitment result in the creation of legal obligations. When conditions are fulfilled, the binding nature of such declarations is based on good faith. States concerned can take them into account and rely on them; such countries are entitled to insist that these obligations be respected[184].

[179] Vienna Convention of the Law of Treaties .

[180] See e.g. S. Nahlik, *Kodeks prawa traktatów*, Warszawa 1976, pp. 178-184, or A. Wyrozumska, *Umowy międzynarodowe, teoria i praktyka*, Warszawa, 2006, p. 273 et seq.

[181] ILC, 1st Report 1998, p. 29, par. 157. See, also A. Kozłowski, *op. cit.*, p. 68, or P. Saganek, *op. cit.*, pp. 87-88.

[182] See. V.-D. Degan, *Unilateral...*, *op. cit.*, p. 151, or J.-D. Sicault, *op. cit.*, p. 636.

[183] G. Venturini, *op. cit.*, p. 403, E. Suy, *Les actes...*, p. 151.

[184] *Guiding Principles*, Principle 1.

Thus, the Commission did not take into account the clarification of the 1974 Court's position in its 1988 and 1998 verdicts cited above. It did not benefit from the diverse views of scholars in this regard. As a result, the principle formulated by the Commission does not reflect either the mainstream doctrine or a proper interpretation of the Court's position.

4. Summary

While the principle of good faith has been invokedin the doctrine of international law as the basis for the binding force of the unilateral state act, it was not until 1974 that the ICJ,discussing the French declarations, gave rise to broader interest in this issue. In fact, the Court has referred to this important legal issue, but in a manner too general and, in addition, not entirely clear. Hence, those commenting on this ruling try to complement and interpret the Court's view of the principle of good faith as a legal basis, the source of binding force of a unilateral act (in the French version).

Paul de Visscher is rather an exception, stating that the Court in its ruling clearly pointed to the "autonomous function of the principle of good faith in the creation of legal obligations"[185]. Other commentators raise even more serious doubts about good faith as the basis for the binding force of a unilateral act. Among such doubts, it is difficult to agree with C. Goodman's view that the Court has succeeded in shifting international obligations "from the subjective expression of the will to the objective of good faith"[186]. The more so, that it itself in principle focuses on good faith as rather securing the fulfillment of international obligations.

In fact, the commentators of the Court's ruling are rather seeking the existence of a specific legal norm of customary character, expressing the essence of the principle of good faith as the basis of binding force of a unilateral state act (or promise). And these searches conclude rather with various suggestions than justified and firm beliefs.

No less trouble is made for the commentators by the matter of specifying from what moment the pledge acquires a binding force that no longer allows the author of that promise to withdraw it arbitrarily. The main source of these doubts is again the Court's view that the promise has legal effect upon reaching the addressee, without need for any reaction showing confidence on the part of that addressee. The Court and ILC were concerned that the requirement of any reaction, even if only showing confidence in the promise received, would have violated the unilateral nature of such a state act. In reality, however, it is difficult to imagine, at least in most situations, that the promise itself of some rights, even beneficial, to its addressee may have legal effect in and of itself without giving rise to real trust and the exercise of that right by the addressee. Actually,

[185] P. de Visscher, *op. cit.*, pp. 463-464.
[186] C. Goodman, *op. cit.*, p. 18.

it is only the exercise of the promised rights that makes it possible to appeal against a one-sided act in the event of its violation. M. Virally tries to clear up these misunderstandings. He emphasizes that legal consequences do not come from a unilateral act alone, only because the author pursues such a purpose. The rights it intends to pass on to the third state will become definitively opposed only when they are "accepted" or used by the addressee[187].

In the scholarship some attempt is made to render more realistic the Court's position on this issue through the presumption of trust in a promise or identifying the roots of such a presumption in the existing legal order. Ch. Eckart was one who drew special attention to this matter. He seeks to prove, not so much from the actual content of the Court's ruling, but rather from its intentions, that the recipient's trust in the promise is to be presumed precisely from the moment it reaches them, and even from the moment of the promise is served. In this version, the protection of trust from good faith comes from the appearance of a promise. Moreover, thanks to this construction, the promise cannot be either altered or withdrawn arbitrarily from its arrival to the addressee or addressees, or even from its receipt.

This is a design not without logic. It is difficult to assume, however, that implied trust in a given promise lies within itself from the beginning or manifests itself when it reaches the addressee, or if it can be identified in the existing legal order. Besides, attributing trust as such a significant effect of the nature of a binding promise can deprive it of its unilateral character. Trust may have an impact on legal effects, on legality, but not on the proper legal nature of the promise itself[188]. One thing is the binding power of promises, and another thing is its effects and related issues of possible complaint or revocation.

It is much simpler to say that a unilateral act "reaching" its addressee means that they have become familiar with its content. The lack of opposition or rejection, though, can create the presumption that this act has led to their trust and will create legal effects. These effects derive from a single unilateral act, and this act sets out and delineates the nature and magnitude of the effects, but they are based on the recipient's confidence in the act addressed to them.

The position of supporters of the binding force of the unilateral act on the sovereign will of its creator is clearly formulated and justified convincingly in connection with the general character of the whole international legal order and the place of sovereign states in it. Not by accident do J. Charpentier, K. Skubiszewski, and E. Zoller interpret the Court's position in this spirit. It is difficult to resist such an interpretation of the judgment of when we read: "When it is the intention of the State to formulate its declaration (*dec-*

[187] M. Virally, *The Sources...*, pp. 153-156
[188] See. e.g. K. Skubiszewski, *op. cit.*

laratio) that it is bound to be binding, because such **intention gives the statement the character of a binding commitment** [emphasis JK]"[189]. It is not without significance for such an interpretation to clarify this view by adding in another, later judgment, the words "only" at the beginning[190]. Only then does the will of the unilateral creator give it the power of a legally binding obligation. This *passus* in the Court's case law is similarly interpreted by Zoller. On the basis of the above-quoted statement of the Court of Justice in its 1974 judgment, he states: "The will of the commitment determines the legal nature of the unilateral obligation. This commitment is essential because it draws on the distinction between declarations of a nature of legal obligations and declarations deprived of such character"[191].

Thus, in the attempt to find grounds for the binding force of a promise in good faith, there are too many serious doubts for it to be credibly opposed to the sovereign will of the state. At the same time, it cannot be doubted that the principle of good faith plays a very important role in respect of unilateral acts by states.

IV. Source of law or international obligations

The considerations contained in this subsection are not limited to merely seeking direct answers to the question in the title. Efforts have also been made to highlight and clarify the specific legal character and specific characteristics, objectives and tasks that the legal norms created by unilateral states in the international community apply. Obviously, this is only fragmentary, hence it does not pretend to cover all the material or to show the full or final image of the basic legal problem. It is difficult to capture it in its complexity, giving a clear, confident and complete answer to whether the unilateral state acts are merely a source of obligation, or whether they can also be an independent source of international law. Considerations have been limited to portraying the various concepts elaborated in the literature, and in this context a more middle-of-the-road look has been put forward on this difficult legal issue.

1. ICJ findings

As to whether the unilateral act is a source of law or merely a source of unilateral international obligations, the Court has spoken in very broad terms. The Court stated, basing its position in this matter on "well-established" views of scholarship: "The declarations in a unilateral act, in relation to legal or political situations, may ultimately create legal

[189] ICJ, Reports, 1974, Judgement, p. 18, par. 43.
[190] ICJ, Reports, 1986, p. 573, par. 39. P. Saganek drew attention here, *op. cit.*, pp. 365-366,
[191] E. Zoller, *op. cit.*, p. 342.

obligations." It was added that such commitments come from the will of the originator of the unilateral act and only oblige that entity. On the other hand, with regard to the specific French declarations that were provided for the cessation of nuclear testing, it ruled with all its authority that "they create obligations with legal effects." This is identified in not only their clearly-expressed content, but also their submission to the entire international community of states, making them obligations *erga omnes*[192]. He also emphasized that those interested in these declarations could familiarize themselves with them and, by trusting them, feel empowered to request that the undertakings made in these declarations be fully respected by the French government[193]. So the French declarations became binding and actionable.

Although the Court speaks of declarations in principle as the only source of commitments for their author, the natural rights of the addressees of such declarations arise naturally, including the Court's right to enforce a commitment. More specifically, the unilateral act can be, in the light of the Court's judgment, not only a source of obligations, but also of rights resulting from those obligations. However, they do not entail a duty to exercise such rights.

In general, however, it must be stated that examination of international case-law shows that international courts have not taken a position on whether unilateral acts of states are a source of international law. They only confine themselves to saying that they are a source of international obligations. It is noted that judicial practice is neither uniform nor fixed in the legal assessment of unilateral state acts[194]. It seems rather difficult to speak at all about the existence of such practice except in sporadic cases.

2. The Doctrine

The scholarship of international law almost unanimously claims that a unilateral act of a state is not a source of international law. In general, it is claimed that it can only be a source of obligations for the author of the unilateral act. It is only rarely added that it can be a source not only of such obligations, but also of rights resulting therefrom. As the basis of such a position, the principle of international law is put forth, ensuring equality of sovereign states. Equal, independent, sovereigns, incapable of imposing obligations on one another. This can only happen with mutual consent, generally on the basis of reciprocity. From then on, it ceases to be a one-sided act.

Maarten Bos's theoretical perspective was particularly firm. His opinion on the sources of international law in relation to the unilateral state act derives from the con-

[192] ICJ, Reports, Judgement, 1974, p. 18, par. 42, 43 and p. 20, par. 51.
[193] *Ibidem*, p. 19, par. 46.
[194] ILC, 1st Report 1998, p.15, par. 82.

ception of a community of free people. He stated that "in the *homines liberi* community no law can exist in its unilateral conception". With regard to international law, he adds: "... if an act entails the emergence of international law, it must have at least a bilateral character." Some of the unilateral decisions made by international organizations may demonstrate features of a source of international law. They function in an "organized community"[195].

An equally adamant author on this subject is K. Skubiszewski. Referring to the views of M. Bos, he categorically states: "... a unilateral state act cannot be the source of this [international] law." To make his point clear, he adds: "Neither the binding nature of certain unilateral acts nor their irrevocable character gives them the status of a source of law". In his view, unilateral state acts can only affect the functioning of sources of international law, may give rise to customary norms, and many treaties are concluded by exchanging unilateral state acts, for example by exchange of notes. Certain unilateral acts may even lead to *legal rights*, obligations or relationships. All this is something other than the creation of sources of international law by the unilateral state act[196].

Skubiszewski admits that although no state can impose obligations on another state, it may unilaterally through its own act activate the obligations of another state resulting from general international law or treaties. Both customary and treaty law leave many different issues to the unilateral decisions of the states concerned. By making such decisions, the state can initiate the operation of some rights or duties. But in such circumstances, stresses Skubiszewski, the unilateral state act does not become a source of rights or obligations. These rights or obligations come either from custom or treaty, and via these unilateral acts[197].

Thanks to unilateral acts that activate international rights or obligations, they become *applicable*, and in this sense can be referred to a unilateral act, sought by other interested states. In this sense, unilateral acts opposing previous acts may also be applicable. To illustrate such a situation, Skubiszewski cites an example of the law of the sea. Each coastal state has the right to delimit the breadth of its territorial sea via a unilateral act. However, this can only be done to the extent permitted by general international law. The link between a unilateral decision of a state and general international law was emphasized by the ICJ in *fisheries* cases:

> While the delimitation act is necessarily a unilateral act, only the coastal state has the power to take it, but the validity of the delimitation itself is dependent on international law (ICJ, Reports, 1951, p. 139)[198].

[195] M. Bos, *op. cit.*, pp. 88-89.
[196] K. Skubiszewski, *op. cit.*, pp. 221-223.
[197] *Ibidem*, p. 233.
[198] *Ibidem*, p. 233.

This quotation seems to indicate that the preceding quotations of K. Skubiszewski refer to unilateral acts closely related to the law of the sea at that time, i.e. non-autonomous acts. Such unilateral acts actually only "activate" the rights guaranteed by the law of the sea. They are, therefore, not autonomous unilateral acts *sensu stricto*. Their anchorage lies in international treaty law or customary law.

Skubiszewski's reasoning, however, draws attention to unilateral acts which may activate the rights or obligations of other states under general law or treaties and become the basis for pursuing claims on the activated rights or obligations. They seem to acquire some degree of independence and come closer to unilateral acts *sensu stricto*. Unfortunately, these arguments are not illustrated by examples from practice. He also emphasizes that the unilateral state act, imposing an obligation upon its author, simultaneously creates an appropriate right for the addressees of such a unilateral act. These states, by putting their trust in such an act, may demand that their rights be exercised and respected by their creator. Such an act can also be challenged in the event that it deprives them of their freedom of action[199]. So such a unilateral act can become the authentic source of these rights, and one can say that in this respect it is also a law-making phenomenon. In the light of Skubiszewski's arguments, however, it does not acquire the character of a source of international law in the strict sense, even when both obligations and corresponding rights arise from it.

Venturini has already emphasized that in a unilateral act, the state can only incur an obligation. He also reinforced the legal nature of such a commitment. This can be a commitment only in one particular case. Such an obligation must be precisely defined and, therefore, cannot constitute a general obligation, not limited and not exhaustive in one case[200]. Such an act cannot be regarded as a source of general law. He did not, however, take a stand regarding a general obligation not limited to one case.

The views expressed are a good reflection of the general position of authors refusing to assign unilateral acts the character of sources of international law. However, there is an increasing tendency in the international law scholarship aimed at providing a certain measure of elasticity to such a firm standpoint, while at the same time to some extent undermine the division adopted by the scholarship into unilateral acts with a conventional base and unilateral autonomous acts, that is unilateral state acts *sensu stricto*. Some unilateral acts of states may have a dual nature. In certain situations, they remain dependent on treaties for exercising their legal effect, while in other circumstances they may produce legal effects on their own.

[199] *Ibidem*, p. 233.

[200] Such a unilateral act cannot therefore be a source of general law. G. Venturini, *op. cit.*, p. 403.

Jean-Paul Jacqué, in his reflections on international law, draws attention to the difference between norms of conventions and norms of unilateral acts. He adopts a binary classification – formal and substantive. By applying a substantive criterion, the author submits unilateral acts as creating legal norms applicable to other legal entities other than the author of the unilateral act, while treaties create legal norms that refer only to their creators[201]. Of course, there may be exceptions, such as a third country contract. As a general rule, unlike treaties, unilateral acts could be regarded as the source of legal norms directed at entities other than their creators. As a result of this arrangement, Jacqué criticizes the supporters of the voluntary approach to international law. From their point of view, a legal act cannot create both obligations and rights, as for the entities involved in the creation of such acts. In this perception, such an act may be a source of legal norms that apply only to the authors of this source. It comes from their will, and can only refer to them[202].

Such a view, of course, does not fit very well with the reality created by legal norms contained in many unilateral acts, especially promises. Closer to the legal reality is a perspective based on the substantive criterion distinguishing norms of convention from norms created unilaterally. This view emphasizes precisely that legal obligations stemming from unilateral state acts are borne by the author of such an act, and at the same time the effects of these obligations are directed to the benefit of other states, the addressees of those acts. For this reason, Jacqué compares such unilateral acts to agreements made with third countries and states that they could be called unilateral acts for third countries[203]. W. Czapliński believes that *pactum in favorem tertii* is in fact a one-sided act[204].

Jacqué's views above live up to the arguments put forward earlier by G. Venturini. He also points out that a binding unilateral act is not geared to the benefit of the state bound to it for a specific conduct or omission. There is also no element of contractual reciprocity. The author of a unilateral act can always keep what they promise to give to others, irrespective of any legal ties. Because they can promise only what they already have. And they promise to create benefits for the addressee of their unilateral act. Venturini explains that he perceives that such unilateral acts are taken and performed "in the name of elementary justice"[205]. Such a character of unilateral acts is strongly emphasized by A. Kozłowski, stressing that unilateral acts of the strictest sense, i.e. autonomous, are

[201] J.-P. Jacqué, *Eléments pour une téorie de l'act juridique en droit international public,* Paris 1972, p. 320.

[202] *Ibidem*, p. 320.

[203] *Ibidem*, p. 320. Jacqué also included in international unilateral acts the decisions of international courts. He calls them one-sided authoritative acts. Among them the most important is the act of jurisdiction. It is authoritative because its creator can impose liability on the addressee of the sentence. This view is rather isolated (*ibidem*, pp. 345-346).

[204] W. Czapliński, *op. cit.*, p. 106.

[205] G. Venturini, *op. cit.*, p. 403.

regarded in the international legal order as not only a source of commitment for their creators, but also positive rights for their addressees[206]. Brierly explicitly states that such unilateral acts generate "rights against the declarant"[207].

To support such a view, it is worth mentioning the opinion quoted and included in the 7th ICJ report. It was pointed out that the current international practice abounds with numerous examples of unilateral promises of states, humanitarian aid, granting permission to use special territories, withdrawing from territories occupied militarily or being used for strategic purposes, debt cancellation, economic assistance, etc. Especially providing assistance in the present day, granting loans based on unilateral pledges has become a *familiar phenomenon*[208]. A notable example here is the Joint Declaration of the Venezuelan and Mexican Presidents issued on July 3, 1980, in which they announced a program of energy cooperation for the countries of Central America and the Caribbean. In this act they assumed obligations that can be considered legally binding, and which are to the benefit of third countries not participating in the formulation of this declaration. The legal nature of these commitments can also be attributed to the fact that they have been consistently performed by both countries and confirmed in time by declarations of the same content[209]. It is therefore possible for Venturini to say that these acts make the system of international law more fair, while giving it greater flexibility and perhaps greater efficiency.

In addition, the quoted views and examples clearly appear to indicate a complex, even legal nature, of some unilateral state acts, and in particular of a promise. Although undoubtedly these acts derive their legal force from the subjective will of their creator and their creator sets the purpose and scope of its act, the obligation and the rights resulting therefrom, the foreseen effects of that obligation or the fulfillment of purpose cannot normally take place without any participation. In the subject to which the act was addressed. M. Virally explicitly states that the rights the author of a unilateral act intends to transfer to a third country become definitive only when they are accepted or practiced by the state concerned[210]. One can say that such unilateral legislation is unilateral only in the aspect of its origin and its source of binding force. In contrast, in its legal-practical fulfillment, in its implementation, it is of a bilateral character[211]. It may even have a quasi-multilateral character in some sense, such as the French declarations, where the com-

[206] A. Kozłowski, *op. cit.*, pp. 71-72.

[207] J. L. Brierly, YILC, 1950, vol. II, p. 227.

[208] ILC, 2004, 7th report, pp. 10-13, par. 23.

[209] Libero*, Amarillo de la Republica de Venezuela*, Caracas 1983, pp. 872-873, after: ILC, 1st report 1998, p. 16, par. 83.

[210] M. Virally, *op. cit.*, pp. 154-156. Similarly, E. Suy, *Les actes*…, p. 151.

[211] Such a kind of bilateralism does not change the character of a unilateral act. In addition, the unilateral act of the State may be rejected, and even in certain cases challenged by its beneficiary.

mitment was made *erga omnes*. So it is an act changing the legal relationship between two or more states. However, it must be remembered that such bi- or multilateralism has its own specificity, distinct from bi- or multilateralism based on the consent of parties and the related reciprocity.

Camille Goodman, as do others, believes that since no state can impose obligations on another without its consent, a unilateral state act cannot be of a source of international law in the strict sense. She adds, however, that the legal effect of a unilateral state act may be to accept the author's obligation, to confirm previously existing rights, and even to acquire important new rights, such as territory[212]. However, she does not give an example nor explain how a unilateral act can lead directly to the right to acquire territory. Is this, for example, a cession, or a customary one-way act?

More about the possible various legal effects of unilateral state acts is expressed by the V.-D. Degan. It seems odd to him that, until now, most of the works and textbooks devoted to international law and dealing with unilateral acts do not at all mention the possibility of acquiring new rights for themselves into new territories, such as not belonging to any other countries. But, moreover, the state can acquire new rights through such act, even if it is contrary to the principles of general international law or the subjective rights of another state. The condition for acquiring such rights may be a peaceful extension of its authority to some territory or part of the sea for a longer period of time and without any protests from other states[213]. In support of this view he quotes Max Huber's statement on Palmas Island of April 4, 1928:

> ... practice and doctrine recognize, though under various legal formulas and with some variation in the required conditions, that the continuous and peaceful exercise of territorial sovereignty (peaceful against other states) is as good as (historical) title ...[214].

Max Huber's remarks refer to overland territory, but they can equally be used to extend state power to international sea waters. Degan points to the many unilateral acts or conduct of various states that initially had no legal basis or were incompatible with existing international law norms, and over time gained legal force on the basis of "subsequent practices of most other states generating new customary rules". It rightly emphasizes that the so-called unilateral acts of states, or even practices, in particular the major

[212] C. Goodmann, *op. cit.*, pp. 2-7.

[213] V.-D. Degan, *Unilateral Act*…, p. 237. M. Virally has different view on the topic. He believes that unilateral acts on the territorial waters or the continental shelf can have effects in international law only if they are not contrary to this law. As long as such an act does not find support in customary law, it cannot be counterproductive in relation to other states, unless it is explicitly recognized by the situation, or if such a situation would gain historical title or universal tolerance (*Fisheries case*, ICJ, Rep. 1951, p. 138 et seq.). M. Virally, *op. cit.*, p. 156.

[214] II Reports of International Arbitral Awards, 839, quoted after V.-D. Degan, *Unilateral Act.*…, p. 234.

maritime powers of the largest commercial, fishing or war fleets, have always been the foundation of the development of international law of the sea[215].

It should also be stressed that it is justified to emphasize that such acts have become merely the root of the practice, which can then lead to a new customary norm. Thus, such state acts aiming at acquiring jurisdiction over some land or sea areas do not fall within the category of unilateral acts of an autonomous nature. They only initiate a practice that can lead to recognition in the form of the so-called *opinio iuris* as evidence of the emergence of a new customary standard. The resulting customary norm consists of two elements – practice as a material element, objectively determined, and subjective element, i.e. *opinio iuris*.

Degan's claim, however, is that unilateral state acts, which at the beginning are incompatible with the international law in force, acquire legal force based on practice recognized as evidence of a customary norm. Such an act is only a beginning and an integral part of the developed practice, and thus accomplishes its goals. It is neither a source of a customary norm, nor can it be given the power of law. It was created on the basis of the practice initiated by the unilateral act, simply as act of absorption. This as such ceases to have any further lawmaking significance. It may, however, affect the process of forming the customary norm. K. Zemanek puts forward a different concept. He believes that while in the law-making process initiated by a unilateral act the custom of the state is considered to be the proper source of law, yet such a unilateral act can be regarded as the source of this custom, and then they can hardly be separated[216]. It does not appear, however, that the unilateral act itself, understood in the sense of action, of the practice of states, could be regarded as a source of customary law. Such a rule of law must consist of two elements – practice and *opinio iuris.* Indeed, practice itself can lead to the formation of a habit, but not legally binding.

In the doctrine of international law, since the middle of the last century views have emerged that a unilateral state act may, at the time of its inception, bring about the legal effects which it assumes as the norm of international customary law. It is quoted by L. Brierly, who argued at the ILC forum in 1950 that in the formation of custom there is no need for "continuation or repetition of the practice over a considerable period of time". Of significance is, however, *opinio iuris,* which may appear "at moment's notice". He argued that the principle of state sovereignty over the air on its territory was "settled at once" at the "outbreak of war in 1914". Previously, it was only a "matter

[215] *Ibidem*, pp. 241-242

[216] K. Zemanek, *op. cit.*, p. 218.

of opinion"[217]. Many authors state that nowadays customary norms can emerge *instantly* through unilateral acts of states.

Igor I. Lukashuk writes, for example, that not only doctrine, but even international bodies are inclined to recognize the possibility of creating a customary norm without preceding it, or even without prior practice. According to this orientation, the essence of the matter in the creation of norms of customary international law is simply to shift the focus from the requirement of *evidence of practice* to *opinio iuris*. So what was formerly recognized as evidence of practice now is the growing *evidence of opinio iuris*[218]. Lukashuk states that lawyers have pointed out for several decades that the length of the practice was not a decisive factor in shaping custom. The time required for custom depends in each case on individual circumstances and may vary from case to case. In situations of rapid change and emergence of new problems requiring immediate decisions, customary norms can even appear without preceding practice. This recalls the view of Bin Cheng, who has long argued that international customary law has only one constitutive element. It is *opinio iuris*[219]. Even if one accepts this view that a unilateral state act may, without the protests of other states, immediately create a legally binding norm, then it would be difficult to regard it as a source of customary norms. It would deny the whole essence of customary norms stemming from practice rather than consent in the form of *opinio iuris*.

The main impetus for the emergence of the concept of *instant customs* has been given particularly thanks to two essential and widely known events of major importance for international law. These were the announcement made on September 28, 1945, by US President H. Truman regarding the continental shelf proclamation, and the launch of space missions by the then Soviet Union of the first Sputnik in 1957, without prior notice to any country. The lack of protest against these two unilateral acts violating the international law in force then began to be explained and justified as a reconciliation of their binding force as a source of new norms of customary law. They were meant to be the source of customary norms of an *instant custom* based solely on the *instantly* created "*opinio iuris*"[220]. However, as it is known, what is and what is not the law is not to be decided by the opinions of lawyers, but by the bodies set up to determine and apply the

[217] YILC, 1950, vol. I, p. 5.

[218] I.I. Lukashuk, C*ustomary Norms in Contemporary international Law,* [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski.* The Hague 1996, pp. 503-505.

[219] B. Cheng, *United Nations Resolutions on Outer Space: Instant International Customary Law?* "Indian Yearbook of International Law", Vol. 5 (1965), p. 36, I.I. Lukashuk, *op. cit.*, p. 506.

[220] Some authors, while recognizing their features, tried to construct something similar to the supposed practice. see. e.g. K. Wolfke, *op. cit.*, 2nd ed. pp. 56-58.

law, i.e. courts, in this case ICJ. Noteworthy here is the opinion of the body set up for the development and codification of international law, namely the ILC.

The Commission, as its member J. Brierly points out, was reluctant to recognize the authority of a legal norm from a practice based solely on the will of the countries concerned. Brierly did not consider that even a fairly extensive practice of states could create sufficient grounds for a customary norm. Considering, however, that since the unilateral act of the United States was widely endorsed by its general utility, such support provided a sufficient basis, but merely to recommend the exclusive rights of coastal states to the adjoining continental shelf[221]. It was considered that Truman's proclamation constitutes only a "part" of the unfinished process of the creation of a new customary norm in the law of the sea relating to the continental shelf[222].

A similar position was taken by the ICJ. In the North Sea continental shelf judgment, Truman proclaimed the "special status" of both the theory and the practice of international law governing the legal regime of the continental shelf. Ultimately, he stated that this was only a "starting point of a positive law", the law codified in 1958 in the Convention on the Continental Shelf[223]. A good example can be mentioned in the matter of Lord Asquish of Bishopstone seized in arbitration concerning the *Abu Dhabi case*. He stated explicitly that even a "continental shelf doctrine was not known in international law" until World War II. He added that until 1951 it did not become part of the corps of international law, nor was it finally established as a norm of international law[224].

Thus, K. Skubiszewski is rather right to say that "*instant custom* is an invention of literature, not a phenomenon of the legal realm"[225]. In the process of creating international customary law, unilateral acts of states can only initiate and participate in its continuation leading to its possible recognition (*opinio iuris*) as proof of the formation of a new customary norm. As such, they do not constitute an independent source of these legal norms.

Both in the jurisdiction and in the doctrine, the position that a customary norm is practiced is widely shared. K. Wolfke, after thoroughly examining both ICJ practice and doctrine, stated: "in present, international law there are no binding precise, pre-established conditions for custom creating practice, except the basic one that such practice

[221] J.L. Brierly, *The Law of Nations*, 6-th ed., Oxford 1963, pp. 213-215.

[222] ILC, 3rd Report, 2000, p.22, par.164-166

[223] ICJ Reports, 1969, par. 47 and 100.

[224] *The Arbitrations between Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi (1951),* 1, ICLQ (1952), pp. 247, 253-255. For G. Schwarzenberger, *International Law*, 3rd ed., 1957, vol. 1, p. 350. See also J. L. Kunz, *Continental Shelf and International Law: Confusion and Abuse*, 50 AJIL, 1956, pp. 228-235.

[225] K. Skubiszewski, *Rezolucje Zgromadzenia Ogólnego ONZ a powstawanie prawa zwyczajowego,* in: Acta Universitatis Wratislaviensis, N° 948, Prawo CLIX , Wroclaw 1987, p.138

must be sufficient foundation for at least a presumption that the states concerned have accepted it as legally binding"[226]. Following M. Virally it can be added on the basis of ICJ practice that proving a custom depends on procedures. On the "legal interpretation of facts objectively established"[227].

Degan, as quoted above, rightly states that unilateral acts on the seas, or even practice, in particular that of the major sea powers, have always been a *factor* in the evolution of international norms. They were so even when they had no legal basis. It is therefore clear that such unilateral state acts can be regarded as a new source of international law. He states first and foremost, as do almost all other authors, that there is such a great diversity of acts of this kind that it is impossible to find one common denominator. Some of them, like *acquiescence*, produce only *opposable situations*. Others, such as protest, preclude them. These types of unilateral acts in his opinion are not *genuine sources* of international law. They are rather reactions to acts of other states[228].

In general, the answer to the question of whether unilateral acts of states are a *genuine* source of international law depends on how we interpret the notion of such sources. If under this concept we understand the source of law as merely *impersonal* legal norms, then the answer is definitely negative. On the other hand, in conjunction with treaties, certain Declarations of the UN General Assembly, the final acts of diplomatic conferences, judicial practice and states' unilateral acts are "an important element in the creation, modification and expiry of customary norms of international law." In this context, they see their "normative character"[229].

Finally, the author acknowledges that in the sense "of a particular agencies creating legal rights and obligations for some states only" certain types of unilateral acts "constitute a source of international law". He adds that in their nature and their legal implications they are closest to treaties. And in this narrower sense they are "a genuine law creating process", as are other sources of international law. And all unilateral acts of the nature "of being law creating agencies" can be incorporated into three groups:

1. a pledge, by which a given subject of international law, the author of a unilateral act, assumes a new obligation in respect of another state, group of states or even *erga omnes*. 2. waiver of certain binding rights. 3. unilateral acts that have for centuries created new rights for their originators in relation to certain land territories or parts of the sea. These rights arise through the peaceful use of these acquisitions for a long time, even without any legal title[230].

[226] K. Wolfke, *op. cit.*, pp.44 and 169.
[227] M. Virally, *op. cit.*, pp.121-122 and 134-135.
[228] V.-D. Degan, *Unilateral Act…*, p. 185.
[229] *Ibidem*, pp. 185-186.
[230] *Ibidem*, pp. 186-187.

This division points to the very unilateral state acts in their content and character. From accepting new obligations towards other countries, renouncing certain rights over other states, and finally acquiring certain special rights that may create obligations for other states, or at least restricting the rights of other states to certain land or sea areas. Except for the above-mentioned reasons, the acts referred to in paragraph 3, Degan's unilateral acts change the relationship between the various parties of that right. They are, as Degan points out, "*law-creating agencies*". Their creators change their legal relationships in a wide range of subjects, with one or a group of subjects, and even in the *erga omnes* scale. With this disproportion, however, the source of this change of relations, even *erga omnes*, is, on the other hand, one legal entity, although it may be composed of several states. And in that sense, such an act of law does not correspond to a non-personal, impersonal act. And according to Degan, these are precisely the sources of international law in a strict sense. Perhaps, however, one can doubt the opinion of Degan that the source of international law must always and everywhere be completely depersonalized. As an example, such a personalized act as the French declaration changed the legal relationship between all states. They applied *erga omnes*. The decisions of an organization recognized as a source of international law also come from one subject of that law. And they are widely recognized as a source of international law. This also seems to point to the lack of a logical and coherent notion of the source of contemporary international law.

Like Degan, J. Dehaussy also seeks in unilateral state acts a new source of international law. He believes that the source of law is the process of creating general legal rules (*caractère général*) designed to regulate existing relations or create a new legal order between states. However, it shares unilateral acts on account of their law-making significance in two groups: unilateral acts of international bodies and unilateral acts of national authorities of states. The acts of international organizations attribute *un caractère plus ou moins nettement supérétatique*. He considers that the autonomous acts of state organs issued for the purpose of regulating international relations are also a source of law, since they fulfill *un role normatif générale en droits des gens*. Given the individual relations between the different states, the nature of international relations, and the unilateral acts of states may regulate such relations, they should be incorporated into the sources of international law. All the unilateral acts of states in international law, however, consider lower rank of international law. They are also made up of the law, but such law is dependent on acts of higher rank. So it is derived law, secondary (*secondaire*) law. This means that the law derived from this source cannot be contrary to the law of the

higher category, that is neither treaty law nor the customary law, which constitute the "main source" of international law[231].

This concept met with harsh criticism from Bos. Only in respect of the first group, that is the acts of unilateral international bodies, he agrees with Dehaussy's view. Nonetheless, only to a certain extent. In his opinion, a "more or less transnational character" can be granted to only "some decisions" and not "resolutions" of international bodies. He cannot agree with the notion of a "derived source" of international law in respect of unilateral acts of states on two grounds.

First of all, there is no place in the system of international law for a second category source, that is, sources of law dependent on another, higher category of sources or main sources. There simply cannot be any source of this kind in international law.

Secondly, the fundamental reason for rejecting such views is seen by Bos in the fact that in the "*homines liberi* community" there can be no law of unilateral nature at its origin. According to Bos, the international act must have at least a bilateral character. The decisions of international organizations, although they are one-sided, are not in the *homines liberi* world. They function in an "organized community". That is why they are "a class of their own". They are a source of international law, and in the terminology used by Bos they are a "Recognized Manifestation of International Law" (RMIL)[232].

This concept of Bos can lead to the conclusion that all treaties concluded by international organizations are not a source of international law, as they cannot conflict with the basic principles of their statutes. And international law cannot be in conflict with the basic provisions of the UN Charter. Bos seems not to notice the emerging hierarchy of norms of contemporary international law. And besides, as Virally rightly writes, the issue of the source of law is different *in a state of community*, and in what we call the *international community*, which is still *imperfectly organized*[233].

Michel Virally refers critically to the adoption in international law of the general theory of the traditional notion of law "sources" from which legal norms are created in the sense of "general and fixed norms" having repeated application without restriction. He believes that such a capturing of sources does not match the so-called "particular rules". This causes difficulties in international law, which is characterized by the fact that it includes relatively few general norms binding all states. Very often the term "international law" is used in the sense that it only covers "general international law". In fact, it also contains other standards binding only a certain group of states, or even some states. It points to the situation of norms contained in multilateral treaties as well

[231] J. Dehaussy, *Sources du droit international: Introduction général*, w: Juris-classeurde Droit International, vol. I, Fasc. 10, pp. 4-12. M. Bos, *op. cit.*, p. 88.

[232] M. Bos, *op. cit.*, pp. 88-89.

[233] M. Virally, *op. cit.*, p. 120.

as customary norms that create regional customs. Finally, general and permanent norms may arise in relations between only two states. In this way, unilateral state acts can lead to the emergence of *international rules of law*. They may be the source of regional international law[234]. This is a concept reminiscent of Degan's above-mentioned opinion.

The same line of reasoning towards unilateral acts is followed by Ch. Eckart. He, above all, took a very strong position on the nature of the legal promise. Eckart believes that the Court has formulated its view of the pledge as a source of commitments rather than a law based on G. Fitzmaurice's theory of treaties. According to this theory, treaties are not a source of law, because they do not apply to all states, but only refer to states that are parties to such a treaty. And yet – as the author rightly noted – according to Art. 38 of the ICJ statute, both "general" and "particular" treaties are considered sources of international law. He believes that the same character should be assigned to promises, and that they should be included among the sources covered in this article as a new source of developing international law[235]. There is now a clearer stance in the scholarship that seeks to recognize autonomous unilateral state acts as "derivative", "particular", and even international law. Even P. Saganek, who is very critical of the authors who perceive sources of international law in unilateral state acts, summarises with the following conclusion: "In the present state of this doctrine, it is impossible to refuse the status of source of law to any unilateral acts. Acts which are at least similar to agreements deserve the same treatment as regards belonging to sources of international law"[236]. Probably, however, he exaggerated or erred by pointing to "any and all" unilateral acts of states. It is rather only some of them that he wished to mention.

As has already been said, there is a broadly shared and accepted division of unilateral legal acts into acts related to the process of treaties and customary law, and acts that are independent of these processes, that is unilateral autonomous acts. The fundamental difference between the two groups of acts is that the unilateral acts of states linked to treaties and customary law cannot independently produce the legal effects they envisage. This may only be in connection with a given treaty or customary law. Autonomous acts, on the other hand, produce legal consequences autonomously, on their own. On this basis, ILC excluded from the scope of its deliberations all of the first group of unilateral state acts. In the scholarship they are also omitted when considering the legitimate character of unilateral acts.

There are, however, some authors who disagree with such an arbitrary division. It is arguable that certain unilateral acts of states, linked to treaties or customary law,

[234] *Ibidem*, pp. 120 and 154.

[235] Ch. Eckart, *op. cit.*, pp. 179-188.

[236] P. Saganek, *Akty jednostronne państw a problematyka źródeł prawa międzynarodowego,* [in:] B. Mielnik (ed.), *Z problematyki źródeł prawa międzynarodowego*, Wrocław 2017, p. 87.

in certain situations may have legal effects independent of a given treaty or custom. Not every unilateral commitment resulting in the legal consequences of a convention has to lose its legitimate autonomy. Unilateral commitments can be combined with conventions without losing their autonomous character. This is an example of the recognition adopted by *Les Douze en application de la Déclaration sur les lignes directrices de la reconnaissance de nouveaux Etats en Europe orientale et en Union Soviétique du 16 décembre 1991*[237]. It is about taking into account the five conditions set out in the Declaration of European Political Cooperation of 16 December 1991, in giving these new states collective recognition. This trend of academic inquiry was initiated by J. Charpentier and further developed by other authors, especially K. Zemanek and E. Suy.

Jean Charpentier basically agrees that the search for an independent source of law excludes the unilateral acts of states aimed at creating or modifying their conventions. This applies to acts such as ratification or objection to a treaty. This may also be related to accession to a treaty, when the state notifying of the act of accession becomes a party to it, although it did not participate in its preparation. Accession to a treaty may also have a different legal character. This can happen when, by unilateral act, a state accepts the provisions of a given multilateral treaty, but does not want or cannot become a party to it. In such a situation, it becomes unilaterally bound by the provisions of the treaty, and the source of the change of legal relationships between the parties to the treaty and the state accepting its provisions is unilateral. Such known cases are, for example, the acceptance by France of the Treaty of Non-Proliferation of Nuclear Weapons in 1968 before its formal accession to it,[238] or the Declaration of December 12, 1978 of the European Space Agency accepting the rights and obligations of the 1974 Convention on the Registration of Objects Sent to Space[239]. One can also include an example by M. Virally, who points out that there are states which, by unilateral declaration, have "accepted" the provisions of the UN Charter. Nevertheless, the declarations made by them do not make them members of the UN, the parties to the multilateral treaty with which they are bound. In such a situation, however, Virally considers that states are bound by the Charter, or by customary law, which "attaches binding effects to unilateral declarations, or that these principles have been universally recognized as customary"[240].

Jean Charpentier is of the opinion that, as a result of such a unilateral act, its creator enters all treaty obligations with respect to all states-parties to the treaty, but also enjoys the rights conferred by that treaty in the same way as all its parties. Conversely, all states as parties to a treaty extend their treaty obligations and rights to one new entity/non-party

[237] J. Charpentier, *op. cit.*, p. 371.
[238] In 1992, however, France joined TNP.
[239] J. Charpentier, *op. cit.*, p. 71; see. E Suy, *Unilateral Act.…*, pp. 636-637.
[240] M. Virally, *op. cit.*, p. 129.

to their treaty. This entire operation does not change the legal character of a unilateral act, even though legal effects are the result of its interaction with the treaty. The appropriate source for the change of the legal situation of the state – author of a unilateral act towards states that are parties to a given treaty is a unilateral act of an autonomous nature.

The important feature of Charpentier's deliberations over the unilateral state acts is to oppose a categorical separation of these acts from the agreements as well as the categorical division of unilateral state acts into autonomous acts and acts related to treaties and customary law. His research leads to the following conclusion: "One can be surprised to find that the difference between the two acts is less than we think". And the stability of unilateral commitments is comparable to conventional obligations[241].

Karl Zemanek has already presented direct criticism of the prevailing scholarship, and the rigid division of unilateral state acts by the ILC into legal and treaty-dependent acts and autonomous acts in this regard. He has certain objections about the fairness of such a categorization of unilateral state acts and draws conclusions on their definitively different law-making nature. First of all, he argues that not all forms of participation of unilateral acts of states in the process of concluding treaties can be fully subordinated to the Convention on the Law of Treaties. Some go beyond just supplementary roles and can produce legal consequences of themselves without a treaty, and are not mentioned in the Convention even though they are linked to a treaty. Current examples include the notification of new states on their accession to multilateral conventions or the continued application of bilateral treaties. States that are not parties to the Vienna Convention on the Succession of States to the Treaties of 1978 nevertheless accepted such notifications without protest. From their silent acceptance in this case Zemanek proposes that either they recognize the relevant rules of this Convention as evidence of existing custom, or they themselves have transformed them into the customary law through their acquiescence. In any case, either way, it was precisely because of the notification, a unilateral act of a country not covered by the Vienna Convention on the Law of Treaties. According to Zemanek, unilateral acts in such situations play an autonomous role, so they can be grouped into unilateral acts[242].

It is obvious to Zemanek that, as in the process of concluding treaties, so in the process of the formation of international customary law, the unilateral state acts constitute the "main instrument". The "definitive nature" of such acts indicates that they do not go in the process of creating or confirming the existence of customary law to establish individual rights and / or obligations for the states that are their authors, but contribute to the creation of norms of a general character, or confirm these norms by applying them. In addition, the

[241] J. Charpentier, *op. cit.*, pp. 175-176 and 380.
[242] K. Zemanek, *op. cit.*, pp. 210-211.

author believes that the difference in this case between the creation and application of customary law is sometimes blurred in practice. It would be possible to distinguish between unilateral acts influencing the formation of custom and then exerting a "constitutive effect", and acts that only apply customary norms and consequently have a declaratory character; however, according to Zemanek this distinction would be purely academic. The law of custom is not a static set of rules, but it is a continuous process where continuous use leads to small changes, at times causing radical changes[243].

Unlike the previous category of unilateral acts, those belonging to the group of autonomous acts go directly to the establishment of rights and / or obligations for the author of the autonomous act. If such an act lays down obligations only for its author, then there is no formal acceptance to achieve the intended legal effects. On the other hand, when it concerns other states, it must be "accepted by them to give them the opportunity to respond"[244].

Based on his quoted *revisited* findings, Zemanek raises the question of whether unilateral acts of states can be regarded as a separate source of international law. First of all, however, again as other authors referred to above, he considers the prevailing practice of distinguishing between sources of rights and/or obligations and sources of international law as questionable and useless. This view can only reflect the situation of unilateral acts connected with the process of concluding treaties. In this respect, exceptions are provisions which do not exclude the provisions of the treaty, but merely alter the content of one of them and thus create a new law binding between the state making such an objection and those of the parties to the treaty which have such an objection. The division of sources here does not incorporate into the role of unilateral acts in the process of creating customary law. Although custom is considered in such a situation to be the proper source of law, unilateral acts, however, can be regarded as the source of this custom, and then they can hardly be separated[245].

Lastly, such division is not appropriate for unilateral acts of an autonomous nature that are not carried out in a single application, but have lasting effects requiring constant adaptation. As an example, Zemanek quotes an ICJ judgment on French nuclear tests. France pledged not to continue such trials in airspace. This behaviour is continuous. It is not consumed in one act of behaviour or written act. In that case Zemanek does not see the difference between a unilateral act and a treaty as a source of international law[246].

It could possibly be argued that the unilateral acts of states, as deriving their legal force from the international custom, are a derivative source, having no separate status.

[243] *Ibidem*, p. 211.
[244] *Ibidem*, p. 212.
[245] *Ibidem*, p. 218. The acts that influence the rise of customary law attribute „constitutional effect", p. 211.
[246] *Ibidem*, p. 218.

According to Zemanek, such an argument, even if it is correct in its first part, is confusing in its conclusions. Similarly, as Dehaussy quoted above, and contrary to Bos, Zemanek considers that "delegated law-making is still law-making"[247].

In conclusion, this author states that while most unilateral state acts will only create rights and / or obligations for their authors, some of them may "create a new law". In Zemanek's terms, this essentially refers to acts unilaterally recognized in the scholarship and in the work of the ILC for non-autonomous acts[248].

Summing up, Zemanek's revisited look at unilateral state acts can be concluded as follows:

1) he contests the consensus of scholarship and the ILC as a criterion for the classification of unilateral acts of states into dependent acts in their legal effects, either on treaties or customary law, and the autonomous acts of states;
2) he believes that the division into the source of rights and / or obligations of states and the proper source of international law is at best questionable and at worst useless;
3) he shows in the examples cited above that, in principle, not unilateral acts of autonomous nature as held by the scholarship, but unilateral acts of a state regarded as having legal effects dependent on treaty or customary law, may be – and in practice are – a source of international law.

Similar to Zemanek, Eric Suy in his recent publication and in his "new" view of international law states that, in the light of the progressive development of international law and the codification of treaties, constitutive elements of the autonomy of unilateral acts of states should be revisited or at least weakened ("shaded")[249]. Among other things, it turns out, as Zemanek noted earlier, that the codified law of treaties does not include the regulation of certain forms of lawful participation of unilateral acts related to treaties.

Eric Suy illustrates this situation with the example of objections to treaties in the form of unilateral acts. If a multilateral convention permits the lodging of a reservation, then such a reservation is a unilateral state act which falls within the process of concluding treaties. It is not an act independent of the treaty in its legal effects. It happens in practice, though, that a multilateral treaty contains a provision excluding objections to it – as do most treaties on disarmament or human rights. However, if, despite such a prohibition, a reservation is made in the form of a unilateral act, such act will not give rise to any legal effect. It is observable that in the current practice of states there are "prohibited reservations" under the cover of "interpretative declarations". If they have clear charac-

[247] *Ibidem*.
[248] *Ibidem*, p. 218.
[249] E. Suy, *Unilateral Acts…*, pp. 634-635.

teristics of objections, they will have no legal effect. The treaty, as it is known, prohibits objections. An authentic interpretative declaration may be regarded as actually an autonomous unilateral act "generating the legal effects intended by its author"[250]. That may be a source of international law, as pointed out by Charpentier and Zemanek. There may be, nonetheless, some doubts as to whether such interpretative declarations should be considered part of a given treaty.

In conjunction with the institution of reservations to multilateral treaties, another lawmaking situation may arise. That is, in the current practice of states, numerous multilateral treaties do not contain a provision at all, nor are they subject to any objection or ban on their submission. If a party to such a treaty lodges a reservation, it will have the effect of restricting the application of the treaty to that state, provided that such a reservation does not contradict the substance and purpose of the treaty. This is due to the rule of customary law incorporated in Art. 19 of the Vienna Convention on the Law of Treaties[251]. A tacit agreement on objections to it does not interfere in such a situation with the determination of the effect of the objection. Hence, Suy draws the conclusion that such a reservation should not be regarded as "a truly autonomous unilateral act". Its legal effects are determined only by the state that is its author. The same applies *mutatis mutandis* to the termination of a treaty or treaty obligation[252].

To the example taken from Charpentier on accepting the rights and obligations of a multilateral treaty without joining as a party, Suy adds a few more. On this basis, he proposes that unilateral declarations containing promises or promises of acceptance of treaty provisions without formal accession thereto be included in the Convention on the Law of Treaties. This means that Art. 11 of this Convention should be extended to "autonomous unilateral commitments", because these acts "may create legally binding obligations and expectations"[253]. C. Goodman considers it even an anomaly that "while the bilateral and multilateral action" of states has been regulated, and unlawful acts have been recognized and codified within the responsibility of states, lawful unilat-

[250] *Ibidem*, p. 635.

[251] Article 19, Formulation of reservations:

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty;

(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty"

Article 11, Ways of giving consent to be bound by a contract; „The consent of the State to be bound by the Agreement may be expressed by the signature, exchange of contractual documents, ratification, acceptance, approval, accession, or in any other agreed manner."

[252] E. Suy, *Unilateral Acts*…, pp. 630-635.

[253] *Ibidem*, pp. 136-138.

eral legal acts remain unconfirmed and non-codified. The author believes that such codification is not only quite possible, but would bring recognition of unilateral acts "as a source of international law." Such an opinion is strongly favoured by this author[254].

3. ILC standpoint

At the very beginning of its work, the Commission, when considering the scope of its tasks, spoke quite clearly about the legal nature of unilateral acts of states. It expressed this in determining the difference in this regard between a binding unilateral act of an international organization and a unilateral state act. The members of Commission indicated that it is important here to delimit the border between unilateral acts "in the context of co-ordination relations" and unilateral acts "in the context of *relationships of association*". Notably, coordination relations are based on respect for sovereignty and legal equality of states. Consequently, unilateral acts in this context "cannot generate obligations for third countries", while an international body may take legal acts to the extent permitted by the legal competence of its member states[255]. They may therefore be equipped with the competence to create obligations for third parties[256].

Continuing to reflect on this problem, the Commission stated that, at the outset of its codification activities, it must first determine whether, formally, a declaration as a formal unilateral act may or may not be an autonomous source of international law[257]. In solving this problem, the Commission relied on the doctrines of international law. It was said that most authors believe that the unilateral state act is not a source of international law. It can only be a source of commitment for its author. However, the Commission used mainly the views of the two most authoritative authors, K. Skubiszewski and M. Bos[258]. It also examined practice of international courts. The members of the Commission found that international Courts did not say whether unilateral acts of states could be a source of law. They limit themselves in this regard to the statement that they may be the source of international obligations[259]. It was acknowledged, however, that there was no doubt about the serious contributions made by unilateral state acts to the rise of custom. In this context, the Commission mentioned unilateral state acts related to the law of the sea. They have been applied since the 18th century and subsequently contributed to the codification of this area of international law[260]. However, the Commission has come to the conclusion that such acts of habitual states can be excluded from the

[254] C. Goodman, *op. cit.*, p. 31.
[255] ILC, 1st Report 1998, p. 8, par. 31-32.
[256] *Ibidem*, p. 9, par. 35.
[257] *Ibidem*, p. 15, par. 80.
[258] *Ibidem*, p. 15, par. 80-81.
[259] *Ibidem*, p. 15, par. 82.
[260] *Ibidem*, p. 19, par. 101.

category of strictly unilateral acts, since their effects boil down to some sort of silent international agreement. Formally unilateral acts may seem autonomous, but generally they are effective when they meet other similar acts and therefore contribute to the customary norm[261].

Thus, in the Commission's view, unilateral acts of the states-parties in respect of the law of the sea may have legal effects, leading to silent agreement or, together with other similar acts, contribute to the norm. In this context, they do not behave as strictly autonomous acts, i.e. producing effects on their own, without the involvement of other entities or similar acts. Exceptions to this general rule may, however, occur. The Commission notes that the act which forms part of the process of creating an international custom does not necessarily have to be excluded from the category of strictly unilateral acts. This can happen when an act, regardless of its function as a source of custom, "reflects an autonomous substantive unilateral act creating a new juridical relationship"[262]. Unfortunately, no example of practice has been quoted.

It is clear from the Commission's consideration that unilateral state acts can play a dual role. Contributing, along with other similar acts, to the formation of a customary norm, they do not need to simultaneously lose their independence and may create new legal international relations. Unfortunately, the Commission did not elaborate on this issue. Finally, in the Guiding Principles, the Commission merely confined itself to the Court, stating that a state declaration made publicly and manifestly willing to commit itself may give rise to legal obligations (rule 1). These may be commitments made to one, several, or other entities (Rule 6). It was difficult to grasp this matter more rigorously. And it would have to leave some flexibility, if only interpretative. In this form, it lags far behind the reality of international law and beyond the rather widespread new views of science[263].

4. Summary

Among the wide array of various autonomous unilateral state acts, three of them draw specific attention to their particular character, creating favourable privileges for their addressees. Both in the literature and in the source of ILC the broader scope is indicated along with a growing role they play in international relations. G. Venturini wrote in the 1960s that such unilateral acts are being made and performed "in the name of elementary justice"[264].

[261] *Ibidem*, p. 20, par. 104.
[262] *Ibidem*, p. 20, par. 104.
[263] Ch. Eckart harshly criticized the Guiding Principles of the Commission, *op. cit.*, e.g. pp. 247-250.
[264] G. Venturini, *op. cit.*, p. 403.

The scale of views on the position of the unilateral state act in the modern system of international law ranges from denying it binding force, restricting it only to the source of its author's obligations, to giving it the role of "secondary source", a source of "particular" law as a source of international law in the full sense of the word. In the background of these diverse views there is also a varied notion of the source of international law. However, there is no closer, more complete display of these new concepts of sources. This is especially true of the lack of development of the basic issue, whether they can be a source of commitments not only for their creators, but possibly also for their recipients. Only historical examples of unilateral acts broadening the sovereignty of states in the waters of the high seas, which may have the effect of imposing duties, and at least restriction of the rights of other states to a given maritime area, are cited. They are created in violation of maritime law and their legal character is differently understood. Actually, however, not a unilateral act, but the new customary norm created by it becomes a source of new international rights and obligations. On the other hand, the example of a more modern unilateral act in the form of the United States' proclamation on the continental shelf, which was supposed to lead to the creation of an *instant custom*, is a creation of doctrine rather than a legal reality.

It can be stated that generally autonomous unilateral state acts are granted only the feature of an obligation, or the nature of international law of derivative or particular law. These are just emerging concepts, but strongly pointing to the need to reflect on the new concept of the source of contemporary international law. This is indicated by a more detailed analysis of Art. 38 of the ICJ Statute or the Vienna Convention on the Law of Treaties.

A clearly different view on this issue is provided by research that runs counter the generally accepted basis for the division of unilateral acts into autonomous acts and dependent acts resulting in legal effects out of treaties or other acts. The authors of this study argue that unilateral acts in connection with treaties can constitute a full source of rights and obligations. One such example is an act of accession of a state to a multilateral treaty without becoming one of its parties. By such an act, a state not being a party to a treaty extends the resulting rights and obligations of it to its relations with all other states-parties to a treaty. At this point it is not a treaty, but a unilateral act that becomes the proper source of rights and obligations in this respect. However, there may be doubts as to whether a unilateral act of a state so interconnected in such a meaningful way to exercise its legal effect with a particular treaty can be regarded as an intrinsic source of law. K. Skubiszewski, for example, absolutely denied this possibility. He demonstrates that the state can unilaterally act by itself, trigger the actions of rights or obliga-

tions resulting from a specific treaty. But such an act does not at all become a source of rights or obligations. The relevant source remains the treaty[265].

It seems unquestionable, however, that the proper source of legal relationships of the author of a unilateral act is, in the above-mentioned case, their unilateral act, and not a multilateral treaty, because the state does not become a party to it. Skubiszewski does not explain what in legal sense he means "launching" or "inducing" legal effects by a unilateral state act. It is only possible to start what has already existed and bound in some way with the state. And linking a unilateral act with the whole regime of international relations of the multilateral treaty, without becoming a party to it, is hardly regarded as merely "activating" it against the author of the unilateral act. If even such a concept of "activation" were to be adopted, the constitutive nature of the act of the parties to the treaty must be admissible to the act in question.

Krzysztof Skubiszewski is undoubtedly stuck in rigid traditional rules defining the source of international law. Other authors, following the development of law and international relations, capture new emerging aspects of the issue, which undoubtedly deserve to be taken into account. It is right to point out the inapplicability of the concept of the source of law transposed into international law from the general theory of law. Article 38 of the ICJ Statute expressly states that the term "international law" also includes standards deriving from particular treaties or particular customary law. They do not have to be the general norms binding all countries of the world today. Reality shows that the sources of international law must be dealt with according to the nature of that law and the direction of its development in a community of sovereign states, taking also into account the consolidating international community. The continuation of the notion of a source of law derived from national law does not allow the inclusion of the specificity of international law in this matter.

V. General conclusions

Today, it is quite clear that unilateral acts of states have appeared for centuries in various forms in international law practice. And at least since the days of Grotius, they have been seen in scholarship, while some of them have been legally binding. It is now widely acknowledged that have had real influence on the formation of customary and indirect law, and even direct involvement in the development of the whole of international law. More and more attention has been devoted to this problem since the well-known ICJ judgment of 1974. Our knowledge in this field has expanded and deepened, revealing its legal complexities. They concern especially important matters such as the notion of a unilat-

[265] K. Skubiszewski, *op. cit.*, p. 233.

eral state act, the basis of its binding force and its proper legal nature, that is to say if it is just a source of commitment for its creator or, in some cases, a source of international law. And while most of the observations and findings refer to just a few such acts, and especially to the promise, they broaden and deepen our insight into the whole system of sources and the functioning of contemporary international law.

Admittedly, there is widespread agreement that the validity of a unilateral state act depends on the fulfillment of four basic conditions: the origin of a competent state body, its content and purpose cannot be contrary to current international law, the intention of the state must be expressed clearly, and its form should be accessible to addressees. In practice, using the same four requirements can lead to quite divergent findings. The same well-known and commonly cited acts by some are termed dependent on the creation of legal norms from treaties or customary law, and by others as autonomous acts, meaning resulting in binding legal consequences by itself. What is more, the very meaning of the division of unilateral state acts into dependent and independent in its law-making sphere is ever more serious. Recently, the proper meaning of this division is increasingly being questioned. It is arguable that unilateral acts considered to be non-autonomous in connection with treaties may take the form of a source of law that is independent of the treaty in question. It would then be necessary to re-evaluate the importance of these two kinds of unilateral acts in the development of international law and possibly find a new criterion for their differentiation.

With regard to the basis of the binding force of the unilateral act, there are also different positions – proponents of the principle of good faith and advocates of the sovereign will of the state. The former did not quite convincingly develop their view on this issue from the decision of the ICJ, which in this case is not quite so unequivocal. Their opponents, on the other hand, convincingly argue that, like treaties, unilateral acts of state draw their legal force from the sovereign will of the state. And their position also underpins the judgment of the Court as adherents of the principle of good faith. However, their interpretation of the Court's position on this point is also more convincing. The source of binding force of the unilateral state act is its will.

Among some supporters of both positions, however, doubts arise whether the very principle of good faith or the will of the state may give rise to binding effects of a unilateral state act. They show that it is only in conjunction with the presumed or even implied trust of the addressee of such an act that it is legally valid. Only then can binding legal consequences arise and only then will this act be secured against its arbitrary change or withdrawal.

It seems that this is due to a misunderstanding of the proper moment the effects come into existence. In fact, the legal effectiveness of a unilateral act, e.g. in the form

of a promise, is realized at the moment of the message reaching the addressee and not being rejected by it. Then the addressee becomes the holder of the rights or other benefits resulting from this act. Non-rejection of the received act creates the presumption that the addressee trusts it and shares some of the benefits with it. It does not, however, need to run those rights or accept the resulting benefits. This does not necessarily have to take place for the legal effectiveness of a given unilateral act. As an example, after the nationalization of the Suez Canal, all states were granted the right to sail on it when publicly manifested in 1957 by the Egyptian government. They did not have to take advantage of these laws in order to legally acquire them. From that point on, they could claimthe right if reasons for doing so arose. It is only right that in the implementation of rights, the effects envisaged in a given act can arise in bilateral, negotiating or judicial terms.

The most controversial issue seems to be whether unilateral state acts can only be a source of commitments, or whether they can be regarded as a source of international law. It is generally accepted that they can only be a source of obligation for their author. But it is also noted that such obligations may result in rights for their addressees. As a rule, these are beneficial and not subject to reciprocity. That is the legal nature of the autonomous unilateral act of a state, in any case in the form of a promise.

In more recent scholarship, however, we cannot conclude with such a vague statement. Efforts are being made to find in the unilateral state acts a particular source, whether in the form of a source of origin, source of particular law, and even source of general law.

The concept of the autonomous unilateral act of a state as a source of particular law is derived from Article 38 of the ICJ Statute, according to which the source of international law is not only general treaties, but also particular treaties, that is the treaties referring to certain countries, even to just a few. This shows that international law consists not only of general norms, but also of norms of a particular nature. Accordingly, the abovementioned autonomous unilateral state acts and, in any case, promises, could be regarded as a source of particular international law, and in the light of Art. 38 of the ICJ statutes, even directly as international law.

With regard to unilateral autonomous acts, the concept of a derivative source, a source of lower legal norms, is also emerging. This points to the emerging hierarchy of norms in the modern system of international law. The derivative is to be characterized by the fact that it is dependent on sources of higher rank, that is, treaty and customary law. And norms from a derivative source must not conflict with norms derived from primary sources.

The specificity of both the derivative and the particular source concept lies in their considerable limitation. There can be no obligation arising from them for other countries. These may be commitments only for the authors of the act, while rights arise from

those obligations to the addressee of the autonomous act of the state, which may even be the entire international community of states. They would, however, be sources significantly limited in their law-making function, of a completely different nature. They would be distinct from particular treaties, as sources based on consensus and creating both reciprocal rights and duties for the states-parties to them.

Finally, there are views that perceive the potential of unilateral acts of a non-autonomous state to come in some form of a source of international law, not only international obligations. It can take such a form, for instance, in contact with a multilateral treaty. This may happen if the state, by way of its unilateral act, accepts all the rights and obligations of a given multilateral treaty while not becoming a party to it. By such a one-sided act, an entire network of new legal ties binding the state that is the author of this unilateral act is established, with all other states-parties to the treaty. The source of these new bonds is not a treaty at that time, because the state that created the act of accession did not become a party to it. The source of these legal relationships becomes the unilateral state act in a specific form of the accession act. Thus, such a unilateral act assumes the form of an intrinsic source of general international law.

The findings of this study, which are related to the legal nature of the unilateral state act, although they are still rather preliminary, constituting rather a discussion, and come in rather simple form, referring in principle to only a few acts, unquestionably demonstrate that the issue of the sources of the modern system of international law requires a new approach. Contemporary international law is a more complex and varied system of legal norms, with a much broader and more diverse set of sources than is apparent from the general study of this law and Art. 38 of the ICJ Statute or the Vienna Convention on the Law of Treaties. Thus, the binding force of contemporary international law derives from a growing and more diversified plane of international relations, as well as an ever-expanding, yet increasingly consolidated international law system. It is an open system for the development and acceptance of the progressive development of modern international law, and it is necessary to capture its origins from this very perspective. Finally, one should go beyond the concept of a source formulated for another legal system and seek the notion of a source expressing the specificity of international law created directly, with various nuances, indirectly, but always from the will of sovereign states. The diversified source leads to the diverse legal character of the norms arising out of them and their increasingly clear hierarchical layout.