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Faculty of Graduate Studies

**Unilateral Declarations of States: as a Potential Source of
International Law**

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**This thesis was submitted in partial fulfillment of the
requirements for the Master's degree in International Law
and Diplomacy**

June/2022

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Thesis Approval

Unilateral Declarations of States: as a Potential Source of International Law

By

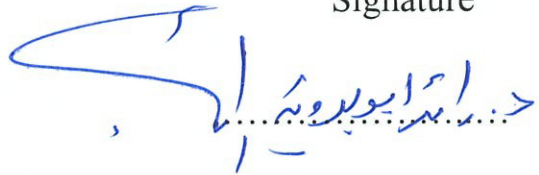
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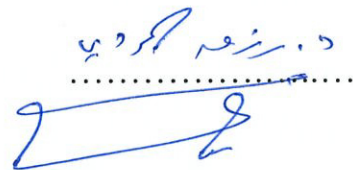
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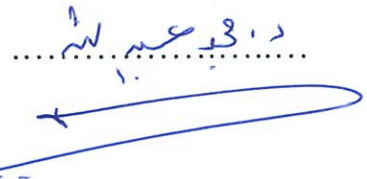
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Declaration

“I, Lina Subhi Hamdan declare that this thesis was submitted in partial fulfillment of the graduation requirements for master’s degree in international law and diplomacy/ graduate studies-department of legal sciences/Arab American University, Ramallah campus/Palestine. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is a conclusion of my own work”

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Acknowledgments

The completion of this thesis would have not been possible without the assistance and words of encouragement of many people. First, I sincerely appreciate Dr. Raed Abubadawia's constant help and advice. I was so lucky to have been supervised by such an expert both in law and in the methods of academic writing. Warm thanks and appreciation are due to him for all his assistance and support.

Finally, my gratitude and thanks goes to my family, friends, and colleagues for their humble opinions on the topic of the research and unlimited encouragement throughout the thesis process.

Abstract

Unilateral declarations of states are widely used in modern international relations. The increasing use of state representatives of these declarations as means to bind their states to certain commitments and obligations is widely encouraged and accepted. Yet, the current international legal framework lacks clear criteria to define the legal nature of unilateral declarations. Even though they are a powerful instrument of international law, acknowledged by the Permanent Court of International Justice and by the International Court of Justice and also by the International Law Commission.

Nevertheless, the conventional sources of international law are associated with certain obligations that must be fulfilled and respected. Considering the constant development of international law doctrine, the traditional sources of international law which are enlisted in article 38 of the ICJ Statute must be revised and modified to meet the modern trends and standards of international cooperation. New concepts such as Unilateral Declarations of States have the potential to qualify as a potential source of international law.

Abbreviations

ILC	International Law Commission
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
PCIJ	Permanent Court of International Justice
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties 1969

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Chapter I

1.1 Introduction

As a part of international relations, state officials, regularly issue unilateral statements or declarations vowing to act or refrain from acting on specific matters on the international stage, and to make promises to both states and non-state actors. Although many of these statements are political and have no legal consequences, yet some unilateral statements and declarations may have the consequence of establishing legal obligations on the declarant state and grant certain rights to the addressee/s.

In recent decades, unilateral declarations have been widely used to advance interstate cooperation, such as the statements of the French ministers of foreign affairs regarding the Nuclear Tests in the Pacific (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974), or the famous Ilhen declaration (Legal Status of Eastern Greenland, Denmark v Norway, 1933) and etc. These statements created certain commitments and obligations on the declarant state, which was acknowledged by the International Court of Justice (ICJ). This implies that some unilateral declarations may give rise to obligations on the international stage, this feature might qualify unilateral declarations to become a potential source of international law.

The topic of sources of international law and their aptness continues to be one of the most disputed and deliberated among many scholars and practitioners, for example Abdulqawi Yusuf, president of the ICJ in 2019 called for a revision and amendment of the sources of law. (Yusuf,

2019) Professor E. Suy, in 2001 also addressed the issue of article 38 of the ICJ and constituted that it no longer reflects the realities of international relations. (Suy, 2001)

The discussion revolves around sources enlisted in Article 38 of the ICJ Statute (Statute of the International Court of Justice, 1945), which outlines primary sources of international law such as customary law, treaties, and general principles of law, in addition to the auxiliary sources mainly judicial decisions and teachings of specialists. Yet, the gradual progression and expansion of international law and its doctrine, accompanied by the rapid growth and progress in interstate relations, call for the revision and modernization of conventional sources of law.

Nevertheless, as States extensively use unilateral declarations to manage international relations, it is imperative to establish a legal mechanism that is simpler and faster than the treaties to manage these interstate relations. Unilateral declarations of states may be used to govern such types of commitments on international stage, as they are used as an instrument of international law that demonstrates that the declarant state has committed to certain obligations and offered rights to the addressee/s.

Moreover, when deliberating on unilateral declarations of states, discussions generally include a broad range of declarations, such as promise, waiver, recognition, declarations of neutrality, independence and etc. Still, the doctrine of international law somehow negated this topic as only after the 1960's the unilateral declarations became the subject of more continued and concentrated doctrinal revision.

Nevertheless, unilateral declarations received considerable attention after the ICJ in 1974 delivered its landmark decision on the Nuclear Tests Cases; (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974) where the court ruled that unilateral declarations may

have a binding force. Therefore, the United Nations International Law Commission (ILC) back in 1996 acknowledged the need to develop a regulative legal framework for unilateral declarations.

After ten years of intense debates and discussions, the ILC published "Guiding Principles Applicable to Unilateral Declarations of States" in 2006 (Commission I. L., 2006). In addition to previous rulings of the Permanent Court of International Justice (PCIJ) and the ICJ, the guiding principles are the only available document in international law doctrine that examines some aspects of the legal nature of unilateral declarations. The guiding principle include provisions and rules relating to declarations, from creation to termination, which are recommendatory since the guidelines are not universally binding on States.

In addition, to determine what distinguishes a political declaration with no legal consequences from a unilateral declaration of state with legal consequences can become a complex issue. Particularly since these declarations do not necessitate any formalities, negotiations, or acceptance from the addressee, or even stage preceding their implementation, as treaties.

Moreover, there are some arguments against qualifying unilateral declarations as a separate source of law, scholars such Thirlway observe unilateral declarations as an immature treaty, as once the addressee's approval is obtained, the criterion of an agreement may be considered fulfilled, (Thirlway, 1973). Garner also suggests that unilateral declarations are a type of oral treaties or a type of spoken agreement. Moreover, he claims that oral agreements constitute a binding unilateral declaration. (Garner, 1933, pp. 493–497).

Therefore, research aims to provide a comprehensive analysis of the various types of unilateral declarations and their binding character in international law. It will also explore the possibility of incorporating other sources of international law into the article 38 of the ICJ Statute.

Furthermore, this research undertakes the task of analyzing in detail the “Guiding principles of ILC on unilateral declarations” including the relevant ICJ dicta, to be able to outline the normative foundations of unilateral declarations since, over time, such declarations may be accepted or may acquire an expressed consent of an addressee. Moreover, comparisons will be made between unilateral declarations and the conventional sources of law to outline if these declarations may qualify as a potential source of international law.

1.2 Research Problem

With the constant development and progression of the ways of conducting international relations, it is highly possible for new sources of international law to emerge. Concepts such as unilateral declarations, *jus cogens* and decisions of international organizations that may bind the states and produce legal obligations, are perceived as sources of international obligation and law. Therefore, article 38 of the ICJ does not reflect the new realities of international relations.

Considering the implications and influence of unilateral declarations on international relations, a little effort was made to thoroughly examine them in the context of potential sources of international law. Moreover, unilateral declarations are not properly codified in a binding document which implies that there are certain disagreements on their legal nature.

1.3 Significance and Justifications

Unilateral declarations play a significant role in international relations. Nevertheless, international law scholars have somehow neglected the issue of unilateral declarations. Little

scientific research only started to appear in the first half of the 19th century, touching upon certain aspects of unilateral declarations, this happened after the PCIJ and ICJ decided on cases concerning unilateral declarations and their binding character.

This was the case until the ILC in 2006 published the “Guiding principles on unilateral declarations of States” in an attempt to outline and codify the legal effects and obligations deriving from unilateral declarations in international law.

However, there may be additional grounds to establish legal obligations based on unilateral declarations other than those included in the ILC guiding principles and courts dicta, which have remained mostly unexplored. This includes their scope, definition, classification, and the possibility of the qualification of unilateral declaration as a new source of international law. All these issues should be analyzed and examined properly.

Several distinct normative foundations may confer the qualification of unilateral declarations as a new source of international law. However, an adequate analysis of these normative foundations in international law is missing.

1.4 Research Objectives

The objective of this research is to contribute and add to existing knowledge in international law related to the topic of unilateral declarations, particularly to outline the legal effects of unilateral declarations in international law, their definition, scope, classification, and whether they qualify as a new source of international law.

The research aims to examine under which conditions unilateral declarations constitute legally binding obligations under international law. Based on these findings, the possibility of their qualification as sources of international law will be outlined. As well as an attempt will be made to identify the legal framework related to the unilateral declarations by the following:

- To analyze the main approaches in international law doctrine related to the source of law, focusing on issues of article 38 of the ICJ Statute.
- To outline other possible sources of international law, which have emerged due to the gradual development and expansion of international law and its doctrine.
- To address the issue of codification and definition of unilateral declarations, based on the doctrine of international law, including the treaty law, jurisprudence, and ILC guiding principles.

1.5 Research Questions

To be able to determine whether unilateral declarations qualify as a potential source of international law, the research therefore, should answer the following questions.

1. What are the criteria for unilateral declarations to become binding and create legal obligations under international law?
2. What is the scope of obligations resulting from unilateral declarations?
3. Who is authorized to make unilateral declarations?
4. How can unilateral declarations of State be revoked?

5. Can a unilateral declaration made by a state representative without a reciprocal response or acceptance from the addressee/s, result in a legal obligation?
6. Can Article 38 of the Statute of ICJ be considered as a complete and comprehensive reference to all source of international law?

1.6 Hypothesis

The research contends that certain unilateral declarations impose international legal obligations on states. Given the importance of legally binding unilateral declarations, they should be regulated and codified similarly to treaties. Furthermore, unilateral declarations of states can be distinguished and separated from actions taken in accordance with treaty or customary law, because the conditions governing their validity can be assumed in accordance with general principles of law. Therefore, proper, and comprehensive codification would enable unilateral declarations to be qualified and recognized as a source of international obligations and, ultimately, as a source of law.

1.7 Methodology

This research is conducted on a legal proposition by analyzing the existing doctrinal tools and courts decisions outlined in case law. Thus, the researcher relied on the doctrinal method, which is the most appropriate method for preparing these types of research papers. It combines a descriptive and detailed analysis of legal instruments such as conventional legal materials and

courts decisions to obtain the desired outcome. Therefore, this study falls here under the framework of the doctrinal analytical method.

1.8 Literature Review

There is an ongoing debate among international scholars and practitioners related to unilateral declarations, the definition, the legal nature of unilateral declarations, and their place in the sources of international law doctrine. Some scholars argue that unilateral declarations are treaties, others, such as Hugo Thirlway, claim that unilateral declarations of states may turn into a customary norm of international law. Moreover, no international legal document clearly defines unilateral declarations, and there are no settled rules or convention that cover all legal aspects related to unilateral declarations.

Furthermore, some scholars call for the revision and reconsideration of article 38 of the ICJ statute, bearing in mind the constantly evolving international law and its doctrine. This demonstrates that article 38 cannot be considered as a complete and comprehensive reference to all sources of international law, especially that it was drafted more than 70 years ago. However, article 38 provides a solid foundation for credible debate and discussion that should be followed by relevant proposals regarding new concepts that may qualify as new sources of international law.

The topic of unilateral declarations of states was touched upon in the works of famous international scholars such as Suy, Schwarzenberger, Fitzmaurice, and Degan, including relatively recent pieces by Christian Eckart and P. Saganek.

One of the early scholarly articles that addressed unilateral declarations of sovereign states is the work of prof. E. Suy, in 2001 where he addressed the issue of article 38 of the ICJ and constituted that it no longer reflects the realities of international relations. Moreover, Suy also outlined the issues of terminology and definitions of unilateral declarations, and proposed a restrictive view on unilateral declarations, as they are able to produce legal effects by themselves and outside of the negotiations process.

Also, Suy focused on examining the role of unilateral declarations of states and the similarities with the law of treaties. Furthermore, he outlined whether the withdrawal from unilateral declarations is possible regarding revocability and estoppel. Moreover, he concludes that unilateral declarations can lose legal effect only by a change in the essential conditions envisaged by the declarant state. (Suy, 2001)

Suy's approach to unilateral declarations and sources of international law gives a great start to reexamining the interrelation between unilateral declarations and the conventional sources of international law enlisted in article 38 of the ICJ.

Later the book on promises of States in international law by Christian Eckart was published in 2016, which addressed a wide spectrum of issues related to the topic of unilateral declarations in international law. Christian Eckert states that "every legal act in public international law must fulfill certain conditions: conditions concerning the author of an act, conditions concerning the declaration of will, and conditions concerning the object and aim of an act. (Eckart, 2012)

Furthermore, Eckart's piece gave a complete description of the process of emergence of unilateral declarations in international law; he also reflected on all cases that included unilateral declarations by the courts such as PCIJ and ICJ, he also touched upon the development of unilateral declarations and their codification by the ILC, which resulted in a better understanding of the

criteria for validity and the binding effect of the unilateral declarations and their development in the system of international law.

Some scholars believe that there is a direct relation between unilateral declarations and other sources of international law; for example, Garner suggests that unilateral declarations are a type of oral treaties or a type of spoken agreement. Moreover, he claims that oral agreements constitute a binding unilateral declaration. (Garner, 1933, pp. 493–497).

Garner seems to undermine the power of unilateral declarations as a separate notion in international law, as he argues that these declarations are treaties; however, it is evident that unilateral declarations and treaties have many similarities when it comes to issues of validity, fulfillment of obligations, interpretation, and termination. Though they are different notions, unilateral declarations are a fast way to engage in international relations, and it only takes one state to issue a declaration without the need for a reaction from the other addressee, contrary to treaties which take a lot of time and consultations to be drafted and signed by the parties.

Additionally, Sanagek, in his book on “unilateral acts of states in international law” demonstrates that the issues surrounding the role of unilateral declarations and their types remain a manifestly controversial in international law. He also argues that even though Article 38 of the ICJ Statute does not list unilateral declarations as a source for its decisions, the writings of eminent lawyers have almost unanimously accepted that unilateral declarations are a formal source of international law or, at least, may have an influence on the primary sources of international law sources. Consequently, it is beyond any doubt that unilateral declarations are a source of international obligations. Moreover, Saganek centers the binding force of unilateral declarations on the principle of good faith. He also concludes that the judicial decisions and scholarly writings recognize this principle as a basis for the binding force of unilateral declarations. (Saganek, 2015)

Saganek considers that unilateral declarations of state are a potential source of international law based on the obligations stemming from them. Besides, other sources of international law produce certain obligations on states which are expected to be fulfilled in good faith, and the binding force of unilateral declarations is also based on the principle of good faith, which is one of the main and well-established principles in international law. Therefore, if they share the same criteria of the fulfillment of the obligations, this means that the unilateral declarations are already treated as a potential source of international law. (Saganek, 2015)

Nevertheless, scholars such as Schwarzenberger and Fitzmaurice tried to differentiate unilateral declarations from treaties; they contributed to the idea that had already been floated before the ruling that unilateral declarations might create an independent legal force. To sustain good faith in international relations, these scholars maintained that there needed to be an enforceable category of unilateral commitments. (Rubin A. P., *The International Legal Effects of Unilateral Declarations.*, 1977)

The process of codification of unilateral declarations is not complete, as the only reference that we have is the result of 10 years of work on the topic “Unilateral declarations of States” by the ILC which in 2006 issued the “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.” (Commission I. L., 2006)

The ILC Guiding Principles confirmed that “Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations while setting up some criteria that identify their binding character, based on ICJ dicta. However, these principles lack some notions, such as silence and other reactions by the addressee state, which might have a significant

impact on the legal nature and arising obligations resulting from the unilateral declaration. Thus, if properly codified, the reaffirmation that these declarations can create an independent legal force and commitments would occur.

Furthermore, V.D. Degan, in his work on sources of international law, concluded that it was difficult to find another branch of international law in which doctrinal concepts would remain for so long a period in such sharp contradiction with international relations and practice as in the case of unilateral declarations of states (Degan, 1997, p. 253) He also briefly states that the general requirements for the validity of unilateral declarations are essentially the same as the validity of the treaties. So, their content cannot be unlawful by law.” This means it must be “materially possible and not forbidden by peremptory norms of general international law.” This makes sense as unilateral declarations have certain parallels with treaties however, still to merge them with treaties would not be possible due to their unilateral nature.

However, the topic of unilateral declarations needs a thorough study as a distinct source of international law, outside of article 38 of the ICJ Statute, as with time, it became outdated and not exhaustive. In the research I will elaborate more on unilateral declarations in terms of the categories, biding force, the source of obligation, and their place in the doctrine of sources of international law. I will also outline the significant flaws or gaps in existing aspects of legal nature of unilateral declaration as discussed by scholars and ILC. Comparisons will be made between unilateral declarations, treaties, and customary law. At last, I will consider the need to expand the existing sources of international law based on the dicta of the courts as evidence of international obligation.

1.9 Limitations

The first issue was the deficiency in finding articles and literature on the topic of unilateral declarations; since this topic is very controversial among international law scholars and practitioners and little research related to it was done, another limitation was finding previous studies that support the idea of qualification of unilateral declarations as a newly emerged source of international law. Additionally, the absence of a regulative framework on unilateral declarations apart from the ILC guiding principles is still absent, considering that the guiding principles do not regulate all legal aspects related to the topic. Therefore, there is a gap in both literature and doctrine that should be addressed.

1.10 Research Structure

This research consists of five chapters. Chapter I includes an introduction and overview of the research and the importance of the topic in international law.

Chapter II outlines the legal nature of sources of international law enlisted on article 38 of the ICJ and explores the possibility of qualifying new notions such as *jus cogens* as new sources of international law.

Chapter III traces the historical underpinnings of unilateral declarations in international law, including the definition and the legal significance of such declarations. Chapter III also focuses on the scope, application, and categories, the conditions of validity and invalidity, and reasons for revocation of unilateral declarations.

While chapter IV focuses on the legal nature of unilateral declarations, their development as a concept in international law, and their doctrinal progress, it also provides a background on the codification of unilateral declarations within the ILC and outlines the ICJ's and PCIJ's dicta related to the subject of unilateral declarations. Moreover, it presents an argument in favor of qualifying unilateral declarations as a new source of international law, and highlights the issues related to article 38 of the ICJ. The final chapter V concludes with an elucidation of the qualification of some unilateral declarations of states as a source of law if certain criteria for their binding force and validity are met.

Chapter II Sources of International Law

2.1 Nature of Sources of International Law

Political and economic outcomes primarily influence international relations, and international law provides a normative framework for governing these relations to meet the needs and aspirations of various subjects of international law. The term source of law constitutes a method of expression of a legally binding code of conduct that gives the rule the quality of a legal norm; in the national law the sources of law include the constitution and other internal law, while sources of international laws are conventions, custom, general principle of law and etc. Thus, the sources of international law are the rules and principles that regulate the conduct of states on international stage, and these rules have the status of an international legal norm.

The source of international law is the formulation of the expression of an international legal norm. Therefore, they differ from the sources of national law as the norms of international law are

established by the states in consensus and agreement between them, expressing their agreed common will. Therefore, such agreements comprise the sources of international legal norms. Moreover, the governments and the political elite adopt national laws of states. Yet, lawmaking in international law is conducted between equal subjects, and the norms of international law, always exist in any legal source.

Furthermore, the primary subjects of international law establish the sources of international law themselves through the coordination of wills and needs. These sources exist in the form of international treaties and international custom, general principles of law recognized by civilized nations, etc. The subjects of international law are sovereign states, nations, and peoples fighting for their independence and self-determination, international intergovernmental organizations, and state-like formations. Some argue that transnational corporations belong to this category as well. However, the sources enlisted in article 38 of the ICJ statute were created by states, as by that time, the states were considered to be the only subjects of international law.

Since the early beginning of interstate interaction, and as the system of international relations developed through the years, there were two main sources of law, the treaties, and customary law. These sources, in practice, had the same hierarchal value. Some rules were followed to regulate these relations; the earliest forms of such rules came in the form treaties, bilateral and later multilateral; some practices then became sources of customary international law, and both sources deserve to be termed as primary sources of international since they had a considerable influence on the progression of international law throughout the years. However, with the gradual development of international law doctrine, other sources of law emerged to fill the gap in the law, such as the general principles of law and auxiliary sources that will be addressed in the next section.

It is a well-worn topic that international law lacks a world court with universal jurisdiction, and an executive power to implement the decisions of the court. It has been discussed since Dante wrote the treatise *De Monarchia*; many scholars use this argument to pack up their theory of the nonexistence of international law in practice. (Pollock, 1902) Nevertheless, the sources of international law are widely used by the ICJ and even its predecessor PCIJ to rule on various disputes between the states.

The first instance to trace the appearance of sources of international law was provided by article 7 of the unratified “Twelfth Hauge convention relative to the creation of an international prize court of 1907”, which reads as follows:

“Art. 7. If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions in the said treaty” (Conference, 1907)

This provision states that a hierarchy of sources of international law is based on the general principle *lex specialis derogat legi generali*, which means that special rules prevail over general rules of law. Besides, in the absence of an agreement or convention between the conflicting parties, generally recognized rules of law shall apply. However, that may constitute a customary norm of international law; thus, in the absence of general rules, this provision leaves the framework of positive law in the strict sense and refers to general principles of justice and equity. (Degan, 1997)

The sources of international law constitute one of the most fundamental patterns around which international legal discourses and legal claims are built. The first attempt to codify the sources of international law in one universal document was the article 38 of the PCIJ Statute in

1920, although this provision was slightly amended by the successor of the PICJ, the ICJ, yet is still used today as the primary document that enlists the recognized sources of international law. Although, sources of article 38 ICJ shall be used by the court when it's deciding on a certain dispute between States, other international courts such as the international criminal court (ICC) also referred to sources of law in article 21 of Rome Statute, yet it dictates that the court shall refer to treaties and customary law as secondary sources, (Rome Statute of the International Criminal Court, 1998) this implies that different actors and institutions have different criteria for acceptable sources of international law.

The subject of sources of international law and their hierarchical superiority is debatable and controversial. In addition, the doctrine of international law is in constant development, therefore the sources of international law must be revised as well to meet the contemporary trends and developments on the international stage. The emergence of new subjects of international law and the growing role of decisions of international organizations and unilateral declarations should be considered. Therefore, this chapter analyzes the sources of law provided by article 38 of the Statute of ICJ, it also outlines the possible emergence of new sources of international law.

2.2 Elements of Article 38 of the ICJ Statute

In modern doctrine of international law, the sources of law are enlisted in Article 38 of the ICJ Statute. This provision identifies the sources that must be used and applied by the ICJ when its deciding on a certain dispute submitted to it; moreover article 38 is applied as a reference for an authentic list of the sources of international law. The Statute of the PCIJ in was drafted in 1920, and it was the first written document that enlisted sources of law in the article 38. However, after

World War II, the PCIJ was replaced by the ICJ, and as its successor, it preserved many of the provisions of the PCIJ Statute including article 38 which was slightly amended. Thus, Article 38(1) ICJ states the following:

(1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.

b. international custom, as evidence of a general practice accepted as law.

c. the general principles of law recognized by civilized nations.

d. subject to the provisions of Article 59, judicial decisions, and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.) (Statute of the International Court of Justice, 1945)

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono if the parties agree to it. (Statute of the International Court of Justice, 1945)

It is broadly agreed that article 38 does not establish a rigid hierarchy of international law sources; however, it is also a well-utilized in practice that customary law and treaties are the primary sources of law, and they can supersede each other; this was confirmed by the ICJ in 1986 when it delivered its ruling on Nicaragua vs. USA case, which confirmed that sources of the law might exist in parallel. (Justice I. C., 1986) Also, there are a set of well-established rules in international law, such as the rule of *lex specialis derogate legi generali* or the *lex posterior derogate legi priori* rule, which means that a later adopted law revokes the earlier one.

In addition, it could be argued that article 38 divided the sources into two groups, the primary sources, and the secondary sources of international law. The primary sources are the treaties, customary law, and general sources of law recognized by civilized nations, while the secondary sources are enlisted in subparagraph (d), mainly the judicial decisions and the writings of the most qualified publicists; this subparagraph referred to article 59 of the ICJ Statute which clarifies that judicial decisions have no precedent effect in international law, confirming that the Court's decisions can only bind the disputants. (Statute of the International Court of Justice, 1945)

This makes sense since the basic principle of state sovereignty requires the ICJ not to make law but only to apply it because laws are the outcome of a coordination positions of the States as primary subjects of international law. As difficult as it may be to differentiate between the process of implementing the law and making law, one thing is certain: judicial precedents would imply law-making and thus cannot be allowed under international law. Moreover, when no applicable treaty or customary law is available the general principles of law are usually applied. While treaties and customs appear to be the more influential sources, which is not surprising given that both are based on sovereign states' consent, yet they still do not cover all aspects related to international law.

At the same time, it should be noted that many experts and scholars have valid criticisms of Article 38 of the ICJ. This is not surprising given that the article was first drafted after WWI and included in the PCIJ Statute. The normative and legal framework at the time was insignificant, and the world was still recovering from the war. Hence, an indication of the possibility of considering other sources of international law outside of article 38 of the ICJ Statute seems quite reasonable.

However, article 38 of the ICJ Statute fails to mention newly emerging concepts in international law, such as international organization resolutions, *jus cogens* norms, and unilateral declarations, which should be studied thoroughly, especially given the growing influence and structure of intergovernmental organizations such as the United Nations, African Union, Non-Aligned Movement, Organization of Islamic Cooperation, and etc. Meanwhile, suppose conventions and customary law are universal sources of international law. In that case, law-making decisions of organizations can be titled as a special source of international law, as their legal force is determined by the constituent documents of the organization, which are signed and adopted by the member states, reflecting their desire and will to be bound by the provisions emphasized in these documents, primarily the charter or the statute.

Nonetheless, given the importance of unilateral declarations in international relations, as many reflect the declarant state's willingness to be bound by them, they compete to establish themselves as a new source of international law. On the other hand, *Jus cogens* have a unique position in international law; as it is the highest source of law, and no deviation from it is permitted under any circumstances. However, *Jus Cogens* is also omitted from article 38 of the ICJ statute. Consequently, it is evident article 38 of the ICJ Statute fails to provide a comprehensive and thorough reference to all sources of international law.

2.2.1 Conventions

The law of treaties, in general, concerns the content of specific obligations accepted by the contracting parties in an express agreement. (Crowford, 2019) As we already mentioned, conventions and treaties are enlisted among the primary sources of law by article 38 of the ICJ;

they outline the willingness of states to become bound by the provisions of a certain treaty that they concluded and signed.

As a result, treaties and conventions come in a variety of forms, such as bilateral treaties which are conducted between two states, and multilateral treaties which are conducted between three or more states. Moreover, these treaties can be written in a language with biblical overtones and referred to as a "Covenant," which graced the League of Nations constituent instrument. This title is used in the modern international law as well, as it is mostly related to the universal human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) ((XXI), International Covenant on Civil and Political Rights, 1966) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) ((XXI), International Covenant on Economic, Social and Cultural Rights, 1966) Furthermore, the constituent documents can be more formalized and referred to as the Charter and Statute, Act and etc.

The process of drafting and adoption of international treaties are customized to achieve an agreement between the parties involved. Although considering international treaties solely from the standpoint of contracts would be difficult, they are developed in a contractual manner and therefore based on consensus. Multilateral treaties are intended to establish an international legal order by accommodating the common interests of many states.

In most cases, the most important issue for a treaty is the expression of the will and intention of a state be legally bound by the treaty's provisions, to ensure its application. The international law of treaties is aimed to maintain the stability and predictability in international relations. However, bilateral treaties govern interstate cooperation in different fields between two

states, while the multilateral treaties seek to achieve the maximum participation of states to cover the most legal regimes in the world.

Nonetheless, the practice of treaty conclusion is not a new one; treaties have been concluded and have been in force since the early interactions between kingdoms, city-states, and so on. As a result, it is only natural that, over time, norms on treaty conclusion, effects and application, legality, and termination have emerged under customary international law, as stipulated in the Vienna Convention on the Law of Treaties 1969 (VCLT) (Nations, Vienna Convention on the Law of Treaties, 1969), which formalized these standards that only apply to treaties made between states.

Furthermore, treaties and conventions reflect states' willingness to be bound by specific provisions, which provides a solid reference for the ICJ to resolve any dispute between the contracting parties later if they fail to meet their responsibilities and obligations. As in national law, *lex specialis derogate lex generalis*, and this rule reflects the essence of international law, as special laws replace general laws, and this means that special treaties or conventions should be observed as the primary source of international law when a specific dispute is governed by that treaty.

Today, seeing the rapid development and expansion of different branches of international law by the treaty process, it seems like states are increasingly preferring the treaty way of creating international law, which makes it possible for all states to participate in the creation of the norms of international law, to deliberate the problems raised, and to gradually coordinate their positions. Nonetheless, international conventions such as the four Geneva Conventions on the laws of war, (Geneva Conventions of 1949 and their additional protocols, 1949)the Vienna Conventions on

diplomatic and Consular Relations (Vienna Convention on Diplomatic Relations, 1961) and the Vienna Convention on the Law of Treaties (Nations, Vienna Convention on the Law of Treaties, 1969) became so important in international law that with time they were integrated into a customary law, applied to all states.

2.2.2 Customary International law

Customary law is the other primary source of international law, which can be viewed as dynamic process deeply consistent with many legal systems, laws, behaviors, and practice. However, article 38 ICJ Statute defines customary law in vague language as a "proof of a universal practice acknowledged as law." (Statute of the International Court of Justice, 1945). Yet, customary law is the overview of particular behavior and practices of states, taking into consideration that such practices are fit to be accepted as general.

We can argue that custom is evidence of a frequent practice rather than the practice being evidence of the existence of a custom. In any case, the definition states clearly two basic conditions: the first is that there must be a general practice, and the second is that the general practice must be recognized as a law, preceded by certain obligations. However, these conditions entail certain complexities, as the exact relationship between them is arguable.

There is, for example, the possibility of the emergence of regional customary law, confirmed as a matter of principle in the 1950 Asylum case. (ICJ, 1950) There might be something remotely similar a two-state custom, though it may be more correct to refer to customary law as a set of historical rights and obligations in this context. Previously, it was thought that developing a

customary rule could take a long time. Therefore, some scholars, such as Vattel, noted in the eighteenth century that customary law consisted of customs and maxims 'consecrated by long use,' which suggests quite a lengthy period of gestation, possibly decades. (Klabbers, International Law, 2021)

In contrast, the ICJ determined in 1969 that "even without the passage of any significant period, a prevalent and representative practice may suffice for the formation of customary law." Similarly, it is impossible to say how many instances of practice are required. Many incidents over a brief period may be just as forceful as a handful of instances spread out over a lengthy period, or even more so. (Klabbers, International Law, 2013)

Nevertheless, the international custom resembles evidence of the general practice of states recognized as law. General practice is the first stage in the creation of customary legal norms; however, it does not necessarily mean and require all states practice. Often, states cannot have practice on some issues due to their geographical location or the natural resources that they have (for example, landlocked states or space activity). As a result of the first stage of coordination of the wills of states, a custom is formed, for example, a rule of conduct usually followed by the state, but which is not yet a legal norm and does not reflect a legal obligation.

Moreover, customary law turns into a norm of international law only after two or more states have recognized it in this capacity. While in forming an ordinary norm, the element of time is not that significant. The custom can develop for a long time and can be formed quickly enough by coordinating and agreeing to the wills of states and their specific behavior; the international law proved this point as many conventions gained the status of customary law, such as the VCLT and the Universal Declaration of Human Rights, (Universal Declaration of Human Rights, 1948) the

Geneva Conventions on the law of war, and many more due to their significance and importance to the international system are now considered customary law, as they were adopted not so long ago, and reflect the agreement of all states on the fundamental content of these conventions.

Furthermore, when analyzing the terms of the development of customary law, the precise issue area is extremely important and should be taken into account; for example, space law, and since there are limited space activities, it appears that space law can develop without as many instances of practice. It has even been proposed that 'instant custom' may develop in such a field. However, in other areas, such as maritime law, where there has been more practice, the requirements for a new rule of custom may indeed be significantly higher. Another pertinent question is whose practice is required. (Klabbers, *International Law*, 2013)

Obviously, landlocked states such as Paraguay and Laos won't have much experience with maritime law, so focusing on their practice will be ineffective. Furthermore, the expansion of customary space law will be influenced more by the practices of the United States, Russian Federation, China, and French Republic than by the states with no experience or resources in that area.

Furthermore, the behavioral component of custom, general practice, is exempt from the requirement of total conformity, which is significant for international custom. It is based not only on state practice, but also on the practice of all international legal participants. As a matter of fact, a state may disagree about whether a particular norm is customary and may even violate such a norm. However, if the norm is supported by patterns of the international community's shared legal framework, expectation, and conforming behavior, the state will still be bound. Still, if the patterns of violation become too widespread, one of the primary bases of customary law can be lost;

moreover, if it is no longer generally expected that a norm is legally appropriate or required, the other base of customary law may be lost (Paust).

Additionally, the existence of customary international law, is dependent on relevant patterns of expectation and behavior. If states respect, abide by and develop international customary law, then we are on the safe side. However, it is still difficult to bind states by customary law on the international stage. This is evident, from the grave violations of customary international law committed by the Israeli occupation in occupied Palestine, mainly the responsibilities of the occupier which are reflected in the Geneva Conventions. Another example is the breach of the Vienna Convention on Diplomatic Relations (Vienna Convention on Diplomatic Relations, 1961) by the United States and many countries in Europe regarding Russian diplomats abroad, and many other cases we can find in practice that indicate grave breaches and violations of customary international law.

The Statute of the International Court of Justice (ICJ) in article 21 also mentions the customary law of war as a source of law for the court, however, the difference between the ICJ and ICC in this regard, is that ICC considers the customary law as secondary source, and it relies primarily on the statute of the ICC and the rules of procedure of the court. While in the ICJ statute customary law is considered primary source. (Rome Statute of the International Criminal Court, 1998, p. 13)

In Principles of Public International Law, Ian Brownlie lists the following sources as evidence of custom: "The material sources of custom are very numerous and include the following: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g., manuals of military law, executive decisions

and practices, orders to naval forces, etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. (Crowford, 2019)

Furthermore, In *Nicaragua vs. the USA* case the ICJ relied on the UN Charter as a reflection of customary law. (Justice I. C., 1986) Considering that the Charter was ratified by both sides, therefore the ICJ had the jurisdiction to rely on the Charter in its judgment. In *Gabčíkovo-Nagymaros* case, the ICJ referred to the VCLT as proof of customary international law. Again, both parties had ratified the VCLT, but it was inapplicable *ratione temporis* since the treaty in question had been concluded before the entry into force of the VCLT. (Gabčíkovo-Nagymaros Project, 1993)

As custom remains one of primary source of international law, yet many issues concerning the formation of the custom remain unresolved. This lends credence to the suggestion that new sources of international law must be investigated. As we can see, not all states truly adhere to customary law, which is undoubtedly a problem with the essence of the custom itself.

2.2.3 General Principles of Law Recognized by Civilized Nations

The most contentious, if not perplexing, of the three primary sources of international law provided by Article 38 of the ICJ Statute is unquestionably general principles of law. There has never been anything close to agreement on the nature, scope, and function of the general principles

of law since adoption of the PCIJ Statute which was the first document that listed the recognized sources of law. Nonetheless, no one can doubt the critical role they have played throughout history and in contemporary international law doctrine. Furthermore, the PCIJ Statute's drafters intended general principles to address treaty and customary international law limitations.

Furthermore, the emergence of new branches of international law in recent years, such as criminal, maritime law, environmental, human rights law and etc. Has given new life to this source. Different schools of thought in international law have fought over general legal principles. However, the way the ICJ and the PCIJ have referred to general principles of law prevents definitive conclusions from being drawn, as supporters of various theories can always find some verdicts to aid their claims. Nevertheless, the International Law Commission (ILC) (Marcelo Vázquez-Bermúdez, 29 April–7 June and 8 July–9 August 2019) proposed some draft conclusions on the general principles of law work that will allow some of the disputes surrounding this source to be resolved, such as the scope of general principles of law, the requirement of recognition and their categories. (Shao, 2001)

However, a typical method of conflict resolution under international law is to refer to the relevant multilateral or bilateral treaties, applicable legislation or to some other instruments that provide proof of relationship and previous attitudes of the disputants. Another option is to refer to state's practice in a specific area, the well-established customary international law. However, what happens if treaties or customary law are inapplicable to the dispute?

As treaties, and customary law, cannot be designed to cover all scenarios that result in a dispute on the international stage, and gaps in any legal system are unavoidable. Yet, international law offers a solution to fill that gap, by proposing to use the general principles law recognized by

civilized nations to resolve international disputes, when treaties and customary law lack any relevant provision to resolve that dispute.

The ICJ's Article 38 Statute allows the court to base its decisions and opinions on general principles of law recognized by civilized nations. The term civilized nations date back to the early twentieth century when there was still a distinction between civilized and non-civilized countries and people. Thus, civilized nations represented the western liberal world. Such a distinction is now criticized, whereas a comparable distinction between liberal democracies and other regimes remains relevant in international relations.

Additionally, the Special Rapporteur, Bermudez claims that “the term "civilized nations" should not cause the Commission any significant problems in its work. He argued that while this term may once have had a specific meaning, it is now obsolete and should be ignored. Considering existing practice and the concept of sovereign equality, this phrase must be interpreted as referring to all members of the international community”. (Bermúdez, 2018)

Moreover, the main issue with this source is that it is unclear who will judge if a regime qualifies as a liberal democracy and by what criteria. Second, and more rationally, some of the world's greatest powers may not be eligible for this category. It is politically inconvenient to regard these countries and their people as a subclass or non-civilized, especially with the rise of new powers in the Asian and African continents.

Furthermore, while it is evident that treaties and custom can be attributed to a state's express willingness to be bound, general principles lack this affirmation. They are frequently regarded as generic concepts that are part of the legal system and can be applied in various contexts, distinguishing them from rules. As a result, the murder prohibition is a rule that only applies if an

actual murder happens; it has insignificant application in burglary cases for example. If it is proven that a murder occurred, the rule can be put into effect, and the consequences it entails can be conducted. (Klabbers, International Law, 2013)

The central concept is that general principles of international law constitute a fundamental legal proposition that can be encountered in almost any legal system. A comparative law search may be conducted to determine whether national legal systems share a common legislative foundation, particularly when relevant treaties and customary international law do not provide the necessary framework or legislative foundation. If such a widespread principle is discovered, is therefore expected that a concept similar to it will be assigned to fill a gap in international law. In its rulings or advisory opinions, the ICJ only occasionally mentioned general principles of law. When provided by the disputant parties the court never used general principles of law as the only foundation for the Court's reasoning.

The concept of State sovereignty in international law is inherently hostile to the prospect of enforcing the will of some States, on some other States, and the diversity of the international community necessitates that international law be neutral. As a result, voluntarist and positivist approaches to international law predominate. The position that international law must be based on State consent has been firmly adopted by the PCIJ in the *Lotus case*: (Shao, 2001)

The rules of law binding upon States [...] emanate from their own free will expressed in conventions or by usages generally accepted as expressing principles of law and established to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot, therefore, be presumed (The Case of S.S Lotus, 1927)

Another momentous decision of the ICJ, was the Corfu Channel case in 1949, which addressed the issue of Albanian civil culpability for the mining of the Corfu Channel and subsequent damage to two British navy vessels caused by striking mines, resulting in a loss of life. Albania was found to be responsible for the 1946 explosion in Albanian waters that caused harm and casualties. Therefore, when deciding if the UK could prove Albania's knowledge and liability for the placement of the mines, the ICJ stated the following:

“The fact that a state exercises exclusive territorial control within its borders has an impact on the methods of proof available to establish that State's knowledge of such events. Because of this exclusive control, the other State, which is the victim of a violation of international law, is frequently unable to provide direct proof of the facts giving rise to responsibility. Such a state should be given more freedom in using inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion” (The Corfu Channel Case, 1949)

The Corfu Channel has indeed left an indelible mark on international law, particularly maritime law. The ICJ ruled that the Albanian side was required to alert the oncoming ships of the presence of mines in their territorial waters. According to the ICJ, "such obligations are based...on certain general and well-recognized principles, namely: elementary considerations of humanity, even more, exacting in peace than in war; the principle of free maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." (The Corfu Channel Case, 1949)

The Court's idea of innocent passage was eventually adopted by several key maritime law agreements. The Court's opinion on the use of force has been influential in future cases, such as *Nicaragua v. the United States*. (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986) In addition, this case established several procedural tendencies that were followed in the following ICJ cases.

Another important case decided by the ICJ is the *Advisory Opinion on the Legality of the Threat or Use of nuclear weapons* in 1996, (ICJ Legality of Nuclear Weapons, 1996) in which the court cites the Martens Clause as a proof that the international humanitarian law principles also apply to nuclear weapons. Besides, Judge Shahabuddeen in his unorthodox opinion referred to the Martens Clause: "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from usages established among civilized peoples, laws of humanity, and dictates of the public conscience."

He also argues that" the Martens Clause provided adequate and conclusive authority in favor of the hypothesis that there were already principles of international law in place according to which humanitarian considerations could exert legal force to administer the military conduct in situations where no relevant rules were offered by conventional law. Some treaties may be interpreted to reflect, codify, or create general principles of law". (ICJ Legality of Nuclear Weapons, 1996)

Nonetheless, general principles of law supplement other sources of law in a variety of aspects; moreover, they guide interpretation of international treaties and serve as a starting point for progressive interpretation due to their conceptual formulation. As the ICJ's dicta shows, principles of international law can be used to connect treaty regimes. They have frequently

influenced the interpretation of customary international law, and they could provide the foundation for the development of a new rule of customary international law. General legal principles can even be used to establish new rights and obligations; also, they fill the gap when treaties and customary law cannot be applied, and general principles of law prove useful for the ongoing and gradual development of international law and its doctrine.

2.3 Auxiliary Sources of International Law

Many argue that judicial decisions and the teachings of the most highly qualified publicists are only secondary sources of international law, and that treaties and customary law are the primary sources of international law used when States seek to engage in legal relationship. Customary international law reflects the common practices of states recognized as legal. International customary law becomes effective when a particular way of behaving is first adopted as a general practice among states and then recognized as a legally binding behavior for those states.

As was discussed above, in the absence of an international lawmaker, customary law has emerged as a particularly important source of international law. Customary law binds all states unless a certain state persistently objects to it. Nevertheless, the drafters of the PCIJ Statute and then the ICJ Statute inserted general sources of law as "gap fillers" into article 38 to compensate for situations where treaties and customs were insufficient to provide legal answers.

However, judicial decisions and teachings of the most highly qualified specialists regarded as secondary sources of law reflected in article 38(1)(d) (Statute of the International Court of

Justice, 1945). Many international law commission reports and Special Rapporteurs have also been cited by the ICJ. Due to the fact that judicial decisions and teachings are considered as secondary obligations, and ICJ judges will only refer to them when they are unable to find authority in the primary source, which is a frequent practice within the ICJ.

In the process of creating international legal norms, states function as sovereign and equal subjects. As a result, their wills are legal equivalents. Because of the equality of states in the process of creating and developing international law norms, most states have no right to create norms that are binding on a minority and attempt to impose them on other states.

In this regard, Article 38(1) of the ICJ Statute splits sources of law into two categories: law-creating procedures that serve as formal sources of international law and law-defining procedures that serve as secondary methods of determining law standards. Nevertheless, the term "subsidiary" or auxiliary as interpreted from Article 38(1)(d) of the ICJ Statute, shouldn't be construed as a verdict of a lesser significance and extent of judicial decisions and/or publicists' teachings in determining legal principles, given their authority and persuasive power; they should not be underestimated.

2.3.1 Judicial Decisions

Judicial decisions are frequently classified as an auxiliary source of international law. Still, they have precedential value, where precedent is a legal term referring to a court decision used to decide subsequent cases involving the same or similar facts or legal complexities. Precedents are incorporated into the doctrine of international law because they establish a legal rule or principle that is used to help resolve and decide on future cases in international courts.

The ICJ Statute, under Article 38(1)(d), refers to "judicial decisions" in a rather broad and vague language. At the same time, it is often assumed that this reference encompasses a wide variety of court decisions. There is a significant disagreement about which judicial decisions are legitimately included in this subparagraph 38 (1) (d). Some believe that the term "judicial decisions" in Article 38(1)(d) of the ICJ Statute (Statute of the International Court of Justice, 1945) includes judicial decisions utilized as evidence of customary international law. However, some do not agree with this viewpoint, as judicial decisions may reflect only a national approach.

Moreover, the judicial decision and teachings of the most highly qualified publicists are enlisted as secondary sources of international law, according to article 38 of the ICJ statute subparagraph (d), which provides the following:

Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. (Statute of the International Court of Justice, 1945)

It is commonly understood that judicial decisions, especially from national courts, can serve as proof of a precedent when deciding on a case and serve as evidence of customary international law. National court judgments represent the will and comprise the activity of States. Substantial portions of customary international law have developed based on the practice and judgements of national courts.

However, others argue that since national law, was primarily derived from the will of one state, as evidenced by domestic laws and/or judicial decisions, then it could be applied to international law. Yet, national law and international law are simply on different levels. Domestic

court decisions reflect national law only and in most cases are irrelevant to state practice. (Moremen, 2006)

Furthermore, judicial decisions on a subject affecting the international community can be derived from a ruling of an international tribunal or a national court. However, international tribunal decisions are frequently more powerful in terms of international law development than domestic and national courts and tribunals.

However, judicial decisions also made a significant contribution to international law because case law can be used to broaden the application of legislation and is regarded to be part of the law. As a result, they could be used in the emergence of new sources of international law, such as unilateral declarations, which are mostly studied in accordance with relevant case law.

Even though the line between interpretation and law-making can be blurred at times, international courts and tribunals are not generally regarded as having norm-creating functions. International courts and tribunals are tasked with resolving international law disputes. This implies that the law must exist as a given fact. Aside from that, decisions of international courts and tribunals bind only the parties to the dispute (Art. 59 ICJ Statute) (Statute of the International Court of Justice, 1945) even if the interpretation of the relevant source is influenced by that case. International courts or tribunals that refer to former judgments, particularly to the ICJ, do it out of convenience rather than obligation.

2.3.2 Teachings of the Most Highly Qualified Publicists

The second auxiliary source of international law enlisted in part two of article 38 is the teachings of the most highly qualified publicists. The key concern with this source is that it is

frequently regarded as proof of law not a source of law. Publicists' teachings include mostly scholarly materials like law review articles and literary works. In practice, they are not given the same weight as case law; yet, they are crucial in international law cases, especially where proving customary law or general principles of law is required.

However, this auxiliary source continues to have a considerable an impact on international law. Publicists may be cited in the deliberations of arbitration tribunals and other conflict-resolution entities. As a result, famous writings serve as a source of law. While publicists' teachings are commonly recognized in international courts and tribunals' judgments, judicial decisions, and case law, however judicial decisions generally accord greater weight and respect. For example, in Taylor, the SCSL Trial Chamber dismissed a defense submission corresponding to the involvement in a joint criminal enterprise, because the defendant had cited only a textbook but no jurisprudence, indicating that if the defense submission had been backed by a relevant judicial decision, it would have been more convincing. Therefore, 'Judicial decisions' are also stated in the table of authority attached to certain courts and tribunals' rulings. (Prosecutor vs Taylor , 2012).

One of the major disagreements when referring to publicist teachings in the context of sources of law is that many of them represent intellectual writings with political undertones. To be fair, these should be revised as legal sources because each author has a unique point of view. Given the number of texts that exist today, if all these teachings were perceived to be sources of law within the scope of Article 38, there would almost be no law. As the inconsistencies in opinions would wreak more havoc than help clarify how the court should proceed in that case.

2.4 Other Possible Sources of International Law

Legal sources play an exceptional role in international law; they serve as an argumentative tool for the states, and a substantive tool for the use of international courts. They are critical in differentiating between the norms of legal and political nature. Legal obligations can arise from sources, even though international law is decentralized.

However, given the rapid development of international law, as its branches have expanded and new subjects of international law have emerged, namely international and/or regional intergovernmental organizations, national liberation movements, state-like formations, and other subjects that have gained much authority and became important players on the international stage, the international law doctrine also should expand, especially that the ICJ statute was drafted over 70 years ago.

Furthermore, in practice, the sources of international law really aren't restricted to the provisions of Article 38 of the ICJ Statute. *Jus cogens* norms are regarded as the fundamental principle of international law, superseding all other sources of international law. For example, VCLT articles 53 and 64 provides that a treaty is void if it conflicts with *jus cogens* norms. (Nations, Vienna Convention on the Law of Treaties, 1969, pp. 18-22)

The emergence of supranational intergovernmental organizations such as the EU, where its laws are dominant over national laws. The United Nations, with binding Security Council resolutions and decisions adopted among sovereign states, thus given their significance, resolutions must be investigated as a potential source of international law. We have already established that the general sources of international law enlisted in Article 38 are not

comprehensive, therefore they cannot reflect the modern legal reality of international law, this calls for extensive research of other possible sources that will cover all aspects related to international law.

Considering the influence and significance that some newly emerged concepts such as unilateral declarations, and decisions of intentional organizations have on international relations, along with their binding nature, they have the potential of becoming new sources of international law, as they reflect the will of states to become bound by them. In the case of unilateral declarations, the will of state is expressed unilaterally, and while voting on a certain resolution within the international organization the state also reflects its positions on the subject of the resolution.

Moreover, decisions of courts have ensured that the obligations stemming from unilateral declarations must be fulfilled. Also, the constituent documents of international organization provide clear rules regarding the decisions taken within the organization and its members must respects them, as they agreed to become a member of that organization in the first place.

2.4.1 Jus Cogens Norms: A Source of Article 38 of the ICJ Statute, or a Source of an External Obligation?

Jus cogens norms, are the first source outside of article 38 of the ICJ statute that used by international courts. *Jus cogens* act as a form of public order by protecting the legal regime from contradictory laws and regulations. The *Jus cogens* norms include the prohibition of genocide, torture, the prohibition of slavery, the prohibition of aggression, the right to self-determination, the prohibition of piracy, and devastating cases of environmental harm. (Parker, 1989)

Therefore, *Jus cogens* embrace a dominant position as source of international law that exists outside of the article 38 of the ICJ. This is also confirmed by article 53 of VCLT Treaties 1969, which provides that: “a treaty is void if it, at the time of its conclusion...conflicts with a peremptory norm of general international law;” (Nations, Vienna Convention on the Law of Treaties, 1969, p. Article 53) meaning that *jus cogens* is a norm from which no derogation is permitted.

Similarly, according to article 64 of the VCLT provides that: “if a new peremptory norm of general international law emerges, any existing treaty which conflicts with that norm becomes void and terminates.” (Nations, Vienna Convention on the Law of Treaties, 1969, p. Article 64) Therefore, articles 53 and 64 undoubtedly confirm the existence of *Jus cogens* as a complete legal norm that exists outside article 38 ICJ Statute and its superiority over other sources of international law.

However, despite this distinctive status, there are certain challenges to the influence of *Jus cogens* as an independent international obligation. Besides, it is well established in the ICJ’s system that to implement a law or a legal norm, the court must refer to a source of that law; therefore, *Jus cogens* are not mentioned in article 38, so how can the ICJ refer to it? What is the origin of *Jus cogens*? Will the ICJ be acting *ultra vires* when referring to this source, and would it apply *Jus cogens* as a source under article 38(1)?

This is indeed a fragmentation of international law, as some scholars such as Thirlway who argues that *Jus cogens* might be a part of the customary international law of article 38. His

reasoning is based on the argument that *Jus cogens* result from the combination of appropriate state practice and the psychological element of *opinio Juris*. (Thirlway, 1973)

Also, ICJ appears to have articulated the same reasoning in the *Belgium vs. Senegal* case, as it ruled that "in the court's opinion, the prohibition of torture is part of customary international law and has become a peremptory norm." This dictum implies that the ICJ considers *jus cogens* a part of article 38(1), which could make it a complete reference. (Shelton, 2021)

It could be argued that the preceding arguments are insufficient because they contradict with the existing principles of customary international law and *Jus cogens*, both of which can coexist. However, another argument is that the preceding court decision implies that some areas that form the basis customary law may also fall under *Jus cogens* separately.

Further to that, this argument calls into question the rule of the persistent objector that can only be applied in the context of customary law. States have an escape route due to the existence of the persistent objector rule. This means that once a rule of customary international law is established and becomes binding on a State, that State cannot arbitrarily exempt itself from the obligations imposed by that rule.

To counteract this, the persistent objector rule was introduced into international law that specifies that if a state objected to a newly evolving norm of customary law through its formation, the objecting state is excluded from this norm when it becomes law. The persistent objector rule, on the other hand, only applies to customary law. Judge Lachs, for example, acknowledged the validity of the persistent objector to customary law in the *North Sea Continental Shelf* case. However, the persistent objector cannot be applied to *Jus cogens* norms since it binds states even if they have objected and refused it. As a result, if *Jus cogens* are considered customary law, then the established law of the persistent objector is null and void. (Dumberry, 2012)

Therefore, *Jus cogens* should not be recognized as customary law, this would contradict with the hierarchy of sources, norms and with the well-established established principles of international law. Especially that article 53 of VCLT grants *Jus cogens* a dominant status, therefore if regarded as customary law this would result in disrupting the steadiness of hierarchy of sources of law enlisted in article 38(1). This confirms that *Jus Cogens* are a separate source of law outside of article 38 of the ICJ Statue.

Chapter III Understanding Unilateral Declarations

3.1 Definition of Unilateral Declarations

States as primary subjects of international may obtain rights and obligations by a simple expression of will. Moreover, States are directly responsible for the expansion and progression of international law doctrine, according to the needs and interests of states and other subjects of international law.

The international law doctrine attaches significant weightage to its sources, principles, and obligations. As we discussed above, the sources of international law are enlisted in article 38 of the ICJ statute, and international conventions and treaties feature prominently amongst the sources of law mentioned in Article 38 of the Statute of the ICJ. Nevertheless, it is well established that states can obtain obligations greater than those assumed in treaty relations through informal

behavior and transactions involving unilateral expressions of will. (Rubin A. P., *The International Legal Effects of Unilateral Declarations* 71(1), 1–30., 1977)

Unilateral declarations are certainly not a new phenomenon in international relations; they may be followed to the first instances of states diplomatic interactions. Nevertheless, unilateral declarations lack a complete legal framework due to the absence of universally document and the mechanism that covers all aspects related to unilateral declarations.

The topic of unilateral declarations received considerable attention as a legally binding instrument after the ICJ delivered its landmark decision on the nuclear testing performed by French Republic in the South Pacific Ocean in 1974. In that judgment, the court established unequivocally that a state's unilateral declaration could have legal consequences. In the following considerations, this ruling and the position of the ILC on the codification of unilateral states is a crucial point of reference when it comes to the status of unilateral declarations. (New Zealand v. France, 1974)

Furthermore, the term “unilateral” has been traced back to its Latin origin from ‘unus,’ meaning ‘one’ and ‘latus’ standing for ‘side’ (Eckart, 2012). As for the term "declaration" is defined as a formal or explicit statement or announcement.

The use of unilateral declarations in international relations is constantly increasing in line with the rapid political, economic, and technological changes that we are witnessing. This phenomenon grabbed the ILC’s attention as it realized that proper codification of legal aspects of unilateral declarations is required due to their influence and impact on modern interstate relations. Despite this, the ILC has made little progress on the topic as commission members remain deeply divided over agreeing on a common ground of rules that encompass all unilateral acts/ declarations.

Moreover, the ILC has attempted to define unilateral declarations as “an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.” (Mr. Victor Rodríguez Cedeño, 2000, p. art 1.) According to Degan, unilateral declarations are a particular form of manifestation of the will of a state, apt to produce legal effects in the same way as any other conduct of a state. (Degan, 1997)

Then, after a series of reports, recommendations, and amendments to the concept of unilateral declarations and having focused on state practice, the Special Rapporteur’s Ninth and final Report presented a ‘Draft Guiding Principles’ (Victor Rodríguez Cedeño, Ninth report on unilateral acts of States, 2006) which included a new and brief definition of a unilateral declaration of a State as the following: “unilateral declaration formulated by a State with the intent of producing certain legal effects under international law.” This definition, however, was not adopted by the Commission; instead, it agreed, in its outcome, on the much more limited ‘Guiding Principles’ (Eckart, 2012, p. 40) Since there are many types of unilateral declarations, it is impossible to give it a clear and comprehensive definition.

Additionally, the Vienna Convention on the Law of Treaties (Nations, Vienna Convention on the Law of Treaties, 1969) has addressed one particular form of unilateral declarations, which is the concept of "reservation". According to the VCLT Article 2 (d), a reservation is a "unilateral statement, however, phrased or named, made by a State when signing, ratifying, accepting, approving, or acceding to a treaty, by which it purports to exclude or modify the legal effect of certain treaty provisions in their application to that State." (Nations, Vienna Convention on the Law of Treaties, 1969) As a result, we can conclude that any unilateral declaration is a public manifestation of the state's will on a certain issue.

However, a wide range of behaviors are covered by the description of unilateral declarations, and the discrepancies between different legal systems caused a widespread of uncertainties and debates on this issue. The PCIJ and ICJ's dicta on unilateral declarations have frequently left space for confusions and uncertainties. Moreover, up to the mid-nineties, no legal research have been conducted on the controversial issues concerning unilateral declarations. Aware of these weaknesses and flaws, the ILC recommended in 1996 to start a comprehensive discussion on legal framework unilateral declarations of States, relying on treaty customary law and judicial decisions as a point of reference.

3.2 Brief History of Unilateral Declarations of States

Contemporary concepts of unilateral declarations have appeared as part of the development of international law starting from the mid-nineteenth century. Hence, this section outlines the evolution of the international law doctrine during that period and examines the history of unilateral declarations after WWII as the starting point.

In the nineteenth century, the international community recognized that unilateral declarations may result in the formation of certain rights and obligations. However, most unilateral declarations were not regarded as legally binding; since they were merely political and/or diplomatic in nature, and they did not have any legal force until they were written down in a treaty or agreement. However, this was the system until 1823, when US President Monroe issued the famous Monroe Doctrine, which exemplified this view on unilateral declarations. The Monroe Doctrine's significance was manifested in later shaping US foreign policy during that period, as the declaration expressly stated that the US would refrain from interfering in European affairs,

particularly regarding European colonies in the Western Hemisphere where no other country should establish a new colony and determine the US policy towards the Americas. (Callahan, 1914)

Nonetheless, initially, the famous Monroe Doctrine had not been regarded as a legally binding document. However, this has changed throughout the twentieth century. The doctrine had been interpreted as creating legal obligations only by the 1960s. This manifested the US's intent to act specifically and was later regarded as a unilateral declaration.

Some Scholars such as Schwarzenberger and Fitzmaurice tried to differentiate unilateral declarations from treaties; they contributed to the idea that had already floated prior to the ruling that unilateral declarations might create an independent legal force. To sustain good faith in international relations, these scholars maintained that there needed to be an enforceable category of unilateral commitments. (Rubin A. P., *The International Legal Effects of Unilateral Declarations.*, 1977)

Also, an article by Garner from the 1930s is one example from the previous literature, where unilateral declarations, according to Garner, are a type of spoken agreement. Furthermore, Garner notes that "the conclusion to the whole affair would seem to be that an oral agreement between states is, or maybe, as binding upon the parties as if it were recorded in writing and will be applied by international tribunals wherever the facts as to the agreement can be proven." Garner believed that oral agreements constituted binding unilateral acts, but he never emphasized purpose as a criterion for unilateral declarations. (Garner, 1933, pp. 493-497)

Furthermore, from the conducted research on the topic of unilateral declarations, one can assume that the unilateral declarations' binding character was developed mostly by case law. One

of the first cases that revolved around a unilateral declaration and, by the decision of the PCIJ, created a legal obligation was the *Mavrommatis Jerusalem Concessions Case* in 1925. Then several cases were discussed by its successor, the ICJ, such as the famous nuclear tests case, the *Eastern Greenland case*, and other cases that will be reviewed in the next chapter.

Nonetheless, as international law doctrine evolved, unilateral declarations and their legal nature began to hold a unique place in the international legal system, as some did produce legally binding obligations. The ILC started investigating this phenomenon to incorporate it later in the “Guiding principles on unilateral declarations of States,” which later became the most widely used source of information on the subject.

Thus, as the result of a decade of work about unilateral declarations, the texts prepared by the ILC represent basis for further investigation of unilateral declarations and their place in international law doctrine.

3.3 Scope and Application of Unilateral Declarations

Starting from the mid of the twentieth century, as the complexities and difference in modern international relations have increased, international law started to develop in various directions. As the law reflects the principles, morals, rules, and practices of the community in which it operates. International law evolved in line with prevalent notions of interstate relations, and to survive, it should meet the realities of the modern era.

Therefore, gradual development of international law is intertwined with the changes in international relations and the aspirations of the States who have created it. States may obtain legal

rights and responsibilities by a simple manifestation of will, which can take several forms, such as agreement either verbal or written.

As for the sources of international law, which imply certain obligations on states, unilateral declarations are not mentioned in article 38. Nevertheless, it is well recognized that states can obtain obligations greater than those assumed in treaty relations through informal behavior and transactions involving unilateral expressions of will. (Rubin A. , 1977) Unilateral declarations are not new and are not a rare phenomenon in international law; there is still a grey area in the law doctrine regarding the legal nature of these declarations.

Nonetheless, there is a persistent conflict between the already established norms and sources and the rapidly evolving forces that wish to change it. One of the major problems of international law is determining when and how to incorporate new standards of behavior and contemporary realities of life into the already existing framework so that, on the one hand, the law remains relevant while, on the other hand, the system itself is not overly disrupted. (Shaw, 2008)

Unilateral declarations of states are as common as they are numerous in inter-state relations. They have different goals and take various forms, which may differ slightly from one author to the next, but they usually include protest, recognition, waiver, and promise. Some people add a notification, pacific blockade, war, and subjugation to the list. (Saganek, 2015)

As previously stated, some unilateral declarations create legal effects, while others may only be political in nature, with no intent to bind a state to any legal obligation. If the state desires to bind itself by a unilateral declaration, the legal obligations should be clear from the declaration's text, meaning if the phrasing is unclear, the alleged legal implications become unreachable. Finally, when determining state's desire to be bound by a declaration, the context and

circumstances in which it is made must also be considered. The way state assertions are transmitted cannot be interpreted as lessening their legal force, and international law does not exclude the possibility of legal ramifications for such declarations.

When discussing the scope of unilateral declarations, we unambiguously focus on declarations formulated with an intention of creating legal obligations on the international stage; the diversity of these declarations, as well as the difficulty in characterizing them, cannot be overlooked. Although it is recognized that this is not a State's only legal activity on the international stage, the concept of unilateral declarations must be restricted to the broad meaning of a legal act. Therefore, a legal act that leads to the establishment of a new norm and involves the application of an existing rule.

The question of who has the competence to formulate and deliver a unilateral act/declaration on behalf of a state is equally practically uncontroversial, at least and if it remains limited to those state representatives mentioned by Article 7(2) (a) of the VCLT, which provides that by virtue of their functions, heads of state, heads of Government and ministers for foreign affairs are competent to formulate such declarations. (Nations, Vienna Convention on the Law of Treaties, 1969)

Every legal act in public international law must meet certain conditions, which are divided into three categories: conditions concerning the author of an act, conditions concerning the declaration of will, and conditions concerning the object and purpose of an act. (Eckart, 2012, p. 118) As for the unilateral declaration in particular, to produce legal effects and obligations, it needs to be based on some conditions, which are as follows:

1. The state expresses its intention publicly, with the purpose to bind itself to it, “This condition is derived from the article 12 of the Vienna convention, and the ICJ has confirmed this rule in the decision on the Nuclear Tests case, which provided that if any unilateral declaration has made publicly and with an intention to be bound, it becomes binding for its declarant, the State being thenceforth legally required to adhere to a course of conduct that is consistent with the declaration. (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974, pp. 267, paras 43–44.)This is also reflected in the first guiding principle of the ILC.¹” (Commission I. L., 2006)

2. Thus, in order to determine the existence of a binding intention, the declaration must contain clear, explicit, and specific language confirming the obligation to be bound by the State in this declaration. In case of doubt as to the scope of these obligations, the declaration must be interpreted in a restrictive manner by interpreting the content of the text. (New Zealand v. France, 1974, pp. 267, paras 43–44)

The purpose of referring to the declaration's text in the interpretation is to protect both parties' interests. It is critical to clarify the methods of interpretation which are applied to unilateral declarations to determine if an intention to be bound has been manifested in clear terms. As a result, the interpreter must proceed with extreme caution when determining the legal consequences of unilateral declarations, particularly when the unilateral declaration has no specific addressee. (Eckart, 2012, p. 211)

3. Additionally, the ICJ affirmed unequivocally in its decision in the Nuclear Tests case, "when States make statements by which their freedom of action is to be limited, a restrictive interpretation is required." (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974, pp. page 267 paras43-44) The ICJ draws attention to the observation that constitutes an analogy application of Article 31, paragraph 2 of the VCTL. The unilateral declaration must be made by an authority vested with the power to do so, to bind the State internationally. These authorities are as follows:

1. Persons who are considered as representing their state in virtue of their functions and without having to produce full powers, as the following:

- a. Heads of State, Heads of Government, and Ministers for Foreign Affairs.*
- b. heads of diplomatic missions for a specific purpose.*
- c. representatives accredited by States to an international conference or an international organization or one of its organs for a specific purpose in that conference, organization, or organ.*

2. A person is considered as representing a State for a specific purpose if:

- a. he produces appropriate full powers.*
- b. or it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and dispense with full powers.*

(Nations, Vienna Convention on the Law of Treaties, 1969)

However, an act performed by a person who is not authorized to represent a State for that purpose is without legal effect and void unless confirmed by that State; this is stipulated in article 8 of the VCTL. (Nations, Vienna Convention on the Law of Treaties, 1969, p. Article 8)

Also, the authority of State representative to commit his State to certain obligations on the international stage, is confirmed by the ICJ and PCIJ's dicta on unilateral declarations and in other cases as well. For example, in the judgment on jurisdiction and admissibility in the case of *Armed Activities on the Territory of the Congo*, the ICJ stated, referring to the analogous customary rule in the law of treaties, that: "State practice shows that unilateral declarations creating legal obligations for States are quite often made by Heads of State or Government or Ministers for Foreign Affairs without their capacity to commit the State being called into question." (*Armed Activities on the Territory of the Congo*, 2005) Furthermore, this was reaffirmed by the fourth guiding principle of the ILC commission. (Commission I. L., 2006, p. 372)

4. Furthermore, according to a general rule in international law the sources of law should not contradict with *erga omnes* obligations of states, this also applies to unilateral declarations, meaning that if a unilateral declaration conflicts with a peremptory norm of international law then it is null and void; this is one of the three grounds of 'absolute invalidity that VCLT has identified, besides the" coercion of a representative of a State, coercion of a State by the threat or use of force." (Nations, Vienna Convention on the Law of Treaties, 1969, pp. Articles 51-53)

In other words, the unilateral declaration becomes null and void, and the state may not rely on it if it contradicts with any peremptory norm of international law, whether written, customary, or general principle. And this condition is reflected in the corresponding rule provided by article 53 of the 1969 Vienna Convention. Also, in the ICJ's judgment on the *Armed Activities on the Territory of the Congo case*, the Court did not exclude the possibility that a unilateral declaration

by Rwanda"- could be invalid if it conflicted with a norm of *jus cogens*, which evidenced later, not to be the case. (Armed Activities on the Territory of the Congo, 2005, pp. 33, para69)In addition to what was stipulated in the eighth principle of the "ILC guiding principles" that also reaffirms that a unilateral declaration that conflicts with a peremptory norm is void. (Commission I. L., 2006, p. 378)

Certainly, not all state's unilateral declarations will result in legally enforceable rights or duties. To assess the legal consequence, all circumstances must be considered, such as the used language, the official capacity of the representative making the declaration, and the response of other states.

Furthermore, many unilateral declarations are merely political statements and have no binding effect on international law. When a state issues a protest objecting to an act conducted by other state/s, for example, a presidential statement on the situation between conflicting states calling them to end the ongoing violence and stop the aggression, such a declaration has no legal implications, as it does not entail any tangible rights or obligations on the state that issued it nor on the addressees. Therefore, it cannot be considered a binding declaration. But a statement like "This is unacceptable, and we will intervene to put an immediate end to the aggression in order to protect the civilian population." constitutes a promise to act in a certain way. Therefore, the high officials should be cautious and precise when they deliver statements orally or issue them in writing.

3.4 Classification of Unilateral Declarations

Most unilateral declarations are delivered by oral statements or speeches during official talks, negotiations, press conferences, etc. Usually, a verbal statement is subsequently recorded in writing in one form or another and reflected later in the minutes of the meeting. This is demonstrated by the various forms that unilateral declarations have acquired, for example, the Ihlen Declaration was made orally (*Legal Status of Eastern Greenland, Denmark v Norway, 1933*), while the Suez Declaration was registered with the UN Secretariat. (Egypt, 1957)

As unilateral declarations can be formulated orally or in writing, which is stipulated in the fifth principle (Commission I. L., 2006). Yet, if the declarations are made orally, they must be public or recorded and filed and officially announced later. For example, the French Minister for Foreign Affairs addressed the United Nations General Assembly when he reassured the international community regarding the Nuclear Tests. (*International Court of Justice Nuclear Tests Case (Australia vs. France), 1974, pp. 266, paras 38, 39.*)

Therefore, in the ICJ's judgment on the Nuclear Tests case, it ruled as follows: "Regarding 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." (*International Court of Justice Nuclear Tests Case (Australia vs. France), 1974, p. Page 18 para 45*) Besides, unilateral declarations can be addressed to one state or more and even to international community.

The international law is remarkably diverse on various aspects of state unilateral declarations, particularly on the question of their classification. Formal legal elements of unilateral declarations include the definition, the capacity of states and their representatives to bind the state internationally, and conditions for validity invalidity of such declarations.

Unilateral declarations are as diverse as they are numerous. For example, there are unilateral declarations pertaining to the international personality of a certain state, including recognition of a state or a declaration of independence. Another type of unilateral declarations are the ones relating to the territorial borders, like declarations on territorial demarcation. There are unilateral declarations related to the settlement of international disputes, these comprise declarations on accepting the jurisdiction of international courts including the ICJ and International Criminal Court etc.

Given the immense variety of ways in which unilateral declarations express themselves in international law, the challenges of finding common grounds for their categorization can be very confusing. Considering the fact that unilateral declarations vary in their content and effects and in the terms of their formulation, this allows for the recognition of very few general criteria for their classification.

Furthermore, some scholars properly outline that international law doctrine mentions “recognition, protest, waiver, and notification as forms of unilateral declarations”. The problem with these classifications is that they confuse form with content or substance with the procedure. (Mr. Víctor Rodríguez Cedeño, Fourth report on unilateral acts of States, 2001, p. page 122 para 50)

There are two types of declarations in terms of their capability to create legal obligations and effects, and their ability to be terminated. The first type is the declarations with no legal effects or obligations on either the declarant or the addressee, such as when we describe a specific action or situation. For example, a statement by Rwanda's Minister of Justice was very general to consider it as a binding unilateral declaration (in relation to the withdrawal of a reservation to the Genocide Convention). According to the minister's statement, "Rwanda is one of the countries that has ratified the greatest number of international human rights instruments," according to the declaration. "Our government ratified ten of them in 2004 alone, including those concerning women's rights, the prevention and repression of corruption, the prohibition of weapons of mass destruction, and the environment. The few instruments not yet ratified will shortly be ratified, and past reservations not yet withdrawn will shortly be withdrawn." (Orakhelashvili, 2006)

We can observe that this particular declaration is not related to the rights of any other State. Thus, the Declarant State may modify, revoke, or withdraw it whenever it wants. Besides, unilateral declarations that may invoke a legal situation; recognition, protest, and waiver fit into this classification. Yet, to guarantee certainty and security in international relations, these three acts require an explicit expression of consent from the State.

The second type is the declarations that produce certain legal obligations on the Declarant State. This category, of course, involves a promise, which is an act that obligates the state to a particular course of conduct. A promise would have significant value only if the Declarant State intended to bind itself by the declaration. However, it can be quite challenging to ensure a genuine willingness to undertake obligations, as we are talking about sovereign states. (Mr. Víctor Rodríguez Cedeño, Fourth report on unilateral acts of States, 2001, p. Page 124 para 63)

This type of declarations should be examined more closely, particularly since failure to object to such declarations may have legal consequences. A promise is generally interpreted as a unilateral expression of a state's will. It obligates to act or refraining from acting in a specific way in the future for one or more addressees.

This commitment is mirrored by a particular right on the part of the addressee/s, allowing the latter to claim better fulfillment of the undertaken obligations. Since these types of declarations are related to the addressee/s rights, thus the Declarant State cannot change, revoke, or withdraw this type of declaration at any time, especially if the addressee/s accepts the declaration, then it will have the right to request the fulfillment of the obligations stemming from the declaration in good faith.

Moreover, the ICJ ruling on the nuclear test Cases 1974 reaffirmed that “declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations”. When the conditions for this are met, the binding character of such declarations is based on good faith; the States concerned may then consider them and rely on them; such States are entitled to require that such obligations be respected. (New Zealand v. France, 1974) (Commission I. L., 2006, pp. page 43 para 18, page 268 para 46)

Nevertheless, a promise does not require the addressee's acceptance or reaction to be effective. A state may also direct a promise to another state and/or the international community for political reasons that prevent it from directly addressing or negotiating with one of the addressees or the actual recipient of the obligation assumed. This often happens between the Israelis and Palestinians since the negotiations between the two sides are stalled.

Given the potentially extensive consequences of these unilaterally assumed legal obligations, there is a lack of specificity in the applicable legal framework. One reason promises receive so little attention is that, whereas unilateral declarations of states are widely perceived as a common practice, declarations that fall into this category of the promise are thought to be uncommon.

Furthermore, one of the distinguishing and sometimes advantageous characteristics of a promise as a unilateral declaration is that it does not allow for bargaining; no acceptance or reaction from the addressee is required for the legal obligation to occur. In comparison to treaty law, which requires a participation of another or several other parties for the treaty to be adopted, however a promise is a faster and easier legal mechanism for assuming legal obligations and granting rights. Furthermore, the newly implied obligation created by a promise will affect the declarant state, ye contrary to popular belief not always to its disadvantage.

In addition, one of the benefits of a promise is that it allows a state to unilaterally undertake a certain obligation to produce a *fait accompli* (a completed act) in the expectation that its addressee will abstain from instituting the frequently lengthy and complex procedure that generally precedes the signing of a treaty, but rather accept the benefit as such willingly promised, even if the pledge made may not get the addressee very far.

This strategy may be beneficial when a state is faced with a claim to change its behavior, provide some assurances, or to establish a clear legal framework for a specific situation, or for a typical commercial exchange situation, such as when promising to receive nothing material in return. In these instances, the self-professed commitment, or *fait accompli*, may help to reduce the public and political pressure to comply with the given claim and to also quickly alter the existing law to provide the necessary legal framework.

Furthermore, by unilaterally assuming an obligation, a state may be seeking a *quid pro quo* (something for something) from another state, whether in the form of altruism or a prospect responsibility from the addressee/s, while deeming it imprudent to establish a formal legal relationship by a treaty. Instead, it may be more practical to use an obligation stemming from unilateral declaration and wait a while before requesting or asking addressee to reciprocate to the given obligation.

While there is still some skepticism, the existence of promises in international law is now widely accepted. The ILC's work, which published the "Guiding Principles," also confirmed the capacity of unilateral declarations of states to legally bind themselves. Thomas Franck's article discussing the Nuclear Tests cases, stated that the landmark decision for unilateral and legally binding declarations, that Egypt's promise that spelled out a legal regime for the use of the Suez Canal was "a most useful step forward in international jurisprudence." also, it was especially helpful when Egypt has indicated the readiness to make binding commitments to Israel but without concluding an agreement. (Mr. Víctor Rodríguez Cedeño, Eighth report on unilateral acts of States, 2005)

Therefore, the ILC has given some significance to the concept of promises, by emphasizing the ICJ's perceptive behind rulings on cases involving unilateral declarations, which quickly disproves the assumption that legally binding unilateral declarations have a clear legal framework, ready for effective application in international relations. Dissimilar to the treaty law codification, where the ILC has completed its work by offering a detailed and comprehensive framework, yet the Commission failed to do that with unilateral declarations.

For States, it is important to look good on the international stage, especially in a time like ours with the social media revolution when public opinion can have considerable pressure on the

governments, demanding to act in a certain way. Therefore, to persuade others to join, states may present their position on a particular issue and make a unilateral commitment, such as abandoning nuclear power. These methods may become far more effective as states in the globalized world are always interconnected. Thus, mutual trust and the preservation of good relations are increasingly important.

Unlike a treaty, a binding unilateral declaration is made by a State without any requirement for reciprocation, response, or acceptance from another State. (Saganek, 2015) The fundamental question that must be raised is what the conditions that make a unilateral declaration binding. This will be clarified in the following sections.

As we already discussed, unilateral declarations of states that are made in public and demonstrate the willingness to be bound may create certain legal obligations and grant rights. The French declarations in the Nuclear Tests case in 1974 are an example of unilateral declaration that was delivered in various forms, including a statement by the French President at a press conference and a then a declaration by the Foreign Minister was delivered at the UNGA.

Another example of a legally binding unilateral declaration of a state is the declaration of neutrality of Austria, which was contained in a statutory document. Turkmenistan also proclaimed permanent neutrality in 1992, which was later reflected in UNGA unanimously adopted resolution A/50/80 on 12 December 1995. (UNGA, 1995)

When international law does not prescribe a particular form, the parties are free to choose what form the declaration will take. (Goodman, 2006) As for the party to which the declaration is directed, a declaration “may be addressed to the international community as a whole, or one or several states or other entities.” (Commission I. L., 2006, p. Principle 6) Some declarations are

simply indications of facts or expressions of political opinions. Some of them are more than just political opinions, especially when accompanied by a promise to act in a certain way. (Klabbers, International Law, 2013) From here, it can be realized when the declaration aimed to produce a certain legal obligation, or it was a mere expression of political or diplomatic opinion.

Another type of unilateral declarations are the ones that express a right of a sovereign State in international law, such as” declarations of demarcation of borders or territorial waters, nationality and declarations of war, peace or neutrality” etc. (Mr. Víctor Rodríguez Cedeño, Fourth report on unilateral acts of States, 2001, p. 124 para 64 (c))

As stated above, unilateral declarations can come in the form of a protest, waiver, promise, and recognition. In addition, to unilateral declarations of neutrality or of war and peace. Even some unilateral declaration on nuclear disarmament and other crucial areas in international security and cooperation. Moreover, it is still difficult to categorize unilateral declarations under certain criteria, for example, international jurisprudence commonly defines the Ihlen declaration as an international promise, even though it may be viewed as a recognition or a waiver if its content was observed in a different context of definitions (Mr. Víctor Rodríguez Cedeño, Fourth report on unilateral acts of States, 2001)

Another relevant example of a unilateral declaration are the declarations of independence, such as the proclamation of independence of Singapore, after numerous rounds of negotiations with Malaysia in 1965, by which the latter renounced sovereignty and jurisdiction over Singapore. As a result Singapore become independent on the 9th of August 1965. It immediately received *de jure* recognition from the United Kingdom, New Zealand, Australia, and the United States of America, followed by becoming a fully-fledged State Member of the United Nations in September 1965. (Marcelo, 2006)

In conclusion, although unilateral declarations are individual acts performed by one state and do not require the acceptance of another party, they are sometimes binding and play a substantial role in expanding cooperation between states politically, economically, and on security levels, primarily if the declarations are related to a sensitive and vital matter at the international level.

Thus, unilateral declarations profoundly influence international relations, as they create a binding force on one state towards a specific situation. Besides, when delivering a statement in the form of a promise, the state's representative should be meticulous in choosing the words to avoid misinterpretation and binding the state to some not intended obligations. Furthermore, there is no doubt that unilateral declarations can vary in their form, nature, and legal obligations that they produce; however, they all have one thing in common the single manifestation of the will to be bound by the declaration.

3.5 Conditions of Validity and Grounds of Invalidity of Unilateral Declarations

International legal effects produced by unilateral declarations are debated among international law scholars and practitioners. As previously stated, there is a general agreement that unilateral declarations produce have legal effect; the ICJ also reaffirmed this in the *Nuclear Tests case* and the *Frontier Dispute case*, which emphasized the publicity of the declaration. The unilateral declaration must demonstrate the state's willingness to be bound, and "the binding character of such declarations is based on good faith." This condition is confirmed by the first principle of the ILC guiding principles. (Commission I. L., 2006, pp. In an article discussing the Nuclear Tests cases,)Any manifestation of will expressed by a state, including unilateral

declarations, must be clear in its intent to be bound to have legal effect, just as the element of consent in treaties must be present.

As UN Special Rapporteur Rodriguez stated in his ninth report referring to the validity of unilateral declarations that “when they operate as sources of legal rights and obligations, the common requirements for validity of unilateral declarations are essentially the same as for the validity of treaties According to this point, the conditions are the following: (a) the unilateral declarations must have been issued by the competent authority or person. (b) The content must be materially possible and not prohibited by *jus cogens*, and (c) the intention expressed by the author of the unilateral declaration must correspond to the author’s true intention. It must not be affected by defects or invalidating factors”. (Mr. Víctor Rodríguez Cedeño, A/CN.4/569, 2006, p. 153 para 16)

However, like with any other notion in international law, there are certain conditions of validity and invalidity of unilateral declarations and situations where they can be revoked; these conditions will be addressed in the next section.

3.5.1 Conditions of Validity of Unilateral Declarations

The provisions concerning the validity of unilateral declarations and their binding character can be deducted from relevant customary international law (mainly those found in the VCLT), what was included in ICJ rulings, in general principles of law, and finally, in the Guiding Principles of the ILC, which are summarized as follows:

First, the declaration's publicity must constitute a unilateral manifestation of the willingness and desire to be legally bound. Thus, the point to which the parties have acted in good faith, state's expression of its will should not be subject to any defects of will; the declaration has to be made by a state's competent authority, the form of the statement itself is not critical, and the declaration should not violate any peremptory norm of general international law. Nothing like a *quid pro quo* (something for something) or reply or reaction is required from the addressee for the declaration to take effect. (Victor Rodríguez Cedeño, Fifth report on unilateral acts of states, 2002)

Moreover, it should be noted that most, if not all, cases where the unilateral declarations were deemed binding did not involve any negotiations on multilateral treaties. Instead, unilateral declarations often revolve around bilateral disagreements, such as diplomatic privileges and immunities, borders, reciprocity, reimbursement for harming the rights of the citizen, torts and etc.

As a result, errors, fraud, corruption, and coercion of a state or its representatives, as stated in the VCLT (article 48 and article 52), may render the treaty null and void, thus terminating it. Similarly, nothing prevents a unilateral declaration from being declared null and void for violating *jus cogens* norm, as indicated by Article 53 of the VCTL. (Nations, Vienna Convention on the Law of Treaties, 1969, p. 18) This is also reaffirmed by principle 8 of the Guiding Principles. (Commission I. L., 2006, p. 378)

The issue that must be addressed is when a state has manifested its intent to commit to certain legal obligations. According to the ICJ in the *Armed Activities on the Territory of the Congo*, the Court stated that it must examine "the actual content as well as the circumstances in which the declaration was made" the court affirmed that a "such a declaration could only produce legal obligations if it is made in clear and specific terms". (*Armed Activities on the Territory of the Congo*, 2005, p. para 50)

Therefore, the term "Content" was used by the ICJ to determine the terms of the declaration, primarily the text, that is the main focus of analysis in determining if the declaration is binding or not. Regarding the interpretation of the declaration's text during the first stage, that is, when determining the presence or absence of a legal obligation, the ICJ when it was deciding on the nuclear tests case applied a strict standard with a focus on the text of the declaration, that is, the actual wording used, which should be interpreted in a natural and reasonable manner." (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974, p. 267 para 44) Additionally, the court confirmed that the declaration must be issued in "clear and detailed" language to be legally binding. The ICJ used the same reasoning in the *Armed Activities on the Territory of the Congo case*. (Armed Activities on the Territory of the Congo, 2005)

Also, the ILC mentioned the use of restricted interpretation in the Guiding Principles as well, especially when the scope of the unilateral declaration is not clear. This was reflected in principle 7, which confirmed that "the interpreter must proceed with extreme caution when determining the legal consequences of unilateral declarations, particularly when the unilateral declaration has no specific addressee." (Commission I. L., 2006, p. 377)

Hence, to implement this principle, a legal obligation is already presupposed. While not required, some textual indicators will support the conclusion that the state has communicated its intention to legally bind itself. Klabbers, for example, investigated some of these indicators in his paper on the concept of the treaty. These are all significant and are likely to tip the scales further in favor of a finding of legal binding force where present. When a declaration refers to its own 'entry into force,' it is frequently interpreted as referring to its own legal nature unless there is evidence to the contrary. (Sinclair, 1997)

Similarly, where a state's declaration of future behavior allows for judicial resolution, this gives a strong indicator that the pledges contained in the declaration should be treated as legally effective and binding. Also, where a declaration includes remedies or allows for sanctions if it is violated, this is a textual indicator of a state's desire to be legally bound. (Klabbers, *The concept of treaty in international law*, 1996)

Regarding the expression of intent, the ICJ stated that "as is generally the case in international law, which places the primary emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it," so the form of the declaration makes no difference. (International Court of Justice *Nuclear Tests Case (Australia vs. France)*, 1974, p. 267 para 45) Formalities are not required, however, they might be of additional indicative value in evaluating a state's intention and desire to become bound, which will be taken into account.

3.5.2 Grounds of Invalidity of Unilateral Declarations

In terms of potential grounds for the unilateral declaration's invalidity, the VCTL can be used as a reference. When we consider the invalidity of a specific act in international law, the first thought that comes to mind is the invalidity caused by the lack of competence of the government representative, as stipulated in article (7) of the VCLT. The general rule is that a competent authority must deliver unilateral declarations, as not any political figure in the government has the power and authority to bind his state to certain obligations or promises.

Furthermore, when the grounds for invalidity are met, the principle of good faith should still be applied. This is especially true given that the state claiming invalidity must not have

contributed to the error through its own actions. Besides, good faith aims at preventing possible behavior with the ultimate goal of relieving the State in question of an international obligation.

Nonetheless, there are certain limitations on authority to express a State's consent. According to Article 47 of the VCLT, which contains provisions where a representative presumed to execute an act binding upon his State but, in fact, lacked authority to do so, because his authority was made subject to specific restrictions that he failed to observe in the particular situation, however the other parties should be notified of these restrictions to invoke invalidity of treaty this is applied to unilateral declarations as well. (Nations, Vienna Convention on the Law of Treaties, 1969, p. Article 47)

The second reason for the potential invalidity of the unilateral declaration is related to the expression of consent; as stated in principle 9 of the guiding principles applicable to the unilateral declarations of States (Commission I. L., 2006), besides, it is well established in international law that no obligations may be placed on a State without its approval, as states are sovereign and independent actors in international relations. This rule was codified in article 34 of the VCLT. (Nations, Vienna Convention on the Law of Treaties, 1969).

Furthermore, it is generally accepted that, in order to invalidate a state's consent in a treaty according to provisions of articles 48 to 50 49 of the VCLT (Nations, Vienna Convention on the Law of Treaties, 1969) which deal with error, fraud and coercion, the rule is that a state may use the error, fraud (including corruption), and coercion to invalidate its consent to be bound by the treaty. An error, for example, must be related to an issue that is central to the State's agreement to be bound by treaty provisions, which may apply to unilateral declarations as well.

The third reason for the invalidity of unilateral declarations is the violation and abuse of the state's internal law. Article 46 of the 1969 Vienna Convention establishes three conditions for invoking the invalidity of a treaty in relation to internal law:

(a) The violation invoked must concern a rule of the internal law of fundamental importance, meaning the Constitution and laws that have the constitutional force and are in effect at the time

(b) the rule in question must concern competence to conclude treaties.

(c) the violation of internal law must be manifest, meaning that it must be objectively evident to any (Nations, Vienna Convention on the Law of Treaties, 1969)

For these requirements to apply to unilateral declarations, such laws must be in effect both when the unilateral declaration was drafted and when the alleged invalidity is asserted, and if a state's expression of consent to be bound by a unilateral declaration clearly violates a fundamental norm of its domestic law, the unilateral declaration becomes invalid.

Finally, the reason for the invalidity of a unilateral declaration may appear if it contradicts with the *jus cogens* norm; as stated in article 53 of the VCLT. (Nations, Vienna Convention on the Law of Treaties, 1969) This applies to all norms of international law. The invalidity of a treaty that contradicts *jus cogens* norm is justified since norms are so fundamental that they deny any contradictory or conflicting act of legitimacy. A similar approach can also be found in international judicial practice.

To summarize, when making a unilateral declaration a state representative must exercise caution, to avoid the scenarios mentioned above, to secure a valid unilateral declaration, for the

sake of beneficial interstate relations and for the interest of legal security. This would put encourage the declarant state to fulfill commitments and given promises.

3.5.3 Revocation of Unilateral Declarations

The unilateral declaration comes into existence when it is formulated if it fulfills the necessary requirements of validity. However, as for any other commitment there are certain rules for its cancelation and termination, the legal term for the termination or cancellation of a declaration or agreement is revocation. According to the ILC's guiding principle 10 the general rule for revocation of unilateral declarations is that a unilateral declaration that has formed certain legal obligations on the declarant state cannot be modified or revoked arbitrarily. (Commission I. L., 2006, p. 380)

Nevertheless, unilateral declarations may be revoked in certain circumstances, subject to a necessary limitation on a state's revocation power. In other words, it's not legal to arbitrarily revoke a unilateral declaration that creates legal obligations for the state making the declaration (Eckart, 2012, p. 253) such as revoking an undertaking in order to harm the addressee state, because the binding character of such declarations is based on the principle of good faith. States are allowed to require that these obligations be respected. Similarly, as the principle of *pacta sunt servanda* in the law of treaties is based on good faith, so is the binding character of an international obligation stemming from unilateral declarations.

Therefore, states can place trust in unilateral declarations, also they have the right to require that the obligations stemming from them be respected and fulfilled by the declarant. However,

because neither practice nor doctrine provides much information on revocation of unilateral declarations, I will attempt to analyze the conditions on the revocation of unilateral declarations.

In our case, the term revoke indicates that the unilateral declaration has been terminated or cancelled as a result of the Declarant State's intention to suspend the given declaration. Moreover, International case law has affirmed that unilateral declarations may be revoked, but under certain limits, taking as an example the ICJ ruling in the case concerning *Military and Paramilitary Activities in and against Nicaragua 1986 on the jurisdiction of the Court and the admissibility of the application*, (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986) as the ICJ stated that “the unilateral undertaking resulting from the French statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration.” (Mr. Víctor Rodríguez Cedeño, A/CN.4/569, 2006)

Furthermore, it is not permissible to revoke the unilateral declaration, which implies legal obligations on the state that issued it arbitrarily. However, in certain circumstances, the unilateral declarations may be withdrawn or amended in the following cases:

3.5.3.1 Terms for Revocation of Unilateral Declarations

The rules on the revocation of unilateral declarations are presented in principle 10 of the ILC guiding principles. (Commission I. L., 2006, p. 380) The general rule for unilateral declarations is that they can be revoked in accordance with the terms included in the declaration itself. For example, several ILC members made observations regarding the problem of the revocation of unilateral promises, as some commented that the ability of a State to revoke a unilateral promise which it had made should depend, at least in part, upon its intention when it

performed that act. (Victor Rodríguez Cedeño, Fifth report on unilateral acts of states, 2002). Thus, such circumstances should be taken into consideration when revocability is discussed.

Also, scholars such as Suy argue that the withdrawal from unilateral declarations is possible in terms of revocability and estoppel; he seems to believe that the provisions regarding the withdrawal or denunciation stated in VCTL would equally be applicable to unilateral declarations. He argues that the “withdrawal, challenge, or revocation must be to the detriment of the relying party. For these reasons, protest and acquiescence or consent viz absent of protest are key elements in the so-called rule of estoppel”. (Suy, 2001, pp. 8-11)

However, there are some rules regarding the revocation, such as certain conditions of revocation included in the declaration. Secondly, the rights imposed on the addressee state resulting from the obligations of the State that issued the declaration; the final issue is the fundamental change in circumstances.

Therefore, according to the first condition, if the State intended for its declaration to be revocable, it should be subject to revocation and any conditions or limitations that State may have imposed on itself are valid. However, if the Declarant State intended for the unilateral declarations to be irrevocable, then it should not, in general, be subject to revocation.

However, if made into a legal principle and put into practice, this position would highlight the importance of certain terms included in a state's declaration that address revocability. Assume a unilateral declaration contains a condition or a time limit. In that case, it will end as declared and specified, implying that the unilateral declaration may be revoked if subjected to that time limit.

Unilateral declarations with no time limit are referred to as declarations with 'infinite duration' and thus cannot be terminated immediately; this also applies to treaties and agreements.

However, the ICJ in the nuclear tests case affirmed that under the good faith principle, unilateral declarations are revocable, but special terms on their revocability must be followed, and unilateral declarations without any provision on termination can only be terminated after prior notice and when a reasonable time has passed. (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974) Interestingly, the ICJ has used the analogy to treaty law, thus establishing the reasonable period of revocation to a minimum requirement of ‘12 months’ as stipulated in Article 56(2) of the VCLT. (Nations, Vienna Convention on the Law of Treaties, 1969)

Therefore, where certain terms are included in the unilateral declaration, it may be revoked only according to the specified terms, and it can also be irrevocable according to the provisions of the unilateral declaration. These terms express the States will remain regarding the status of the declaration made.

3.5.3.2 The Rights of the Addressee/s

The rights of the addressee/s in the context of revocation of unilateral declarations are reflected in Principle 10 of the ILC Guiding Principles applicable to unilateral declarations of states which provides the following:

“A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether revocation would be arbitrary, consideration should be given to (b) the extent to which those to whom the obligations are owed have relied on such obligations...” (Commission I. L., 2006, p. 380) Meaning that unilateral declarations that reflect specific commitments cannot be revoked arbitrarily without consulting the addressee and have relied on these commitments and obligations.

Furthermore, if the addressee is protected the principle of estoppel because revocation would cause harm, then cancellation would not be possible. However, if the addressee consents to revoke the undertaking, it may be revoked; additionally, if the addressee rejects the undertaking, the declarant is no longer bound vis-à-vis the latter by its promise. (Eckart, 2012, pp. 262-263) Also, the addressee is protected by the "estoppel principle," which states that if the addressee would suffer as a result of revocation, this revocation would be invalid.

3.5.3.4 The Fundamental Change in Circumstances

Another intriguing issue in international law is when a fundamental change in circumstances may result in supervening of the impossible performance of an obligation, which may permit the declarant state to revoke the declaration without adhering to the notice period that is normally required. Such as a situation in which the subject matter of the unilateral declaration has ceased to exist or a fundamental change has taken place in the circumstances that gave rise to the act, the fulfillment of a condition included in the declaration also might lead to the declaration be revoked. (Eckart, 2012, p. 274)

Additionally, a fundamental change of circumstances 'within the strict limits of the customary rule enshrined in Article 62 of the VCLT; a declaration can be revoked; a fundamental change of circumstance can be any unforeseen satiations, such as war, force majeure, and even economic crisis. Suy also seems to conclude that the only way unilateral declarations lose legal effect is by a change in the essential conditions envisaged by the declarant state. (Suy, 2001) Besides, to consider the revocability of a unilateral declaration, one must first consider the nature of the declaration, its legal consequences, and the attitude of the addressee towards the declaration.

Furthermore, it can be said that the unilateral declaration may be revoked when the addressee gives consent to revoke the undertaking, or in case the declaration contains certain conditions or a time limit, it will terminate as declared, or when a fundamental change of circumstances took place. Nevertheless, a unilateral declaration of a state cannot be revoked when it has created legitimate expectations for the addressee/s and when this withdrawal would cause prejudice (Suy, 2001, p. 9) However, in case when the addressee rejects the unilateral declaration, then declarant is no longer bound by the made promise and commitment.

Nevertheless, there is simply too much conflict and disagreements, minimal state practice, and limited jurisprudence when it comes to the subject of revocability of unilateral declarations. The ILC could not reach an agreement on an existing or future “ground rule” regarding the revocation of unilateral declarations that do not fall within the stated scenarios in the guiding principles. This was an issue of debate within the ICJ when it was deciding on the Nicaragua case in 1986 (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. A.279)

However, using the ICJ's jurisprudence as evidence in this regard, it may be suggested that the court has approved those unilateral declarations, including promises, which are revocable, but not freely and at any time as there are specific limitations which were discussed above. Revocation also necessitates giving the addressee reasonable notice of the declarant's intention to revoke its promise.

This prior notice and the time it take for revocation to take effect protects the addressee/s though giving it time to adjust to the declarant's new position. Besides, when determining the reasonable period, the ICJ relied on VCTL, specifically on treaties that do not include provisions

on termination, with reference to Article 56 (2) of the VCLT, which stated that the minimum notice period is 12 months (Nations, Vienna Convention on the Law of Treaties, 1969).

In sum, it can be said that the court followed a flexible approach when it addressed the issue of revocation of unilateral declarations, which imposes some restrictions but are not as complex as revocation of treaties. This is another reason states might prefer a unilateral declaration over a treaty obligation because the former is perceived as 'less binding' by them, in the sense of it being more easily revocable and amendable than a treaty, especially a multilateral one. (Eckart, 2012, pp. 251-276)

Chapter IV Unilateral Declarations in International Law

4.1 Development of Unilateral Declarations of States

Primary source of law such as treaties and customary law are perceived as the international legal instruments for promoting stability and predictability in interstate relations. However, when it comes to unilateral declarations, they function as the tool that facilitates international relations to run efficiently. Unilateral declarations of states are used to declare war or peace, to de facto or de jure recognize other states and to pronounce the acceptance of the jurisdiction of an international court and etc.

To be precise, oral agreements or declarations between states have existed since the early establishment of city-states. However, modern international law throughout the twentieth century has experienced a rapid progressive development and expansion, for instance new subjects of international law were recognized, as well as modern modes of communication aimed at

strengthening the ties connecting the subjects of the international law has emerged due to the technological development and progression.

Furthermore, since international law and interstate relations are in constant expansion and growth, the unilateral declarations have evolved as a common means for states to conduct and manage their interstate relations. Moreover, unilateral declarations of states grow into an efficient instrument recognized by courts and international jurisprudence. Traditionally, communiqués between states was usually conducted through formal diplomatic channels; however, the rapid technological development of the last decades has enabled a wide range of new means of communication, including telephones, fax, TV, and, in later on, the internet, email, and various social media platforms.

Nevertheless, unilateral declarations were first recognized as a considerable legal instrument after the establishment of the PCIJ in 1922. The PCIJ was an international court with general jurisdiction that functioned as an international jurisprudential legal tool, assisted in the clarification of international law and contributed to its progress and expansion. Moreover, since its establishment and until 1940, the PCIJ investigated twenty-nine cases and issued twenty-seven advisory opinions, (Nations, UN Documentation: International Court of Justice, 2022) a number of these cases involved disputes that revolved around unilateral declarations.

It is fair to say that the doctrinal development of the unilateral declarations started with the case law, probably the first case that elaborated on the significance of unilateral declarations, was the very first case of the PICJ in the Wimbledon which applied not only to treaties but also to specific unilateral acts (Eckart, 2012).

Up until the PCIJ decided on the Ilhen declaration, there were other cases that involved the topic of unilateral declarations, such as the Mavrommatis Jerusalem Concessions case in 1925, (Greece v. Britain, 1924) where PCIJ considered the declarations not to expropriate of Greek national Mavrommatis estates, which were made by the British representative at the court, assumed compliance with an already existing obligation and the British Declaration was considered binding. The court established that all the declarations comprised a confirmation of an existing duty. The PICJ treated these declarations as pledges with legality restricting power and that they should be maintained.

Additionally, there was another case at the PICJ, the Free zones Case, in 1932, in which the court emphasized the binding character of declarations made by a Swiss representative, which was binding on Switzerland, and the French representative accepted the declaration, which constituted an offer and acceptance from its addressee. Several cases concerning the protection of minority rights were made before international tribunals by Iraq, Lithuania, Albania, and Estonia. These were the first instances of states using unilateral assurances at the international level. (Eckart, 2012, p. 88)

Since its establishment, the ICJ as the successor of the PIJC, examined several cases concerning unilateral declarations and delivered decisions that emphasized that there are types of unilateral declarations that imply certain obligations on the declarant state. Moreover, several ICJ decisions, as well as legal scholars, attempted to differentiate between unilateral declarations that are only political and declarations that constitute a legally binding obligation. However, some declarations contain elements of both political and legal content. Still the willingness to be bound by certain obligations, expressed by the state is crucial for the unilateral declarations.

The development of unilateral declarations has shown a slow progression, primarily relying on case law until the ILC drafted the “guiding principles.” This was an attempt to codify certain rules that apply to unilateral declarations, and resulted in the formation of an innovative approach for states to assume legally binding obligations, by using unilateral declarations, which are comprised of specific assurances and commitments. The examples of cases that involved unilateral declarations will be discussed in detail in the next section.

4.2 Codification of Unilateral Declarations

4.2.1 Judicial Decisions and Case Law

The process of codification of unilateral declarations of states was mainly guided by courts dicta in relevant cases, also the ILC guiding principles based most of the guidelines on courts decisions. This attempt to codify legal aspects related to unilateral declarations have contributed to their gradual development in international jurisprudence. Decisions of the PCIJ and ICJ have confirmed the impact of unilateral declarations on international law and interstate relations. Moreover, the courts recognized the binding character of unilateral declarations on the declarant state and acknowledged legal obligations stemming from them.

Likewise, the PCIJ and ICJ judgments in several cases, such as the Ilhen declaration and the nuclear tests case, resulted in a breakthrough in Courts approach on the topic of unilateral declarations. This has demonstrated that States refer to unilateral declarations to present their willingness to be bound by the declaration made, which emanates from their own free will.

The approach of the court was centered on the realities of the international relations in the twentieth century. Once distance hampered access to information on a state's position because most communications were conducted through official diplomatic channels between states. Furthermore, the judicial decisions are considered an auxiliary source of international law as stated in article 38 of the ICJ statute. Yet, the rulings regarding the legal nature of unilateral declarations confirm their binding character and legal force. Accordingly, in many cases, unilateral declarations impose obligations and responsibilities on the declarant state. From here derives a need to examine this phenomenon as a potential source of international law.

Nevertheless, judicial decisions provide a starting point for examining the legal nature of unilateral declarations. As states' interest increased, this gave the judicial institutions the competence to issue rulings and to further examine the legal nature of unilateral declarations.

Moreover, unilateral declarations of states were observed by both the PICJ and ICJ; the former examined several cases related to the unilateral declarations in the early 1920s, as I mentioned in the first section of this chapter.

The first case brought to the PCIJ on the legality of unilateral declarations was the *Mavrommatis Jerusalem Concessions case* in 1925, where Greece filed a complaint against the UK, demanding an equitable compensation for one of its nationals, Mr. Mavrommatis, who signed an agreement with the city of Jerusalem which was under Ottoman rule in 1914. This agreement granted him a "concession for the public distribution of electric power and trams as well a concession for the construction and exploitation of the works required for the supply of drinking water to the city of Jerusalem". (The Mavrommatis Palestine Concessions, 1925)

However, WWI broke out before Mr. Mavrommatis had the chance to start the actual construction work in Jerusalem. Following that, the UK was assigned as the Mandatory Power for Palestine under the League of Nations, and was placed responsible for the city of Jerusalem. As a mandatory power, the British government then signed a contract with Mr. Rutenberg, which conflicted with the earlier signed agreement with Mr. Mavrommatis.

The court examined many aspects related to the legality of the claim brought by the Greek side. There was a signed agreement with the Greek national and the city of Jerusalem before the start of the British mandate on Palestine. Moreover, the British side announced its decision to comply with the existing commitment regarding the contract signed between Mr. Mavrommatis and Ottoman Authorities in Jerusalem. There was tangible evidence of an existing duty; thus, the declaration made by the British representative, which reaffirmed the commitment to an existing obligation, was considered binding on Britain.

The court, in its decision, considered the declarations not to expropriate Greek national Mavrommatis estates, which were made by the British representative at the court, assumed compliance with an already existing obligation, and the British unilateral declaration was considered binding. The court established that the declaration comprises a confirmation of an existing duty and the PCIJ treated these declarations as pledges with legality that they should be implied. (The Mavrommatis Palestine Concessions, 1925)

The second case examined by the PCIJ was *the Certain German Interests in Upper Polish Silesia Case* in 1926. The PCIJ had to rule on the legality of expropriation, directed at various German nationals and their estate and companies on the territory of Poland since Poland sought to liquidate certain rural estates. However, the Polish representative delivered a statement where he reaffirmed that there was no longer any intention of liquidating some of the property that had

initially been notified, referring to the German-owned properties. The PCIJ concluded that the statement made by the Polish representative was binding. This case also reflected the commitment to an existing duty, reaffirmed by a unilateral declaration. (Germany vs. Poland, 1926)

Additionally, the *Free zones Case* that the PCIJ examined in 1932 reflected a dispute between Switzerland and France, in which the court emphasized that declaration made by a Swiss representative in court was binding on Switzerland. The French representative accepted the declaration regarding the free zones of Upper Savoy and the District of Gex to be settled through experts regarding the agreement on the terms of the exchange of goods. (France v. Switzerland, 1932)

Although the above-mentioned cases deal with unilateral declarations, but also contained certain agreements between the disputed parties, thus representing tangible evidence of certain commitments by states. Therefore, the case that confirmed the existence of unilateral declarations with binding character was the case of the *Legal Status of Eastern Greenland*, which received a lot of attention because it established a significant precedent confirming the existence of obligations arising solely from a unilateral declaration. The PCIJ accepted as binding on the Norwegian State an oral but later written unilateral declaration by M. Ihlen the Norwegian Foreign Minister. This disputed declaration referred to Denmark's intent to extend its political and economic interests to entire Greenland, and Ihlen assured that Norway would not cause any difficulties in that regard. (Legal Status of Eastern Greenland, 1931)

Ten years later, Norway expanded its occupation of the territories of the Eastern Green Land. As a result, Denmark brought a claim before the PICJ since it considered the occupied territories to fall under Denmark's sovereignty. The court decided that the Ihlen declaration made by the Minister of Foreign Affairs on behalf of Norway on July 22, 1919, was unequivocally

affirmative and binding on Norway. Since the foreign minister could legally bind his government to specific commitments. (Eckart, 2012, pp. 93-99)

Additionally, several cases concerning the protection of minority rights were discussed by international tribunals of Iraq, Lithuania, Albania, and Estonia. These were the first instances of states using unilateral assurances at the international level. (Eckart, 2012, p. 88) However, not all cases in international practice on the topic of unilateral declarations involved a court or tribunal, for instance, the *permanent neutrality status of Austria* in 1955, which was signed in the form of the memorandum between Austria and the Soviet Union (Tichy, 2008).

In the same manner, Turkmenistan, after it gained independence in 1991, had the pronounced status of permanent neutrality, and on December 12, 1995, the UNGA adopted resolution 50/80 on the Permanent Neutrality of Turkmenistan. (Nations, United Nations General Assmebly 50th session, 1995) Furthermore, Egypt's declaration in 1957 regarding the Suze Canal, which was registered at the UN secretariat, constituted an essential aspect indicating a state's intention to be legally bound by the given declaration. (Mr. Víctor Rodríguez Cedeño, Eighth report on unilateral acts of States, 2005, p. 127)

After the League of Nations was disbanded in 1946, its functions and powers were transferred to the UN. As a result, the PCIJ reassigned its archives and cases to the new court established within the UN, the ICJ, which became its formal successor. The ICJ's primary function and mandate are to resolve legal disputes and provide advisory opinions, submitted to it by states or UN competent organs in accordance with international law.

Therefore, in 1974 in a landmark ruling on the *Nuclear Tests Case*, the ICJ confirmed once again the binding nature of unilateral declarations as Australia and New Zealand filed a claim to

the ICJ regarding the nuclear tests conducted by France in the Pacific. After having examined the case, the court confirmed in its decision that "it is well recognized that unilateral declarations made concerning legal or factual situations may have the effect of creating legal obligations." When the State making the declaration intends to be bound by its terms, that intention gives the declaration the character of a legal commitment. The State is then obliged to adhere to a specific behavior consistent with the declaration. (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974)

This case represented a milestone in the legal status of unilateral declarations. By his statement, the French government announced "that no more nuclear tests will be conducted in the Pacific" which constituted a direct promise. In this case, the Court accorded this statement the same legal consequences as a binding treaty towards the other State. Moreover, the ICJ concluded that a unilateral declaration could bind a State if certain conditions are met, such as the context of the statement and the intention of the declarant.

At the same time, no mandatory acceptance is needed from the addressee. For that time, the context and intention to be bound were the most critical considerations and provided for further deliberations on the legal status of unilateral declarations. Furthermore, the statements in this case, came in a variety of forms which greatly exemplified the ways in which unilateral declarations can be pronounced and expressed.

Thus, based on the Court's decision on the *Nuclear Tests case*, we may conclude that a unilateral declaration to have legal consequences should be made publicly; it also should demonstrate the intention of the State to be bound. Also, there is no requirement of any acceptance or response from the other States for the declaration to produce a legal obligation and commitment. (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974, p. paragraph 43)

In the *Frontier Dispute case* between Burkina Faso and Mali, the ICJ acknowledged that "legally binding," unilateral declarations can be addressed to one or more states and also to the international community. At the same time, the Court cautioned against deriving legally binding obligations from unilateral conduct, particularly "when it is a question of unilateral conduct not directed to any specific recipient." (*Frontier Dispute*, 1986, pp. paragraphs 39–40.)

The primary reason for the need to be extra cautious in this situation is that the resulting commitment, once discovered to exist, will be an obligation towards all. Moreover, this case has shed light on the restrictive interpretative standard the ICJ still applies to declarations made by the representatives of states outside the judicial proceeding (Eckart, 2012, p. 174), therefore, to evaluate the intentions of the declarant, all of the factual circumstances must be considered.

While in the *Military and Paramilitary Activities Case*, (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986) the US claimed that a resolution of the Nicaragua Junta stating its intention to hold democratic elections was legally binding upon it. However, the ICJ rejected this reasoning; instead, it declared that it was unable to find anything in the documents and communications transmitting the Junta's declaration from which any binding obligation could be inferred.

As a result, the International Court of Justice determined that "it could not find an instrument with legal force by which Nicaragua has committed itself in respect of the principle or method of holding elections." The ICJ declared that the intention of the Nicaraguan Junta to hold free elections constituted a mere political statement with no legal consequences. (Case concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. Merits page 14)

Therefore, the interpretation of unilateral declaration plays a significant role in identifying its legal status. The precision with which the intention is stated has a substantial impact on its interpretation. As the legal norm-creating intention becomes clear when the object of a declaration is precise, and any conduct that is not in conformity with the norm can be identified, this leads to the creation of a legal norm rather than a simple political wish.

Thus, the clarity with which the unilateral declaration expresses its intention has a significant impact on its interpretation and potential legal force. This means that to identify any behavior that violates the undertaken obligation, the manifestation of the will of the declarant must be clear and unequivocal.

Additionally, it is evident that the courts, tribunals, and states treated the topic of unilateral declarations with caution while noting their significance and power in international relations. The used approach in the above-mentioned cases is remarkably similar, and it helped shape the norms relating to unilateral declarations and their legal force.

Some cases outlined the substance, form, and legal nature of unilateral declarations. The cases were examined, taking various aspects into consideration, which helped the international legal system understand the essence of unilateral declarations and their legal nature. Unilateral declarations are not mere political statements. If they are delivered in a clear and public manner by a competent authority, they may produce legal effects and bind the declarant state to certain obligations and commitments.

The pattern that lies in the decisions of various courts, tribunals, and separate memorandums reaffirms the legal force of unilateral declarations, which is expressed by the will of states to be bound through certain commitments. This was also reflected in the registry of the

UN secretariat of the Suez Canal declaration and Turkmenistan Neutrality status, for example, or the famous Ilhan declaration. The reasoning behind the decisions of these institutions reiterated the significance that the unilateral declarations impose, including the obligations of the declarant state.

Moreover, the outlined cases reflected the ICJ and PIJC reasoning on various essential aspects of the legal framework for unilateral declarations. The courts treated this topic in a very substantial manner, providing the basis of their binding forces and commitment, taking into consideration aspects such as the publicity and the content of the unilateral declaration, the competence of the declaree, the non-contradiction with the norms of jus cogens and the conditions under which they were pronounced. These conditions reflect the rules and norms that were further examined by the ILC, which will be discussed in the next section.

4.2.2 The ILC Guiding Principles and Reflections on Relevant Case Law

4.2.2.1 The International Law Commission

The interest of the ILC in unilateral declarations dates back to 1967 when a reference was made to unilateral declarations and their legal force in the ILC's future organization of work; (Nations, Yearbook of the International Law Commission, 1967, p. 369) since then, unilateral declarations have become a subject of interest of states, and the members of the ILC, as they perceived that the issue of unilateral declarations became a promptly emerging concept in international law which deserved attention, as some of the declarations could bind the states to certain obligations based on the relevant case law.

Moreover, it was frequently difficult to establish whether the legal consequences of a State's unilateral declaration were the result of its expressed intent or relied on the assumptions raised by the state's behavior, as well as other issues. Also, legally binding behavior of states can come in the form of unilateral declarations or simple, informal behavior, such as silence in some cases that other states can rely on. These issues were of utmost importance to be clarified by the ILC, the UN organ responsible for codifying and developing international law and its concepts.

Furthermore, the ILC comprises of jurists and persons of recognized competence from the UN member states. For example, MR. Tammes, a member of the Commission stated, "So far as the sources of international law were concerned, the Commission had recently completed a very far-reaching and comprehensive draft on the law of treaties, and it would be difficult to suggest another source of international law that was as wide in scope". A limited counterpart to the law of treaties could, however, be found in the topic of unilateral declarations, and that research and practice on the subject of unilateral declarations greatly needed clarification and systematization. (Commission Y. o., 1969, pp. 179, para. 6.)

However, the reasoning behind the interest of the ILC lies in its vision that institutionalizing unilateral declarations was necessary to increase legal certainty, predictability, and stability in international relations. Codification has been applied to the recognized legal principles, and unilateral declarations manifested states will to be bound by certain assurances, thus creating a binding obligation on the declarant state.

Therefore, it is disheartening to note that the ILC was still debating the topic of unilateral declarations and their feasibility and methodology more than six years after it was first proposed. This issue was reflected in the formation of a working group on the unilateral declarations during the 55th UNGA Session, with the mandate to reach an agreement on the topic's definition and

scope, as well as the method to be used in dealing with it: (Report of the working group on Unilateral Acts of States, 2003) A task identical to that assumed by the 51st Session's working group in 1999. (Assmebly, 1996)

Nonetheless, the ILC has dedicated to examining some of the confusions surrounding unilateral declarations of states, considering the necessity of the topic presented, and the regular use of unilateral declarations in interstate relations and their discussion in different legal texts and rulings of the ICJ and other courts, since the ILC's first report on the topic of unilateral declarations. (Assembly, 1997) Moreover, representatives to the UN Sixth Committee continued to emphasize the interest that they place on the development of several principles applicable to unilateral declarations, which they regard as an essential source of legal norms. (Commitee, 2004)

Therefore, after ten years of extensive examination and discussion, the ILC adopted ten "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations," (Commission I. L., 2006) which represent a reliable guidance on the requirements and binding impact of unilateral declarations; the principles are based on the PCIJ's and ICJ's dicta. Yet, as the title implies, these principles are recommendatory therefore, not strictly binding on States. Still, they represent a mere attempt to codify the significant aspects related to unilateral declarations and to open the floor for further discussion and debate on the topic.

While the Guiding Principles might be viewed as an expression of customary law that applies to unilateral declarations. Moreover, the ILC's Special Rapporteur, Mr. V. Rodriguez-Cedeño, introduced nine reports on the subject, which provide an outstanding compilation of arguments that analyze the customary law of unilateral declarations.

4.2.2.2 Overview of the ILC Guiding Principles on Unilateral Declarations of States

The majority of the ten guiding principles deal with unilateral declarations' prerequisites and binding effect. The principles affirm that “any state has the capacity to create legal obligations using unilateral declarations, (Commission I. L., 2006) just as it has the capacity to conclude treaties” this was plainly reflected in the VCLT (Nations, Vienna Convention on the Law of Treaties, 1969), besides the ICJ 's dicta have also recognized this competence.

The first principle unequivocally confirms the dicta in the ICJ's judgments on the *Nuclear Tests case* and the *Frontier Dispute case*. It revolves around the concept of publicity, as it confirms the importance of publicizing the declaration. The unilateral declaration must demonstrate the declarant state's willingness to be legally bound. The binding character of such declarations is based on *bona fide* or the principle of good faith. (Commission I. L., 2006, p. 370)

In other words, according to the first principle, public unilateral declarations with an intent to be bound may create legal obligations; once this condition is fulfilled, the binding nature of such declarations is founded on the principles of good faith. Moreover, the addressee/s may then consider and rely on the declaration, and also has the right to demand that the obligations stemming from it be respected and met. Thus, Principle 1 reiterates the requirements outlined in the *Nuclear Tests* and *Frontier cases* by the ICJ, the intention to be bound and commit themselves, and publicity.

Furthermore, good faith is considered to be one of the fundamental principles governing the performance of legal obligations in international law. Besides, it is a well-established principle

enshrined in the VCLT, also considered a customary law, as it represents the values of trust, royalty and confidence which are very important in a time when interstate cooperation in myriad fields is becoming progressively essential.

Moreover, the rule of *pacta sunt servanda* in treaties is based on good faith, the binding character of an international obligation stemming from a unilateral declaration is also based of the principle of good faith. Therefore, involved states may take the perception of unilateral declarations and place trust in them, and they have the right to request that the obligation created be respected and fulfilled in good faith.

The second principle confirms the ability of any state to commit itself to being legally bound by a unilateral declaration (Commission I. L., 2006, p. 371). This principle outlines an incredibly crucial point, in parallel with article 6 of VCLT, which provides that any state can conclude and enter into agreements and treaties. (Nations, Vienna Convention on the Law of Treaties, 1969)This principle confirms that the declarant state should have the legal capacity to commit itself to the unilateral declaration and to be capable of implanting the obligations stemming from the unilateral declaration.

The third principle was also influenced by the judgments of the ICJ in the *Nuclear Tests cases* with references to the *Frontier Dispute* and the *Armed Activities on the Territory of the Congo cases*. It provides that the circumstances under which a declaration was made are significant when determining the legal effects of unilateral declarations. The principle confirms “it is necessary to take account of the context, of all the factual circumstances in which they were made, and of the reactions to which they give rise” such circumstances play an imminent part in analyzing whether the declarant manifested an intent to be legally bound or not. (Commission I. L., 2006, p. 371)

The third principle revolves around the context and the reactions of another state to the unilateral declaration; in international relations, there are a lot of examples of the reactions of states, such as the Russian protest against Turkmenistan's law on the delimitation of territorial waters of the Caspian Sea, a matter refused by Caspian littoral states as the reactions of states may challenge the legality of the unilateral declarations or question the asserted rights vindicated by the content of these declarations. (Commission I. L., 2006, p. 372)

Guiding Principle 4 added an additional requirement primarily inspired by the customary rule in the law of treaties. The ICJ referred to this requirement in the case of *Armed Activities on the Territory of the Congo*, which provides that: "A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so." (Commission I. L., 2006, p. 372) This was also in parallel with article 7 (2) of the VCLT, the competent authority, by their functions that may bind the state, are the following: heads of state, Heads of Government, and foreign ministers are competent to issue such declarations (Nations, Vienna Convention on the Law of Treaties, 1969) This implies that a unilateral declaration formulated by an unauthorized person is deprived of legal power unless it is expressly confirmed by the declarant state.

The national laws, such as the constitution and other internal laws, should be taken into consideration as the authority to bind the State to certain commitments provided by the internal laws; for example, in parliamentary systems, the President does not have the authority to bind the state to any commitment without the consent and approval of the parliament.

Principles 3 and 5 expand on the theory that a certain form of the declaration, whether written or oral, is unimportant, and international law does not imply distinct or strict requirements in that sense. The validity or legal effects will only occur if the declaration was delivered in clear and specific terms, considering the circumstances. (Commission I. L., 2006, pp. 372-374)

Principle 6 of the ICJ's Frontier Dispute decision acknowledges that Unilateral Declarations can be addressed to the international community, one or more States containing *erga omnes* obligations. Thus, Egypt's declaration regarding the Suez Canal was not addressed only to the State parties to the Constantinople Convention or to the States members of the Suez Canal Users' Association but to the entire international community and was registered at the UN. (Commission I. L., 2006, p. 376)

Another example is the declaration made by King Hussein of Jordan in 1988 regarding waiving Jordan's claims to the West Bank territories, which was addressed at once to the international community, to another State (Israel), and another entity, the Palestine Liberation Organization (PLO). (Costelloe)

The question that must be addressed is when a state has demonstrated its willingness to legally commit. According to the *Armed Activities on the Territory of the Congo* case where the ICJ argued that to define a declaration's legal effect, it must examine “the content and the circumstances in which it was made.” And it also stated that such a statement can only create legal obligations if it is made in clear and specific terms.” (Armed Activities on the Territory of the Congo, 2005, p. para 50) Thus, the content of the declaration gives the court access to the terms of a declaration.

Principle 7 in the first sentence highlights whether a declaration created a legally binding obligation, and the second part provides the basis for the restrictive interpretation. Besides, the ILC adapts restrictive interpretation if there is any uncertainty in the scope of the obligation; in sum, this principle focuses on the substantive details of an obligation in the declaration. The ILC is the second part of principle 7 provides that if there is an uncertainty on the scope of the declaration, it must be interpreted in a restricted manner, the content of the obligations, the text of

the declaration, and the context and circumstances on which it was expressed should also be considered when interpreting the unilateral declaration. (Commission I. L., 2006, p. 377)

Nevertheless, “when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for”. (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974, pp. , p. 267, para. 44, and pp. 472 and 473, para. 47) As a result, a legal obligation to implement this principle is already presumed. While not required, there are a few text-based pointers that will add to the conclusion that a state has communicated its intention to become legally bound.

Overall, this principle focuses on the substantive details of an obligation in the declaration. For example, Jan Klabbers examined a few of these metrics in his study on the concept of a treaty, which is significant and is likely to shift the balance in favor of a finding that legal force and binding character were present. To begin with, whenever a declaration refers to its entry into force, this provision describes its legal nature unless there is proof to the contrary. Likewise, where a state's declaration of future conduct allows for judicial resolution, it includes a strong indicator that the pledges enclosed should be regarded as binding upon the contracting parties. Also, if a declaration includes remedies or allows for sanctions for the breach of the declaration, this is a textual indicator of an intent to be legally bound. (Klabbers, *The concept of treaty in international law*, 1996).

While Principle 8 provides an essential term for invalidity of the unilateral declaration, it asserts that the unilateral declaration becomes null and void if it conflicts with *jus cogens*. This principle assumes that "the provisions of Article 53 of the 1969 Vienna Convention apply to unilateral declarations of states". (Commission I. L., 2006, p. 378) The parallel with the VCLT shows the similarity of unilateral declarations and customary law in the treaties.

Principle 9 dictates that the general rule is that obligations may not be imposed on another state without its permission. The obligations imposed on another state become binding only if that state or states accept them in a clear manner and only then become bound by the acceptance. This is a very well-established principle in international law and reflected in article 34 of the VCLT, and again a parallel with the unilateral declarations was made. (Commission I. L., 2006, p. 379)

Thus, this implies that the addressee state can welcome or refuse the declaration. However, the Principle is drafted quite generally, focusing solely on the addressee state's reactions to the declarations. A state that has not been addressed may, of course, express its opinion on a statement, but its position cannot affect the legal consequences of the undertaking. Nevertheless, for the addressee/s, the situation is slightly different. While it cannot influence whether a state has manifested an intent to be bound, its behavior may have an impact where such an intention has been found to exist. (Eckart, 2012, p. 249.)

This is also a well-established principle of international law codified in article 34 of the VCLT. (Nations, Vienna Convention on the Law of Treaties, 1969) According to this principle, it is impossible to impose obligations from one state on another without its consent. And there is nothing to prevent this principle from applying to unilateral declarations either.

Finally, the last principle provides the rules for revocation of unilateral declarations. It underscores that unilateral declarations that impose legal obligations on a State may not be revoked arbitrarily. The ILC has compiled a list of criteria for revocation; the first condition provides that if the declarations stipulate for specific terms for revocation, the second reasons for revocation are about the obligations and to whom they are owed have relied on them. The last condition is the fundamental change in circumstances. (Commission I. L., 2006, p. 380)

After having examined and analyzed the Guiding principles with commentaries, it is evident that the guiding principles failed to cover all aspects related to the legal nature of unilateral declarations, leaving a large loophole in this matter. For example, the guiding principles did not refer to the collective declarations nor to the legally binding unilateral declarations covered by other legal regimes, such as coercion, fraud, error, acquiescence, absence of protest, recognition, declarations of war and peace, etc. These concepts were neglected without even referring to a parallel approach with the VCLT.

Another essential aspect that is ignored is the link between the principle of estoppel and unilateral declarations, that of a great significance in international law, which prevents the declarant from going back on their word and may have a substantial impact on the binding force of the unilateral declaration, especially considering the conditions on validity and on the revocation of unilateral declaration that we have outlined earlier.

Although references were made to the informal conduct and silence in the preamble of the guiding principles, however a precise analysis of these two issues was overlooked even though silence reflects an unspoken acceptance or a tacit recognition in international law, which is linked directly to the topic of unilateral declarations and may result in implying different obligations that must be respected and fulfilled as states may use silence or informal conduct to avoid formal and visible national pledges or political obstacles or to keep the good image.

Nevertheless, as the ILC's "guiding principles" only have a recommendatory character therefore are strictly binding. However, they are noteworthy for a few reasons: First, they are issued by the UN sixth committee which comprises thirty-four members with high expertise and qualifications in international law. Therefore, they may be paired with the teachings of publicists as provided by article 38 of the ICJ statute. (Statute of the International Court of Justice, 1945)

Secondly, members of the ILC represent almost all legal systems in the world. As a result, the drafts and guiding principles issued by them can be regarded as an international practice that may one day become considered customary law.

Lastly, the ILC's guiding principles are primarily based on the court's dicta. These may be viewed as the judicial decisions reflected in article 38 (1) (d) of the ICJ (Statute of the International Court of Justice, 1945). Moreover, several principles were paralleled with the VCLT, a customary law. As a result, these factors may be starting point for evaluating the legal framework applicable to binding unilateral declarations.

However, an extensive and all-encompassing work to amend the guiding principles so that they cover all the aspects related to the unilateral declarations should be done, not only based on the ICJ's dicta but more parallels should be done with the VCLT as a clear reference point, which reflects a well - established customary law, given the significance of the unilateral declarations on the international relations. Moreover, the unilateral declarations should include regulations on the waiver, promise, recognition, silence, and other states' reactions, even the informal ones, to further extend the content that should be included while codifying regulations on unilateral declarations.

Unilateral declarations are the conduct of sovereign states. They, therefore, must be regulated in the same way that bilateral or multilateral agreements are codified. For instance, the conditions governing the validity of unilateral declaration may be deduced from general principles of law, such as the principle of good faith; however other legal aspects related to unilateral declarations of a more complex nature should be examined outside the traditional concepts and codified accordingly.

It has now been nearly a decade since the UN General Assembly tasked the ILC to investigate “unilateral declarations of states” to strengthen the rule of law. However, to reach the desired outcome, the work of the ILC must be amended to cover all legal aspects that have emerged due to the constant use of unilateral declarations in international relations.

The international legal community should prioritize the proper codification of unilateral declarations by using existing treaty and customary law and a practical approach founded on general principles of law and major judicial decisions on this topic.

Additionally, as international law evolves rapidly, considering the recent developments in the international system, unilateral declarations are becoming a tool widely used by states to communicate their positions or engage in a binding commitment. The proper codification in a legally binding instrument would regulate the use of unilateral declarations, their purpose, and scope, which will minimize the misuse of political declarations and would regulate the conduct of state representatives while issuing statements in the form of unilateral declarations.

4.3 Legal Nature of Unilateral Declarations

On the international legal stage, there is an ongoing debate concerning the nature of unilateral declarations as an independent source of international law or as merely a source of international obligations that are derived from other rules of international law. The debate is almost identical to the discussion on whether treaties are a source of international law or merely international obligations. (Mandelson, 1990). This section will analyze the legal nature of unilateral declarations, comparisons with conventional sources will be made, to answer the question if unilateral declarations constitute a source of obligation or qualify as a source of law.

4.3.1 Unilateral Declarations: A Part of Primary Sources, or an Independent Source of Law?

As we already established unilateral statements and declarations made by state representatives with the official authority to bind their states may create obligations and commitments under international law. These declarations are characterized as public declarations of will and can be performed orally or in writing.

Although unilateral declarations may share some similarities with treaties, yet they do not require a response from the addressee/s to become legally binding. Attempting to base unilateral declarations on customary rules is also difficult because, as state practice and court decisions have demonstrated, it is problematic to undertake the presence of a state practice carried out by an *opinio Juris* as binding upon the declarant, at least not before the PCIJ and then its successor the ICJ began attaching binding force to unilateral declarations.

The judicial practice and case law have had the decisive shaping legal effect on this topic, rather than that of states. Furthermore, it is the Court's jurisprudence, not state practice that provides answers as to the detailed rules applicable to the unilateral declarations of states.

Furthermore, while states appear to follow the ICJ's dicta that states may assume obligations by unilateral declarations that potentially may be grounded on a general state practice and supported by the Court's judicial decisions, however this status is far from complete. The ICJ, has associated the binding effect of unilateral declarations to the principle of "good faith" therefore, to a general principle of international law.

Nuclear Tests cases judgments have made this point very clear: The principle of good faith is, as the Court has observed, ‘one of the basic principles governing the creation and performance of legal obligations’ (ICJ Legality of Nuclear Weapons, 1996) it is not in itself a source of obligation where none would otherwise exist.

The legal status of unilateral declarations has many interesting characteristics. as we mentioned before, there’s no requirement for any kind of reaction from the addressee for the declarations to become legally binding on the declarant. For instance, in the *Eastern Greenland* case, the PCIJ has ruled that the declaration of a Foreign Minister of Norway as a legally binding statement on his state. Hence, while a bilateral Danish-Norwegian discussion on the status of *Eastern Greenland* took place, the Foreign Minister of Norway, in response to Danish claims to Greenland, declared that Norway “would not make any difficulties in the settlement of this question.” When Norway later contested Danish sovereignty over the area, the Court found that earlier statement “unconditional and definitive” and therefore binding on Norway. (Legal Status of Eastern Greenland, 1933)

Even though unilateral declarations may be binding, do they qualify as a separate source of law, or they are a part of sources enlisted in article 38 of the ICJ Statute. Thirlway claims that “unilateral declarations can be categorized as an immature treaty. Various arguments can support this claim: a treaty is usually unilaterally ratified; states bind themselves by unilaterally ratifying a treaty, and this ratification also binds other states. In comparison, like the unilateral ratification of a treaty, the unilateral declaration also binds the state itself and enables other states to enforce the unilateral declaration.” (Thirlway, 1973)

While Professor Degan emphasized that unilateral declarations of states by which they assume obligations and grant or waive rights, then these declarations should be recognized as a

separate source of international law. Moreover, Degan argues that these declarations are like treaties in the legal consequences that they produce. (Degan, 1997, p. 6)

Nevertheless, despite some similarities between unilateral declarations and treaties, particularly after the ILC adopted the “guiding principles” in 2006, it can be argued that unilateral declarations should not be classified as treaties under article 38 of the ICJ statute, since a treaty is a binding obligation that requires the time and effort of two or more states. Unilateral declarations, on the other hand, impose obligations only on the declarant state and do not require the consent of the other state.

Additionally, a state may withdraw from a treaty under the conditions set out in the VCLT, yet a unilateral declaration cannot be revoked arbitrarily, revocation is possible under certain conditions which are broader than those provided for treaties. As a result, classifying unilateral declarations as treaties is illogical.

Professor Suy states that there are similarities between treaties and unilateral declarations. Still, the approach to codifying the international law on unilateral declarations as an extension of the law of treaties or as being analogous to it entails some dangers because it overlooks the fact that not all unilateral declarations are commitments or promises. (Suy, 2001, p. 10)

Another argument claims that unilateral declarations can be integrated into article 38(1) as a customary law. However, in order to legitimize this, the unilateral declarations should demonstrate that it meets the requirements of customary law. The state practice and *opinio Juris* are the most important elements in establishing a customary law. The necessity for state practice would be difficult to meet in the context of unilateral declarations, due to the lack of consistent and reoccurring incidents of practice. As for the other element of *opinio Juris*, there is a judicial

practice that has dealt with the topic of unilateral declarations, but still not enough to establish *opinio Juris* to satisfy the second element of customary law.

Some scholars, such as K. Zemanek, note that “binding legal effect of unilateral declarations lies in the essence of international customary law. Therefore, unilateral declarations cannot be regarded as an independent source of international law”. (Zemanek, 1998, p. 218)

Nonetheless, the distinction between customary law and unilateral declarations can be vague. As customary law necessitates state practice and *opinio Juris*, which binds other states, while for a unilateral declaration to bind a state the willingness and desire of that state is needed, also unilateral declarations vary in forms and subjects.

According to this argument, unilateral declarations have no legal standing under any of the primary sources enlisted in article 38 of the ICJ statute because neither treaty, custom, nor general principles of international law may clarify the binding force or the legal criteria applicable to unilateral declarations.

Given their legal force and significance, which was recognized by international courts and by the states themselves, however, unilateral declarations are not included in Article 38 and are only codified in some case law and ILC guiding principles on unilateral declarations made by states. As a result, article 38 is indeed not a complete reference point for international law sources as it does not reflect the modern realisms of international law and interstate cooperation.

4.3.2 Unilateral Declarations of States as a Source of Obligation

After having examined an attempted process of codification of unilateral declarations, along with some reflections on the cases as well as developed practices regarding the topic, we should have a clearer image by now of legal nature of unilateral declarations in international law. However, the issue that will be analyzed in this section is to what extent unilateral declarations represent an obligation in international law.

Since, international law is mainly defined as a set of rules and norms that apply between states and other subjects of international law, and the sources of law, as defined by Degan, are the forms in which the rules of law find their expression. (Degan, 1997, p. 42). This means that unilateral declarations must contain legal norms accepted by states to become a legitimate source of law.

State practice is critical in the formulation of unilateral declarations, which continues to pose complications in terms of interpretation and identification—as in the realm of international relations, differentiating between political and legal declarations remains a difficult task. As a result, in order to establish a legal obligation based on unilateral declarations, the state should demonstrate its willingness to accept obligations in relation to other states. For example, nuclear-weapon states' unilateral declarations aimed at offering security guarantees to non-nuclear states, or the military assistance guarantees provided for the OSCE Member States, which were implemented earlier this year in Kazakhstan.

Therefore, since unilateral declarations may have a binding force, they create certain obligations for the declarant state and grant or waive rights to the addressee. One can argue that this is the reason the unilateral declaration was made, to manage international relations smoothly and quickly. Since treaties and agreements, even bilateral, take aloft of time to become biding, the procedure of conducting a treaty of agreement is complex and time-consuming.

The legal force of the obligations arising from unilateral declarations of states sometimes is equal to that of obligations arising from international treaties and international custom, aimed to create consistency in the international law. The general rule when it comes to assuming an obligation or an existing agreement is the principle of good faith or *bona fide* in Latin. Also, obligations stemming from a unilateral declaration should also be fulfilled in good faith. This means that all obligations assumed regardless of the source of their origin is subject to the observance and fair execution.

Besides, principle of “good faith” revolves around trust and reliance on the behavior of other states, provided that such reliance is well-founded and therefore reasonable. In this context, it is important to highlight that the principle of good faith does not itself create or impose any obligations under international law. Still, it regulates the pre-existing obligations and can therefore be invoked only in relation to a legally binding obligation. Or, to put it another way, good faith does not have a normative value. (Villiger, 2009, p. Article 31 (1))

Also, the principle of *pacta sunt servanda* is not a rule that creates legal obligations but is a general rule applied to an existing obligation that are based on binding agreement between States, and according to this principle, states become bound by the obligations they contested and should keep their agreements.

Consequently, in order to invoke the principle of good faith, there must already be a treaty or a treaty relationship that has formed legally binding obligations, to which principle of *pacta sunt servanda* would then apply. If the parties did not intend to create a legal obligation in the first place, then they will not be bound by the principles of *pacta sunt servanda*.

States should be able to presume "good faith" from one another when it comes to fulfillment of obligations and commitments on international stage. In the Nuclear Tests case, the ICJ defined good faith as "one of the fundamental principles governing the formation and performance of legal obligations." (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974) The ICJ's rationale demonstrates that good faith serves as a foundation for legal obligations in the same way that the principle of *pacta sunt servanda* serves as a foundation for treaty obligations.

The rationale behind this is evident, which is confirmed by the need of the international community for a system capable of maintaining international order and preventing arbitrary behavior, chaos, and even anarchy. Therefore, the binding character of an international obligation is based on good faith, just as the rule of *pacta sunt servanda* in treaty law. The same approach should also be applied to unilateral declarations.

At this point, there is no such rule as declarations must be kept or *declaratio sunt servanda*. Yet, Parallels between *declaratio sunt servanda* and *pacta sunt servanda* are analogous; they serve the same purpose, ensuring that states fulfill their legal obligations. *Pacta sunt servanda* ensures the fulfillment of an agreement, and *declaratio sunt servanda*, if adopted as a new principle, would guarantee the fulfillment of an obligation by the declarant state. Therefore, it would result in granting unilateral declarations more legal supremacy and force.

Nevertheless, the binding nature of an international obligation stemming from a unilateral declaration is based on good faith, in the same manner as the rule of *pacta sunt servanda* in treaty law. For example, the ICJ stated in the nuclear tests case that “One of the main principles regulating the formulation and fulfillment of legal obligations in good faith.” (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974)

As a result, states may take note of unilateral declarations and put their trust in them, and they have the right to demand that the obligation created, as a result, be respected and fulfilled. Therefore, the principle of good faith provides unilateral declarations with the basis of their binding force and plays an eminent role when it comes to unilateral declarations.

Therefore, in accordance with good faith, the ICJ has ascertained in the Nuclear Tests Case (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974, p. 253) that a State can be bound solely by a unilateral declaration that can also generate legal obligations that would otherwise be imposed only through a treaty or agreement. Besides, to determine the legal consequences of such declarations, it is essential to analyze their content, all of the factual circumstances under which they were made, and the reactions they elicited.

The principle of good faith operates as a bridge between different legal systems because of its universal nature and is based on moral and ethical values. Besides, the principle of good faith signifies honesty, loyalty, and reasonableness between states in international law. Such a realistic approach makes good faith central to modern international law while setting the necessary behavioral standard for respecting rights and fundamental values.

Nonetheless, international treaty law demonstrates the current importance of good faith in international law. Furthermore, the primary purpose of good faith is to safeguard and protect the

legitimate expectations of states, and to pursuit constancy, due process and predictability, as well as the protection of the objects and purpose of a treaty against inordinate unilateral action the would endanger the common terms and interests.

Additionally, the presumed fulfillment of the obligations resulting from unilateral declarations should be in accordance with the principles of good faith and *declaratio sunt servanda*. It is evident from the relevant case law on unilateral declarations that the PIJC and ICJ based many of their rulings regarding the legal nature and the binding force of unilateral declarations on the notion of good faith and *pacta sunt servanda*. Since these principles represent the foundation of interstate relations and cooperation, states are expected to comply with fundamental rule to act in good faith when engaging in any sort of duties or commitments deriving from unilateral declarations of states in which they intend to assume obligations.

4.3.3 Unilateral Declarations as a Source of Law

The process through which international legal norms are created, modified, or cancelled is referred to as the source of international law. In previous chapters, we outlined the sources of law as stipulated in article 38 of the ICJ Statute, which is the only document that enlists the recognized sources of international law for the use of the ICJ.

Moreover, after analyzing unilateral declarations, their significance, and influence on the system of international relations, the possibility of qualifying unilateral declarations of states as sources of international law seems quite reasonable, given that such declarations may be assented to or acquire the express consent of an addressee over time.

Furthermore, whether unilateral declarations qualify as a new source of international law is clearly dependent on the type of declaration. As a result, not every unilateral declaration qualifies as a source; much international law doctrine concludes that a state's unilateral declarations do not establish a source of international law; however, this does not mean that a state cannot create international law through its unilateral declarations because they have become a source of international obligations. Besides, some of these declarations may create rights, obligations, or legal relationships.

Unilateral declarations of state may result in international responsibility and liability; however, it seems like the states tend to use unilateral declarations to arbitrarily assume obligations. Yet, treaties are still used as the most common procedure or instrument for states to assume commitments and obligations drafted in a binding document.

Nevertheless, sources of international law enlisted in Art. 38 of the ICJ Statute, are clearly not exhaustive. Concepts such as unilateral declarations of states, resolutions of international organizations, and *jus cogens* are commonly perceived as sources of law, evidenced by ICJ's dicta and state practice. However, the resulting legal content and obligations are critical when discussing the emergence of new sources of law outside of article 38, as the traditional sources are used to abstract the normative rule for the ICJ to base its decisions, while the proposed new sources are already reflected in ICJ's decisions, therefore the revision and amendment of article 38 is empirical.

Reflecting on the process of codification of unilateral declarations, which mainly was influenced by the rulings and opinions of international courts, it is crucial to outline that The ICJ and PICJ have not taken a stance about whether unilateral declarations are a source of international law; instead, they were satisfied with the assertion in the Nuclear Tests cases of 1974 (International

Court of Justice Nuclear Tests Case (Australia vs. France), 1974) that these declarations constitute a source of international obligations.

The above confirms the presumption that unilateral declarations regarding legal or factual situations can also be sources of international obligations, and their binding character is reliant on the fulfillment of the assumed obligations, implying that they may qualify as sources of international law if the binding character characteristics are met.

Furthermore, the conventional sources of law, just as unilateral declarations constitute a source of obligation, A treaty, for example, is not so much a source of law as it is a source of a legal obligation, because a treaty binds only the states that become parties to it, whereas the decision on becoming a party to a treaty is entirely up to the state. Moreover, the rule of customary international law *pacta sunt servanda* obliges the states to honor and respect the treaties that they have signed and consented to. As a result, treaties are more precisely pronounced as sources of legal obligation.

Also, as we discussed earlier, the obligations stemming from unilateral declarations must also be fulfilled in good faith. The addressee has the right to expect the fulfillment of obligations in good faith. This adds to the assumption that unilateral declarations of states meet the requirement of becoming a source of international law.

Since unilateral declarations may produce international legal obligations, this means that they are consistent with bilateral and multilateral relations of states. The ILC has frequently used the analogy with the coinciding regime of declarations of treaty law norms such as powers, validity, termination, reservations, etc. also; States are bound by their unilateral behavior; States

they are captives of the obligations assumed and must carry them out in good faith and by the *declaratio sunt servanda* so that there is no way they can escape from in bearing responsibility.

However, one can assume that the grounds for differentiating a source of law from a source of obligations are reasonable. They are associated with the ability to fix international law norms, a quality inherent in sources of international law but not in sources of international obligations.

Meanwhile, unilateral declarations of States may produce legal consequences without requiring an expression of will subject other than the declarant, the criterion of agreement of wills does not allow them to be included in the concept of the source of international law in its traditional sense, since the consent of two or more states is crucial for a norm to become valid. While sources of international obligations, such as court decisions and binding UNSC resolutions, give rise to states' rights and obligations, they do so through a different process that does not require an agreement.

Yet, it is important to clarify that the obligations stemming from a unilateral declaration, when compared to commitments produced from the sources of international law, the legal force of such obligations are not reduced or undermined in any case as their power and fulfillment correspond to other obligations in international law.

Also, when determining whether unilateral declarations of states are a source of law, the process which occurs between the formulation of a declaration and the emergence of its legal consequences must be considered, as many unilateral declarations receive a reaction from the addressee as they express tacit consent to the declaration. Although this consent is not required for the declaration to impose legal consequences, an expression of the will of one of the declarant states to the created legal relationship is sufficient.

Regarding the fact that unilateral declarations of a State impose obligations only on the declarant, this does not mean that the corresponding rule may not qualify as a norm of law. The effect of a unilateral declaration not only extends to the declarant but also to the addressee, who uses it to exercise the rights granted to them, including the powers to comply with the declaration.

This means that unilateral declarations constitute a source of rights and obligations. However, since they are not the consequence of the direct coordination of the wills of the states in the traditional sense, there is an argument that they cannot be regarded as a primary source of international law, since they only reflect the will and desire of one state to become bound and the addressee to gain certain rights out of the declaration.

Nevertheless, when it is possible to obtain the consent of the addressee/s, the criterion of agreement of wills can be considered detected over time, and a unilateral declaration of a state can be considered as a *sui generis* source of international law. Some argue that this means that the condition of the establishment of an agreement is fulfilled and that the unilateral declaration would now become an oral agreement. This argument is misleading, as in the first stages of the creation of the unilateral declaration, it took one state to initiate the declaration. This means that the legal obligations and terms are proposed by one state, while two or more states must negotiate an agreement.

Although some unilateral declarations of states have gained the explicit or tacit consent of the addressee/s to the legal effects, they cause over time. This does not contradict with the nature of the unilateral declaration. As previously stated, the consent of the addressees is not required for the occurrence of legal obligations. Thus, only the will of the declarant state to become bound by the unilateral declaration is required.

Furthermore, when determining if unilateral declarations of states may be qualified as sources of international law, one must also consider the process that follows after the declaration is made and the emergence of legal consequences deriving from that declaration. In addition, each unilateral declaration, directed at a specific area in international law, establishes a foundation for subsequent coordination of wills of the states concerning the changing legal relationship on that matter.

Nonetheless, it is hard to deny that the addressee to whom rights are granted through a unilateral declaration react in some way to it, as they have the option of either exercising the granted rights or to reject them. However, this has no bearing on the declaration's unilateral nature in the process that follows the formulation of the declaration that produces legal effects, besides the reaction of the addressee is discussed regarding the formulated unilateral declaration. This implies that when the addressee rejects the rights granted by the unilateral declaration, the responsibility and obligation of the declarant state ceases to exist.

Furthermore, if a unilateral declaration receives tacit consent from its addressee regarding the granted rights to them, the declaration may change its status over time. Such consent fills the gap in qualifying a rule created by a unilateral declaration of a state as a norm of law, thus, it becomes a source of international law. Since the condition for the coordination of wills can be considered met, the corresponding rights and obligations acquire the status of a norm of international law.

Assume that the content of the resulting legal effects produced by the unilateral declaration is accepted. In that case, the newly emerging sources of international obligations become binding on the declarant state. The fact that a state's unilateral declaration enforces obligations only on the declarant does not preclude the corresponding rule from being qualified as an international law

norm. A unilateral declaration has an effect not only on the declarant but also on the addressees' ability to exercise their rights.

Also, unilateral declarations of the states that had previously served as a source of international obligation now serve as a source of law. This feature is required due to the peculiarities of the norm creation process in international law. Besides, the coordination of wills of the declarant and the addressee/s occurs after certain rights and obligations emerge under international law.

However, some authors place unilateral declarations of states at the same level as international treaties in the hierarchy of sources of international law. "Such acts are similar in their implications to treaties and are likely to have the same hierarchical value; according to J. Garner (USA), unilateral declarations have the same legal force as treaties and should be preferred for political or practical reasons. (Garner, 1933, p. 488)

Another argument towards qualifying unilateral declarations as sources of international law, although they share many similarities with treaties, however, they should be distinguished from treaties and customary law. As for treaties, the binding force derives from the willingness of the states to be bound by the treaty provisions which constitutes a coordination of wills of two or more states.

Whereas in the case of customary international law, the process of formation is entirely different from that of unilateral declarations, that may be binding on one state, several states, or the entire international community, depending on the circumstances. Customary international law is formed as result of states general and consistent practice that with times becomes a law.

It should be noted that such norms cannot be applied to other sources of international obligations, like to the decisions of international courts, binding UNSC resolutions, and other decisions adopted by international organizations. For instance in accordance with the constituent documents, the resolutions adopted should be implemented by the member states, especially that they have agreed to abide by these decisions when they acceded to the organization or accepted the court's jurisdiction.

Therefore, we can conclude that norms of international law may emerge from unilateral declarations and that these declarations themselves are considered a source of law and are obligatory for the states bound by them if they meet all the conditions for their validity. This approach is reasonable, as international courts use unilateral declarations of states and an international treaty and international custom to determine rights and obligations under international law.

Consequently, unilateral declarations of states generate international legal obligations with the same force as obligations derived from universally recognized sources of international law which are enlisted in article 38 of the ICJ statute, such as treaties, customary law, and etc. This suggests that judicial decisions and scholarly writings recognize this principle as a basis for the binding force. For example, Judge Abdulqawi Ahmed Yusuf, president of the ICJ in 2019, stated that

“The Court has shown a high degree of creativity by adapting and updating the sources of international law described in Article 38 of the Statute to reflect the evolution of international law and the realities of international life. Thanks to the jurisprudence of the Court, unilateral acts of States are now well-established sources of international law”. (Yusuf, 2019)

4.4 Issues of Article 38 of the ICJ

The international law doctrine is a dynamic, constantly evolving system; with the constant development and progression of the ways of conducting international relations, it is highly possible for new sources of international law to emerge. Moreover, that Article 38 of the ICJ Statute is criticized by many international lawyers both theorists and practitioners, as not reflecting an objective representation of modern sources of international law. Despite the deep-rooted belief that the sources of international law are restricted to the provisions of Article 38 of the ICJ Statute, contemporary trends have emerged calling for an amendment and revision of the sources of international law, as they often fail to reflect the reality of modern international law, therefore, new sources must be examined.

This section examines the legal discussion over the sources of international law; it also calls to broaden the list of sources of international law and include concepts such as unilateral declarations of states, as newly emerged sources of law will eventually result in further expansion and progression of international law.

One of the main weaknesses of article 38 of the ICJ is that it only provides the applicable instruments for the use of court in specific disputes. According to the ICJ Statute it can only serve as a dispute resolution organ of the UN. Therefore, the ICJ is not the world's court as some may perceive it. As a result, its statute applies only within the organization and the State Members.

This means that relying solely on article 38 as the only instrument that contains sources of international law is impractical and eccentric; this is an essential argument for exploring the idea of drafting a document that includes all sources of international law including the sources that exist

outside of article 38 of the ICJ, which in its current form should not be generally observed as the standard for defining sources of international law.

While Article 38 neatly summarizes the primary sources of international law, it is far from exhaustive. Indeed, even if the provision makes no mention of it, there are other notions in international law that produce certain legal obligations, such as international organization decisions that can may give rise to international rights and obligations, especially organizations acting in a supranational capacity. For example, the UN Security Council has the capacity to adopt a decision under the well-known Chapter VII of the UN Charter to maintain peace; (Charter of the United Nations) this results in the creation of a legally binding obligations. Similarly, when the European Union's Council adopts regulations on trade-related issues, for example, it creates regional international law, which is binding upon all of the EU.

However, Art. 38 Statute omits an important detail, the unilateral declarations of states, which attaches legal obligations and consequences when the conditions of its validity are fulfilled. Moreover, the qualification of unilateral declarations of States and resolution of international organizations, particularly those acting in a supranational capacity, may give rise to international rights and obligations, as sources of international law is evidenced by the PICJ and ICJ case law; even though the courts did not openly claim that unilateral declarations are a source of law, however, they indeed treated it like one. The court's approach was confirmed in nuclear tests cases in 1974 (International Court of Justice Nuclear Tests Case (Australia vs. France), 1974) in a frontier dispute between Burkina Faso and the Republic of Mali in 1986. (Frontier Dispute, 1986) And many other cases that we have discussed earlier.

Additionally, sources of international law constitute the evidentiary means for explaining international law its norms, and principles. Unilateral declarations of states that are capable of

creating legal obligations constitute a source of rights and obligations under international law. If they are violated, the state is subject to international responsibility, and participating states are bound by the rights and obligations. International courts determine these rights and obligations based on unilateral declarations of states, an international treaty, international custom and etc.

The ILC tackled the issue of the influence of the sources of origin of international law obligations on the regime of responsibility for their violation and concluded that the establishment of such a dependence lacks sufficient justification. As a result, unilateral declarations of states have the same force as obligations derived from recognized sources of international law, including international conventions and treaties.

Furthermore, judicial decisions, particularly those issued by the ICJ, play a significant role in confirming international law rules. Although the rulings only bind the parties involved, the ICJ's decisions carry enormous weight. The Court assists in the identification and interpretation of international legal principles. The Court's decisions are the main reason for the ILC's consideration of the legal aspects of unilateral declarations, as according to the Court's dicta, it treated unilateral declarations in the same way as customary law and treaties, in accordance with their binding nature and legal consequences that they produce. As a result, if well-regulated and codified, unilateral declarations qualify as potential sources of law.

This implies that Article 38 of the ICJ should be revised to reflect the new realities of international relations. International law is constantly expanding and developing; it has many branches. Recent subjects have emerged, necessitating the need to regulate the potential sources of law while keeping state wills and behavior as primary subjects of international law in mind.

Chapter V

5.1 Conclusion

While unilateral declarations of states are a part of the international law, it is evident that they are still a source of a substantial amount of debate. The issues of their legality, codification, scope, and definition still cause many disagreements. Bearing in mind the dicta of the ICJ and PCIJ on unilateral declarations, it is apparent that the court's approach is quite rigid. In most cases, unilateral declarations are perceived as a source of international obligations, which opens many prospects for their qualification as a potential source of international law.

Furthermore, the sources of international law derive from the obligations imposed on the states; in case of a breach of their responsibility, there are inevitable consequences, therefore, considering the rapid expansion of international law the conventional sources enlisted in Article 38 of the ICJ Statute remain insufficient. Unilateral declarations of states, resolutions of international organizations, and *jus cogens* are widely acknowledged as sources of law, as demonstrated by courts dicta, ILC guiding principles, and some state practice.

Considering that trust, and confidence are crucial in international cooperation between sovereign states, especially since this cooperation is expanding rapidly in increasingly essential fields. This cooperation is expected to be carried out based on one of the basic principles governing the creation of legal obligations in international law, the principle of good faith. Besides, just as in the law of treaties, the principle of *pacta sunt servanda* is based on good faith. Besides, international obligations stemming from unilateral declarations are also based on this principle.

Nevertheless, the courts such as ICJ and PCIJ treated unilateral declarations as a binding source of obligation that should be implemented in good faith and according to the principle of *pacta sunt servanda*.

Moreover, a unilateral declaration is a statement made on behalf of a state that produces legal rights and obligations, yet unlike treaties, it doesn't require any reciprocity or response from the addressee. In this case, the belief that a promise to act in a certain way necessitates some form of acceptance appears to be insignificant.

Unilateral declarations proved to be a convenient method of State interaction, weaving a daily mill of interstate relations. Given that states are aware of the commitments they make through unilateral declarations that imply certain obligations and grant rights to the addressee, these obligations must be respected and carried out in good faith.

Moreover, States are conscious that a bilateral or multilateral treaties are used for more important matters to ensure optimal stability and predictability. However, treaties require a significant amount of time and effort to be concluded. At the same time, unilateral declarations are a fast tool to conduct and manage international relations, which have a binding character and impose obligations just like treaties do.

Nevertheless, the legal nature of unilateral declarations has not yet been thoroughly studied; the courts dicta and ILC guiding principles law have contributed to the considerable advance of the topic of unilateral declarations in international law. Several decisions of the PCIJ and ICJ have confirmed the impact of unilateral declarations on international law and relations and their binding character.

Additionally, the PCIJ and ICJ judgments in several cases, such as the Ilhen declaration and nuclear tests cases, resulted in a breakthrough in the Court's approach on the topic of unilateral declarations. This indeed highlighted the will of States to be bound by the declaration made emanate from their own free will.

As unilateral declarations constitute a unilateral will of a state; they are different from the bilateral and multilateral agreements, which impose obligations and responsibilities on more than one state. On the other hand, unilateral declarations grant rights to the addressee and impose obligations on the declarant state only.

Considering that the obligations arising from unilateral declarations of states are sometimes equal to that of obligations arising from international treaties and international custom, this is aimed to create consistency in international law. The general rule when it comes to assuming an obligation or an existing agreement is the principle of good faith. This leads us to the argument that unilateral declarations can become a potential source of international law, bearing in mind their legal nature and effect on international relations.

Therefore, when determining if unilateral declarations of states qualify as a source of international law, one must consider the process that occurs between the formulation of the declaration and the emergence of its legal consequences, as many unilateral declarations receive some kind of reaction from an addressee as they express tacit consent to the declaration. Although consent is not required for the declaration to impose legal consequences, simply expressing the will of one of the parties to the created legal relationship is sufficient.

Regarding the fact that unilateral declarations of a State impose obligations only on the declarant, this does not preclude the corresponding rule from being qualified as a norm of

international law. Also, the effect of a unilateral declaration not only extends to the declarant but also to the addressee, who uses it to exercise the rights granted to them, including the powers to comply with the declaration.

Also, there are no established clear and binding rules governing all legal consequences of unilateral declarations. Nevertheless, certain conditions, such as the language of the declaration, the authority of the state representative delivering the statement, the content and context of the declaration, and the expression of will and desire to be bound by the declaration, are all considered when determining the legal force and effect of the unilateral declaration.

Yet, to place unilateral declaration in the system of sources of international law, a proper codification should be conducted, as the ILC guiding principles and courts dicta are not enough to manage all the legal aspects related to unilateral declarations. The proper codification of unilateral declarations would advance the emergence of new sources of international law, backed up by substantial case law and practice.

As a result, the research established that article 38 is not a comprehensive. Yet, it is a foundation for any credible discussion on the topic of sources of law. Outside of article 38, there are other possible sources that cannot be classified as conventions, customs, or general principles. *Jus cogens* norms, international organization resolutions, and unilateral declarations are often perceived as potential sources of law.

The research concludes that the legal force of the obligations arising from unilateral declarations of states is equal to obligations arising from international treaties and international custom. The research has also outlined the significance of the theoretical development of the topic as well as all regulations associated with this phenomenon. Thus, considering normative

foundations, unilateral declarations may qualify as a new source of international law if the criteria for their binding character are met.

Additionally, when a representative of a state with the authority to bind his state to certain commitments and obligations, in return, the international community expects the fulfillment of these obligations and that the words of the representative are a deliberate expression of a state policy and desire, moreover, the obligations deriving from that declaration must be fulfilled in good faith.

This means that the state's representatives who have the power to bind their states to certain commitments on the international stage and towards other states must be highly cautious when expressing the state's will, or desire through unilateral declarations, as these declarations may impose obligations on the state once it is issued, this calls for the proper codification of unilateral declarations and a regulative legal framework would give them more power on the international arena, as a new source of international law. Also, such codification and acknowledgment of such declarations as source of international law would benefit the international community, as states will minimize the use of unilateral declarations in a spiteful manner.

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المُلخَص

تُستخدم إعلانات الدولة أحادية الجانب على نطاق واسع في العلاقات الدولية الحديثة. حيث تشهد تزايداً في استعمال إعلانات الدولة أحادية الجانب من قبل ممثلين عن الدول والحكومات كوسيلة لفرض على دولهم بعض الالتزامات الدولية، وهذا أمر مقبول على نطاق واسع في المجتمع الدولي. على الرغم من ذلك، يفتقر الإطار القانوني الدولي الحالي إلى معايير واضحة لتحديد الطبيعة القانونية للإعلانات الأحادية الجانب. علماً بأن هذه الإعلانات تُعد من أحد ادوات القانون الدولي مُعترف بها من قبل محكمة العدل الدولية الدائمة ومحكمة العدل الدولية وكذلك من قبل لجنة القانون الدولي التابعة للأمم المتحدة. ومع ذلك، ترتبط المصادر التقليدية للقانون الدولي في بعض الالتزامات التي يجب الوفاء بها واحترامه على الصعيد الدولي. لذلك ونظراً للتطور المستمر للقانون الدولي وجبت مراجعة المصادر التقليدية للقانون الدولي الواردة في المادة 38 من النظام الأساسي لمحكمة العدل الدولية، وتعديلها لتلبي الاحتياجات والمعايير الحديثة للتعاون الدولي القائم. وخاصةً وأن إعلانات الدولة أحادية الجانب لديها القدرة لتصبح أحد مصادر القانون الدولي المحتملة.