Unilateral Acts in the Age of Social Media

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ABSTRACT
In the past five years, a new type of politician has entered the global stage: the politician who defies mainstream opinion, who speaks freely without constraint or fear of repercussions. This type of politician is frequently at odds with centrist media, in a love-hate relationship where reporting on their behaviour returns profit for the media and supporters for the politician. One of the tools that have allowed this new politician to reach top-tier positions is social media, which allows them to enter the sphere of public debate by bypassing the gatekeeper function of traditional media. Using social media, their statements may at times be outrageous or practically impossible, while at the same time deeply insulting to other peoples or States.

No research has been done on the international legal significance of such statements. In this article, I suggest that the relatively unknown law of unilateral acts can be applied to these statements. These statements should be held to the regular standards of international law, just as any other behaviour by world leaders acting on behalf of their State.

Keywords:
Public international law, unilateral acts of the state, social media, international relations
1. BACKGROUND

1.1 Introduction

Unilateral acts of States have largely been overlooked by international legal scholars: unilateral acts are rarely afforded more than a few pages in academic volumes on public international law. Naturally, treaties deserve much attention – they are the most widely used instruments of international legal transactions (among subjects of international law). However, as the only other instrument that is capable of binding States to their wills through the application of the principle *pacta sunt servanda*, the unilateral act remains remarkably neglected. In this article, I seek to examine the unilateral act and its role in international law, and to present ideas on how to approach the subject in a fast-paced world of near-instant global communication and near-universal publicity enabled by social media.

In earlier times, diplomatic relations often took place behind closed doors, further away from the public eye, and the public perception of them was accordingly more easily manageable. In our times, with global and easy access to news and live, direct video coverage from important events, diplomatic relations seem to have taken on a more fragmented nature. The more formalised forums such as the United Nations (UN) and its associated organs are still of fundamental importance, but Heads of State and other world leaders also increasingly rely on social media to make quick statements directed at both domestic audiences and the world-at-large. In the words of US President Trump: ‘The FAKE MSM is working so hard trying to get me not to use Social Media. They hate that I can get the honest and unfiltered message out.’ However, the international legal significance of statements made in social media has not yet been examined.

While the treaty may be the gold standard of international legal instruments promoting stability and predictability, the unilateral act is the currency that makes international relations function smoothly. Declarations of war or peace, acknowledgement of other States or governments, as well as making public announcements to the international community or to other States when diplomatic relations have soured, are all unilateral acts. In sections one and two, this article presents the current theory of unilateral acts, whereas section three examines modern forms of communication in the light of such acts.

1.2 A Century of Unilateral Acts

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

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Unilateral acts gained legal significance during the years of the Permanent Court of International Justice (PCIJ). The first case to confirm the existence of obligations arising out of a unilateral act was the case of the Legal Status of Eastern Greenland (Denmark v. Norway).³ In the judgment, the PCIJ accepted an oral (although later transcribed) unilateral declaration by the Norwegian Foreign Minister M. Ihlen as binding upon the Norwegian State: ‘The court considers it beyond all dispute that a [declaration] given by the Minister for Foreign Affairs on behalf of his government … in regard to a question falling within his province is binding upon the country to which the Minister belongs’.⁴ The declaration in question amounted to a renunciation of a Norwegian claim to sovereignty.⁵

Since then, the International Court of Justice (ICJ) has in a number of cases recognised various forms of unilateral acts as sources to determine international obligations, considering unilateral acts both as directly effecting legal obligations,⁶ and indirectly by using them to clarify and interpret the content of obligations arising out of treaties or other agreements.⁷ In the ICJ’s judgments as well as in legal scholarship, one can observe a clear aim to distinguish between unilateral acts of States embodying only political content, and those that also embody a legal content.⁸ However, some acts clearly have aspects of both political and legal content. One example is a press conference held by the French State regarding atmospheric nuclear tests in the Pacific Ocean (more on this below), which the ICJ in the Nuclear Tests cases considered to be a source of a legal obligation. Such televised press conferences were non-existent a few decades earlier, and thus a new source of international obligations emerged.

When studying unilateral acts of States, one needs to review the characteristics of new forms of communication between States as technology further develops in order to determine whether and in which sense States can assume obligations through these new forms of communication. Whereas earlier communication between States usually occurred through rather formalised diplomatic channels, the fast technological development of the past few decades has allowed for a great variety of new forms of communication, such as through telephone, fax, television, and in later years through internet-based channels, such as email and social media platforms.⁹

⁴ ibid., para. 192.
⁸ Ibid. See also Alfred P. Rubin, 'The International Legal Effects of Unilateral Declarations' (1977) 71 The American Journal of International Law 1, 30.
⁹ Zemanek (n 5) 215.
1.3 Codifying the Law of Unilateral Acts

The ICJ judgments on unilateral acts of States have often left room for uncertainties, and until the 1990s, no legal studies by an international body had examined these unresolved issues. Aware of these shortcomings, the International Law Commission (ILC) in 1996 proposed to begin work on the codification of the law of unilateral acts of States, using the law of treaties as a point of departure due to their many similarities.10

The ILC aimed at codifying an important and frequently utilised source of international law, inspired by having successfully done so with the law of treaties in the Vienna Convention on the Law of Treaties (VCLT).11 After ten years of research and discussion, the ILC adopted ten ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations’12 (hereinafter Guiding Principles). As the name implies, these principles are not strictly binding upon any State, and they only directly apply to unilateral acts in the form of formal declarations – so-called strictly unilateral acts.

While the Guiding Principles are not binding as international law, they are an expression of the international customary law applicable to unilateral acts.13 The work of the Special Rapporteur to the ILC on the subject also provides an excellent compilation of sources to illuminate the customary law of unilateral acts. In the following, this article relies heavily on the guidance of the ILC and its work on unilateral acts of States.

2. CLARIFYING THE TERM ‘UNILATERAL ACTS OF STATES’

2.1 The Strictly Unilateral Act

In its conclusions on unilateral acts of States put forth to the UN General Assembly in 2006, the ILC provides a useful division of unilateral acts primarily into two categories.14 One of the categories deals with the various unilateral acts that are executed within the framework of other rules of international law, such as within the framework of the Law of the Sea. Illustrative of such unilateral acts are the various domestic legal acts that define a coastal State’s territorial sea and contiguous zone, such as the Norwegian Territorial Sea and Contiguous Zone Act.15 Such acts, while domestic in origin, are also considered unilateral acts.

11. ibid.
13. As evidence of a general practice accepted by law, see Art. 38 ICJ Statute. The place of unilateral acts in the international legal order is disputed. The most common view is that they are a separate formal source of international law, akin to treaty and international customary law. However, the secondary rules governing the instrument of the unilateral act itself are to be found in international customary law, as evidenced by state practice and opinio juris, similar to the status of treaties prior to the VCLT.
on the international plane, since they confer rights on the author State to the detriment of the rights of other States by a unilateral act. However, such acts are also executed in conformity with the regulatory framework of the UN Convention on the Law of the Sea,\(^{16}\) a well-established regime prescribed by international convention, and therefore do not give rise to controversy about their binding force on the international plane. Another example would be the acts of signature or ratification of treaties, which are in fact unilateral, but simultaneously governed by the VCLT regime.

In the other primary category suggested by the ILC are unilateral acts that are ‘formulated by States in exercise of their freedom to act on the international plane’.\(^{17}\) Within the objective meaning of the term, there are numerous actions a State can undertake that can be considered unilateral acts. For example, in the context of international negotiation, even the individual acts of offer and acceptance can be viewed separately as unilateral acts by the offeror and the acceptor. As Rubin writes, ‘[e]very legally significant act in a legal system that posits individual legal personality is, in a sense, unilateral’.\(^{18}\) However, such a wide meaning of the term will not be utilised for the purposes of this article, nor was it researched by the ILC, owing to the fact that these are not strictly unilateral acts; they happen within the context of international negotiations, and thus require something of a quid pro quo nature to take effect.\(^{19}\)

The ICJ first defined the strictly unilateral act in the *Nuclear Tests* cases:

> ‘[A unilateral declaration], if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act’.\(^{20}\)

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

> ‘[A] unilateral act is an expression of will which is attributable to one or more subjects of international law, which is intended to produce legal effects and which does not depend for its effectiveness on any other legal act’.\(^{21}\)

The Special Rapporteur maintains that this criterion must be supplemented by considering the autonomy of the act, meaning one must look to whether the unilateral act is indepen-

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17. ILC Conclusions (n 14).
18. Rubin (n 8) 8.
20. ibid.
dent of other legal acts. In my view, the criterion of autonomy is sufficiently clear within his definition – not only must the legal effectiveness of the act originate from a manifestation of will, it must also be effective independently of any other act.

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

2.2 The Binding Nature of Unilateral Acts

The principle pacta sunt servanda is fundamental in determining contractual obligations within all domestic legal systems, and it also lays the foundation for the creation of obligations and rights on the international plane. The application of this principle in relation to treaty obligations is codified in Article 26 VCLT, but its application in relation to unilateral acts of States is based on customary international law. The principle is for the purposes of unilateral acts translated into the principle acta sunt servanda. The contents of these principles are near identical: the former can be translated as ‘agreements must be kept’, whereas the latter can be translated as ‘acts must be kept’. These principles are both based on the principle of good faith: ‘Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.’ The principle is also applicable to forms of unilateral acts other than the formal declaration. According to the ILC Special Rapporteur, ‘[t]he rule of good faith is, without any doubt whatever, applicable to all categories of unilateral acts’. The VCLT can serve for guidance on the conditions that must exist for an obligation assumed by a unilateral act to be binding, as the requirements for its validity are essentially the same as the requirements for the validity of treaties. The conditions are:

23. ILC (n 21) para. 135.
27. Nuclear Tests case (n 19) para. 46.
29. See Vladimir Duro Degan, Sources of International Law (Martinus Nijhoff 1997) 286.
1. the author of the act must express a will or an intent to be bound by the terms of the act;
2. the author of the act must be a sovereign State represented by a competent authority or representative;
3. the content of the obligation must be admissible, meaning it must be materially achievable and not forbidden by law;
4. it must have the correct form.30

In the following, this article examines these four criteria more closely. When these criteria are fulfilled, the unilateral act is binding, whether it takes the form of a strictly unilateral act or not.

2.3 Elements of a Binding Unilateral Act

2.3.1 Intent to be Bound

The importance of the consent or will to be bound by the terms of a treaty is apparent in Articles 11-15 VCLT. The principles contained therein are equally applicable to unilateral acts. The requirement of intent or will to be bound is closely linked to the principle of State sovereignty in international law. Just as treaties are not binding upon States that are not parties to them and bilateral agreements do not confer obligations on third parties, unilateral conduct of a State that does not contain an expression of a will or an intent to be bound, does not normally bind the State (with the possible exception of acquiescence or international estoppel).31 This is because in all three cases, the unbound State has not expressed a will or intent to be bound by the associated terms. The State does not therefore express any consent, which is a necessary requirement for the respect of State sovereignty: ‘[t]he expression of will is closely linked to the legal act and, consequently, the unilateral act. Will is a constituent of consent and is also necessary for the formation of the legal act’.32

Therefore, for a unilateral act to create international obligations for its author State, the State must somehow display intent to be bound according to the terms of the unilateral act. The ILC Guiding Principle No. 1 states that ‘[d]eclarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations’.33 As pointed out by Cedeño and Cazorla, there are two main perspectives from which to approach the question of when a declaration has legal effects, depending on the legal-cultural origins of the observer.34 One perspective is that for a unilateral act to be legally binding, it must contain an ‘express manifestation of a will to be bound on part of the author State’. The other is the view that ‘any unilateral behaviour by the State producing legal effects on the international plane may be categorized as a unilateral act’. Due to the easier consensus on issues relating to binding unilateral acts in the first sense – so-called unilateral acts stricto sensu, which

30. ibid.
32. ILC, Fifth report on unilateral acts of States, by Mr. Victor Rodriguez Cedeño, Special Rapporteur (4 and 17 April and 10 May 2002; Doc. A/CN.4/525) para. 58.
33. ILC (n 12).
most often take the form of formal declarations – they were the focus of the ILC during its research towards the Guiding Principles. However, the ILC acknowledged in the preamble to the Guiding Principles that a State might also be bound by other conduct than formal declarations, such as ‘mere informal conduct including, in certain situations, silence.’35

No matter the behaviour that constitutes the binding unilateral act, declaration or otherwise, the act must imply that the author State intends to adhere to its terms. Showcasing the tension between the two above-mentioned perspectives on the binding force of unilateral acts, the preamble of the Guiding Principles also states that ‘in practice, it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law’. However, the expectations of other said subjects would only be legitimate if the author State had displayed apparent intent to adhere to its own terms, i.e. if the State has acted in such a way as to create legitimate expectations on the part of other States. If the State that has created legitimate expectations later tries to change its course, it may violate the principle of good faith. It seems the practical differences in applying the requirement of intent are negligible, as the result will be the same after all the necessary considerations. When considering whether a State has expressed sufficient intent to be bound, it follows from the Nuclear Tests cases that a restrictive interpretative approach must be kept: ‘[w]hen states make statements by which their freedom of action is to be limited, a restrictive interpretation is called for’.36

2.3.2 Competent Authority or Representative

For a unilateral act to be legally binding, it must be authored by a competent State organ or representative. One may look to Article 7 VCLT and its section on invalidity of treaties for guidance on this matter,37 as the principles embodied in these provisions are also applicable to unilateral acts as general principles of international law. Chiefly, one finds that the respective act must have been formulated by a State organ or representative authorised, according to the domestic laws of the State, to bind the State on the international plane. The Guiding Principles No. 4, like Article 7 VCLT, consider Heads of State, Heads of Government and Ministers of Foreign Affairs as competent to formulate such unilateral acts, in line with customary international law.

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

‘The answer to the general question as to who may legally commit a State in international law depends on the relative merit which one attaches to two conflicting concerns: one is the necessity to protect the trust of other States in the authority of an apparently competent State agent; the

35. ILC (n 12).
36. Nuclear Tests case (n 19) para. 44.
37. ILC (n 32) paras. 84 and 85.
other is the respect for the autonomy of a State to determine the competence of its organs, which it usually does in its constitution. These conflicting concerns are treated differently in the rules concerning the conclusion of treaties on the one hand, and in the processes leading to the formation of custom or to a commitment by a unilateral legal act on the other.38

The competence to formulate unilateral acts is rarely, if ever, expressly prescribed in constitutions. Constitutions may give certain powers to certain ministers, among them the powers to represent the State internationally to the Head of State, Head of Government and the Foreign Minister. However, these representatives are not exclusively the ones who formulate unilateral acts, binding or not. Other ministers as well as State organs may do so as well, as evidenced by the Nuclear Tests cases: in addition to statements by the French President and Foreign Minister, the ICJ also deemed a statement by the French Embassy in Wellington and statements by the French Defence Minister to be relevant in the determination of the obligations which the French State had put upon itself.39

However, even though the person formulating the act may be assumed to have the competence to formulate the act according to international law, he or she may not be authorised to do so under their respective State’s constitution. This was the setting in the Eastern Greenland case: the Norwegian Foreign Minister did not have constitutional authority to make the promise that he gave his Danish colleague, namely a de facto renunciation of the Norwegian claim to sovereignty over the disputed area. Yet, the PCIJ, in considering the statement by the Norwegian Foreign Minister, held that it was ‘beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government […] in regard to a question falling within his province, is binding upon the country to which the minister belongs’40

Later judgments suggest the case might have had a different outcome today. Nowadays, one would have to consider the rules of invalidity as expressed in Article 46 VCLT, which provide for the invalidation of consent if there has been a manifest violation of a rule of internal law of fundamental importance, and the violation would be ‘objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith’.41 In the 1951 Fisheries Case (UK v. Norway), the ICJ considered whether Norway’s method of drawing baselines was in accordance with international law. The UK argued that ‘the Norwegian system of delimitation was not known to [the UK] and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against [the UK]’.42 The ICJ did not agree with this view, and said that the UK could not have been ignorant of two relevant Norwegian decrees of 1869 and 1889 regulating the matter, due to the country’s own interest in the matter as a neighbouring Coastal State.

This suggests that a stricter standard currently applies to the good faith of States wishing to rely on unilateral acts than that which was applied in the Eastern Greenland case. States

38. Zemanek (n 5) 213.
40. Eastern Greenland case (n 3) para. 71.
41. Art. 46 VCLT.
nowadays have a more far-reaching duty to investigate the powers of an authority or representative formulating a unilateral act. In the Eastern Greenland case, the PCIJ simply stated that statements such as the one made by the Norwegian Foreign Minister are beyond all dispute binding upon the country of the minister who makes them. Today, if it was ‘objectively evident’ that the Norwegian Foreign Minister did not have the powers to make such a promise, the unilateral act could be rendered invalid. The considerations as to who can formulate binding unilateral acts can be summarised as follows. In the sphere of unilateral acts, an observer seeking to clarify whether a unilateral act is valid or not, must assess, in good faith, whether the act falls within the ambit of the regular function and powers of the State authority or representative who produced it. If there is any circumstance that should reasonably give rise to suspicion about their competence, a State examining the act should be sceptical towards its validity. On the other hand, as strict a standard as Article 7 VCLT is not required. This would severely hamper the smooth functioning of international relations and raise the transaction costs between States significantly.

2.3.3 An Admissible Lawful Object

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

2.3.4 The Correct Form

In the sphere of unilateral acts, international law does not demand a specific form with which to formulate the act – contrary to most other international legal acts, which often require a certain form to be valid. The essential condition of the binding nature of a unilateral act is intent itself, and its author is free to choose the form through which that intent shall be expressed. This is explicitly stated by the ICJ in the Nuclear Tests cases. When referring to a series of statements by French authorities, the Court stated: ‘[w]ith regard to
the question of form, it should be observed that this is not a domain in which international
law imposes any special or strict requirements. Whether a statement is made orally or in
writing makes no essential difference. The statements referred to by the Court were produced by various authorities in various
forms: one was a note sent by the French embassy in Wellington, in addition to a com-
muniqué issued by the Office of the President of the French Republic statements made
by the French President, the Ministers of Foreign Affairs and Defence, and, finally, an oral
statement made by the French President at a press conference. The case truly showcases
the variety of forms through which unilateral acts can be expressed.

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

3. UNILATERAL ACTS AND SOCIAL MEDIA

3.1 A shift in communications

We are currently witnessing the adolescence of a new form of communication. In 2000, an
estimated 6.8% of the world’s population had access to the internet, whereas in 2016, that
number had increased to 46.1%. The internet has permeated nearly all sides of social
and professional life, and continues to do so with increasing intensity. In its early years,
the internet was mainly used as a quicker form of communication in the form of email,
simple forums or bulletin boards, as well as for nascent shopping websites such as eBay
and Amazon. It was characterised by users mostly remaining passive viewers of content
uploaded by site administrators. In the early 2000s, a new webpage design philosophy

49. Nuclear Tests case (n 19) para. 45.
50. ibid., para. 35.
51. ibid., para. 34.
52. ibid., para. 36.
53. ibid., para. 37. The case of the Declaration on the Suez Canal and the arrangements for its operation provides
another example of forms unilateral acts can take, notably a unilateral act formulated by Egypt, but registered
with and accepted by the UN Secretariat as an ‘international instrument’ under Art. 102 of the UN Charter and
54. Nuclear Tests case (n 19) para. 43.
56. Balachander Krishnamurthy and Graham Cormode, ‘Key Differences between Web 1.0 and Web 2.0’ (2008)
emerged: users were now encouraged to take a more active role in creating content by uploading videos, creating their own profiles and connecting with other users. This gave rise to the emergence of websites such as YouTube, Facebook and Twitter, which remain hugely popular and influential to this day.

Politicians and world leaders entered the game somewhat late, but the past few years have shown that they are not willing to be left behind by the change in technology. In 2014, more than 76% of world leaders had active accounts on social media such as Facebook and Twitter. As witnessed by anyone with access to daily news, US President Trump famously relied heavily on social media during the US presidential election campaign, and still maintains a very strong presence there. According to Trump himself, he uses social media to challenge views promulgated by the traditional media, and to get his word out directly to his supporters. While he was a presidential challenger, Trump used unusually adversarial and direct language to distinguish himself clearly from the old establishment, coining slogans such as ‘drain the swamp’.

The traditional view among communication and conflict theorists before the advent and spread of the internet was that the masses remained passive receivers of elite messages. According to these scholars, there were primarily two types of adversarial public communication: elite-level communication and mass-based appeals. Elite-level communication includes diplomacy, political negotiations, and the signalling of intentions with allies and adversaries. Mass-based appeals involve leaders and challengers seeking to coordinate mass behaviour, or inhibit it, by controlling the narrative and manipulating the mass channels of communication. However, social media provide for a new form of communication: the traditional agenda-setting media can now be bypassed at will. Leaders, both incumbents and challengers, can communicate directly with the masses and the masses can now also respond, opening up easy direct channels of communication between the masses and elites. In the words of Donald Trump: ‘[t]he Fake News Media hates when I use what has turned out to be my very powerful Social Media – over 100 million people! I can go around them.’

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57. ibid.
59. ibid.
61. Such as in this tweet: ‘Crooked @HillaryClinton's foundation is a CRIMINAL ENTERPRISE. Time to #Drain-TheSwamp!’ <https://twitter.com/realdonaldtrump/status/788923410353008640> (accessed 30.10.2018).
63. Zeitzoff (n 62).
64. ibid.
65. ibid.
66. ibid.
Therefore, social media have many functions: leaders can use them to communicate messages to other elites (such as a challenger criticising an incumbent, or a government communicating a message to foreign leaders), they can use them to garner support domestically, and they can communicate directly with their supporting base and opponents.\textsuperscript{68} Social media know no borders (subject to restrictions in certain countries, such as China) and can also contain diplomatic messages.\textsuperscript{69} When studying social media activity and its effects, it is important to have these different functions in mind.

3.2 Unilateral Act by Tweet?

The shift in communication we are currently witnessing has far-reaching ramifications, just as is the case every time a new type of communication is invented.\textsuperscript{70} Legal scholars should therefore also pay close attention to such changes. The sphere of social media has received some attention from international legal scholars, but this attention is mostly directed at the power of online movements,\textsuperscript{71} or at understanding or harmonising law on online governance.\textsuperscript{72}

Even though legal scholars might be hesitant to investigate such an informal and populist tool as social media, the matter should be afforded more attention by academia. Statements by State leaders with powers to bind their States, such as Presidents and Ministers for Foreign Affairs are created on social media every single day. Arguably the world’s most powerful person, the US president, uses social media more than any other leader. As elaborated above, social media activity serves several purposes for world leaders; an important one is to get messages out to their respective domestic populations in order to garner support for their political platform. Another one is to convey messages to foreign populations, foreign leaders, or the world-at-large. Both these functions are easily observed in the September 2017 tweets from President Trump directed at North Korea. In one tweet, President Trump stated:

’Just heard Foreign Minister of North Korea speak at U.N. If he echoes thoughts of Little Rocket Man, they won’t be around much longer!’\textsuperscript{73}

Such a statement serves both as a message of assurance to the domestic US population and as a warning to the North Korean government. Out of many possible interpretations, it is not unnatural to draw the conclusion that this amounts to a threat of violence. Indeed,

\textsuperscript{68} Barberá and Zeitzoff (n 58) 129.
\textsuperscript{69} ibid.
\textsuperscript{70} As a powerful example, the invention of the printing press allowed Martin Luther’s ideas to spread easily through pamphlets, and lead to the decline of the power of the Roman Catholic Church.
\textsuperscript{72} See for example P. Lambert, \textit{International Handbook of Social Media Laws} (Bloomsbury Professional 2014). To date, I have not found any scholarly articles exploring the legal effects of competent state representatives’ activity on social media.
\textsuperscript{73} <https://twitter.com/realDonaldTrump/status/911789314169823232> (accessed 30.10.2018).
this is exactly how North Korea interpreted the message. Only a short time after Trump’s
tweet, North Korea’s Foreign Minister Ri Yong-ho declared that it amounted to a declara-
tion of war:

‘[L]ast weekend Trump claimed that our leadership won’t be around much longer, and hence at
last he declared war on our country … Given the fact that this came from someone who holds the
seat of the US presidency, this is clearly a declaration of war’.74

While exchanges like the above can never amount to strictly unilateral acts,75 they clearly
show the diplomatic ramifications of social media activity and, thus, the need to study it
from a legal perspective. The question of whether Trump’s statement amounts to a legally
relevant fact, such as the unlawful threat of the use of force in violation of Article 2(4)
UN Charter, can be left open. Rather, the remainder of this article focuses on whether and
under which conditions social media activity may amount to a strictly unilateral act.

The base criteria set out above in section 2.3 govern strictly unilateral acts in general,
and, as such, they are also applicable to statements made in social media. In considering
unilateral acts, the ICJ explicitly noted that ‘[w]ith regard to the question of form, it should
be observed that this is not a domain in which international law imposes any special or
strict requirements’.76 Moreover, since statements on social media may fall within the ordi-
nary meaning of ‘declarations’, the ILC Guiding Principles are also directly applicable.

3.3 The Criteria Applied to Social Media

3.3.2 Intent to be Bound on Social Media

As with unilateral acts assumed in other forms, a unilateral act assumed by a statement
on social media must display intent to be bound by its terms in order to be binding. This
criterion operates, in essence, no differently when applied to statements on social media
compared to other forms of unilateral acts. It is, however, necessary to be aware of the
manner in which the social media are utilised: does the statement in question contain a
message aimed at domestic audiences, or is it a message to foreign audiences containing an
obligation upon which other States may rely? The distinction is vital and follows from the
principle of State sovereignty. A unilateral act cannot arise from a statement that was inten-
ded exclusively for domestic purposes, because such an effect would lead to undue foreign
interference in the domestic affairs of States. In the Asylum Case, the ICJ highlighted
the importance of refraining from interfering in the domestic affairs of States: Colombia
claimed it had the right to qualify, unilaterally and binding upon Peru, a Peruvian national
wanted for a domestic offence in Peru as having a right to asylum. The Court stated that

75. The object of such an act would be an unlawful one, such as commitment to the unlawful use of force in violation
of Art. 2 (4) UN Charter, or dependent on other acts such as a Security Council resolution.
76. Nuclear Tests case (n 19) para 45.
'such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of States'. Similar considerations can be made with regard to the interpretation of potential unilateral acts.

On the other hand, leaders in democratic States are accountable for their statements and should not be considered unbound by policy statements with international implications even if only used to collect domestic support. This is also stressed by Zemanek, who points out that inter-state communications via public media ‘may be ostensibly addressed to the public at large, yet they may concurrently convey a message to other States… They require careful examination to determine whether an international effect was intended or whether they served only a domestic purpose’.

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

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

Another statement forming the unilateral act was made by the French Minister of Defence in an interview on French television, in which he said that ‘the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests’. These statements were not directed at Australia, New Zealand or the international community at large, but primarily at a domestic French audience. The Court stated: ‘[i]t is true that these statements have not been made before the Court, but they are in the public domain, and are known to the Australian Government … It will be necessary to consider all these statements’. The Court seemingly considers the statements to be relevant because they concerned an international matter and were made public by State representatives with presumed powers to bind their State. Whether the message is intended for foreign or domestic audiences seems to be less relevant as long as the sufficient intent to be bound by the terms of the statement is displayed.

Thus, when State representatives make statements regarding international matters in social media, even if only intended for domestic audiences, possible international effects can nevertheless not be ignored. One must also keep in mind, however, that social media might be used as a domestic political tool to gain popularity to a larger degree than press conferences or television interviews, especially preceding elections. It is important to ascertain whether the statement embodies an obligation or is merely an expression of political

78. Zemanek (n 5) 215.
79. Nuclear Tests case (n 19) para. 37.
80. ibid., para. 38.
81. ibid., para. 32.
will or enthusiasm. This will be particularly interesting when President Trump, known for his use of social media, is up for re-election; the tweets made in that future context will then be authored by a State leader with the power to bind the United States, not merely a presidential contender.

3.3.3 Competent Authority on Social Media

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

I suggest it would be useful to draw analogies to the rules of State attribution of internationally wrongful acts. According to Crawford, in order to hold States bound by consensual obligations, ‘the normal rules of authorization under treaty law apply; in order to attribute conduct to them for the purposes of determining their compliance with such obligations, the normal rules of attribution for the purposes of State responsibility apply’.82 However, the ICJ has made clear that the rules of authorisation are not as strict for unilateral acts as they are under treaty law:

‘with increasing frequency in modern international relations other persons [than those authorised under the VCLT] representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials’83

Therefore, a good solution would be to balance the rules of authorisation under treaty law and the rules of State attribution for the purposes of unilateral acts, especially when formulated in social media. The rules on State attribution are contained in the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts. Although not ratified, they are considered customary law.84 The rules reveal the necessity of attributing the actions of individuals to the State: although the State has legal personality, acts attributable

to it will necessarily be carried out by individuals or groups of individuals acting in their official capacity. In the commentary to the chapter on attribution of conduct to a State, the ILC emphasises that "the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State."

Furthermore, the ILC highlights that attribution of conduct must be clearly distinguished from the characterisation of conduct as wrongful. The rules of attribution are concerned with attributing an act to a State – the wrongfulness of the act, however, is not a relevant consideration in this exercise.

Draft Article no. 4 reads:

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

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

Naturally, this provision is not directly transferrable to unilateral acts. For example, judicial bodies cannot undertake unilateral acts. However, one can adapt the principles embodied within this provision for the purposes of unilateral acts. There can be no analogy drawn from the rules of State attribution to the competence to conclude a treaty, because the rules of attribution are intended to clarify when a State is to be considered responsible for an act.

Under the law of treaties, international obligations may only be created by entities according to the rules of the law of treaties, and they do not fully coincide with the entities that may engage the responsibility of a State.

However, due to the less strict competency requirements for unilateral acts, one may draw analogies from the rules of State attribution: if there exists rules for the attribution of conduct for the purposes of responsibility for acts of States, a State should be considered bound by unilateral acts embodied within a statement attributable to it by those same rules. Statements in social media are frequently formulated and created by individuals under the control of organs or persons with the authority to bind the State. Insofar as it can be determined that the statement is compatible with the intent of those authoritative persons or organs, the statement should be understood as if it came directly from them. Thus, a State should be considered responsible for the act, and therefore bound by it, if a social media profile under control, direction or instigation by persons or State organs that would otherwise be considered competent to author a unilateral act, authors a statement that embodies unilateral obligations.

85. ibid., 38 para. 2.
86. ibid., 39 para. 4.
87. See also Zemanek (n 5) 216.
3.3.4 An Admissible Lawful Object

The criterion of ‘admissible lawful object’ will likely often be lacking in statements in social media. It is closely linked to the display of intent to be bound: to date, most internationally and diplomatically relevant social media activity is either couched in an opinionated or vague form, or it contains warnings or veiled threats which may never embody an obligation by which the author State is bound. Dmitri Medvedev, the Russian Foreign Minister, provides a good example: ‘Today we see even worse examples of violence than in South Ossetia. One thing remains certain: Russia is always ready to defend its citizens.’

Just as a treaty or an agreement on the unlawful use of force would be in conflict with *jus cogens*, so would an attempted unilateral act to that effect be. Even if the statement amounted to a warning on the lawful use of force for self-defensive purposes or following a Security Council resolution, it would not be considered a strictly unilateral act: the rights to self-defence or use of force in accordance with Security Council resolutions arise out of other facts, namely the aggression of another State and the resolution respectively. Its legal effectiveness is therefore reliant upon other acts, and it is thus not a strictly unilateral act. The object of a unilateral act via a statement in social media must be unilaterally governable by the State authoring the statement.

3.3.5 A Certain Form

The criterion of ‘a certain form’ does not need any special consideration for statements in social media. Unilateral acts can take any form as long as they are made public, and statements in the domain of social media are public by nature.

3.4 Interplay Between Unilateral Acts and Social Media

While we may not see many unilateral acts couched in the form of social media, we might see more interplay between unilateral acts and statements in social media. Governmental social media accounts are likely to be checked by a team of experts before being posted, and it appears that more traditional forms are still preferred for assuming obligations through declarations. However, statements in social media can be helpful in determining and clarifying the intent of a State and the exact content of an obligation assumed by a unilateral act.

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

However, one must keep in mind that a subsequent declaration cannot have such an effect as to revoke arbitrarily the obligation assumed by the unilateral act. Guiding Principle No. 10 unequivocally states that ‘[a] unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily’.

Interplay between the principle of international estoppel and social media activity is also possible. The central difference between an obligation arising out of international estoppel and one arising out of a unilateral act of a State is to be found in the source of the obligation: an obligation created by a strictly unilateral act arises out of that State’s declaration of intent, whereas according to the principle of international estoppel, the obligation arises out of the expectations created in other States by certain conduct. Social media profiles under the direction of executive branches of governments regularly post statements exposing their view of factual circumstances, on which other countries may rely. In doing so, States might find themselves bound by their statements according to the rules of international estoppel.

4. CONCLUSION

While it is clear that unilateral acts are a part of the international legal order, they are the source of a significant amount of disagreement among legal scholars, even within the ICJ itself. Opinions on the origin of obligations based on unilateral acts differ greatly among legal scholars. Some even deny the existence of the strictly unilateral act and claim the obligation is founded in estoppel or other consistency-promoting legal constructs based on good faith, whereas proponents of the strictly unilateral act may disagree on the source of their binding nature. Even though the legal reasoning may vary, the end result would rarely differ after applying any of these approaches: in the ICJ cases where there is disagreement on the source of the obligation, the judges still mostly agree that the obligation exists.
As of today, strictly unilateral acts may be the most widely used uncodified legal method of assuming obligations. Unilateral acts are a frequently used legal construct that may bind States, but without clear and agreed-upon criteria, they may be a cause for uncertainty and confusion in the international community. However, international relations seem to function quite fine without any codified rules on unilateral acts. As Zemanek writes: ‘unilateral acts have become the most frequent tool of State interaction. They weave, so to speak, the daily web of international relations’. Much like the many legal actions that weave the daily web of personal lives, such as unwritten loan agreements or other simple obligations, a reference to the principle *pacta sunt servanda* embodied in legislation will usually suffice in domestic legal systems.

Perhaps a similar consideration can be made for State interaction: States are, for the most part, aware of the commitments they undertake and the way they formulate declarations and other statements. They are conscious that for more important matters, a formal treaty or bilateral agreement is the appropriate form, in order to ensure optimal stability and predictability. However, they also know that a treaty requires a great amount of cost to both parties. A codification of the unilateral act may lead to a higher cost related to the formulation of such acts as well. If State interaction functions smoothly, as it for the most part does, perhaps scholars of international law should heed the age-old saying, ‘if it’s not broken, don’t fix it’. If there is no real problem, the attempts at fixing the imagined problem would not improve the situation, and those efforts would be a waste of time and more likely affect the status quo negatively. After all, questions regarding unilateral acts are rarely brought before international courts or tribunals.

On the other hand, perhaps the rise of social media and the participation of State leaders on such platforms is about to break the hitherto uncodified practice of unilateral acts. Social media may have made top administrative positions available to persons that earlier would not have stood a chance. The current US President seems to have restrained himself somewhat after ascending to the presidency, perhaps aware of the possible consequences of his statements. At the same time, it was his presence on social media that got him elected: ‘Sorry folks, but if I would have relied on the Fake News of CNN, NBC, ABC, CBS, washpost or nytimes, I would have had ZERO chance winning [the White House]’. As he nears re-election, he might revert to the more aggressive social media strategy in order to repeat his success – at which time the consequences on the international plane will become more apparent.

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

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

105. In another example from the Twitter sphere, President Trump, according to himself, would never call Kim Jong-Un ‘short and fat’: <https://twitter.com/realDonaldTrump/status/929511061954297857> (accessed 30.10.2018).

106. Crawford (n 82) 416.